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# Pluses and Minuses of Assisted Living

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*The National Senior Citizens Law Center is a non-profit organization whose principal mission is to protect the rights of low-income older adults. Through advocacy, litigation, and the education and counseling of local advocates, we seek to ensure the health and economic security of those with limited income and resources, and preserve their access to the courts. For more information, visit our Web site at [www.NSCLC.org](http://www.NSCLC.org).*



- The Assisted Living Consumer Alliance (ALCA) is a national collaboration of groups and individuals working together to promote consumer safety, choice, and rights in assisted living.



## ALCA Opportunities

- **Voting Membership** (\$50) for Non-Profit Organizations  
Subscribing to ALCA's Principles
- **Supporting Membership** (\$50) for Others (Organizations or  
Individuals) Subscribing to ALCA's Principles
- **Donations** also welcome; although webinars are free to  
attendees, they involve much work by ALCA members.
- Membership application on ALCA website; mail to ALCA, c/o  
LTCCC, 242 West 30th Street, Suite 306, New York, NY 10001

# Webinar Logistics

- All attendees are on mute.
  - For technical questions, use chat box.
  - For substantive questions, use questions box.
- E-mail [trainings@nsclc.org](mailto:trainings@nsclc.org) if unable to access webinar.
- Link for slides will be sent to all attendees. Slides and recording will be at nsclc.org.

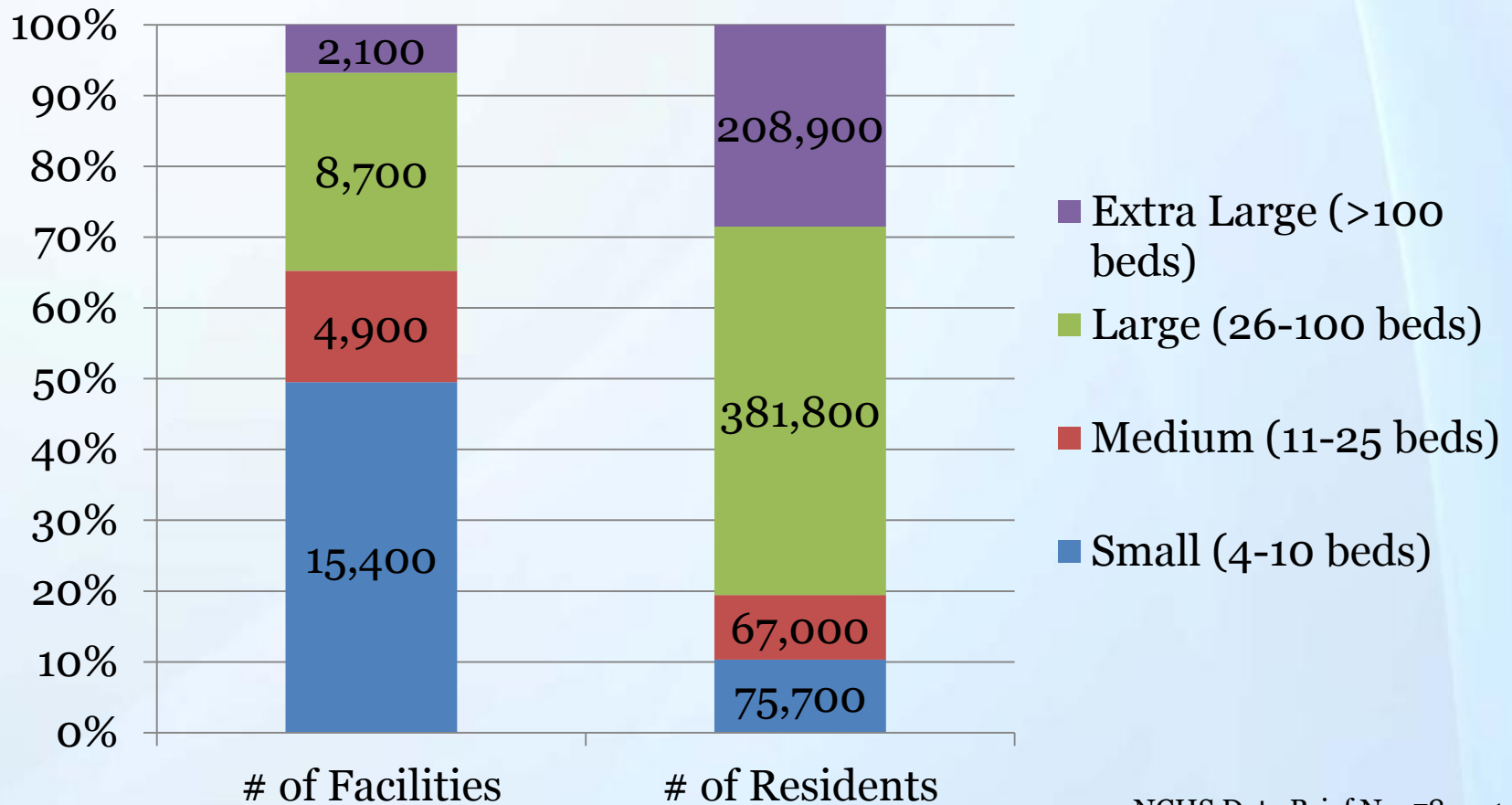
# What Is Assisted Living?

- Standards set by state law.
- Various terms used by the states.
  - E.g., assisted living, residential care, housing with services, etc.

# Effort to Compile National Data

- National Center for Health Statistics conducts survey of “residential care facilities.”
- Survey includes facilities for younger adults.
- Data published in:
  - HCBS Data Brief No. 78 (Dec. 2011)
  - HCBS Data Brief No. 91 (Apr. 2012)

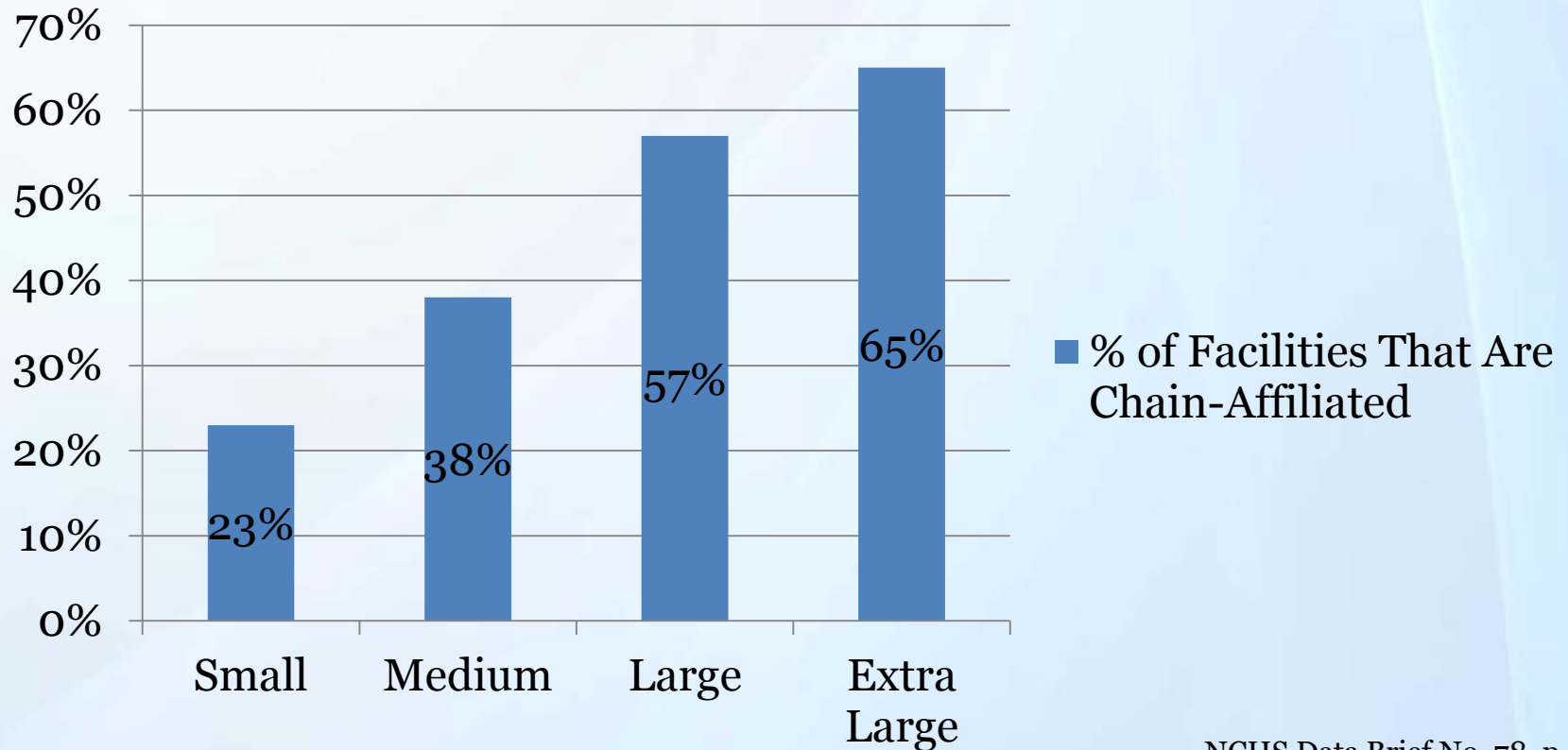
# 31,100 RCFs, with 971,900 Beds



NCHS Data Brief No. 78, p. 1

# Shift to Larger Corporations

## % of Facilities That Are Chain-Affiliated



NCHS Data Brief No. 78, p. 2

# Trends in Recent Years

- More likely to have residents who previously would have lived in nursing facilities.

# More Variability, Compared to Nursing Facilities

- Inconsistency in:
  - Service packages.
  - Staff qualifications.
  - Staff training.
- Less public information.
  - Internet information limited, especially when compared to Nursing Home Compare ([www.medicare.gov/nursinghomecompare](http://www.medicare.gov/nursinghomecompare)).

# Level of Care Can Be Elusive Concept

Law varies from state to state.

Definitions written in general  
language.

# What **Can** Be Provided versus What **Must** Be Provided

- Level of care ceilings generally have been raised.
- But regulations generally do not require facilities to provide services up to regulatory ceiling.

# Need for More Clarity: Can Contracts Provide Answers?

- E.g., 210 Illinois Statutes 9/5:
  - “Assisted living ... should be based on a contract model designed to result in a **negotiated agreement** . . . . This model supports the principle that there is an **acceptable balance between consumer protection and resident willingness to accept risk** and that most consumers are competent to make their own judgments about the services they are obtaining.”

# Disclosure Requirements Are Common

- Texas, Washington, & others have state-developed forms.
- Most commonly, format of disclosure is within facility's discretion.

# Levels of Care

- One-third of states recognize more than one level.
  - Generally two or three levels
  - Higher levels reflect great health care capabilities.
    - E.g., Ark. Code of Rules and Regulations, sections 016 06 001 and 016 06 002

# The Case in Favor of Multi-Level Systems

- Different types of facilities require different types of standards.
- When licensing standards are drawn in a one-size-fits-all model, standards tend to drop to the lower common denominator.
- A facility always can retain residents by licensing at the highest level.

# The Case Against Multi-Level Systems

- By pigeonholing residents into specific regulatory boxes, multi-level systems force residents to move multiple times.
- Flexible licensing standards allow assisted living facilities to adjust services as necessary.

# In Reality, All Systems Are Multi-Level

- The real question is whether the levels are being set by the state, or by individual facilities.

# Related Issue: Evictions

- Generally involve care needs, and also nonpayment.

# Most Frequent Allegation: “Can’t Meet Your Needs”

- Pivotal question is whether facility is obligated to provide care up to limits of license.
  - Resident may wish to cite Americans with Disabilities Act – facility should not discriminate against residents with more difficult care needs.

# Eviction Process

- Minority of states specify process.
  - Administrative appeal.
    - E.g., Conn. Gen. Stat. Ann. 19a-535a(d)).
  - Explicit right to follow state's landlord/tenant eviction process
    - E.g., Mass. Laws Ann. Ch. 19D, 9(a)(18).

# Appeal Rights Commonly Weak or Nonexistent

- File complaint with licensing agency.
- Pursue internal appeal with facility.
- No mention of appeal rights or procedures in state law.

# As Practical Matter, Landlord/Tenant Procedures Likely Viable for Resident

- If resident doesn't leave, facility will need to seek court order to evict.
- Do-it-yourself evictions inadvisable for facilities.

# Medicaid and Assisted Living

# Assisted Living as Home and Community-Based Service

- Generally through home and community-based service (HCBS) waiver.
- Alternative to nursing facility services.

# CMS Defers to States on Assisted Living Standards

- But often state assisted living licensure law is poor fit for HCBS-eligible population.

# Accepting Medicaid

- Medicaid law requires Medicaid-certified provider to accept Medicaid as payment in full.
  - *See, e.g.*, 42 CFR 447.15
- E.g., MD, hospital.

# Many States Fail to Enforce This Rule Against ALFs

- E.g., New Jersey
  - Disclosure statement must list whether private pay for specific period of time a precondition for facility accepting Medicaid.
  - NJ facilities often requiring private payment of year or more.
    - NSCLC White Paper, Preventing Discrimination Against Medicaid-Eligible Residents (Nov. 2010)
    - NJ Dep't of Public Advocate, Aging in Place: Promises to Keep, (2009) , at p. 29.

# Must Bring Issue to CMS's Attention

- Providers and state licensure agencies are likely unfamiliar with such Medicaid principles.
- NSCLC and ALCA would be interested in presenting issue to CMS.

# Room and Board Not Covered

- Room and board allocations often set at SSI levels, or somewhat more.
- Both resident and facility have concerns:
  - Facility considers amount inadequate, and also must collect from resident.
  - Facility often not limited in how much it can charge.

# WI: Covering Room and Board in Assisted Living

- If member's income is insufficient to cover room and board, the MCO either
  - Develops an alternative plan of care, or
  - Supplements payment to facility to make up for shortfall in room and board.
- *See Wisconsin model MCO contract (effective Jan. 1, 2013 through Dec. 31, 2013), at p. 31.*

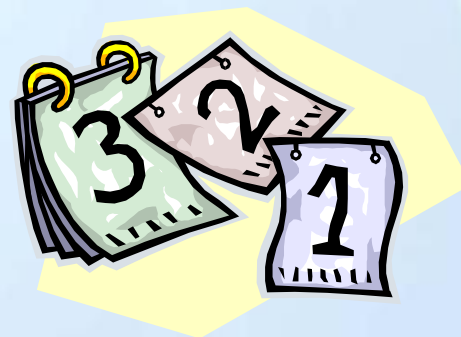
# Recommended Changes to Room and Board Rules

Require facilities to accept designated amount as payment in full.

Set room and board at adequate amount.

# Retroactive Eligibility

- Medicaid eligibility generally granted up to three months **prior to** month of application, if applicant met eligibility requirements during those months.
  - 42 USC 1396(a)(34)



# Retroactive Eligibility Less Certain in HCBS

- CMS relies upon Olmstead Letter No. 3 (July 25, 2000)
  - Attachment 3-a covers “Earliest Eligibility Date in HCBS Waivers”

# Eligibility Only After All Requirements Have Been Met

- Eligibility determined (financial and level-of-care).
- Written plan of care is established.

# What Type of Care Plan Is Required?

- Olmstead Letter announces policy change:
  - “To facilitate expeditious initiation of waiver services, we will accept ... a **provisional** written plan of care which identifies the essential Medicaid services that will be provided in the person’s first 60 days of waiver eligibility.”

# Arranging for Earlier Eligibility: Managed Care

- Florida's new managed care program provides for presumptive eligibility.
  - Services provided under MCO enrollment prior to financial eligibility determination.
    - If ultimately found **in**eligible, person is financially liable to MCO.

# But Don't Assisted Living Residents Always Have Care Plans?

- Assisted living residents have good argument for retroactive coverage.
  - At minimum, this care plan should be good enough to qualify as “provisional” care plan.

# Proposed Rules for Community Character of Residential Settings

- Helpful provisions applicable to all HCBS settings:
  - Facilitation of full access to greater community, including ability to seek work.
  - Right to privacy, dignity, and respect.
  - Freedom from coercion and restraint.
  - Independence in making life choices.
  - Facilitation of LTSS choices.

# Rights Specific to Provider-Owned Settings

- Right to particular physical space, with protections against eviction.
- Privacy
  - Lockable doors (appropriate staff with keys)
  - Sharing rooms only by choice
  - Freedom to furnish or decorate living units

# Additional Rights in Provider-Owned Settings

- Control over schedules and activities.
- Visitors at any time.
- Physically accessible setting.

# Excluded Settings

- Nursing facilities, IMDs, ICF-MRs
- Other settings as determined by CMS, with presumption of disqualification:
  - In building that also provides inpatient treatment, or
  - On grounds of, or adjacent to, public institution or disability-specific housing complex.

# Community Character Rules Already Being Set for Medicaid Managed Care

- Recent approvals for Medicaid managed care in Florida & N.J.
- Florida program requires (e.g.):
  - Lockable door.
  - Choice in scheduling.
  - Telephone without time limit.
  - Visitation without limits.
  - Ability to prepare snacks.

# Questions?

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- ALCA membership application at [www.assistedlivingconsumers.org](http://www.assistedlivingconsumers.org); mail to ALCA, c/o LTCCC, 242 West 30th Street, Suite 306, New York, NY 10001