Advocating Today and for the Future: Nursing Homes and HCBS in a COVID-19 World

Eric Carlson, Directing Attorney
Gelila Selassie, Staff Attorney

June 30, 2020
Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we’ve focused our efforts primarily on fighting for people who have been marginalized and excluded from justice, such as women, people of color, LGBTQ individuals, and people with limited English proficiency.
To achieve Justice in Aging, we must:

• Acknowledge systemic racism and discrimination
• Address the enduring negative effects of racism and differential treatment
• Promote access and equity in economic security, health care, and the courts for our nation’s low-income older adults
• Recruit, support, and retain a diverse staff and board, including race, ethnicity, gender, gender identity and presentation, sexual orientation, disability, age, economic class
Housekeeping

• All on mute. Use Questions function for substantive questions and for technical concerns.

• Problems with getting on to the webinar? Send an e-mail to trainings@justiceinaging.org.

• Find materials for this training and past trainings by searching the Resource Library, justiceinaging.org/resource-library. A recording will be posted to Justice in Aging's Vimeo page at the conclusion of the presentation, vimeo.com/justiceinaging.
Adapting to COVID-19

• Today’s agenda

• Current law and policy re:
  • Nursing facilities
  • Home and Community-Based Services

• Policy ideas to strongly consider, given likelihood that COVID-19 is not going away soon
Nursing Facilities: Visitation
Limits on Visits

• Under federal waivers & guidelines, visits limited to “compassionate care” situations.
  • "Compassionate care” including, but not limited to,
    • End of life.
    • Resident recently living with family, prior to admission.
    • Recent death of family member or friend.
      • CMS, Frequently Asked Questions (FAQs) on Nursing Home Visitation (6/23/20).
Push Back Against Overly Restrictive Limits

• Facilities tend to be overly restrictive, e.g., limiting visits only to a resident’s last hours or days of life.

• Residents and advocates should make case for why specific circumstances call for “compassionate care” visit.
In-Person Visitation Also Limited for Ombudsman

- Residents continue to have statutory right to access ombudsman program.
- “If in-person access is not available due to infection control concerns, facilities need to facilitate resident communication (e.g., by phone or other format) with”
  - Ombudsman program.
  - Resident’s representative.
  - Resident’s physician.
  - Representative of state’s protection and advocacy organization.
Alternatives to In-Person Visits

• Visiting outside.
  • E.g., courtyards, patios, parking lots.
  • Follow precautions including screening (temperature, symptoms), masks, hand hygiene, physical distancing.

• Window visits.

• Other conversations through glass.

• Telephone calls and video conferencing.
Social Media Campaign Today

• If you believe that federal or state visitation standards should be more accommodating, there is an advocacy opportunity today.
  • Visitation Saves Lives
    • visitationsaveslives.com
  • Post short video or photo to Facebook, Instagram or Twitter.
    • Tag federal and relevant state officials.
Quality of Care
Nurse Aide Training

• Waiver of nurse aide training requirements, except for “competency.”

• Ordinarily,
  • Within 4 months of employment, must complete 75 hours of training and pass competency examination.
  • Must participate in training program during first 4 months.
Reporting COVID Information

• Facilities must:
  • Inform residents, their representatives and family by 5pm next day after occurrence of:
    • Confirmed COVID case among residents and staff; or
    • Three or more residents or staff with new respiratory symptoms that occur within 72 hours of each other.

• Information to CDC at least weekly:
  • Including suspected and confirmed COVID cases, total deaths and COVID-linked deaths.
  • Information is posted publicly by CMS.
    • 42 C.F.R. § 483.80(g).
CMS Makes Data Available

• COVID-19 Nursing Home Data,
  • Can access from Nursing Home Compare.
  • Located at data.cms.gov.

• Data problems—requires data for May 8 and later; for earlier data, submission is optional.

• Comments on Interim Final Regulation due on July 7 via Regulations.gov.
  • Template comments available from Consumer Voice for Quality Long-Term Care.
Limited Surveys & Enforcement

• Currently, only surveying for
  • Incidents triaged at Immediate Jeopardy (IJ) level.
  • Infection control surveys.
  • Initial certification surveys.

• No enforcement unless finding of immediate jeopardy.
Transfer **Within** Facility

- For sole purpose of separating COVID+ and COVID- residents, CMS has waived regulatory rights to:
  - Share a room by consent of both persons.
  - Receive notice before transfer within facility.
  - Refuse certain transfers within facility.
Waiver of Eviction Regulations in Only Three Situations

1. Resident with COVID-19 transferred to COVID-dedicated facility.

2. Resident without COVID-19 transferred to No-COVID facility.

3. Transfer for 14-day observation.
Process for “Cohort” Evictions

• “New” facility must agree to accept resident.

• Advance notice is not required.
  • Notice must be provided “as soon as practicable,” but what is that supposed to mean when the notice is occurring after the resident already has been transferred?
Cohorting

• No set standards for facilities dedicated to care of COVID-positive residents.
• Specifics are left to states.
• Advocacy can seek:
  • Standards for facilities.
  • Process to protect individual residents, so that they aren’t transferred with no notice whatsoever.
"Reopening" Nursing Facilities
Reopening Recommendations from CMS

• Three phases, set to lag behind the three phases that the community will follow in reopening.

• Phases depend on:
  • Whether facility has had new COVID case.
  • Rate of COVID transmission in surrounding community.
  • Ability to conduct significant amount of testing.
  • Adequate personal protective equipment.
  • Adequate facility staff.
  • Adequate hospital capacity.
States Facing Many Choices

• They are writing their own procedures, with no obligation to follow CMS recommendations.

• Policy questions include:
  • Weighing risk of infection against harm of isolation.
  • Classify stages statewide, by region, or facility-by-facility?
  • Does one case in a facility require starting over, or something less drastic?
Home and Community-Based Services
COVID-19 Legislation: Families First Coronavirus Response Act

• FMAP increase of 6.2% if states meet the following:
  • Maintenance of Effort.
    • “Cannot increase stringency of any eligibility standards, methodologies or procedures.”
  • No increase in premiums.
  • No cost sharing for COVID-19 testing or treatment.
  • Continuous coverage.
    • See section 6008 of legislation.
Continuous Coverage Applies to Eligibility

- If enrolled, "shall be treated as eligible for such benefits through the end of the month in which such emergency period ends."
  - Even if level of care changes.
  - Even if failure to pay cost sharing.

Continuous Coverage

• No retroactive adjustment for an individual who became ineligible for Medicaid prior to the end of the emergency.
  • See COVID-19 Frequently Asked Questions (FAQs) for State Medicaid and Children's Health Insurance Program (CHIP) agencies, #26.

• Does not prohibit adjustments to HCBS service authorization.
  • But states often have revised programs to maintain service authorizations during emergency.
Additional Legislative Protections

• Coronavirus Aid, Relief, and Economic Security (CARES) Act.
  • Enacted March 27, 2020.

• Extends funding for two HCBS initiatives through November 30, 2020.
  • Money Follows the Person (MFP).
  • Protections against spousal impoverishment in HCBS.
Non-Legislative Responses to COVID-19

• Non-emergency mechanisms
  • Section 1115 demonstration waivers.
    • Either modifying existing demonstrations, or initiating new demonstrations.
  • State Plan Amendments.
    • Modifying procedures for state plan services, subject to existing statutory requirements.

• Emergency waivers
  • Section 1135 Waivers
    • Used by CMS to make significant modifications, even though statute by its terms applies more narrowly.
  • Appendix K
    • Used to make modifications in states’ HCBS waivers.
HCBS Waivers

• Authorized by Section 1915(c) of the Social Security Act
  • Aka Section 1396n(c) of Title 42 of the United States Code.

• Allows state to provide home and community-based as an alternative to institutional care (usually nursing facility care).
  • Medicaid beneficiary must be assessed to need nursing-facility level of care.
  • Must be budget neutral to Medicaid program.
Emergency Changes to HCBS Waivers

- **Appendix K**
  - CMS form used to make changes in HCBS waivers.
  - Changes are allowable under Section 1915(c), ... but many likely would not have been sought or approved otherwise, e.g., eliminating provider prerequisites.

- Form application lists a termination date of January 26, 2021.
  - States may elect to end earlier.

- See Justice in Aging [Appendix K tracker](#)
Emergency Modifications to State HCBS Programs

States are receiving federal approval for modifying their Medicaid home and community-based services (HCBS) waivers in response to the COVID-19 emergency. The table summarizes approved modifications to state HCBS programs for older adults.

Specifically, the table includes approved modifications to the following waiver programs:

- Alaskans Living Independently Waiver
- Arizona Health Care Cost Containment Section 1115 Demonstration Waiver
- Arkansas Choices in Homecare Waiver
- California Home and Community-Based Alternatives Waiver
- Colorado Elderly, Blind and Disabled Waiver
- Connecticut Home Care Program for Elders
- District of Columbia Elderly and Persons with Physical Disabilities Waiver
- Florida Long-Term Care Program
- Georgia Elderly and Disabled Waiver
- Illinois Persons Who Are Elderly Waiver
- Iowa Home and Community Based Services Elderly Waiver
- Kansas Frail Elderly Waiver
- Kentucky Home and Community Based Waiver
- Louisiana Community Choices Waiver
- Maine Waiver for Elderly and Adults with Disabilities
- Maryland Home and Community Based Options Waiver
- Massachusetts Frail Elderly Waiver
- Minnesota Elderly Waiver
- Mississippi Elderly and Disabled Waiver
- Missouri Aged and Disabled Waiver
- Montana Big Sky Home and Community Based Waiver
- Nebraska HCBS Waiver for Aged and Adults and Children with Disabilities
## Justice in Aging

### Appendix K Tracker (2 of 2)

<table>
<thead>
<tr>
<th>a. Access &amp; Eligibility</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Increase individual cost limits.</td>
<td>CT, NC</td>
</tr>
<tr>
<td>Modify target criteria so that receiving monthly monitoring is sufficient, if participant does not receive service during month.</td>
<td>KS</td>
</tr>
<tr>
<td>Modify target criteria so that beneficiary does not have to use planned services and will not be subject to discharge due to an inability to access services.</td>
<td>NC</td>
</tr>
<tr>
<td>Disregard rate increases linked to COVID-19 in considering whether beneficiary has exceeded cost cap.</td>
<td>TN</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>b. Services</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Waive federal HCBS settings regulation to allow visitation to be restricted in communal residential settings.</td>
<td>AK</td>
</tr>
<tr>
<td>Authorize live-in caregiver services.</td>
<td>FL</td>
</tr>
<tr>
<td>Allow increase in number of hours/units for specified services.</td>
<td>AK, CO, KY, NC, WA</td>
</tr>
</tbody>
</table>
Common Service Approvals

- Expanding and adding flexibility to services.
  - Remote services/monitoring, telehealth.
    - Electronic service delivery available for various services.
  - Services provided in alternative settings.
  - Allow services in out of state settings.
  - Waive Medicaid settings regulation that requires HCBS setting be set up to integrate beneficiary with broader community.
Expanded Nutritional Services

• Up to two home delivered meals daily.
• Additional case of monthly nutritional supplements.
• Allow meals to be provided through commercial restaurant delivery services.
• Waive dietary guidelines for home delivered meals.
Family Caregivers

• Payments to family members or legally responsible persons.
• Alter certain requirements for family members
  • Waive or delay background checks.
  • Waive or delay certifications for CPR or First Aid training.
  • Allow training and certification to be completed remotely.
Provider Qualifications

• Certification and Licensing
  • Waive or modify training requirements.
  • Extend renewals for provider certifications otherwise due to expire.
  • Allow services through unenrolled entities.
    • E.g. Providers enrolled through one Medicaid waiver may provide services to beneficiaries of other waivers.

• Remote Access
  • Allow remote or online training for direct service staff and case managers.
Level of Care Evaluations and Service Planning

- Level of care assessments and service planning may be completed remotely.
  - Telephonically or through video conferencing.
- Extend level of care determinations.
  - Typically up to one year.
- Extend service plans otherwise set to expire for one year.
  - Beneficiary and service providers consent.
  - Provide additional supports and services to respond to COVID-19 pandemic.
Rate Increases

• Rate increases for various providers.
  • May not be limited to direct service providers.

• May vary based on geographic area or circumstance.

• Significant variability in rate increases, from 8% up to 50%.
Payments Available When Beneficiary is Out of the Home

• Many states allow for payments to support beneficiary during an acute care hospitalization or short-term institutional stay.
  • Typically limited in duration and to necessary services not available in acute setting.

• Retainer payments may be made to providers when beneficiary cannot receive services.
Changing the Conversation

• Much of today’s conversation is around “nursing home problems.”
  • E.g., newspaper articles.
  • Legislators and legislative staff.

• But there are responses beyond improving nursing facilities.
Nursing Facility Residents as the “Other”

• Statistics are sobering.
  • 52,000 deaths from long-term care facilities.
  • Deaths from LTC facilities are 45% of total deaths.
  • Impact even greater among Black and Latinx residents.

• Often characterized as someone’s family member, rather than you or me.
  • I.e., your “loved one.”
Some Existing Problems with Nursing Facility Care

- Much more expensive than HCBS.
  - Average total annual public expenditure per HCBS beneficiary was $44,000 less than for beneficiary receiving institutional services.
    - See H. Stephen Kaye, *Do Noninstitutional LTC Services Reduce Medicaid Spending?*, Health Affairs

- Poor quality of life.
  - Majority of seniors prefer living in their home or community over nursing facility
    - See Mathematica Policy Research, 2016 MFP Demonstrations Overview.

- Poor health outcomes; poor infection prevention and control.
What If You Needed Long Term Services and Supports Tomorrow?

• Would you want to move into a nursing facility?

• What COVID-related complications would you face?
  • Heightened risk of infection.
  • Potential quarantine upon admission, and after discharge.
  • Inability to have visitors.
What Would Limit Your Options?

- Most nursing facilities are mediocre.
- Inability to obtain adequate health care assistance at home.
- Long waitlist for Medicaid HCBS.
- Inability to start Medicaid HCBS quickly.
- Inability to afford housing.
- Difficult to transition from nursing facility back to home.
Addressing Problems: Mediocre Nursing Facilities

• Average Medicaid-certified facility has over 100 residents with very little privacy.

• Reform models offer single-occupancy, household model, and greater staff autonomy.
  • As of early May, 243 Green House projects reported just 8 cases of COVID-19, and no deaths.
    • See NYT article, As Death Toll in Nursing Homes Climbs, Calls to Redesign Them Grow (5/12/2020).
Addressing Problems: Limited Access to Home Health

- Improperly requiring that beneficiary is improving, or not “plateauing.”
- Homebound requirement.
- Limited duration of home health.
- Limited access to Medicaid home health.
Addressing Problems: Limited Access to Medicaid HCBS

• Under Medicaid, if person has need for nursing facility level of care...
  • Access to nursing facility care is guaranteed.
  • But access to HCBS is not guaranteed, and may be subject to waiting lists.
    • Depending on the state, person may need to wait for months or years.
Woodwork Effect?

By definition, HCBS must be shown to be cost-effective.

But states claim that offering desirable services will lead to increased demand, i.e., people coming out of woodwork to enroll.

Responses:

- HCBS overall is less expensive.
  - E.g., H. Stephen Kaye, *Do Noninstitutional LTC Services Reduce Medicaid Spending?*, Health Affairs

- The benefit is worth the extra cost.
Making HCBS More Accessible

- States authorizing adequate amount of HCBS.
- Federal government establishing HCBS on equal footing with nursing facility services.
Other Problems, with Options

• Inability to start Medicaid HCBS quickly.
  • Change Federal and State policies.

• Inability to afford housing.
  • Increase Medicaid’s income allocations; consider use of Medicaid for housing or housing-related expenses.

• Difficult to transition from nursing facility back to home.
  • Continue and strengthen Money Follows the Person program.
Conclusion

• In every crisis, lies opportunity.

• Status quo is increasingly untenable.

• Justice in Aging looks forward to working with you on these important issues.
Want to receive Justice in Aging trainings and materials?

Join Our Network!

Go to justiceinaging.org and hit “Subscribe.”

Send an email to info@justiceinaging.org.

Open a text and text the message “4justice” to the number 51555.
Questions?

@justiceinaging

JUSTICE IN AGING
FIGHTING SENIOR POVERTY THROUGH LAW