

# Federal Medicaid Law and Assisted Living Advocacy:

## What to Do When a Facility Refuses to Accept Medicaid, or Attempts to Evict Without Offering Appeal Rights

### INTRODUCTION

Medicaid increasingly can cover care in an assisted living facility. Most often, funding is provided through a Medicaid home and community-based services (HCBS) waiver, but other Medicaid mechanisms are used as well.

Two provisions of federal Medicaid law — one historically underutilized, the other brand new — offer eviction protections for assisted living residents. This document provides assistance for the attorney or other advocate in identifying potential problems, developing an advocacy strategy, and litigating issues as necessary.

### PROBLEM #1

#### Medicaid-Participating Facility Refuses Medicaid From Existing Resident

A Medicaid-participating facility sometimes refuses to accept Medicaid from an existing resident who previously had paid the private-pay rate, prior to becoming Medicaid-eligible. The facility generally is on shaky legal ground: federal law requires that a Medicaid-participating provider accept Medicaid as payment in full.<sup>1</sup> Just as a Medicaid-participating physician (for example) cannot charge a Medicaid-eligible patient on a private-pay basis, an assisted living facility that accepts Medicaid cannot impose a private-pay charge on a resident approved for Medicaid assisted living.

Regardless of the federal law, facilities frequently refuse Medicaid from existing residents. In many cases, unfortunately, the resident capitulates and moves out.

Here, assertive legal representation can make all the difference, allowing the resident to stay under Medicaid. The

first step is straightforward: the resident simply does not move out. Second, the attorney or other representative explains to the facility that federal law prohibits it from declining the resident's Medicaid coverage.

At that point, the ball is in the facility's court. It can accept Medicaid from the resident or, alternatively, file an eviction action. But — and assuming any eviction action is based on nonpayment — the resident can argue in defense that nonpayment is the facility's fault. The facility, after all, refused to accept the resident's Medicaid coverage.

State laws and policies can present complications; in some cases, the attorney may need to take action against the state. Here are recommendations on handling certain common fact patterns.

#### Facility Claims That It Has No Available Medicaid-Certified Unit

The attorney first must determine whether the facility is telling the truth. A good first step is asking the facility for proof of its assertion that there is no Medicaid unit available. In addition, the attorney should do independent research on state law and policy. Some answers may be found in administrative materials such as the approved Medicaid HCBS waiver application for assisted living services, or Medicaid agency policy manuals. Specific information about a facility's status may be held by the state and/or by a regional agency administering the Medicaid assisted living program.

Depending in part on state policy, there are several possible sub-scenarios:

- **Facility Is Completely Certified for Medicaid**

A facility's complete certification could be due either to state policy establishing facility-wide certification for Medicaid-participating facilities, or by the facility's choice to certify itself without limits. In either case, the facility's claim of "no available Medicaid unit" is wholly unfounded.

<sup>1</sup> 42 C.F.R. § 447.15.

In many cases, state laws and policies may not explicitly address whether certification extends to every unit. The resident's attorney generally should interpret this as implicit evidence of facility-wide certification.

Advocacy is relatively straightforward. As discussed above, the resident stays in the facility, and the attorney informs the facility that it must accept the resident's Medicaid coverage. Depending on the circumstances, the attorney also may explain the law or facts that establish facility-wide certification.

- **Facility Is Partially Certified for Medicaid, but Resident Resides in Certified Unit**

Advocacy here is virtually identical to the advocacy for a resident living a wholly certified facility. The resident stays put, and the attorney explains the relevant law to the facility. If the facility pursues eviction, the resident defends themselves by pointing out that nonpayment is the facility's fault.

- **Facility Is Partially Certified for Medicaid, and Resident Is Residing in Non-Certified Unit**

Here advocacy becomes more challenging. Although the facility's actions may be justified under state law and policy, the state's limited-certification policy may violate federal law, particularly without explicit federal approval for limited certification. Also, the resident can request that the facility honor a request to transfer the resident to the next available certified unit, and hold the facility responsible for any failure to do so. The attorney should enlist support from stakeholder organizations, advocate for changes with the Medicaid agency, and, as necessary, develop litigation against the state. The specifics of such litigation will vary greatly, depending on state law and policy.

## **Facility Requires That Resident Pay Privately for Specified Period of Time as Condition of Using Medicaid**

The facility's claim here relies upon a "duration of stay" provision in its admission agreement. In such a provision, the resident commits to paying for a specified number of months on a private-pay basis, as a prerequisite for the facility accepting Medicaid.

Such "duration of stay" agreements have been explicitly banned in federal nursing facility law since 1990.<sup>2</sup> Before that time, they were not uncommon but also had been found to violate federal and state law, based on general principles (from Medicaid and health insurance generally) that a certified provider must accept the insurance for

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<sup>2</sup> 42 U.S.C. §§ 1395i-3(c)(5)(A)(i), 1396r(c)(5)(A)(i); 42 C.F.R. § 483.15(a)(2)(i), (ii).

which it is certified, and cannot instead charge the insured the private rate.<sup>3</sup>

Using such general Medicaid law, legal analysis in the assisted living context is relatively straightforward. The resident is approved for Medicaid coverage, the facility is Medicaid-participating, and the facility has no arguments regarding unit certification. The duration of stay provision is contrary to Medicaid law and thus unenforceable.<sup>4</sup> In litigation, the Medicaid law might be enforced through state-law causes of action such as unconscionability or violation of public policy.

The basic advocacy strategy also is relatively straightforward. The resident refuses to leave, and the attorney informs the facility that they must accept the resident's Medicaid coverage. If the facility tries to evict the resident for nonpayment, the resident responds by pointing out that any nonpayment is attributable to the facility's refusal to accept Medicaid.

## *A facility cannot require prior private payment as a prerequisite for accepting Medicaid.*

Initially, the facility will be inclined to fight back, based on their assumption that they have a clear contractual right. After all, they probably have been using duration of stay agreements for years, with little to no pushback from anyone.

Regardless, any lawyer for a provider should recognize that, at a minimum, the resident has a credible argument. Also, from a risk avoidance perspective, a facility has an incentive to make the case go away, so as to retain its flexibility with other current and future residents.

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<sup>3</sup> See *Discrimination Against the Poor and Disabled in Nursing Homes*, Senate Hearing No. 1091, Senate Special Comm. on Aging, 98th Cong., App. 3 (1984) (duration of stay provisions from nursing facility admission agreements in various states); 1985 Ohio AG LEXIS 39, Ohio Att'y Gen. Op. No. 85-063 (duration of stay requirement illegal under state law); *Glengariff Corp. v. Snook*, 471 N.Y.S.2d 973, 1984 N.Y. Misc. LEXIS 2893 (N.Y. Sup. Ct. 1984) (nursing facility admission illegally conditioned on incoming resident's promise to not apply for Medicaid within 18 months); *Berry v. First Healthcare Corp.* (D.N.H. 1977), reprinted in *Medicare & Medicaid Guide* (CCH) ¶28,693 (class action allegations based on nursing facility practice of transferring residents who became Medicaid-eligible within two years after admission).

<sup>4</sup> 42 C.F.R. § 447.15.

As a result, the resident likely will be able to remain in the facility and access Medicaid reimbursement. The burden is on the facility to move for eviction, and they likely will find the risk of losing too high, particularly compared to the moderate downside of receiving the Medicaid rate rather than the private-pay rate for a certain number of months. (See Problem #2 below for information on defending assisted living evictions.)

The resident's attorney should celebrate this type of win, but also consider how to protect other residents. When a facility backs down, the attorney should take the opportunity to spread the news to other residents, the relevant government agencies, and the local aging network. A further option is consumer law litigation, seeking facility-wide injunctive relief. The exact procedure will vary from state to state.

What about filing a complaint with the state? Unfortunately, unless the attorney has an inside track with state officials, the risk here probably exceeds the reward. The licensing agency likely will not consider federal Medicaid law within its purview, while the Medicaid agency likewise will consider assisted living to be under the licensing agency's jurisdiction. Although it is possible that the Medicaid agency (or another administrative agency) will rule against a duration of stay agreement, the odds are higher that the agency will defer and, in so doing, only embolden facilities.

## **Potential Complicating Factor: State Policy Implicitly Condones Facility Refusing Medicaid Coverage for Improper Reason**

A few states require a facility to disclose its policy on duration of stay agreements, or limited unit certification, thus implicitly approving those policies. Minnesota, for example, requires that an assisted living contract include any limit on the number of Medicaid-reimbursed residents at one time, or any duration of stay requirement.<sup>5</sup> Likewise, New Jersey requires that each facility create a "Medicaid full-disclosure handout" for prospective and current residents. This handout must include several dozen topics specified by the state, including:

- Whether the facility expects "a resident to pay privately for a certain number of years before accepting him or her on the GO Medicaid Waiver;"
- Whether the facility will "accept the resident as Medicaid beneficiary as soon as he or she is approved for the Waiver;"
- Whether the facility "reserve[s] Medicaid beds only for those who have paid privately first;" and

- Whether the facility "accept[s] Medicaid reimbursement for residents who are located in a specialized Alzheimer's or Dementia unit."<sup>6</sup>

It is unclear how many other states have similar policies.

In a state with policies like these, advocacy (including litigation) likely should be directed at the state rather than an individual facility. Otherwise, a facility could cite the state policy to support its positions and, in litigation against a facility, a judge might be inclined to defer to state policy.

## **PROBLEM #2**

### **Medicaid-Participating Facility Attempts to Evict Resident With No Opportunity to Appeal**

#### **New Federal Regulation Establishes Minimum Eviction Protections in Medicaid-Participating Facilities**

Assisted living eviction protections are weak in many states. The good-cause justifications for eviction may be slanted toward the facility — for example, by allowing a facility to create eviction justifications in a resident's admission agreement. Worse, some states may offer almost no protections whatsoever, by not requiring *any* cause for eviction and/or not providing any appeal mechanism.

To address these problems, a relatively new federal regulation sets minimum levels of eviction protection for residents living in a facility which receives Medicaid funding through an HCBS Waiver, the HCBS State Plan Option, or the Community First Choice program.<sup>7</sup> The regulation became effective in March 2023, and each state has a CMS-approved "transition plan" that explains how the state is implementing the eviction protection, along with the regulation's many other provisions.<sup>8</sup>

Under the federal regulation, a resident must have at least "the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity."<sup>9</sup> These

6 N.J. Dep't of Health & Senior Servs., Div. of Aging and Comm. Servs., [Disclosure of Assisted Living Facilities' Medicaid Policies](#), Policy Memorandum 2011-4, VII-2, at 3-4 (Feb. 11, 2011).

7 The eviction protections are located in Title 42 of the Code of Federal Regulations, sections 441.301(c)(4)(vi)(A) (HCBS Waiver), 441.530(a)(1)(vi)(A) (Community First Choice program), and 441.710(a)(1)(vi)(A) (HCBS State Plan Option).

8 See CMS, [Statewide Transition Plans](#) (posting of transition plans for each state).

9 42 C.F.R. §§ 441.301(c)(4)(vi)(A) (HCBS Waiver), 441.530(a)(1)(vi)(A) (Community First Choice program), & 441.710(a)(1)(vi)(A) (HCBS State Plan Option).

5 Minn. Stat. § 144G.50(2)(e)(5)(iii), (iv).

protections can be created in one of two ways. Most simply, the state's law can include assisted living facilities among the settings covered by the landlord-tenant eviction protections. Alternatively, the state must ensure that the resident receives comparable protections through a lease or similar agreement with the facility. More precisely, the regulatory language requires that the state "ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant, and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law."<sup>10</sup>

## **Advocacy for Comparable Eviction Protections**

For obvious reasons, problems are most likely to arise in a state that does not extend landlord/tenant protections to assisted living residents. In such a state, under the regulation, each resident should have contractual rights to eviction protections. But many states and facilities are not in true compliance with the federal regulation. In some states, the transition plan, policy manuals, and regulations do little more than restate the federal requirement that a resident have a contractual right to eviction protections, with minimal efforts to ensure that such protections are provided.<sup>11</sup> Or sometimes the fault lies with facilities for failure to include eviction protections in residents' admission agreements.

In one likely scenario, a facility tells a resident that they must leave, acting as if the resident has no appeal rights. The eviction message can take many forms, including a written notice, an oral explanation, or a supposed it's-for-your-own-good transfer to another facility.

The first advocacy step in response is simple but vital: the resident must stay strong and not leave. And the resident's attorney should inform the facility in no uncertain terms that the resident is entitled to the state's landlord/tenant

protections, which likely include at a minimum the right to an unlawful detainer trial or the equivalent.

At this point one immediate problem presents itself: how can a resident receive eviction protections comparable to landlord/tenant protections if state law does not establish such a right. A contract cannot shoehorn an assisted living eviction dispute into an unlawful detainer court unless the court has jurisdiction under state law. And it's difficult to imagine, for example, how a contract might create an out-of-court process that might be deemed comparable to a jury trial. The word "comparable" can be stretched to a certain extent, but not in a way that degrades a resident's rights.

To a significant extent, however, this should be presented as a problem for the facility and state, not for the resident. The resident has rights under federal law, and those rights aren't limited by supposed logistical difficulties.

*The first advocacy step in response is simple but vital: the resident must stay strong and not leave.*

Under some circumstances, an attorney also should consider affirmative litigation, either against a facility for not providing adequate eviction protections in admission agreements, and/or against a state for not implementing the federal law adequately. Note that any case against a state will face the not-inconsiderable hurdle that the federal government has approved the state's transition plan for implementing the regulation.

Advocacy in this area obviously will confront many unknowns. As time goes on, attorneys representing residents will develop advocacy strategies to push states and facilities toward greater compliance with the federal regulation. For now, during these first stages of advocacy, the first priority is to engage on these issues — specifically, to educate and represent assisted living residents threatened with eviction. Making arguments and bringing cases is a necessary initial step to give assisted living residents the eviction protections they deserve.

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<sup>10</sup> *Id.*

<sup>11</sup> For example, Oklahoma assisted living regulations authorize a facility to terminate a resident's stay with a 30-day written notice. The waiver regulations have added the requirement that a waiver participant in a facility "have the same responsibilities and protections from eviction as all tenants under the landlord-tenant law of the state, county, city, or other designated entity." Okla. Admin. Code §§ 310:663-29-1 (licensing standards), 317:30-5-763(18)(D)(i)(II) (waiver).