

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Who's Monitoring Medicaid Assisted Living?—A Brief Overview

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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.

Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
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- Find materials for this training and past trainings by searching the [Resource Library](https://justiceinaging.org/resource-library), justiceinaging.org/resource-library. A recording will be posted to [Justice in Aging's Vimeo page](https://www.vimeo.com/justiceinaging) at the conclusion of the presentation, [vimeo.com/justiceinaging](https://www.vimeo.com/justiceinaging).
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Justice in Aging's Commitment to Advancing Equity

To achieve Justice in Aging, we must:

- [Advance equity](#) for low-income older adults in economic security, health care, housing, and elder justice initiatives.
- Address the enduring harms and inequities caused by systemic racism and other forms of discrimination that uniquely impact low-income older adults in marginalized communities.
- Recruit, support, and retain a diverse staff and board, including race, ethnicity, gender, gender identity and presentation, sexual orientation, disability, age, and economic class.

Three Recent Guides from Justice in Aging

- [Rights and Wrongs in Medicaid-Funded Assisted Living](#)
- [Defending Evictions from Medicaid-Funded Assisted Living Facilities](#)
- [An Illusion of Protection: Meaningless Federal “Quality Measures” Endanger Assisted Living Residents](#)



The Basics

No “Assisted Living” Benefit in Medicaid

- Medicaid has certain mandatory services:
 - E.g., Hospital services
 - Doctor services
 - Nursing facility care, etc.
- Also optional services:
 - E.g., Dental care
 - Home and community-based services, etc.
- “Assisted living” is not listed as either mandatory or optional

So How Does Medicaid Cover Assisted Living?

- Generally classified as home and community-based services (HCBS), via programs that mostly are used to provide services at participant's home.
 - HCBS Waiver (aka Section 1915(c) waiver)
 - Medicaid Demonstration Waiver (Section 1115 waiver)
 - Community First Choice Option (Section 1915(k))

Also Might Be State Plan Service

- Personal care services.
 - Since these are an optional service, rather than a waiver service, they must be made available without enrollment caps or waitlists.

How Is Assisted Living Defined?

- This presentation will focus on HCBS Waivers.
- Technical Guide for HCBS Waivers offers a definition for assisted living:
 - “Personal care and supportive services (homemaker, chore, attendant services, meal preparation) ...”
 - “includes 24-hour on-site response capability to meet scheduled or unpredictable resident needs and to provide supervision, safety and security.”

What's Included?

- “Assisted living” may include nursing and therapy services, but these are “incidental”
- May also include medication administration, transportation, etc.
- DOES NOT include room and board.
 - Remember, this is HCBS, not a facility benefit.



Quality in HCBS Waivers

Federal Standards for HCBS Waivers

- No statutory or regulatory standards specific to assisted living.
- State must make six “assurances” as part of HCBS waiver application:
 - Administrative Authority
 - Level of Care
 - Qualified Providers
 - Service Plan
 - Health and Welfare
 - Financial Accountability

“Qualified Providers” Assurance

- State promises:
 - All providers meet licensure and certification standards.
 - State monitors non-licensed/non-certified providers.
 - State verifies that provider training follows state law and waiver requirements.
- Much of these promises are based on the State having a agency that licenses assisted living.

“Health and Welfare” Assurance

- State promises:
 - State identifies, addresses, and seeks to prevent instances of abuse, neglect, exploitation, and unexplained death.
 - State demonstrates that incident management system will address incidents of abuse, neglect, exploitation, and death.
 - State follows its own policies on restraint and seclusion.
 - State establishes and monitors “overall health care standards.”
- Note lack of quality standards.



Reports to Federal Government

Annual 372(S) Reports to CMS: Data

- # of participants
- # using each waiver service
- Days of enrollment
- Average length of enrollment
- Expenditures per service, and total expenditures

Annual 372(S) Reports: Quality (1 of 2)

- Assurances that
 - All provider standards and health and welfare safeguards were met, with corrective actions as necessary.
 - All providers were trained and licensed/certified, with corrective actions as necessary.

Annual 372(S) Reports: Quality (2 of 2)

- Either
 - No deficiencies were detected, or
 - If deficiencies were detected,
 - Provide summary of significant areas where deficiencies were detected.
 - Explain how deficiencies have been corrected.
- Are states reporting deficiencies?
 - Probably not, but unclear, since these reports generally aren't made available to the public.



Performance Measures

Continuous Quality Improvement

- State devises performance measures in HCBS waiver application.
- State collects performance measures info and reports to CMS,
- Compliance is considered above 85%.

Reporting Performance Measures to CMS

- State must provide evidence on oversight (including performance measures) prior to waiver expiration.
- At least one year before waiver expiration, CMS issues draft report to State.
- If some requirements are not met (e.g., 85% or less), State either
 - Disputes findings, or
 - Proposes plan to remediate problem.

Example:

California Assisted Living Waiver

- Only 5 of 18 performance measures purport to measure quality ... and none of those are particularly useful:
 - % of facilities that did not allow licensure or certification to lapse.
 - % of providers that maintained provider qualifications.
 - % of facilities that were qualified to provide waiver services.
 - % of providers that held mandatory in-service training for staff.
 - % of participants with services delivered in accordance with waiver service plan (with questionable data).

“Perfect” Performance May Indicate Unimportant Measures

- 15 of 15 applying care coordination agencies were enrolled.
- 7,541 of 7,541 level-of-care determinations performed by nurse.
- 20,236 of 20,236 level-of-care determinations (purportedly) performed appropriately.

Additional Issues with CA Performance Measures

- Measures not visible to public; State of California only turned over information after lawsuit filed.
- No indication that measures are used to improve program.



New Federal HCBS Regulations

New Federal Regulations

- The HCBS “Settings Rule” was motivated by intent to ensure that
 - HCBS is provided in non-institutional environment, and
 - HCBS participants are not segregated from broader community.
 - See Section 441.301(c)(4) of Title 42 of Code of Federal Regulations.

“Assisted Living” Rights?

- Regulation sets standards for “provider-owned or controlled residential setting” aka residential facility.
 - E.g., Eviction protections at least as good as landlord/tenant law.
 - Privacy, including lockable doors to living unit.
 - Choice of roommates.
 - Right to accept visitors.

But No Enforcement Mechanism

- Settings Rule did not create enforcement mechanism within states:
 - Re: HCBS waiver quality, state Medicaid agency has procedures to administer critical incident reports and quality measures.
 - State licensing agency has more focus on quality, but likely without jurisdiction over federal regulations.



Current and Future Advocacy

Initial Advocacy Steps

- Look at:
 - State Transition Plan, to consider how State has proposed to implement HCBS Settings Rule.
 - HCBS Waiver application, including performance measures.

Seek Out and Review Data

- Is State posting relevant information?
- May want to make public records requests for 372 reports, critical incident information, performance measure information, etc.

Elevate HCBS Settings Rule

- Publicize federal protections.
- Make complaints and investigate how program participants can get relief.

Work Together

- Justice in Aging is still in initial stages of developing strategies in this area.
- Please feel free to contact us with questions and to share information and ideas.



Questions?

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