



CMA Weekly Alert – March 22, 2007

IS IT TIME FOR FEDERAL REGULATION OF THE ASSISTED LIVING INDUSTRY?

Introduction

The assisted living industry is regulated by states. No federal law regulates, or even defines, assisted living. It has generally been assumed that Congress would not become involved in assisted living until either (1) a considerable amount of federal money was spent in assisted living, or (2) states failed to do an adequate job regulating the industry, or both. We have now reached a point where both conditions may be true. The federal government pays for assisted living through the Medicaid program's home and community-based services (HCBS), primarily through HCBS waivers, and more is spent each year. And, as a shocking series in *The Philadelphia Inquirer* reports, states are not doing a good job of regulating this industry.

Federal Dollars In Assisted Living

At present, 41 states pay for assisted living services for some Medicaid beneficiaries under a Medicaid HCBS waiver or as a Medicaid HCBS State plan service (home health or personal care).¹ The 41 states are more than double the 20 states that used Medicaid dollars for assisted living in 1998.

The assisted living industry estimates that more than 120,000 of the one million people living in assisted living facilities in 2006 received Medicaid support for their stay.² The number doubled from the year 2000, when only 60,000 assisted living residents used Medicaid.³ What began as an entirely private-pay industry has become part of the Medicaid-supported long-term care system.

Determining the amount of Medicaid money that supports assisting living is difficult because national data describe Medicaid payments for HCBS separately for each of three categories (waivers, home health, and personal care) and because assisted living facilities receive reimbursement from each of these three Medicaid funding streams. Data do not report how much Medicaid HCBS money is spent specifically on assisted living.

What is known is that HCBS, broadly defined, "more than doubled from 15 percent [of Medicaid funding] in 1992 to 31 percent in 2002."⁴ In 2002, Medicaid spent \$16.9 billion on HCBS waivers, including assisted living, and served 487,877 elderly beneficiaries and beneficiaries with disabilities; Medicaid spending on HCBS waivers increased by nearly \$8 billion (46%) between 1999 and 2002.⁵ It is unknown how much HCBS home health and personal care money supports assisted living.

The numbers of people using Medicaid for assisted living and of federal dollars supporting assisted living are, however, likely to continue rapidly increasing. Administration proposals, such as *Money Follows the Person Rebalancing Demonstration* and *Real Choice Systems Change Grants*, encourage development of HCBS alternatives to nursing home care, which are defined to include assisted living.⁶

Poor oversight by states

Oversight of the assisted living industry by some states has not been effective. Following an eight-month investigation, *The Philadelphia Inquirer* published a four-day series (February 25-28, 2007) on Pennsylvania's failed oversight of the assisted living industry.⁷

The Philadelphia Inquirer reported that since 2000, "at least 55 assisted-living residents have died across the state under circumstances that raise questions about whether they were cared for properly and whether their deaths could have been prevented." Ken Dilanian, "Shame of the State; Troubled facilities and lax state oversight have for years put residents of Pennsylvania's assisted-living homes at risk of assault, neglect – and tragedy" (Feb. 25, 2007). The series reported that numerous state audits, newspaper reports, and a 2002 grand jury report about the murder of an assisted living resident by staff have documented poor care for many years. But with weak regulatory standards and a small number of state regulators, who are overwhelmed with complaints about care and insufficiently aggressive in addressing problems, poor care continued.

The Philadelphia Inquirer reported that poor care is found in facilities serving a wealthy population as well as in facilities serving poor people. Recognizing that "an upscale appearance... can mask weaknesses in care or supervision," the series described residents in wealthy suburban facilities who died when they wandered away from the facility, were murdered by a facility employee, and suffered from complications from severe bedsores. The series includes numerous detailed case examples and links to case studies, complaint investigations, and litigation.

Another theme in the series is Pennsylvania's weak state regulation of the assisted living industry and the success of the industry in watering down regulations. Ken Dilanian, "Writing their own rules; Drive for change left Pa.'s personal-care industry at the wheel" (Feb 27, 2007). Following lobbying from the industry, the Department of Public Welfare made numerous changes to regulations in 2005, including imposing a one-year moratorium on any enforcement of the new rules; exempting 20% of the facilities from various fire safety requirements; delaying new staff training requirements for six months; and exempting existing facilities from having larger rooms for residents using wheelchairs.

Conclusion

The dramatic increase in public funding of assisted living facilities over the last decade and the inadequate regulatory system at the state level suggest a need to consider some level of federal oversight of the assisted living industry.

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¹ National Center on Assisted Living, *Assisted Living State Regulatory Review 2007* (March 2007), http://www.ncal.org/about/2007_reg_review.pdf.

² National Center on Assisted Living, *Assisted Living State Regulatory Review 2007* (March 2007), http://www.ncal.org/about/2007_reg_review.pdf.

³ Robert Mollica, “Coordinating Services Across the Continuum of Health, Housing, and Supporting Services, *Journal of Aging and Health*, Vol. 15, No. 1, 1650188 (Feb. 2003), as quoted in Toby S. Edelman, “Enforcement In The Assisted Living Industry: Dispelling the Industry’s Myths,” *NAELA Quarterly* (Spring 2003), http://www.naela.com/PDFFiles/Quarterly_spring2003.pdf.

⁴ Kaiser Commission on Medicaid and the Uninsured, “Medicaid 1915(c) Home and Community-Based Service Programs: Data Update” (July 2005), <http://www.kff.org/medicaid/upload/7345.pdf>.

⁵ Anna Sommers and Mindy Cohen, The Urban Institute, and Molly O’Malley, Kaiser Commission on Medicaid and the Uninsured, “Medicaid 1915(c) Home and Community-Based Service Programs: Data Update” (July 2005), <http://www.kff.org/medicaid/upload/7345.pdf>; Kaiser Commission on Medicaid and the Uninsured, “Medicaid 1915(c) Home and Community-Based Service Programs: Data Update” (July 2005), <http://www.kff.org/medicaid/upload/7345.pdf>.

⁶ CMS, *Roadmap for Medicaid Reform*, <http://www.cms.hhs.gov/NewFreedomInitiative/downloads/LTC%20Roadmap%20to%20Reform.pdf>.

⁷ The four major articles in *The Philadelphia Inquirer* series are:

“Shame of the State; Troubled facilities and lax state oversight have for years put residents of Pennsylvania’s assisted-living homes at risk of assault, neglect – and tragedy” (Feb. 25, 2007), <http://www.philly.com/mld/inquirer/16776324.htm>

“Criminal neglect, overlooked cruelty: Rotten food, violence and suspicious deaths – and state regulators fail to see it” (Feb. 26, 2007), <http://www.philly.com/mld/inquirer/16784111.htm>

“Writing their own rules: Drive for change left Pa.’s personal-care industry at the wheel” (Feb. 27, 2007), <http://www.philly.com/mld/inquirer/16790552.htm>

“A dysfunctional system: A jumble of state-by-state rules let a chain of horrors grow” (Feb. 28, 2007), <http://www.philly.com/mld/inquirer/16798034.htm>