Legal Basics: Medicaid Long-Term Services and Supports

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Logistics

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to NCLER@acl.hhs.gov.
- Written materials and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

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About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

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About Justice in Aging

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, housing, elder justice, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBTQ individuals, and people with limited English proficiency.

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Long-Term Services & Supports (LTSS) Coverage: Nursing Facility

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Overview of Medicaid

- Medicaid is a joint federal-state program for individuals who meet certain criteria, including income and/or asset limits
- Learn More: Medicaid 101

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Medicaid LTSS Covers Both Congregate Settings and HCBS

- Federal law requires states to provide minimum mandatory services including:
  - Hospital
  - Physician
  - Nursing facility services
- States have the option to provide additional Medicaid coverage for services including:
  - Dental
  - Physical therapy
  - Home and Community-Based Services (HCBS)

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Nursing Facility Services

- Since nursing facility services are a mandatory coverage requirement under Medicaid, there are no enrollment caps.
- Unlike Medicare, there are no time limits for coverage – Medicaid will cover as long as the resident is financially and functionally eligible.
  - Approximately 6 out of 10 nursing facility residents are covered by Medicaid.

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Financial Eligibility for Nursing Facility Services (and often HCBS)

- Income less than federal poverty level ($1,255 monthly in 2024).
  - Or federal poverty level with certain amount of income excluded.
- Often nursing facility services and HCBS limited to incomes ≤300% of federal SSI ($943 X 3 = $2,829).
  - Trusts might be used for “excess” income (often termed “Miller trusts.”)

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Financial Eligibility for Nursing Facility Services under Medically Needy Category

- States may also offer coverage under medically needy programs.
  - Under “income cap” eligibility or medically needy eligibility, residents generally will have to pay some of their income for health care. The extent of this financial contribution will vary with income level and state law.

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Financial Eligibility Example

- Assume monthly income of $2,000, income allocation of $50 for nursing facility, and $1,500 for HCBS.
  - Nursing facility: Beneficiary pays $1,950 monthly
  - HCBS: Beneficiary pays $500 monthly

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Spousal Impoverishment Protection

- Applies always to nursing facility benefit and is mandatory for HCBS through 2027 (at state option thereafter).
- Allows community spouse to maintain higher amount in resources.
  - Up to $154,140 in 2024.
- Allows community spouse to maintain income up to state-specific limit.
  - $2,555 to $3,853.50 in 2024.

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Spousal Impoverishment Resource Protections

- State sets Community Spouse Resource Allowance from $30,828 to $154,140.
  - "Community spouse" can keep half of joint resources up to $154,140
  - Or, can keep minimum as set by state from $30,828 to $154,140

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Spousal Impoverishment Income Protections

- Community spouse can obtain some of resident's income as necessary to raise total income to amount set by state between $2,555 to $3,853.50.
- Community spouse can keep all of their own income, no matter how much.
  - “Name on the check” rule

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Compliance with Federal Law

- All nursing facilities certified for Medicaid and/or Medicaid must comply with Nursing Home Reform Law and regulations.
- Protects all residents, regardless of payment source.
  - **No discrimination based on form of reimbursement.**

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Care Planning

- Assessment through Minimum Data Set (MDS).
- Care planning directed by resident to the extent possible.
- Care planning involving team including facility staff, resident physician, and other persons chosen by the resident.
- **Facility must reasonably accommodate resident preferences.**

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Broad Provision of Services

- Services so that the resident can attain or maintain highest practicable physical, mental and psychosocial well-being.
- Therapy should be provided whenever ordered by physician.

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Visitors

- Right to accept visitors at any time of the day or night.
  - Facility potentially can assess “reasonable clinical and safety restrictions” for visitors who are not family members.

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Involuntary Transfer/Discharge

- Only allowed for one of six reasons:
  - No longer needs nursing facility care.
  - Needs more than nursing facility care.
  - Endangers others' health.
  - Endangers others' safety.
  - Non-payment.
  - Facility closing.

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Frequent Improper Discharges When Medicare Coverage Ends

- Resident should be able to continue under Medicaid, if he or she chooses.
  - Potential complication if state allows partial Medicaid certification.
- Notice should be sent to resident and ombudsman program.
- Learn More: Representing Older Adults in Nursing Facility Eviction Cases

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Home and Community-Based Services (HCBS) Waivers and State Plans

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HCBS Waiver

- Provide HCBS as alternative to institutional care.
  - Hospital, nursing facility, or intermediate care facility.
- Person must qualify for the corresponding institutional coverage.
- Overall cost neutrality – federal and state governments pay no more than they otherwise would have paid.
  - State has option of requiring beneficiary-specific cost neutrality.

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HCBS Services

- E.g., Personal care services.
- Case management.
- Home health aides.
- Adult day health care.
- Assisted living.
- Home modifications.

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Limited Enrollment, Potentially

- Waiver can allow state to
  - Limit enrollment.
  - Limit eligibility to particular populations.
  - Limit coverage to particular regions of state.
- State remains subject to ADA requirements.
  - State programs should not lead to unnecessary institutionalization.

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HCBS Through State Plan Rather than Waiver

- 2005 Deficit Reduction Act authorizes HCBS through state plan, rather than waiver process.
- Enrollment not subject to numerical or geographic limitations.
  - But eligibility can be limited to particular populations.

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Financial Eligibility for HCBS State Plan Coverage

- Income less than 150% of federal poverty level, or
- Eligibility for HCBS through other HCBS mechanism.
  - Provided that eligibility not available to persons with income more than 300% of federal SSI benefit level.

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Clinical Eligibility for HCBS State Plan Coverage

- State must use needs-based standards.
  - Reference to ADL tests, but state has discretion to set standards.
- Nursing facility eligibility must also use needs-based standards.
  - Standards for nursing facility coverage must be **more stringent** than standards for HCBS.

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Community First Choice Program

- Provides states with financial incentive for state participation.
  - 6% increase in federal financial participation rate.
- Eligibility without enrollment caps.

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Financial Eligibility

- Income not exceeding 150% of federal poverty level, or
- Meeting financial eligibility standards for nursing facility coverage – often, 300% of federal SSI benefit.

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Services

- Typical HCBS, e.g., personal care services, home health aides, adult day care, assisted living, etc.
- **Must** include
  - Services that assist person in acquiring or maintaining ability to perform ADLs.
  - Back-up system to ensure continuity of services.
  - Training on tasks of participant direction.

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Specified Optional Services

- Payment of transition costs.
  - E.g., Rent and utility deposits.
  - First month's rent.
  - Kitchen supplies.
  - Bedding.

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LTSS Payment Delivery Systems

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Fee-For-Service (FFS) vs. Managed Care Delivery Systems

- Fee-For-Services
  - Traditional model.
  - Medicaid reimburses providers for each service provided to the enrollee.
- Managed Care
  - State pays set amount to Managed Care Organization (MCO) per each enrollee.
  - Increasingly used by states for Medicaid programs, including LTSS.

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Potential Challenges

- Fee-for-Service enrollees must find their own Medicaid providers
  - Meanwhile, MCOs connect enrollees with in-network providers.
- Capitated payments under managed care could incentivize MCOs to limit services due to cost.

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Newly Published Managed Care Rule

- Final rule published in 2024 to improve standards in managed care.
- Requires public, accessible website containing information about managed care plans.
- In Lieu of Services (ILOS) – Services under MCO that substitute for traditional state plan services
  - Rule expands ILOS to better address unmet needs; greater oversight in ILOS spending.

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Standards for HCSB Settings

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HCBS Settings Rule

- Ensures HCBS funds are used in truly non-institutional settings.
  - Setting must provide full integration with the community and have other characteristics of non-institutions.
- Regulation published in 2014, deadline for states' final compliance was March 2023.
  - Some limited extensions for specific, pandemic-related purposes.

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Standards Applicable to All Settings

- Integration with community.
- Privacy and dignity.
- Choice, including
  - Services and supports.
  - Service providers.
  - Daily activities.
  - With whom to interact.

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Standards Specific to Provider-Owned or –Controlled Settings (1/2)

- Privacy
  - Locked doors to living unit.
- Choice
  - Furnish and decorate unit.
  - Choose roommate.
  - Decide schedule.

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Standards Specific to Provider-Owned or –Controlled Settings (2/2)

- Visitation
  - Right to accept visitor at any time.
- Food
  - Access to food at any time.
- Eviction protections.

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Eviction Protections in Provider-Owned or Controlled- Settings

- Unit must be a specific physical place that can be rented or owned under a legally enforceable agreement and must have:
  - "Same responsibilities and protections" as provided under the jurisdiction's landlord-tenant law, or
  - If not subject to landlord-tenant law, then a written agreement must provide "comparable" protections to those provided under landlord-tenant law.
- States may have administrative hearing system
  - Not technically referenced in the law.

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Modification of Requirements for Provider-Owned/Controlled Settings

- Modification through person-centered service plan.
  - **Recipient must consent.**
- Service plan must
  - Identify need.
  - Document previous interventions.
  - Describe modification that is proportionate to need.
  - Provide for periodic review.

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Resources

- Medicaid Statute: 42 U.S.C. §§ 1396- 1396w-5
- Medicaid Regulations: 42 C.F.R. §§ 430.1- 435.1015
- Centers for Medicare & Medicaid Services
- NCLER Resources: LTSS
- Justice in Aging Resources: LTSS

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Questions?

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Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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