Policy Issue Brief

NSCLC
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PROTECTING THE RIGHTS OF LOW-INCOME OLDER ADULTS.

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The HCBS Opportunity: Recommendations for the Commission on Long-Term Care

This week President Obama appointed the final members of the Commission on Long-Term Care. This new Commission has six months to accomplish one objective: develop a plan for the establishment, implementation and financing of a comprehensive, coordinated, and high quality system that ensures the availability of long-term services and supports (LTSS) for individuals who need LTSS.[1]

The foundation of a comprehensive LTSS system should be a high quality, accessible network of services that supports individuals to live with dignity and independence at home and in the community. Known as home and community-based services (HCBS), these services are widely acknowledged as both the preference of individuals who require LTSS and the most cost-effective way to deliver LTSS. In addition, over a decade ago, the Supreme Court clarified the civil right of integrated, community living in its landmark *Olmstead* decision.[2]

Unfortunately, Medicaid, the nation's largest payer of LTSS, continues to give preference to the provision of LTSS in institutional settings instead of at home and in the community. As a result, many people who could be receiving care at home are unnecessarily moved into institutions. Congress summarized this imbalance in a statement in the Patient Protection and Affordable Care Act of 2010 (ACA, Pub. L. No. 111-148):

> Despite the . . . *Olmstead* decision, the long-term care provided to our Nation's elderly and disabled has not improved. In fact, for many, it has gotten far worse. . . . Although every State has chosen to provide certain services under [Medicaid] home and

[1] The American Taxpayer Relief Act of 2012 (Pub. L. 112-240) established a bipartisan 15 member Commission on Long-Term Care tasked with evaluating the current long-term care landscape and developing a report with recommendations for a comprehensive, coordinated, and high quality long-term services and supports system.

[2] *Olmstead v. L.C.*, 572 U.S. 581 (1999). The Supreme Court held that individuals with disabilities have the right to choose to receive their long-term services and supports in the community rather than in an institutional setting.

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community-based waivers, these services are unevenly available within and across States, and reach a small percentage of eligible individuals.[3]

The Commission must address this imbalance by developing a strategy to shift the delivery of Medicaid-funded long-term services and supports away from institutions and into the community. This brief provides seven specific recommendations for the Commission to consider and, ultimately, adopt in its recommendations to Congress, in order to make progress towards developing a comprehensive, coordinated, and high quality HCBS system:[4]

1. HCBS Should Be Provided to Every Medicaid Beneficiary Who Needs the Services

Under current Medicaid law, states must provide institutional long-term care for all persons who are determined to need that level of care, as long as the individual meets certain financial eligibility requirements. Thus, Medicaid institutional coverage is considered an entitlement. States must provide it and all those who are eligible for it are entitled to receive it.

In contrast, state Medicaid programs are not required to provide most HCBS. Instead, they are given the option of providing these services and do so often through "waiver" programs. In these waiver programs, states are able, under Medicaid law, to impose enrollment caps, spending limits and waiting lists on many of the HCBS programs they do offer. As a result, a Medicaid recipient with LTSS needs has guaranteed access to institutional care, but often cannot get similar, potentially more cost-effective, services at home and in the community. The recipient must enter an institution to get the needed services and supports.

Incremental changes by Congress and the states over the years have increased access to HCBS, but the sum total of these additions has been insufficient. In order to achieve significant change, HCBS should be a required benefit of every state's Medicaid program, and should be made available to every eligible Medicaid beneficiary, without artificial enrollment limits.

2. Harmonize Eligibility Standards for Coverage of Nursing Home Care and HCBS

Institutional coverage under Medicaid is not more widely available than HCBS simply because states are required to provide it as a Medicaid benefit, but also because the financial eligibility

[3] Pub. L. No. 111-148, § 2406.

[4] The recommendations in this brief are explained in more detail in our 2010 report, *10-Plus Years After the Olmstead Ruling: Process, Problems and Opportunities.* Carlson E, Coffey G. 10-Plus Years After the *Olmstead* Ruling: Progress, Problems, and Opportunity. National Senior Citizens Law Center, (September 2010). Available at http://www.nsclc.org/wp-content/uploads/2011/07/NSCLC-Olmstead-Report.pdf.

standards are more accommodating. To balance Medicaid's LTSS system, financial eligibility procedures should be the same whether the enrollee is receiving institutional care or HCBS.

The Commission should recommend that Congress require states that provide medically needy eligibility for institutionalized persons to provide medically needy eligibility for waiver services as well.

3. Mandate Medicaid Spousal Impoverishment Protections for Spouses of HCBS Enrollees

Under current federal law, spousal impoverishment protections are mandatory for spouses of institutionalized enrollees, but not for spouses of HCBS enrollees. The Affordable Care Act (ACA) repairs this discrepancy, but not until 2014, and the legislation is scheduled to sunset in 2019. The need for equivalent protections exists now, so the extension of the protections should not be delayed, and the extension should not sunset.

4. Establish Income Allocations Sufficient to Allow Medicaid Enrollees to Afford Room and Board Expenses

Medicaid coverage of community-based services is ultimately impractical if the enrollee does not retain enough income to meet, at a minimum, his room and board expenses. Medicaid programs should set the Personal Needs Allowance (for special income-limit eligibility) at levels that are sufficient to cover room and board expenses. Likewise, for medically needy eligibility, the Commission should recommend that Congress require Medicaid programs to offer targeted income deductions that enable a Medicaid beneficiary to afford room and board even after spending down available income to the medically needy income level. Alternatively, the Commission should recommend that Congress repeal or amend the federal law that ties a state's medically needy income level to the state's 1996 public benefits level.

5. Fund and Require CMS to Develop and Enforce Quality Standards for Medicaid-Funded HCBS

The Centers for Medicare and Medicaid Services (CMS) has an obligation to assure the quality of Medicaid-funded HCBS, but too frequently CMS has deferred to states' written assurances of compliance. Particularly given that HCBS waiver enrollees are persons whose health care needs would qualify them for nursing home care, the Commission should recommend that Congress fund and require CMS to develop and enforce quality standards for Medicaid-funded HCBS.

6. Emphasize HCBS in the Next Reauthorization of Older Americans Act

When the Older Americans Act (OAA) was reauthorized in 2006, Congress prioritized the expansion of HCBS. The Commission should recommend that Congress reauthorize the OAA and reinforce this priority.

7. Develop Consistent Funding Sources for Aging and Disability Resource Centers

Arranging and maintaining LTSS at home is not an easy task, and consumers generally cannot be expected to take it on without guidance. Aging and Disability Resource Centers (ADRCs) are envisioned as an antidote to the delivery system's fragmentation, but the Administration on Community Living's funding for ADRCs has been limited in scope and in time. To truly support consumer decision-making, funding should be adequate to support further ADRC development and maintenance into the foreseeable future. In the American Taxpayer Relief Act, Congress demonstrated support for ADRCs by appropriating $5 million through 2013; however, the importance of the program justifies a funding commitment more focused and of longer duration.

Conclusion

The development of a comprehensive plan that answers the increasing LTSS needs of this country is long overdue. In creating such a plan, it is imperative that the Commission take steps to address the glaring institutional bias in the Medicaid program. Adopting the recommendations in this paper will help move the delivery of LTSS in this country away from more costly institutions and towards the home and community-based services most people prefer.