

Address Medicaid's Institutional Bias and Expand Your Practice

PATRICIA E. KEFALAS DUDEK, ESQ.

Aggressive advocacy efforts are happening at the state and national level to address what is called the institutional bias in Medicaid. Essentially, this bias means that, when a person with a disability or an elder is served in an institution or a nursing home, Medicaid will pay for all of his services, including anything related to housing. However, if the same person with a disability or elder lives in a less restrictive set-



ting, and his services are paid for by a Medicaid Waiver, his housing costs are specifically excluded from coverage. See U.S.C. 42 § 1396n(c)(1). The impact of this bias is a huge financial disincentive for the states to move towards true implementation of the Supreme Court's decision in *Olmstead*, 527 U.S. 581 (1999), and the integration mandate of the American with Disabilities Act, 42 U.S.C. § 12101(a)(2) and (5). See also 28 C.F.R. § 35.130(d).

This is how institutional bias works against the states: If a Medicaid beneficiary wants to live in the community, in many cases either the individual or the State will have to pay for the housing costs. If the person pays for this cost, then this is private money

and it cannot be used as state match to draw down additional Medicaid funds. In Michigan, that means a loss of the 50% match of the housing cost (which they get if the person is placed in a more restrictive setting). In some states, the match is even higher. If the State pays for this, these funds need to come from general fund dollars. As the funds are not being used to pay for Medicaid covered services, they again may not be used for Medicaid match. The states are all experiencing a reduction in revenue, with large growth in their Medicaid budget. Therefore, it becomes more difficult for budget directors and policy makers to understand the importance of using these funds to provide long term care services in the community when they can provide these services in a more restrictive setting, and then do not need to come up with as much money to do so.

Advocates for seniors and people with disabilities need to understand this essential policy issue, and need to develop creative strategies to address it and at the same time to achieve the desired goal of many of our clients to age in place, and live in the least restrictive setting. The first strategy to consider is working with Community Non-Profit Housing Corporations.

Non-profits provide a charitable gift to low-income people by arranging for affordable supportive housing; they also lessen the burden of the states by creating and providing safe and affordable supportive community living situations. These charitable organizations capture and preserve the

resources the states spend through the public mental health system and long-term care system on behalf of people with disabilities and seniors. They do this by reinvesting any funds spent, plus the appreciation on the real estate into the development of additional affordable, supportive housing. Without these vital agencies, these often times accessible homes would be in the hands of for profit landlords, and could not be used to defer the continuing obligation of the state to house and provide services to its most vulnerable citizens in the least restrictive setting.

Prior to 1976, Michigan's citizens with developmental disabilities and mental illnesses were typically institutionalized. However, in *Michigan Association for Retarded Citizens v Smith*, 475 F.Supp 990 (ED MI 1979), the State of Michigan agreed to a federal district court judgment requiring the State to provide community based housing for adults with disabilities. The "Plymouth Center" case, as it is now known, was an early part of the national trend toward de-institutionalization, or providing housing and needed services to people with disabilities under the federal Medicaid program in the least restrictive setting. This resulted in the creation of smaller community based residential settings, as opposed to large isolating institutions. Under several administrations, Michigan became a leader in this national effort. In the late 1960s, over 13,000 people with developmental disabilities resided in state-operated institutions across Michigan. Now there are fewer than 100.

Small group homes for six or fewer people proved to be the primary vehicle for complying with the Plymouth consent decree and for implementing a statewide de-institutionalization program. Early on in

(continued on page 13)

Address Medicaid's Institutional Bias, and Expand Your Practice

(continued from page 12)

this de-institutionalization effort, state and federal funds were used to lease houses from private investors, and services were typically provided under contract with a separate service provider organization. While the housing and support services were separately contracted, they were both provided as a direct responsibility of the State under the Michigan Mental Health Code, §§ 330.1704 and 330.1208, and State Constitution, Article I § 2, and were inextricably linked. Services could not be provided without housing to replace the institution, and housing could not be provided without needed support. The housing and services were so closely tied together that if the person with a disability had a falling out with his service provider, the only choice he had was to move to another setting. This meant that even when a service provider violated the person's rights under the Mental Health Code § 330.1208, or even neglected or abused the person, the person with a disability was punished, as he would have to lose his home and housemates to avoid the provider of services. This model was merely an extension of the institutional model of care, but in smaller settings.

As a result, variations on the group home service delivery model emerged to afford people with disabilities greater protection and choices in housing. Supportive living arrangements are currently offered as a popular alternative to group homes. All of these living arrangements, however, still include some similar type of configuration linking the required elements of housing and support as an alternative to institutional or nursing home care.

In addition to the shift to community based care, Michigan has changed its role from that of a direct provider of services to a director of a state wide system of Community Mental Health boards responsible for providing State Medicaid funded services to eligible low-income citizens with disabilities in its community. The Community Mental Health boards, in essence, act as an agent of the Department of Community Health. They typically contract for the necessary services, although some continue to provide direct services.

Contemporaneous with these systemic changes, a relatively small number of non-profit organizations have emerged to assist the State and the local Community Mental Health boards in providing housing for Medicaid-eligible citizens. These non-profit organizations share a common mission of reducing the burden upon state and local governments in meeting their obligations to citizens under the Medicaid program and the Michigan Mental Health Code.

Nationally, the trend toward de-institutionalization continues. Recent examples include the U.S. Supreme Court *Olmstead* decision, *Olmstead v LC ex rel Zimring*, 527 U.S. 581; 119 S.Ct. 2176; 144 L.Ed.2d 540 (1999), and the President's 2001 "New Freedom" Initiative. The New Freedom Initiative is described by the George W. Bush Administration as one that "promotes the full integration of people with disabilities into all aspects of American life by increasing employment opportunities, by expanding access to technology and public accommodations, and by providing accessible transportation and housing." Without affordable supportive housing options, the objective of delivering services in the "least restrictive setting" cannot be achieved. People with disabilities

and their advocates consider this a basic civil right. Without the efforts of these charities, the burden on the states' Medicaid systems could force people with disabilities and seniors back into institutions and nursing homes.

Many advocates for seniors and people with disabilities throughout the country agree that it is best to have the non-profits focus their efforts on providing housing or social services, but not both. Philosophically, empowering people to be able to select and change service providers without having to lose their homes and friends promotes independence and self-determination. Advocacy groups attested to the validity of this premise; consumers of long term care services can now protect themselves from inadequate care by simply firing the service provider, without fear of losing their home and housemates. This model goes a long way in protecting these citizens and it ensures that the mistakes of Willowbrook and other institutions are not continued (on a much smaller scale) in group homes. See *The End of a Nightmare at Willowbrook*, Headline News, Page 2, Queenscourier, May 11-17, 2000, for a detailed account of atrocities that took place at the Willowbrook State Institution.

The other rationale for separating the housing and social service functions is for all the organizations to focus on only one of these very important missions, so that they can be even more efficient and effective with the scarce resources allocated to caring for this population. Consistent with this trend, the Department of Housing and Urban Development ("HUD") does not permit tenants to be required to accept services as a condition of living in HUD funded units. See *Federal Register*, Vol. 69, No. 94, May 14

(continued on page 14)

Address Medicaid's Institutional Bias, and Expand Your Practice

(continued from page 13)

2004, p.27761. Similarly, the Michigan State Housing Development Authority ("MSHDA") has strongly encouraged the separation of housing from the provision of support services. These non-profit organizations represent the best of the non-profit sector, providing important services that immeasurably benefit people's lives and doing so in an incredibly cost efficient manner, usually on the proverbial shoestring budget.

As a result of working closely with such organizations, I recently found myself drafting Amicus Curiae briefs in their efforts to secure property tax relief for their developments. My advocacy on behalf of individual clients has expanded my practice into areas never anticipated. Forcing these organizations to continue to pay property taxes impedes and restricts their ability to provide this needed charitable resource. If continuously forced to use their limited resources to pay property taxes, they are essentially using one type of tax dollar allocated to house people with disabilities and seniors to pay another type of tax. This is a very inefficient use of these scarce resources and, as a result, people with disabilities and seniors (and those who are responsible for their care) will be forced to divert even more of these scarce resources toward higher housing costs and away from the Medicaid budget, which pays for the services. Ultimately, states will be forced once again to bear more of this financial burden in the future. This burden is even greater as often times these homes are not even allowed the "homestead" valuation, at least under Michigan law, specifically, MCL 211.7cc, for these property taxes.

Another strategy to address the institutional bias is the use of spe-

cial needs trusts to handle the housing costs. It will make it much easier to establish that providing the services in the less restrictive setting is a reasonable accommodation under the ADA if the state does not have to deal with the financial dis-incentive.

Many of the Pooled Accounts Trusts, or Exception C trusts, that I work closely with were developed by nonprofit housing organizations. Many of our sub-accounts hold real estate, and the trust often acts as a "friendly" landlord. Recently, we applied for, and secured a property tax abatement on behalf of the trust by sending the following letter:

Dear Sir or Madam:

Enclosed please find a copy of the Deed showing that the Pooled Account Trust of the Friends of CLS, Inc. f/b/o XXXXXXXX owns the residence located at XXXX Street, XXX, Michigan XXX. In addition, I have provided copies of the Articles of Organization and the Bylaws for the Friends of CLS, Inc. Friends of CLS, Inc. is a Michigan non-profit corporation granted tax exempt status from the Internal Revenue Service under a ruling dated October 21, 1993. Please note from the enclosed corporate documents that the original name of the organization was the Friends of Wayne County Living Services.

The purpose of this correspondence is to request tax exempt status be granted the above-referenced property, under Michigan Compiled Law - MCL 211.7o non-profit charitable institutions; exemptions; definitions. The underlying property should be exempt from Michigan property taxes because one of the charitable purposes of the Friends of CLS, Inc. is to provide housing assistance for individuals who are struggling with a disability. Friends of CLS, Inc. established a Trust to accomplish this charitable

purpose. A review of the Trust indicates that the purpose of the Trust is to organize and administer funds in order for individuals with disabilities as defined by Section 614(a)(3) of the Social Security Act, 42 U.S.C. § 1396p, amended August 10, 1993, by the Revenue Reconciliation Act of 1993, to qualify for medically necessary public benefits. The Trust facilitates this purpose by using the assets of the Trust to provide financial assistance to individuals with disabilities, including assistance to defer the cost of supplemental services.

Through this Trust, there are many Sub-Trusts wherein each Sub-Trust benefits an individual beneficiary and is designated in the name of such beneficiary. The Trust in question is the Friends of CLS, Inc. Pooled Accounts Trust f/b/o XXXXXXXX. As demonstrated by the enclosed Deed, the Sub-Trust owns the residence now being used as XXXXXXXXh's semi-independent living arrangement.

To qualify for the exemption, the property owner must satisfy the following requirements:

The real estate must be owned and occupied by the exemption claimant;

The exemption claimant must be a library, charitable, educational or scientific institution;

The claimant must have been incorporated under the laws of the State of Michigan;

The exemption exists only when the building or other property therein, are occupied by the claimant solely for the purposes for which it was incorporated.

From the above standard, the Trust should be granted the exemption.

The Trust is currently owned and occupied by the Friends of CLS, Inc. Pooled Accounts Trust f/b/o XXXXXXXX. By the terms of the Pooled Accounts Trust, Sub-Trust and the main Trust, the Trust can only benefit an individual who is cop-

(continued on page 15)

Address Medicaid's Institutional Bias, and Expand Your Practice

(continued from page 14)

ing with a disability. Assisting individuals with a disability falls directly within the charitable purposes Section 501(c)(3). When XXXXX passes away, the Terms of Trust require the property to be used for supportive housing for people with disabilities who are indigent under Section XI (2).

The enclosed Articles of Incorporation show that Friends of CLS, Inc. is in fact incorporated in the State of Michigan and is a non-profit entity. The Friends of CLS, Inc. chose to utilize the Trust to accomplish this goal of providing and assisting individuals with disabilities.

The purposes for which all of the above-referenced entities were established is the charitable purpose of supporting individuals with disabilities. Providing support for the housing needs for XXXXXX, an individual with disabilities, fulfills the Friends of CLS, Inc. charitable purpose and thus satisfies this requirement for a property tax exemption.

We request that you modify your tax records to indicate that the above-referenced parcel is exempt from taxation until it is transferred or is no longer engaged in this charitable purpose.

It is important that NAELA members understand the system barriers that make it difficult for us to assist our clients that desire to live in places other than nursing homes and institutions. I encourage you to use your advocacy skills to address the Medicaid institutional bias, and, who knows, you just might end up expanding your practice into new areas at the same time.

Patricia E. K. Dudek, Esq., practices Elder Law in Bloomfield Hills, MI.

Memoirs of a Counsellor: "After So Much Time..."

BRIDGET O'BRIEN SWARTZ, ESQ.
(AKA SOCIAL WORKER AT HEART)

Ah, Maggie. After nearly eight years serving as your counsellor, advocate, I've finally become a part of the conspiracy against you. It was inevitable, I suppose.

I was "forced" to be your attorney by order of the court, after you expressed dissatisfaction with your former court-appointed attorney. I, and others, often wondered why I did more than what is normally required of a court-appointed attorney. Those of us who practice law, particularly, those of us who are Elder Law attorneys, all have at least one, probably more such cases for which the reason we feel a strong connection is uncertain.

Yes, you were a challenge, lacking insight into your mental illness, blaming others for your circumstances, impossible to reason with... But that's the nature of your illness, isn't it? I often wondered why those with training and experience in dealing with persons such as yourself were repeatedly at a loss as to how to "treat" you. Talking around you, as if you weren't present. Talking condescendingly, despite acknowledgement of your intelligence.

The least I could do was be present, unlike your family, and stand at your side when you so often believed the world was against you. Sometimes I believed that as well! You trusted me and I gave you hope. Why? I do not know. Maybe it was because I would see and believe what was truth when no one else could sift through the delusions or rise above their frustrations.

And now, even I cannot help or give you encouragement as, in your eyes, I'm "one of them." So, it's the end of an era, so to speak. I hope your new "counsellor" is able to do for you what I no longer can. But in my heart of hearts, I unfortunately know that the next person won't have the same will or desire; won't recognize that you have no one else who'll accept you for who you are. What was a case that stood out from the rest for me, will just be one of many for the next person. Ah, Maggie . . .



Bridget O'Brien Swartz, Esq., practices Elder Law in Phoenix, AZ.