

The Journal of Health Care Law & Policy
Volume 4, Number 2

“The Crisis in Long Term Care”

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Be Careful What You Ask For: The Repeal of the Boren Amendment and Continuing Federal Responsibility to Assure that State Medicaid Programs Pay For Cost Effective Quality Nursing Facility Care

Malcolm J. Harkins III, J.D.

In 1980 Congress passed the Boren Amendment to the Medicaid Act, which transferred to the states from the Secretary of the Department of Health and Human Services the responsibility of determining that Medicaid payment rates complied with the standards set by the Medicaid Act. However, the Boren Amendment was repealed by the 1997 Balanced Budget Act, principally at the demand of the states. The National Governors Association argued that the Boren Amendment needlessly inhibited state control and required excessive fiscal demands. Nevertheless, the article proposes that the Medicaid Act contain payment criteria that institutional care providers can enforce despite the repeal of the Boren Amendment. In fact, the repeal of the Boren Amendment allows the Secretary greater ability to oversee the states' compliance with the Medicaid Act. It further allows providers greater ability to enforce the Medicaid Act's substantive requirements against the states and procedural requirements against the Secretary. Therefore, Medicaid beneficiaries should have the same level of access to care as the rest of the population.

Federal Law Enforcement in Long-Term Care

Marie-Therese Connolly, J.D.

Significant medical advances in recent years have led to increasing numbers of Americans living into advanced old age. However, the growing numbers of elderly still require assistance and long term care, including short and long stays in public and private nursing homes. Several cases in civil and criminal courts have revealed that these nursing homes are often underfunded, understaffed, and underregulated, resulting in a large number of elderly suffering abuse and/or neglect while residents of nursing homes, some of these cases leading to the premature death of the victims. Marie-Therese Connolly outlines the causes of problems in nursing homes that lead to the abuse and neglect of nursing home residents, including increasing

numbers of elderly needing long term care, and the unnecessary depletion of resources needed to fund long term care by fraud and abuse of the Medicare/Medicaid programs. In this article, Ms. Connolly discusses the enlarging role the Department of Justice plays in preventing victimization of nursing home residents. This role includes education, outreach, prosecuting wrongdoers, proposing new legislation, sponsoring projects, and medical forensic activities. Ms. Connolly asserts that a well funded, comprehensive national plan such as that of the Department of Justice can prevent fraud and abuse in nursing homes and better prepare the nation to assume the long term care of a growing elderly population.

The Crisis in the Long-Term Care Workforce

Karl Pillemer, Ph.D. and Mark S. Lachs, M.D., M.P.H.

Between 2001 and 2011, the number of elderly persons with functional disabilities will also grow by 1.6 million. This is critical because the need for long-term care increases, yet the labor force is growing slower than the population that needs their assistance. In their article, Drs. Pillemer and Lachs examine the long-term care workforce, its problems and subsequent staffing crisis. Pillemer and Lachs first discuss the problems that long-term caregivers face, which leads to a high turnover rate. Next, the authors examine the relationship between allowing increased numbers of acute care residents per nursing home because of a purely economic mechanism – a reimbursement system. Pillemer and Lachs conclude that in order to increase the quality of the long-term care workforce, more training needs to be provided and salaries and benefits need to increase to allow caregivers to live above the poverty level. Additionally, subacute care must be studied more aggressively to ensure that those patients are receiving the care that is best for them, not just the most lucrative for the long-term providers.

The Nursing Home Crisis: Views From A Trustee in the Nonprofit Sector

Marshall B. Kapp, J.D., M.P.H.

The Nursing Home industry in the United States is facing a crisis, which equally affects nonprofit and proprietary sectors of the industry. In this article, Professor Kapp examines the factors contributing to the crisis, such as the competition for customers considering people's desire to delay institutionalization regardless of nonprofit status, legislature that makes nursing home management more difficult, a shortage of nursing home staff, and the negative image of the nursing home industry in the media. Then Kapp examines the effects of these factors of the nonprofit sector, which are not distinguishable from the proprietary sector with respect to the regulations, tort doctrine, and negative media attention. Next Kapp explains why the impact on nonprofit nursing homes matters and what the impact will be on the quality and of care and life for people who need long term care services. Kapp concludes since there will always be a need for some form of institutional long term care services, nonprofit nursing homes should be considered and supported as valuable providers.

Voting and Nursing Home Residents: A Survey of Practices and Policies

Joan L. O'Sullivan, J.D.

In 1998, a Maryland citizens group, Citizens for Democratic Elections, successfully petitioned in federal court to enjoin the mailing of absentee ballots to nursing homes and assisted living centers. Nevertheless, the injunction stood for only two days because the plaintiffs had no standing to bring suit. Based on this case, Citizens for Democratic Elections conducted a survey of nursing home residents and staff to determine how voting is done in nursing homes, to ascertain whether anyone screens the residents for competency before they vote, and to establish whether the Maryland State Administrative Board of Elections guidelines are followed and how effective they are. The survey compared the results of nursing home residents in an area in which the State Board of Elections does not instigate the voting process in nursing homes, and an area that does follow the guidelines of the State. The results of the survey show that those in the latter category had voted more often than those in the latter and that those initiatives taken by the local Board of Elections seemed to have made a difference.

The article further includes a description of regulations and case law, both at the state and federal level, which relate to voting rights of the elderly and handicapped. It examines guidelines used by states to protect the voting process, many of which prevent anyone from registering to vote who has been found by the court to be incompetent. In addition, O'Sullivan examines elections in Chicago, where there have been allegations of fraud for voting in nursing homes, which parallel those of Maryland. There is also a discussion of new technologies available today to assist voters who are visually impaired.

***Shalala v. Illinois Council on Long Term Care: The United States Supreme Court
Confounds the Crisis in Nursing Home Care with an Unneeded Jurisdictional Channeling
Requirement (Note)***

Marko W. Kipa

Kipa explores *Shalala v. Illinois Council on Long Term Care* in which the U.S. Supreme Court held that a constitutional challenge to a decision by the Secretary for the Department of Health and Human Services could not originate in a district court but had to proceed through a special review channel. Kipa criticizes the major procedural hurdle resulting from the Court's ruling which made non-waivable the requirement that a constitutional claim regarding the administration of nursing homes be presented to the Secretary. He argues that this requirement has outlived any practical consideration and that such challenges should commence in the judiciary. Kipa recognizes the importance of allowing the Secretary to review non-constitutional claims so that relatively minor benefits claims can be resolved without clogging the courts. To this end, Kipa proposes a modified test whereby Congress allows for a jurisdictional channeling provision which efficiently and fairly accounts for the concerns of the Secretary as well as constitutional challenges of claimants.

***Statutory Limits on Punitive Damages in Nursing Home Negligence Tort Actions: Preventing
the Collapse of the Private Nursing Home (Comment)***

Terrance J. Shanahan

In recent years there has been an explosion in the number of lawsuits involving patient care and treatment in the nation's nursing homes. The result of these lawsuits has been larger punitive damage awards, in many instances far larger than the awarded compensatory damages. In States such as Florida and California that have large elderly populations this problem has become alarming. In his article, Terrance Shanahan examines the recent trend by courts to award large punitive damages and the problems that have resulted. First, Shanahan reviews the history of punitive damages in the United States, and the results of attempts to curb them. Next, Shanahan presents a few recent awards of punitive damages which demonstrate the magnitude of the punitive damage problem. Shanahan explains that massive punitive awards adversely affect the nation's nursing homes, by making it difficult for nursing homes to secure liability insurance, or remain viable business entities at all. Finally, Shanahan looks at current statutory initiatives to improve care in nursing homes. Shanahan concludes that greater government oversight, statutory caps on punitive damages, and harsher fines for levied on nursing homes will allow the nursing homes to stay open as functioning businesses.