National Health Law Program

To: National Association of Protection and Advocacy Systems
From: Sarah Somers, National Health Law Program
Date: October 25, 2003

Re: Monthly Question and Answer

Question: When can Medicaid pay for the cost of room and board?

Brief answer: Generally, Medicaid will not pay for room and board when it is provided to individuals living in a community setting. It can sometimes be covered when it is an integral part of another covered Medicaid services - in other words, when it is provided in institutional settings, such as intermediate care facilities for the mentally retarded (ICF-MRs), nursing facilities, or hospitals. If states choose to provide room and board as a part of medical treatment in other settings, they must find another source of funding.

Discussion: The Medicaid statute contains a list of all services that states may provide through their Medicaid programs. 42 U.S.C. § 1396d(a). Some of these services are mandatory, and must be provided by states that have Medicaid programs, while others are optional - states may choose to provide them, but do not have to.[1] 42 U.S.C. § 1396a(a)(10)(A); 42 C.F.R. § 440.210. One of the mandatory services is Early and Periodic Screening, Diagnosis and Treatment (EPSDT), which must be provided to all Medicaid recipients under age 21. 42 U.S.C. § 1396d(a)(4)(B). The EPSDT benefit includes all of the mandatory and optional Medicaid services, which must be provided to beneficiaries under 21 when necessary to correct or ameliorate mental or physical conditions, regardless of whether the services are covered for adults.[2] 42 U.S.C. § 1396d(r)(5).

When Medicaid was first enacted, in 1965, health care differed substantially from our current system. Among other differences, care was much more institutionally based. The list of covered services in the statute still reflects this institutional bias. Room and board does not appear on the statute's list of covered services. The statute does, however, include a number of institutional services that necessarily include room and board, such as nursing facility services, inpatient hospital services, ICF-MR services and psychiatric hospital services for patients under 21. 42 U.S.C. §§1396d(a)(1), 1396d(a)(4)(A), 1396d(a)(16); 42 C.F.R.§§ 440.10, 440.40, 440.150, 440.160.

---

[1]For an in-depth discussion of Medicaid services, *see* Perkins and Somers, *An Advocates Guide to the Medicaid Program*, National Health Law Program (2001), available through www.healthlaw.org at reduced rates for P & As.

[2]For an in-depth discussion of Medicaid's EPSDT benefit, *see* Perkins and Somers, *Towards a Healthy Future*, National Health Law Program (2003), available through www.healthlaw.org at reduced rates for P & As.

Over the past four decades, the Medicaid statute has been amended to reflect changes in health care and the movement towards serving the elderly and people with disabilities in less restrictive, natural environments. Certain services that are not covered by Medicaid, such as respite, may be provided through a home and community-based waiver for the mentally retarded or for the frail elderly. 42 U.S.C. §§ 1396n(c), 1396n(d). Room and board, however, is specifically excluded from the list of services that can be covered under these waivers. 42 U.S.C. §§ 1396n(c)(1); 1396n(d)(1). Medicaid may also be provided to certain individuals who need home and community care or who are living in community-supported living arrangements. Similarly, coverage is forbidden for room and board costs provided to these individuals. 42 U.S.C. §§ 1396t(a)(9) 1396u(f)(1).

This prohibition can place barriers in the way of states that are attempting to use home and community based waivers to move people from institutions into the community. CMS is aware of this problem but has not signaled a willingness to change this restriction. *See e.g.* Dear State Medicaid Director, *Olmstead No. 5*, p. 5 (January 10, 2001) (acknowledging that it may be difficult for low-income individuals to afford to move from an institution to the community because Medicaid covers room and board costs in institutional settings but does not do so in the community).

Behavioral Health Services and the Room and Board Issue

The issue of payment for room and board has arisen in conjunction with behavioral health services. States frequently offer mental or behavioral health services through Medicaid's rehabilitation option. The statute defines this service as:

> [O]ther diagnostic, screening, preventive and rehabilitative services, including any medical or remedial services (provided in a facility, a home or another setting) recommended by a physician or other licensed practitioner . . . for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level. 42 U.S.C. § 1396d(a)(13). *See also* 42 C.F.R. § 440.130(d).

According to the Department of Health and Human Services (DHHS) this definition does not include room and board costs unless the services are being provided in hospitals, nursing facilities, inpatient psychiatric facilities, or ICF-MRs. This interpretation has caused problems for states attempting to offer behavioral health services in other settings. The most notable example comes from Texas. In 1990, Texas proposed amending its state plan to cover inpatient residential chemical dependency treatment for children under 21 under EPSDT. The Health Care Financing Agency (HCFA)[3] denied the amendment on the grounds that it would impermissibly result in Medicaid funds paying for room and board, asserting that the definition of rehabilitation services did not include room and board services. The agency further stated that Congress only intended that room and board services be paid in the specifically enumerated settings set forth in the statute. If federal subsidization were allowed in other settings, according to HCFA, funds

[3] HCFA was the agency within HHS responsible for the administration of the Medicaid and Medicare Programs. It has since been renamed and is now called the Centers for Medicare & Medicaid Services (CMS).

might be paid to facilities that did not meet Medicaid statutory and regulatory requirements for participating providers, such as halfway houses. HCFA also rejected Texas' argument that room and board could be covered under the catch-all service category, which provides for coverage of "any other medical care, and any other type of remedial care recognized under state law, specified by the Secretary." 42 U.S.C. § 1396d(a)(22). *See also* HHS, HCFA Administrator Decision, No. 91-6, Jan. 25, 1994 (available from NHeLP). Texas took its case to the federal courts but was unsuccessful. The Fifth Circuit upheld DHHS' interpretation and Texas was not permitted to cover the treatment under Medicaid. *Texas v. U.S. Dep't Health and Human Servs.,* 61 F.3d 438 (5th Cir. 1995).

Notwithstanding the above decision, flexibility has increased in the definition of "inpatient psychiatric facilities." Until recently, inpatient psychiatric treatment for individuals under 21 could only be covered under Medicaid if it was provided in a facility that met Medicaid institutional standards, i.e., a hospital, nursing facility or ICF-MR. In 1990, however, Congress authorized DHHS to revise regulations governing this service to allow reimbursement to a broader range of treatment facilities. Omnibus Budget Reconciliation Act, P.L. 101-508, Sec. 4755(a)(1) (1990); 42 C.F.R. § 440.160(b). Accordingly, states could choose to provide services in any accredited psychiatric facility - which can include some residential treatment centers. *See e.g.* HCFA Program Issuance, Transmittal Notice MCD-35-91, Region IV (March 26, 1991); HCFA, Chicago Regional State Letter No. 65-92 (October 1992) (available from NHeLP).

It is not clear how this potential flexibility will play out. So far, the federal government has not signaled an intent to give states great leeway. For example, Minnesota proposed offering "wraparound" services under EPSDT and the rehabilitation option. HCFA required the state to demonstrate that all elements of the service qualified as Medicaid services. With respect to payment for residential services, HCFA cautioned the state that room and board are not covered except as part of an inpatient hospital or nursing facility services (an apparently narrower definition that the statute) and required the state to provide a more complete description of the setting in which it proposed to provide this care. Letter from Pamela Carson, Health Insurance Specialist, HCFA, to Patricia McTaggert, Health Care Purchasing, Minnesota Dep't of Human Services (Sept. 20, 1995) (available from NHeLP).

States and advocates should not be resigned to serving children only in facilities, however. Other sources of funding, both federal and state, can be explored to fund a room and board component of a home or community-based course of treatment. For example, in the case of foster children, funds might be available from Title IV-E to fund room and board for therapeutic foster care. *See* Bazelon Center for Mental Health, *Mix and Match: Using Federal Programs to Support Interagency Systems of Care for Children with Mental Health Care Needs,* "Using Federal Funds Effectively," (2003) *available at* www.bazelon.org.