

NURSING HOME RESIDENT PROTECTION AMENDMENTS OF
1999

MARCH 8, 1999.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. BLILEY, from the Committee on Commerce,
submitted the following

REPORT

[To accompany H.R. 540]

The Committee on Commerce, to whom was referred the bill (H.R. 540) to amend title XIX of the Social Security Act to prohibit transfers or discharges of residents of nursing facilities as a result of a voluntary withdrawal from participation in the Medicaid Program, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

The purpose of H.R. 540, the Nursing Home Resident Protection Amendments of 1999, is to amend title XIX of the Social Security Act to prohibit transfers or discharges of residents of nursing facili-

ties as a result of a voluntary withdrawal from participation in the Medicaid Program.

H.R. 540 affords protection from discharge or transfer based on Medicaid status to residents of nursing homes which decide to withdraw from the Medicaid program. The residents protected include those who are presently receiving Medicaid benefits in nursing homes, as well as those patients who are already residents but not yet dependent on Medicaid.

For those individuals who take up residence in the nursing home after the effective date of the facility's withdrawal from the Medicaid program, H.R. 540 provides that they must be informed orally and in writing that the nursing home may transfer or discharge the resident once the resident is unable to pay the charges of the facility through non-Medicaid sources.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 540 was introduced to respond to the practice of targeting Medicaid recipients for eviction from nursing homes.

In April 1998, a nursing home operated by Vencor, Inc. in Tampa, Florida, attempted to evict 52 Medicaid residents ostensibly for the purpose of remodeling the nursing home facility. A judge halted the evictions, and the nursing home allowed the residents to remain. A State agency concluded that the evictions were based solely on the fact that these residents relied on Medicaid to pay their nursing home bills. Since that time, Vencor reversed its actions in Tampa and invited back all the discharged patients. In the Vencor case, Medicaid patients were protected by current law and regulations because the Vencor facility continued to participate in the Medicaid program. However, other facilities that have withdrawn from the Medicaid program are free to evict Medicaid patients.

Over time, many residents of nursing homes are expected to exhaust their financial resources and become eligible for Medicaid coverage. According to some estimates, the rate of exhaustion of resources among the elderly for nursing home care is 63 percent over 13 weeks, 87 percent over 52 weeks. Medicaid, a partially Federally funded welfare program administered by the States, is not available to individuals until and unless they have limited assets and monthly incomes. Medicaid may be used to pay for nursing home care provided the nursing home has elected to participate in the Medicaid program.

Providers do not often leave the Medicaid program. The large portion of Medicaid beneficiaries among the overall nursing home population (often over 60 percent of occupancy) and the general financial dependence of many homes on Medicaid revenues makes voluntary withdrawal an uncommon occurrence. When termination of participation does occur, it is usually caused by (1) a termination action by the State or Federal government, (2) a failure of the facility to meet recertification requirements for renewal of the provider agreement, or (3) in rare instances, the inadequacy of the payment structure under Medicaid. It is relatively uncommon for a nursing home to withdraw from the Medicaid program voluntarily, since Medicaid beds provide the majority of the revenue stream for most facilities. The Health Care Financing Administration ("HCFA") es-

estimates that an average of 58 nursing homes voluntarily withdraw from the Medicaid program each year out of approximately 17,000 nursing homes in the United States.

Notwithstanding the relatively few nursing homes that withdraw from the Medicaid program each year, “[N]ursing ‘homes’ become just that,” according to the testimony provided by James L. Martin, President, The 60 Plus Association, at the February 11, 1999, Subcommittee on Health and Environment hearing on H.R. 540, “They are not a hospital room, nor a hotel room, they are ‘home’ to these patients * * *. Attrition, not eviction, should be the rule, so indigent patients do not suffer relocation trauma.”

In an informal survey conducted by HCFA of forty-seven State nursing home ombudsmen, fifteen cited transfer and discharge violations as highly problematic. According to a February 8, 1999, letter to Health and Environment Subcommittee Chairman Michael Bilirakis in support of H.R. 540 from Geme G. Hernandez, Florida Secretary of Elder Affairs, “The evidence is overwhelming that, without extraordinary preparatory efforts that are hardly ever made, any move is harmful for the preponderance of the frail elderly; the technical term is ‘transfer trauma.’”

Current law protects seniors from unreasonable transfer and discharge only if the nursing home remains in the Medicaid program. Section 1919 of the Social Security Act (42 U.S. C. 1396r) sets forth transfer and discharge rules a skilled nursing facility must follow when transfer or discharge is under consideration.

Under section 1919(c)(2), a skilled nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless:

- (i) the transfer or discharge is necessary to meet the resident’s welfare and the resident’s welfare cannot be met in the facility;
- (ii) the transfer or discharge is appropriate because the resident’s health has improved sufficiently so the resident no longer needs the services provided by the facility;
- (iii) the safety of individuals in the facility is endangered;
- (iv) the health of individuals in the facility would otherwise be endangered;
- (v) the resident has failed, after reasonable and appropriate notice, to pay (or to have paid under this title or title XVIII on the resident’s behalf) for a stay at the facility; or
- (vi) the facility ceases to operate.

Nursing homes are required to accept Medicaid payment as payment in full for nursing home residents. Additionally, notice must be given at least 30 days prior to the transfer or discharge of a resident.

H.R. 540 closes the loophole of nursing homes seeking to discharge or transfer patients based solely on their Medicaid-eligible status. According to a February 8, 1999, letter to Health and Environment Subcommittee Chairman Michael Bilirakis from Horace B. Deets, Executive Director of the American Association of Retired Persons (“AARP”), “H.R. 540 establishes clear legal authority to prevent inappropriate discharges, even when a nursing home withdraws from the Medicaid program. AARP believes this is an impor-

tant and necessary step in protecting access to nursing homes for our nation's most vulnerable citizens."

If a nursing facility were to decide to withdraw voluntarily from the Medicaid program, all residents of the facility prior to such a decision would be protected from transfer or discharge based on Medicaid status, regardless of whether they are Medicaid-eligible at the time or become eligible in the future.

According to testimony delivered by Mike Hash, Deputy Administrator, Health Care Financing Administration at the February 11 hearing, "without the legislation that you, Chairman Bilirakis, and Congressman Davis, have introduced, we cannot prevent the evictions of Medicaid patients if nursing homes leave participation in Medicaid. America's nursing home residents need this bill to be enacted into law * * *. I know that our staff has provided technical assistance to your staff and others in the drafting of this legislation. We look forward to working with you to further ensure passage of this bill * * *."

As Nona Bear Wegner, Senior Vice President, The Seniors Coalition, put it in a March 1, 1999, letter to Health and Environment Subcommittee Chairman Michael Bilirakis, "We believe that this is a very fair and balanced piece of legislation which protects consumers while, at the same time, poses no unreasonable burden of compliance upon providers of care. Rather, it is a measure which will actually boost consumer confidence in the nursing home industry by providing patients and families with certain knowledge that care will not be unreasonably interrupted or withdrawn."

HEARINGS

The Subcommittee on Health and Environment held a hearing on H.R. 540, the Nursing Home Resident Protection Amendments of 1999, on February 11, 1999. The Subcommittee received testimony from: the Honorable Jim Davis, U.S. House of Representatives, Eleventh Congressional District, State of Florida; Michael Hash, Deputy Administrator, Health Care Financing Administration; Nelson Mongiovi of Tampa, Florida; Nona Bear Wegner, Senior Vice President, The Seniors Coalition; James L. Martin, President, 60 Plus; Kelley Schild, Administrator, Floridian Nursing and Rehabilitation Center, testifying on behalf of the American Health Care Association; and Robyn Grant, Severns & Bennet, representing the National Coalition for Nursing Home Reform.

Subcommittee Chairman Bilirakis entered into the record letters in support of H.R. 540 from AARP, the National Senior Citizens Law Center, the Florida Department of Elder Affairs, and the American Health Care Association.

COMMITTEE CONSIDERATION

On March 2, 1999, the Subcommittee on Health and Environment met in open markup session and approved H.R. 540 for Full Committee consideration, without amendment, by a voice vote. On March 4, 1999, the Full Committee met in open markup session and ordered H.R. 540 reported favorably to the House, without amendment, by a voice vote, a quorum being present.

ROLLCALL VOTES

Clause 3(b) of rule XIII of the Rules of the House requires the Committee to list the recorded votes on the motion to report legislation and amendments thereto. There were no recorded votes taken in connection with ordering H.R. 540 reported. A motion by Mr. Bliley to order H.R. 540 reported to the House, without amendment, was agreed to by a voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held a legislative hearing and made findings that are reflected in this report.

COMMITTEE ON GOVERNMENT REFORM OVERSIGHT FINDINGS

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Reform.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 540, Nursing Home Resident Protection Amendments of 1999, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 5, 1999.

Hon. TOM BLILEY,
*Chairman, Committee on Commerce,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 540, Nursing Home Resident Protection Amendments of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Jeanne De Sa and Dorothy Rosenbaum.

Sincerely,

BARRY B. ANDERSON
(for Dan L. Crippen, Director).

Enclosure.

H.R. 540—Nursing Home Resident Protection Amendments of 1999

CBO estimates that enactment of H.R. 540 would not affect federal spending. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. H.R. 540 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA) and would not affect the budgets of state, local, or tribal governments. The bill does contain a private-sector mandate on nursing facilities currently participating in the Medicaid program, but the cost of that mandate to the affected facilities would be small.

H.R. 540 would amend Medicaid law to prohibit transfers or discharges of residents of nursing facilities as a result of a facility's voluntary withdrawal from participation in the Medicaid program. The bill would not affect federal Medicaid spending because nursing facility residents would be likely to continue to receive Medicaid benefits if a facility withdraws from the program under both current law and the bill's new requirements.

Current Medicaid law includes a set of requirements regarding residents' transfer and discharge rights for nursing facilities that participate in the Medicaid program and establishes mechanisms that states and the federal government may use to punish violation of those requirements. The bill would add a new requirement that a participating facility agree that in the event that it decides to withdraw from the Medicaid program in the future, it would continue to care for residents who were in its care at the time. In that instance, the facility would be deemed to be participating in the Medicaid program and would continue to receive payments for residents who were in its care at the time of withdrawal until the legal discharge or transfer of those residents. The requirement would apply only to facilities that continue to provide nursing facility services.

CBO estimates that this bill would not affect federal Medicaid spending. Because nursing facilities are highly dependent on Medicaid revenue, it is unlikely that there would be a largescale withdrawal from Medicaid program participation under current law. Furthermore, in many states, withdrawal from the Medicaid program carries risk of civil monetary penalties or other sanction. For instance, some states require Medicaid participation as a condition of licensure. Even in the rare instance where a facility does withdraw from the program under current law, the state or the Health Care Financing Administration would likely find new placement for Medicaid-eligible residents. As national occupancy rates in nursing facilities are about 86 percent, it would be unlikely that a new placement would not be found.

CBO finds that the new requirements of H.R. 540 would be considered a private-sector mandate under UMRA. For facilities now

participating in Medicaid who chose to leave the program, the requirement to continue to care for current residents would be a new duty they could not avoid, even though it was not part of their agreement when they joined the program. Because few nursing facilities leave the program, however, and because those who did choose to leave would continue to receive Medicaid payments, the aggregate cost to affected facilities of this mandate would be small.

The CBO staff contacts for the federal costs of this estimate are Jeanne De Sa and Dorothy Rosenbaum. Bruce Vavrichek is the staff contact for private sector mandate costs. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

SECTION 1. SHORT TITLE

Section 1 provides the short title of the Act, the "Nursing Home Resident Protection Amendments of 1999."

SECTION 2. RESTRICTIONS ON TRANSFERS OR DISCHARGES OF NURSING FACILITY RESIDENTS IN THE CASE OF VOLUNTARY WITHDRAWAL FROM PARTICIPATION UNDER THE MEDICAID PROGRAM

Section 2 provides for restrictions on transfers or discharges of nursing facility residents in the case of voluntary withdrawal from participation under the Medicaid program. In general, this section provides that a nursing home's voluntary withdrawal from the Medicaid program is not an acceptable basis for the transfer or discharge based on Medicaid status of individuals who had taken up residence in the facility on the day before the effective date of withdrawal, including those who were not Medicaid eligible at that

time. In the case of each individual who takes up residence in the nursing home after the effective date of such withdrawal, the nursing home must provide notice both orally and in writing that the nursing home will no longer participate in the Medicaid program. This section further identifies what constitutes notice and acknowledgments of notice. The effective date is the date of enactment of the Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 1919 OF THE SOCIAL SECURITY ACT

REQUIREMENTS FOR NURSING FACILITIES

SEC. 1919. (a) * * *

* * * * *

(c) REQUIREMENTS RELATING TO RESIDENTS' RIGHTS.—

(1) * * *

(2) TRANSFER AND DISCHARGE RIGHTS.—

(A) * * *

* * * * *

(F) CONTINUING RIGHTS IN CASE OF VOLUNTARY WITHDRAWAL FROM PARTICIPATION.—

(i) *IN GENERAL.*—*In the case of a nursing facility that voluntarily withdraws from participation in a State plan under this title but continues to provide services of the type provided by nursing facilities—*

(I) the facility's voluntary withdrawal from participation is not an acceptable basis for the transfer or discharge of residents of the facility who were residing in the facility on the day before the effective date of the withdrawal (including those residents who were not entitled to medical assistance as of such day);

(II) the provisions of this section continue to apply to such residents until the date of their discharge from the facility; and

(III) in the case of each individual who begins residence in the facility after the effective date of such withdrawal, the facility shall provide notice orally and in a prominent manner in writing on a separate page at the time the individual begins residence of the information described in clause (ii) and shall obtain from each such individual at such time an acknowledgment of receipt of such information that is in writing, signed by the individual, and separate from other documents signed by such individual.

Nothing in this subparagraph shall be construed as affecting any requirement of a participation agreement that a nursing facility provide advance notice to the State or the Secretary, or both, of its intention to terminate the agreement.

(ii) INFORMATION FOR NEW RESIDENTS.—The information described in this clause for a resident is the following:

(I) The facility is not participating in the program under this title with respect to that resident.

(II) The facility may transfer or discharge the resident from the facility at such time as the resident is unable to pay the charges of the facility, even though the resident may have become eligible for medical assistance for nursing facility services under this title.

(iii) CONTINUATION OF PAYMENTS AND OVERSIGHT AUTHORITY.—Notwithstanding any other provision of this title, with respect to the residents described in clause (i)(I), a participation agreement of a facility described in clause (i) is deemed to continue in effect under such plan after the effective date of the facility's voluntary withdrawal from participation under the State plan for purposes of—

(I) receiving payments under the State plan for nursing facility services provided to such residents;

(II) maintaining compliance with all applicable requirements of this title; and

(III) continuing to apply the survey, certification, and enforcement authority provided under subsections (g) and (h) (including involuntary termination of a participation agreement deemed continued under this clause).

(iv) NO APPLICATION TO NEW RESIDENTS.—This paragraph (other than subclause (III) of clause (i)) shall not apply to an individual who begins residence in a facility on or after the effective date of the withdrawal from participation under this subparagraph.

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