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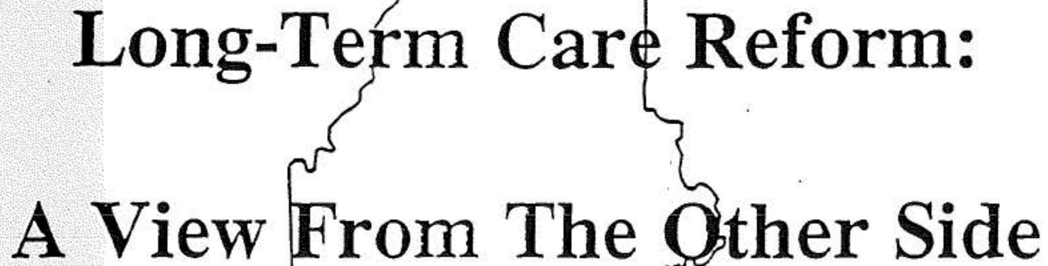

Long-Term Care Reform:

A View From The Other Side

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February, 1995

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Long-Term Care Reform: A View From The Other Side

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EXECUTIVE SUMMARY

The Bureau of Elder and Adult Services (BEAS) of the Department of Human Services has released its January 1995 Status Report on Long-Term Care Reform. That report provides the Department's view of the 1993 reforms and discusses the policy choice it made to implement LD 418.

Impact of the Department's policy choices can be measured in different ways. Their report is one. It reports on dollars saved and numbers of requests for nursing facility level of care received in 1994 (3,500) and numbers denied (385). In a report such as that, those are only numbers. As the attached news clippings make clear, in the real world, those are real people with real life needs, circumstances, and pain. A denial of nursing home services, coupled with the unavailability of appropriate community-based services, should be the measure of failure of this program, not the measure of success.

One of the choices people have in a democratic society is to complain about their government. There was sufficient anecdotal evidence during the last election to know that people all around this State complained to legislative candidates about these reforms. Legislative interest is high in seeking solutions to the problems caused by these reforms. A class action lawsuit hangs over the whole process, threatening its undoing. Federal action is another unknown.

Our report is written then to give voice to an opposing point of view to the Department's report. More importantly, we hope that it spells out the policy mistakes that were made and offers some suggested solutions. We offer it in the spirit of informed debate.

Ronald G. Thurston, Executive Vice President
Maine Health Care Association
February 13, 1995

I. BACKGROUND

Maine's 114th Legislature in 1989 passed into law LD 1410, An Act to Increase the Authority of the Department of Human Services to Assess the Medical and Active Treatment of Individuals Applying for Admission to Nursing Homes, which established as policy that patients making choices about long-term care placement be offered a full-range of services. The policy basis was an informed consumer. The Department of Human Services was to be the informer. The law extended for the first time a right to the Department of Human Services to assess private-pay patients seeking admission to nursing facilities. The assessment was to result in a determination to be made by the Department whether the services provided (or to be provided) were medically necessary, or if home and community-based services would be more appropriate, with notification of the applicant and the facility of the Department's determination.

The Act stipulated that the Department, prior to performing assessments, "shall develop and disseminate to all nursing homes and the public the specific standards the Department will use to determine the medical eligibility of an applicant for admission to the nursing home." Negative incentives were established to prevent private-pay patients from entering nursing homes who might not qualify medically for Medicaid nursing home care after six months. Information and patient choice would provide incentives to effect system changes. The paradigm was consistent with Betty Friedan's teaching in her seminal work on aging, *The Fountain of Age*. She wrote, "The exercise of our unique human capacity for mindful control is key to vital age." LD 1410 was never implemented.

Four years later, faced by budget problems of staggering proportion, the Legislature's Human Resources Committee once again visited the concept of medical eligibility and preadmission screening. Turning to LD 1410 (or PL 1989, c498), the Committee changed the original needs assessment language that stipulated "the Department may assess..." to "the Department or its designee shall assess the medical and social needs of each applicant to a nursing facility who is reasonably expected to become financially eligible for Medicaid benefits within 180 days of admission..." The law added that if the Department used a designee, "it shall ensure the designee does not have a pecuniary (financial) interest in the outcome of the assessment."

The Act as amended further required:

A. The assessment must be completed prior to admission or, if necessary for reasons of the person's health or safety, as soon after admission as possible.

B. The Department shall determine whether the services provided by the facility are medically and socially necessary and appropriate for the applicant and, if not, what other services, such as home and community-based services, would be more clinically appropriate and cost effective.

C. The Department shall inform both the applicant and the administrator of the nursing facility of the Department's determination of the services needed by the applicant and shall provide information and assistance to the applicant in accordance with subsection 1-A.

D. Until such time as the applicant becomes financially eligible to receive Medicaid benefits, the Department's determination is advisory only. If the advisory determination is that the applicant is not medically eligible for Medicaid reimbursement for nursing facility services, the applicant must be advised that the applicant may be required to leave the nursing facility when the applicant no longer has the resources to pay for the services and an appropriate placement has been identified.

E. The Department shall perform a reassessment of the individual's medical needs when the individual becomes financially eligible for Medicaid benefits.

F. Prior to performing assessments under this section, the Department shall develop and disseminate to all nursing facilities and the public the specific standards the Department will use to determine the medical eligibility of an applicant for admission to the nursing facility. A copy of the standards must be provided to each person for whom an assessment is conducted.

G. A determination of medical eligibility under this section is final agency action for purposes of the Maine Administrative Procedure Act, Title 5, Chapter 375.

This then is the legislative basis for the screening process now being implemented.

The legislation then when on to stipulate that information and assistance was also a responsibility of the Department and further required that the Department, after making a determination that nursing facility care was clinically appropriate, had to then make a further determination "whether the applicant also could live appropriately and cost-effectively at home or in some other community-based setting if home-based or community-based services were available..."

If that determination were in the affirmative, the Department, or through private agencies, shall:

A. Advise the applicant that a home or other community-based setting is appropriate;

B. Provide a proposed care plan and inform the applicant regarding the degree to which the services in the care plan are available at home or in some other community-based setting and explain the relative cost to the applicant of choosing community-based care rather than nursing facility care; and

C. Offer a care plan and case management services to the applicant on a sliding scale basis if the applicant chooses a home-based or community-based alternative to nursing facility care.

Who can argue that LD 1410, revisited as LD 418, did not make sense. We did not. The Maine Health Care Association, on behalf of its 200 nursing, residential care, assisted living, congregate housing, and home care members, supported LD 418. Yet, policy makers and providers now find themselves faced with a class action lawsuit, several bills in the Legislature to change medical eligibility, a flood of adverse publicity, and horrific stories of human suffering caused by changes everyone supported. What went wrong? How could good legislation turn into bad policy? What follows is our report on the top ten reasons the policy went wrong.

II. POLICY GOALS

Maine's long-term care policy, if it is to find its way out of this conflict-ridden morass, must rest on the assumption that consumers of services, given choices, will make the right decision. Offering informed consumers choice of a broad-range of services should be our policy direction. More importantly, our system of support should then put ***economic power*** in the consumers' hand to support that choice. It is not only good economic policy, it is good aging policy as well.

It seems to us as well that policy goals need to be articulated clearly, be measurable and be framed within a positive context. Keeping people out of nursing homes as political rhetoric has for too long served as a policy goal. As such, it meets none of our tests of a policy goal.

Having a well-balanced system of housing and services support for people with disabilities, within an affordable environment, would be our suggestion of a policy goal that meets our tests of articulation, measurability, and positiveness.

III. POLICY ISSUES & RECOMMENDATIONS

Maine's long-term care policy debate, too long focused on home care versus nursing home care, polarizes us so that we become blinded to the fact that what we are really talking about is housing and services. Housing includes a variety of living situations from the warmth of the family farm to the family farm as an isolated prison, from the institution as a total institution to one where life and companionship thrives. Housing can be anything we want it to be.

In Maine, as elsewhere in the United States, people with disabilities receive housing assistance, as a matter of policy, ranging from property tax relief to rent subsidy to adult foster care, elderly housing, congregate housing, residential care and nursing facility care.

These are almost as many housing options as there are people, yet our long-term care debate omits many of them.

Similarly there are many service options. Services can be provided in any housing option. Eighty percent of long-term care services are provided by unpaid care givers, usually family members. It is only when we as individuals move beyond the ability of our family and friends to support us that we turn to others for help. It is here where we begin to focus on how we deliver that help, be it housing or services.

In all of the debates between and around housing and services, one constantly confronts two conflicting policy choices. They are the choice of risk versus safety. Housing and services options range along a scale of risk versus safety. At one end is the single-family dwelling, at the other, the nursing facility. Risk is related to the availability of assistance and the skills/ training of the assistance personnel. At the one end, risk is assumed as the availability of caregivers is on a scheduled basis. Contingency plans make up for the absence of available caregivers. At the other end, the presence or availability of skilled/trained staff for unscheduled needs is assured.

There is no doubt that the single-family dwelling is the most preferred housing environment in our society. There is also little doubt that the nursing facility is the least desired, all things being equal. But when age and disability begin to play a significant role in our lives, all things are not equal. We seek, if not for ourselves, our loved ones, the safest environment possible. The nursing facility, with its 24-hour access to licensed nurses, becomes that safe environment. Our *over reliance* on the nursing facility, if in fact we are *over reliant*, is almost solely a result of our emphasis on safety versus risk. As policy changes and we move resources toward the side of least restrictive or less expensive, we move without question toward the side of greater risk. This is not to speak against it, only to put it on the record. Who decides what risk to take is, of course, the key question. Our view is that informed consumers have a right to choose greater risk in order to maintain greater autonomy.

Today's nursing facility is the product of what might be considered extreme emphasis on safety. Regulation driven and inspection dominated, it has become the model of the bureaucratic process. If we are to continue to rely on nursing facilities as we believe we should as the safest environment for the frailest of our elderly, we need to pay attention to them as well. But that is the subject for another report.

The following then are specific policy issues that relate to some of the housing and service policy issues under conflict:

- ***Policy Issue #1 - Assessment Policy:***

  Maine's nursing facility assessment policy is driven by Federal requirements enhanced by its participation in a national <u>case mix</u> payment and quality assurance demonstration

project. Nurses, social workers, and others comprehensively assess each patient's need for services using an instrument called MDS+ and develops plans of care for identified needs. Extensive data is collected and analyzed from those assessments, and used for quality improvement processes. Plans are underway to extend that assessment process to State-funded residential care and home care. That policy decision appears to make sense.

The assessment, when completed, results in a Medicaid payment determination that reflects the mix of resources required to meet that particular patient's needs. There are in all 44 different levels of payment called *classifications*. Each classification carries with it a payment that is equivalent to the number of minutes of services required by patients within that classification. The more minutes of services required, the higher the payment. All patient minutes are then averaged to produce an average payment per day for the facility. Left on its own, the case mix payment system produces powerful payment incentives to move lower acuity or case mix patients to less expensive levels of care.

Medicare, when its part of the case mix demonstration begins, will use the same system to identify and pay for its patients. It will, however, use the assessment in another way. It will use the classifications to determine medical eligibility for services as well.

Designers of assessment policy to determine patient entitlement to the new Medicaid medical eligibility criteria could have utilized the nursing facility assessment form. They could have allowed the case mix classification to result in medical eligibility. They chose instead to develop another instrument, the MED '94. Costs and confusion doubled. New forms then led to new assessors, though the new assessors were given only the authority to complete the form, not to make definitive decisions. Costs and confusion doubled again. Massive training programs were held, and are still being held. The Department's status report says, "more community education might have eased the transition." You cannot educate your way around bad policy.

Policy Recommendation #1:

Utilize one assessment instrument and have that instrument result in a payment level and allow the consumer to determine where he or she will exercise that payment.

- ***Policy Issue #2 - Housing Options:***

Government control of long-term care housing, at least on the nursing facility (NF) and residential care facility (RCF) level, is through certificate of need (CON) for NFs and what I call certificate of control (COC) for residential care. Reconfiguring NF housing into RCF housing requires two steps, first one must develop a response to a request for

proposal for a COC and be awarded it, then one must request a CON and be awarded it. Each process requires substantial sums of money to complete and each must appeal to a different master within the same Department.

Policy Recommendation #2:

Simplify or eliminate the approval process.

- *Policy Issue #3 - Payment:*

Since long-term care is either housing or services, payment policy should follow consumer needs and be controlled by one agency (or the patient). In our system, NF payment policy is made by one agency (Bureau of Medical Services) and RCF payment policy is made by another (Bureau of Elder and Adult Services). NFs' payments are controlled by Principles of Reimbursement period. RCFs are controlled by Principles of Reimbursement plus special circumstance allowances. Special circumstance allowances are granted without benefit of written policy and are time limited.

In attempting to restructure NF and RCF housing, inconsistent, at times contradictory and nebulous, unwritten policy played a major barrier in the transformation of bed supply. When providers are asked to put substantial sums of money at risk over 20 years to build or modify residential care housing, assurance of means to repay debt is fundamental to a workable plan.

Policy Recommendation #3:

In the absence of consumer-driven payment, require payment policy to be made by one agency utilizing written policy.

- *Policy Issue #4 - Licensing:*

Maine's NF and RCF housing is transitioning to single buildings containing both levels of care. Patients and staff should move freely within the same building. Maine's NF and RCF licensing policy treat the two levels as if they were distinct buildings with prohibitions against staff moving from one unit to another. Efficiency and patient care suffer as a result.

Policy Recommendation #4:

License buildings, not levels of care.

- *Policy Issue #5 - Medical Eligibility:*

Changing the medical eligibility criteria before services changed. This was the Department's most serious mistake. The Principles of Total Quality Management require us to use a *plan do-study act* cycle. Essentially, the Department eliminated the *plan* element and went directly to the *do* element.

Total quality management principles require us to treat each other as our customers. The Department left the provider community out of even the *do* element; and when problems were encountered, it adopted the tactic of blaming the providers. It was never the fault of those making the policy, only those attempting to make it work.

Policy Recommendation #5:

Adopt immediately the Principles of Total Quality Management.

- *Policy Issue #6 - Illegal Eligibility Criteria:*

Adoption of medical eligibility criteria that are inconsistent with Federal law and Congressional intent.

The policy basis of Issue #5 is development of the medical eligibility criteria. Legal Services for the Elderly believes the criteria are illegal under Federal law. There is evidence that the Boston Regional Office of the Health Care Financing Administration (HCFA) supports that belief. A lawsuit is filed and pending Court action. The HCFA Central Office in Washington is contemplating its action with regard to findings.

The legal argument centers around P.L. 100-203, Sec. 4111 (OBRA 87). The following language is taken from the Congressional record:

> *In redefining nursing facility, the Committee amendment would not in any way alter the entitlement of current Medicaid beneficiaries or applicants, or future beneficiaries or applicants, to what is now an ICF level of care. Those beneficiaries who now reside in a nursing facility if they continue to meet the current ICF level of care requirement--that is, because of their mental or physical condition they require institutional care and services above the level of room and board. It is sufficient that the individual require care and services that are health-related; a beneficiary need not require skilled nursing care. The same would apply to those individuals who in the future seek Medicaid coverage in a nursing facility, whether before or after admission.*

Policy Recommendation #6:

Convene immediately a group of interested and involved policy makers and resume negotiations to take this issue out of the Court's hands.

- *Policy Issue #7 - Absence of Social Criteria:*

The Legislature wisely inserted the words "and social" following the word "medical" in its assessment requirements. Despite that, the eligibility criteria disallows patients with cognitive impairment whose needs can only be met within a structured environment. These patients are the ones most frequently victims of the denial process.

Policy Recommendation #7:

Amend the criteria at the very least.

- *Policy Issue #8 - One Size Fits All:*

Maine's mix of urban and rural areas assures an uneven availability of almost all health care services. Long-term care is no exception. Ignoring that fact to attempt single-dimensional policy assures that greater pain is inflicted on rural Maine. Distance and time have less dimension in rural Maine and greater dimension in urban Maine; yet housing and services policy is created as if no differences existed. One of the indications for higher nursing home use is rurality, an obvious reference to a lack of alternatives. Other variables include degree of poverty, percentage of population in excess of age 85, and climate.

Policy Recommendation #8:

Develop policy that recognizes different circumstances in housing, services, transportation, and populations in rural versus urban Maine.

- *Policy Issue #9 - RCF and Nursing Care:*

A natural consequence of limiting Medicaid medical eligibility for NF care is to move patients with nursing needs to the residential care level of care. A natural consequence of patients with nursing needs is the employment of nurses. Many of Maine's residential care facilities are moving quickly down that path, being driven by circumstance and Department pressure to medicalize their services.

Medicalization of residential care services has led the Nursing Home Administrators Licensing Board to plan to require licensure of previously unlicensed residential care administrators, at least those now responsible for providing medical care and nursing

supervision. Medicalization of residential care services threatens the private, nonmedical institutional basis of Medicaid reimbursement.

In addition, RCFs are faced with increasing demands to create organized nursing services and thus become subject to strict rules of nursing delegation from the Board of Nursing. We are in danger of losing the residential care model.

Policy Recommendation #9:

Hold a hearing on this issue as soon as possible to make legislative recommendations.

- *Policy Issue #10 - Long-Term Care Policy As Separate and Distinct From Acute Care Policy:*

The triggering event for most long-term care need is a hospital stay which results from the acute flare up of a chronic condition. Further, long-term care and acute care as pieces of an interdependent system for seniors (those over 65) collectively consumes in excess of one billion dollars of Maine taxpayers' and rate payers' money per year. Yet each is seen and treated as if there were no interconnectedness at all. Piece-meal policy making is wasteful and expensive. Most importantly, the absence of holistic policy denies everyone the incentive to work together to make the system work for the customer and take costs out of the system. Provider-specific policy creates provider-dominated systems not customer-dominated systems.

Policy Recommendation #10:

Maine-Net managed care gives us the potential framework to create a consumer-directed choice model of care within an overall integrated system of acute and long-term care. It will be easy, however, to miss the opportunity and instead create another command and control model under a different name. Our recommendation, therefore, is for legislative oversight to assure that Maine-Net be developed within the policy goal of creating a choice model, managed care system. We believe it can be done.

IV. CONCLUSION

Dr. Deming taught us that quality has no meaning except in the eye of the customer. The elections of 1994 taught us that we must develop new paradigms, new visions, new ways. We believe that informed policy debate in a spirit of mutual respect will lead us out of the morass we now find ourselves in to a new high ground of customer quality. We offer this paper in that spirit, no more, no less.

Advocates for the elderly fight evictions

State government, nursing homes caught in Medicaid's attempt to tighten spending

(1)

By Nancy Garland
Of the NEWS Staff

A saga that pits frail, elderly people against nursing homes where they want to remain and a state bureaucracy that no longer wants to pay for their care will be played out later this month in Hancock County.

Hearings are tentatively scheduled at the end of February at Penobscot Nursing Home in the coastal community of Penobscot. A representative from the state Department of Human Services is scheduled to preside at the hearings, called after as many as 12 residents received eviction notices because they no longer qualified for Medicaid.

Medicaid is a federal-state program that, among other things, funds expensive nursing-home care for impoverished elderly people.

New guidelines last year on the "Med 94" form — a form one nursing-home administrator called "Draconian" — severely restrict the types of medical conditions that will be covered. For instance, people with Alzheimer's disease or dementia — a large percentage of nursing-home patients — no longer are covered by Medicaid unless they also have a complicated medical condition.

Since Med 94 was issued, some startling developments have occurred, including courtroom intervention to prevent the Penobscot Nursing Home from ejecting two elderly females last summer.

The state's denial of nursing-home care to needy elderly has presented "a huge, expensive boondoggle" to everyone involved, said Peter Roy, an Ellsworth attorney representing Penobscot Nursing Home.

Roy is attempting to portray the nursing home as a kindly caretaker unwillingly caught up in a race for funds to operate, mostly because of the state's drastic cutback on Medicaid money.

Discharging the patients, "is the last thing Penobscot Nursing Home wants to do," said Roy.

"They (nursing home staff) don't want to compromise the level of care these people are getting."

Other nursing homes are beginning to join the battle against Medicaid rules. Thirteen of the 36 residents of the Charles A. Dean nursing home in Greenville have been issued discharge notices in the past month because they no longer qualify for Medicaid. Hearings have not been scheduled at the Greenville facility — residents

See Elderly, A12, Col. 1

(2)

Medicaid evictions prompt challenge

Group fighting to keep elderly in nursing homes

Elderly, from A1

there still get funded under an emergency hardship clause — but Andrew Finnegan, the nursing home's administrator, expects action.

A number of the residents will run out of funding soon and already have complained about their situations to Legal Services for the Elderly, a state-wide organization serving senior citizens.

"It's a quandary more people should know about," said Finnegan, referring to the dilemma of patients needing care, a nursing home needing money to operate and a state needing to review the rules of Medicaid funding for long-term care.

Jeri Jones, managing attorney for the Brewer office of Legal Services for the Elderly, said the state is rapidly approaching a crisis for people threatened with discharge from nursing homes.

Legal Services for the Elderly brought a class-action lawsuit addressing the issue in December in federal court in Bangor. Magistrate Judge Eugene Beaulieu has not issued a decision in the case, which sought an injunction to prevent the state from using Med 94 to qualify people for Medicaid nursing-home funding.

Legal Services for the Elderly also defended Elizabeth Plant, 90, and Nettie Douglass, 93, who were threatened with eviction last summer from Penobscot Nursing Home. The women remain at the facility under court order.

(3)

Jones said 12 people recently received eviction notices from Penobscot Nursing Home, but she plans to represent only five or six of them at the hearings. The others either have left the facility, have been reevaluated and allowed to stay after their conditions worsened, or have extenuating situations that make them ineligible for representation by Jones' office, she said.

Asked how many residents received eviction notices, Roy said, "I know it was more than 10."

Roy said the situation may worsen, despite the fact that the Legislature has "three or four bills to address the problem," Roy said.

Kevin Concannon, Gov. Angus S. King's choice for human services commissioner, "prides himself on cutting expenses," Roy said.

Concannon, who just gave up an eight-year job in the Oregon Human Resources Department to return to Maine, his home state, said he has obtained Medicaid waivers in the past to fund small foster homes for elderly people. "We have had very impaired people in the home settings" in Oregon, Concannon said in a telephone interview.

Concannon said people in the smaller facilities "have more personal freedom and are less likely to get somebody else's medication. It's less than half the rate of institutional care," Concannon said.

"Everyone wants expenses cut except when it comes to their families," Roy said. "Maybe we should wheel these people down to an Augusta hearing room and let the people there decide their eligibility for nursing-home care."

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Bangor Daily News

SECTION 3
SATURDAY/SUNDAY, NOVEMBER 5-6, 1994

Disabled man testifies in favor of Med 94

By Nancy Garland
Of the NEWS Staff

Steven Tremblay, 44, broke his neck 24 years ago in a fall that left him paralyzed and dependent on a wheelchair for the rest of his life. His disability forged a determination to lead an independent lifestyle and to advocate independence for others with disabling conditions.

He testified with passion Friday in Bangor's U.S. District Court about the need for the state to move forward with its 9-month-old effort to maximize independence for elderly people who once were funneled into nursing homes and, perhaps, forgotten.

Tremblay's testimony came on the second day of hearings in a class-action lawsuit filed by Legal Services for the Elderly Inc. against the state and the Department of Human Services. The lawsuit, in part, is attempting to ban DHS from using the "Med 94," a restrictive form that disqualifies a lot of elderly applicants for nursing home care under Medicaid. The form was put into effect last January and rules out most psychosocial conditions, like dementia and Alzheimer's disease, and many physical conditions that once qualified a person for nursing home funding.

Med 94 has prompted much acrimony and statewide debate since its inception. Nursing homes, in general, don't like it because it is causing empty beds in the facilities. Some boarding homes — now called residential care facilities — are panicked by its implications because more expectations are being placed on them to take care of very feeble patients once delegated to nursing homes. Economically pressed families are failing into a chasm between the warring factions and are wondering if long-term care still exists for ailing elderly relatives.

Tremblay is the founder, president and chief executive officer of Alpha One, a 14-year-old organization that enhances independence for about 5,000 disabled people in Maine yearly.

He acknowledged Friday that Med 94 initially caused problems in Alpha One. His organization had to disqualify 25 people who received personal-attendant care funded through Medicaid. However, Tremblay stressed that a reasoned approach to the problem was better than abandoning the form.

It would be a "tragedy" for the lawsuit to succeed, said Tremblay, who drove his handicapped-accessible van from his Cape Elizabeth home to Bangor Friday to voice his opinions on the matter.

"It would set the needs of our disabled citizenry in Maine back God knows how many years," to reverse efforts and to increase reliance on nursing home care again, he said.

Tremblay referred to the legal

See Tremblay, B2, Col. 1

In second day of hearing, man testifies in support of Med 94

Plan to maximize independence of elderly, disabled target of suit

Tremblay, from B1

action as a "bellwether" lawsuit that prompts headlines that gain the attention of politicians and some policy-makers.

"This lawsuit sends a message to the public, to the Legislature and to the governor that this fundamental shift in long-term care policy is wrong when we know that home-based and community services are right. Elderly people and people with disabilities know that home-based care and community-based care is the direction we must move in. We must give people the independence they want," Tremblay wrote in an affadavit.

Tremblay's testimony highlighted the second day of a hearing that is raising fundamental questions about society's view of aging and the changing attitude of an economically strapped state toward long-term care.

The defendants — specifically Steven Davis, an assistant attorney general for the state — took over at midmorning following 1½ days of testimony by witnesses against the MED 94. Davis kicked off his presentation by asking Judge Eugene Beaulieu for a "quasi-directed verdict" motion. The move would, in essence, cease further action on the matter. Legal Services for the Elderly attorneys Jeri Jones and Andrew Stewart had failed to prove irreparable harm to their clients if Med 94 is used, according to Davis. Judge Beaulieu said he would take the matter under advisement and told Davis to call his witnesses.

Francis Finnegan, director of the state's Bureau of Medical Services, said the state would suffer severe financial shortfalls if it were ordered to cease using the Med 94 form in favor of an older, more inclusive evaluation form for Medicaid called the "BMS-85." The Legislature, last year, deallocated more than $17 million from the Medicaid nursing home account.

"I anticipate the department would suffer a loss of 87 percent of the $17,158,527 savings anticipated by the Legislature," Finnegan wrote in an affadavit. Questioned later by Jones, Finnegan amended his statement a bit and said the state stands to lose $5.2 million.

Finnegan read a July 1994 letter from the national Health Care Finance Administration demanding immediate explanation and justification of Med 94. Department policies come under HCFA review "quite regularly," Finnegan said.

Molly Baldwin, a registered nurse and state officer familiar with MED 94, reviewed, under Davis' direction, the cases of the 14 elderly people named in the class-action lawsuit. She said each person had conditions that could be taken care of in the home or in residential care facilities.

Other Human Services leaders testified at the hearing. Brenda Gallant, owner of three residential care facilities, said her organization reserves the right to deny admission to people with severe dementia and incontinence problems. Gallant said she was under the impression that providing a high level of medical care was optional at boarding homes, not ordered by the state.

The hearing will be continued at a later date which had not been determined by press time.

BDN NOV 4, 1994

Nursing home care is focus of hearing

Elderly, poor calling for ban on Med 94

By Nancy Garland
Of the NEWS Staff

Fundamental questions about society's view of aging and the changing attitude of an economically strapped state toward long-term care were posed Thursday during a court hearing in Bangor.

The questions were raised as part of a class-action lawsuit pitting many elderly and poor people in Maine against the bureaucracy that oversees Medicaid funding of long-term care.

Does the state — specifically the Department of Human Services — have the legal right to deny nursing home care under Medicaid to frail elderly people who easily could have qualified for it a year ago?

No, according to Jerry Jones, Brewer attorney for Legal Services for the Elderly Inc., a statewide organization that filed the lawsuit in August.

"The evidence will clearly show that the long-term care system in Maine is in total disrepair and that a significant portion of Maine's elderly are being jeopardized," Jones said in opening remarks.

"The defendant places a lot of emphasis on the 'least restrictive' nature of alternative care settings.

See Hearing, A3, Col. 1

Nursing home care is focus of hearing at Bangor

Hearing, from A1

Those settings are also often the least supportive and the least expensive. On behalf of patients who need the care available in a nursing home, we urge the court to grant this injunction before someone gets seriously hurt," Jones said.

Is the Department of Human Services justified in continuing its 9-month-old policy of reducing reliance on nursing homes and increasing placement of Medicaid clients in less-restrictive settings?

Yes, according to Steven R. Davis, an assistant attorney general for the state, who will present DHS' official point of view in a hearing that is expected to take several days.

"The plaintiffs in their myopic efforts to force the department to provide them care in a nursing facility have ignored the damage that may be done to both themselves and others whose mental, social and physical needs will be better served in a least restrictive setting," Davis wrote in a legal document. Davis also wrote that the state would suffer severe financial shortfalls if forced to return to previous methods to determine eligibility for a nursing home level of care .

The official focus of the hearing before Magistrate Judge Eugene Beaulieu is a legal request to ban the state from continued use of "Med 94."

Med 94 came into existence last January. It is an evaluation form used to determine an applicant's physical and medical eligibility for Medicaid-funded nursing home-level care. Med 94 has been praised by some advocates for the disabled, including Alpha One, an organization that promotes independence for disabled people. The document also has been called restrictive and "draconian" by at least one nursing home owner.

The Med 94 form restricts physical and psychosocial reasons for allowing people into nursing homes under Medicaid. It has produced many empty beds in Maine nursing homes.

For example, an elderly person who is alone, poor, diabetic, blind and has a seizure disorder controlled with medication currently cannot qualify for Medicaid funding for nursing home care. A person who has advanced Alzheimer's disease but is healthy otherwise cannot qualify for Medicaid-funded nursing home care under Med 94 guidelines.

Ann Gunning, long-term-care director for the Eastern Area Agency on Aging, said she knew of Medicaid applicants who needed help with several "ADLs" — activities of daily living such as bathing, turning over in bed, and going to the bathroom. In addition, some of these people are on oxygen daily or have tracheotomies. Still, they do not qualify for nursing home care under the Med 94 evaluation.

More gripping than the legal arguments surrounding Med 94 are the stories of 14 elderly people mentioned in the lawsuit who are caught in a funding mire that threatens their long-term care options.

• Nettie Douglass, 93, from Little Deer Isle, resides at Penobscot Nursing Home in the coastal community of Penobscot. Douglass has several medical conditions, including blindness, leg ulcers and congestive heart failure, that the state claims can be tended in a residential care facility — a boarding home — rather than a nursing home. Douglass was threatened with eviction from the nursing home last summer after her savings ran out and Medicaid refused to pay for her continued care there. She remains at the nursing home under a court order. A boarding home placement in the Somerset County town of Athens was offered to her, but no action was taken, according to legal documents. Dr. Daniel Rissi of Stonington, who was Douglass' physician for 14 years, testified Thursday that Douglass "definitely" needed nursing home care.

• Rose Shink, 89, a patient at Parkview Nursing Facility in Livermore Falls, threatened suicide last winter after hearing she might be moved from the nursing home. Shink was a private-pay patient who later was denied Medicaid coverage. The state maintains Shink's medical conditions do not warrant nursing home care. "While she awaits transfer to an appropriate residential care setting, counseling regarding her suicidal tendencies is appropriate," Davis wrote in a legal memo.

• Elbert Tyler of Hancock County has a combination of medical disorders that makes him a human "time bomb," according to Dr. Charles Alexander, an Ellsworth gerontologist who testified at Thursday's hearing. Tyler is fairly good at activities of daily living. This means he can turn over in bed, and bathe and feed himself. Under cross-examination from Davis, Alexander said he was not Tyler's physician and he had not seen Tyler's medical records. A cursory review of Tyler's history shows his chronic lung conditions could flare up dramatically and suddenly, putting him in instant need of skilled, extended nursing care, Alexander said.

Lawsuit points out dilemma facing elderly

Action against state questions Medicaid-funded care policies

By Nancy Garland
Of the NEWS Staff

BDN 8/30

A class-action lawsuit has been filed against the state on behalf of elderly people no longer able to qualify for Medicaid-funded nursing home care. The suit highlights a dilemma that pits some of Maine's elderly and poor people against the state bureaucracy that oversees funding for long-term care.

In dramatic language, the suit details 14 cases, like that of Rose Dickson, 90, who put a gun into her mouth and pulled the trigger Aug. 15 at her Columbia Falls home. A month earlier, despite numerous ailments, Dickson was denied Medicaid funding for nursing home care.

Dickson failed to kill herself because the gun was loaded with a blank cartridge, a fact she did not realize. The elderly woman remains at Eastern Maine Medical Center in Bangor with damage to her mouth.

Rose Shink, 89, is a patient at the Parkview Nursing Facility in Livermore Falls. Denied Medicaid coverage in February, Shink has threatened suicide if she is moved from the facility.

The women are members of a group represented in the suit, which was filed Monday in Federal District Court in Bangor. Some say it may gain national attention. The civil suit was filed by Legal Services for the Elderly Inc. and names as defendant Jane Sheehan, commissioner of the Department of Human Services.

The lawsuit seeks court intervention to prevent DHS from further evaluating people for Medicaid nursing-home care and home care using a process adopted Jan. 1. It seeks to outlaw the controversial "Med 94," an evaluation form that at least one nursing home owner has called "Draconian."

Until this year, Medicaid served as a type of insurance policy for many impoverished elderly people in Maine, guaranteeing most with physical ailments funding for nursing-home care which averages $85 to $150 a day. Suddenly, many people already in nursing homes or about to enter them cannot qualify medically for Medicaid.

Jane Sheehan, commissioner of the Maine Department of Human Services

"We estimate there are hundreds of people in this class," said Andrew Stewart, statewide manager for Legal Services for the Elderly Inc.

"This is probably the most important lawsuit we've filed at Legal Services for the Elderly. It affects so many people in such a dramatic way," Stewart said.

Cases outlined in the lawsuit, include those of Elizabeth Plant, 90, and Nettie Douglass, 93, residents at Penobscot Nursing Home in Hancock County. The women gained statewide publicity when they couldn't qualify for Medicaid and were threatened with eviction last spring. The nursing home is under a court order to keep the women. The facility has appealed the matter to the Maine Supreme Judicial Court.

Dickson's case is one of the most dramatic in the suit. "On Monday, Aug. 15, with her son in the living room of her Columbia Falls home and her daughter and granddaughter in the living room, Mrs. Dickson went up to her bedroom and attempted suicide by firing a gun into her mouth. She failed because

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Lawsuit, from A1

the bullet was blank," the legal document states.

Dickson has had several strokes and had a heart attack last winter. She suffers from right-side weakness, "extreme anxiety" and an "unsteady gait which makes her prone to falls and fractures," the lawsuit states. She uses a walker. Around July 10 Dickson applied for nursing home care under Medicaid and was denied.

Three days before the suicide attempt, Dickson had her cat put to sleep. "Mrs. Dickson's reaction to her predicament, her unmet need for nursing care, clearly shows the importance of resolving the problems of medical eligibility in the Medicaid program," the lawsuit states.

Other cases include:

• Helen Freeman, 78, who has been a patient for a month at the Hibbard Nursing Home, Dover-Foxcroft. This month Freeman was deemed ineligible for Medicaid. She has a mild seizure disorder and advanced Alzheimer's disease "and is deteriorating rapidly," the lawsuit states. She does not remember any names and "wanders and doesn't know where she is going."

• Hazel Gross, 99, who lives in Bucksport with her elderly son and daughter-in-law. He is disabled with respiratory problems and her daughter-in-law had knee replacement surgery. Gross is legally blind and almost deaf but was denied Medicaid home-care services in July by an assessor. She has not received a denial letter from DHS, however. Gross is "prone to falls due to osteoporosis and an unsteady gait. She needs assistance with transfers and locomotion," the lawsuit states. She is incontinent, suffers impaired cognition, needs help with activities like dressing, bathing, toileting and hygiene.

• Everett Nason, 92, of Brunswick, paid privately for his nursing-home care for several years until his savings ran out. DHS issued conflicting decisions on Nason, who has a catheter, but finally declared him ineligible for Medicaid in April.

The lawsuit represents all past, current and future Medicaid recipients and applicants denied coverage for nursing-home or home care.

An estimated 10 percent of people in the state's 135 nursing homes and 50 percent of the 726 people receiving Medicaid home-care services will fail to meet the new medical eligibility guidelines, according to statistics in the document.

The restrictions and the Med 94 screening form violate federal law, state law, provisions of the Social Security Act and the Constitution of the United States, according to the lawsuit which was filed by Jeri Jones, managing attorney for the Brewer office of Legal Services for the Elderly Inc.

"I believe this action is of national significance," said attorney Tim Vogel of Portland, head of the elder law section of the Maine State Bar Association.

"The long-term care system in Maine is broken," said Vogel. "This is rationing health care by a system formed by certain officials in the Maine Department of Human Services."

Libby McCullum, deputy DHS commissioner, said Monday she was surprised Legal Services for the Elderly had filed the lawsuit.

The department had offered to negotiate with LSE attorneys two weeks ago, according to McCullum. She said it was difficult to comment on a lawsuit when she hadn't seen the document.

"The commissioner is sympathetic to problems created when nursing homes discharge the frail elderly with no place to go," McCullum said.

The attorney general's office has reviewed the language of the Medicaid plan to assure its legality, according to McCullum.

"We're comfortable defending it. The lawsuit won't prevail," said Christopher Leighton, director of the health and institutional services unit of the attorney general's office. The Medicaid changes were reviewed at state and federal levels to assure legality, according to Leighton. The rules "may seem unpalatable to some but they are legal," Leighton said.

DHS officials last week tried to quell complaints about Medicaid's new nursing-home and home-care guidelines. They offered to pay nursing homes to keep patients who no longer qualify for Medicaid until appropriate placements are found. Many nursing homes are not pleased with the plan because it offers $53 a day, only half the the cost of daily care in many facilities.

NEW ENGLAND

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MAINE

Nursing home patients face eviction under new Medicaid rules

By Denise Goodman
SPECIAL TO THE GLOBE

PENOBSCOT, Maine – Nettie Douglass, 93, suffering from coronary artery disease and osteoarthritis and 98 percent blind, entered the Penobscot Nursing Home last September.

She spent her last $30,000 there, expecting Medicaid to pick up the cost of her care when her money ran out. Instead, when she applied for Medicaid in May, she got an eviction notice.

The same thing happened to Elizabeth Plant, 90, who entered the nursing home here in March, partially blind, incontinent and suffering from dizziness, mini-strokes and dementia. She applied for Medicaid two months later.

Their cases represent just a hint of an impending storm over new state criteria for Medicaid nursing home reimbursement aimed at directing more patients to less costly care alternatives, nursing home officials and attorneys for the elderly say.

State officials say both women were deemed too healthy for nursing home care and should either live with their families and receive home health care or move to boarding homes.

Relatives say they have their own health problems, can't care for the women and can't they find boarding homes which will admit them. So they went to court.

Late Thursday and Friday, Justice Nancy Mills issued preliminary injunctions prohibiting the nursing home from discharging Douglass and Plant until it can make a safe and orderly transition for them to boarding homes.

"By definition, 'transition' means from here to there, but there's no 'there.' I don't think anyone has had to deal with these issues before," said Peter Roy, the Ellsworth attorney representing the nursing home who said he will now try to make the state a party to the litigation because state regulations are at the heart of the problem.

"We made a fundamental change in how we provide services to people without first making sure the services were available," agreed Ronald Thurston, executive director of the Maine Health Care Association, which represents many nursing homes.

In the meantime, Roy said, the Penobscot Nursing Home must absorb the cost of care for both women, a figure that already tops $10,000 and is mounting at the rate of nearly $200 a day.

While initial cases affect previous private-pay nursing home residents who apply for Medicaid after Jan. 1, the same medical criteria will affect residents whose nursing home care has been paid for by Medicaid.

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Elderly facing eviction under Medicaid rules

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Ten residents of the Island Nursing Home in nearby Deer Isle, already on Medicaid, no longer qualify and nursing home staff must seek alternative placement for them. But, administrator Lori Roll said, "We have no boarding care beds that are medicaid certified in Hancock County."

Critics say the elderly have become victims of a quick- fix state budget-cutting effort. But James Gorman, deputy director of the Bureau of Medical Services in the state Human Services Department, said that, compared to other states, Maine's nursing home policies were "too restrictive and too expensive." And, he added, there are success stories, such as a 91-year-old woman who improved so much after moving to a boarding home that "she's now doing volunteer work back at the nursing home."

But Roll countered that "common sense would tell you people don't generally go to nursing homes because they want to.

"You don't fix a problem like this overnight ... It's completely unfair because you're dealing with people at the most vulnerable, fragile time of their lives and that is a tragedy. We have residents reading these things in the paper and they're scared to death," she said.

Residents' families are so alarmed, Roll said, that she has scheduled a meeting with them tomorrow to discuss the impact of the new state regulations.

Most troubling, Roll and other nursing home officials say, is that the new rules don't consider dementia – affecting many residents – a condition requiring nursing home care, but few boarding homes are staffed to adequately care for such patients.

"If we had five patients that had to be discharged, there would be no place for them to go," said Jane Hibbard-Merrill, a Dover-Foxcroft nursing home owner. "Boarding homes are not staffed to handle the type of patients they're asking them to take," she said.

Current nursing home residents may represent just the tip of the iceberg, officials say, because there is no estimate of how the regulations are affecting those seeking admission.

Nursing home officials also complain that state rules keep changing. "It's like attacking Jell-O on a wall," said Wendell Dennison, Penobscot Nursing Home administrator.

Written regulations require alternative housing to be within a 50 to 60-mile radius of the nursing home, but Roll said she was later told there was no distance restriction.

Parker Carter, Plant's son-in-law, acknowledged that the state had found boarding homes that would take her, but they are 80 to 100 miles from Bucksport where he and his wife live.

Nursing and boarding home officials say a such move can be so traumatic that the elderly person quickly worsens and has to return to a nursing home. "If there is one thing that is common among [nursing home residents], it is a tremendous sense of anxiety [which is] as serious as a medical problem," Roll said.

Many agree with state Sen. John Baldacci, a Bangor Democrat running for Congress, who said that while the new approach is "good in theory ... we need to slow the process down until we can assess the impact."

Gorman acknowledged last week that some "refinement" may be needed, including more flexible interpretation of the medical criteria for Medicaid nursing home care. "There may be areas which were thought to be black and white which are not ..."