

What's HCBS Got To Do With It?

The Role of HCBS in Major Policy Debates

December 8, 2020





The “Curb Cut Effect”



Today's Panel

Mike Oxford

National Organizer

ADAPT

Michelle Martin

Executive Director, LTSS and Complex Care

America's Health Insurance Plans

Sarah Triano

Senior Director, Complex Care Policy & Innovation

Centene Corporation

Mary Kaschak

Executive Director

National MLTSS Health Plan Association

Agenda

What's HCBS Got To Do With....

- 1. The Affordable Care Act*
- 2. State Medicaid Budgets*
- 3. The COVID Maintenance of Effort Debate*
- 4. Biden's "Big Ones"*



Photo of Mike Oxford laying on Mitch McConnell's floor during the ADAPT "Die-In" featured in a June 23, 2017 article in *Rolling Stone* magazine: "Why Disability Rights Activists Stormed Mitch McConnell's Office."

What's HCBS Got To Do With It?

The Fight to Preserve the Affordable Care Act



SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division
Notice to Appear in Court or Post and Forfeit
1st, 3rd and 4th District Arrests by Any Law Enforcement Agency Within These Districts

SUBJECT INFORMATION

Arrest No. 521739995	CCN 17164664	PDID 649302
Arresting Officer/Officer/Badge/Unit/Cad. No. OFFICER SMITH, Terri #6868 SD-3	Offense PSA 103	
Name of Arrested Person: Last, First, Middle OXFORD, MICHAEL, L		
You Have Been Arrested for the following offense(s) Please List All Arrest Charges] DISRUPTION OF CONGRESS		

Release and Return to Court Information

<input checked="" type="checkbox"/> CITATION RELEASE ONLY <small>Officers: Please mark the appropriate Courtroom location and select a date by using the date chart on the Court's website.</small> You are being released on your promise to appear at the Superior Court of the District of Columbia, 500 Indiana Ave., NW, Washington, D.C. on the DATE and TIME below:	<input type="checkbox"/> COURT ORDERED BOND RELEASE <small>Officers: Please complete if the arrested person posts bond on a warrant issued by the Superior Court of the District of Columbia.</small> You were arrested on a bench warrant issued by a D.C. Superior Court Judge. You failed to appear in a criminal case. You must report to Court on the DATE and TIME below:
ONLY OAG Charge(s)	Appearance times are based on the date and time of arrest. at 9:30 a.m. \$

What's HCBS Got To Do With It? Liberty and Justice by the Numbers:

1990 - 10% HCBS / 90% Institution 500,000 on HCBS (Medicaid.gov)

2000 - 26% HCBS / 74% Institution 2.2 million on HCBS (Pam Doty,
ASPE/HHS)

2010 - 45% HCBS / 55% Institution 3.2 million on HCBS (SCAN
Foundation)

2013 - 51% HCBS / 49 % Institution. 3.0 million on HCBS (SCAN
Foundation)

2018 - 57% HCBS / 43% Institution 4.0 million on HCBS (Kaiser
Family Foundation)

Who is AHIP?

America's Health Insurance Plans (AHIP) is the national association whose members provide coverage and health-related services that **improve and protect the health and financial security of consumers, families, businesses, communities and the nation.**

Affordable Care Act and the Supreme Court

California v. Texas

- *California v. Texas* is the second case challenging the constitutionality of the Affordable Care Act's individual mandate. The first challenge was the 2012 case, *National Federation of Independent Business (NFIB) v. Sebelius* which upheld the "individual mandate."
- In December, 2017 Congress passed the Tax Cuts and Jobs Act which "zeroed out" the tax penalty for failing to buy health insurance from \$695 to \$0, effectively eliminating the individual mandate.
- 18 states with Republican attorneys general or governors, led by Texas, filed a lawsuit in federal district court in February 2018 and believe the individual mandate (now without a financial penalty) is unconstitutional and must be thrown out.
 - The Federal Government normally defends the law, but here the Government sides with the challengers.
- Texas and other states also believe the ACA has to be thrown out entirely if the individual mandate is removed.
- California and a group of other states and the House of Representatives have defended the law.

Affordable Care Act and the Supreme Court

California v. Texas

- District court: individual mandate is unconstitutional, mandate cannot be separated from the full ACA and the entire law must be struck down.
- US Court of Appeals: agree that individual mandate is unconstitutional but instructed the district court to go back and examine each provision of the ACA to determine what is or isn't severable from the mandate.
- California and the House of Representatives sought SCOTUS review.
- Supreme Court of the United States heard arguments on November 11, 2020, on three legal questions:
 - **Standing**: whether the challengers have been injured.
 - **Constitutionality of the mandate**: whether the zeroed-out mandate is constitutional.
 - **Severability**: whether the mandate can be separated from the rest of the ACA, or whether some or all of the ACA must also be invalidated along with the mandate.
- [AHIP](#) filed an [amicus brief](#) in support of the Affordable Care Act
- Experts indicate confidence (but never say never) that the worst case SCOTUS scenario of the ACA being invalidated is **not** on the horizon.
- Ruling expected from SCOTUS in June 2021.

What's HCBS Got to Do with State Medicaid Budgets?

3 Main Ways to Address State Medicaid Budget Deficits:

1. Eligibility
2. Benefits
3. Rates

Other Paths:

- Carve-ins and carve-outs
- Generate additional federal match/
revenue streams

MOE and HCBS / LTSS

Mary Kaschak, Executive Director
National MLTSS Health Plan Association

National
MLTSS
Health Plan Association

COVID-19 Medicaid Maintenance of Effort Requirements

Section 6008(b) of the Families First Coronavirus Recovery Act (FFCRA) set the MOE requirements (March 18, 2020):

- 6008(b)(1) – states could not create more restrictive eligibility standards, methodologies, or procedures than those in place prior to the PHE
- **6008(b)(3)** – “the State fails to provide that an individual who is enrolled for benefits under such plan (or waiver) as of the date of enactment of this section or enrolls for benefits under such plan (or waiver) during the period beginning on such date of enactment and ending the last day of the month in which the emergency period described in subsection (a) ends shall be treated as eligible for such benefits through the end of the month in which such emergency period ends unless the individual requests a voluntary termination of eligibility or the individual ceases to be a resident of the State”

CMS Initially Interprets Section 6008(b) MOE Reqs in FAQs

- “States may not impose eligibility standards, methodologies, or procedures that are more restrictive than those that were in place on January 1, 2020, in order to receive increased FMAP during the emergency period”
- States must provide continuous coverage through PHE regardless of “any changes in circumstances of redeterminations at scheduled renewals that otherwise would result in termination”
- States could increase the level of assistance provided to a beneficiary who experiences a change in circumstances, such as moving the individual to another eligibility group which provides additional benefits, but states could not reduce benefits for any enrollees

States Became Frustrated with MOE Requirements

- Examples:
 - Could not shift HCBS/LTSS beneficiaries despite changes in beneficiary level-of-care circumstances
 - Locked in EPSDT beneficiaries even if aging out (above 21)
 - Potential creation of significant redetermination backlogs post COVID-19
 - Could not properly shift newly-eligible dual beneficiaries off full-benefit Medicaid services

CMS Issues New MOE Interpretation

- Under new interpretation states can shift beneficiaries so long as shift occurs to an equivalent or better category
- Created **three categories of coverage** to help guide states in shifting of beneficiaries:
 - **Tier I** – “Minimum Essential Coverage” (MEC - as defined at 26 CFR 1.5000A-2)
 - **Tier II** – Non-MEC but provides coverage for COVID-19 treatment and services
 - **Tier III** – Non-MEC and doesn’t provide coverage for COVID-19 treatment and services

Implications for HCBS / LTSS

- Specific programmatic implications
 - States now have increased freedom to shift folks between HCBS/LTSS service categories
 - States can transition beneficiaries into partial dually-eligible programs that decrease net access to Medicaid services
- Broader political implications
 - MOE requirements previously part of discussions of increasing FMAP even further
 - Republican lawmakers were open to increasing FMAP further, but in exchange for adjustments to MOE
 - CMS' changes to MOE interpretation adjusts the calculus of these negotiations

What's HCBS Got To Do With “Biden’s Big Ones”?

1. *Racial Equity*
2. *Climate Change*
3. *COVID*
4. *The Economy*

How do we make HCBS the first thought, rather than the last, in Biden’s Big Ones?

Thank You!



National
MLTSS
Health Plan Association

CENTENE[®]
Corporation

Mike Oxford, National Organizer, *ADAPT*
mikeoxford@rocketmail.com

Michelle Martin, Executive Director, LTSS and Complex Care, *America's Health Insurance Plans*
mmartin@ahip.org

Mary Kaschak, Executive Director, *National MLTSS Health Plan Association*
mkaschak@mltss.org

Sarah Triano, Senior Director, Complex Care Policy & Innovation, *Centene Corporation*
Sarah.Triano@centene.com