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FIGHTING SENIOR POVERTY THROUGH LAW

What's Wrong with Long-Term Care Facilities?

And What Can You and I (and Residents) Do About It?

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Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we’ve focused our efforts primarily on fighting for people who have been marginalized and excluded from justice, such as women, people of color, LGBTQ+ individuals, and people with limited English proficiency.

Outline

1. Nursing Facilities
   a) Federal Law
   b) Falsehoods and Fact
2. Assisted Living
   a) State Law
   b) Federal Law (Is that a thing in assisted living?)
   c) Initial steps towards using federal law.
3. Why is progress so slow?
   a) Vulnerable consumer population.
   b) Nursing facility culture and power dynamics.
   c) Assisted living as neither fish nor fowl.
4. What’s missing? Need to hear from residents/families/representatives.
   a) In facilities.
   b) In public policy.

Nursing Facilities

Nursing Facilities and State Law

- In general, state licensure standards have changed little in recent decades, because federal law has dominated.

Federal Nursing Facility Law

- Effective since October 1990.
- Applies to any nursing facility that accepts Medicare and/or Medicaid (and almost all do).
- Federal government implements law through regulations and administrative guidance.

Federal Enforcement Processes

- Facilities generally inspected by state surveyors implementing federal law.
- Inspections annually, on average.
  - Note recent Justice in Aging lawsuit against Maryland for tardy, insufficient surveying.
- Violations require plan of correction in response.
  - Sometimes fines or other sanctions are assessed.

My Earliest Experience

- 1991(!!!): Woman reports that she was told that her husband must leave within 24 hours because Medicare has ended and he is in "Medicare bed."

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My Lessons Learned

- Many facilities operate under standard operating procedures that conflict with law.
- “Everybody” knows about these procedures but often seem to be unfamiliar with legal requirements.

Difficult for Residents and Others to Push Back

- Often they will give up, feeling unsure about what is right and wrong.
- To respond, important to call out false statements and put them up against relevant law.
  - E.g., Ten Lies Told By Nursing Facilities
  - Fifteen Nursing Facility Falsehoods
  - Twenty Nursing Facility Myths

25 Common Problems, and how to Resolve Them

- Common problems are often based on facility misstatements.
- Residents need the confidence to push back when they hear false statements.

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"Medicare Beds": Falsehood and Truth

- "Medicare payment has ended, so you must leave your 'Medicare bed.'"

- "Medicare beds" are not limited to Medicare-reimbursed residents.

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Limits on Transfers within Facility

- Medicare certification of bed does not prohibit resident from using other type of reimbursement.
- Also, resident can refuse intra-facility transfer if purpose is to move resident out of Medicare-certified room.
  - 42 C.F.R. § 483.10(e)(6), (7).

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Shortchanging Medicaid-Eligible Residents: Falsehood and Truth

- "Medicaid does not pay for individual attention during meals."

- Medicaid-eligible residents must receive equivalent care.

No Discrimination Based on Payment Source

- Facility must have "identical policies and practices regarding transfer, discharge, and the provision or services … regardless of payment source."
  - 42 C.F.R. § 483.10(a)(2).

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Remember, Medicaid Certification Is Voluntary

- In order to receive Medicaid $, facility promises to follow federal law.
- Unfair for facility to accept money, and then shortchange resident.

Assisted Living Basics

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“Assisted Living” Licensure

- Many different names for facilities, depending on state.
  - E.g., assisted living, residential care facility for elderly, home for the aging, adult foster care.

Relatively Loose State Standards

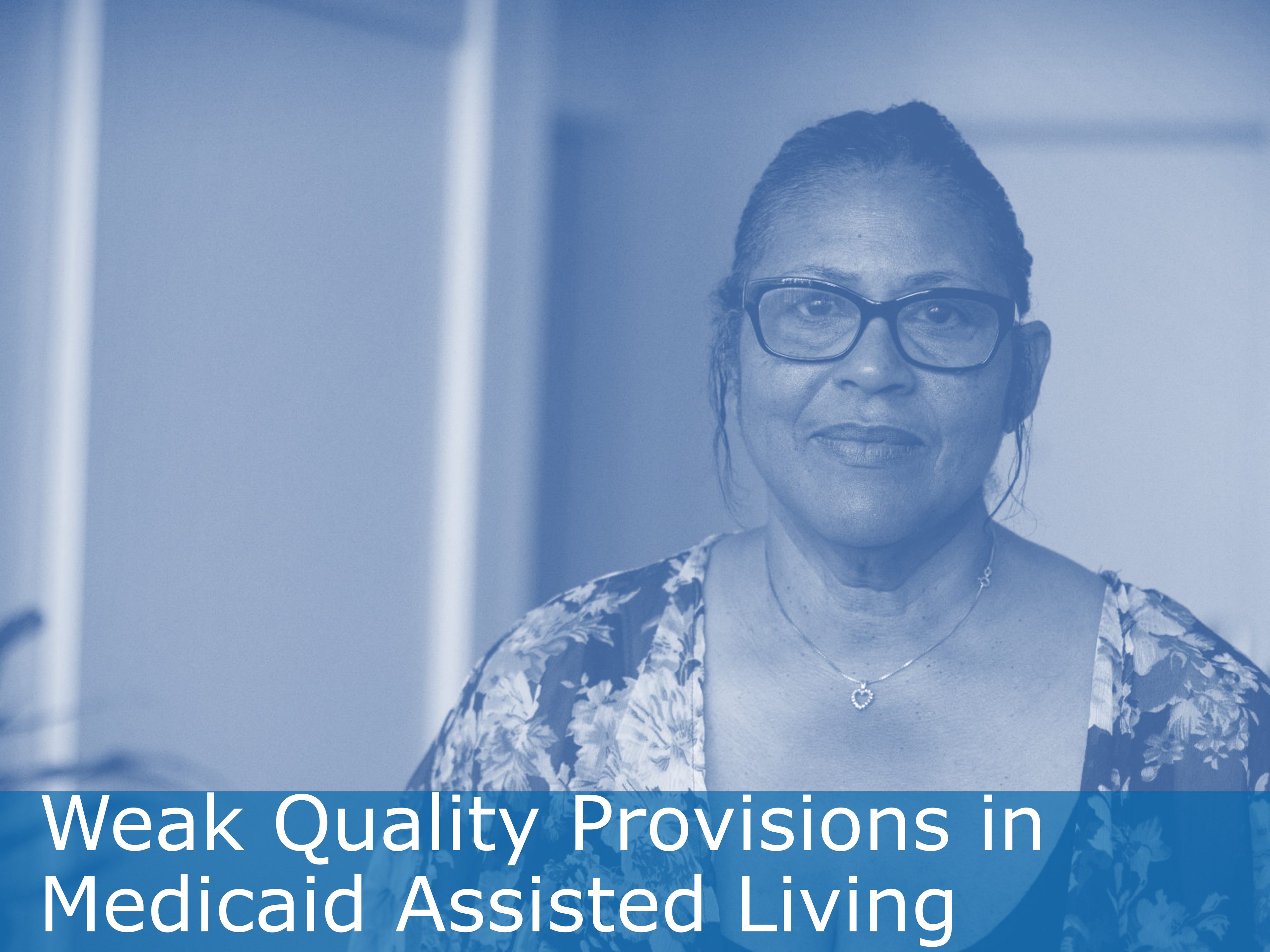
- Often define services that can be provided, but without requiring that particular services be provided.
- So individual facilities often set their own level of care
  - Through contract, or
  - By practices and statements.

No “Assisted Living” Benefit in Medicaid

- Medicaid has certain mandatory services:
  - E.g., Hospital services
  - Doctor services
  - Nursing facility care, etc.
- Also optional services:
  - E.g., Dental care
  - Home and community-based services, etc.
- “Assisted living” is not listed as either mandatory or optional

So How Does Medicaid Cover Assisted Living?

- Generally classified as home and community-based services (HCBS), via programs that mostly are used to provide services at participant's home.
- Medicaid covers assisted living facility's services but not room and board.


Weak Quality Provisions in Medicaid Assisted Living

Federal HCBS Quality Standards

- State must make six “assurances” re:
  - Administrative Authority
  - Level of Care
  - Qualified Providers
  - Service Plan
  - Health and Welfare
  - Financial Accountability

“Qualified Providers” Assurance

- State promises:
  - All providers meet licensure and certification standards.
  - State monitors non-licensed/non-certified providers.
  - State verifies that provider training follows state law and waiver requirements.
- Much of these promises are based on the State having agency that licenses assisted living.

“Health and Welfare” Assurance

- State promises:
  - State identifies, addresses, and seeks to prevent instances of abuse, neglect, exploitation, and unexplained death.
  - State demonstrates that incident management system will addresses incidents of abuse, neglect, exploitation, and death.
  - State follows its own policies on restraint and seclusion.
  - State establishes and monitors “overall health care standards.”
- Note lack of rules/standards for assisted living.

Supposed Continuous Quality Improvement

- State devises performance measures in HCBS application.
- State collects performance measures info and reports to CMS,
- Compliance is considered above 85%.

Example: California Assisted Living Waiver

- Only 5 of 18 measures purport to measure quality … and none are particularly useful:
  - % of facilities not allowing licensure/certification to lapse.
  - % of providers that maintained provider qualifications.
  - % of facilities qualified to provide waiver services.
  - % of providers that held mandatory in-service trainings.
  - % of participants with services delivered in accordance with waiver service plan (with questionable data).
- Other states' systems have similar problems.

Recent Federal
HCBS Regulations

Recent Federal Regulations

- The HCBS "Settings Rule" was motivated by intent to ensure that
  - HCBS is provided in non-institutional environment, and
  - HCBS participants are not segregated from broader community.
    - *See* Section 441.301(c)(4) of Title 42 of Code of Federal Regulations.

“Assisted Living” Rights?

- Regulation sets standards for “provider-owned or controlled residential setting” *aka* assisted living or similar residential facility.
  - E.g., Eviction protections at least as good as landlord/tenant law.
  - Privacy, including lockable doors to living unit.
  - Choice of roommates.
  - Right to accept visitors.

But No Enforcement Mechanism

- Settings Rule did not create enforcement mechanism within states:
  - Re: HCBS quality, state Medicaid agency has procedures to administer critical incident reports and quality measures.
  - State licensing agency has more focus on quality, but likely without jurisdiction over federal regulations.

Some States Noncompliant

- Residents with no real ability to appeal assisted living eviction.
  - E.g., Florida, Nevada, Washington, Wisconsin.
- Routine use of restraints, despite regulation that requires “freedom from coercion and restraint.”
  - Florida, Oregon, and many other states.

Why Is Progress So Slow?

Vulnerable Consumer Population

- Residents and families enter LTC facility world with little relevant knowledge.
- Persons identify as LTC facility resident only for few years.
  - And, during those years, they may be in poor health.
- So difficult to organize ongoing coalition.
  - Compare to
    - Persons with disabilities, or
    - Persons with particular medical condition.

System Makes Matters Worse…

- By disregarding residents as decision-makers.
  - E.g., Care Compare website focused on choosing facility, with implicit assumption that all will be fine in "good facility."
    - But real world requires advocacy to obtain quality care.
      - Justice in Aging issue brief (Nov. 2022) raised this issue.
      - On August 1, 2024, Care Compare for first time will include info on federal nursing facility law.

Disregarding Residents as Decision-Makers (cont.)

- Antipsychotic reduction campaigns have focused heavily on
  - Training for physicians and facility staff.
  - Examination of Medicare claims data and similar data to flag potential bad practices.
- Initiatives have largely ignored critical factor: laws requiring resident's consent for all medication.
  - System assumes that residents are passive and must rely on professionals for quality of care.
    - See Justice in Aging issue brief (Jan.2023).

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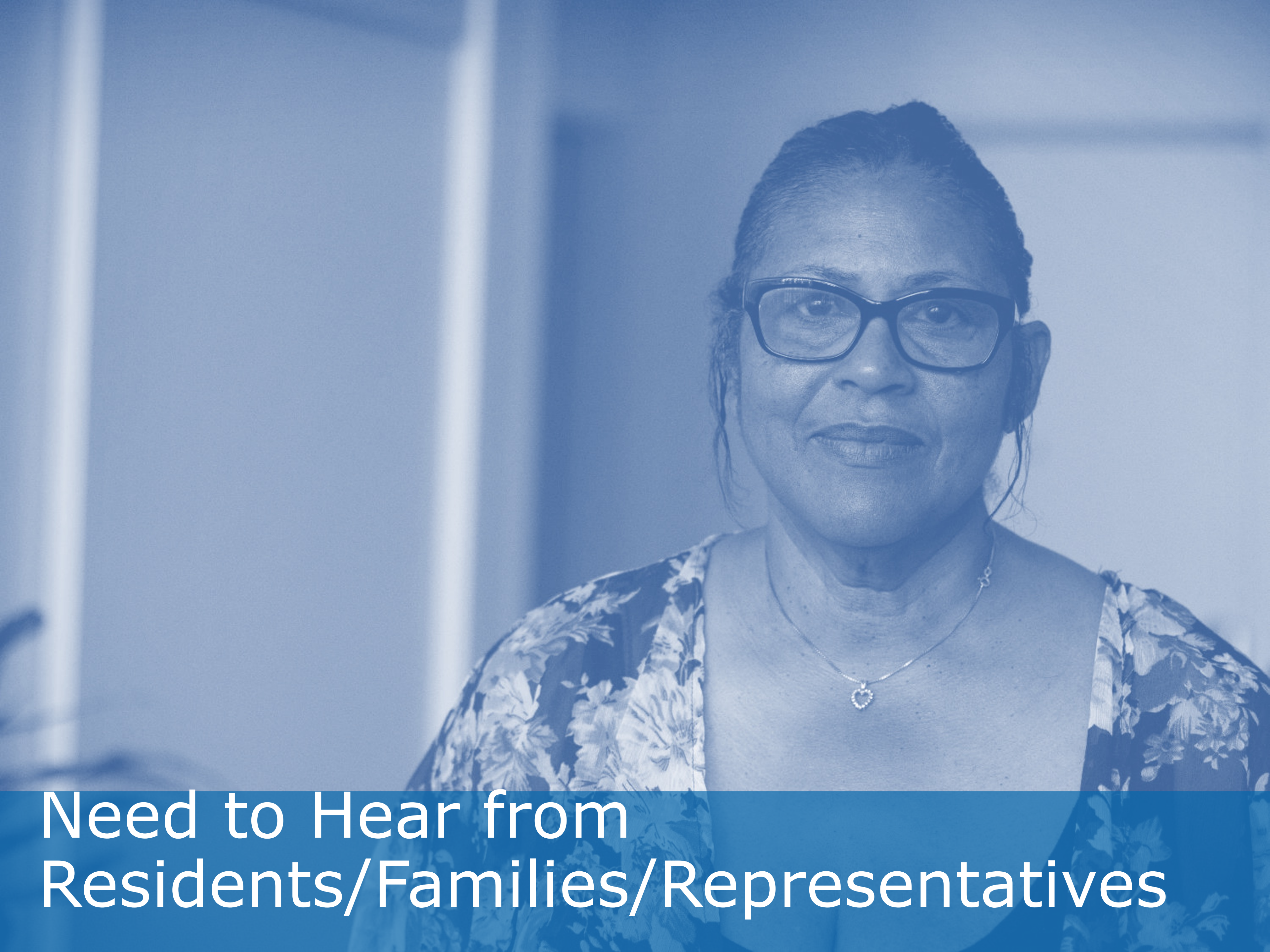
And the Strange Case of Federal Assisted Living Policy

- Operated through federal programs of home and community services.
- Assisted living receives much less attention than nursing facilities, although assisted living "system" does next to nothing to even track quality of care.
- Federal gov't has no identifiable focus on Medicaid-funded assisted living.


Need to Hear from
Residents/Families/Representatives

Contradictions in LTC Facility Conversations

- At facility level:
  - Facilities present themselves as being all about care and compassion,
  - BUT residents/families often say that they are afraid of even asking for better care.
- At public policy level:
  - Facilities see themselves as punished by supposedly "punitive" enforcement system,
  - BUT critics point to intricate corporate structures that seem designed to hide profits.

Facility "Culture Change"

- Generally focused on staff training.
- But "culture change" should involve increased power of residents/family/representatives within facilities.
  - E.g., taking "person-centered" care seriously.
  - Reinvigorated resident, family councils.
  - Focused education for residents/family.
  - Better funding for ombudsman programs.
  - Stronger enforcement of supposedly "no harm" legal violations.

Public Policy Discussions

- Need a way to break through current stalemate.
  - Congress and CMS might respond differently if they could hear more from residents/families/representatives on day-to-day LTC facility reality.
    - E.g., current efforts by facilities to reverse federal minimum staffing standards for nursing facilities.

Special Considerations for Medicaid Assisted Living

- Current system is not prepared, AT ALL, to ensure quality in Medicaid-funded assisted living.
- CMS should start over.
  - HCBS system is not set up for facility care, and
  - HCBS system itself is heavily focused on process rather than beneficiary well-being.

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Conclusion

- Admittedly, all of this is easier said than done.
- Main points:
  - Most facets of LTC facility policy could benefit from increased input from residents/families/representatives.
  - LTC facility policy needs a reset, particularly in assisted living.

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Recent Assisted Living Resources from Justice in Aging

- Rights and Wrongs in Medicaid-Funded Assisted Living
- Defending Evictions from Medicaid-Funded Assisted Living Facilities
- An Illusion of Protection: Meaningless Federal "Quality Measures" Endanger Assisted Living Residents