# **Memorandum:** Hogan Lovells Comparison of the Medicare and Medicaid Hospice Benefits

**November 2021**

## Comparison of the Medicare and Medicaid HospiceBenefits

The following chart, commissioned by the National Hospice and Palliative Care Organization (NHPCO), sets forth the ways in which the Medicare and Medicaid hospice benefits must be thesame and the ways in which they may or must differ. Since hospice is an optional Medicaid benefit, States may, but are not required to, offer it to their Medicaid recipients. However, those States that do choose to include hospice in their Medicaid programs must structure the benefit to meet certain statutory requirements.[1] This chart addresses the provisions of the Medicare and Medicaid statutes applicable to fee for service Medicare and Medicaid, which are included in TitleXVIII (Medicare) and Title XIX (Medicaid) of the Social Security Act.

**This does not address Medicare or Medicaid managed care**, to the extent they include hospice care. This document also does not address the more detailed provisions of the Medicare hospice regulations found in Part 418 of Title 42 of the Code of Federal Regulations, or the provisions included in various Medicare and Medicaid manuals. Consult your State hospice organization or State Medicaid agency for additional information regarding the specifics of each State's Medicaid hospice benefit.

### MEDICARE AND MEDICAID ARE ESSENTIALLY THE SAME:

| Issue | Requirements |
|---|---|
| **Definition of "Hospice Care"** | The Medicaid statute incorporates the Medicare definition of "hospice care" and a "hospice program", which requires that such programs provide a full range of services, pursuant to a plan of care developed for each patient by the patient's physician and an interdisciplinary group. |
| **Definition of "Hospice Program"** | The Medicaid statute incorporates the Medicare definition ofa "hospice program", which requires that such programs be primarily engaged in providing "hospice care", provide core services directly through employees, and maintain professional management responsibility for all services arranged by the hospice. Inpatient days must be limited to no more than 20 percent. |
| **Revocation and Change of Hospice** | Both Medicare and Medicaid allow patients to revoke their election of hospice at any time and allow patients to change hospices. Although the Medicare statute includes some language that is not included in the Medicaid statute, the rules are essentially the same. |

[1] As of 2021, 49 states included hospice as a Medicaid benefit.

| Issue | Requirements |
|---|---|
| **Payment Rates** | The Medicaid statute requires that Medicaid programs pay for hospice care "in amounts no lower than the amounts, using the same methodology, used under Part A [of Medicare]".[2] Therefore, **Medicaid programs may pay more, but not less,than the Medicare rate for hospice services.** [*Note: This is unrelated to the room and board payment for nursing facility residents which is addressed separately*] |
| **Waiver of Other Benefits** | Under both Medicare and Medicaid, patients who elect hospice must waive their right to other payment for servicesrelated to their terminal condition if those services would be covered by Medicare.[3] Federal law does not require Medicaid recipients to waive payment for other services thatwould be covered by Medicaid but not Medicare (e.g., certain personal care services) in order to elect the hospice benefit. However, states may require, as a condition of receiving certain non-hospice Medicaid benefits (e.g., home& community-based waiver services), that recipients chooseeither those benefits or the hospice benefit. Under both Medicare and Medicaid, payment for physician services is not waived and continues to be paid separately. |

## MEDICARE AND MEDICAID REQUIREMENTS MAY OR MUST DIFFER:

| Issue | Medicare | Medicaid |
|---|---|---|
| **Eligibility for Hospice** | Hospice is available to individuals who have been certified as "terminally ill", which is defined as an individual with amedical prognosis that their life expectancy is 6 months or less. | The law states that hospice care is care provided to a "terminally ill individual" but doesnot define "terminally ill" and does not incorporate the Medicare definition. However, most states use the Medicare criteria. A Statecould define "terminally ill" more, but not less,broadly than the Medicare definition because there is a separate Medicaid provision stating that hospice care may not be made available "in an amount, duration or scope" less than that provided under Medicare.[4] |

[2] Social Security Act § 1902(a)(13)(B).

[3] There is an exception for terminally ill children, who may receive Medicaid hospice services without having to forego coverage of curative care to which they would otherwise be entitled under the Medicaid program.

[4] Social Security Act section 1902(a)(10). The meaning and scope of this provision with respect to hospice services have not been tested, so it's unclear to what extent it would protect Medicaid hospice recipients from state efforts to impose certain restrictions.

| Issue | Medicare | Medicaid |
|---|---|---|
| **Election of Hospice** | Individuals must elect to receive hospice care providedby, or under arrangements made by, a particular hospiceprogram instead of certain other benefits to which they would otherwise be entitled. The Medicare hospice regulations specify certain election procedures that mustbe followed and certain information that must be provided to beneficiaries electing hospice. | States are to establish their own procedures for electing hospice, but the election must be voluntary, and the procedures must be "consistent with" the procedures established under the Medicare program. Therefore, States may adopt the Medicare election procedures, but are not required to. |
| **Certification of Terminal Illness** | At the beginning of the first 90- day hospice benefit period the patient's attendingphysician and a hospice physician must each certify in writing that the patient is terminally ill, based on their clinical judgment regarding the normal course of the individual's illness.<br><br>At the beginning of each subsequent period, the attendingphysician or hospice physician must recertify that the patient is terminally ill.[5] Beginning with the third benefit period, a hospice physician or nurse practitioner must make a face-to-face visit todetermine continued eligibility for hospice.[6] For the duration of the federal Public Health Emergency declared during the COVID-19 pandemic in 2020, the face-to-face visit may be conducted via telehealth.[7] | The Medicaid statute does not address certification of terminal illness. Many States followthe Medicare rules regarding certification, but theymay establish different requirements.[8] Some states have elected to implement a face-to-face visit to determine continued eligibility for hospice, but it may differ from the Medicare requirements. During the COVID-19 pandemic, some states that require face-to-face visits adopted various waivers or exceptions allowing them to be conducted via telehealth, but specific requirements and the expiration of these waivers and exceptions vary. Check with your state Medicaid program or your state hospice organization for details. |

[5] Although Nurse Practitioners and Physician Assistants may serve as the patient's hospice attending physician, only physicians may certify the patient as terminally ill.

[6] Although Physician Assistants may serve as a Medicare beneficiary's attending physician, the statute was not amended to allow them to perform the face-to-face visit to determine continued eligibility.

[7] Provisions of the CARES Act allow the hospice face-to-face encounter to be done by telehealth for the duration of the COVID-19 Public Health Emergency.

[8] Some States continue to use the Medicare requirements that were in effect prior to passage of the Balanced Budget Act of 1997 ("BBA"). Although the BBA eliminated the Medicare requirement that written certification be on file within a certain number of days, States are not required to follow suit.

| Issue | Medicare | Medicaid |
|---|---|---|
| **Benefit Periods** | Medicare provides for two benefit periods of 90 days each, followed by an unlimitednumber of 60-day periods provided the beneficiary continues to be re-certified as terminally ill. | States may establish their own benefit periods, and the length and number of these periods "need not be the same" as those established under the Medicare program.[9] However, since Medicare has an unlimited number of benefit periods, arguably a State could not limit the total number of days that recipients could receive hospice services becauseof the separate Medicaid requirement that hospicecare may not be made available "in an amount, duration or scope" less than that provided under Medicare.[10] |
| **Annual Cap on Payments** | The Medicare statute establishesan aggregate annual limit, adjusted annually, on the total amount of Medicare reimbursement the hospice may receive during the year. | The Medicaid statute does not incorporate the Medicare cap on payments, but States have theoption of establishing a Medicaid cap. Provisionsin the CMS State Medicaid Manual provide instructions, which largely mirror the Medicare cap provisions. "Room and board" payments for nursing facility residents are excluded from calculations regarding the hospice cap. |
| **Hospice for Nursing Facility Residents, including Room and Board** | The Medicare hospice benefit does not include payment for residential services, but it does pay (primarily at the routine home care rate) for hospice care provided to Medicare beneficiaries who reside in a nursing facility ("NF") or intermediate care facility for individuals with intellectual disabilities ("ICF/IID). | The Medicaid benefit requires States to make a separate payment to hospices to cover the "room and board" costs of individuals who have elected hospice and whose residence in a NF or ICF/IID would otherwise be covered and reimbursed by Medicaid. In all cases, this payment for "room and board" must be made **to the hospice** and must be"equal to at least 95 percent of the rate that would have been paid by the State under the plan for facility services in that facility for that individual."[7]While the room and board payment is made to the hospice, which then passes it on to theNF, this is an expenditure that the State would otherwise have paid directlyto the NF for that individual.<br>**Dual Eligibles:** For individuals who (1) areeligible for both Medicare and Medicaid, (2) have elected hospice, and (3) reside in a NF or ICF/IID paid for by Medicaid, the Medicaid program must make the room and board payment to the hospice even if the State does not provide a Medicaid hospice benefit. [11] |

[9] The Centers for Medicare and Medicaid Services ("CMS") has advised States that it generally is easier to administer the Medicaid hospice benefit when the periods for the benefit are the same as under Medicare, but they have no legal authority to require States to establish any particular benefit periods

[10] SSA § 1902(a)(13)(B)

[11] The hospice must have entered into an agreement with the NF or ICF/IID under which the hospice takes full responsibility for the professional managementof the individual's hospice care and the facility agrees to provide room and board.

| Issue | Medicare | Medicaid |
|---|---|---|
| | | **Medicaid-Only Recipients:** If a Medicaid program provides a hospice benefit, they must make the additional room and board payment tothe hospice if the individual electing hospice is eligible for Medicaid covered services in a NF or ICF/IID and is receiving hospice care while residing in such a facility. |

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