

## Negotiating Regulations for Reallocation of Medicaid Beds in Texas

### The Problem

An expose in the Austin American-Statesmen about widespread nursing home abuses prompted the Texas legislature to act. There were reports of egregious negligence. Nursing homes were being investigated across the state. Many suffered disciplinary action.

Legislators wanted to crack down on nursing homes by taking away unused beds that had been allocated for Medicaid patients. It was estimated that of about 115,000 Medicaid beds in Texas, only about 50,000 to 60,000 were occupied.

In 1997, the legislature passed a bill that extensively changed the state's regulatory framework for nursing homes. A section of the bill called for decertifying and reallocating valuable Medicaid beds. The section was brief, with little elaboration. Basically it said that unused Medicaid beds in nursing homes were to be decertified and decertified beds reallocated to other nursing homes.

The measure had significant financial consequences. Nursing homes in Texas held on to as many Medicaid beds as they could get because they could borrow money off projected revenue streams from the beds, even if the beds were unoccupied.

The state agency that primarily regulates nursing homes is the Texas Department of Human Services (DHS). Its challenge was to develop regulations to implement what was the legislature's brief and somewhat vaguely worded action on Medicaid beds.

The department decided that creating these regulations was an apt subject for the first regulatory negotiation (reg-neg) to be convened under a new Texas Negotiated Rulemaking Act. Reg-neg, or negotiated rulemaking, is defined as a form of public policy mediation where parties having a stake in proposed government regulations reach agreement on key provisions through the assistance of mediators and facilitators.

### The Process

The reg-neg process began when Paul Leche, deputy general counsel for DHS, convened the reg-neg and identified key people willing to take part in negotiations. The players included representatives of the American Association of Retired Persons (AARP), Texas Advocates for Nursing Home Residents, Advocates for Nursing Home Reform, the Texas Health Care Association, the Texas Association of Homes and Services for the Aging, the Texas Department of Aging, and the Texas Health and Human Services Commission.

Opposing poles in the reg-neg were the politically influential AARP and the nursing home industry, which was defensive about decertification because of the specter of diminished revenues and borrowing power. DHS worked with the Center for Public Policy Dispute Resolution at the University of Texas School of Law in Austin to get the process underway and select the facilitators.

The reg-neg committee held its first session on October 31, 1997 against a backdrop of skepticism on the part of several stakeholders and DHS personnel that consensus could be reached. Patients'



*Mediation works because it is built on the good sense of the people. People either rise to or descend to the expectations you have of them. I like to expect good sense.*

*Governor Marc Racicot of Montana*

advocates and nursing home representatives were leagues apart on the pivotal matter of mechanisms governing decertification of Medicaid beds and their reallocation.

The first and perhaps the most important procedural step in the reg-neg was the development of the committee's agenda: What should be the order of issues considered? Decertification of beds was certain to be the most contentious issue because it meant inevitably taking beds from at least some nursing homes. The industry was sure to strongly resist such action, and patient advocates were sure to press hardest on this point. Reallocation, on the other hand, was likely to go smoother because it would be keyed to determining how nursing homes could obtain more beds, or even how they could get decertified beds back.

The facilitators chose to put reallocation of beds first on the agenda. They hoped that if the parties could agree on a reallocation method, then the concerns of the industry on decertification might be allayed. A reallocation system was developed fairly rapidly and the committee moved on to decertification. Assured that lost beds could be recovered, decertification became less contentious.

Over eight sessions that lasted into February, the dozen or so committee members around the reg-neg table found common ground on rules covering Medicaid beds. En route to agreement was a good deal of negotiation, information sharing, and facilitated dialogue—familiar ingredients in the successful resolution of conflicting positions.

All sessions were open to the public. The news media were expected, but never attended. Staffers of various legislators were present as, for several sessions, was a member of the legislature who developed an interest in the dynamics of regulatory negotiation. Representatives of organizations that lend money to nursing homes attended most sessions and communicated their concerns through parties at the reg-neg table.

### The Result

Key to this reg-neg success was hammering out acceptable formulas on bed decertification and reallocation. The new formula for decertifying Medicaid beds involved setting a base occupancy rate of 85 percent.

Nursing homes that wanted more Medicaid beds had to have at least a 95 percent occupancy rate for their current Medicaid beds, according to the reallocation formula devised by the committee. Homes that met this threshold could seek a 10 percent increase over their current number of occupied Medicaid beds.

Another key aspect of the agreement, urged by AARP, was that nursing homes petitioning for reallocation of Medicaid beds had to requalify for receiving them under stricter quality of care standards.

It is difficult to estimate specific savings stemming from the reg-neg's outcome. However, most parties agreed that development of the rule through the traditional process would not have yielded a final rule as rapidly, and that litigation would have been possible with a rule unsatisfactory to either side.

Also important was the legislative scrutiny that was focused on the rule. DHS could have lost legislative support if the rule had been viewed as soft on the industry. The legislative agendas of the other parties might have been hindered if they were seen as bad actors in a traditional rulemaking. By allowing the parties to work together and reach consensus, all interests seemed better off.



*The old approach gave neither side what it wanted. If you involve the people who must live with your policy, there's a decent chance you'll get buy-in and ownership of the process. Based on the progress we've made through a collaborative process, I wouldn't hesitate to use a similar approach to some other area of conflict.*

Governor Tom Carper of Delaware