Department of Health and Human Services
Office of Inspector General, Office of Audit Services
233 North Michigan Ave, Suite 1360, Chicago, IL 60601

States' Progress in Implementing the Provisions of the OBRA '93 and DRA '05

A-05-12-00027 - GA
QUESTIONNAIRE AND INFORMATION REQUEST

ELIGIBILITY

Look-back and Penalty Periods

1. Section 6011(a) of the Deficit Reduction Act of 2005 (DRA'05) amended section 1917(c)(1)(B)(i) of the Social Security Act (the Act) to extend the look back period to 60-months for any transfer of assets made on or after February 8, 2006.

    a. Did your State agency implement the DRA '05 provision of 60-month look back period?

    b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

    c. If no, what was the reason for not implementing this provision?

    d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

2. Section 6011(b) of DRA '05 amended section 1917(c)(1)(D) of the Act to require that the penalty period start date be the later of either: (1) the first date of the month during or (at State option) after which assets have been transferred for less than fair market value; or (2) the date on which the individual is eligible for medical assistance under the State Plan and is receiving institutional level of care services (based on an approved application for such services) that, were it not for the imposition of the penalty period, would be covered by Medicaid.

    a. Did your State agency implement the DRA '05 penalty period start date provision?

    b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

    c. If no, what was the reason for not implementing this provision?

    d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

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3. Section 6016(a) of DRA '05 amended section 1917(c)(1)(E) of the Act to prohibit a State from rounding down or otherwise disregarding any fractional period of ineligibility. States must impose a penalty period even where the period of ineligibility would be less than a full month.
    a. Did your State agency implement the DRA '05 provision related to partial months of ineligibility?

    b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

    c. If no, what was the reason for not implementing this provision?

    d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

4. Section 6016(b) of DRA '05 amended section 1917(c)(1) of the Act to give States the option to accumulate multiple transfers into a single period of ineligibility, rather than imposing multiple penalty periods.

    a. Did your State agency opt to permit accumulation of multiple transfers in computing the penalty period?

    b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

    c. If no, what was the reason for not implementing this provision?

    d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

5. Section 13611 of OBRA 93 amended section 1917 of the Act to include in the definition of "assets" any income or resources which the individual or spouse is entitled to but does not receive because of their own action. Such actions may include disclaiming an inheritance, waiving pension income or refusing to accept an injury settlement. Disclaiming an inheritance could cause a person to lose his or her eligibility for Medicaid for a penalty period.

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a. Did your State agency implement the OBRA '93 provision that required treating such actions as disclaimer of inheritance as an asset transfer?

b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

c. If no, what was the reason for not implementing this provision?

d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

Annuities – Medicaid Application Requirement

6. Section 6012(a) of DRA '05, which amended sections 1917 of the Act by adding a new section 1917(e), provides that the States shall require, as a condition for an individual's eligibility for medical assistance related to long-term care services, that the individual's application for such assistance (including any subsequent recertification) shall disclose any interest the individual or community spouse has in an annuity or similar financial instrument, regardless of whether the annuity is irrevocable or is treated as an asset.

    a. Did your State agency implement the DRA '05 provision related to disclosure and treatment of annuities?

    b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan, procedure manuals and example copies of Medicaid application.

    c. If no, what was the reason for not implementing this provision?

    d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

    e. If the Social Security Administration is making Medicaid eligibility determinations for your State, who is responsible for collecting and analyzing the annuity disclosures and remainder beneficiary statements?

Annuities – When State is Not the Remainder Beneficiary

7. Section 6012(b) of the DRA '05, which amended section 1917(c)(1) by adding new sub-paragraph (F). The newly added subparagraph (F), provides that the purchase of an annuity on or after February 8, 2006 shall be treated as transfer of assets for less than fair market value unless the State is named as the remainder beneficiary in the correct position for amounts paid by Medicaid. Under 1917(e)(2)(A) (added by section 6012(a) of the DRA), the State must notify the issuer of the annuity of the State's rights as a preferred remainder beneficiary. The State may also require the issuer to notify the State when there is a change in the amount of income or principal being withdrawn.

    a. Did your State agency implement the DRA '05 provision of treating the purchase of annuity as asset transfer for less than fair market value unless the State is named as the remainder beneficiary of the annuity?

    b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

    c. If no, what was the reason for not implementing these provisions?

    d. If your State agency could not have implemented this provision without State legislation, when did the State legislation occur? Provide relevant pages of such State legislation.

    e. For each of the Federal fiscal years ended since February 2006:

        i. How many notifications regarding your State's right as a preferred remainder beneficiary were submitted to issuers of annuities?

        ii. How many remainder beneficiary collections were received from issuers of annuities?

Annuities – Purchases and Other Transactions

8. Section 6012(c) of the DRA'05, which amended section 1917(c)(1) by adding a new sub-paragraph (G), provides that the purchase of an annuity on or after February 8, 2006, by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility

services or other long-term care services, shall be treated as a transfer of assets for less than fair market value unless the annuity meets the criteria listed in the section.

a. Did your State agency implement the DRA '05 provision of treating the purchase of certain annuities as asset transfer for less than fair market value?

b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

c. If no, what was the reason for not implementing these provisions? and

d. If your State agency could not have implemented this provision without State legislation, when did the State legislation occur? Provide relevant pages of such State legislation.

9. Section 6012(d) of the DRA '05 specifies that the provisions of the DRA apply to annuity-related transactions, including purchases, which occur on or after February 6, 2008. In its State Medicaid Directors Letter number 06-018 dated, July 2006, Centers for Medicare and Medicaid Services stated that such transactions include any action taken by the individual that changes the course of payments to be made by the annuity or the treatment of the income or principal of the annuity. Such actions include additions of principal, elections to annuitize the contract and similar actions. Routine changes, automatic events, and changes beyond the control of the individual are not considered transactions that would subject the annuity to treatment under the provisions of the DRA. .

    a. Did your State agency implement the DRA '05 provision that would make an annuity, regardless of its purchase date, subject to asset transfer rules if certain transactions occur?

    b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

    c. If no, what was the reason for not implementing this provision? and

    d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

Annuities – Income

10. The Act, as amended by DRA '05, prevents the State agency from treating certain transactions related to annuities as transfer for less than fair market value. However, under CMS's SMD letter 06-018, the annuity must still be considered in determining Medicaid eligibility, including spousal income and resources, and post-eligibility calculation, as appropriate. Even if an annuity is not subject to penalty under the provisions of the DRA, this does not mean it is excluded as income or resource.

    a. Is your State agency considering income derived from annuities when determining Medicaid eligibility for long-term care?

Promissory Notes, Loans or Mortgages

11. Section 6016(c) of DRA '05, which added section 1917(c)(1)(I) of the Act, provided that, with respect to the transfer of assets, the term 'assets' includes funds to purchase a promissory note, loan, or mortgage unless such instruments have a repayment term that is actuarially sound, provide for payments to be made in equal amounts during the term of the loan with no deferral and no balloon payments, and prohibit cancellation of the balance upon the death of the lender. If the instruments do not satisfy such requirements, their value shall be the outstanding balance as of date of the individual's application for medical assistance for long term care services.

    a. Does the definition of assets in your State include funds used to purchase certain promissory note, loan, or mortgage as specified in Section 6016(c) of DRA '05?

    b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

    c. If no, what is the reason for not implementing this provision? and

    d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

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Life Estates

12. Section 6016(d) of DRA '05, which amended section 1917(c)(1) of the Act by adding a new subparagraph (J), provides that the term assets includes the purchase of life estate interest in another individual's home unless the purchaser resides in the home for a period of at least 1 year after the date of purchase. If the purchaser resides in the home for less than a year, CMS's SMD letter states that the transaction should be treated as a transfer of assets. The amount of the transfer is the entire amount used to purchase the life estate. This amount should not be reduced or prorated to reflect an individuals' residency for a period of time less than a year.

    a. Does the definition of assets in your State include a life estate interest in another individual's home as specified in Section 6016(d) of DRA '05?

    b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

    c. If no, what was the reason for not implementing this provision?

    d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

13. Do any of the provisions of your State law or State agency policies specify conditions that would result in a presumption that undue hardship exists (or does not exists)? If yes, list such conditions and provide relevant pages of the State laws, regulations, or policies.

Income First Rule

14. Section 6013 of the DRA '05, which amended section 1924 of the Act, required all States to follow the "income first" method in calculating revisions to the community spouse resource allowance. All States are required to attribute or allocate the maximum available income of the institutionalized spouse to the community spouse before granting an increase in the CSRA under section 1924(e)(2)(C).

    a. Did your State agency implement the DRA '05 provision of income first rule.

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b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

c. If no, what was the reason for not implementing this provision?

d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

Entrance Fee

15. Section 6015 of the DRA '05 added subsection (g) to Section 1917 of the Act to set forth conditions under which an entrance fee paid to a continuing care retirement community or life care community would be treated as a resource to an individual for purposes of determining Medicaid eligibility.

    a. Did your State agency implement the DRA '05 provision of treating, in certain circumstances, entrance fee deposits as resources of the applicant for determining Medicaid eligibility?

    b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

    c. If no, what was the reason for not implementing this provision?

    d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

Home Equity Limit

16. Section 6014(a) of the DRA '05, which amended section 1917 (f) of the Act, provided that in determining the eligibility of an individual to receive medical assistance payment for nursing facility services or other long-term care services, States must deny eligibility if the individual's equity interest in his or her home exceeds $500,000 (disqualification rule). States may elect a home equity limit greater than $500,000 , as adjusted by inflation beginning in 2011, but that does not exceed $750,000, adjusted by inflation. This restriction applies only to applicants who do not have a spouse or a child under age 21, or who is blind or disabled, lawfully residing in the individual's home.

a. Did your State agency implement the DRA '05 home equity limit rule?

b. If yes, when were the effective date, and how the State agency determines the dollar value of equity interest? Provide any relevant pages of the CMS approved State plan and procedure manuals.

c. If no, what was the reason for not implementing this provision?

d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

17. Section 6014(a) of DRA '05, which amended section 1917(f)(3) of the Act, provided that nothing in the provision shall prevent an individual from using a reverse mortgage or home equity loan to reduce the individual's total equity interest in the home.

    a. Does your State plan or State regulation contain any provisions that would prevent a Medicaid applicant from using a reverse mortgage or home equity loan to reduce the individual's total equity interest in the home?

    b. If yes, please provide related pages of CMS approved State plan, state legislation and procedure manuals.

Trusts – Establishment of a Trust

18. Section 13611(b) of OBRA '93, which added section 1917(d) (2) to the Act, addresses the availability to the individual of assets held in trusts that were established on August 11, 1993 or later, for purposes of determining Medicaid eligibility. This section provides that an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the principal of the trust and if such trust was established (other than by will) by: (i) the individual; or (ii) the individual's spouse; or (iii) a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or (iv) a person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

a. Did your State agency implement OBRA '93 provision related to when an individual shall be considered to have established a trust?

b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

c. If no, what was the reason for not implementing this provision?

d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

Trusts – Legal Instrument or Device Similar to Trust

19. Section 13611(b) of OBRA '93, which added section 1917(d)(6) to the Act, provides that the term 'trust' includes any legal instrument or device that is similar to a trust. Section 3259.1 of the CMS' State Medicaid Manual provides that, " legal instrument or device similar to a trust" is any legal instrument, device, or arrangement which may not be called a trust under State law but it involves a grantor who transfers property to an individual or entity with fiduciary obligations (trustee). The grantor makes the transfer with the intention that it be held, managed, or administered by the individual or entity for the benefit of the grantor or others. This can include (but is not limited to) escrow accounts, investment accounts, pension funds, and other similar devices managed by a trustee, but includes an annuity only to the extent CMS specifies in guidance.

a. Did your State agency implement OBRA '93 provision that treats "legal instruments or device similar to a trust" as a trusts for purpose of determining Medicaid eligibility?

b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

c. If no, what was the reason for not implementing this provision?

d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

Trusts - Revocable

20. Section 13611(b) of the OBRA '93, which added section 1917(d)(3)(A) to the Act, provides guidelines for the treatment of assets held in revocable trusts (trusts which can under State law be revoked by the grantor or which provide that the trust can only be modified or terminated by a court), that were established on August 11, 1993 or later, for purposes of determining Medicaid eligibility. This section provides that: (i) the principal of a revocable trust is considered a resource to the individual; (ii) payments from the revocable trust to or for the benefit of the individual are considered income to the individual; and (iii) any other payments from the trust that are not made to or for the benefit of the individual are considered assets disposed of by the individual.

    a. Did your State agency implement OBRA '93 provision related to the principal of a revocable trust and payments from the revocable trust for determining Medicaid eligibility?

    b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

    c. If no, what was the reason for not implementing this provision?

    d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

Trusts - Irrevocable

21. Section 13611(b) of the OBRA '93, which added section 1917(d)(3)(B) to the Act, provides guidelines for the treatment of assets held in irrevocable trusts (trusts which cannot, in any way, be revoked by the grantor), that were established on August 11, 1993 or later, for purposes of determining Medicaid eligibility. Under this section: (i) if there are any circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, the portion of the principal from which (or income on that principal from which) payment to the individual could be made is considered resources available to the individual; (ii) payments from that portion of the principle or income on the principle to or for the benefit of the individual are considered income of the individual: (iii) payments for any other purpose are considered a transfer of assets by the individual; and (iv) any portion of the irrevocable trust or income on the principle from which no payment could be made under

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any circumstances to the individual is considered assets disposed by the individual on the date the irrevocable trust was/is established (If, however, the access by the individual was blocked later, the date of the transferred assets will be the date that access was blocked (foreclosed)).

a. Did your State agency implement OBRA '93 provision related to the principal of, payments from, and income of the irrevocable trust for determining Medicaid eligibility?

b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

c. If no, what was the reason for not implementing this provision?

d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation.

Lien

22. Under §1917(a), The Tax Equity and Responsibility Act of 1982 (TEFRA) allows States to file liens, known as TEFRA liens, on the real property of permanently institutionalized nursing home residents.

a. Did your State agency elect to use TEFRA liens? Provide relevant pages of the CMS approved State plan

If yes:

b. How does your State agency determine whether a Medicaid recipient is permanently institutionalized?

c. Do any of the provisions of your State law or State agency policies specify conditions that would result in a presumption that a Medicaid recipient is permanently institutionalized? If yes, list such conditions and provide relevant pages of the State laws, regulations, or policies

d. Are the TEFRA liens in your State limited to the homestead of the Medicaid recipient or does your State agency impose TEFRA liens on real property other than home, such as income-producing property? If yes, provide relevant pages of the CMS approved State plan

ESTATE RECOVERY

23. Section 13612(a) of OBRA'93 which amended Section 1917(b)(1) of the Act required each State to seek adjustment or recovery from the individual's estate of amounts correctly paid by the State on behalf of an individual who was 55 years or older when the individual received medical assistance for nursing facility services, home and community-based services, and related hospital and prescription drug services. Section 1917(b)(2) permits such recovery only after the death of any surviving spouse, when there is no surviving child under 21 or blind or disabled child.

    a. Did your State agency implement the estate recovery provision as required in section 13612(a) of OBRA'93?

    b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

    c. If no, what is the reason for not implementing this provision?

    d. If this provision needed State legislative approval, was the approval obtained and when? Provide relevant pages of such State legislation, and

    e. Do any State laws or regulations limit your State agency's ability to enforce the estate recovery mandated under Section 13612(a) of OBRA'93?

    f. How does your State agency obtain the information about the death of the Medicaid beneficiaries?

24. Section 13612(a) of OBRA'93, which amended section 1917(b)(1) of the Act, provided States the option of recovering payments from the individual's estate for all Medicaid services provided to beneficiaries who were 55 or older and received nursing facility services, home and community-based services, and related hospital and prescription drug services.

a. Did your State opt to recover payments for all Medicaid services as provided in section 13612(a) of OBRA'93?

b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

c. Do any State laws or regulations limit the State agency's ability to recover additional Medicaid payments?

25. Section 13612(c) of OBRA'93, which amended section 1917(b) of the Act, provided that [in addition to the assets in the individual's estate as defined under the State probate law] the term "estate" may include, at the option of the State, any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest) such as assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

    a. In addition to recoveries from the probate estate, of an individual Medicaid recipient, did your State opt to recover from the individual's other real and personal property that transferred outside of probate?

    b. If yes: (i) when was the effective date? (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

26. Section 13611(b) of OBRA'93, which amended section 1917(d)(4) of the Act, allowed a Medicaid applicant to transfer assets to OBRA'93 special needs irrevocable trust for the benefit of a person with disability under the age of 65 to qualify for Medicaid without incurring any penalty. Also, an individual with disabilities and under the age of 65 who had assets in his or her own name (as well as the parent or guardian of such individual or the court on behalf of such individual) can create an OBRA'93 special needs irrevocable trust. When the disabled individual dies, the State is entitled to reimbursements from such trusts to the extent of Medicaid expenses incurred by the Medicaid recipient.

    a. Does your State plan provide for recovering Medicaid expenses from the special needs trusts?

b. If yes: (i) when was the effective date? and (ii) when was the implementation date? Provide any relevant pages of the CMS approved State plan and procedure manuals.

27. Does your State agency use third party contractors for conducting estate recoveries?

    a. If yes, who are the contractors? Provide copies of contracts/agreements.

    b. How the contractors are compensated?

    c. How long have you been using the contractors for conducting estate recoveries?

28. What was the cost of operating your State agency's estate recovery program for each of the last seven Federal fiscal years? How many individuals are employed in your estate recovery unit?

29. Provide a break-down of the estate recoveries and long-term care expenditures for each of the Federal fiscal years 2005 through 2011 as requested in the table in the Appendix. For estate recovery items, indicate the CMS-64 page numbers and line description under which the item was reported to CMS. (Please provide the contact information of your designated staff to whom we can forward an electronic copy of the table seen in the Appendix).

OTHER

30. Are there any OBRA '93 provisions or DRA '05 provisions that your State agency has not implemented?

    If yes, provide reason for not implementing and a listing of such provisions.

31. Have any reviews or studies been conducted [by your State or outside contractors] on State's potential cost savings resulting from the implementation of penalty periods and estate recovery provisions? If yes, what were the results of such reviews or studies? Provide copies of such reviews, study results, and budget estimates.

32. What changes to the Act would you propose to ensure that Medicaid covered long-term care services are provided to the needy while preventing the individuals with substantial assets from qualifying for Medicaid coverage through circumventing the Medicaid regulations?

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33. In your opinion, what loopholes in the current Act allow individuals with substantial assets to transfer their assets to others to qualify for Medicaid covered long-term care?

34. What barriers within the Act has your State encountered relative to filing TEFRA liens on residential property? and

35. What barriers within the Act has your State encountered relative to recovering from the estate of the deceased spouse of a deceased institutionalized beneficiary?

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APPENDIX

State______________________________ Calendar Quarter____________ Year_____________				
Estate Recoveries and Long Term Care Expenditures	**Number of recoveries**	**Amount**	**Line number on CMS-64**	**Item Description on CMS-64**
Estate Recoveries From -				
1. Probate Courts				
2. Small Estate Affidavits				
3. Deceased's Funds from nursing homes				
4. Deceased's bank and investment accounts				
5. Funeral Trusts				
6. Other Special need trust balances				
7. Annuity issuers				
8. Life insurance policies				
9. Real property, homestead - Enforcement of TEFRA liens				
10. Real property, non homestead-Enforcement of TEFRA liens				
11. Real property – post death liens				
12. Unclaimed Funds				
13. Others – Please list (insert more lines as necessary)				
–				
Total Estate Recoveries (Sum of 1 through 13)				
Long-Term Care Expenditures For -				
Nursing Home				
Intermediate Care - Mentally Retarded: Public Providers				
Intermediate Care - Mentally Retarded: Private Providers				
Total Long-Term Care Expenditures				

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APPENDIX

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