

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Consumer Rights in Nursing Facility Admissions

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FIGHTING SENIOR POVERTY THROUGH LAW

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.

To achieve Justice in Aging, we must:

- Acknowledge systemic racism and discrimination
- Address the enduring negative effects of racism and differential treatment
- Promote access and equity in economic security, health care, and the courts for our nation's low-income older adults
- Recruit, support, and retain a diverse staff and board, including race, ethnicity, gender, gender identity and presentation, sexual orientation, disability, age, economic class

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Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems with getting on to the webinar? Send an email to trainings@justiceinaging.org.
- Find materials for this training and past trainings by searching the [Resource Library](https://justiceinaging.org/resource-library), justiceinaging.org/resource-library. A recording will be posted to [Justice in Aging's Vimeo page](https://Justice%20in%20Aging's%20Vimeo%20page) at the conclusion of the presentation, vimeo.com/justiceinaging.
- Enable closed captioning by selecting "CC" from the Zoom control panel.

Consider Your Options

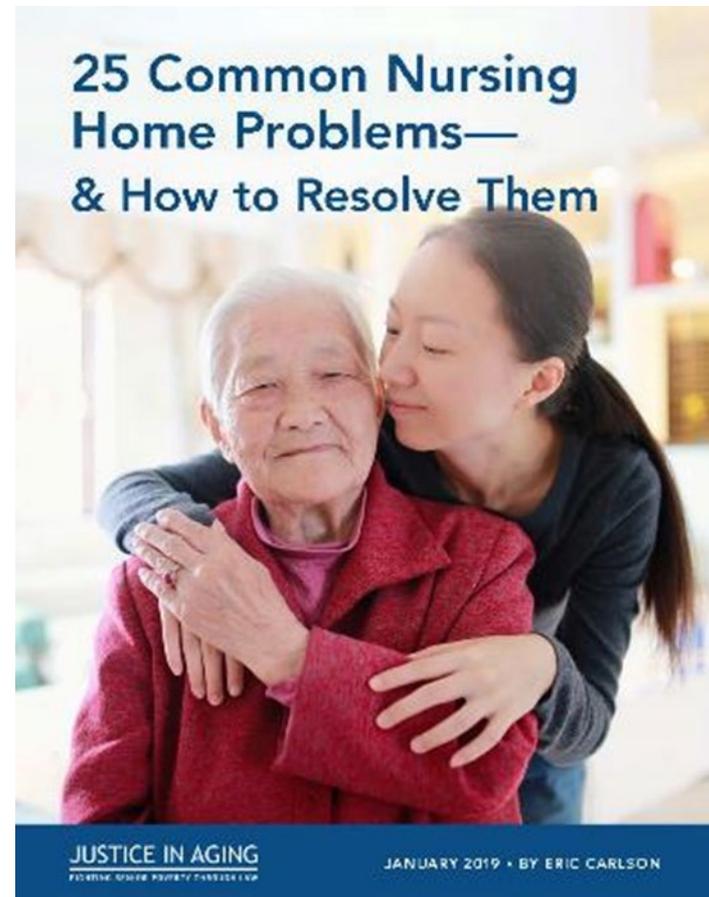
- Various options for getting the assistance that you need.
 - Personal care at home.
 - Plus various related items and services.
 - Adult day care.
 - Assisted living facilities.
 - Nursing facilities.

Federal Nursing Facility Law

- Applies to any nursing facility certified to accept Medicare and/or Medicaid funding.
- Applies to every resident in certified facility, regardless of resident's payment source.

Resource on Handling Nursing Facility Problems

- Many nursing facilities follow illegal practices.
- Guide explains how to get better care and protect resident rights.
 - 2021 update now available at [Justice in Aging website](#).





Discrimination Against Medicaid-Eligible Applicants

Protections Against Medicaid Discrimination

- Facility can't require resident to promise to not apply for Medicaid. (42 C.F.R. §483.15(a)(2))
 - Exception for continuing care retirement communities, which "may require residents to spend on their care resources declared for the purposes of admission before applying for medical assistance."
 - 42 U.S.C. § 1396r(c)(5)(B)(v).

But the Loophole Is Huge

- Facilities are allowed to ask for information about residents' income and savings.
 - Facilities use this info to estimate when resident is likely to become Medicaid-eligible.

States May Establish Other No-Discrimination Protections

- Federal law explicitly authorizes states to establish additional protections.
 - 42 C.F.R. § 483.15(a)(5).
- Some states have some sort of first-come, first-served requirements, but with many exceptions.
 - *See, e.g.,* Conn. Agencies Regs. § 17-311-209; N.J. Admin. Code tit. 8, § 8:39-5.2(a)(2); Ohio Rev. Code § 5165.08.

Alternate Strategy: Tie Private Pay Rates to Medicaid Rates

- E.g., Minnesota ties Medicaid rates to private-pay rates, in order to eliminate incentive to favor private-pay admissions.
 - [Minn. Stat. § 256R.06.](#)



Discrimination Based on Health Care Needs

Americans with Disabilities Act

- ADA prevents discrimination “on the basis of disability in the full and equal enjoyment of any place of public accommodation.”
- A nursing facility is a “place of public accommodation.”

How to Contest Disability-Based Discrimination

- File complaint with Office of Civil Rights of Dep't of Health and Human Services.
- File lawsuit in federal court.
 - E.g., *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002 (3rd Cir. 1995).
 - Facility's discrimination is not excused by the fact that all of its residents have a disability.



COVID-Related Issues

Facility-Specific Info

- Facility must notify residents and families of confirmed COVID infection in facility.
 - Notification by 5 p.m. the following day.
- Facility must provide cumulative update at least weekly.
- Notification may be via e-mail, website postings, paper notices, recorded telephone messages, etc.
 - 42 C.F.R. § 483.80(g)(3); CMS FAQs on LTC Facility Requirements for Notification of COVID-Cases Among Residents and Staff (May 6, 2020).

Facility Also Must Report COVID-Related Info to CDC

- Centers for Disease Control and Prevention (CDC) compiles data, and then shares it with the Centers for Medicare & Medicaid Services (CMS).
 - *See COVID-19 Nursing Home Data, data.cms.gov/stories/s/bkwz-xpvg*

Vaccine Issues

- Vaccination rates within facility.
 - Ability to visit may depend upon facility's vaccination rate.
 - Specifically, no visitation if county's COVID positive rate is greater than 10%, resident is unvaccinated, and less than 70% of facility's residents are vaccinated.
 - CMS, Nursing Home Visitation – COVID-19, QSO-20-39-NH REVISED (revised March 10, 2021).

Vaccine Issues (cont.)

- Facilities have incentive to prefer vaccinated applicants.
 - Less risk of COVID-19.
 - Less likely to have to limit visitation.



Guarantees of Payment

No Third-Party Guarantees of Payment

- Facility cannot require or request that third party (e.g., adult child) co-sign an admissions agreement.
 - 42 C.F.R. § 483.15(a)(3).

Facilities Attempt to Impose Duty on Third Party

- Admission agreement asserts that “responsible party”
 - Has access to resident’s money;
 - Promises to use resident’s money to pay facility’s bills; and
 - Promises to take all appropriate steps to arrange for Medicaid eligibility.

Dubious Enforceability of “Responsible Party” Duty

- If bill is unpaid, facility may sue responsible party.
- Why these lawsuits should fail:
 - Facility is attempting to evade federal law’s prohibition of third-party guarantees.
 - Generally, an agent isn’t liable for debts incurred by the person being represented.
- But beware: courts sometimes rule for facilities, particularly when family member has misappropriated money instead of paying facility.



Arbitration

Arbitration Definitions

- Arbitration: Agreement to have dispute resolved by private judge, rather than through litigation in state or federal court.
- “Pre-Dispute” Arbitration Agreement: Agreement to arbitrate any future dispute that may arise between the two parties.
 - E.g., resident promises to go to arbitration for any future personal injury claim against the facility.

What's Wrong With Arbitration?

- Compared to jury, arbitrator may be less inclined to support personal injury claim.
- Because facility may give arbitrator repeat business, arbitrator may be inclined to rule in facility's favor.
- Expensive: Arbitrator may charge \$400 to \$1,000 per hour.

Facility Can't Require Pre-Dispute Arbitration Agreement

- Federal regulation prevents facility from requiring pre-dispute arbitration.
- Agreement must state:
 - Arbitration is not required.
 - Resident can rescind arbitration agreement within 30 days.
 - 42 C.F.R. § 483.70(n).



Negotiating/Refusing Admission Agreements

When Resident Already Has Been Physically Admitted

- Resident has leverage to refuse any offending provisions.
 - Remember: resident has right to refuse arbitration agreement.
- Only six reasons for eviction from nursing facility – and “refusing to sign admission agreement” is not one of those reasons.

When Resident Has Not Yet Been Physically Admitted

- Recommended: Delete or revise the offending provisions, explaining to facility why they are inappropriate.
- DON'T rationalize signing by assuming that things will work themselves out.
 - In litigation, judge will be inclined to hold your signature against you.

Empirical Evidence of Widespread Admissions Discrimination at Nursing Homes

Ashvin Gandhi, Assistant Professor, UCLA Anderson

April 7, 2021

About Me:

- Assistant professor at UCLA Anderson
 - Health economist
 - Focus on nursing homes
- Previous work of mine you might have seen:
 - Turnover at U.S. nursing homes is alarmingly high
 - Understanding when private equity acquisitions of nursing homes hurt and help quality
 - Which nursing homes are more likely to have outbreaks of COVID-19

What I'm Going to Tell You

- Admissions discrimination is widespread.
 - 19% of residents (40% of days) aren't at their first-choice nursing home
 - Beds are available, *just not available to them.*
- Evidence consistent with discrimination on Medicaid, stay length, disability, and race.
- Policy solutions aren't obvious.
 - Unintended consequences and ineffective

I Am Not a Lawyer

- Disability discrimination is clearly illegal
- Medicaid protections are less clear
 - Language seems to have a clear *intention*.
 - Potential loopholes and no clear case law. (Why?)
 - HHS OCR, MACPAC, etc., won't advise
 - Some employees will state an opinion off the record
 - Ombudsmen: "Not really on our radar." and "I wouldn't even know what box to check."
 - HHS survey (1999): only 4% of Medicaid officials think financial screening happens with any frequency (70% of discharge planners)

Access Matters

- Large variation in whether facilities had COVID-19 outbreaks.
 - Many contributing factors such as size, location, staffing, etc.
 - Access to a smaller facility, a better-resourced facility, or a better-located facility could reduce your risk dramatically.
- Important long before COVID
 - 1% less staff -> +1.9% mortality (.15 pp)
 - Friedrich and Hackmann (2020)

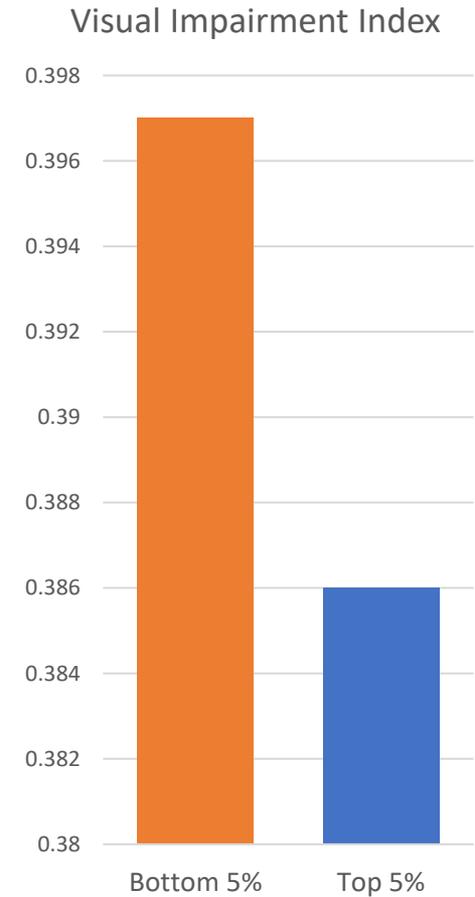
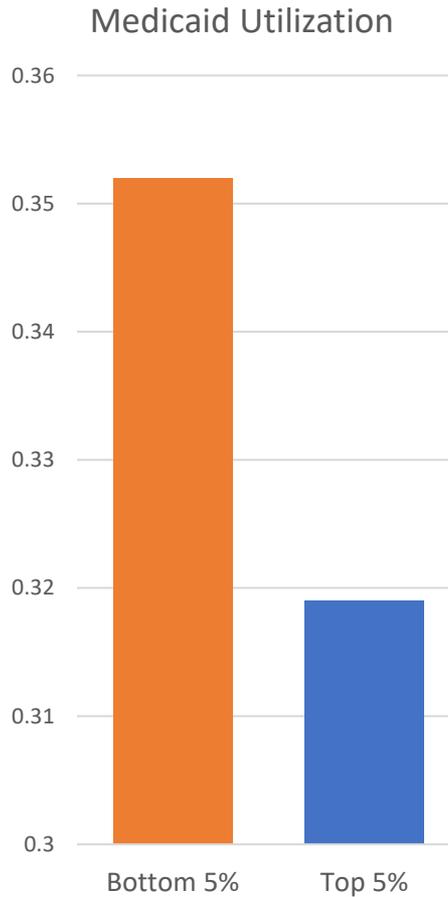
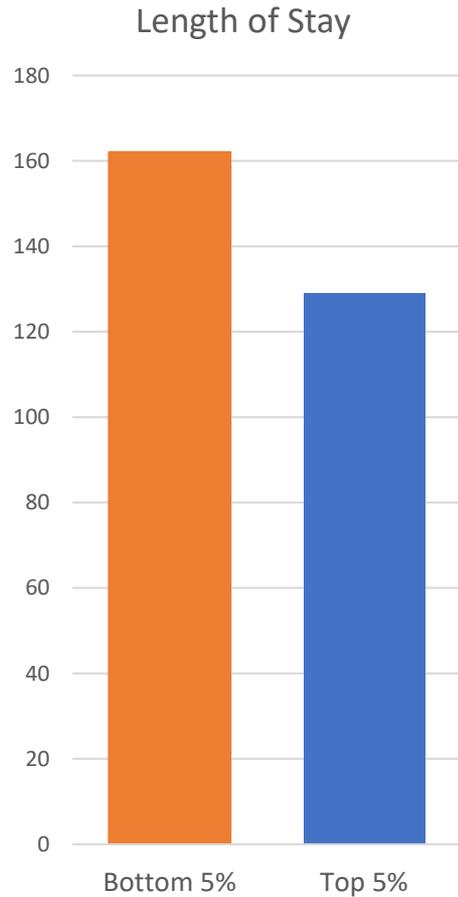
Study Overview

- **Data:** All residents admitted to CA nursing homes between 2004 and 2007.
 - Assessments, claims, enrollment
- **Key challenge:** We don't see applications or know where residents wish they could have gone.
 - How do we prove there's discrimination?
 - Residents on Medicaid and with disabilities live in different geographic areas and *may even have different preferences.*

Identifying Discrimination

- **Idea:** Look for patterns consistent with strategic discrimination.
 - Smart facilities will discriminate more when fewer beds are available.
 - Study identifies discrimination based on this.
- **Discrimination Test:** Do the *same facilities* admit different patients depending on how full they are?

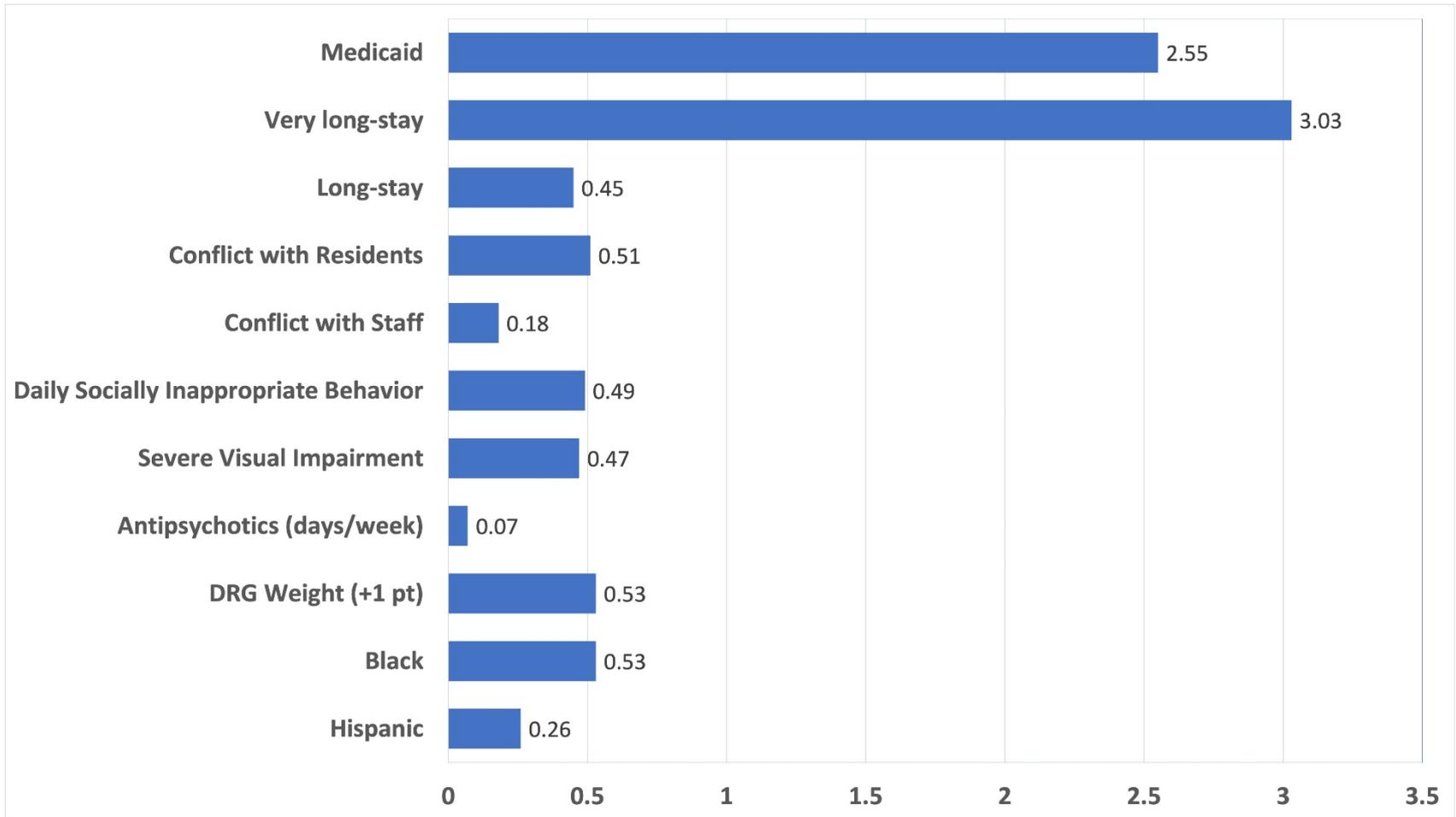
Simple Evidence



Machine Learning

- **Challenge:** Residents have many characteristics: payment source, care needs, race, gender, age, etc.
- **Idea:** Ask a computer to “learn” from the data who is discriminated against based on what types of patients are typically admitted when less full.

Discrimination "Points"



Modeling and Policy Analysis

- **Idea:** statistically fit an economic model of patients' preferences over facilities and facilities' preferences over patients.
 - Common in economics research (especially competition/antitrust).
 - Now common in industry (Amazon, Uber, etc., all have teams that do this).
- **Value:**
 - Precise measurement of the problem.
 - Simulate alternative regulation and policy.

Measuring the Problem

- 19% are not at their first-choice facility.
 - Higher for very long-stay Medicaid (49%)
- Medicaid beneficiaries would gain a lot of value from better access.
- Medicaid beneficiaries do care 35% less about RN staffing.
 - Though, they care much more than naïve approaches would infer.

Alternative Policies

- **First come, first served**
 - Large benefits to Medicaid residents: \$10.09/day
 - Small harms to short-stay Medicare patients
- **Raising Medicaid reimbursements**
 - Matching private-pay costs \$37.26 per Medicaid day and is valued at \$0.72.
 - Access alone isn't worth it. (Need improvement.)
- **Expanding Capacity**
 - Benefits both Medicaid and non-Medicaid patients and benefits can exceed costs.
 - San Diego (+800 beds): \$11,544/day cost, \$27,384/day benefit

Questions?

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