Implementing the HCBS Settings Rule: Protecting Consumers from Harmful Evictions

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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.
Housekeeping

• All on mute. Use Questions function for substantive questions and for technical concerns.
• Problems with getting on to the webinar? Send an e-mail to trainings@justiceinaging.org.
• Find materials for this training and past trainings by searching the Resource Library, justiceinaging.org/resource-library. A recording will be posted to Justice in Aging's Vimeo page at the conclusion of the presentation, vimeo.com/justiceinaging.
• Enable closed captioning by selecting “CC” from the Zoom control panel.
To achieve Justice in Aging, we must:

- **Advance equity** for low-income older adults in economic security, health care, housing, and elder justice initiatives.
- Address the enduring harms and inequities caused by systemic racism and other forms of discrimination that uniquely impact low-income older adults in marginalized communities.
- Recruit, support, and retain a diverse staff and board, including race, ethnicity, gender, gender identity and presentation, sexual orientation, disability, age, and economic class.
Equity for Older Adults Cohort

• Justice in Aging and NCLER are excited to share an upcoming opportunity for legal services programs interested in advancing equity for older adult clients.

• Application coming soon
  • Sign up for NCLER emails at ncler.acl.gov
  • Reach out to stakshi@justiceinaging.org with any questions.
Roadmap to Webinar

• Overview of HCBS Settings Rule.
• Define eviction protections outlined in Rule.
• Share state-specific examples.
• Discuss advocacy strategies to establish adequate eviction protections.
• Q&A.
Overview of Settings Rule
What is the HCBS Settings Rule?

• Establishes minimum standards to ensure that Medicaid HCBS consumers live in settings that are truly non-institutional.

• Rule ensures that residents of HCBS settings have same access to community as other community-dwelling older adults not receiving HCBS.
Implementation

• Published on January 16\textsuperscript{th}, 2014.
• Became effective on March 17\textsuperscript{th}, 2014.
• States were given transitional period through March 17\textsuperscript{th}, 2023 to update their policies and work with providers to comply with Rule.
• On case-by-case basis, CMS may grant states time-limited and issue-specific extensions beyond March 17\textsuperscript{th} to achieve compliance.
What Does the Rule Require for HCBS Settings?

• Rule establishes basic community-integration requirements for all HCBS settings where consumers live and receive services.

• The Rule establishes additional conditions for “provider-owned or controlled settings,” like assisted living facilities and group homes, to protect the rights of residents of these settings, because a single entity controls both housing and services.
Issue Spotting: Weak Eviction and Due Process Protections

• Current concerns include need to ensure eviction and due process protections for residents in settings owned or controlled by HCBS service provider.

• Your knowledge of this issue is critical.
  • To ensure baseline protections for HCBS consumers.
  • To inform future advocacy efforts at state and federal levels.
    • Strong advocacy is needed to ensure ongoing compliance and implementation.
High Level Overview: Eviction and Due Process Protections in the Rule

• HCBS consumers in “provider-owned or controlled” residential settings should receive SAME protections that non-HCBS consumer gets under state’s landlord-tenant law

• A resident of a Medicaid HCBS setting should not receive worse treatment than residents in non-Medicaid HCBS settings.
Looking Carefully at the Eviction Protections
Protections Against Eviction
(1 of 4)

• “The unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services,...”
“... and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity.”
Protections Against Eviction (3 of 4)

• “For settings in which landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant,...”
Protections Against Eviction (4 of 4)

• “... and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction’s landlord tenant law.”

• 42 C.F.R. § 441.301(c)(4)(vi)(A).
Short Version of State’s Obligation

• Providing “same responsibilities and protections from eviction” as provided under landlord-tenant law ...; or

• Ensuring that residency agreement provides protections “comparable to those provided under ... landlord tenant law.”
Ways for State to Explicitly Comply

• Via landlord-tenant law.
  • Specifying that landlord-tenant law applies, or
  • Supplementing landlord-tenant law with good-cause requirements appropriate for residential facilities.

• Requiring written agreements that establish protections equivalent to landlord-tenant law.
  • Developing compliant template agreement, or
  • Requiring that facilities develop compliant agreements.
One Other Common Approach: Administrative Appeal

• Creating administrative appeal system that establishes “comparable” protections.
  • Not technically in compliance with federal Rule -- unless written agreement references state regulation.
  • In any case, may be seen as good outcome.
Protections Through Landlord-Tenant Law
State-Specific Examples

• Examples of:
  • Landlord-tenant law supplemented by assisted living good cause requirements.
  • State requiring written agreements.
  • State developing template agreement.
  • State developing regulations.
Disclaimer

• References to state laws based on review of laws and documents -- not meant to suggest complete understanding of state’s legal landscape.

• State-specific illustrations used to illustrate potential problems and possibilities.
Potential Limitations of Landlord-Tenant Law Only

• Limited substantive protections. Landlord-tenant law likely will bring in a right to trial, but maybe little else.
  • E.g., tenancy at will.
  • Broad authorizations for eviction, e.g., nuisance.

• Potentially short notice.
Example of Landlord-Tenant Plus

• California assisted living law explicitly incorporates unlawful detainer protections.

• Regulations add overlay of good cause requirements
  • E.g., non-payment,
  • Increased need beyond facility’s capacity.
    • 22 Cal. Code Regs. § 87224 (Residential Care Facilities for the Elderly).
California Implicitly Incorporating Other Landlord-Tenant Laws

- Stating that HCBS residential agreements cannot modify tenant rights, including
  - Implied warranty of habitability.
  - Return of security deposit.
  - Limited right of landlord to enter unit.
    - Attachment X to California Statewide Transition Plan, Residential Rental Agreements Guidelines.
Evaluating Landlord-Tenant Protections

• State that applies landlord-tenant law likely in compliance with HCBS Settings Rule.

• But landlord-tenant law may be uncomfortable fit for residential facility.
  • Possibly great discretion for “landlord” to evict.
  • Or, even if good cause protections are strong, eviction case may be awkward venue for adjudicating (for example) resident’s health care needs.
Requiring Written Agreements
Restating Federal Rule in State Regulation, with Little Else

• Restates federal Rule with almost identical language.
  • Unit owned or rented under legally enforceable agreement.
  • Consumer has same protections as provided by landlord-tenant law.
  • If landlord-tenant law doesn’t apply, State must ensure that a written agreement provides protections comparable to those in landlord-tenant law.
Utah: Four Self-Assessment Eviction Questions for Facilities

• Self-Assessment Question #1:
  • “Does the setting provide the individual(s) with a lease or, for settings in which landlord tenant laws do not apply, a written residency agreement?”
Self-Assessment Question #2

• “Does the setting inform the individual(s) of their rights regarding housing and when they could be required to relocate?”

  • Critique: Focused on being “required” to relocate, with no mention of appeal rights.
Self-Assessment Question #3

• “Does the setting inform the individual(s) of how to relocate and request new housing?”
  • Critique: Again, no sense that consumer might have a right to stay. Focused on expediting “relocation.”
Self-Assessment #4

“Does the written agreement include language that provides protections to address eviction processes and appeals comparable to those provided under the jurisdiction’s landlord-tenant laws?”

• Critique: Almost word-for-word from federal Rule. Little assurance that agreement actually is compliant.
Determining Compliance in Utah

- State assesses each provider, based upon provider self-assessment, state review, and sometimes other factors.
- Providers told whether they’re
  - Fully Compliant;
  - Not Yet Compliant; or
  - Not Compliant.
Moving Towards Compliance

• Non-compliant facilities must develop and submit remediation plan.

• State will take various steps to assist providers to come into compliance.
  • Extensive discussion focuses almost exclusively on whether residential setting has qualities of institutional setting.
Utah’s Assisted Living Law Addresses Eviction

- Limited reasons for eviction, including:
  - Facility can’t meet resident’s needs.
  - Non-payment.
  - Resident fails to comply with facility policies.

- Resident can “contest” eviction by requesting “informal conference” with facility.
What’s Happening in Utah?

• (Best-case scenario) Residential agreements combine landlord-tenant protections (right to trial) with assisted living eviction limits;
• Residential agreements reference landlord-tenant eviction protections;
• Residential agreements broadly reference landlord-tenant laws; or
• Residential agreements don’t address issue in any meaningful way.
Developing Template Agreement
N.J. Community Care Residence

• Written lease agreement must give consumer “all the rights and responsibilities accorded by New Jersey tenant and landlord law, and shall be comparable to leases for all other persons in the State.”

• If no formal lease, “consumer residency agreement” gives consumer “same protections against unlawful evictions as would otherwise be provided by a signed lease agreement.”
  • N.J. Admin. Code § 10:44B-2.2(g).
N.J. Sample Agreement for Persons with Developmental Disabilities

• Written notice to consumer of intent to terminate services & residence.
• Written notice to state, including evidence supporting claim.
• State determines whether provider has grounds for terminating residence.
• Consumer can appeal to state, through process to appeal termination of services.
Potential Problems with NJ Sample Agreement

• Does not acknowledge applicability of landlord-tenant protections.
• Fails to address other legal protections.
• Does not address other protections of HCBS Settings Rule.
N.H. Is Combining Residency Agreement and Regulations

• Draft residency agreement:
  • 90 days advance notice.
  • Resident can request “team meeting” for provider to reconsider.
  • Right to appeal under draft regulations, if provider is “agency residence.”
Question: Do Regulations Set Standards or Contractual Terms?

- N.H. is proposing regulations that dictate terms of residency agreement, rather than setting standards for facility.
  - *See, e.g., Proposed N.H. Code Admin. R. He-M 310.10(b).*
Issues in N.H. Draft Regulations

• Note: State may claim protections aren’t feasible/practical.
  • E.g., family residences.
    • Appeal right only for “Agency Residence” in proposed N.H. Code Admin. R. He-M 312.
• When consumer supposedly is endangering others.
  • Proposed N.H. Code Admin. R. He-M 310.10(c)(4)(c) (72-hour notice when behavior “poses a serious threat of bodily harm” to others).
Expansive “Good Cause” Justifications for Eviction

• “Other good cause, which need not be based on the action or inaction of the resident including, but not limited to any legitimate business or economic reasons.”

Eviction Threatened –
Now What Do You Do?
First Rule of Defending Evictions in Residential Facilities

• Don’t Move Out!

• Yes, this is obvious ... but, due to the power dynamic within facilities, residents can be very hesitant to contest an eviction.
Utilize Available Appeal Processes

• Either:
  • Unlawful detainer processes under landlord-tenant law;
  • Landlord-tenant look-alike processes as set forth in residency agreements; or
  • Administrative appeal procedures.
Look for Extras in Landlord-Tenant Law

• Assert a right to advantages provided under landlord-tenant law.
  • E.g., notice.
  • Discovery rights.
  • Obligation for landlord to file action, rather than tenant/resident making appeal.
Problem: State Has OK’d Weak Residency Agreements

• Problem: Residency agreement merely repeats federal regulatory language about “comparable” protections.

• Advocate’s Response: The weak language effectively incorporates all eviction-related provisions of state’s landlord-tenant law.
Facility’s Non-Compliance Should Not Be Defense

• Argue for appeal rights even if facility has failed to include required contractual language.
  • E.g., facility estopped from evicting.
  • Eviction-related rights are implied term of residency agreement.
  • Resident is third-party beneficiary of contract between state and facility.
What If the Problem Is State Non-Compliance?

• Administrative advocacy with state and with CMS.

• Maybe argument for writ under state law on grounds that state has shirked clear nondiscretionary duty.

• In individual eviction defense, probably need to be creative to assert defense based on state non-compliance.
Housing Perspective
How to Determine if Residents Have At Least the Same Eviction Protections as Tenants

• Advocates doing advocacy on this issue should understand relevant landlord-tenant laws.

• Advocates should compare eviction protections that tenants receive to rights that residents receive under state regulations/residency rights agreements.
Examples of What to Look for in Your Local Landlord-Tenant Laws

- Notice requirements (time periods, content of notices, how to deliver)
- Grounds for eviction
- Time to remedy lease violations
- Right to pay and stay
- Right to discovery
- Rules against self-help evictions
- Rules against retaliatory evictions
- Who can enforce eviction judgments (usually law enforcement)
- Appeal rights
- Keep in mind landlord-tenant law also includes case law
- Right to counsel for eviction proceedings
Systemic Advocacy: Pros/Cons of Landlord-Tenant Court

• Should HCBS evictions be handled through landlord-tenant courts (vs. administrative process)?
• Pros:
  • Judicial landlord-tenant process is better than none at all, may deter providers from pursuing evictions.
  • Some courts have established eviction diversion programs to prevent evictions.
  • Growing number of jurisdictions have a tenant right to counsel.
Pros/Cons of Landlord-Tenant Court, Continued

• Cons:
  • Process generally makes it easy for landlords to obtain eviction judgments.
  • Court system can be harder to navigate for unrepresented clients.
  • Eviction records may pose future barriers.
  • Judges may not be familiar with issues arising in HCBS settings.
Individual Eviction Defense: Fair Housing Act Is Also Important

• Federal Fair Housing Act (FHA) applies in many HCBS settings, including assisted living facilities.

• Residents in these settings have right to reasonable accommodations (RAs).

• Denial of RAs for people with disabilities is FHA violation.

• RAs can be used to defend against evictions (and are used all the time in eviction defense in traditional housing contexts).
Examples of Reasonable Accommodation Requests

• Assisted living facility wants to evict a resident due to disruptive behavior or behavior that is allegedly a danger to others. The resident has a mental health condition that contributes to these behavioral issues.

• Example RA Request: Ask facility to rescind eviction notice to allow the resident an opportunity to try a new treatment plan/medication for mental health issue.

• At minimum, can make RA request for delay in eviction so resident can find appropriate new housing.
Fair Housing Administrative Complaints

- If facility is not willing to negotiate and denies RA, resident can file an administrative fair housing complaint (can also file FH lawsuit, but more complicated).
  - Can also raise FH claim as affirmative defense in eviction action in state court.

- If necessary, HUD or state/local civil rights agency handling case on behalf of HUD can intervene to try to stop eviction while FH complaint is pending.

- Contact a Fair Housing Initiatives Program (FHIP) or other fair housing organization for representation or help with making RA requests, filing FH complaints.
Consult with Housing Advocates

• Consult with advocates who handle eviction defense cases in landlord-tenant court and who understand the FHA, FH administrative complaint process.

• Consider collaborating on systemic advocacy and refer cases as appropriate.
HCBS Settings Rule Resources

CMS Materials

- Home & Community Based Services Final Regulation
- Home & Community Based Services Training Series
- Statewide Transition Plans Approval Process

HCBS Advocacy Coalition

- HCBS Advocacy Coalition Settings Rule Toolkit

Justice in Aging

- New Toolkit to Help Advocates Push for Strong HCBS Rules
Let’s Stay in Touch!

• Federal and state procedures are a work in progress.
• Let us know if we can assist you in your work.
  • We will continue to advocate with CMS for federal-level improvements.
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Questions?

Note: due to significant variations in state landlord-tenant law, we cannot answer state-specific landlord-tenant law questions during this webinar.

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