

Rights and Wrongs in Medicaid-Funded Assisted Living

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INTRODUCTION

State Medicaid programs generally can pay for assisted living care through Medicaid home and community-based services (HCBS). If a facility is certified to accept Medicaid HCBS payment, it must comply with relevant federal law. As discussed below, however, many facilities violate the law. This guide gives residents and their representatives the advocacy tools to force facilities to follow the law and treat residents appropriately.

The term “assisted living facility” applies here to a licensed residential facility that provides meals, assistance with activities of daily living, and other services to a resident population of older persons. Depending on the state, this type of facility could be licensed as “assisted living,” but it also might be licensed as (for example) an adult foster care home or a residential care facility for the elderly.

Although this guide focuses on assisted living, the relevant federal laws cover any similar residential setting reimbursed through Medicaid HCBS. Accordingly, this guide’s advice generally applies also to HCBS-funded facilities for persons with disabilities, such as group homes and adult residential facilities.

RIGHTS AND WRONGS

Autonomy and Privacy

WRONG:

A resident cannot do longtime exercises because the facility does not make appropriate space available.

RIGHT:

Under federal regulations, a resident must “have the freedom and support to control their own schedules and activities.” Accordingly, the facility should arrange for an appropriate space to be made available for an adequate number of days per week, with sufficient time per session.

WRONG:

Residents share a bedroom with no barrier between them.

RIGHT:

Federal regulations require that “[e]ach individual has privacy in their sleeping or living unit.” A shared bedroom, at a minimum, must have a curtain for visual privacy.

WRONG:

Facility staff go in and out of a resident's room whenever they please.

RIGHT:

Entrance doors to the living unit must be lockable by the resident, with only appropriate staff having keys. Because residents have a right to privacy, staff should knock and ask permission to enter, even if the door is unlocked or they have a key.

WRONG:

The facility tells a resident that a roommate is moving into the living unit tomorrow.

RIGHT:

Federal regulations say: "Individuals sharing units have a choice of roommate in that setting." Accordingly, the facility should consult with all affected residents in deciding who will be sharing with whom.

Decorating and Furnishing the Living Unit

WRONG:

The facility tells a resident that they cannot bring in furniture or hang anything on the walls.

RIGHT:

A resident has the right under federal regulations to furnish and decorate their living unit.

Food

WRONG:

The facility serves breakfast, lunch and dinner, but offers no snacks or other food.

RIGHT:

Under federal regulations, a resident must "have access to food at any time." Food should be available whenever a resident may want something to eat, night or day. Furthermore, for this right to be meaningful, food options should be reasonably appropriate and appealing. It would not be adequate, for example, for a facility to claim compliance by leaving out a few bags of snack crackers.

Access to the Community

WRONG:

When a resident says they want to leave the facility (go shopping, attend church service, etc.), the facility's only assistance is to provide the resident with a city bus schedule. Or possibly the facility will provide transportation but only one morning a week, and only to one shopping center.

RIGHT:

The facility must support residents' "full access" to the community, including the ability to engage in community life and receive services. The level of needed support will vary with the resident, and could include transportation and hands-on assistance.

Visitors

WRONG:

The facility sets visiting hours from 10 a.m. to 8 p.m.

RIGHT:

Under federal regulations, a resident has a right "to have visitors of their choosing at any time." "Any time" must mean exactly that: 7 days a week, 24 hours a day. If a resident with a shared living unit chooses to accept a visitor when the roommate is sleeping, the resident and facility should arrange for an appropriate place for the visit, away from the sleeping roommate.

Physical Access and Freedom to Move

WRONG:

The bathroom door is too narrow for a resident's wheelchair.

RIGHT:

Under federal regulations, the facility must be "physically accessible" to the resident.

WRONG:

Using a vest restraint, the facility prevents a resident from leaving their chair.

RIGHT:

Facilities cannot use physical restraints: federal regulations guarantee "freedom from coercion and restraint."

Evictions; Unit-to-Unit Moves Within Facility

WRONG:

The facility tells a resident that they are being evicted and have no right to appeal.

RIGHT:

The resident must have eviction protections and appeal rights comparable to a tenant's rights under the state's landlord/tenant law. Either the state's landlord/tenant law includes assisted living or, if not, a written residency agreement with the facility must create comparable protections. See the Justice in Aging guide [Defending Evictions from Medicaid-Funded Assisted Living Facilities](#) for detailed discussion on how to defend against wrongful assisted living evictions. Also, individual assistance may be available from a local legal services office.

WRONG:

A resident has been paying the private-pay rate for one year but, after spending down savings, now is eligible for the HCBS program. The facility refuses HCBS Medicaid from the resident and says that the resident has to pay the private-pay rate or move out, claiming that the admission agreement obligates the resident to pay the private-pay rate for at least 18 months before converting to Medicaid.

RIGHT:

Because the facility is Medicaid-certified, a federal regulation requires that the facility accept Medicaid as payment in full. This follows the general rule that when a health care provider is certified for a patient's health care coverage (Blue Cross, for example), the provider must not charge the private-pay rate and must instead bill the insurance coverage.

WRONG:

The facility tells a resident that they must move from one living unit to another.

RIGHT:

Under the federal regulations, the living unit is a "specific physical place" rented under a "legally enforceable agreement." The resident's situation is comparable to living in an apartment. Just as a landlord generally cannot force an apartment tenant to move from one apartment to another, an assisted living facility cannot force a resident to move to a different living unit.

WHEN FACILITY VIOLATES THE LAW

When a problem arises, the resident should speak first to the staff member(s) most directly involved and then, as necessary, to a supervisor or facility administrator. Depending on the state, the [local long-term care ombudsman program](#) may be able to give advice and assist with advocacy.

If the facility digs in its heels, the resident should file a complaint with the state. Ideally, the state assisted living licensing agency will have authority to enforce the relevant federal laws. In many cases, however, authority to enforce the federal regulations will rest with the state Medicaid agency, which may not yet have a good enforcement mechanism. The majority of these federal regulations did not become effective until March 2023.

Because of the relatively recent effective date, many state enforcement systems are extremely limited at this time. Systemic advocacy is sorely needed. Residents, resident representatives, and resident advocates should advocate with state officials to create effective systems for accepting consumer complaints and enforcing federal regulations against noncompliant facilities. Please feel free to contact Justice in Aging if we can assist.

LEGAL PROTECTIONS REDUCED THROUGH INDIVIDUAL SERVICE PLANS

Under limited circumstances, some of the resident rights discussed above can be reduced through the resident's service plan, which is developed by the agency operating the HCBS program. Specifically, only the following legal protections can be reduced:

- Rental of a “specific physical space” in the facility.
- Eviction protections comparable to protections available under landlord/tenant law.
- Lockable doors.
- Choice of roommate.
- Decorating and furnishing living unit.
- Freedom and support to control schedules and activities.
- Visitors at any time.

Importantly, reductions to legal protections are allowed only after the facility first has tried “less intrusive methods,” and only if the resident (or resident's representative) agrees to the reduction. Any reduction must be proportionate to the relevant issue, so the resident loses legal protection only to the extent necessary.

Note some ambiguity in the potential reduction of a resident's privacy rights. While the protection for “privacy in their sleeping or living unit” can be reduced, no reduction is authorized for a broader requirement that a facility ensure the resident's “rights of privacy, dignity and respect.”

ADVOCACY TIP

Remember: legal protections can be reduced only if the resident (or resident's representative) consents. If a resident does not want a legal protection reduced, they should give the facility clear written notice that they do not consent to any reduction.

CERTAIN LEGAL PROTECTIONS DELAYED IN SOME STATES

Because of lingering effects of the COVID-19 public health emergency — labor shortages, most prominently — some states have permission from the federal government to delay implementing a few of the federal regulations discussed above. These temporary delays are laid out in state-specific Corrective Action Plans (CAPs) [available on a federal website](#).

Residents, resident representatives, advocates, and other interested persons should review the federal website to see if the state is operating under a CAP and, if so, which laws currently have delayed implementation. Note that under federal policy the following legal protections cannot be subject to delay under a CAP:

- Privacy.
- Freedom from coercion and restraint.

- Rental of a “specific physical space” in the facility.
- Eviction protections comparable to protections available under landlord/tenant law.
- Lockable doors.
- Decorating and furnishing living unit.
- Visitors at any time.
- Access to food at any time.
- Physical accessibility.
- Facility required to accept Medicaid from Medicaid-approved resident.

FINDING THE LAW

Most relevant federal regulations are found at section 441.301(c)(4) of Title 42 of the Code of Federal Regulations. The federal regulation that requires Medicaid-certified facilities to accept Medicaid from a Medicaid-approved resident is section 447.15 of Title 42.

WORKING TOGETHER TO SUPPORT ASSISTED LIVING RESIDENTS

Much advocacy work remains to be done. On the federal level, Justice in Aging and other national stakeholders advocate regularly with federal Medicaid HCBS officials to improve how federal laws are implemented and enforced across the states. If you see problems in your state, please let us know. We will do what we can to give you some guidance and, as appropriate, seek action on the state or federal level. Justice in Aging can be reached at info@justiceinaging.org.