

# JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

## Advocacy Strategies When Nursing Facilities Won't Allow Residents to Return After Hospitalizations

Webinar Transcript

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Eric Carlson:

Welcome to the webinar. Justice in Aging is a nonprofit organization that focuses on benefiting and protecting older Americans, particularly those with limited resources or who have been historically disadvantaged. I'm Eric Carlson, I'm presenting the webinar today. Regarding housekeeping. Use the questions button for submitting substantive and logistical questions. I'll answer some questions at the end of this webinar, time permitting. Also, just note talking about the end of the webinar, there'll be a quick survey, I ask that if you can just take a minute and fill it out. We do intend to do this type of nursing facility advocacy webinar on an ongoing basis, and there's an opportunity in the survey to list topics that you'd like to be addressed in the future. So, we'd really appreciate it if you'd be able to pitch in and provide your input on the survey as to future topics. And if you would like to receive policy alerts from Justice in Aging, go to our website, there's a signup button on the upper left corner.

Our work focuses on equity, including advancing equity in our policy advocacy, addressing the inequities caused by systemic racism and other forms of discrimination and maintaining a diverse staff and board of directors. Our website has many resources for advocates. There's just one here to flag, two resources that are specific to nursing facility advocacy. First, the guide 25 Common Nursing Home Problems and How to Resolve Them. This guide is useful for both professionals and consumers. Also, we offer a toolkit for Nursing Facility Eviction Defense, and I'll be referencing that toolkit during today's presentation. So, we start with the relevant federal law.

The federal law addresses both bed holds and the right to return. Those are different things, so we should be clear to distinguish between the two. In a bed hold, the room or bed is held vacant while the resident is away. On the other hand, when a resident has a right to return, the room is not held for the resident, but they have the right to return to the facility either in the same room

or another room. The right to return then is a cheaper option because neither Medicaid nor the resident have to pay for a vacant room or bed.

So now let's move and start with the specifics of federal law. The law applies to any nursing facility that's certified for Medicaid. The bed hold notice provisions, which we'll discuss in a minute, apply to all residents in the facility, but the right to return only applies to those residents who would be returning to the facility under Medicare or Medicaid reimbursement. We'll discuss the federal bed hold notice rules. Again, the notice rules in a minute, but to understand those we need to understand the state bed hold provisions first. So, the substantive bed hold rules are found in state law. These state laws generally require a nursing facility to hold a bed for a certain number of days if they're paid. The Medicaid program generally will pay for such bed holds. The specific limit of days varies from state to state in a week, 10 days, two weeks.

Some states condition bed holds on a nursing facility having a high occupancy rate. This is particularly for Medicaid purposes because it doesn't make sense to pay for a vacant room if a facility has all sorts of vacancies already. Just to note here, also, even if hypothetically there's no state law bed hold period or if the resident has exceeded the period beyond seven days, for example, beyond 10 days, the resident may have a contractual claim to hold a bed. So just assume that the resident has paid in advance for the month of February and then goes to the hospital on February five. The resident would have a strong claim to hold a bed just through February based on the advanced payment.

So, before we get to federal law, here are the citations for your future reference, you will have access to these slides. They're on our website. I believe they'll be sent you in an email as well. I want to highlight the third item, which are the Surveyor's Guidelines. You can find these on the internet, just type in Appendix PP, the letter P twice in any search engine and it'll be the first result. These Surveyor's Guidelines provide extensive detail, extensive detail. They're 600-700 pages long, so extensive detail to the federal nursing facility regulations and by and large, they tend to be quite pro-resident in orientation. So, you can find a lot good material there in the Surveyor's Guidelines.

You'll see that when we talk about the federal law here on several occasions, it applies to residents, not just who are hospitalized, but also those who are on "Therapeutic leave." So, note that therapeutic leave is defined as an absence for a purpose other than hospitalization. So that just about covers it, right? The federal laws generally apply to any temporary absence because the law applies both to hospitalizations and to therapeutic leaves, which are defined as everything but... Absence for everything other than hospitalization.

Now finally maybe let's get to the federal law, the substance of it pertaining to bed hold notice. The federal law requires a facility to give written notice of a resident's bed hold rights, if any. The notice must be given to the resident and the resident's representative. It must include the things listed here. The length

of bed holds under state policy. The ability of the Medicaid program to pay for bed holds, the facility's bed hold policies and the resident's right to return under federal law. And then a second notice must be given before a hospitalization or therapeutic leave, excuse me. This one, the one I just mentioned is given before a hospitalization, before a hospitalization or therapeutic leave. And facilities generally give this notice at the time of admission along with the admission agreement and other notice documents. So oftentimes there's extensive documentation here, and among those many pieces of paper will be this notification of bed hold rights, which will list the things from the previous slide about the duration and the ability for Medicaid payment and the federal right to return.

And then now we get to the second notice that's required under the federal law. This notice has to be given when the resident is leaving, at the time of leaving for a hospitalization or a therapeutic leave. Again, the notice has to go to the resident or the resident's representative, and this notice informs the resident of any right to a bed hold and also the right to return, the information that you need to know at that moment. Look, you're leaving. Do you want to hold the bed? You also have a right to return, which we'll discuss in them in a minute. And so, this is the right to return under federal law. The second part of the federal law, the first was the notice of the bed hold rights, which is like I said, the bed hold rights themselves are set by state law. Then the federal law requires notice of that.

And then the second part of the federal law is not focused on notice. Instead, it establishes a resident's right to return. This right applies when a resident has exceeded a bed hold period or there wasn't a bed hold period to begin with, or the resident chose not to request a bed hold. For this to be in play, the resident has to... Coming back from a hospitalization or therapeutic leave must need nursing facility services and be eligible for Medicare or Medicaid payment of nursing facility expenses. Not applied to when someone's coming back paying out of pocket. As a practical matter, most of these contested cases concern residents returning under Medicaid since facilities usually are eager to get the Medicare reimbursement, so they're less likely to deny somebody the right to return when somebody's coming back under Medicare.

But if people are coming back under Medicaid, which is a lower rate, then it's much more likely as a practical matter for a facility to say, no, we're not letting you return to this facility. Under this federal right to return, the resident can return to the same room if it's available. Otherwise, if it's not available, the resident has a right to return to the first available semi-private bed in the facility.

So now we'll get into some of the contested part. So far, we've just presented this as if, oh, it's easy. You have a right and you can hold the bed and you can come back. But as those of you in the audience I'm sure understand that oftentimes it's not that easy and there's some advocacy that needs to be done.

Notice here the Surveyor's Guidelines, Appendix PP to the State Operations Manual. A facility cannot decide unilaterally to lock a resident out if a facility thinks it has grounds for involuntary transfer/discharge, there's only six reasons for involuntary transfer/discharge. One of them, for example, is your needs can't be met in nursing facility. So, if that's the case, for example, the facility has to give a transfer/discharge notice and the resident has a right to appeal through an administrative hearing. In the meantime, the resident has a right to return and live in the facility while the transfer/discharge appeal process is pending.

So, the short of that is a facility just can't wrongfully evict, it can't skip the appeal rights by just trying to make these decisions while the resident happens to be absent on a hospitalization. You can understand in a landlord tenant situation, the landlord doesn't have the right to lock out the tenant just because the tenant is gone for a day or two or a week. Same thing here. Even though the resident is hospitalized, the facility doesn't have a right to just decide, we're not taking you back and we're just going to evict you unilaterally. You got to give notice. The resident has a right to appeal and while it's pending, the resident has a right to go back to the facility. Often, you'll see situations where the facility flatly refuses to accept a resident back and points to the resident's condition when leaving the facility.

Say, "Well, we can't... This person was..." Whatever their condition is, they're having heart problems or they had some sort of debilitating wound or who knows what, they hadn't recovered from a hip replacement adequately or there's some complications. But if the hospital's ready to release the person, the resident likely is in a much better situation now. That's why they're ready to leave the hospital. The Surveyor's Guidelines recognize this and they require that the facility not base decisions on the resident's prior condition, but instead communicate with the hospital to ascertain the resident's current condition. And also note that a facility cannot refuse a resident based on a payment dispute saying, "We're not taking you back. You owe us money." The Surveyor's Guidelines here point out that the right to return is not affected by money allegedly owed. The language here refers to outstanding Medicaid balances. So that's the outline of the federal law. So now we'll transition to talking more specifically about advocacy strategies. Like I said, well it's good we know what the law is, but how does this play out in practice?

The first step, let's say there's a dispute or at least there's a hint of the dispute, there's a possibility of a dispute. As an initial step you want to make clear requests to nursing facility and have those requests documented in writing. This is true for bed holds and also true for requests to return to the facility. In returns to the facility, don't be deterred if it's difficult to prove that the facility has a vacancy, they have the right to come into the next vacant room. The problem there is that the facility really has that information about how many vacancies they have. And so, you don't want to be stymied by a facility that's just claiming that there's no vacancy. The point that you want to make is that

the resident wants the next available vacancy and you're not going away just because the facility might say that they have a no vacancy today.

It's an ongoing right, you have the first available bed if it's not today, what about tomorrow? What about the day after tomorrow? What about the day after that? Make it clear that the facility isn't going to evade their responsibility just by one time saying, "No, there's no vacancy here today." That's not the end of the matter. It's an ongoing right for the next available spot in the facility. As is true in most facility advocacy, you'll want to talk to the administrator, the director of nursing. Those are the two most likely person. You want to cite the relevant law so they know that you're knowledgeable and unlikely to give up. I think it is helpful to cite the Surveyor's Guidelines. Oftentimes the people who work in the nursing facilities are not lawyers and they're not accustomed to talking about the code of federal regulations or the... But if you just talk more broadly about regulations, so-and-so or about the specific FTag number in the Surveyor's Guidelines, that may make more sense to them because their resources to the law is probably the Surveyor's Guidelines rather than a clean copy of the federal regulations.

So, cite the relevant law and also you might enlist the assistance of the Long-Term Care Ombudsman Program, which may be able to help out with... May have a relationship with the facility or certainly have some knowledge themselves and can be a really good resource in these situations. So, let's assume that the facility is becoming a problem, is not just immediately recognizing the law. I want to talk about three potential advocacy strategies if the facility digs in its heels. File a complaint with the inspection agency, file a transfer/discharge appeal, and or request immediate relief from a local state court.

In thinking about the best strategy, you want to keep in mind that you need quick action. You know that the hospital is pressuring the resident to get out as soon as possible, and if you can't get quick action, it looks like it's dragging on, then the resident loses hope quickly. I mean, I'm not blaming people, that's just the reality. They're getting all this pressure from the hospital and if that plays out, the resident's more likely to succumb to pressure and just move on to some other facility that the hospital will send them to. So, it's oftentimes really important to make something happen quickly or get some momentum going so something will happen quickly.

Otherwise, if it looks like there's no remedy in sight, then the residents are more likely to lose hope and consent to just go in wherever the hospital might send them. There's some pros and cons of complaining to the inspection agency. Personally would be most comfortable with filing a complaint with the inspection agency if I had a good sense with some kind of personal relationship, with some history, that the agency would take quick strong action on one side of the balance here.

But on the other side, there's also a danger that the agency will take too long or decline to find a violation just for whatever reason find that a deficiency isn't warranted and that's problematic. It is worse than nothing because down the road the facility might incite the inspection agency's inaction as proof that the facility is right to exclude the resident. If the agency just says, "Well, we can't confirm this allegation." And that may be for whatever reason, but the facilities may well cite it as proof that they are right. So, if you're going to go forward with the inspection agency, it really helps to have some reasonable expectation that they're going to do the right thing and do it reasonably quickly.

Another possibility is making a transfer/discharge appeal request. So just very briefly, the very short version of the transfer/discharge rules, there's only six reasons for being forced out from a nursing facility. Nursing facility can't meet your needs. You don't belong in a nursing facility anymore. You don't need nursing facility care anymore. Actually, you're a danger to the health of others, you're a danger to the safety of others. You haven't paid or the facility is going... It's not going to be operating as a nursing facility anymore. It's closing. And in those cases, generally the facility gets a 30 day notice and then you can request an appeal and you get an administrative hearing and then the hearing officer listens to both sides and rules. The advantage there is you get a hearing, that's better than making a complaint because there it's not in your presence and the licensing agency just will or will not issue something that verifies a deficiency.

The bad news is that the timing may not be good and the hearing maybe... It's going to vary from state to state, maybe won't occur for a week or two. So usually, I think this delay makes it a poor option. However, it may be the best option if the resident's situation, for example is unsympathetic for a reason or if there's a reason you think that the delay is manageable or if the resident is not the most sympathetic character. And regarding the sympathy factor in these other two strategies, make an administrative complaint or filing a court action, I'll talk in a second. You're asking an agency or court to take emergency action to protect your resident. You're going to say, "You need to do something really quickly, it's really important and you need to move things forward and take quick action."

That's a lot easier when your resident has clean hands and just can be presented as extremely sympathetic. But if it's problematic, some of the resident's condition may be a little problematic. And I say problematic, not to say that they don't have a right to return, for example, or to assert a bed hold because they do, but just because of the fact pattern is a little messier and it may be more difficult to convince a state court judge, for example, to issue an immediate injunctive relief. But the hearing officers and transfer/discharge appeal, they're more familiar with nursing facility situations. They're more likely to recognize that, yeah, some nursing facility residents aren't perfect people, or their conditions may be a little bit difficult. But so what? They belong in nursing facilities and they have rights and they're accustomed to, depending on the

hearing officer, accustomed to ruling in resident's favor even in sometimes complicated situations.

But that's less true in these other situations where you're asking for immediate emergency relief. So again, just the transfer/discharge appeal, generally it may take too long, but maybe a decent option if the delay is not a particular problem for whatever reason, given the resident's actions and attitude or if the resident's condition is a little bit problematic in a way that might make emergency temporary relief more difficult to get.

Oftentimes speaking of problematic, you get these situations where the facility loses and still doesn't comply. So sometimes in transfer/discharge hearing rules... the agency will issue a ruling that says facility X has to allow resident so-and-so to return. And the facility says, "Well, that's a nice piece of paper you got there, but we don't particularly care. And you can cite us or give us some money penalties, we don't care." And sometimes, unfortunately, state agencies are not particularly good about this and have some, I don't think particularly good arguments, but arguments about why their hands are tied and they can't force the nursing facility to do that.

Anyway, if you find yourself in such a situation, feel free to give us a call or send us an email. They're important situations. The law should be on your side in this situation outside of the regulation here that the federal regulations require that a state agency provide for the resident's return. And also, I'll note here that California Advocates for Nursing Home Reform initiated some litigation in this California District Court case of a couple years back. And the statement of interest from the United States in that case is a really strong statement from the federal government as to the authority of the state to take meaningful action in these situations.

And then that brings us to option number three, which is filing a case in court. All things being equal, I prefer this option, but the court order is going to be accepted as binding. You're not going to have the same problems generally of facilities just turning their nose up at a court order. They're going to abide by it. Also, I think that if you get this in front of a judge, they recognize the unfairness of being locked out without any due process. It's a wrongful eviction, right? And they recognize it. And they also don't have a particular reason to be deferential towards nursing facilities.

And sometimes inspection agencies get so much pushback from nursing facilities that they get a little gun shy, but your local trial court judge won't be doing that much work involving nursing facilities and won't have any particular reason to be deferential towards them. But all of that. So that's good in a perfect world, the world we live in, however, it is more difficult to find a lawyer and it's an expensive process if you're talking about the private bar. And it does take some work from the lawyer's side of it. So, I recognize that it's easier for me to say, oh yeah, you should take this to court than it is to make it happen.

But if you're able to do that, I think it's really powerful. And also, it helps because the nursing facility doesn't expect to find themselves in court. And if they do find themselves in court, it is just a nice wake-up call for them. We certainly hope this training can help in encouraging legal aid and private bar attorneys to accept this kind of case. And we do have some resources. I mentioned the toolkit earlier. The Justice in Aging toolkit has sample documents for filing a court action, both the complaint and the petition for injunctive relief. So, to find that, go to the nursing facility section of our website, and there you'll find the toolkit.

So before closing, let's recognize some other strategies as well. Why should a nursing facility continue to treat residents so poorly and put hospitals in such a bad position? This needs to be recognized as a bad thing. And so, I can imagine doing trainings within the local Aging Network and coordinating efforts by hospitals and hospital discharge planners to let nursing facilities know that this sort of behavior won't be tolerated. And with that Gelila we can check and see if we have some questions that have been submitted.

Gelila Selassie: Yeah, there's a few that we... A couple that we can get to. The first is, if these policies and particularly the right to return policy, does that apply to private pay residents or people in assisted living facilities?

Eric Carlson: No and no. So, the right to return is solely for people coming back to the nursing facility under Medicaid or Medicare reimbursement. So, the bed hold might apply to private pay. If it's a seven-day bed hold, you have the right to pay out of pocket for seven days. Like I said, there's a contractual right as well. But anyway, so no, not private pay for the right to return. And then everything we said here is solely related to nursing facilities. We're talking about federal nursing facility law, assisted living facilities, completely separate. There's no relevant federal law on assisted living, and it would just be a matter of state law. And for what it's worth, the state law is likely to be much sketchier on these sort of questions than as is in the nursing facility context.

Gelila Selassie: Thank you. And then another question is that if a resident is in the hospital and the hospital discharges them to another facility, not their initial facility that they came from, do they lose the right to return to that first available bed from that initial facility?

Eric Carlson: I think you would have to assert... If you were sort of sent with against your will... So, if you didn't say anything, I'm thinking, and you didn't say anything to facility number one, and then you went to facility number two and then a week later thought, I hate facility number two, I want to go back to facility number one. I think you're in trouble there because it looks like you've just made a decision and you're not coming back from the hospital anymore. And I think you'd have a hard time, maybe an impossible time asserting a bed hold or a right to return. But if you asserted that and said, "I want to get back. And the nursing [inaudible 00:29:30] said, "We're not taking you." And you continued



fighting it, indicating that you didn't agree with that, but because the hospital wouldn't hold onto you indefinitely, you ended up in another nursing facility.

In that case, I think you could make a claim. And I recall, it's been back in my direct service days. I can remember a case where I had a client not particularly sympathetic again, but that's why I did the transfer/discharge appeal hearing. It took a couple of weeks to get the hearing. He was in a separate nursing facility while the hearing was pending, we won. And at the end of the day, he moved back to the facility number one.

Gelila Selassie: Thank you. And then I guess this might be the last question is if a family member did not agree to pay for a bed hold but receives a bill from the facility, do they have to pay for the bed hold or does the facility require the family to sign something that says you must pay for the bed hold.

Eric Carlson: It's the resident's responsibility to request a bed hold. I do think it's a little bit complicated. I think in general I can imagine some complications, but in general, I would say for the purposes of answering a webinar question that the resident is a strong position, you are given a bed hold notice under these provisions and you are told, do you want to hold the bed? The facility has to give you notice that gives you that option. And so that indicates that that's your decision point as a resident. So yeah, then the facility can't just say, "Oh, by the way, while you were in the hospital, we just chose to keep your bed vacant. Now please pay us for your vacant bed while you weren't here, even though you never asked for it."

I've clearly talked myself into the proper answer to that question that it's a resident's option. The resident is given notice, the resident has to assert that bed hold. And in general, I obviously don't know what the specific facts are in any particular situation and maybe driving this question, but the facility can't unilaterally decide without a request by the resident to bill the resident for a room during days when the resident wasn't there.

Gelila Selassie: I believe that is it. There were a couple questions about resources for help with appeals or other information. I don't know if you want to touch on that, Eric.

Eric Carlson: Oh, the question is just broadly what other information is there out there.

Gelila Selassie: Right, yeah, if you have any resources.

Eric Carlson: Yeah, we've got a toolkit. It's broader than what I said that I just talked about the right to return stuff. And there's also information about the transfer/discharge appeal hearings themselves. There's issue spotting, initial introductory paper. There's some other maybe a half dozen papers on common problems like walking through some of the most common eviction related issues and why and how the resident can win. And then also there's some sample

administrative appeal hearing briefs on some of the most common issues as well.

So, I will just go back to our eviction toolkit and note that it's got a lot of material in there. And then also you would look at the Surveyor's Guideline. The federal law, but also for all these regulatory provisions, pull up the particular regulatory subsection in the Surveyor's Guideline as well. And there's likely going to be a couple pages of discussion related to those regulatory provisions. Like I said, they tend to be resident friendly. It's always worth the time to at least look and see what you could find.

Gelila Selassie:

Great. I think that's it then.

Eric Carlson:

Okay. Well, thank you. It's been a pleasure presenting this. And I'll just remind folks if you can... Or ask people, request them. You'll get a survey immediately after signing out here, the survey among other things will ask you if you have any ideas for future topics and we will take a look at that. So, feel free to indicate what might be of interest to you and thank you very much. Goodbye.