

**JUSTICE IN AGING**

**FIGHTING SENIOR POVERTY THROUGH LAW**

# Fighting Evictions in Nursing Homes and Assisted Living Facilities

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# JUSTICE IN AGING

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.

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# A Note on Language

- Nursing facility law and assisted living law generally refers to “transfer” or “discharge.”
- These terms are overly mechanical; they focus on institutional processes, obscuring the reality that a resident is being forced out.
- For those reasons, I often speak of “eviction” rather than “transfer/discharge.”

# The Prime Directive in Fighting Evictions Is ...

- Don't
- Move
- Out!!!



# Nursing Facility Evictions

# Nursing Home Reform Law

- Applies to every facility certified for Medicare and/or Medicaid.
- Applies regardless of resident's payment source.
- Eviction regulations are found at section [483.15\(c\)](#) [of Title 42 of Code of Federal Regulations.](#)

# Six Allowable Reasons for Eviction

1. Necessary to meet resident's welfare.
2. Resident's health has improved; no longer needs facility services.
3. Safety of others is endangered.
4. Health of others is endangered.
5. Nonpayment after reasonable notice.
6. Facility ceases to operate.

# Notice

- Notification of resident, resident's representative, and long-term care ombudsman program.
- Must be in writing in language that resident and representative will understand.

# Contents of Notice

- Reason.
- Date of proposed transfer/discharge.
- Location where resident is to be moved.
- Right to appeal.
- LTC Ombudsman program: name, address, & telephone #.

# Timing of Notice

- Generally, 30 days in advance of proposed transfer/discharge.
- “Practicable” notice of less than 30 days allowed in certain unusual circumstances.
  - No interpretation of “practicable” in law.
  - No eviction should be allowed while appeal is pending.

# Documentation in Clinical Records

- Basis for transfer/discharge must be documented in resident's clinical record.
  - By **resident's MD** if transfer/discharge based on resident's welfare, or improved condition.
  - By **any MD** if transfer/discharge based on endangerment of other's health or safety.

# Extra Documentation When Facility Claims Inability to Meet Resident's Needs

- Must document:
  - Needs that allegedly can't be met;
  - Facility's efforts to meet those needs; and
  - Service available in new facility to meet those needs.

# Preparation for Transfer/Discharge

- Facility must provide and document “sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.”
- Plus, resident should have discharge plan as part of care plan.

# Appeal Hearings

- Hearing officer.
- Hearing generally held at nursing facility.
- Relatively informal.
- Right to introduce evidence and cross-examine witnesses.
- **Resident usually outnumbered, so strong advocacy needed.**

# Fear of Retaliation?

- Dispute is often with management, rather than staff.
- No guarantee that resident will be treated better if they move to different facility.
- After prevailing, resident will be treated with more respect.



# Common Eviction Problems

# End of Medicare Payment for Nursing Facility Care

- Facility says: “You have to leave because Medicare payment is ending, and this facility doesn’t provide custodial care.”
- The truth: Resident has right to stay under Medicaid or private payment; facility cannot limit someone’s stay to only Medicare reimbursement.

# Right to Stay When Medicare Payment Ends

- Medicare coverage for nursing facility care is time-limited.
- Facility has two sets of notice requirements: Medicare notice and eviction notice.
- Illegal to attempt to discard residents after Medicare payment ends.

# “Difficult” Residents

- Facility claims:
  - Resident’s disruptive behavior endangers others’ health or safety;
  - Resident has broken rules;
  - Resident has “behaviors”; or
  - Resident needs higher level of care.
- The truth: Resident is not endangering others’ health or safety, and is appropriate for a nursing facility.

# Disruptive ≠ Dangerous

- Facility should do care planning rather than pursuing eviction.
- Facility often undercuts the “needs-higher-level-of-care” argument by proposing to send resident to another nursing facility.

# “Heavy” Care

- Facility claims that resident requires “one-on-one” care that they don’t provide.
- The truth: Facility is required to provide care necessary for resident to attain or maintain highest practicable physical, mental and psychosocial well-being.

# Expense of Care

- Facility claims that caring for resident costs them more than Medicaid reimbursement rate.
- The truth: facility is not allowed to discriminate in evictions based on payment source.

# Facility Must Accept Medicaid As Payment in Full

- Medicaid provider agreement requires facility to follow federal law in return for payment.
- Unfair for facility to accept payment and then claim to resident that rate is insufficient.

# Eviction While Medicaid Pending

- Facility tries to evict because they aren't being paid while Medicaid application is pending.
- The truth: Facility cannot evict if application for third-party payment (including Medicaid) is pending.
  - **Section** [483.15\(c\)\(1\)\(i\)\(E\) of Title 42 of Code of Federal Regulations.](#)



# Affirmative Defenses

# Faulty Notice

- No effective date.
- Not enough advance notice.
- Failure to describe appeal rights.
- Failure to list ombudsman program and/or disability rights organization.

# Problems with Transfer Location

- Not listing location.
- Listing inadequate location.

# Inadequate Documentation

- Inadequate MD documentation.
  - Resident's MD when resident supposedly needs different level of care.
    - Including when resident supposedly needs higher level of care.
  - Any MD when endangerment is at issue.



**Refuting Facility's Allegations**

# Care Needs or Endangerment

- Go to resident's file.
  - Nurse's notes.
  - Minimum Data Set (MDS) assessment.
  - Care plan.
  - Social service notes.
  - Medication administration record.

# Cross-Examination

- Highlight what facility failed to do.
- E.g., Show that
  - Facility didn't do adequate care planning or discharge planning, or
  - “New” facility is licensed and certified no differently than original facility.



**Returning After Hospitalization**

# Right to Return

- State law often includes bed holds, generally parallel with Medicaid payment for bed holds.
- Federal law – right to return to next available bed, regardless of length of hospitalization.

# Returning When Facility Is Refusing

- E.g., resident in hospital trying to return to nursing facility.
  - Right to return pending eviction appeal.
  - Difficulty in enforcing right to return when facility is defiant.
    - Complaint to inspection agency.
    - Court action.



# Assisted Living Evictions

# What is Assisted Living?

- Standards set by state law.
- Various terms used by states.
  - E.g., assisted living, residential care, housing with services, etc.

# “Good Cause” Requirements in State Eviction Laws

- Common eviction justifications.
  - Facility can't meet resident's needs.
  - Nonpayment.
  - Various expansive justifications.
    - E.g., facility gives notice
    - Resident not compatible with others.
    - For the resident's welfare.
- Systemic advocacy may be advisable to reform law when justifications give too much leeway to facilities.

# Can't Meet Resident's Needs?

- In some states, facility may be citing state law that does not allow residents with particular condition.
  - E.g., needing insulin injections, or having Stage 3 pressure sores.
- In such cases, be prepared to prove that the resident in fact does not have the disqualifying condition.
  - Maybe also challenge the state law under Americans with Disabilities Act (but that is obviously a heavier lift).

# More General Claims of “Can’t Meet Your Needs.”

- These vaguer claims are more common.
  - E.g., resident’s worsening dementia requires too much staff time.
- Combat these claims by
  - Citing favorable language from:
    - State law.
    - Admission agreement.
    - Facility’s obligation under Americans with Disabilities Act to accommodate condition.
  - Pointing out that facility is misrepresenting resident’s condition.

# Non-Payment

- Admission agreement sets private pay rates.
- Facility should be limited in what can be charged when resident eligible for SSI or Medicaid – but some state laws are deficient in this area.

# Push Back Against Evictions Based on Resident Becoming Medicaid-Eligible

- Do **NOT** let facility enforce a supposed agreement by the resident to pay private-pay for a specified number of months or years.

# No Private-Pay Rates for Medicaid-Eligible Residents

- In general, Medicaid-certified provider cannot charge a Medicaid beneficiary anything more than what is allowed under Medicaid rules.
  - [Section 447.15, Title 42 of Code of Federal Regulations.](#)

# “Duration of Stay” Agreements

- Historically, some LTC facilities have required period of private-pay residence as condition of accepting Medicaid.
- Explicitly barred by federal **nursing facility** law.
  - [Section 483.10\(f\)\(11\), Title 42 of Code of Federal Regulations](#)

# Some Assisted Living Facilities Require “Duration of Stay” Promise

- Should be considered violation of federal regulations.
- Don't assume that duration of stay agreements are enforceable.
- Contact Justice in Aging for consultation if you encounter one of these situations – [info@justiceinaging.org](mailto:info@justiceinaging.org)



# Assisted Living Eviction Procedures

# Procedures

- State's landlord-tenant law;
- Administrative hearing; or
- None specified (or, at least, facilities believe that landlord-tenant law does not apply).

# Good and Bad of Landlord-Tenant Law

- More expensive than administrative hearing.
- Generally, resident will be less likely to go that route, because of expense and being intimidated by court process.
- But facilities also are scared by the cost and intimidated by court process, and thus more likely to just let resident stay.

# When It's Unclear What Process Might Apply

- In some states, there's ambiguity as to whether any particular process applies.
- Ambiguity can be in resident's favor, if resident is willing to stay put.
  - Facility won't want to perform self-help eviction.
  - It won't seem fair to a judge (or anyone else) that there's no process.



**Assisted Living Evictions When Facility  
Accepts Medicaid**

# HCBS Settings Rule

- Establishes minimum standards to ensure that Medicaid Home and Community-Based Services (HCBS) consumers live and receive services in settings that are truly non-institutional.
  - [42 C.F.R. § 441.301\(c\)\(4\)](#).

# Settings Rule Covers HCBS-Funded Residential Facilities

- HCBS regulations refer to these facilities as “provider-owned or controlled residential settings.”
- Includes, but not limited to, assisted living.
  - E.g., can include group homes and other facilities for persons with disabilities.

# Transfer Within Facility?

- Settings Rule says that living unit is “specific physical place” rented under a “legally enforceable agreement.”
- Resident has right to remain in original unit.

# Settings Rule's Eviction Requirement

- Person “has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law.”
- “[T]he State must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant, and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction’s landlord tenant law.”
  - [Section 441.301\(c\)\(4\)\(vi\), Title 42 of Code of Federal Regulations.](#)

# 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: Providing Administrative Appeals

- Creating administrative appeal system that establishes “comparable” protections.
  - Maybe not technically in compliance with federal regulation – because landlord-tenant law doesn’t apply, and there’s no separate written agreement – but may be seen as good outcome regardless.

# 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.

# Many States Do Not Provide Required Eviction Protections

- E.g., Florida, Nevada, Wisconsin.
- In Washington, lawsuit filed against state by LTC Ombudsman Program and individual consumer.
- Please contact Justice in Aging if your state does not provide mechanism to challenge assisted living eviction in Medicaid-funded facility.

# Justice in Aging Resources

- [Toolkit for Fighting Nursing Home Evictions](#)
- [Defending Evictions from Medicaid-Funded Assisted Living Facilities](#)



# Questions?

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