

Defending Evictions from Nursing Homes and Assisted Living Facilities

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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 e-mail to NCLER@acl.hhs.gov.
- Slides and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

About Justice in Aging

Justice in Aging is a national non-profit legal advocacy organization that fights senior poverty through law. Formerly the National Senior Citizens Law Center, since 1972 we've worked for access to affordable health care and economic security for older adults with limited resources, focusing especially on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency. Through targeted advocacy, litigation, and the trainings and resources we provide to local advocates, we ensure access to the social safety net programs that poor seniors depend on, including Medicare, Medicaid, Social Security, and Supplemental Security Income (SSI).

Transfer/Discharge from Nursing Facilities

Nursing Home Reform Law

- Applies to every facility certified for Medicare and/or Medicaid.
- Applies regardless of resident's payment source.

Six Allowable Reasons for Transfer/Discharge

- Necessary to meet resident's welfare.
- Resident's health has improved; no longer needs facility services.
- Safety of others endangered.
- Health of others endangered.
- Nonpayment after reasonable notice.
- Facility ceases to operate.

Notice

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

Notice Required Whenever Transfer/Discharge Is Facility-Initiated

- “Resident-initiated” when the resident (or representative) “has provided verbal or written notice of intent to leave the facility.”
 - Surveyor’s Guideline to 42 C.F.R. § 483.15(c), Appendix PP to CMS State Operations Manual.

Contents of Notice

- Reason
- Date of proposed transfer/discharge
- Location to 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 circumstances.
 - No interpretation of “practicable” in law.
 - No transfer/discharge 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 health.

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 receiving 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 his/her 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.

Evictions from Assisted Living Facilities

Assisted Living Basics

- Nursing Home Reform Law doesn't apply.
- Residents generally reliant on state law for assisted living transfer/discharge, but these laws tend to be weak.
 - Broad justifications, *e.g.*, inability to meet resident's needs.
 - No designated adjudication mechanism.
 - Advisable to request landlord-tenant procedures.

New Federal HCBS Rules Add Requirement

- Resident must have, “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.”
 - 42 C.F.R. §441.301(c)(4)(vi)(A).

Written Agreement As Necessary to Protect Residents

- If landlord/tenant laws do not apply, State must ensure that each resident has written agreement that “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).

Transition Process for HCBS Rules

- States currently are developing transition plans.
- Transition plans must be approved by no later than March 2019.
- Implementation by states and providers must be complete by March 2022.

States Should Do More Than Incorporate Federal Language

- Most states seem to be incorporating the requirement that residents must have protections at least equivalent to landlord-tenant protections.
 - States are inserting language in state policy and/or model residency agreements.
 - But this insertion, without more, leaves too many unanswered questions.

Advantage of Administrative Hearings

- More prepared to address resident care needs and related issues.
- Less intimidating than court trial for residents.

Common Issues in Nursing Facility Transfers and Discharges

Fear of Retaliation?

- After prevailing, the resident will be treated with more respect.
- No guarantee that resident will be treated better if he or she moves to a different facility.
 - Example – resident with dispute with administrator; the resident stays and the administrator ends up leaving.

Nursing Facility: Improper Justifications

- Misbehaving by resident:
 - Resident is disruptive, argumentative, and/or obnoxious.
 - Resident does not follow facility policies or care plan; is “non-compliant.”

Improper Justifications (2 of 5)

- Too difficult to care for resident:
 - Too expensive.
 - Too time-consuming; takes away from care that should be provided to other residents.
 - Resident needs one-to-one care, which facility does not provide.
 - Facility is exposed to potential legal liability for injuries suffered or caused by resident.

Improper Justifications (3 of 5)

- Resident refuses treatment.
- Resident does not need facility's specialized services.
 - Example: woman who needed specific physical therapy.

Improper Justifications (4 of 5)

- Resident's Medicare eligibility has ended.
 - *See also Jimmo v. Sebelius* on continued Medicare reimbursement.
 - Center for Medicare Advocacy has Self-Help materials for “improvement standard” denials, [medicareadvocacy.org/medicare-info/improvement-standard](https://www.medicareadvocacy.org/medicare-info/improvement-standard)

Improper Justifications (5 of 5)

- Medicaid issues:
 - Resident has exhausted savings; now is Medicaid eligible.
 - Depends on whether state allows partial Medicaid certification.
 - Resident's Medicaid application is in process; facility has not been paid.
 - Facility has voluntarily withdrawn from Medicaid program.

Defenses (1 of 3)

- Facility hasn't met burden.
 - *E.g.*, facility can meet needs, resident isn't a danger.
 - Facility violates law “if it refused to provide a statutorily defined service in order to eliminate certain residents under ... the transfer reasons.”
 - 56 Federal Register at 48,839 (1991).

Defenses (2 of 3)

- Facility has made procedural mistake.
 - *e.g.*, no MD documentation, no listed destination.

Defenses (3 of 3)

- Facility proposed transfer to another location and that location:
 - Can't provide appropriate level of care (assisted living facility, homeless shelter, daughter's house, etc.).
 - Provides the same level of care as the current nursing facility.

Common Issues in Assisted Living Evictions

Purported Inability to Meet Resident's Needs (1 of 2)

- Look to state statute or regulation that addresses facility's obligation to meet resident's needs.
- Facility may have failed to disclose purported limitation in ability to provide care.

Purported Inability to Meet Resident's Needs (2 of 2)

- ADA prohibits discrimination based on medical need.
 - Is facility trying to cherry-pick the easier residents?

Practical Considerations

- Is facility realistically capable of providing the required care?
 - Resident should weigh the pros and cons.

Alleged Nonpayment

- Look to the contract.
 - Extra charges only appropriate if authorized by contract.

Additional Resources

- Eric Carlson, ecarlson@justiceinaging.org
- Federal Nursing Facility Laws: 42 U.S.C. §§ 1395i-3, 1396r; 42 C.F.R. §§ 483.5-483.95
- Federal HCBS Settings Requirements: 42 C.F.R. §§ 441.301(c)(4)-(6)

Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.