

You Can't Stay Young Forever – Addressing Problems in Senior Housing and Long-Term Care

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Long-Term Care Options

- Nursing Facilities
- Assisted Living Facilities
- Continuing Care Retirement Communities
 - Campus offering nursing facility, assisted living facility, and independent living units.
- At-Home Care (including subsidized housing)

Nursing Home Reform Law (OBRA '87)

- Applies to every facility certified for Medicare and/or Medicaid.
- Applies regardless of resident's payment source.
- See 42 U.S.C. §§ 1395i-3 (Medicare certification), 1396r (Medicaid certification); 42 C.F.R. § 483.

Cornerstone of Law: Individualized Care

- Facility must provide services that resident needs “to attain or maintain the highest practicable physical, mental, and psychosocial well-being.”

42 C.F.R. § 483.25.

20_{Common} Nursing Home Problems—and How to Resolve Them



National Senior Citizens Law Center

With Support from The Commonwealth Fund

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Many facilities' procedures violate the Reform Law.

Education and litigation are desperately needed.

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#1: *“Medicaid does not pay for the service that you want.”*

- A facility “must establish and maintain identical policies and practices regarding transfer, discharge, and the provision of services required under the State [Medicaid] plan for all individuals ***regardless of source of payment.***” 42 C.F.R. § 483.12(c).

Residents Eligible for Medicaid Are Not Second-Class Citizens

- Reform Law requires high quality care for all residents.
- A facility must not discriminate on the basis of payment source.
- **Don't listen to facility tales of financial woe**; it is hypocritical for facility to accept Medicaid money and then plead poverty as an excuse.

#2: *“The nursing staff will determine the care that you receive.”*

- Assessments done within 14 days.
 - Care plan completed within 7 days of assessment.
 - Resident and resident’s representative participate in preparation of care plan.
- 42 C.F.R. § 483.20.

#3: *“We don’t have enough staff. You must wake up every morning at six.”*

- A resident has right “to reside and receive services with reasonable accommodation of individual needs and preferences.”
42 U.S.C. §§ 1395i-3(c)(1), 1396r(c)(1).
- “[A] resident has the right to [c]hoose activities, schedules, and health care consistent with his or her interests, assessments, and plans of care.”
42 C.F.R. § 483.15.

#4: *“If we don’t tie your father into his chair, he may fall or wander away.”*

- Resident has right to be free from “any physical or chemical restraint imposed for purposes of discipline or convenience and not required to treat the resident’s medical symptoms.”
42 C.F.R. § 483.13.
- Use of restraints requires physician order and informed consent by resident or resident’s representative.

#5: *“Your children can visit only during visiting hours.”*

- “[I]mmediate family or other relatives” have the right to visit at any time.
42 C.F.R. § 483.10(j).
- Continued existence of problem illustrates difficulty in making legal requirements a reality.

#6: *“We can’t admit your mom unless you become ‘Responsible Party.’”*

- “Responsible Party” is financially liable.
 - But Reform Law prohibits facilities from requiring financial guarantees. 42 C.F.R. § 483.12(d).
 - Facilities claim that person “volunteers” to become “Responsible Party.”

'Responsible Party' Provisions Are Illegal and Unenforceable

- Why illegal?
 1. Facility actually is requiring guarantee.
 2. Family members are deceived.
 3. No benefit provided. *Podolsky v. First Health Care Corp.*, 58 Cal. Rptr. 2d 89 (1996).

#7: “You must leave because you are a difficult resident.”

- Only six legitimate reasons for eviction (42 C.F.R. § 483.12(a):
 1. Resident failed to pay.
 2. Resident no longer needs nursing facility care.
 3. Facility is going out of business.
 4. Resident’s needs cannot be met in a nursing facility.
 5. Resident’s presence in facility endangers others’ safety.
 6. Resident’s presence in facility endangers others’ health.

Federal Law Provides for Administrative Hearing

- Notice must list reasons along with right to appeal.
- Notice generally must be given 30 days before proposed transfer/discharge.
- Hearing generally held in nursing facility.

Assisted Living



What Is Assisted Living???????

Two problems:

- Law varies from state to state.
- Definitions tend to be written in general language.

Why the Vagueness?

- No facility wants to be left out of the “assisted living” category.
 - Higher standards are financially impossible, say smaller facilities and others.
 - “Big tent” philosophy of regulation allows for shared rooms, thin staffing, no health professionals, etc.

Disclosure Requirements Are Common

- Texas, Washington, & others have state-developed forms.
- Most commonly, format of disclosure is within facility's discretion.
- Alzheimer's Ass'n has emphasized disclosure of facilities' dementia care.

Fair Housing/ADA Implications

- “Flexibility” of regulations creates model in which facilities discriminate based on disability level of applicant or resident.

Levels of Care

16 states recognize more than one level.

- Two or three levels
- Higher levels reflect greater health care capabilities

In Reality, All Systems Are Multi-Level

- Two options:
 - Levels Set By State
 - Levels Set By Individual Facility

“Aging in Place,” or “Minimizing the Need to Move”

Non-Legal & Legal Arguments In Support

- NON-LEGAL: “Please don’t send me to a nursing home” is a compelling argument.
- LEGAL: Americans with Disabilities Act requires states to give fair treatment to non-institutional alternatives.

Q: Is assisted living a “non-institutional” option?

Potential Negatives of “Aging in Place”

- Facility may not be able to provide adequate care.
- Assisted living may resemble discredited “intermediate care facilities” of 1980’s.

Disqualifying Conditions Under State Law

- Disqualifying conditions are becoming less common, and/or less restrictive.

“Private” Exceptions: State Is Not Involved

- Fourteen states have private exceptions of one sort or another.
- Private exceptions usually apply to retention but not admission.
- Consent of physician may or may not be required.

Private Exceptions: Pros & Cons

- Pro: State should not stand in the way of an arrangement that is acceptable to the parties involved.
- Con: State standards are beneficial to all concerned. Routine use of private exceptions undermines the effectiveness of state quality-of-care standards.

Facilities Generally Have Discretion to Discharge Residents

- Thirty-nine states allow discharge based on a facility's inability to meet a resident's needs.

Two Problems

- Too-soon discharge
- Too-late discharge
- Public policy question is difficult, but attorney just needs to follow client's wishes in particular case.

States Generally Do Not Specify Mechanism for Adjudicating Evictions

- State regulations usually are silent, or make vague reference to filing complaint with licensing agency.
- Resident and attorney generally should assume landlord/tenant procedure, and force facility to find means of adjudicating dispute.

**** Segue ****

- Segue to Aisha and Use of the Fair Housing Act in Long-Term Care Disputes