

Closing the Justice Gap for Older Adults

Part One: Representing Older Adults in Nursing Facility Eviction Cases

- Introduction:
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Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to NCLER@acl.hhs.gov.
- Written materials 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.

Introductions

- Ron Flagg: President, Legal Services Corporation
- Hilary Dalin, Director, Office of Elder Justice and Adult Protective Services at ACL



Overview

Six Permissible Reasons for Involuntary Discharge

1. The resident's needs cannot be met in the nursing home.
2. The resident's health has improved and they no longer need nursing home care.
3. The resident's presence in the nursing home endangers others' safety.
4. The resident's presence endangers others' health.
5. The resident has failed to pay.
6. The nursing home is going out of business.

First Step – Check the Notice

- ✓ Is the resident being discharged for one of the six permissible reasons?
- ✓ Is the timing of the notice sufficient?
- ✓ Was the notice sent to the correct people/places?
- ✓ Does the notice contain all required information?

Timing of Discharge Notice

- Written notice must be provided at least 30 days before the discharge date unless:
 - The resident's presence in the nursing home endangers the health or safety of individuals in the facility;
 - The resident's health has improved sufficiently to allow a more immediate discharge;
 - The resident's urgent medical needs require them to be discharged; or
 - The resident has not resided in the facility for 30 days.

Notification

- A written discharge notice that is in a language the resident understands must be sent to:
 - The resident and the resident's representative(s) and
 - A copy to the Office of the State Long-Term Care Ombudsman

Required Content of Notices

- The reason for the discharge;
- The date of the discharge;
- The location where the resident will be discharged;
- A statement of the resident's appeal rights, including the name, mailing address, email address, and telephone number of the entity that receives the appeals;
- Information on how to obtain an appeal form and assistance in completing the form and submitting the appeal;
- The name, email, and mailing address of the Office of the State Long-Term Care Ombudsman; and
- For residents with intellectual and developmental disabilities or mental disorders the mailing address, email address, and telephone number for the agency responsible for protection and advocacy of those individuals.

Hearing Rights

- All residents in nursing homes that accept either Medicare or Medicaid have the right to appeal an involuntary discharge. Each state has an agency appointed to receive the appeals.
- The nursing home may not discharge the resident while an appeal is pending, unless the nursing home can document the danger that the resident poses to the health or safety of other individuals in the nursing home.

Discharge Planning Requirements

- The nursing home must provide sufficient preparation and orientation to residents to ensure safe and orderly discharge from the facility in a form and manner the resident can understand.
- Examples:
 - The nursing home must inform the resident where they are going and takes steps to minimize anxiety;
 - The nursing home works with the resident and family and care plan team for discharge planning and allows the resident a choice where they go; or
 - The nursing home could take the resident to tour the proposed facility prior to discharging them.

Where to Find the Federal Law

- Federal law applies to every facility certified for Medicare and/or Medicaid.
- Applies regardless of resident's payment source.
- Re: Transfer/Discharge, see 42 U.S.C. 1395i-3(c)(2), 1396r(c)(2); 42 C.F.R. 483.15(c).

Federal Guidance

- Guidance to Surveyors for Long Term Care Facilities
 - Appendix PP to CMS State Operations Manual.
- Organized by CFR section and also F-Tag #.
- Regulation text followed by guidance.
- Extensive guidance – document is over 800 pages long.

Frequent Illegal Practices

- Some illegal practices have become standard operating procedure.
- Pushback needed from consumers, ombudsman programs, surveyors, etc.
- See [Justice in Aging eviction toolkit](#) for flyers on common but illegal justifications for eviction.

Long-Term Care Ombudsman Program (LTCOP)

What is the Long-Term Care Ombudsman Program (LTCOP)?

- **Resident-directed** advocates
- Educate
- Advocate
- Empower

Who Does the LTCOP Serve?

- As resident advocates, LTCOPs:
 - Need resident consent
 - Are directed by resident wishes and goals
 - Represents resident interests in individual and systems advocacy

Working with the LTCOP

- Individual Advocacy
- Referrals
- Ensure Rights and Address Barriers
 - Private communication (e.g., mail, calls, meetings)
 - Access to outside services (e.g., legal services)

Working with the LTCOP

- Community Education
- Systems Advocacy

Contact the Ombudsman Program

- Visit our map to locate programs:
https://theconsumervoice.org/get_help

Learn more about ombudsmen →



Key Resources

- [Long-Term Care Ombudsman Program: What You Must Know](#)
- [Transfer/Discharge Issue page](#)



The National Long-Term Care Ombudsman Resource Center

Connect with us!

 ltcombudsman.org

 ombudcenter@theconsumervoice.org

 The National LTC Ombudsman Resource Center

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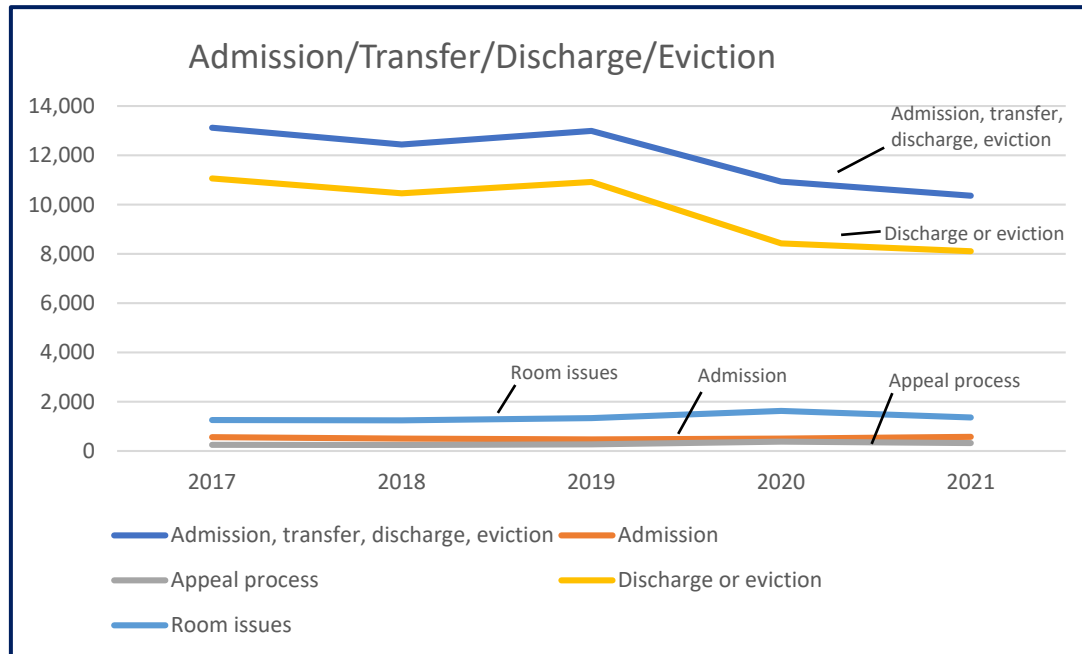


Get our app! Search for "LTC Ombudsman Resource Center" in the Apple Store or Google Play

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Ombudsman Data

Category	2017	2018	2019	2020	2021
Admission, transfer, discharge, eviction	13,118	12,437	12,992	10,935	10,359
Admission	560	500	469	502	574
Appeal process	246	242	268	378	320
Discharge or eviction	11,059	10,455	10,922	8,428	8,105
Room issues	1,253	1,240	1,333	1,627	1,360



Resident Experiences (1 of 3)

A resident with dementia was admitted to a facility that had recently opened. The provider had not opened their memory care unit at the time of the resident's admission. The resident walked out on the second and third day after admission.

The staff called 911 and had the resident transported to a hospital. The resident's family was notified that the facility was unable to care for the resident and that the resident could not return. The state regulatory agency directed the facility to issue a discharge notice and readmit the resident with appropriate supervision, but the facility refused to readmit.

~adapted from Ombudsman report FY 22

Resident Experiences (2 of 3)

- An Ombudsman representative received a call to report a 30-day discharge had been issued to the caller's brother. The administrator notified the family that since the resident was gay, they would not be allowed to remain in the facility. There were no issues other than the administrator disapproving of homosexuality. The Ombudsman representative educated the administrator, explaining rights, proper transfer and discharge protocol. The resident remained at the nursing home.
- Discharges and evictions due to behavioral challenges experienced by the resident did not always provide resolution to the satisfaction of the resident.

Resident Experiences (3 of 3)

A resident was informed that they would have to leave the facility the following day because their insurance would not pay for their care any longer. There had been no discharge planning meeting, and no one had explained the insurance coverage or right to appeal.

The Ombudsman discussed options with the resident and the resident contacted Legal Aid for assistance with the insurance appeal and advocacy for legal rights. The resident, attorney, and Ombudsman met with the administrator to discuss the resident's right to appeal. The appeal to the BFCC-QIO was successful, so the resident was able to continue rehabilitation. The resident was also referred to the local aging and disability resource center for an assessment for community services, including housing and caregiver resources.

Common Cases

“Your Mother Is Disruptive”

- Always consider whether the claim fits under the six allowable reasons for eviction.
 - “Disruptive” is not equivalent to dangerous to safety or health.
- Same reasoning with similar bogus justifications:
 - E.g., “Your mother has violated the admission agreement (or facility policies).”
 - “Your mother is upsetting to the other residents.”

“We Can’t Provide Enough Care Under Medicaid Reimbursement”

- Facility can’t discriminate based on reimbursement source.
- Quality of care standards aren’t dependent upon reimbursement amount or source.
- Facility has promised Medicaid program to provide care under Medicaid reimbursement; it’s not fair for facility to accept money and then tell resident that money is inadequate.

“Your Medicare Coverage Has Ended, and We Don’t Provide Custodial Care”

- If loss of Medicare coverage based on supposedly lessened care needs, the determination is appealable.
 - Note that “plateauing” in therapy is not by itself a reason for Medicare coverage to end. *See Jimmo v. Sebelius.*
- Regardless of Medicare coverage, resident has right to stay under Medicaid or private payment.
- For purposes of eviction, facility cannot designate itself only for a certain level or type of care (even if, hypothetically, facility’s motivations were good).

From Surveyor's Guidelines Re: Eviction After Medicare-Covered Stay

- “Discharges following completion of skilled rehabilitation may not always be a resident-initiated discharge. In cases where the resident may not object to the discharge, or has not appealed it, the discharge could still be involuntary and must meet all requirements of this regulation.”
 - Surveyor's Guidelines to 42 CFR § 483.15.

“We Don’t Provide One-on-One Care”

- Facility must provide care that is necessary for resident to reach highest practicable level of physical and emotional functioning.
- Residents who need one-on-one care still are classified as nursing facility level-of-care.

“You’re Refusing Your Medication.” i.e., Not Following Doctor’s Orders

- Resident has right to accept or refuse treatment.
- Doctor’s orders are directed to health care providers, not resident.

“Your Medicaid Hasn’t Been Approved Yet”

- Under federal regulations, no nonpayment if resident has “submit[ted] the necessary paperwork for third party payment.”
 - 42 C.F.R. § 483.15(c)(1)(i)(E).

Representing Residents

Planning for Hearing

- Meet with the resident;
- Review the notice for deficiencies to see if the case can be summarily reversed prior to the hearing;
- Attempt to settle the case;
- Interview potential witnesses such as family members, medical providers, and the local State Long-Term Care Ombudsman;
- Order records needed to prove your case:
 - For non-payment cases obtain records concerning the billing, admission records, Medicare Notice of Non-Coverage if one exists, and Medicaid application if applicable.
 - For behavior or level of care cases request a copy of the medical records.

Medical Records

- Behavior Discharges:

- Focus on records that relate to the reason for the discharge.
- Verify the conditions the resident had when admitted which are often listed on their face sheet.
- Review medication records to see if new medications were added or if medications were given timely.
- Review care plans.
- Review doctor's orders and progress notes.
- Review nurse's notes.
- Review social worker notes.
- Review MDS records.
- Medical records from outside facilities if sent out for behavior.

Handling the Hearing

- The burden is on the nursing home to prove they are discharging the resident for a permissible reason and have followed the regulations.
- Make objections to impermissible evidence or testimony.
- Plan your questioning and ensure you get your exhibits entered in the record.
- Prepare a strong closing statement.

After the Hearing

- Appeal the negative hearing decision.
- Connect the resident with the local State Long-Term Care Ombudsman.
- If you win, make sure the facility abides by the Hearing Officer Order, otherwise you may need to seek assistance from your local court for enforcement.

Case Study: Fred

- Fred, a 100 year old Veteran, received notice of discharge from his nursing home of 10 years due to allegedly endangering other people in the facility and the facility not being able to meet his needs.
 - First, I verified that the notice was issued on time, sent to the correct parties, and that it was not deficient.
 - After meeting with the client and his family, it was discovered that Fred had a UTI when he threw his water cup at a nurse. Fred suffered from dementia and PTSD and would frequently wander the halls of the nursing home and scream and cuss at staff thinking they were the enemy and he was at war. Fred never actually harmed any residents or staff, but he required a lot of the staff's time with one-on-one care when he was having an episode.

Case Study: Fred (cont.)

- I ordered records from the nursing home. When investigating the records, it was determined that the doctor did not put the required documentation in the record and that the psychiatrist treating Fred was never consulted when he had behaviors. The care plan was not updated to reflect the alleged behaviors. Fred's UTI was treated and he did not have further physical behaviors after the incident. The incident report revealed that the incident at issue caused no physical harm.
- Fred's daughter, the State Long-Term Care Ombudsman, and his psychiatrist were witnesses at his hearing. The nursing home had the administrator, the medical director, and head nurse as witnesses.
- The hearing officer ruled that the nursing home failed to meet their burden to prove that they could not meet his needs and that he was a danger to other residents in the facility.

Right to Return from Hospital

- Bed hold: depends on state law.
- Federal law – return to next available bed, regardless of length of hospitalization, if care to be covered by Medicaid or Medicare.
 - 42 U.S.C. § 1396r(c)(2)(D)(iii); 42 C.F.R. § 483.15(e).

Returning When Facility Is Refusing

- Under regulations, right to return pending appeal.
 - 42 C.F.R. § 483.15(e)(1)(ii), and accompanying Surveyor's Guideline.
- Difficulty in enforcing right to return when facility is defiant.
 - Complaint to licensing.
 - Eviction appeal.
 - Court action.
 - See template for complaint & petition for injunction in Justice in Aging eviction toolkit.

Toolkit for Fighting Nursing Facility Evictions

- The Basics of Nursing Facility Evictions (fact sheet)
- Recognizing Improper Evictions (summaries of seven common types of evictions)
- Administrative Hearing Briefs (addressing five common types of evictions)
- Court Documents to Seek Order to Stop Hospital Dumping (complaint and petition for injunction)

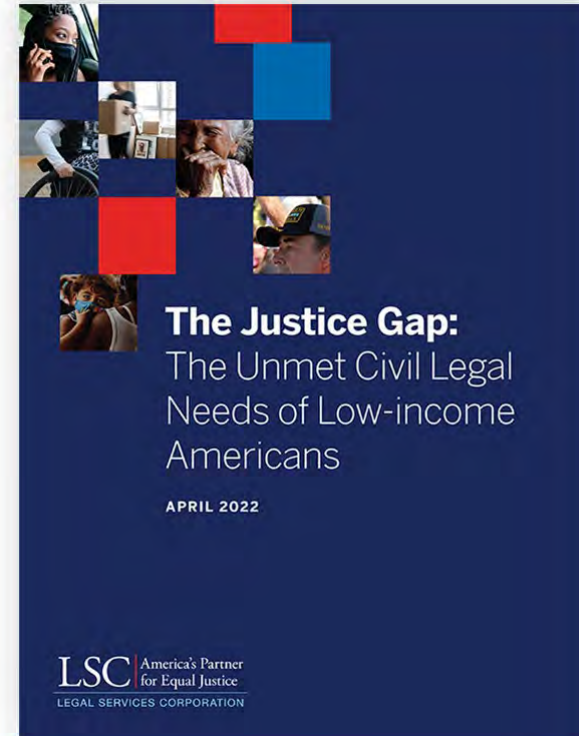
Guide: 25 Common Nursing Home Problems & How to Resolve Them

- Common problems are often based on facility misstatements.
- Residents need the confidence to push back when they hear false statements.



Closing the Justice Gap Report

- This report presents findings based on data collected by LSC and NORC about the unmet civil legal needs of low-income Americans.



Questions

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