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FIGHTING SENIOR POVERTY THROUGH LAW

Common Challenges in Nursing Homes and Memory Care, and How to Handle Them

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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.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

Diversity, Equity, and Inclusion

To achieve Justice in Aging, we must:

- Acknowledge systemic racism and discrimination
- Address the enduring negative effects of racism and differential treatment
- Promote access and equity in economic security, health care, and the courts for our nation's low-income older adults
- Recruit, support, and retain a diverse staff and board, including race, ethnicity, gender, gender identity and presentation, sexual orientation, disability, age, economic class

Why Are Certain Problems So Common?

And what does this say about advocacy strategies?

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Facilities' Illegal Practices Must Be Called Out

- Some illegal practices have become standard operating procedure.
- Pushback needed from consumers, ombudsman programs, surveyors, etc.

Be Specific

- Residents, families and others need clear guidance.
- Identify the problem, rather than just explain the law.

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Federal Law

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Nursing Home Reform Law

- Enacted 1987; effective since October 1990.
- Protects all residents, regardless of payment source.

Core Principles

- Provide services that resident needs "to attain or maintain the highest practicable physical, mental, and psychosocial well-being."
- No discrimination against Medicaid-eligible residents in providing services and in transfer/discharge.

#1--Care Planning: Falsehood and Truth

- "The nursing staff will determine the care that you receive."
- Resident and family can participate in developing a care plan.

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Care Planning

- Facility must develop and implement comprehensive person-centered care plan for each resident."
  - 42 C.F.R. § 483.21(b)(1).

Addressing Resident Preferences

- Resident has the "right to reside and receive services in the facility with reasonable accommodation of resident needs and preferences except when to do so would endanger the health or safety of the resident or other residents."
  - 42 C.F.R. § 483.10(e)(3).

Comprehensive Care Plan

- Within 7 days of assessment.
- Interdisciplinary team includes, “[t]o the extent practicable, the participation of the resident and the resident's representative(s).”
  - Written explanation needed if resident and resident don’t participate.
    - 42 C.F.R. § 483.21(b).

Interdisciplinary Team

- Must also include:
  - Attending MD.
  - RN with responsibility for resident.
  - CNA with responsibility for resident.
  - Member of food and nutrition staff.
  - Other appropriate staff, based on resident's need or as requested by resident.

Residents Should Have Higher Expectations

- Resident should brainstorm a list.
  - Don’t just wait for the facility to set out a few options.

#2 -- Shortchanging Medicaid-Eligible Residents: Falsehood and Truth

- "Medicaid does not pay for individual attention during meals."
- Medicaid-eligible residents must receive equivalent care.

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No Discrimination Based on Payment Source

- Facility must have "identical policies and practices regarding transfer, discharge, and the provision or services … regardless of payment source."
  - 42 C.F.R. §483.10(a)(2).

Remember, Medicaid Certification Is Voluntary

- In order to receive Medicaid $, facility promises to follow federal law.
- Unfair for facility to accept money, and then shortchange resident.

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#3 -- Medicare Coverage: Falsehood and Truth

- "Medicare won't pay because you've plateaued in your therapy."
- Improvement is not required; the deciding factor is whether therapy is appropriate.

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Therapy Required When Appropriate

- Facility must provide "specialized rehabilitative services" to any resident who needs them.
  - Even if care is reimbursed through Medicaid.
  - Even if resident does not show improvement.

Medicare Coverage Does Not Require "Improvement"

- E.g., Doesn't matter if resident has "plateaued."
- *Jimmo* litigation emphasizes regulatory right; info available from Center for Medicare Advocacy.
  - "The restoration potential of a patient is not the deciding factor in determining whether skilled services are needed. Even if full recovery or medical improvement is not possible, a patient may need skilled services to prevent further deterioration or preserve current capabilities."
    - 42 C.F.R. § 409.32.

The Most Important Rule in Avoiding Eviction Is …

Don’t Move Out!

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#4 -- End of Medicare Reimbursement: Falsehood and Truth

- "You must leave when Medicare payment ends; we don't provide custodial care."
- Facility must give notice and wait for hearing.

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Notice

- Written notice generally at least 30 days prior to date of proposed transfer/discharge.
  - Notice at "practicable" time under certain conditions, including when resident has lived in facility < 30 days.

Contents of Notice

- Reason.
- Effective Date.
- Location of new residence.
- Appeal rights.
- Contact info for ombudsman or other relevant advocacy organization.

#5 -- Involuntary Transfer/Discharge: Falsehood and Truth

- "You must leave the nursing facility because you are a difficult resident."
- Eviction is allowed only for six limited reasons.

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Six Legal Reasons for Involuntary Transfer/Discharge

1. Resident needs higher level of care.
2. Resident doesn't need nursing facility care.
3. Resident endangers others' safety.
4. Resident endangers others' health.
5. Nonpayment.
6. Facility is going out of business.
   - 42 C.F.R. § 483.15(c).

Facility Should Cope with "Difficulty"

- Facility should be well prepared to deal with dementia and other conditions.
- Any "difficulty" should lead to renewed care planning, rather than to transfer/discharge.

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Facility Must Document Inability to Meet Resident's Needs

- Specific needs that allegedly can't be met.
- Facility's attempts to meet those needs.
- Ability of receiving facility to meet those needs.

#6 -- Returning from Hospital: Falsehood and Truth

- "You can't return because your bed hold has expired."
- Medicaid-eligible resident can return to next available bed.

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Returning to Facility After Hospitalization

- Facility must give notice of bed-hold policy.

- Facility also must allow return to next available room.
  - If resident eligible for Medicaid or Medicare coverage of nursing facility care.
  - Must be previous room, if available.
    - 42 C.F.R. § 483.15(e).

Resident Allowed to Return Pending Hearing

- If facility "determines that a resident who was transferred with an expectation of returning to the facility cannot return to the facility," the facility must comply with transfer/discharge requirements.
  - 42 C.F.R. § 483.15(e)(1)(B)(ii).
- Surveyor's Guidelines: "resident must be permitted to return and resume residence in the facility while an appeal is pending."

Paying for Nursing Facility Care: A Short Guide

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Medicare

- Only if resident needs skilled nursing or skilled rehabilitation.
- Maximum of 100 days, with only the first 20 days paid in full.
- Days 21 through 100 requiring daily co-payment of $176.

Medicaid: Unmarried Resident

- Medicaid standards vary from state to state.
- Generally asset limit from $2,000 to $4,000.
  - Not including home, if resident has intent to return.
  - Other exempt assets include clothing, necessary car, retirement accounts, personal jewelry, etc.

Unmarried Resident: Income

- Assets determine eligibility; income determines amount resident needs to contribute towards health care expenses.
- Resident retains personal needs allowance of around $50 to $100 monthly; remainder of income paid for nursing facility bill or other health care expenses.

Married Residents

- "Community spouse" gets allocation of assets and income.
- Can keep one of the following from the couple's assets, whichever is greater:
  - One-half of couple's assets up to $128,640.
  - An amount set by the state from $25,728 to $128,640.

Married Residents: Income

- Community spouse can keep all of his or her own income.
- Community spouse can supplement from resident's income to raise community spouse's monthly income to an amount set by state from $2,155 to $3,216.

Keep Extra Assets If Needed to Create More Income

- Benefits couples with lower incomes but significant savings.
- Example: Joint income of $2,000; joint savings of $200,000; 6% interest rate; income allowance of $3,216 monthly.
- Savings generate $12,000 in interest annually, or $1,000 monthly.
  - $200,000 X 6% = $12,000.
- $2,000 + $1,000 = $3,000 < $3,216
- Result: eligible with $200,000.

Medicaid Estate Claims

- Medicaid program can seek repayment from estate after Medicaid beneficiary has died.
- Estate claim cannot be made against
  - Surviving spouse.
  - Minor or disabled child.

Cautions and Disclaimers

- Medicaid policies change significantly from state to state.
- Consult with elder law attorney in your state to discuss your situation.

More Information

- 25 Common Nursing Home Problems guide and other materials at justiceinaging.org.

- Text 51555 with the message "4justice" to receive Justice in Aging legal alerts.

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