LeadingAge Illinois

2023 SENIOR LIVING CONFERENCE

Jason Lundy, Partner

IceMiller

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Transition Tensions

- CCRC thinks a resident needs to progress through the continuum, from IL to AL or SNF, but the resident is resisting. What can the CCRC do?
- Considerations:
  - CCRC is looking out for best interests of residents (resident at issue and all others)

    – vs. –

  - Resisting resident prefers to remain in IL and have strong desire for independence and self-direction
- Both considerations are legitimate but might be mutually-exclusive—which prevails?

Transition Tensions

- Considerations (continued):
- CCRC has made commitments to care for resident, by virtue of Life Care contract (and sizable entrance fees)
- Residents of IL have legal rights to obtain additional services in their apartments and to be free from discrimination based on disability
- As Life Care and CCRC residents, resisting resident entered into the community knowing the CCRC's model was to move residents through the continuum to higher levels of care as health care needs progress

Transition Tensions

- Considerations (continued):
- CCRC has to apply its policies and practices consistently to all residents
- CCRC has to be a good financial steward to maintain its viability for the whole community

* Do these considerations change if a resident is not on a Life Care contract?

* Do these considerations change for a “micro-CCRC” (i.e., IL + AL but no SNF)?

Legal Framework

- CCRC = SNF + AL + IL + Life Care

Legal Framework

- **SNF**
  - Licensed by State
  - State statute and regulations
  - regulated by State department of health
  - Certified for participation in Medicare and/or Medicaid
  - Federal Requirements of Participation (42 CFR 483)
  - State Operations Manual, Appendix PP guidance
  - regulated by CMS
  - Transfer or discharge process – both for higher and lower LOC!

Legal Framework

- **AL**
  - Licensed by State
  - State statute and regulations
  - regulated by State department of health

  - Transfer or discharge process
  - Higher LOC, ~ ‘services available to the resident in the establishment are no longer adequate to meet the needs of the resident’

Legal Framework

- **IL**
  - Not licensed
  - Landlord/Tenant relationship
  - ‘Transfer or discharge process’ = eviction

  - Fair Housing Act applies . . .

* *but, Life Care leads to important distinctions/ exceptions*

Fair Housing Act Considerations

- Fair Housing Act prohibits discrimination in housing decisions, including discrimination on the basis of disability
- FHA applies to CCRC – strongest at IL segment and exceptions build as you consider AL then SNF
- FHA case law and enforcement actions have established a rule for "no inquiry" into the existence and nature of a housing applicant's disability status
  - applies to applicants but what about existing residents?
  - what application/exceptions for CCRCs, which are a mix of housing and health care services???
  - should *non-Life Care* CCRC abide by the "no inquiry" rule?

Fair Housing Act Considerations

- "no inquiry" into the existence and nature of a housing applicant's disability status; exceptions for CCRCs:
  - CCRCs able to inquire about disability status to admit applicant to the appropriate point within the continuum
  - CCRCs must be able to evaluate an applicant's health status for actuarial forecasts and may base decisions to admit based on financial/actuarial considerations
  - See two HUD "No Reasonable Cause" opinions from Texas, brought by the Austin Tenants' Council against CCRCs Longhorn Village (2012) and Westminster Manor Health Care Facilities Corp (2014)

* *CAUTION* – inquiries must be done carefully, narrowly, and consistently for all applicants or else give rise to claims of pretext for discrimination

Fair Housing Act Considerations

- Does FHA prohibit CCRC from forcing a resident to move through the continuum from IL to AL or SNF as the resident's health care needs expand???
- Some advocates/academics argue that forcing a move out of IL housing (even due to health care needs—e.g., a "disability") is discrimination that violates FHA
  - in a non-senior housing context, a tenant may contract for as much assistance and health care services as needed, and it is no business of the landlord – so why can't a resident in an IL apartment at a CCRC do the same???

Playbook for a Level of Care Change

- CCRC’s Residency Agreement
- Residency Agreement’s terms give basis for CCRC’s actions to make level of care decisions and changes
- Residency Agreement might not eliminate a battle, but do not let the lack of contract terms frustrate the action
- Residency Agreement helps set expectations and reinforce that level of care changes will occur and are part of the CCRC model
- Provides notice of the issue upon admission

Playbook for a Level of Care Change

- CCRC’s Residency Agreement
- Provides notice as to Levels of Care, criteria, and explains Levels of Care change process
- “Subject to applicable law, there may come a time when you must move to Assisted Living, Memory Support, or Skilled Nursing, or to another location that provides services not available at the Community. We are aware that this is a critical transition and will follow the following procedures, during any transfer or reassignment. . . . ”

Playbook for a Level of Care Change

- CCRC's Residency Agreement
  - Indicates that CCRC has discretion and final decision-making regarding moving through continuum
  - "If in our sole discretion we determine that you need assisted living, memory support, or nursing care, we will admit you to the campus Assisted Living or Skilled Nursing unit."

Playbook for a Level of Care Change

- CCRC's Residency Agreement
  - Instructs on temporary relocation off CCRC if health care space is unavailable
  - "Upon determination that a permanent transfer to Assisted Living or Skilled Nursing is required, in the event that space for you is not available, we will arrange and pay for your care in another care setting of our choice that can provide similar care until space becomes available."

Playbook for a Level of Care Change

- CCRC's Residency Agreement
  - Instructs on protocol for spouses who need different levels of care in different settings
  - "Should one or both Residents have a temporary need for AL/SNF while still occupying the Residence, you will continue to pay the current Monthly Service Fee less the current second person Monthly Service Fee for your Residence. For temporary care provided in AL/SNF, each Resident will be required to pay the current AL/SNF Rate."
  - "Should one Resident of double occupancy in Residential Living have a permanent need for AL/SNF, the Monthly Service Fee will remain the same, and the transferred Resident will pay [adjusted health care costs]."

Playbook for a Level of Care Change

- Ensure all staff are supporting continuum
  - Consistent messaging across all departments. For example, ensure sales team are not promising that ‘you’ll be in your IL unit for at least 20 years before you’ll need to worry about assisted living.’
  - De-stigmatize higher levels of care. Do you have an integrated CCRC or an IL world versus AL/SNF world?

Playbook for Level of Care Change

- Utilize annual Assessments and Reports
- Health & Financial
- Annual/periodic assessments (health by physician or wellness navigator, financial by self-report) allow CCRC to track health/finances across time
- Great source of “documentation” and monitoring, even in IL
- Routine and part of CCRC’s culture—not just a reaction to problems
  - Do not wait until level of care change is urgent to start the paper trail
  - CCRC’s decision to make level of care change should not come as a surprise

Playbook for a Level of Care Change

- Transitions Team/Transitions Meetings
  - Identify a Transition Team
  - Have objective, available definitions and examples for each Level of Care in the continuum; apply criteria consistently
  - Memorialize transition reviews/meetings in internal notes; send "confirming letter" to resident/family participants as necessary
    - "As we reviewed, Resident is declining and requiring higher levels of ADL support. We anticipate a move to AL will be necessary . . ."
  - Notes become a timeline and show Team's analysis and accommodations

Playbook for a Level of Care Change

- Different playbook for different reasons for move
  - Dementia
    - Slow progression, so set criteria and monitor
  - Behavioral issues (e.g., hoarding)
    - Show attempts to assist, offers of assistance, but act immediately on safety risks
  - ADL needs
    - Balance private care-givers with continuum model
  - Nursing needs
    - Point to regulatory requirements

Playbook for a Level of Care Change

- Negotiated Risk Agreements
- Contract that enumerates risks to Resident for remaining in lower level of care, bargain between CCRC and Resident for placement, promise to "hold-harmless" because Resident accepts risks
- PROS: Vehicle to encourage aging in place; protects CCRC from liability (theoretically)
- CONS: Leads to inconsistency and pushing boundaries; false sense of security; identification of risk undercuts hold-harmless
- RECOMMENDATIONS: Never in SNF; better options in AL; counter-productive in IL

Playbook for a Level of Care Change

- How to sell resident and family on voluntary move?
  - an internal consultation process? (appeals?)
  - propose temporary stay at higher Level of Care to “try it out”
  - 30-day evaluation trial at current Level of Care, with measurable goals to provide concrete data on resident’s care needs
    - * Formalize “try it out” and trial run with an agreement so all can assess outcomes against concerns from the beginning – use it to counter resident/family’s denials, avoidance, moving-targets, etc.

Playbook for a Level of Care Change

- Administrative process?
  - for AL and SNF, involuntary transfers involve proceeding before licensing agency and regulations for notices, hearings, appeals, etc.
  - attempt to tie-in any State CCRC requirements for assessments, disclosures, reporting???

Playbook for a Level of Care Change

- State/local agencies for seniors' protection
  - most appropriate in situations of family abandonment, concerns over lack of self-care, suspicions of financial exploitation, etc.
  - agencies like Adult Protective Services, ombudsman, law enforcement
- Alternate decision-maker
  - any advance directives or estate planning in place?
  - petition for guardianship?
    - guardian gains authority to decide on best residency/placement
    - not necessary to "win" guardianship when process spurs others to act and/or filing gets court to intercede
    - what if guardian also opposes move from IL?

Playbook for a Level of Care Change

- Terminate Residency Agreement
  - under the contract, what steps are needed to terminate?
  - able to eliminate the Life Care commitment?
  - requirements for full or partial refund of entrance fee? timing?
- Eviction
  - once CCRC terminates Residency Agreement, need to evict resident from IL apartment
  - housing court action for “forcible entry and detainer”
  - follow state/local practice under landlord/tenant law
  - housing courts likely are not familiar with CCRC model, may be reluctant to order eviction of an elder, someone in need of health care or supervision – you may need to recruit State/local agencies for seniors’ protection and/or alternative decision-makers for support to clear those hurdles in housing court

Level of Care Change scenario 1

- "Solo ager" resident with declining self-care and hygiene, possible financial exploitation . . . due to her dementia
- NOT a violation of FHA to make a housing change based on a disability when it creates a safety risk, i.e., a "direct threat to self or others"
  - direct threat to others – OK
  - direct threat to self – developing into a gray area?

* Argument against disability as "direct threat to self"

Level of Care Change scenario 1

* CCRC's counter-arguments about disability as "direct threat to self"
  - unlike apartment/condo, there are congregate living aspects of CCRC (e.g., community dining) where a direct threat to self quickly translates to a direct threat to others
  - remedy in apartment/condo setting is eviction; remedy in CCRC is move to higher level of care
* Is resident's self-care trouble due to a choice or does she lack that capacity due to dementia???

Level of Care Change scenario 2

- Resident is contracting for extensive health care services and assistance in his IL apartment, so he claims that a move through the continuum to AL is unnecessary. Can CCRC require him to move, or would that be discrimination in violation of FHA???
  - Resident claims that allowing him to remain in IL apartment with help of private duty services is a reasonable accommodation. But, FHA recognizes actions that make a fundamental alteration to a housing provider are beyond a reasonable accommodation

* exempting residents who want to stay in IL from the requirement to move through the continuum *is a fundamental alteration of a CCRC*

Level of Care Change scenario 2

- Resident's spending on private health care services and assistance in his IL apartment may change his actuarial/financial profile
- Paying private for health care services and assistance that he would receive in the CCRC's AL facility under his monthly charges
  - paying both the monthly charges and the extra private charges dissipates his funds faster than the CCRC anticipated
  - his funds for health care are being spent outside the CCRC (to the private care givers), so the CCRC does not receive the revenue it expected from resident
  - what happens when resident depletes his funds? CCRC has obligation to provide health care under the Life Care commitment

Life Care, Charity-Care, and Financial Health

- Obligation to provide charity-care (benevolence) [as a NFP does] provides further support for financial considerations to force a move through the continuum
- Two-way street: CCRC on the hook for a life-time care commitment but resident must responsible preserve finances
- CCRC's Residency Agreements that provide for charity-care allow analysis into "reasonableness" of how residents spend their money – inappropriate use of funds can be breach of contract

* Threshold for when IL + HHA becomes more expensive than AL???

Life Care, Charity-Care, and Financial Health

- credentialing for outside providers – allows to monitor usage so CCRC does not find out that a resident has been receiving 24-hour, outside care after the fact
- periodic review and updates of financial disclosures

Jason Lundy
Partner

Jason.Lundy@icemiller.com
P 312-726-2591
C 312-498-5630