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When Resident Issues Become Legal Issues in Long-Term Care:

Navigating Rights, Risk and Complex Care Transitions



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Resident issues rarely begin as legal issues

They usually begin as ordinary operational challenges

- A resident refuses care, medication, supervision, or another recommended service.
- Family members disagree about care, finances, placement, or access to information.
- Staff are uncertain about the scope or effectiveness of a power of attorney.
- A resident's condition or service needs change after admission.
- A conversation about a higher level of care becomes contentious.
- A resident, or their representative, stop paying the bills.
- The organization begins considering involuntary termination.

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Agenda

1. Fair Housing Starts at Admission
2. Residency Agreements and Expectations
3. Authority and Decision-Making
4. Documentation and Reassessment
5. Accommodation or Movement Through the Continuum
6. Involuntary Discharge

Each stage affects the next.
Problems that begin at admission often reappear during reassessment, transition, or termination.

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Case Study: Margaret

- Margaret applies for admission to an assisted living community.
- Margaret has mild cognitive impairment and uses a mobility device.
- Margaret's daughter is heavily involved and signs as the "responsible party."
- Admissions personnel state that Margaret can "age in place."
- After admission, Margaret begins refusing services and leaving supervised areas.
- Family members disagree about whether Margaret should move to memory care.
- Documentation differs among shifts, departments, and family communications.

At each stage, there is opportunity to set clear expectations and follow a thoughtful process.

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Fair Housing Starts at Admission

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Fair Housing Act

- The Fair Housing Act generally prohibits discrimination in the sale, rental, and availability of housing because of race, color, national origin, religion, sex, familial status, or ***disability.***
- It requires reasonable accommodations in rules, policies, practices, or services when necessary to provide a person with a disability an equal opportunity to use and enjoy a dwelling.
- Other federal, state, and local fair housing and civil rights laws may apply at the same time, including the Americans with Disabilities Act and Section 504 for federally assisted programs.

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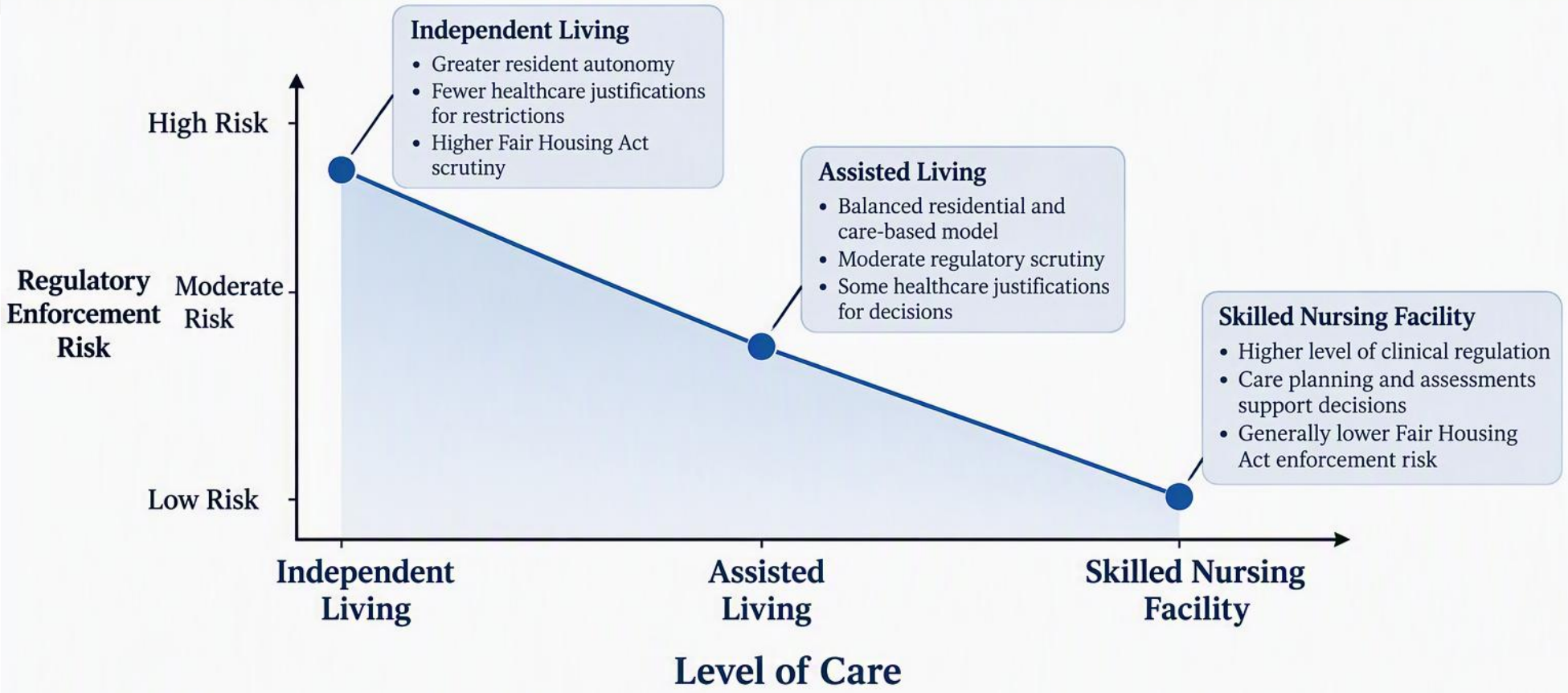
Fair Housing Act

- The Act commonly applies to independent living, senior apartments, continuing care retirement communities, assisted living, memory care, and other residential arrangements when the residence functions as the resident's home.
- The Act may affect advertising, inquiries, screening, admission, terms and conditions of residency, access to services and amenities, accommodations, transfers, and termination.
- Housing for Older Persons Act ("HOPA"): Age-restricted housing may qualify for a limited exemption from the Act's familial-status provisions, but that exemption does not eliminate protections based on disability or the Act's other protected characteristics.

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Regulatory Enforcement Risk by Level of Care

Fair Housing Act regulatory risk is often higher in lower acuity residential settings.



Less regulated settings often have greater discretion in resident management decisions. That discretion can create increased Fair Housing Act scrutiny regarding admissions, accommodations, transfers, and terminations.

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Six-figure settlement with the DOJ

Traditions of Hanover, senior housing apartments in Pennsylvania, sued by Dept. of Justice

The lawsuit, which the United States filed on May 13, 2020, alleges that from at least 2005 to the present, defendants created and implemented a series of discriminatory tenant occupancy and eligibility policies and practices that discriminate against persons with disabilities, including requiring residents to sign a lease that imposes conditions such as requiring an initial physical assessment as a requirement of tenancy and potential eviction if a resident develops certain health conditions. In addition, Traditions maintained policies that required residents who use wheelchairs to transfer from their wheelchairs into a dining room chair and required residents who used motorized and non-motorized wheelchairs to pay a non-refundable deposit. In addition, the complaint alleges that the defendants provide transportation as an amenity and that until 2013, that transportation was inaccessible to people who used wheelchairs, in violation of the Fair Housing Act.

Under the consent order, defendants will pay a minimum of $250,000 and a maximum of $325,000 into a settlement fund to compensate residents and prospective residents who were harmed by these policies. Defendants will also pay a $55,000 civil penalty to the United States. In addition, defendants will appoint a Fair Housing Act compliance officer at Traditions and other senior living facilities, and will implement new resident policies, including a new reasonable accommodation policy and a new motorized wheelchair policy.

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Six-figure settlement with Civil Rights Organization

Fair Housing Justice Center, Inc. v. Harbor View Senior Living Residence, LLC et al.

The named Defendants are **Harbor View Senior Living Residence LLC, Amber Court of Brooklyn, LLC Lakehaven Equities Inc, Judith Lyn Home for Adults LLC, Amber Court of Westbury II LLC,** and **Amber Court @ Suffolk County LLC.**

In 2023, the FHJC began an investigation into Defendants' facilities, assigning testers to pose as family members seeking admission information for their relatives who use wheelchairs. Through its investigation, the FHJC collected evidence showing that Defendants apply a blanket policy of turning away prospective residents who use wheelchairs while allowing other prospective residents to apply.

Instead of conducting an individualized determination of eligibility assessment or providing a reasonable accommodation, Defendants told testers whose relatives use wheelchairs to look elsewhere for housing and services or failed to follow-up after promising they would. In contrast, testers whose relatives did not use wheelchairs could proceed with Defendants' ACF application process.

The complaint alleges that Defendants' blanket discrimination against and exclusion of prospective residents who use wheelchairs (including manual and motorized) violates the Fair Housing Act (FHA), Section 504 of the Rehabilitation Act, and Section 1557 of the Patient Protection and Affordable Care Act (ACA).

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Six-figure settlement with Civil Rights Organization

Fair Housing Justice Center, Inc. v. Harbor View Senior Living Residence, LLC et al.

In response to FHJC's claims, Defendants have agreed to pay $399,000 and to take certain affirmative steps, including:

- Adopting a Non-Discrimination Policy regarding individuals with mobility impairments
- Adopting a Reasonable Accommodation and Modification Policy
- Referencing these policies in all marketing materials
- Implementing annual fair housing training for Defendants' principals, facility administrators, and employees involved with the admissions process
- Refraining from communicating any form of a "no wheelchair" policy to applicants or residents
- Refraining from rejecting any applicant or terminating any resident because they use a wheelchair, without having them participate in the Reasonable Accommodation process detailed in the new policy
- Extensively revising the application process in specific ways prescribed in the settlement which ensure that Independent Applicants and Institutional Applicants are made aware of their rights and are not discriminated against

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Margaret: Admission Process

- Was Margaret evaluated based on current needs or diagnosis?
- Did the community assess supervision, mobility, and evacuation needs?
- Did they make arbitrary decisions based on observable disability?
- Did Margaret or the daughter request any policy or service modification?
- Were those requests recognized and routed for review?
- What exactly did admissions promise about aging in place?
- Were those promises communicated to clinical and operational staff?

Residency Agreements and Expectations

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Residency Agreement as a Legal and Operational Tool

It establishes both legal rights and operational expectations

- Services included in the base rate
- Additional services and charges
- Services the community does not provide
- Resident and payment responsibilities
- Assessment and reassessment procedures
- Service-plan and policy changes
- Transfer and termination provisions
- Refund, property, grievance, and notice procedures
- Complete and accurate (be wary of ‘fill in the blank’)

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The Setting Dictates the Requirements

Common areas of focus in a residency agreement review

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IL

- Fair Housing Act
- Life Care Contracts
- Landlord/Tenant Law
- Eviction Proceedings

AL

- State Licensure
- Discrimination Statutes
- Medicaid Waiver
- Service Limitations
- Level of Care Changes

SNF

- State Licensure
- Federal Conditions of Participation
- Discrimination Statutes
- Arbitration Agreements

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Does the Agreement Reflect Operational Reality?

Potential issues warranting a closer look:

- Admissions cannot explain the provision.
- Operations cannot implement the provision.
- Clinical staff do not understand the provision.
- The provision conflicts with marketing materials.
- Staff routinely create undocumented exceptions.
- The provision does not reflect applicable operational or regulatory requirements.
- The organization applies the provision inconsistently.
- Independent living agreements require a health assessment or mandatory move to higher level of care.

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Common Contradictions

Misalignment across sales, contract, and operations creates risk at the beginning of the relationship.

What Residents Hear/Expect

1. The community can care for the resident indefinitely (“age in place”).
2. The community provides all inclusive care including medication assistance, escorts, supervision, or personal care.
3. Transfer decisions will be based on assessed needs with resident input.
4. The resident receives copies of policies and rules.

VS

What the Agreement Says

1. Permits or requires transfer when resident needs increase
2. Separately charges for medication management, escorts, incontinence care, transportation, or increased assistance.
3. Transfer decisions are based on the decision of the facility.
4. The policies and rules have changed and the resident received an outdated version.

KEY TAKEAWAY

The organization’s agreement, marketing materials, assessments, service plans, policies, billing practices, and staff communications should tell one consistent story.

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Margaret: Residency Agreement

- Has the form agreement been recently reviewed for accuracy and updates?
- Did Margaret sign the most up to date version?
- Was Margaret promised services that are not in the agreement?
- Were major terms (fees, services, rules) explained?
- Were service limitations discussed?
- Are all blanks filled in on the agreement?
- Did the proper individual(s) sign the agreement?

Authority and Decision-Making

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Who makes the decision?

Resident is competent → Follow the resident choice and document it

Resident is incompetent → Is there a legal decision maker appointed? → Do they have the legal authority to make ***this*** decision?

Competency fluctuates or is unclear → Resident's choice?

Is the resident more often competent or not?

What is the specific decision to be made?

Does the family support the choice or disagree? → ??

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Identify the Decision Before Authority

What is the decision that needs to be made?

- Signing the residency agreement
- Consent to care, services, or treatment
- Financial decisions and payment arrangements
- Access to records and permission to communicate
- Requests for accommodations or policy modifications
- Room changes, transfer, and selection of another setting
- Termination, move-out, and end-of-life decisions
- What to wear each day, have for breakfast, or when to go to bed

Authority is decision-specific. A document that authorizes one type of decision may not authorize another.

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Executing the Residency Agreement: Who Signs?

If someone else is signing, verify their authority

"Responsible party," "primary contact," "emergency contact," "next of kin," and "payer" may describe practical roles but do not necessarily create decision-making authority.

- Obtain the underlying documentation and review for effectiveness
- Make clear the representative is signing on behalf of the resident
- Note on the agreement the capacity in which the person is acting
- If both a POA for healthcare and for property, have both to sign if possible
- Avoid personal guarantees (SNF)

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SNF Definition of “Resident Representative”

42 CFR 483.5

Resident representative. For purposes of this subpart, the term resident representative means any of the following:

1) An individual chosen by the resident to act on behalf of the resident in order to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications;
2) A person authorized by State or Federal law (including but not limited to agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident in order to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications;
3) Legal representative, as used in section 712 of the Older Americans Act; or.
4) The court-appointed guardian or conservator of a resident.
5) Nothing in this rule is intended to expand the scope of authority of any resident representative beyond that authority specifically authorized by the resident, State or Federal law, or a court of competent jurisdiction.

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Power of Attorney for Health Care

- Authorized to make health care decisions as permitted by state law and the document.
- Authority may be immediate or become effective only after incapacity.

Examples:

- Medical treatment
- Medication decisions
- Care planning
- Placement decisions (depending on the document and state law)

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Power of Attorney for Property / Finances

- Authorized to make financial decisions.
- Does **not** automatically have authority to make healthcare decisions.
- Authority may be immediate or become effective only after incapacity.

Examples:

- Paying bills
- Managing assets
- Insurance claims
- Financial contracts

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Guardian / Conservator

- Authority comes from a court order.
- Scope depends on powers granted by the court.

Examples:

- Healthcare decisions
- Placement decisions
- Financial decisions
- Contract execution

Key point: Always review the court order.

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Reviewing a Document for Legal Authority

- Confirm the resident and representative identified in the document.
- Determine whether execution requirements appear satisfied.
- Determine whether authority is currently effective or requires an incapacity determination.
- Review the scope, limitations, co-agent requirements, and successor provisions.
- Check for revocation, amendments, or a newer document.
- For guardianship, review the order itself and identify rights retained by the resident.

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Considerations

When in doubt, defer to resident choice

1. **Resident always has the right to choose.** The resident has the right to and the facility must promote and facilitate resident self-determination through support of resident choice. 42 CFR 483.10(f)
2. **Does the resident have legal capacity to direct decisions?** A diagnosis, age, memory impairment, or a decision staff considers unwise does not automatically establish incapacity.
3. **Has the resident appointed someone else to make decisions on their behalf?** The resident generally remains the decision-maker unless another person has legally effective authority for the specific decision.
4. **Are loved ones supporting or disagreeing with the resident's choice?** Family involvement can support the resident without displacing the resident's voice. When they disagree, it can cause conflict and should warrant careful inquiry.
5. **What is the decision to be made?** Identify the decision, explain it in an understandable manner, and document the resident's stated preference.

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Margaret: Authority Questions

- Does Margaret retain capacity for care and placement decisions?
- What authority, if any, does the daughter possess?
- Is that authority currently effective and broad enough for the decision presented?
- Does another family member have competing or co-equal authority?
- Who may receive information and participate in care conferences?
- How should staff respond if Margaret disagrees with the daughter?

Documentation and Reassessment

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What makes Documentation Effective?

- **Accurate:** The entry reflects what the author personally observed, learned, or did.
- **Objective:** The entry distinguishes facts from opinions, assumptions, and conclusions.
- **Specific:** The entry identifies the conduct, service, event, time, location, and participants.
- **Resident-centered:** The entry records the resident's words, preferences, choices, and objections.
- **Complete:** The entry includes the assessment, intervention, response, notifications, and follow-up.
- **Timely:** The entry is completed close enough to the event to preserve reliability.
- **Consistent:** The entry aligns with incident reports, service plans, emails, and other records.

Key takeaway: Effective documentation should allow a person who was not present to understand what happened and what the organization did next.

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Documenting Facts, Sources, and Conclusions

- Identify facts personally observed by the person making the entry.
- Attribute information received from the resident, family, staff, or another provider.
- Use direct quotations when the resident's exact words are important.
- Distinguish a reported allegation from a verified fact.
- Identify the assessment or information supporting a conclusion.
- Avoid stating that conduct was intentional unless there is a factual basis.
- Avoid copying another person's characterization without attribution.
- Update the record when later information changes the initial understanding.

Key takeaway: A later reviewer should be able to reconstruct what happened, what was considered, and why the organization acted the way it did.

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Conclusory vs Specific

Be specific about when, what, where, and who.



Resident fell again

Sets up a record of knowledge of a problem but no assessment of the cause or mitigation efforts



Abuse occurred

Whether abuse occurred is a conclusion made after thorough investigation.



Resident noncompliant with care

Carries negative connotations and can mean different things to different readers



Unwitnessed fall

Whether a resident had an unwitnessed fall is a conclusion



Time, location, frequency

Document each instance where resident incident occurred– to establish a pattern of behaviors rather than conclusion of intent.



Staff observed Resident A strike Resident B

Helps keep the description factual and avoids making conclusions



Resident declined scheduled care

Documentation should reflect resident choice and method of refusal



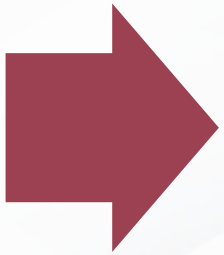
Resident found sitting on floor

Don’t make assumptions about facts that were not observed

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Effective Documentation Examples

"Margaret was observed yelling and aggressive towards staff"

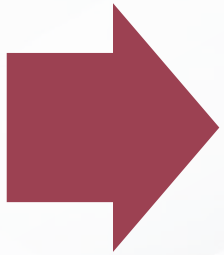


"At 11:35 a.m., Margaret raised voice and struck dining room table with hand after staff informed Margaret that lunch would begin in fifteen minutes. Margaret yelled, 'You never listen to me.' Staff moved Margaret to a quieter area and offered coffee. Margaret stopped yelling within five minutes and no physical contact with staff or residents occurred."

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Effective Documentation Examples

"Margaret wandered again and was unsafe"

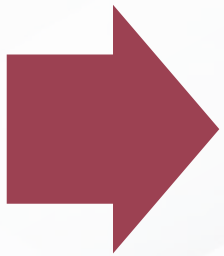


"At 3:20 p.m., staff observed Margaret outside the secured activity area walking towards the front door and leaving her walker behind. Margaret stated, 'I'm going home.' Staff redirected Margaret to the activity area and ensured her walker was within reach. Staff reminded Margaret to use walker when ambulating. No injury occurred."

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Effective Documentation Examples

"Margaret hit her roommate on the shoulder. Staff informed charge nurse of resident on resident abuse. Residents separated and assessed for injury. No further behaviors noted."



"At approximately 2:15 p.m., staff observed Margaret strike roommate on left shoulder with an open hand in doorway to room. Staff immediately intervened. Both residents were separated and assessed. Charge nurse notified at 2:19 p.m. Incident will be investigated pursuant to facility policy."

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Roadmap for Incident Documentation

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1

Observable facts describing the event rather than labels or conclusions

2

Assessments completed and findings

3

Options, education, and interventions offered

4

The resident's response including statements, preferences, objections, and choices

5

Notifications, follow-up plan, responsible owner, and review date

Remember: A later reviewer should be able to reconstruct what happened, what was considered, and why the organization acted the way it did.

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Documentation Outside the Resident Record

The chart and internal communications should tell one consistent story.

- Emails, text messages, internal messaging, and meeting minutes
- Incident reports and shift reports
- Billing and collection notes
- Family and representative communications
- Staffing records and operational data
- Access-control, call-system, or other electronic records

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Margaret: Documentation and Reassessment

- What specific conduct is described as wandering or leaving supervised areas?
- How often has it occurred and what happened immediately before each event?
- What does Margaret say about the events and service refusals?
- What interventions were attempted and with what result?
- Are different shifts and departments documenting the same facts?
- Has the assessment and service plan been updated?
- What measurable criteria will trigger continued monitoring, added support, or transition planning?
- Have Margaret’s physician and legal decision-maker been consulted?

Accommodation or Movement Through the Continuum

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Transition Decision Framework

Always consider the level (IL, AL, SNF) and the associated legal requirements.

Identify the issue

- What changed?
- Is there an immediate safety concern?
- Is the issue clinical, environmental, etc?

Gather facts

Use various sources of information to get a full picture of the issue (incident reports, direct observation, nursing evaluations)

Consider alternatives

- Care plan revisions?
- Environmental modifications?
- Reasonable accommodations?

Evaluate fit

- Can their needs be met safely?
- Would another setting better meet those needs?
- Does the resident understand the risks and options?

Develop transition plan

- Communicate, communicate, communicate
- Engage resident in discussions and planning
- Document, document, document

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Common Opportunities for Transition Discussions

- Significant change in cognitive status
- Increased assistance with ADLs
- Repeated falls or safety incidents
- Behavioral concerns affecting others
- Elopement or wandering risks
- Increased clinical needs beyond available services
- Failure of previously implemented interventions
- Repeated emergency department visits or hospitalizations

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Resident Choice vs Facility Constraints

Resident Right to Self-Determination

- Residents may make choices others disagree with.
- Residents may refuse recommendations.
- Residents may accept known risks.

Facility Licensure/Services Constraints

- License may dictate whether resident can stay or not.
- If license doesn't dictate, assess risk to retaining the resident without additional intervention.
- Educate regarding consequences.
- Offer available services.
- Document informed choice.
- Continue monitoring.

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Transition Planning Reduces Resident Dissatisfaction

And, by extension, reduces legal risk

Residents and families are more likely to accept difficult transitions when they believe:

- ✓ They were heard
- ✓ The process was fair
- ✓ The decision was individualized
- ✓ The community attempted alternatives
- ✓ The transition was planned rather than forced or abrupt
- ✓ The focus remained on resident needs rather than operational convenience

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Common Reasonable Accommodations

Often addressed as care plan interventions

- Allowing or accommodating private-duty caregivers
- Modified dining, medication, housekeeping, or activity schedules
- Mobility devices, parking accessibility, room location
- Providing reminders, cueing, redirection
- Communication assistance or alternative-format materials
- Assistance animals

Accommodations need not be provided if:

- **They would constitute an undue financial and/or administrative burden**
- **They would fundamentally alter the provider's program/services**
- **The resident poses a direct threat to the health or safety of others**

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Safety and Direct-Threat Analysis

Shows up in discrimination laws and licensure laws

1. **What is the specific threat of harm?** Decisions cannot be based on generalized assumptions, stereotypes, fears, or speculation about a disability.
2. **What objective evidence supports it?** Providers must rely on resident-specific, objective, reliable evidence (such as current behavior or a recent history of overt acts).
3. **How serious and probable is the harm?**
4. **Can an accommodation or intervention mitigate it?**
5. **Does the record demonstrate the individualized analysis?** Is there evidence supporting what the specific threat is, such as an increase in behaviors or sudden significant concerns? Is there evidence supporting the consideration of interventions and why they would or would not work?

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Margaret: Accommodation and Transition

- Could schedule, staffing, communication, or environmental changes reduce refusals or wandering?
- Are concerns based on actual events or assumptions?
- What supports are available within the current setting?
- When should transition planning begin?
- What current needs can the setting no longer meet, and why?
- What does Margaret want?
- Who will coordinate the transition and what happens if placement is unavailable?

Involuntary Discharge or Eviction

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Setting Dictates the Procedure



Independent living may implicate the residency agreement, fair housing requirements, and state or local landlord-tenant law.



Assisted living discharge standards and notice rights are generally governed by state law and the agreement.



Medicare- and Medicaid-certified nursing facilities are subject to specific federal resident-rights and transfer/discharge requirements, in addition to state law.



Hospital transfer, non-return, payment owed, lease termination, threat to others, and other discharge reasons are not necessarily the same legal event.

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What happened before we got to this point?

- What was promised at admission?
- What does the admission agreement say?
- What does applicable law permit?
- What changed after admission?
- Was the resident reassessed?
- Were alternative interventions or accommodations considered?
- Were concerns communicated before the situation became a crisis?
- Does the record support the actual reason for discharge?

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Preparing for Discharge

1. Admission
   - Discuss potential reasons for discharge on admission
   - Do not promise care for life or “aging in place”
   - Confirm the agreement, licensure, landlord-tenant, and other setting-specific requirements

2. Documentation
   - Clearly identify and document the concern each time it occurs
   - Document prior interventions and the effectiveness of those interventions
   - Identify what facts support the decision
   - What agreement provision and legal authority apply?

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Preparing for Discharge

3. Addressing Changing Needs
   - Reassess the resident and current services
   - Consider whether other interventions or accommodations can be made
   - Involve the resident and verify decision-making authority
   - Review available scope of services within the facility's license

4. Educate the Resident and their Family
   - Communicate with resident and necessary parties throughout the process
   - Educate on service limitations of the facility as care needs increase
   - Educate with potential alternatives and available options

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Potential Grounds for Involuntary Discharge

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Requirements vary based on jurisdiction but commonly include:

- Nonpayment
- Material violation of the residency agreement
- A specific and individualized safety or health concern
- Needs exceeding the provider's lawful or operational capabilities
- Closure, conversion, or discontinuation of services
- Another ground specifically authorized by applicable law and the agreement

The stated ground should match the actual facts, the agreement, and applicable setting-specific law.

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Involuntary Discharge Notice

Requirements vary based on jurisdiction but commonly include:

- Correct resident, address, and recipient
- Specific ground and supporting facts
- Agreement provision and legal authority
- Accurate effective date and notice period
- Appeal, grievance, hearing, or other applicable rights
- Required agency, ombudsman, or advocacy contacts
- Services during the notice period
- Payment, refund, personal-property, and move-out procedures
- Method and proof of delivery

Like the residency agreement, the discharge notice is a legal document that must be well drafted and accurate

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Issuing the Notice and Moving to Discharge

- Continue required care, services, and safety measures
- Provide clear staff instructions and designate a communication lead
- Continue to recognize and evaluate accommodation requests
- Document placement assistance and resident participation
- Address billing, payment, refunds, and personal property
- Prepare for complaints, regulatory inquiries, or challenges
- Define the operational and legal response if the resident does not leave by the effective date

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Margaret: Involuntary Discharge

- What is the actual reason the community wants Margaret to leave?
- Does the record support the stated ground?
- Does the admission agreement and applicable law authorize the discharge?
- Were reassessment, interventions, and accommodations attempted?
- Was Margaret involved and was the daughter’s authority verified?
- Is another setting available?
- What kind of notice is required under applicable law and what services and protections apply during the notice period?
- What will the community do if the transition does not occur?

Questions?

For more information on these topics visit hallrender.com.



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