

How States Can Prevent Evictions When Implementing Federal HCBS Regulations

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Eric Carlson

Directing Attorney, Justice in Aging

Executive Summary

New Standards for Medicaid-Funded Home and Community-Based Services

Since 1983, the federal Medicaid program has funded Home and Community-Based Services (HCBS) to provide an alternative to nursing facility care. HCBS can be provided both in residential and non-residential settings — in residential facilities and also day service centers, for example. In recent years, concern developed that HCBS are being provided in an inappropriately-institutional manner. In response, in 2014 the Centers for Medicare and Medicaid Services (CMS) released regulations that set standards for the settings in which HCBS are provided. To implement these regulations, each state must have a transition plan approved by CMS by March 2019, with full compliance required by March 2022.

Overall, the HCBS regulations promote a non-institutional environment. Both residential and non-residential HCBS settings must provide service recipients with access to the community outside the setting, and must offer choice regarding services, service providers, and other aspects of the service

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recipient's life. Furthermore, the setting also must protect each person's rights to privacy, dignity, and respect.

A subset of the regulations applies only to residential HCBS settings — assisted living facilities and group homes, for example. One provision requires that each resident have protections from eviction that are at least equivalent to the protections provided under the state's landlord-tenant law. If landlord-tenant law does not apply, the state must ensure that equivalent protections are established by a written agreement between the resident and the setting.

The Problem: Evictions from Residential HCBS Settings

This issue brief focuses on how the HCBS regulations can be implemented in residential settings to protect against inappropriate evictions. Such evictions are too common. For example, assisted living facilities frequently force out residents who begin to require additional attention, even though the resident's care needs remain well within the type of care that the facility is licensed to provide. The facility may tell the resident that he or she has to leave, or may issue a written notice — in either case, the resident often feels compelled to leave. The resident's options are limited because many state laws set few standards for assisted living evictions and/or give the resident no workable mechanism for appealing a facility's decision.

How States Propose to Implement Eviction Protections

As this issue brief is being written, three states have received CMS' final approval of their HCBS transition plans. In other states, the transition plans are still a work in progress. Some of these states have received an initial CMS approval that finds that the state has made adequate progress in initial steps such as analyzing existing state law, and surveying providers and service recipients. Other

states are at an earlier stage and still are waiting for their initial approval.

In order to receive final approval, each state must develop additional policies to implement each provision of the HCBS regulations. As mentioned, final approval must be obtained by March 2019, although the state and providers are not required to be in full compliance until March 2022.

This issue brief examines how some state transition plans propose to implement the HCBS regulations' eviction protections. The most common strategy is to incorporate the relevant federal language into state regulations, waiver applications, and/or provider manuals. Some states have established standards for written agreements used by residential settings and residents. Other states have established eviction protections through state regulations that limit the justifications for eviction, and provide an administrative appeal mechanism for any resident who wishes to challenge a proposed eviction.

Analysis

It is insufficient for a state merely to incorporate the federal eviction protections. The federal protection is grounded upon state landlord-tenant law, which may not be adequate to protect HCBS recipients living in residential settings. In many states, landlord-tenant law allows for eviction without cause; in some states, this is true also of the state law governing residential HCBS settings. In other states, landlord-tenant eviction justifications may be ill-suited for residential HCBS settings.

Also, landlord-tenant law may not provide the best forum for adjudicating disputes. A court trial is a poor mechanism to adjudicate such issues as a residential HCBS setting's alleged inability to meet a resident's needs. Also, a courtroom will be inappropriate and disorienting for many residents of residential settings.

An additional problem is the inadequate level of detail even if the federal regulation and state

landlord-tenant law are considered together. The federal HCBS regulation requires that a provider use a written agreement that provides a resident with protections that are at least equivalent to the protections of landlord-tenant law. It generally will be far from obvious how such an agreement should be written, and a provider will receive little insight from a state policy that just restates the federal requirement that there be such an agreement.

Recommendations

Protection against eviction is an important piece of the HCBS regulations. A residential setting cannot honestly be considered “non-institutional” if the service provider has broad discretion to force a resident out. A resident needs two protections: 1) appropriate limitations on the substantive reasons for eviction, and 2) a usable procedure for challenging an improper eviction.

One attractive option is a state regulatory system that sets appropriate justifications for eviction, and also provides an administrative appeals mechanism for challenging an eviction. A state may choose to pursue the same goals through written agreements between residential settings and residents but, to be successful, the state would have to provide great detail about the agreements’ content. Such an agreement would specify appropriate justifications for eviction and set forth a practical mechanism for a resident’s challenge of a proposed eviction. It would not be sufficient for one of those agreements simply to incorporate the state’s landlord-tenant law.

Medicaid Home and Community-Based Services

Since 1983, Medicaid Home and Community-Based Services (HCBS) programs have funded non-institutional assistance for persons who otherwise would have received care in a nursing facility or other institution. HCBS programs are designed as win-win alternatives for all parties:

state Medicaid programs spend less money, while Medicaid beneficiaries receive necessary services in a preferred environment.

In recent years, advocates and others have expressed concern about the true nature of some HCBS settings. On many occasions, supposedly non-institutional settings have seemed to be overly institutional in nature. The problem exists both in non-residential day programs and in residential settings (such as assisted living facilities or group homes).

In response to these concerns, the Centers for Medicare and Medicaid Services (CMS) released HCBS settings regulations in March 2014.¹ These regulations provided for a five-year transition period, so full compliance by states and providers would be required by March 2019.² The federal government recently extended the deadline: now, a state will be required to have a transition plan approved by CMS by no later than March 2019, but full implementation will not be required until March 2022.³

The HCBS Settings Regulations

Provisions Applicable to All Settings⁴

Under the federal regulations, community integration is key. The setting must support “full access” by the HCBS recipient to the “greater community.”⁵ Choice also is an important

1 42 C.F.R. §§ 441.301(c)(4)-(6) (HCBS funded through HCBS waiver), 441.530(a) (HCBS funded through Community First Choice Option), 441.710(a) (HCBS funded through state plan amendment). These three provisions are essentially identical, although they apply to different HCBS funding streams. For simplicity, all further citations to the HCBS settings requirements will reference only section 441.301, since an HCBS waiver is a more common funding mechanism than the Community First Choice Option, or HCBS funded through a state plan.

2 79 Fed. Reg. 2,948, 2,979 (2014).

3 CMS, CMCS Informational Bulletin, Extension of Transition Period for Compliance with Home-and Community-Based Settings Criteria (May 9, 2017).

4 42 C.F.R. § 441.301(c)(4)(i)-(v).

5 42 C.F.R. § 441.301(c)(4)(i).

component of a non-institutional environment. Specifically, the setting must “[f]acilitate[] individual choice regarding services and supports, and who provides them.”⁶ This choice includes the setting itself, as the regulations require that the setting be selected by the HCBS recipient from options that include non-disability-specific settings and (for residential care) an option for a private unit.

Significantly, the regulations also address how services are provided. The setting must ensure the rights of privacy, dignity, and respect, and the HCBS recipient must not experience any coercion or restraint.⁷

Provisions Applicable Only to Residential Settings

Residential settings present particular risk of an institutional environment, since the HCBS recipient is living with other service recipients, and in constant contact with HCBS staff. To address this greater risk, the regulations establish additional standards specifically for these residential settings.⁸

One component — and the focus of this issue brief — is reasonable protection from eviction. At a minimum, the resident must have protections equivalent to those provided to the state’s rental tenants. If the state’s landlord-tenant law does not apply to the setting, the setting and resident must enter into a written agreement that establishes equivalent protections.⁹

More information about the HCBS settings requirements, both for non-residential and residential settings, is available in *Just Like Home: An Advocate’s Guide to Consumer Rights in Medicaid HCBS* (Justice in Aging May 2014).

6 42 C.F.R. § 441.301(c)(4)(vi).

7 42 C.F.R. § 441.301(c)(4)(iii).

8 42 C.F.R. § 441.301(c)(4)(vi).

9 42 C.F.R. § 441.301(c)(4)(vi)(A).

Transitioning Into Compliance

As discussed above, states have until March 2019 to finalize a transition plan, and March 2022 to fully implement the regulations. As this issue brief is being written (August 2017), three states — Arkansas, Kentucky, and Tennessee — have received final approval for their transition plans. Most states have received initial approval for their transition process, with the focus on procedural steps such as survey methodologies for consumers and service providers, the state’s review of existing regulations, and stakeholder engagement strategies. Each of these states still needs to make many decisions regarding the transition plan’s substance — for example, what will be required for a setting to be considered “integrated,” and what eviction protections will be required of residential HCBS settings. These same decisions are required from the remainder of the states: those states first must obtain initial approval focusing on procedural aspects of the transition, and then must move on to develop the required substantive policies.

Eviction Issues in Residential Care Settings

Introduction

Medicaid does not have a specific funding mechanism for services provided in an assisted living facility, an adult foster care home, a group home, or other similar setting. (The names of these settings vary from state to state). If the state chooses to cover these services, they are classified as home and community-based services (HCBS) under federal Medicaid law.

This issue brief examines how states should implement the HCBS settings rule to prevent inappropriate evictions from residential settings. The issue brief focuses primarily on assisted living facilities, but also addresses state policies relating to other types of residential care. It should be noted that state policy for assisted living often is identical

to the same state's policy for different types of residential care. For simplicity's sake, this issue brief frequently cites only to assisted living when a state's eviction policy relates both to assisted living facilities and to residential HCBS settings that serve an under-65 population. By and large, the policy issues discussed in this issue brief apply equally to assisted living facilities and to other types of residential HCBS settings.

The Problem: Too-Frequent Evictions from Residential Settings

Assume, for example, an assisted living resident who is challenging to the residential setting for some reason. Due to advancing dementia, she may need more attention, even though her care needs remain well within the type of care that the setting can provide under its license. Or, alternatively, she may make regular complaints about services and meals. In situations like these, the setting too frequently will move to force the resident out, either by telling the resident that she must leave, or by issuing a written eviction notice. In either case, the resident often has few options other than just moving out, because the state law may not meaningfully limit the lawful justifications for evictions in assisted living, and/or residents may not have viable appeal procedures.

The underlying problem is a weakness in many state laws. Although state law often limits the justifications for eviction from a residential HCBS setting, the standards may give great discretion to the setting. A typical provision authorizes eviction when the service provider cannot meet a resident's needs, and gives the provider leeway in determining the level of services that it will offer.¹⁰ Because state law may be somewhat inexact in describing the

10 *See, e.g.*, Ala. Admin. Code r. 420-5-4-.06(2)(b) ("Whenever a resident requires hospitalization, medical, nursing, or other care beyond the capabilities and facilities of the assisted living facility, arrangements shall be made to discharge the resident to an appropriate setting, or to transfer the resident promptly to a hospital or other health care facility able to provide the appropriate level of care.")

required level of services, residential settings may feel relatively free to initiate eviction of a resident based on the resident's care needs, even though those care needs may be within the care needs that the setting is allowed to accommodate under the state's licensing laws.¹¹

Procedural protections also are frequently lacking. State licensing laws often list grounds for eviction without specifying an appeals mechanism.¹² In many of these states, the resident may have a solid legal argument for a right to an eviction trial under the state's landlord-tenant law, because the assisted living unit should be considered a "residence" (or a similar term used by the state's law).¹³ Unfortunately, however, most residents in these states will not be savvy enough to make this argument — if the residential setting and the state licensing agency are proceeding as if the resident has no right to a hearing or trial, the vast majority of residents will give up and move out when the setting gives notice. In any case, the court trial may be a poor forum for the type of issues that arise in the residential HCBS setting.

How State Transition Plans are Addressing Eviction Issues

States Offering Appeal Rights through Administrative Hearings

Oregon is noteworthy in addressing the eviction-protections requirement in a system that utilizes administrative hearings to adjudicate instances of "involuntary move-out."

11 Under some circumstances, an eviction based on care needs may violate the Americans with Disabilities Act (ADA), but few residents will have the resources or legal sophistication to assert the ADA in these situations.

12 *See, e.g.*, *Bouman v. Dep't of Pub. Welfare*, 108 A.3d 944, at 947 n.7 (Pa. Commw. Ct. 2015) (no right to appeal; court suggests that resident of personal care home could defend herself from eviction by filing breach of contract lawsuit).

13 *See, e.g.*, Cal. Civ. Code § 1940(a) (landlord-tenant law applying to all persons renting "dwelling units").

Like many states, Oregon has promulgated new regulations that restate the federal HCBS settings regulations.¹⁴ As relevant to eviction protections, these new state regulations include a definition of “residency agreement,” and the requirement that a HCBS beneficiary have protections against eviction that are equivalent to the protections applicable to residential tenants.¹⁵ In addition, the licensing rules for assisted living facilities have been revised to include, in the listing of resident rights, certain rights granted by the federal HCBS settings regulation. This includes the right to “[l]ive under a legally enforceable residency agreement.”¹⁶ Furthermore, the licensing rules apply HCBS standards to all licensed facilities, whether or not the facility is certified to accept Medicaid.¹⁷

This same licensing regulations govern “involuntary move-out” in assisted living facilities, whether the resident’s care is funded through Medicaid HCBS or otherwise.¹⁸ Under the relevant regulation, a resident can be forced to move out only under one of seven specified conditions, including failure to pay, health care needs that the facility cannot meet, or resident behavior that endangers others or interferes with others’ rights.¹⁹ A facility must provide 30-day written notice of any involuntary move-out.²⁰ Importantly, the resident may request an administrative hearing to appeal the facility’s proposed action.²¹ Furthermore,

14 See Or. Admin. Code 411-004-0000 through 411-004-0040.

15 See Or. Admin. Code 411-004-0010(18) (“residency agreement” definition), 411-004-0020(2)(c) (eviction protections); see also Oregon’s Home and Community Based Services (HCBS) Setting Statewide Transition Plan, at 99 (referencing new regulatory provisions) (Oct. 31, 2016).

16 Or. Admin. Code 411-054-0027(2)(a)(A); see also Oregon’s Home and Community Based Services (HCBS) Setting Statewide Transition Plan, at 99 (referencing new regulatory provisions) (Oct. 31, 2016). The regulations govern residential care and assisted living facilities; for simplicity, this issue brief simply refers to “assisted living facilities.”

17 Or. Admin. Code 411-054-0000(2).

18 Or. Admin. Code 411-054-0080.

19 Or. Admin. Code 411-054-0080(4)(a)-(g).

20 Or. Admin. Code 411-054-0080(2). Notice of less than 30 days is adequate in specified “unusual circumstances.” Or. Admin. Code 411-054-0080(6).

21 Or. Admin. Code 411-054-0080(7).

these resident protections must be documented in the residency agreement; the specified issues to be addressed in the agreement include “[c]riteria, actions, circumstances, or conditions that may result in a move-out notification or intra-facility move,” and “[r]esident rights pertaining to notification of involuntary move-out.”²²

Montana also offers helpful consumer protections. The statewide transition plan points to existing state regulations as establishing compliance and, indeed, those regulations offer significant protections.²³ Under the regulations, personal care facilities must provide 30-day notice prior to any involuntary discharge, which is allowed only in case of nonpayment or under one of five justifications based on a resident’s significant care needs. If the resident objects to the involuntary discharge, he or she has a right to an administrative hearing conducted by the Montana Department of Public Health and Human Services.²⁴

States Incorporating Federal Requirements with Little Additional Detail

Review of in-process transition plans show that most states are short on detail in regards to eviction protections. The most common strategy by far is to restate the federal requirements, or to promise to include the federal requirements in regulations or subregulatory guidance. **Indiana** and **Mississippi** intend to amend their regulations to add the federal eviction-related language.²⁵ **New Mexico** similarly will add the federal requirements to its Medicaid waiver, state regulations, provider agreements, and provider applications.²⁶

22 Or. Admin. Code 411-054-0025(10)(a)(L), (M).

23 State of Montana Home and Community Based Services Settings Transition Plan, at 55 (Dec. 21, 2016).

24 Mont. Admin. R. 37.106.2824.

25 Indiana Statewide Transition Plan for Compliance with Home and Community-Based Services Final Rule, at 22 (March 2017); Mississippi Revised Statewide Transition Plan Summary 1915(c) and 1915(i) Home and Community-Based (HCB) Programs Compliance with HCB Settings (Feb. 6, 2017), at 33.

26 New Mexico Statewide Home and Community-Based Services Transition Plan Amendment, at 110-12 (Jan. 9, 2017)

Ohio has revised its regulations to add a restatement of the federal HCBS settings regulations.²⁷ The relevant Ohio Medicaid regulation requires that a provider-owned or controlled residence use either an agreement subject to Ohio’s landlord-tenant law, or an agreement that contains eviction protections “comparable to” those provided by the landlord-tenant law.²⁸ Such a comparable agreement must specify the circumstances under which the resident would be “required to relocate,” along with the relevant appeal process.²⁹

Oklahoma similarly has slightly revised its Medicaid assisted living regulations to require a “legally enforceable agreement” that creates protections equivalent to those provided under the relevant landlord-tenant law.³⁰ Unfortunately, however, the same regulation contains provisions that give a facility broad discretion to force a resident out. The regulation authorizes “termination of residence” for “inappropriately placed” assisted living residents, listing multiple ways in which a “placement” may be “inappropriate,” including situations in which the resident exhibits behavior that interferes with other residents’ well-being, or has needs that cannot be addressed adequately by the provider’s services.³¹ Thirty-day notice is required, and the notice must include “notification of appeal rights and the process for submitting appeal of termination of Medicaid [assisted living services] to [the state agency].”³²

Hawaii proposes relatively limited modifications to state policy. In regards to assisted living facilities,

(promise to revise Medicaid waiver, state regulations, provider agreements, and provider applications to include language of federal eviction-related requirements).

27 See Ohio Admin. Code § 5160-44-01.

28 Ohio Admin. Code § 5160-44-01(C)(1).

29 Ohio Admin. Code § 5160-44-01(C)(1)(b).

30 Okla. Admin. Code § 317:30-5-763(18)(D)(i)(II) (unofficial version on website of Oklahoma Health Care Authority).

31 Okla. Admin. Code § 317:30-5-763(18)(C)(x)(xi) (unofficial version on website of Oklahoma Health Care Authority).

32 Okla. Admin. Code § 317:30-5-763(18)(C)(xi)(V) (unofficial version on website of Oklahoma Health Care Authority).

the state promises to “amend the provider contract to add language that ensures [a] legally enforceable agreement by the individual receiving services.”³³ The state does not intend to amend the regulations, based on a finding that the relevant regulation already requires a contract that describes services, rates, and conditions under additional charges can be assessed.³⁴ The regulation obligates facilities to give a 14-day notice if the facility seeks discharge under three conditions: the resident poses an imminent danger, the facility cannot meet the resident’s needs, or the resident or representative is not abiding by necessary agreements. Notably, the resident’s only remedy is an “informal conference” with the facility, to “determine if a satisfactory resolution can be reached.”³⁵

States with Model Agreements

North Dakota has revised its regulations for Foster Homes for Adults to address the eviction issue. The “service and rental agreement” must include the “[l]andlord tenant eviction and appeals process,” and the provider must comply with that process.³⁶ North Dakota has prepared a sample lease agreement for residential providers, although that sample is a bare-bones, one-page document.³⁷ It lists five headings — Rent, Termination, Landlord Obligations, Tenant Obligations, and Violation — with very little detail under each of the headings. The “Termination” heading includes only the following language:

33 State of Hawaii HCBS Settings Rule Statewide Transition Plan, Attachment B-HI Remediation Crosswalk MASTER, at 8 (Jan 5, 2017).

34 State of Hawaii HCBS Settings Rule Statewide Transition Plan, Attachment B-HI Remediation Crosswalk MASTER, at 8 (Jan 5, 2017).

35 See Haw. Admin. R. 11-90-10(b).

36 N.D. Admin. Code § 75-03-21-12(1)(a), -13(2); see North Dakota Revised Statewide Transition Plan for HCBS Settings Under 1915(c) Waivers, at 147 (Nov. 1, 2016) (discussing revision of regulation).

37 North Dakota Revised Statewide Transition Plan for HCBS Settings Under 1915(c) Waivers, at 18, 20, 24, 59.

If Tenant violates a material term of this Agreement or fails to pay rent for ___ days after rent is due, Landlord may terminate this Agreement after ___ days' written notice. Any eviction action by Landlord shall comply with NDCC Chap. 47-32 [the North Dakota landlord-tenant eviction laws].³⁸

In addition, under the state's HCBS waiver for Residential Habilitation, North Dakota will review provider leases for compliance with the state's landlord-tenant law.³⁹

Idaho, in addition to restating the federal HCBS settings regulation in state regulations,⁴⁰ has revised its template "Admission Policy and Agreement" for Certified Family Homes to state that a HCBS-funded provider will comply with the federal HCBS requirements.⁴¹ State guidance explains that the template agreement was revised to align with the state's landlord-tenant law.⁴² The agreement otherwise, however, shows no signs of being modified to reflect the federal regulations themselves.

Protections are minimal. Under the Idaho agreement, the provider can terminate the agreement without cause after service of a 30-day notice. Notice can be reduced to three days for non-payment, violation of admission agreement terms, or use of a controlled substance, with the

resident having a right to rectify the problem during those three days. A termination for cause cannot be implemented until approved by the Idaho Department of Health and Welfare.⁴³

States with Approved Transition Plans

Unfortunately, the states with approved transition plans demonstrate some of the legal gaps that can disadvantage assisted living residents. **Arkansas** references its existing assisted living regulations, and incorporates those regulatory requirements into the state's manual for providers of assisted living waiver services.⁴⁴ On the plus side, the regulations call for extensive procedural protections, including written notice and the right to an administrative appeal.⁴⁵ On the other hand, the regulations also authorize an eviction *without cause* as long as the provider gives 30-day notice.⁴⁶

Kentucky, another state with an approved transition plan, has yet to provide details about how it will comply with the eviction protections requirement. Kentucky's transition plan cites the federal requirement, acknowledges that current Kentucky law does not include this requirement, and promises to amend Kentucky regulations to include this requirement.⁴⁷ Based on the Kentucky transition plan, the amendment will be close to a word-for-word incorporation of the federal regulatory language.⁴⁸ As a result, it will be left to residential settings to "[r]esearch state laws for leases to understand how to comply" and "[d]raft lease or legally enforceable document that provides participants the same responsibilities and protections from eviction that tenants have under Ky law."⁴⁹

38 Basic Rental Agreement developed by North Dakota Department of Human Services. The four sections of Chapter 47-32 are: §§ 47-32-01 (when eviction maintainable), 47-32-02 (appearance; notice of intention to evict; when required; when and how served), 47-32-03 (legal representatives bringing eviction actions), and 47-32-04 (eviction actions generally not joinable with other actions).

39 North Dakota Revised Statewide Transition Plan for HCBS Settings Under 1915(c) Waivers, at 24, 119-20.

40 See IDAPA §§ 16.03.10.310 -.317.

41 Idaho Dept. of Health and Welfare, Certified Family Home: Admission Policy and Agreement, at 1, *available at* healthandwelfare.idaho.gov/Portals/0/Medical/CFH/AdmissionAgrmt4.pdf.

42 Idaho Dept. of Health and Welfare, Certified Family Home Admission Agreement Guidance, at 1, *available at* healthandwelfare.idaho.gov/Portals/0/Medical/CFH/AdmissionAgrmntGuidance1.pdf. One revision likely was the requirement of a thirty-day notice for a without-cause terminate. The regulations for certified family homes require only 15-day notice. See IDAPA 16.03.19.260.02(a).

43 Idaho Dept. of Health and Welfare, Certified Family Home: Admission Policy and Agreement, at 3-4.

44 Ark. Dept. of Human Servs., Home and Community-Based Services (HCBS) Statewide Settings Transition Plan, at 66-67.

45 Ark. Code R. & Regs. 016 06 002, § 602(d).

46 Ark. Code R. & Regs. 016 06 002, § 602.1(a).

47 Kentucky 1915(c) Waiver Statewide Transition Plan, at 8.

48 Kentucky 1915(c) Waiver Statewide Transition Plan, at 31.

49 Kentucky 1915(c) Waiver Statewide Transition Plan, at 48.

Tennessee, the third state with an approved plan, similarly is leaving most specifics to individual settings. A draft provider manual for IDD providers requires either that landlord-tenant law be applicable, or the beneficiary have a lease agreement with the provider. Unfortunately, the initial references to “tenant law” and “lease agreement” are somewhat undefined, with no specific mention of eviction or eviction protections.⁵⁰ A subsequent provision notes that leases are “preferred” over tenancy agreements, but that tenancy agreements are “appropriate” for certain “room and board model[s],” and “must ensure the same protections a person would otherwise be entitled to under applicable Landlord and Tenant laws.”⁵¹ According to the draft provider manual, a lease or tenancy agreement must provide for at least a thirty-day notice prior to termination, but the provision makes no mention of any appeal rights.⁵² It should be noted that Tennessee’s Landlord and Tenant Act has eviction justifications that are a poor fit with residential settings — specifically, termination of tenancy is authorized for failure to pay or (the poorly fitting item) failure to adequately maintain the rental property.⁵³

Analysis and Recommendations

Limitations in Strategies that Rely on Incorporating Federal Regulatory Language

The easiest way to comply with the letter of the HCBS eviction protections is to incorporate the language of the federal regulation into state documents — regulations, preferably, but also

50 Tennessee Department of Intellectual and Developmental Disabilities, Draft Provider Manual, page 11-3 (Dec. 29, 2016); *see also* Tennessee’s Approved Home and Community-Based Services Setting Rule Statewide Transition Plan, at 13 (discussion of provider manual revisions).

51 Tennessee Department of Intellectual and Developmental Disabilities, Draft Provider Manual, page 11-11 (Dec. 29, 2016).

52 Tennessee Department of Intellectual and Developmental Disabilities, Draft Provider Manual, page 11-13 (Dec. 29, 2016).

53 Tenn. Code Ann. §§ 66-28-505, -506, -510. The tenant has 14 days to rectify the problem or to move out. If neither happens, the landlord can file an action to retain possession of the property.

HCBS waiver applications, provider manuals, and other guidance. The easiest way to comply, however, is not the most effective.

First, the federal requirement essentially incorporates state landlord-tenant law, which may not be adequate to protect HCBS recipients living in residential settings. For eviction protections to be useful in residential HCBS settings, eviction must be allowed under only a limited number of circumstances, and only under circumstances that are relevant to the setting. In many states, however, landlord-tenant law allows for eviction without cause and, in some states, this is true also of the state law specifically governing residential settings.⁵⁴ In other states, landlord-tenant eviction justifications may be ill-suited for residential settings — for example, the above-discussed provision in the Tennessee Landlord and Tenant Act that authorizes eviction for failure to adequately maintain a rental property.⁵⁵

Also, landlord-tenant law may not provide the best forum for adjudicating disputes. On the plus side, landlord-tenant law generally provides the right to a court trial, which is certainly an improvement over having no appeal rights whatsoever, or having the *de minimis* right to an informal conference with the service provider.⁵⁶ On the other hand, a court trial generally is a poor mechanism to adjudicate issues related to residential HCBS settings — most prominently and commonly, a setting’s alleged inability to meet a resident’s needs. The average landlord-tenant court will have experience in rent payments and property damage, but will be completely unfamiliar with care issues. Also, the courtroom setting will be inappropriate and disorienting for many residents of residential HCBS settings, including assisted living residents and the under-65 persons with physical and intellectual disabilities

54 *See supra* at 8 for discussion of without-cause evictions in Arkansas and Idaho.

55 *See supra* at 9.

56 *See supra* at 7 for discussion of the right to an informal conference under Hawaii law.

who typically reside in other types of residential HCBS settings.

A third problem is the inadequate level of detail even if the federal regulation and state landlord-tenant law are considered together. If state landlord-tenant law is not otherwise applicable to a residential HCBS setting, the federal regulation requires that a provider use a written agreement that provides a resident with equivalent protections. It generally will be far from obvious how such an agreement should be written, and a provider will receive little insight from a state policy that just restates the federal requirement that there be such an agreement. Under the (approved) Kentucky transition plan, for example, providers are directed to “[r]esearch state laws for leases to understand how to comply” and “[d]raft lease or legally enforceable document that provides participants the same responsibilities and protections from eviction that tenants have under Ky law.”⁵⁷ This type of policy leaves too many unanswered questions, making it more likely that residential settings ultimately will use agreements that do not comply with relevant law and/or disadvantage residents.

Recommendations

Protection against eviction is an important piece of the HCBS regulations. A setting cannot honestly be considered “non-institutional” if the provider has broad discretion to force the resident out. A resident needs two protections: 1) appropriate limitations on the substantive reasons for eviction, and 2) a usable procedure for challenging an improper eviction. The systems chosen by Oregon and Montana offer much to like in this regard. In each of these states, the justifications for eviction are appropriate to the resident population, and seem to strike a reasonably appropriate balance between a resident’s right to remain in a residential setting, and the need of a residential setting on occasion to remove a resident from the setting.

A state could choose to pursue the same substantive and procedural goals through the written agreement discussed in the regulation, but the state would need to ensure that the agreement actually addressed the issues adequately—specifically, that justifications for eviction are limited in a way appropriate to the resident population, and the resident has a usable mechanism for challenging an improper eviction. By this standard, the current efforts of North Dakota and Idaho fall short. Although these states’ proposals require the use of lease-like written agreements, the states’ policies do not do enough to limit the justifications for eviction, or to provide for a workable appeals mechanism. For a written agreement actually to accomplish its goals, a state will need to require specific language that establishes the necessary substantive and procedural requirements.

It is vital that states implement the eviction protections in a way that honors the intent of the HCBS settings regulations. At bottom, having a non-institutional environment means treating residents with respect. Under this standard, a state is acting inconsistent with the HCBS settings regulations if it implements the HCBS regulation in a way that gives residential settings broad latitude to evict residents, and that does not provide residents with meaningful appeal procedures.

A state and its citizens are losing a valuable opportunity if the state simply applies its landlord-tenant law to an eviction from a residential setting, even though the landlord-tenant law does not provide residents with meaningful substantive and procedural protections. A state instead should ensure that eviction justifications are appropriately limited, and the resident has access to a meaningful appeals process. As discussed immediately above, these goals can be accomplished either by promulgating state regulations or by mandating specific language that would be incorporated into written agreements between settings and residents.

⁵⁷ Kentucky 1915(c) Waiver Statewide Transition Plan, at 48.