

Enforcing the Nursing Home Reform Act

Meryl D. Grenadier
Attorney, AARP Foundation Litigation
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About AARP Foundation

AARP Foundation works to end senior poverty by helping vulnerable people over 50 build economic opportunity. Our approach emphasizes equitable outcomes for populations that have faced systemic discrimination. As AARP's charitable affiliate, we serve AARP members and nonmembers alike. Through vigorous legal advocacy and evidence-based solutions, and by building supportive community connections, we foster resilience, advance equity and restore hope.

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What this presentation will cover:

- The Nursing Home Reform Act
- Recent litigation & decisions concerning enforcement
 - *NCV v. Becerra*
 - Private enforcement decisions
- Questions

Nursing Home Reform Act

42 U.S.C. §§ 1395i-3 & 1396r

■ Nursing Home Reform Act

What is it?

- Federal law enacted in 1987 as part of the Omnibus Budget & Reconciliation Act of 1987 (OBRA '87)
- Response to 1986 Institute of Medicine Report titled *Improving the Quality of Care in Nursing Homes*
- Sets requirements for nursing facilities to follow; establishes resident rights

“A nursing facility must provide services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident...”

42 U.S.C. § 1396r(b)(2)

■ Nursing Home Reform Act

Requirements:

- Provision of Services
- Resident rights
- Administration and other matters
- State requirements
- Responsibilities of Secretary
- Survey and certification process
- Enforcement
- Nursing Home Compare/Care Compare

■ Nursing Home Reform Act

Resident Rights:

- Free choice
- Free from restraints
- Privacy
- Confidentiality
- Accommodation of needs
- Grievances
- Participation in resident & family groups, activities
- Examination of survey results
- Refusal of certain transfers

Any other right established by the Secretary

Survey and Certification Process:

- Shared federal and state responsibility to ensure nursing facilities are in compliance with NHRA.
- State survey agencies enter contracts with CMS to perform surveys & investigate complaints.
- State surveyors recommend enforcement action; CMS imposes.

Enforcement

- Government enforcement
- Based on nature, scope, severity, and duration of identified deficiencies
- Range of available remedies:
 - Terminate facility's participation
 - Deny payment
 - Assess a civil monetary penalty (CMP)
 - Appointment of temporary management
 - Close the facility and/or transfer residents

*National Consumer Voice for
Quality Long-Term Care v.
Becerra, 1:21-cv-00162 (D.D.C.)*

■ Lawsuit: *NCV v. Becerra*, 1:21-cv-00162 (D.D.C.)

Overview

- Case brought under the Administrative Procedure Act
- Challenged CMP guidance for *past noncompliance*: noncompliance with NHRA that is corrected before survey performed
- Plaintiffs: National Consumer Voice for Quality Long-Term Care; California Advocates for Nursing Home Reform
- Defendants: Secretary of HHS, CMS

■ Lawsuit: *NCV v. Becerra*, 1:21-cv-00162 (D.D.C.)

Background

- **2014:** CMP Analytic Tool made public. *Per-day* CMP is default for past noncompliance.
- **2016:** Federal Civil Penalties Inflation Adjustment Act adjusts CMPs for nursing facilities.
- **March 2017:** AHCA & NCAL letter to HHS Secretary Price says: “The use of CMPs is out of control.”
- **July 2017:** Guidance changing default for past noncompliance from *per-day* to *per-instance*.

■ Lawsuit: *NCV v. Becerra*, 1:21-cv-00162 (D.D.C.)

- Past Noncompliance: ROs will impose a per-instance CMP for past noncompliance – something occurred before the current survey, but has been fully addressed and the facility is back in compliance with that area.
- Per Instance CMP is the Default for Noncompliance that Existed before the Survey: CMS ROs will generally impose a Per Instance CMP retroactively for non-compliance that still exists at the time of the survey, but began earlier....

(S&C: 17-37-NH, July 7, 2017)

■ Lawsuit: *NCV v. Becerra*, 1:21-cv-00162 (D.D.C.)

Effect of policy change:

- Nullify discretion State's have to recommend imposition of per-day CMPs
- Cabin the discretion CMS regional offices have to consider imposition of per-day CMPs
- Contrary to Congress's express authorization of per-day penalties in the NHRA
- Contrary to CMS regulations that authorize CMS and States to impose per-day CMPs

■ Lawsuit: *NCV v. Becerra*, 1:21-cv-00162 (D.D.C.)

Impact of policy change:

- Decrease the dollar amount of penalties assessed for past noncompliance
- Encourage facilities to knowingly allow deficiencies to linger unaddressed until next state survey
- Weakened enforcement system
- Increased workload for advocacy groups; who rely on robust enforcement scheme
- Subject residents to poor care and dangerous conditions

■ Lawsuit: *NCV v. Becerra*, 1:21-cv-00162 (D.D.C.)

Taking action:

- AARP sent CMS a letter asking for withdrawal of guidance
- NCV & CANHR advocated against this policy change
- January 2021: lawsuit filed
- Agency requested time to reconsider the policy
- July 2021: agency rescinded the policy memo

CMS is hereby removing the July 7, 2017 Memo (S&C 17-37-NH) from its guidance repository. In that memo, CMS instructed CMS Locations (formerly “Regional Offices”) to impose civil monetary penalties for prior noncompliance solely on a per-instance basis. Upon further consideration, CMS has determined that the agency should retain the discretion at this time to impose a per-day penalty where appropriate to address specific circumstances of prior noncompliance. We will work within CMS operations to apply such discretion, and any final notice of noncompliance will set forth the penalty, and the reason(s) for imposing per-instance or per-day penalties.

<https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Policy-and-Memos-to-States-and-Regions-Items/Survey-and-Cert-Letter-17-37>

Private Enforcement

42 U.S.C. § 1983

■ Private Enforcement

- Section 1983 authorizes lawsuits against state actors for violations of *federal rights*
- 3-part test to determine if a statute (like NHRA) creates a privately enforceable right:
 - Whether the plaintiff is an intended beneficiary of the statute;
 - Whether the plaintiff's asserted interests are not so vague and amorphous as to be beyond the competence of the judiciary to enforce;
 - Whether the statute imposes a binding obligation on the State.

Blessing v. Freestone, 520 U.S. 329 (1997).

■ Private Enforcement

Three U.S. Courts of Appeal have held that the NHRA is a rights creating statute:

- *Grammer v. John J. Kane Reg'l Centers-Glen Hazel*, 570 F.3d 520, 532 (3d Cir. 2009)
- *Anderson v. Ghaly*, 930 F.3d 1066 (9th Cir. 2019).
- *Talevski v. Health and Hosp. Corp.*, 6 F.4th 713 (7th Cir. 2021)

■ Private Enforcement

Grammer v. John J. Kane Reg'l Centers-Glen Hazel, 570 F.3d 520, 532 (3d Cir. 2009)

- Resident's daughter sued county-run SNF and rehab center
- Wrongful death suit
- Holding:
 - “No question“ that Grammer's mother was intended beneficiary of NHRA;
 - Rights included in NHRA are clearly delineated;
 - NHRA unambiguously binds the state and state-run nursing facilities.

■ Private Enforcement

Anderson v. Ghaly, 930 F.3d 1066 (9th Cir. 2019)

- Suit brought by two residents and advocacy group against Secretary of California DHHS alleging they were subject to unlawful “dumping”
- Holding:
 - Provisions of NHRA requiring states to provide mechanism for hearing appeals on transfers and discharges of residents created statutory right enforceable under Section 1983
- Case is ongoing

■ Private Enforcement

Taleveski v. Health and Hosp. Corp., 6 F.4th 713 (7th Cir. 2021)

- Suit brought by resident's wife against county-run facility for violations of resident's rights
- [Amicus brief](#) filed by coalition of advocacy groups
- Holding:
 - Congress intended section (c) to benefit residents
 - Not vague/ambiguous – facilities “must not” do what was alleged in suit
 - “Must” language is mandatory
- Case remanded for further proceedings

Questions?

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