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FIGHTING SENIOR POVERTY THROUGH LAW

Common Nursing Home Problems and How to Resolve Them

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Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on fighting for people who have been marginalized and excluded from justice, such as women, people of color, LGBTQ individuals, and people with limited English proficiency.

Nursing Home Reform Law

- Protects all residents of any nursing facility that accepts Medicare and/or Medicaid, regardless of resident's payment source.

Core Principles

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

Push Back Against False Statements.

- Common problems are often based on facility misstatements.
- Residents need the confidence to push back when they hear false statements.

Admission Agreements: Falsehood and Truth

- "Your daughter has to sign the admission agreement as 'responsible party.'"
- A nursing facility must not obtain a third-party guarantee of payment.

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No Financial Guarantees Allowed

- Third-party guarantees cannot be required or requested.
  - This does not prevent a third party (adult child, etc.) from signing an agreement as agent for the resident, obligating the resident to pay nursing facility charges.
    - 42 C.F.R. § 483.15(a).
      - Note: "42 C.F.R." means Title 42 of the Code of Federal Regulations.

Some Facilities Still Seek to Collect Against Family Members

- Some facilities attempt to file suit against family member/agent for unpaid bill.
  - These suits generally should fail, unless family member was looting resident's finances for family member's own benefit.

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How Resident Avoids Signing "Bad" Admission Agreement

- Delete or revise improper provisions.
- Explain how provisions violate law.

- No risk of being refused admission if resident already has moved in.

Arbitration Agreements: Falsehood and Truth

- "Arbitration is more efficient than litigation."

- There is no good reason for resident to commit blindly to arbitration for all future disputes.

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Residents Should Refuse to Sign Arbitration Agreements

- Why is arbitration generally bad option for residents?
  - Arbitrator may tend to favor the facility, who often is repeat customer.
  - Arbitrator is generally less empathetic than jury.
  - Arbitration agreements may have provisions that disadvantage resident.

Best Argument Against "Pre-Dispute" Arbitration Agreements

- Arbitration agreements are best for when dispute already has occurred, and both parties understand what is at stake.

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How Resident Avoids Signing Arbitration Agreement

- Often agreement itself says that arbitration is voluntary.

- No risk of being refused admission if resident already has moved in.

Potential Defenses Against Signed Arbitration Agreement

- Resident lacked legal capacity.
- Family member did not have authority to make decisions for resident.
- Arbitration agreement is unconscionable.
  - Unconscionability requires proof of
    - Unfair barbaining process and
    - One-sided terms.

Care Planning: Falsehood and Truth

- "The nursing staff will determine the care that you receive."

- Resident and family can participate in developing a care plan.

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Care Planning

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

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Is Care Really "Person-Centered"?

- "Person-centered care means to focus on the resident as the locus of control and support the resident in making their own choices and having control over their daily lives."
  - 42 C.F.R. § 483.5.

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Addressing Resident Preferences

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

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Comprehensive Care Plan

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

Interdisciplinary Team

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

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The Holy Grail of Person-Centered Care

- Regulatory language is good but compliance is poor.
- Affirmative advocacy is essential – residents may not take initiative.
- Possible strategies:
  - Publicity/Education.
  - Shaming.
  - Care planning assistance.

Residents Should Have Higher Expectations

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

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Activities:
Falsehood and Truth

- "Bingo is our only activity."

- Facility must develop appropriate group and individual activities.

Bingo Is OK But Not Remotely Sufficient

- "[F]acility must provide, based on … assessment and care plan …, an ongoing program to support residents in their choice of activities, both facility-sponsored group and individual activities and independent activities."
  - 42 C.F.R. § 483.24(c)(1).

Important to Have Access to Broader Community

- "Involvement in community includes interactions such as assisting the resident to maintain his/her ability to independently shop, attend the community theater, local concerts, library, and participate in community groups."
  - Surveyor's Guideline to 42 C.F.R. § 483.24(c), F-Tag F679.

Surveyor's Guidelines Include Suggestions for Activities for Certain Populations

- E.g., with dementia.
- With behavior "not conducive [to] a therapeutic home like environment."
- Who looks through others' belongings.
- Who is withdrawn.
- Who has delusions.
  - Surveyor's Guideline to 42 C.F.R. § 483.24(c), F-Tag F679.

Meal Options: Falsehood and Truth

- "This isn't a restaurant – you must eat what's on our daily menu."
- Facility must attempt to meet resident's food preferences.

Good Faith Efforts to Address Residents' Food Preferences

- Meals must "[r]eflect, based on a facility's reasonable efforts, the religious, cultural, and ethnic needs of the resident population, as well as input received from residents and resident groups."
  - 42 C.F.R. § 483.60(c)(4).

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Restaurant Menus? Not Quite

- "… reasonable efforts to provide food that is appetizing to and culturally appropriate for residents. … alternatives aligned with individual needs and preferences should be available if the primary menu or immediate selections for a particular meal are not to a resident's liking. .. [Need] reasonable and good faith efforts to develop a menu based on resident requests and resident groups' feedback."
  - Surveyor's Guideline to 42 C.F.R. § 483.60(c)(1)-(7), F-Tag F803.

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Moving Out of Nursing Facility: Falsehood and Truth

- "You can leave if you want, but it's not our job to assist you."

- Care planning generally must include discharge planning.

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Care Plan Contents

- Services needed for resident's highest practicable well-being.
- Resident's goals and desired outcomes.
- Resident's preference and potential for future discharge.
- Discharge plans, as appropriate.
  - 42 C.F.R. § 483.21(b).

Possibility of Returning Home

- Default to discharge – if discharge to community is deemed not feasible, facility must document who made determination and why.
- Discharge plan:
  - Considers caregiver support and availability.
  - Documents resident offered information about interest in returning to community.
    - 42 C.F.R. § 483.21(c).

Shortchanging Medicaid-Eligible Residents: Falsehood and Truth

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

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No Discrimination Based on Payment Source

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

Remember, Medicaid Certification Is Voluntary

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

Right to Accept Visitors: Falsehood and Truth

- "Visiting hours are from noon to 8:00 p.m."

- Residents can accept visitors at any time.

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Right to Accept Visitors

- Resident has right to "immediate access" to visits by relatives or non-family visitors.
- Non-family visitation is "subject to reasonable clinical and safety restrictions." 42 C.F.R. § 483.10(f)(4).
  - Does this strengthen visitation rights for family, by suggesting that family visits are not subject to restriction?

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What Are "Clinical and Safety Restrictions?"

- Non-exclusive list in Surveyor's Guideline to section 483.10(f)(4):
  - Infection-related restrictions.
  - Denying access if person
    - Is suspected of abusing resident, <u>until investigation is completed or if allegation is confirmed.</u>
    - Is found to have stolen or have committed another criminal act.
    - Is drunk or disruptive.

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Physical Restraints: Falsehood and Truth

- "Your father may fall if we don't tie him into a chair."

- Physical restraints can't be used for facility's convenience.

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Limiting Physical Restraints

- No physical restraints for discipline or staff convenience.
  - Restraints can include bed rails, a “concave mattress,” tightly tucked-in sheets, etc.
    - 42 C.F.R. § 483.10(e), 483.12(a), Surveyor’s Guidelines at F-Tag F604.

Informed Consent Is Required

- Resident (or representative) has authority to authorize or decline restraints.
- So in advocacy, generally no need to prove that restraints being used for discipline or convenience – resident or representative does not need to justify a denial of consent.

Psychotropic Drugs: Falsehood and Truth

- "Your mother needs medication to make her more manageable."

- Medication can only be used to address a diagnosed illness.

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Psychotropics and Anti-Psychotics

- Psychotropics affect brain activities associated with mental processes and behavior, including
  - Anti-psychotics;
  - Anti-depressants;
  - Anti-anxiety drugs; and
  - Hypnotic drugs.
    - 42 C.F.R. § 485.45(c).

Psychotropics Used Only as Necessary

- Medication must be necessary to treat specific, diagnosed condition.
- Must be gradual dose reductions in effort to halt use of psychotropics.

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Consent Required

- All medications require informed consent of resident or representative, and denial of consent does not require justification.

Medicare Coverage: Falsehood and Truth

- "We have determined that Medicare won't pay for your nursing facility stay."

- The resident can require facility to submit bill to Medicare program.

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Notice of Non-Coverage

- States that facility or its utilization review committee "believes that the care listed below does not meet Medicare coverage requirements."
  - Skilled Nursing Facility Advance Beneficiary Notice of Non-Coverage (SNFABN) (CMS Form 10055)

Notice of Non-Coverage (cont.)

- Notice must list:
  - Type of care.
  - Reason Medicare may not pay.
    - Must include coverage guidelines and an individualized explanation.
  - Estimated cost.

Three Options

- Check one of three boxes:
  - "I want the care and want Medicare to be billed. I understand that I'm responsible for paying if Medicare doesn't pay."
  - "I want the care but do not want Medicare to be billed. I understand that I can be billed for the care."
  - "I don't want the care. I have no appeal rights to see whether Medicare would pay."

Resident May Be Excused from Paying If Not Notified that Medicare Will Not Pay

- Financial Liability Protections
  - *See* Chapter 30 in Medicare Claims Processing Manual

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Continuing Medicare Coverage: Falsehood and Truth

- "Medicare won't pay because you've plateaued in your therapy."

- Improvement not required; deciding factor is whether therapy is appropriate.

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Therapy Required When Appropriate

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

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Medicare Coverage Does Not Require "Improvement"

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

Jimmo Resources

- CMS *Jimmo* website
  - https://www.cms.gov/Center/Special-Topic/Jimmo-Center.html
- *Jimmo v. Sebelius* Settlement Agreement Fact Sheet
- *Jimmo v. Sebelius* Settlement Agreement Program Manual Clarifications Fact Sheet

"Medicare Beds": Falsehood and Truth

- "Medicare payment has ended, so you must leave your 'Medicare bed.'"
- "Medicare beds" are not limited to Medicare-reimbursed residents.

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Limits on Transfers within Facility

- Resident can refuse intra-facility transfer if purpose is:
  - To move the resident out of a Medicare-certified room.
  - "Solely for the convenience of staff."
    - E.g., according to surveyor's guidelines, putting residents together because they have similar care needs.
- Facility must give written notice, including reason for change, before change in room or roommate.
  - 42 C.F.R. § 483.10(e)(6), (7).

Involuntary Transfer/Discharge: Falsehood and Truth

- "You must leave the nursing facility because you are a difficult resident."

- Eviction is allowed only for six limited reasons.

Six Justifications for Involuntary Transfer/Discharge

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

“Difficulty” Is Not Endangerment

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

Alleged Nonpayment: Falsehood and Truth

- "You must leave the nursing facility because we cannot wait for your Medicaid approval."
- Facility must wait for Medicaid decision.

Waiting for Medicaid

- "Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for his or her stay."
  - 42 C.F.R. §483.15(c)(1)(i)(E).

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End of Medicare Reimbursement: Falsehood and Truth

- "You must leave the nursing facility when your Medicare payment ends."

- Facility must give notice and wait for hearing.

Notice

- Written notice generally at least 30 days prior to date of proposed transfer/discharge.

Contents of Notice

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

Facility-Initiated Eviction After Medicare-Funded Rehabilitation

- Residents should not be forced out when Medicare-funded rehabilitation is ending, because resident could stay under Medicaid or private pay.
- If facility tries to end residence, facility must issue written eviction notice (in addition to Medicare notice).

Transfer/Discharge Decisions: Falsehood and Truth

- "We decide whether you have the right to stay."

- Resident has right to ruling by administrative law judge.

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Be Patient

- No transfer/discharge while appeal is pending.
  - 42 C.F.R. 483.15(c)(1)(ii).

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Advocacy Tips

- The most important rule: "Don't Move Out!"
- Don't let facility demonize the resident.
- Point out facility's shortcomings.

Returning from Hospital: Falsehood and Truth

- "You can't return because your bed hold has expired."

- Medicaid-eligible resident can return to next available bed.

Returning to Facility After Hospitalization

- Facility must give notice of bed-hold policy.
  - 10-day bed hold in New Jersey.
    - N.J. Admin. Code § 8:85-1.14.

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

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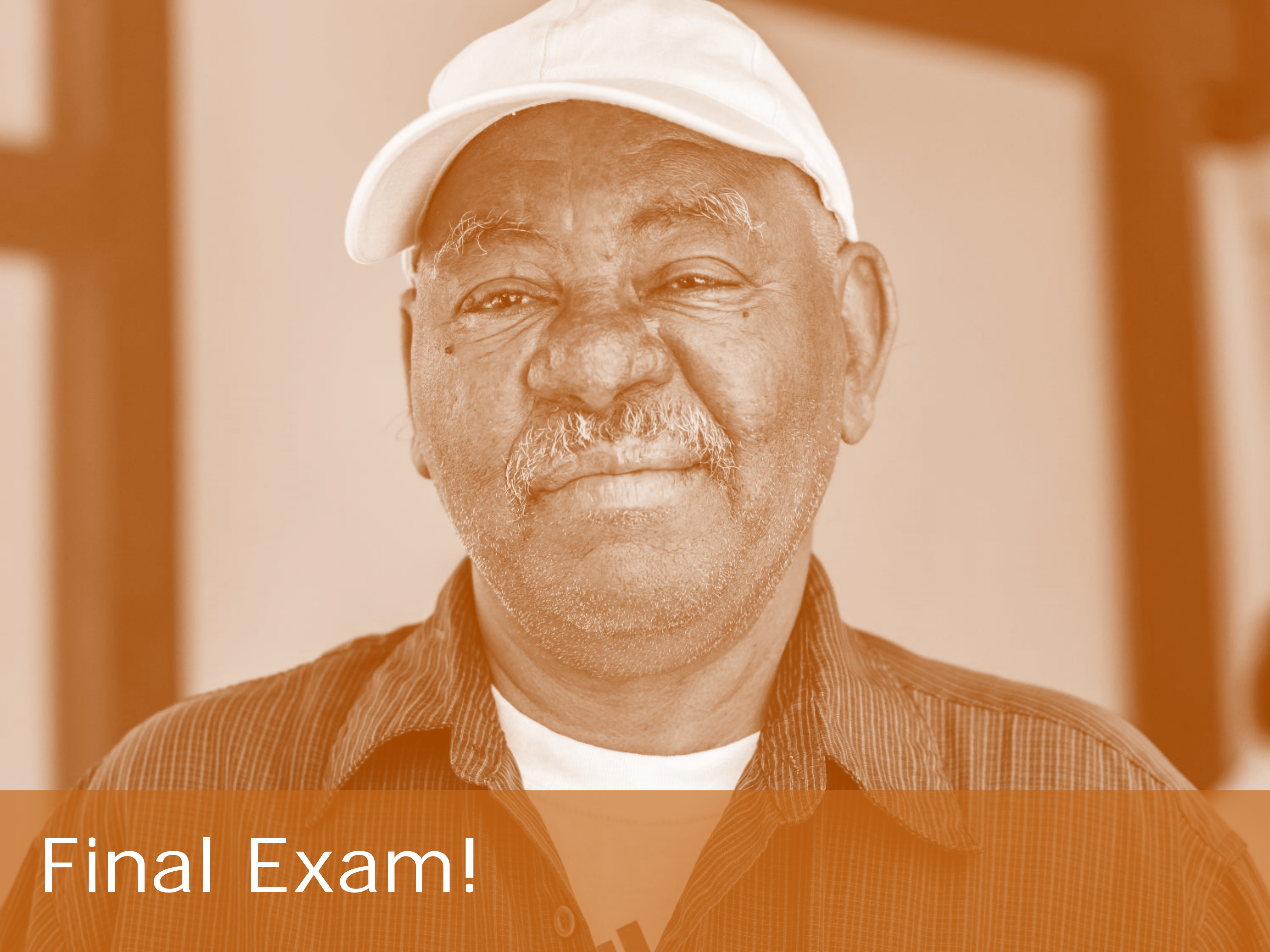
Final Exam!

Two Core Principles

- Facility must provide care needed for resident to reach highest practicable level.
- No discrimination against Medicaid-eligible residents.

First Rule of Avoiding Eviction

- Don't Move Out!

One Final Thought

- Thank you for the good work that you do!!!

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