No. 124019

IN THE
SUPREME COURT OF ILLINOIS

LAKEWOOD NURSING & REHABILITATION CENTER, LLC,	)	On Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-17-0177
Plaintiff-Appellee,	)	
v.	)	
THE ILLINOIS DEPARTMENT OF PUBLIC HEALTH, and DIRECTOR LAMAR HASBROUCK,	)	There Heard on Appeal from the Circuit Court for the Twelfth Judicial Circuit, Will County, Illinois, No. 14 MR 1184
Defendants-Appellants,	)	
and HELEN SAUVAGEAU,	)	The Honorable JOHN C. ANDERSON,
Defendant.	)	Judge Presiding.

BRIEF AND APPENDIX OF APPELLANTS
ILLINOIS DEPARTMENT OF PUBLIC HEALTH AND ITS DIRECTOR

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NATURE OF THE CASE

Under the Illinois Nursing Home Care Act, and related federal law, nursing home facilities may not remove residents without their consent except for certain limited reasons, including nonpayment. 210 ILCS 45/3-401 (2016); 42 C.F.R. § 483.15(c)(1)(i). Lakewood Nursing & Rehabilitation Center, LLC notified resident Helen Sauvageau that it was going to discharge her for nonpayment. As the Act permits, Sauvageau requested an administrative hearing before the Illinois Department of Public Health to challenge the involuntary removal. *See* 210 ILCS 45/3-410 (2016). After holding a hearing, the Department approved the proposed discharge, and Sauvageau left the facility.

Although the Department's decision was favorable to Lakewood, it sought administrative review in the circuit court. As relevant here, Lakewood raised a mandatory/directory question. Section 3-411 of the Act provides that, after a resident files a request, the Department will hold a hearing in "not later than 10 days" and render a decision "within 14 days." *Id*. 45/3-411. Lakewood contended that the Department lacked authority to conduct the hearing or issue a decision outside those time frames.

The circuit court disagreed, construing section 3-411's time frames as directory. Lakewood appealed, and the appellate court reversed. The appellate court concluded that the Department "lost jurisdiction" to conduct the

administrative hearing. *Lakewood Nursing & Rehab. Ctr., LLC v. Ill. Dep't of Pub. Health*, 2018 IL App (3d) 170177, ¶ 24. Section 3-411's 10-day time frame for a hearing was mandatory, the court determined, because "the term 'not later than 10 days' in section 3-411 constitutes negative language." *Id.*, ¶ 23.

The Department and Director[1] sought leave to appeal, which this Court allowed.

[1] By operation of law, current Director Ngozi Ezike replaces former Director LaMar Hasbrouck as a defendant, who himself had been replaced by former Director Nirav Shah. *See* 735 ILCS 5/2-1008(d) (2016).

ISSUE PRESENTED FOR REVIEW

Whether, given the Illinois General Assembly's goal of safeguarding nursing home residents as well as other indicia of its intent, section 3-411's 10-day hearing time should receive a directory construction.

JURISDICTION

On August 16, 2018, the appellate court entered its judgment. On September 20, 2018, the Department and Director timely filed a petition for leave to appeal under Supreme Court Rule 315. On November 28, 2018, this Court allowed that petition.

STATUTE INVOLVED

This appeal involves the construction of section 3-411 of the Act, which reads:

> The Department of Public Health, when the basis for involuntary transfer or discharge is other than action by the Department of Healthcare and Family Services (formerly Department of Public Aid) with respect to the Title XIX Medicaid recipient, shall hold a hearing at the resident's facility not later than 10 days after a hearing request is filed, and render a decision within 14 days after the filing of the hearing request.

210 ILCS 45/3-411 (2016).

STATEMENT OF FACTS

The Administrative Proceedings

Sauvageau — who was in her late 90s during the relevant time — moved to Lakewood in July 2012. C.107, 130. For over a year, she paid Lakewood with her own resources and no governmental assistance. C.107, 128. In late October 2013, Lakewood sent Sauvageau a Notice of Involuntary Transfer or Discharge ("ITD Notice") informing her that it was going to involuntarily discharge her for failing to continue to pay. C.186-88.

As the notice related, because Lakewood accepted Medicare and Medicaid recipients and was federally certified as well as state-licensed, federal law governed the reasons for the involuntary discharge. C.186; *see infra* at 14-15. Sauvageau obtained an attorney, through whom she acted throughout the proceedings. C.185.

In early November 2013, Sauvageau requested a hearing before the Department on the ITD Notice, and also applied for Medicaid, which the parties agreed stayed the discharge proceedings. C.185, 108, 129. In January 2014, Sauvageau's Medicaid application was denied. C.108.[2] On January 15,

[2] Sauvageau's Medicaid application appears to have been denied for lack of certain information. C.129. According to her attorney, she corrected the omission, and in February 2014 her Medicaid application was approved, but with a "spend-down." C.129, 131, 138-39. Thus, the cost of past care Sauvageau received from Lakewood — the basis of the ITD Notice — would not be retroactively covered and paid for by Medicaid.

2014, Lakewood notified the Department of that denial and requested that the administrative proceedings resume. *Id*.

In February 2014, a pre-hearing conference was held before an ALJ for the Department. C.117. Also in February, Lakewood filed a "Motion to Dismiss [Sauvageau's] Hearing Request," contending that, under the Act, the Department could not hold a hearing more than 10 days from the date of a request. C.183-84. Sauvageau opposed the motion, noting (among other things) that it was unfair to use the 10-day requirement to deny her "basic due process rights," and that Lakewood had agreed to stay the proceeding pending a Medicaid determination. C.178-82. The ALJ denied Lakewood's motion, determining that the Department had not lost jurisdiction over the proceedings. C.173-77.

In early March 2014, Lakewood tendered a list of potential witnesses and exhibits for the hearing. C.169-72. And the Department sent the parties formal notice that the evidentiary hearing was set for March 24, 2014. C.168.

The hearing proceeded as scheduled on that date. C.117. At the hearing, Sauvageau's counsel acknowledged that "there are monies due and owing to [Lakewood]," although he did not agree to the "exact amount" claimed. C.136. Counsel observed that "we didn't pay because we ran out of money." *Id*. Sauvageau described her life and stated her desire to remain at Lakewood. C.146-49. The ALJ observed that, after he obtained and reviewed

the hearing transcript (which would need to be prepared), he expected to recommend approving the discharge. C.158.

On April 17, 2014, the ALJ issued a Report and Recommendation. C.117-18. He determined that the proposed discharge comported with applicable federal regulations, which permit a facility to discharge a resident who has failed to pay, or have payment made under Medicare or Medicaid. *Id*. The ALJ recommended that "the [ITD Notice] be approved 30 days subsequent to the receipt of the final ruling in this matter." C.118.

On May 6, 2014, the Chief ALJ — acting as the Director's designee — issued the Department's final administrative decision, adopting the ALJ's recommendations and approving Lakewood's ITD Notice for departure within 30 days. C.116. Sauvageau left the facility on May 29, 2014 — 23 days after the Department's final order issued. C.53.

The administrative hearing was held 68 days after Lakewood requested that the proceedings resume due to the denial of Sauvageau's Medicaid application. C.108. And the final administrative decision issued 43 days after the hearing date (and 111 days after Lakewood's request to resume the proceedings). *Id*.

Lakewood's Complaint for Administrative Review

In May 2014, Lakewood filed a circuit court complaint for administrative review of the Department's final decision, raising multiple

contentions. C.5-8. Among them, it asserted that the Department lacked statutory authority to exceed the Act's 10-day hearing time and 14-day decision time for involuntary transfer or discharge proceedings. C.7-8. It also asserted that the Department lacked authority to allow residents to remain at a facility more than 10 days after they receive a final administrative decision approving transfer or discharge. *Id*.

The Circuit Court's Dismissal of Lakewood's Complaint as Moot and the Appellate Court's Remand Order

In October 2014, following a motion by the Department and Director, C.42-49, the circuit court dismissed Lakewood's complaint as moot because Sauvageau had left the facility, C.74-75. Upon Lakewood's appeal, C.77-78, the appellate court — in November 2015 — reversed and remanded, C.87 (¶ 1); C.99 (¶ 42). The appellate court agreed that Lakewood's claims were moot, C.92-93 (¶¶ 17-21), but determined that they fell "within the public interest and capable of repetition yet evading review exceptions to the mootness doctrine," C.87 (¶ 1); *see also* C.92-98 (¶¶ 22-38).

The Circuit Court Proceedings After Remand

Following the appellate court's remand, Lakewood and the Department submitted to the circuit court "joint stipulated facts" that essentially set forth relevant dates (addressed above) in the administrative timeline. C.107-08. The parties' stipulation also limited the issues under review to:

> (a) Does the [Act] require [the Department] to hold an intent to discharge hearing not later than 10 days after a hearing request is filed?
>
> (b) Does the [Act] require [the Department] to render a decision on the discharge within 14 days after a hearing request is filed?
>
> (c) Does [the Department] have the authority under the [Act] to issue an Order directing the nursing care facility to allow the Resident facing discharge to remain at the facility for a specific period of time after the issuance of a Final Order on the merits of the discharge hearing?

C.109.

Briefing followed. C.191-224. Lakewood maintained that section 3-411's 10-day hearing time and 14-day decision time should be deemed mandatory, asserting that they affected public and private rights and contained negative language. C.192-95. Arguing for a directory construction, the Department emphasized the Act's purpose of protecting residents, as well as the statutory framework. C.203-14. Lakewood and the Department also addressed the construction of section 3-413 — arguing for and against, respectively, a 10-day cap on residents' time to leave a facility following discharge approval. C.198-99, 214-15.

The Circuit Court's Decision

In February 2017, the circuit court issued its final order. C.233-38. The court construed section 3-411's 10-day hearing time and 14-day decision time as directory. C.234-37. Its primary reason was that a directory construction better protected residents and thus furthered the Act's purpose. C.235-36. In

its analysis, the court noted that the "Act is designed to prioritize the concerns and rights of the **resident**, and so [it] must interpret the statute with that purpose in mind." C.238 (bold in original).

Additionally, the circuit court observed that the provision did not identify a consequence for noncompliance, procedural commands are presumptively directory, and the Department's interpretation should be afforded some deference. C.234-35. Further, the court considered it significant that facilities retain a cause of action against residents for unpaid bills, thus providing a business-related remedy. C.237. In a footnote, it took judicial notice that Lakewood had in fact pursued legal action against Sauvageau, resulting in a payment agreement. *Id*.

In its analysis, the circuit court acknowledged that the appellate court, in *Frances House, Inc. v. Dep't of Pub. Health*, 269 Ill. App. 3d 426, 430-31 (3d Dist. 1995), construed another provision of the Act as mandatory. C.237. Nonetheless, the court found a directory reading appropriate given section 3-411's different language and the benefits to residents from a directory construction. *Id*. Additionally, the court determined that section 3-413 permitted the Department to allow a resident more than 10 days to leave a facility following discharge approval. C.237-38.

The Appellate Court's Decision

Lakewood appealed, C.243-45, and the appellate court reversed the circuit court. *Lakewood Nursing*, 2018 IL App (3d) 170177, ¶¶ 1, 32-33. As for section 3-413, the court determined that it precluded the Department from requiring a facility to house a resident more than 10 days following discharge approval. *Id*., ¶¶ 25-30.

Moreover, the appellate court construed section 3-411's 10-day hearing time as mandatory, concluding that the Department "lost jurisdiction because it did not conduct a hearing in 10 days." *Id*.,¶ 24. In light of that ruling, the court declined to further determine whether the Department "erred" by not satisfying section 3-411's 14-day decision period. *Id*.

The appellate court concluded that "the term 'not later than 10 days' in section 3-411 constitutes negative language" that demonstrates a legislative intent to make the time period mandatory. *Id*., ¶ 23. The court cited various cases, including its earlier decision in *Frances House* deeming a different provision of the Act mandatory. *Id*. It considered this case akin to those in which other courts "determined that language prohibiting a further action constitutes negative language and, therefore, a mandatory construction." *Id*. The court did not otherwise expressly address legislative intent.

The Department and Director petitioned for leave to appeal, which this Court allowed. They seek reversal of the appellate court's mandatory

construction of section 3-411's 10-day hearing time. Because they do not contest the appellate court's other holding — *i.e.,* that section 3-413 caps residents' time to leave a facility at 10 days following discharge approval — that issue is not further addressed.

ARGUMENT

I. Overview and Standard of Review

Deeming section 3-411's 10-day hearing time mandatory, as the appellate court did, is out of step with this Court's precedents. It encourages a mechanical search for "negative language," rather than a meaningful inquiry into legislative intent. The result was a decision that undermines that intent.

Under a proper analysis, Lakewood failed to overcome the presumption that section 3-411's time frames are directory. In itself, the phrase "not later than" does not establish that the General Assembly intended to eliminate residents' hearing rights whenever that process cannot be initiated in 10 days. Added to that, a directory construction is needed to fulfill the Act's purpose of protecting residents. Other indicia of legislative intent, evident from the statutory scheme as a whole, likewise support a directory construction.

This Court's review is *de novo*. *See*, *e.g.*, *In re M.I.*, 2013 IL 113776, ¶ 15 (whether statutory provision is mandatory or directory presents statutory construction question reviewed *de novo*). Nonetheless, to the extent there is ambiguity in the Act's provisions, this Court should accord the Department's interpretation considerable deference. An agency's interpretation of its enabling statute and regulations is "entitled to substantial weight and deference," given that agencies make "informed judgments . . . based upon their experience and expertise and serve as an informed source for ascertaining

the legislature's intent." *Provena Covenant Med. Ctr. v. Dep't of Revenue*, 236 Ill. 2d 368, 387 n.9 (2010); *accord Bonaguro v. Cty. Officers Electoral Bd.*, 158 Ill. 2d 391, 398 (1994).

II. The Act Protects Residents Against Improper Involuntary Transfer or Discharge.

A. The Act's Primary Purpose Is to Protect Nursing Home Residents.

Because nursing home residents constitute a vulnerable population, the Act creates a comprehensive regulatory scheme for their protection. That includes (among other things) safeguards against abuse and neglect, licensing standards and other requirements for care-giving facilities, and procedures for inspections and complaint investigations. 210 ILCS 45/1-101 *et seq*. (2016).

The "legislature promulgated the Act amid concern over reports of inadequate and degrading treatment of nursing home residents." *Moon Lake Convalescent Ctr. v. Margolis*, 180 Ill. App. 3d 245, 255-56 (1st Dist. 1989) (citing *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 357-58 (1986)). And Illinois courts have recognized that the "primary purpose of the Act undoubtedly is to protect nursing home residents." *Moon Lake*, 180 Ill. App. 3d at 255; *see also UDI No. 2, LLC v. Dep't of Pub. Health*, 2012 IL App (4th) 110691, ¶ 24 ("We agree that the welfare of residents is paramount."); *UDI No. 10, LLC v. Dep't of Pub. Health*, 2012 IL App (1st) 103476, ¶ 22 (same); *Grove Sch. v. Dep't of Pub. Health*, 160 Ill. App. 3d 937, 941 (1st Dist. 1987)

(recognizing Act's purpose of protecting nursing home residents). Therefore, the courts' "focus in construing the Act is on the legislature's intent and the consequences to nursing home residents, the Act's intended protected class." *Moon Lake*, 180 Ill. App. 3d at 256.

B. The Act's Framework, Which Protects Residents by Limiting Involuntary Transfer or Discharge

As part of the Act's protections for residents, certain provisions provide safeguards concerning transfer or discharge, particularly when departure is involuntary. 210 ILCS 45/3-401 *et seq*. (2016). Moreover, the Act coordinates with and implements federal law, when the latter applies. *See*, *e.g.*, 42 U.S.C. § 1396r(e)(3); 42 C.F.R. §§ 431.220(a)(2), 483.204. Here, federal law applied to the proposed discharge because Lakewood "admits private-pay and Medicare or Medicaid residents and is federally-certified and state licensed." C.186.

With respect to involuntary transfer or discharge, both federal law and the Act limit the reasons that a facility may remove a resident. *See* 42 U.S.C. § 1396r(c)(2)(A); 42 C.F.R. § 483.15(c)(1)(i); 210 ILCS 45/3-401 (2016). Under both, involuntary removal generally is permitted only for medical reasons, safety reasons (involving the resident or others), or nonpayment (with certain exceptions and conditions). *Id*. Although the permissible reasons for involuntary removal are not identically phrased under federal and Illinois law, in substance they are similar. *Id*. Here, Lakewood sought to discharge Sauvageau under a federal regulation that permits discharge if the resident,

after due notice, fails to pay for the stay, or to have the stay paid for under Medicare or Medicaid. 42 C.F.R. § 483.12(a)(2)(v) (now codified at 42 C.F.R. § 483.15(c)(1)(i)(E)); C.186.

Under the Act, the facility usually must discuss the proposed involuntary transfer or discharge with an affected resident and his or her representative. 210 ILCS 45/3-408 (2016). At least 21 days before the planned removal, it must provide the resident with an ITD Notice — a written notice that sets forth the reasons and date for the planned transfer or discharge, informs the resident of the right to request a hearing before the Department, and attaches the appropriate request forms. *Id*. 45/3-402, 45/3-403. Where applicable, there are also federal requirements for the timing and content of a notice. 42 C.F.R. § 483.15(c)(3)-(5).

Whether the reasons for an involuntary transfer or discharge are drawn from federal or Illinois law, under section 3-410 of the Act, a resident may seek a hearing within 10 days of receiving the facility's notice. 210 ILCS 45/3-410 (2016). Generally, a hearing request stays the transfer or discharge, but will not necessarily do so if medical or safety concerns are involved. *Id*. 45/3-404; *see also* 42 C.F.R. § 483.15(c)(1)(ii). Section 3-411 of the Act sets forth time frames for addressing a resident's hearing request: "[W]hen the basis for involuntary transfer or discharge is other than action by the Department of Healthcare and Family Services (formerly Department of Public Aid) with

respect to the Title XIX Medicaid recipient," the Department "shall hold a hearing at the resident's facility not later than 10 days after a hearing request is filed, and render a decision within 14 days after the filing of the hearing request." 210 ILCS 45/3-411 (2016).

Although section 3-411's time frames are keyed to when a "hearing request is filed," *id*., Sauvageau applied for Medicaid a few days after she received the facility's ITD Notice. C.108. Lakewood and Sauvageau agreed that the discharge proceedings should be stayed while that application was pending. C.108, 129. The appellate court endorsed that approach, *Lakewood Nursing*, 2018 IL App (3d) 170177, ¶ 24, and nothing appeared to prevent such agreement. Thus, as Lakewood acknowledged, C.108, the time that the Medicaid application was pending did not "count" toward the 10-day hearing period.

Staying discharge proceedings pending a Medicaid determination also finds support in the law. As noted, under applicable federal regulations, nonpayment is one reason that a resident may be involuntarily discharged. 42 C.F.R. § 483.15(c)(1)(i)(E). But a failure to pay does not occur until a resident is given an opportunity to seek payment through Medicaid, and such payment is denied. *Id*. (eff. Nov. 28, 2016); 42 C.F.R. § 483.12(a)(2)(v) (eff. Apr. 18, 2013 through Nov. 28, 2016). So, a stay makes sense given that, were a

proposed nonpayment discharge to proceed to hearing while a Medicaid application was pending, the facility could not prevail.

Also, section 3-406 of the Act provides that "[w]hen the basis for an involuntary transfer or discharge is the result of an action by the Department of Healthcare and Family Services . . . with respect to a recipient of [Medicaid]," then "the 21-day written notice period shall not begin until a final decision in the matter is rendered by the Department of Healthcare and Family Services . . . . or a court . . . and notice of that final decision is received by the resident and the facility." 210 ILCS 45/3-406 (2016). Complementing section 3-406, section 3-411 includes a qualifying clause that limits that section's initial applicability to situations "other than" where involuntary transfer or discharge is based on such action by the Department of Healthcare and Family Services. *Id*. 45/3-411. The appellate considered section 3-411's qualifying clause (and thus implicitly also section 3-406) inapplicable here. *Lakewood Nursing*, 2018 IL App (3d) 170177, ¶ 20. But if that is mistaken, then these sections further support a stay pending determination on a Medicaid application.

Additionally, the Act provides that a section 3-411 hearing "shall be conducted as prescribed under Section 3-703." 210 ILCS 45/3-412 (2016). Section 3-703 applies to multiple types of proceedings, expressly including

when a resident requests a hearing on involuntary transfer or discharge. *Id*. 45/3-703 (incorporating section 3-410 hearing requests).

Section 3-703 specifies review "in accordance with Sections 3-703 through 3-712." *Id*. 45/3-703. Those sections, in turn, describe various hearing procedures, such as requiring an initial notice before the hearing, *id*. 45/3-704(b); providing for subpoenas of witnesses and documentary evidence, *id*. 45/3-705; allowing parties to be represented by counsel, *id*. 45/3-706; allowing parties to depose witnesses whose attendance cannot be secured, *id*.; requiring the Director to review the record, findings, and recommendation, and render a final decision, when a hearing officer initially hears a matter, *id*. 45/3-707; and requiring that the Department preserve documents and transcribe oral proceedings, *id*. 45/3-711. The Department's final administrative decisions are subject to judicial review. *Id*. 45/3-713.

Some of the time frames incorporated by reference for involuntary transfer or discharge proceedings differ from those in section 3-411. For example, section 3-704(c) provides that hearings shall commence within 30 days of a request. 210 ILCS 45/3-704(c) (2016). And section 3-704(b) provides for an initial notice of hearing at least 10 days *before* the hearing, although section 3-411 provides for a hearing *within* 10 days. *Id*. 45/3-704(b), 45/3-411.

III. Section 3-411's 10-Day Hearing Time Should Be Construed as Directory.

Turning to the merits, this Court should conclude that the legislature intended a directory construction of section 3-411's 10-day hearing window. That result follows from the Act's purposes and framework, and avoids placing undue weight on the isolated phrase "not later than."

A. Procedural Statutes Are Presumptively Directory Unless Protected Statutory Rights Would Be "Generally Injured" or Negative Language Forecloses Further Action.

Beginning with *People v. Robinson*, 217 Ill. 2d 43 (2005), this Court has sought to clarify the mandatory/directory dichotomy, noting that the issue generates considerable confusion. *Id*. at 51-52. Although they are not the same inquiry, "mandatory/directory" questions are easily confused with "mandatory/permissive" ones, as both use the term "mandatory," albeit with different implications. *See M.I.*, 2013 IL 113776, ¶ 16; *Robinson*, 217 Ill. 2d at 51-54.

The mandatory/permissive dichotomy asks whether particular statutory language "has the force of a command that imposes an obligation." *Robinson*, 217 Ill. 2d at 52. If so, the language is deemed "mandatory." *Id*. In contrast, if statutory language merely authorizes or permits an action, it is deemed "permissive." *Id*. For this inquiry, the term "shall" provides evidence that the legislature intended a mandatory construction, while "may" bolsters a permissive one. *See M.I*, 2013 IL 113776, ¶ 21; *Robinson*, 217 Ill. 2d at 54.

A mandatory/directory question, on the other hand, examines the consequences of a failure to comply with a statutory obligation. *M.I.*, 2013 IL 113776, ¶ 16; *Robinson*, 217 Ill. 2d at 52. If noncompliance with a particular provision invalidates the governmental action to which that requirement relates, the provision is mandatory. *M.I.*, 2013 IL 113776, ¶ 16. A directory construction, in contrast, triggers no specific consequences and noncompliance does not necessarily invalidate the governmental action. *Id.* For this inquiry, the legislature's use of the word "shall" has limited relevance. Such questions already assume that the provision creates an obligation, and "shall" in itself provides no insight into the consequences of noncompliance. *See M.I.*, 2013 IL 113776, ¶¶ 19, 21; *Robinson*, 217 Ill. 2d at 53-54.

The mandatory/directory analysis, like other statutory construction issues, ultimately seeks to ascertain legislative intent. *M.I.*, 2013 IL 113776, ¶ 15; *Robinson*, 217 Ill. 2d at 54. Statutes should be construed as mandatory only if "the intent of the legislature dictates a particular consequence for failure to comply with [a] provision." *M.I.*, 2013 IL 113776, ¶ 16 (internal quotation marks and citation omitted).

This Court has provided a framework to aid in determining legislative intent. First, courts "presume that language issuing a procedural command to a government official indicates an intent that the statute is directory." *M.I.*, 2013 IL 113776, ¶ 17 (internal quotation marks and citation omitted); *accord*

Robinson, 217 Ill. 2d at 58. Two conditions generally guide whether that presumption can be overcome: "(1) when there is negative language prohibiting further action in the case of noncompliance or (2) when the right the provision is designed to protect would generally be injured under a directory reading." *M.I.*, 2013 IL 113776, ¶ 17; *see also In re Rita P.*, 2014 IL 115798, ¶ 44; *Robinson*, 217 Ill. 2d at 58.

B. The "Negative Language" Inquiry Requires a Meaningful Evaluation of Legislative Intent.

This Court does not appear to have considered, under any statutory scheme, whether the phrasing at issue here — "not later than" — suffices to overcome a presumption that procedural commands are directory. *Cf. People v. Hardman*, 2017 IL 121453, ¶¶ 51, 70 (declining to address whether time limit is mandatory or directory in provision that allowed court to impose public defender reimbursement fee "no later than" 90 days after entry of final disposition). This Court's precedents do, however, establish that such "negative language" must be understood in light of the structure and purpose of the statute as a whole.

As noted, this Court has emphasized that whether a provision is mandatory or directory ultimately turns on legislative intent. *M.I.*, 2013 IL 113776, ¶ 15. In evaluating intent, in addition to statutory language, a court "may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one

way or another." *Oswald v. Hamer*, 2018 IL 122203, ¶ 10; *accord Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 36. Additionally, a "court must view the statute as a whole, construing words and phrases in light of other relevant statutory provisions and not in isolation." *People v. Chenoweth*, 2015 IL 116898, ¶ 21; *accord Oswald*, 2018 IL 122203, ¶ 10; *see also M.I.*, 2013 IL 113776, ¶ 15 (considering entire statute, in light of subject and apparent reasons for enactment, in determining plain meaning of statutory terms).

Moreover, this Court has clarified that the "negative language" inquiry contemplates more than looking for statutory phrases that broadly could be termed "negative." Rather, it requires that courts consider whether the legislature intended to cut off further activity through the use of "negative language prohibiting further action in the case of noncompliance." *M.I.*, 2013 IL 113776, ¶¶ 16-17.

In discussing "negative language," the Court has consistently focused on whether a statute dictates consequences for noncompliance. *See M.I.*, 2013 IL 113776, ¶¶ 18, 20 (applying directory construction where statute detailed no specific consequences for noncompliance with 60-day hearing requirement, such as prohibiting hearing or voiding subsequent sentence); *see also Round v. Lamb*, 2017 IL 122271, ¶ 14 ("The statute does not include any negative language prohibiting further action in the case of noncompliance. It prescribes no result for situations in which the judge fails to include the MSR term in the

written order."); *Rita P.*, 2014 IL 115798, ¶ 45 (applying directory construction where statute "lacks any language that would prohibit the entry of a final order, or language identifying a specific consequence, for noncompliance with the statutory command"); *Robinson*, 217 Ill. 2d at 58 (applying directory construction because "[h]ad it intended a different arrangement, the legislature could easily have written, for example, that no summary dismissal shall be entered unless the clerk timely serves notice of the court's intent to dismiss, or that no dismissal shall become a final order unless there is timely service").

Indeed, because of the lack of specified consequences, this Court has held that the phrase "shall not" did not constitute mandatory negative language. *In re James W.*, 2014 IL 114483, ¶ 36. There, the Court construed as directory a timing provision in the Mental Health Code that provided that continuances for involuntary commitment hearings "shall not extend beyond 15 days except to the extent that [they] are requested by the respondent." *Id.*, ¶ 26. "Shall not" did not constitute "negative language preventing further action in the event that the time limit is not met," the Court observed, because "it impose[d] no consequences, such as dismissal of the State's petition, if the hearing occurs after the designated time frame." *Id.*, ¶ 36. The appellate court never explained why "not later than 10 days" is mandatory when "shall not extend beyond 15 days" is directory.

C. By Failing to Conduct a Meaningful Inquiry, the Appellate Court Reached a Conclusion That Undermined Legislative Intent.

The appellate court determined that inclusion of the phrase "not later than" required a mandatory construction. *Lakewood Nursing*, 2018 IL App (3d) 170177, ¶ 23. But the mere presence of the word "not" did not transform that phrase into negative language "prohibiting further action in the case of noncompliance." *M.I.*, 2013 IL 113776, ¶ 17. After all, the General Assembly could have used the phrase "within 10 days" in place of "not later than 10 days" with no change in ordinary meaning.

The key point is that neither section 3-411 nor related provisions contain language establishing that the legislature intended to withdraw from residents the protections of an administrative hearing if the hearing was not held within 10 days. Without clearer language, it cannot be concluded that the legislature regarded "not later than" as adding any mandatory effect to "shall." *Cf. James W.*, 2014 IL 114483, ¶ 36 (phrase "shall not" did not amount to negative language preventing further action).

Because "not later than" is at best inconclusive about the consequences of noncompliance, the appellate court erred in not considering other indicia of intent. It failed to consider the reason for involuntary discharge hearings, the purposes they achieve and problems they avert, and the consequences of a mandatory versus directory construction. *Oswald,* 2018 IL 122203, ¶ 10. In

short, in focusing on the phrase "not later than" in isolation, the court failed to consider the Act as a whole. *Id.*; *Chenoweth*, 2015 IL 116898, ¶ 21. Had it done so, it would have deemed section 3-411's hearing time directory.

1. A Directory Construction Is Required to Fulfill the Legislature's Intent.

Most fundamentally, the appellate court failed to consider the purposes that underlie the Act's involuntary discharge framework and the consequences of construing section 3-411 as mandatory. *Oswald,* 2018 IL 122203, ¶ 10; *see also, e.g., Lawler v. Univ. of Chicago Med. Ctr.*, 2017 IL 120745, ¶ 12 ("we must presume that the legislature did not intend to create absurd, inconvenient, or unjust results").

As the court appeared to recognize, *Lakewood Nursing*, 2018 IL App (3d) 170177, ¶¶ 21-22, the Act's paramount concern is to protect nursing home residents, who constitute a vulnerable population, *see, e.g., Moon Lake*, 180 Ill. App. 3d at 255-56. To that end, the legislature protected residents with a statutory right to remain in the care facility of their choice, without being subject to removal, except for specific reasons involving nonpayment, health or safety. 210 ILCS 45/3-401; *see also* 42 C.F.R. § 483.15(c)(1)(i). And it did not intend that facilities be the final arbiter of eviction decisions. Rather, section 3-411 and related provisions protect residents by ensuring that they will not be subject to involuntary transfer or discharge without the opportunity for review by the Department, a neutral decision-maker. 210 ILCS 45/3-410, 45/3-411.

The availability of a prompt hearing generally benefits residents and facilities alike. But because a mandatory construction cuts off the hearing process outside of section 3-411's short 10-day time frame, it thwarts the legislature's fundamental objective of protecting residents against improper involuntary removal.

A mandatory construction precludes the Department from acting regardless of the reason for exceeding the time frame. *See*, *e.g.*, *M.I.*, 2013 IL 113776, ¶ 16. That is particularly troubling because it penalizes residents by taking away their rights based on timing issues beyond their control. An inflexible deadline also operates to harm residents who are ill, seek an attorney as the Act permits, 210 ILCS 45/3-706 (2016), or otherwise cannot meaningfully participate within the narrow window. And, perhaps worst of all, it incentivizes facilities to seek to delay the proceedings beyond the time frame.

Indeed, because a mandatory construction undermines statutory rights accorded to residents, it may raise constitutional concerns. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-37 (1982) (statutory 120-day time limit for holding a fact-finding conference implicated due process when construed to extinguish employee's cause of action under Fair Employment Practices Act after commission failed to timely schedule conference). Were there any doubt that the legislature intended a directory construction, these constitutional concerns would provide a powerful reason to adopt such a

reading. *See*, *e.g.*, *People v. Alcozer*, 241 Ill. 2d 248, 253 (2011) (constitutional questions avoided unless resolution necessary); *see also Oswald,* 2018 IL 122203, ¶ 38. At bottom, though, in view of the Act's goal of protecting residents, it is difficult to conclude that the legislature intended to allow facilities to proceed unchecked in evicting residents against their will whenever a hearing is not commenced within 10 days for any reason.

2. Reading Section 3-411 in its Entirety, as Well as Together with Section 3-413, Reinforces a Directory Construction.

Reading the Act as a whole reinforces the conclusion that the legislature intended a directory construction of section 3-411's hearing time. *See*, *e.g.*, *Chenoweth*, 2015 IL 116898, ¶ 21 (courts "must view the statute as a whole").

One source of evidence comes from the remainder of section 3-411. That provision also requires that the Department issue a decision "within 14 days." 210 ILCS 45/3-411 (2016). No potentially negative phrasing describes that latter time frame. It is unlikely that the General Assembly intended the hearing time frame to be mandatory when the decision time frame, which functions alongside it, is written in directory terms.

Further evidence comes from reading section 3-411 together with 3-413. Under section 3-413, absent certain circumstances, if the Department approves an involuntary transfer or discharge, the "resident shall not be required to leave the facility before the 34th day following receipt of [the facility's ITD

Notice] or *the 10th day following receipt of the Department's decision, whichever is later."* 210 ILCS 45/3-413 (2016) (emphasis added). This highlighted language is relevant in two ways.

First, by providing that a resident may not be removed until after "receipt of the Department's decision," section 3-413 shows that the legislature contemplated that the Department's issuance of a decision would precede implementing a contested discharge. *Id*. Cutting off the Department's ability to act would undermine that framework.

And section 3-413 shows that the legislature recognized that the hearing might extend beyond 10 days. That is because 34 days corresponds to the statutory time frames absent extension (*i.e*., 10 days to request a hearing, *id*. 45/3-410; 14 days for hearing and decision, *id*. 45/3-411; and 10 days for a resident to leave the facility, *id*. 45/3-413). If the legislature contemplated that the statutory time frames would never be exceeded, or that doing so would shut down the process, its provision for Department decisions received "later" than 34 days after receipt of the facility's notice would mean little.

Accordingly, synthesizing section 3-411's two time frames, and reading that section together with section 3-413, reinforce a directory construction.

3. The Legislature's Incorporation of Detailed Procedural Requirements for Involuntary Transfer or Discharge Hearings Reinforces a Directory Construction.

The lack of mandatory intent is further evidenced by the legislature's incorporation of detailed procedural requirements for involuntary removal hearings. As noted, s*upra* at 17-18, the Act includes several provisions that apply to multiple types of hearings, *id*. 45/3-703 – 45/3-712, expressly including involuntary transfer or discharge hearings, *id*. 45/3-410, 45/3-412, 45/3-703.

For example, the incorporated procedures allow parties to be represented by counsel, *id*. 45/3-706, provide for depositions in certain circumstances, *id*., and permit subpoenas for witnesses and documentary evidence, *id*. 45/3-705, among other things. They also contemplate a multiple-step hearing process — an evidentiary hearing; an ALJ's recommendation; preparation of a transcript and documentary record; and record review and final decision by the Director. *See id*. 45/3-704, 45/3-706, 45/3-707. Consistent with that statutory scheme, the Department's regulations contain several similar provisions for conducting hearings. *See* 77 Ill. Admin. Code §§ 100.3 – 100.19.

Moreover, in the Act, the legislature incorporated other, different time frames for involuntary transfer or discharge proceedings that are at odds with a mandatory construction of section 3-411's 10-day hearing and 14-day decision periods. For example, section 3-704(b) requires that the Department

send an initial notice setting forth the date, time, and place for the hearing at least 10 days before the hearing occurs. 210 ILCS 45/3-704(b) (2016). Section 3-704(c) provides that a hearing shall commence within 30 days of a request. *Id*. 45/3-704(c). And section 3-707 allows the Department up to 120 days following a hearing to issue a final decision. *Id*. 45/3-707.

In sum, the legislature incorporated into involuntary transfer or discharge proceedings multiple, potentially time-consuming, allowances or obligations that do not comport with conducting a hearing in 10 days, or issuing a decision in 14. In many circumstances, compliance with these additional provisions within that short window would be difficult or impossible. As one example, allowing a participant to obtain an attorney may preclude holding a hearing within 10 days. *Id*. 45/3-706. As another, the Department cannot both hold a hearing within 10 days of a request and send notice of that hearing more than 10 days in advance. *Id*. 45/3-704(b), 45/3-411. Yet this extensive procedural framework is exactly what the legislature specified.

The point here is not for the Court to determine whether some of the incorporated statutory requirements may be dispensed with, or to reconcile conflicting time provisions. Rather, the point is that the Act must be read as a whole. *Chenoweth*, 2015 IL 116898, ¶ 21. And these additional provisions are part of that whole. Uneasy fit or not, for involuntary transfer or discharge

hearings, the legislature expressly incorporated several provisions that are incompatible with a rigid insistence on section 3-411's time frames. Because it did so, one cannot conclude that the legislature intended to cut off the hearing process after 10 days.

4. Reading Section 3-411 Together with Federal Law Reinforces a Directory Construction.

Moreover, federal law requires that nursing home residents facing involuntary removal have a means to challenge that action. *See*, *e.g.*, 42 C.F.R. §§ 431.220(a)(2), 483.204. Therefore, cutting off residents' hearing rights within days of a request potentially risks putting Illinois at odds with federal law. Noncompliance with federal requirements can result in federal payments being withheld. 42 C.F.R. § 430.35. It is unlikely that the legislature intended such potential incompatibility. *Oswald,* 2018 IL 122203, ¶ 10 (courts consider consequences of proposed construction).

Accordingly, a meaningful inquiry into legislative intent fails to overcome the presumption that section 3-411's time frames should be construed as directory.

D. The Appellate Court's Reliance on *Frances House* and Similar Case Law Was Misplaced.

The appellate court relied on *Frances House,* 269 Ill. App. 3d 426; *Foley v. Civil Serv. Comm'n*, 89 Ill. App. 3d 871, 873 (1st Dist. 1980); and *Lincoln Park Realty, Inc. v. Chicago Comm'n on Human Relations*, 9 Ill. App. 3d 186,

189-90 (1st Dist. 1972). *Lakewood Nursing*, 2018 IL App (3d) 170177, ¶ 23. None supports a mandatory construction of section 3-411's 10-day hearing window. None is a decision of this Court. And all predate its more recent guidance on "negative language." *See, e.g., M.I.*, 2013 IL 113776, ¶¶ 16-20, 28; discussion *supra* at 19-23. To the extent the appellate court's cited cases (or similar ones) endorse deeming mandatory any language that broadly could be construed as "negative" without a meaningful examination of legislative intent, they are outmoded.

Moreover, the cited cases involved provisions with language and purposes different from the Act's involuntary transfer and discharge framework. Therefore, whether or not those cases were correctly decided, they are uninstructive in construing section 3-411. Significantly, in none of them did a court apply a mandatory construction — as the appellate court did here — to eliminate statutory rights accorded to a protected group based on factors outside that group's control.

In *Foley*, the appellate court construed a regulation of the city's personnel board that required it to give "written notice of its decision no longer than seven days after the termination of the hearing." 89 Ill. App. 3d at 872. Upon a city police officer's appeal to the board of an initial decision discharging him, the board failed to comply with its regulation. *Id*. The court deemed that provision mandatory as to the time for issuing a decision, so that

the board's untimely decision affirming the officer's discharge was void. *Id*. at 872-74.

In *Lincoln Park*, a city commission was charged with enforcing a fair housing ordinance. 9 Ill. App. 3d at 187-89. It investigated complaints, proceeded to a full hearing on potential violations if appropriate, and ultimately issued a report and recommendation, authorizing the mayor to suspend real estate brokers. *Id*. at 187-88. The appellate court deemed mandatory an ordinance provision requiring that "[n]o report shall be delayed more than sixty days" after the hearing notice issued. *Id*. at 187-90. Therefore, the court invalidated the mayor's 30-day broker suspension that resulted from a belated commission report and recommendation. *Id*.

Thus, in *Foley* and *Lincoln Park*, administrative delay did not result in an officer being discharged or a broker being found in violation. That is unlike here, where residents would be left without recourse for a facility's decision to involuntarily transfer or discharge them.

Frances House — a decision in which the Third District construed a different provision of the Act — is similarly distinguishable. There, the court construed section 3-707, a timing provision that applied to the Director's final administrative decision on alleged regulatory violations. *Frances House* held that the legislature's use of the phrase "not to exceed 90 days," following its allowance of additional time, evidenced mandatory intent. 269 Ill. App. 3d at

430-31.[3] Later, the Fourth District, following *Frances House*, construed the same statutory provision as mandatory. *Lincoln Manor, Inc. v. Dep't of Pub. Health*, 358 Ill. App. 3d 1116, 1118-21 (4th Dist. 2005).

The *Frances House* court concluded that a mandatory construction was consistent with residents' interests in that it encouraged the Department to enforce regulations more promptly. 269 Ill. App. 3d at 431. But although residents (and facilities) benefit from prompt resolution, a mandatory/directory inquiry asks whether the legislature intended to foreclose further action when the promptness sought is not forthcoming. *Robinson*, 217 Ill. 2d at 51-52; *M.I.*, 2013 IL 113776, ¶ 16. *Frances House* did not consider that question.

Moreover, in *Frances House*, section 3-707 imposed time limits on a process in which *the Department* contended that a facility has violated the Act or related regulations. *See* 210 ILCS 45/3-303(e), 45/3-707 (2016). Here, the administrative process is initiated by residents, not the Department, to protect their own statutory rights against improper removal. *Id*. 45/3-401, 45/3-410, 45/3-411; 42 C.F.R. § 483.15(c)(1)(i). A mandatory construction that prevents the Department from providing relief thus affects residents more directly, and

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[3] At the time, section 3-707 stated "the Director shall render his decision within 30 days after the termination of the hearing, unless additional time not to exceed 90 days is required by him for a proper disposition of the matter." *Frances House*, 269 Ill. App. 3d at 430 (quoting 210 ILCS 45/3-707 (1992) (emphasis removed)).

detrimentally, than one that curbs the Department in its general enforcement functions. That difference (among others) warrants a different result. Accordingly, none of the cited cases supports a mandatory construction here.

E. The "Rights Generally Injured" Prong Likewise Supports a Directory Construction.

The appellate court did not address part of this Court's test for overcoming the presumption that procedural commands are directory — whether "the right the provision is designed to protect would generally be injured under a directory reading." *M.I.*, 2013 IL 113776, ¶ 17. That factor also does not support a mandatory intent.

Here, a directory construction supports the rights that the legislature sought to protect; a mandatory construction would "generally injure" them. As discussed, *supra* at 13-14, under the Act, the "welfare of residents is paramount." *UDI No. 2*, 2012 IL App (4th) 110691, ¶ 24. Section 3-411 and related provisions protect residents by limiting the reasons for involuntary transfer and discharge and assuring that a resident can contest removal before a neutral decision-maker. 210 ILCS 45/3-401, 45/3-410, 45/3-411 (2016). The notion that the Act was somehow meant to secure facilities a strict eviction timeline at the expense of residents' rights to a fair hearing turns the Act on its head. That is especially true when the factors leading to delay are outside the residents' control. Therefore, the "rights generally injured" prong likewise counsels for a directory construction.

In sum, under a meaningful analysis that comports with this Court's precedents, the isolated phrase "not later than" carries little weight. Rather, the indicia of legislative intent point compellingly toward a directory construction of section 3-411's time limit for hearings.

CONCLUSION

For these reasons, Defendants-Appellants Illinois Department of Public Health and its Director request that this Court reverse the appellate court's judgment on the construction of section 3-411, and affirm the circuit court's judgment on that issue, which, in turn, affirmed in part the Department's final administrative decision.

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief under Rule 342(a), is 36 pages.

/s/ Laura Wunder
LAURA WUNDER
Assistant Attorney General

APPENDIX

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Illinois Official Reports

Appellate Court

***Lakewood Nursing & Rehabilitation Center, LLC v. Department of Public Health*, 2018 IL App (3d) 170177**

Appellate Court Caption	LAKEWOOD NURSING AND REHABILITATION CENTER, LLC, Plaintiff-Appellant, v. THE DEPARTMENT OF PUBLIC HEALTH; LAMAR HASBROUCK, Director of Public Health; and HELEN SAUVAGEAU, Defendants (The Department of Public Health and Lamar Hasbrouck, Director of Public Health, Defendants-Appellees).
District & No.	Third District Docket No. 3-17-0177
Filed	August 16, 2018
Decision Under Review	Appeal from the Circuit Court of Will County, No. 14-MR-1184; the Hon. John C. Anderson, Judge, presiding.
Judgment	Reversed.
Counsel on Appeal	Holly Turner, of Odessa, Texas, for appellant. Lisa Madigan, Attorney General, of Chicago (David L. Franklin, Solicitor General, and Laura Wunder, Assistant Attorney General, of counsel), for appellees.

Panel JUSTICE McDADE delivered the judgment of the court, with opinion.
Presiding Justice Carter and Justice Schmidt concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff Lakewood Nursing and Rehabilitation Center, LLC (Lakewood), filed a notice of involuntary transfer and discharge against Helen Sauvageau for failure to pay for her residency. Sauvageau filed a request for hearing, which the parties agreed to stay when Sauvageau applied for Medicaid. Two days after Sauvageau's application was denied, Lakewood requested defendant Illinois Department of Public Health (IDPH) to set a hearing date. Sixty-eight days after Lakewood's request, a hearing was held. IDPH approved the discharge 30 days after the receipt of its final ruling. Lakewood filed a complaint in the circuit court, arguing that (1) IDPH's ruling is void because it violated statutory time requirements, and (2) IDPH erred when it required Lakewood to keep Sauvageau as a resident for an additional 30 days. IDPH filed a motion to dismiss, which the trial court granted. Lakewood appealed, and this court reversed the trial court's decision. On remand, the trial court determined that IDPH did not violate statutory time requirements and that it had the discretion to impose the 30-day extension. Lakewood appealed. We reverse.

¶ 2 FACTS

¶ 3 This case involves an involuntary discharge of a resident of Lakewood. In 2012, Helen Sauvageau became a Lakewood resident and initially paid for her residency through her pension and social security without the assistance of government financial aid. In August 2013, Sauvageau stopped paying Lakewood.

¶ 4 On October 28, 2013, Lakewood sent Sauvageau a notice of involuntary transfer or discharge and opportunity for hearing. The notice stated that it was seeking to discharge Sauvageau because she failed to pay for her stay at Lakewood. On November 1, 2013, Sauvageau filed an involuntary transfer or discharge request for hearing and, the next day, filed an application for Medicaid. On January 13, 2014, her Medicaid application was denied. On January 15, 2014, Lakewood's attorney informed IDPH of the denial and requested IDPH to set an intent to discharge hearing date.

¶ 5 On February 10, 2014, a prehearing was held. Lakewood filed a motion to dismiss its hearing request, arguing that the IDPH no longer had jurisdiction to hold a hearing because it would be doing so after the 10-day limitations period in section 3-411 of the Nursing Home Care Act (210 ILCS 45/3-411 (West 2014)). In Sauvageau's response to the motion to dismiss, she claimed that, through an exchange of e-mails, the parties had agreed to stay the hearing pending her application for medical assistance, that failure to hold a hearing would violate her due process rights, and that the original discharge notice was defective. Sauvageau explained that she applied for medical assistance, that the application was denied, and that she was currently appealing the denial. IDPH denied the motion to dismiss, determining that the language within the section was directory rather than mandatory. It

reasoned that there was no negative language denying a hearing if the time requirement was not met and that strict compliance of the time requirement would cause more adverse effects than a delay.

¶ 6 On March 24, 2014, an evidentiary hearing was held. At the hearing, Sauvageau's attorney stated that "we can stipulate to the fact that there are monies due and owing to Lakewood Nursing Home. I don't know that we can stipulate to the exact amount that they are claiming but we can definitely stipulate that we didn't pay because we ran out of money, and we applied for the Medicaid and we've been still in that process with the intent that Medicaid will eventually be approved. It is approved with the spend down and we are hoping to appeal and get some better terms out of that." The administrative law judge (ALJ) recommended, based on Sauvageau's stipulation that she owed money to Lakewood, that the notice of involuntary transfer or discharge should be approved "30 days subsequent to the receipt of the final ruling in this matter." The chief ALJ adopted the recommendation in its final administrative order.

¶ 7 Lakewood filed a complaint in the Will County circuit court. The complaint alleged that the hearing and final order is void because they violate the statutory time requirements. It also claimed that the final order unconstitutionally required Lakewood to keep Sauvageau as a resident for an additional 30 days after the order was issued. IDPH filed a motion to dismiss, arguing that Lakewood's claims were moot because Lakewood received the relief it sought as Sauvageau no longer lived in the facility. It also claimed that the trial court only has jurisdiction to review final administrative decisions and that Sauvageau does not challenge the decision but rather seeks "declaratory relief regarding the timing of the Department's actions." The trial court granted the motion to dismiss.

¶ 8 Lakewood appealed, and this court reversed and remanded the trial court's decision in *Lakewood Nursing & Rehabilitation Center, LLC v. Department of Public Health*, 2015 IL App (3d) 140899. This court determined that the issues were moot because relief was not available to Lakewood once Sauvageau left the facility. However, the court found that the public interest and the capable of repetition yet evading review exceptions applied. *Id.* ¶¶ 19, 30, 36. This court stated that the time requirement issues that Lakewood presented were too premature for its review and would be better addressed on remand. *Id.* ¶ 40.

¶ 9 On remand, the parties stipulated to the following facts:

> "1. On July 6, 2012, Helen Sauvageau (hereinafter 'Resident') became a resident at Lakewood Nursing and Rehabilitation Center (hereinafter 'Lakewood') and was a private pay resident (meaning, Resident was not receiving governmental financial aid; Resident had a pension and Social Security) until August 2013, when Resident no longer paid for her nursing stay.
>
> 2. On October 20, 2013, the facility filed a 'Notice of Intent to Discharge' Resident due to her failure to pay.
>
> 3. Resident hired an attorney, who, on November 1, 2013, filed a Notice of Hearing with IDPH for the intended discharge.
>
> 4. On or about November 2, 2013, Resident filed an application for Medicaid, which stayed the intent to discharge hearing.

5. On January 13, 2014, Resident's Medicaid application was denied. Resident's request for Medicaid was denied for her stay at Lakewood because Resident gifted her house to her daughter.

6. On January 15, 2014, Lakewood's attorney informed IDPH of the denial and requested the intent to discharge hearing be set.

7. IDPH scheduled the intent to discharge for hearing to occur March 24, 2014 (68 days after January 15, 2014).

8. On March 24, 2014, the intent to discharge hearing was held. At said hearing, Resident's attorney stipulated that Resident had not paid for her stay, and that monies were owed to Lakewood.

9. On May 6, 2014 (43 days after the intent to discharge hearing was held), IDPH signed the Final Order in the intent to discharge case, and mailed said Order to the parties on May 7, 2014 (44 days after the intent to discharge hearing was held).

10. In said Final Order, IDPH ordered the facility to allow Resident to stay in the facility an additional 30 days from the date of the Final Order.

11. Lakewood did not consent to the hearing being held more than 10 days after Medicaid denial being issued.

12. Lakewood did not consent to the Final Order being issued more than 14 days after the intent to discharge hearing was held.

13. Lakewood did not consent to the language in the Final Order allowing Resident to remain in the facility for 30 days.

14. Both parties agree that the Nursing Home Care Act, 210 ILCS 45 (more specifically, Art. III Pt. 4 'Discharge and Transfer'; 210 ILCS 45/3-401 through 210 ILCS 45/3-423) governs this review.

15. Both parties agree to limit the issues to those set forth in the Appellate Court remand Order, specifically:

(a) Does the Nursing Home Care Act require IDPH to hold an intent to discharge hearing not later than 10 days after a hearing request is filed?

(b) Does the Nursing Home Care Act require IDPH to render a decision on the discharge within 14 days after a hearing request is filed?

(c) Does IDPH have the authority under the Nursing Home Care Act to issue an Order directing the nursing care facility to allow the Resident facing discharge to remain at the facility for a specific period of time after the issuance of a Final Order on the merits of the discharge hearing?"

¶ 10 Lakewood argued that section 3-411's time requirement that IDPH shall hold a hearing no later than 10 days after a hearing request is filed and render a decision within 14 days after the filing of the hearing request are mandatory because (1) the statutory provision affects public and private rights, (2) the provision contains negative language, and (3) the provision unambiguously construes specific time requirements. Furthermore, Lakewood claimed that section 3-413 of the Nursing Home Care Act (210 ILCS 45/3-413 (West 2014)) did not give IDPH authority to approve the notice 30 days after the final ruling.

¶ 11 The circuit court held that section 3-411's time requirements were directory for three reasons: (1) without negative language, provisions that construe procedural commands are

generally interpreted as directory, (2) the court must give some deference to an administration's interpretation of the act it is responsible for administering, and (3) the Nursing Home Care Act is intended for the protection of nursing home residents and their interests are more protected under a directory interpretation of the statute. The court also ruled that section 3-413 did not prevent IDPH from requiring a period of time a resident is allowed to stay after its decision. It determined that section 3-418, which gives IDPH authority to prepare transfer or discharge plans to ensure the protection of residents, allowed IDPH the discretion to approve the notice 30 days after the final ruling. Lakewood appealed.

¶ 12 ANALYSIS

¶ 13 Lakewood appeals the trial court's ruling, arguing that the court's interpretation of section 3-411 and section 3-413 was error. We note that Sauvageau is no longer a resident of Lakewood. However, this court has previously determined that these issues meet the mootness exceptions. Therefore, we review Lakewood's claims.

¶ 14 In construing a statute, the function of the court is to ascertain and give effect to the intent of the legislature by examining the entire statute. *Grove School v. Department of Public Health*, 160 Ill. App. 3d 937, 941 (1987). Where the language is clear, it must be given effect without resort to further aids of construction, and a court may not read into it any exceptions, conditions, or limitations that the agency did not express. *Davis v. Toshiba Machine Co.*, 186 Ill. 2d 181, 184-85 (1999). "Determining whether a provision is mandatory or directory is primarily a matter of ascertaining the intention of the legislature." *Alpern v. License Appeal Comm'n*, 38 Ill. App. 3d 565, 567 (1976). The construction of a statute is a question of law reviewed *de novo*. *Hayashi v. Illinois Department of Financial & Professional Regulation*, 2014 IL 116023, ¶ 16.

¶ 15 I. Section 3-411

¶ 16 First, Lakewood claims that the IDPH lacked jurisdiction because it violated section 3-411's statutory time requirements. Citing *Carrigan v. Illinois Liquor Control Comm'n*, 19 Ill. 2d 230, 233 (1960), Lakewood states that generally statutory time requirements are discretionary; however, there are two exceptions: (1) the provision injuriously affects public or private rights or (2) the provision contains negative language. Under the first exception, it argues that the following public and private rights are affected by section 3-411's statutory time period: (1) the rights of Medicare or Medicaid patients awaiting admission, (2) the resident's right to have an "expeditious hearing and determination," (3) the contract rights of Lakewood to avoid keeping nonpaying residents, and (4) potential increased cost on Lakewood to house nonpaying residents. Under the second exception, it claims that the "no later than" language within section 3-411 constitutes negative language because it prohibits any hearings after expiration of the 10-day period. Furthermore, it alleges that section 3-411 unambiguously mandates specific time requirements. It posits that the 34-day requirement in section 3-413 is specifically calculated to include the 10-day and 14-day requirements in section 3-411 and, therefore, indicates that section 3-411's time requirements are mandatory.

¶ 17 IDPH argues that the time requirements of section 3-411 do not apply because the statute applies to involuntary discharges *other than* an action by the Department of Healthcare and Family Services (DHFS) with respect to the Title XIX Medicaid recipient. IDPH alleges that this case involves an action by the DHFS because Sauvageau had applied for Medicaid

shortly after she requested a hearing. Alternatively, IDPH claims that section 3-411 should be given a directory interpretation. In particular, IDPH claims that the purpose of the Nursing Home Care Act is to protect nursing home residents and that residents would be injured under a mandatory construction, rather than a directory construction, because it would (1) affect the residents' ability to effectively proceed with their claims, (2) " 'encourage facilities to obscure issues and delay in providing necessary information,' ", (3) affect the court's compliance with other provisions in the statute, and (4) violate federal law as it could affect due process rights.

¶ 18 The mandatory or directory question " ' "simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates." ' " *In re M.I.*, 2013 IL 113776, ¶ 16 (quoting *People v. Robinson*, 217 Ill. 2d 43, 51-52 (2005)). Under the mandatory or directory question, statutes are mandatory if the intent of the legislature dictates a particular consequence for failure to comply with the provision. *Id.* However, in the absence of legislative intent, the statute is directory and no particular consequence flows from noncompliance. *Id.* "If a provision of a statute states that the time for performance of an official duty without any language denying performance after a specified time, it is directory." *Grove School v. Department of Public Health*, 160 Ill. App. 3d 937, 941 (1987). However, "if the time period is provided to safeguard someone's rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed." *Id.* (citing *Andrews v. Foxworthy*, 71 Ill. 2d 13 (1978)).

¶ 19 Section 3-411 provides time periods for when the IDPH must hold a hearing on a notice for involuntary transfer or discharge and render a decision. It states:

> "The Department of Public Health, when the basis for involuntary transfer or discharge is other than action by the Department of Healthcare and Family Services (formerly Department of Public Aid) with respect to the Title XIX Medicaid recipient, shall hold a hearing at the resident's facility not later than 10 days after a hearing request is filed, and render a decision within 14 days after the filing of the hearing request." 210 ILCS 45/3-411 (West 2014).

¶ 20 In regard to IDPH's initial argument, the plain language of section 3-411 states that the section does not apply when an action by the DHFS with respect to the Title XIX Medicaid recipient is the basis for involuntary transfer or discharge. Here, although IDPH argues that this language applies to this case because Sauvageau applied for Medicaid after her request for a hearing, Sauvageau is not considered a Medicaid *recipient* but rather a Medicaid *applicant* during the proceedings and her Medicaid application is not a basis for the involuntary discharge. Therefore, we reject IDPH's initial argument.

¶ 21 In regard to IDPH's alternative argument, IDPH cites *Grove School*, 160 Ill. App. 3d 937, and *Moon Lake Convalescent Center v. Margolis*, 180 Ill. App. 3d 245 (1989), for the proposition that the right that section 3-411 was designed to protect would be more injured under a mandatory construction rather than a directory construction. In *Grove School*, plaintiff argued that IDPH's administrative decision was void because it failed to comply with time requirements stated in section 3-704 of the Nursing Home Care Act. 160 Ill. App. 3d at 940. The relevant portion of section 3-704 stated that, " 'The Department shall commence [the] hearing within 30 days of receipt of the request for a hearing ***.' " *Id.* at 940-41 (quoting Ill. Rev. Stat. 1985, ch. 111½, ¶ 4153-704). The First District stated that the

purpose of the Nursing Home Care Act was to protect nursing home patients and held that the rights of those individuals are more injuriously affected by a mandatory interpretation of the statute. *Id.* at 941. It also found that there was no negative language within the Nursing Home Care Act. *Id.* Therefore, it ruled that section 3-704's language was directory. *Id.*

¶ 22 In *Margolis*, 180 Ill. App. 3d at 254-55, the First District reviewed whether the time requirements in section 3-702(d) of the Nursing Home Care Act were mandatory or directory. The statute stated that,

> " 'A determination about a complaint which alleges a Type A violation *shall* be made by the Department, in writing, within 7 days after the complaint's receipt. A determination about a complaint which alleges a Type B or C violation *shall* be made by the Department, in writing, within 30 days after the complaint's receipt.' " (Emphases in original.) *Id.* at 254 (quoting Ill. Rev. Stat. 1983, ch. 111½, ¶ 4153-702(d)).

The court noted that the purpose of the Nursing Home Care Act was to protect nursing home residents. *Id.* at 255-56. In light of the Nursing Home Care Act's purpose, it believed that a mandatory construction of section 3-702(d) would result in "obvious" consequences such as unaddressed resident abuses, incomplete and inaccurate determinations, and "encourage facilities to obscure issues and delay in providing necessary information." *Id.* at 256. It further explained that a mandatory interpretation would be "more injurious to residents than the benefits the residents would receive." *Id.* Ultimately, the court found that the provision in section 3-702(d) was directory. *Id.* at 254-55.

¶ 23 Here, the term "not later than 10 days" in section 3-411 constitutes negative language. Illinois courts, including this court, have determined that language prohibiting a further action constitutes negative language and, therefore, a mandatory construction. See *Frances House, Inc. v. Department of Public Health*, 269 Ill. App. 3d 426, 431 (1995) (determining that the phrase "not to exceed 90 days" within section 3-707 of the Nursing Home Care Act constituted negative language and was, therefore, mandatory); *Foley v. Civil Service Comm'n*, 89 Ill. App. 3d 871, 873 (1980) (finding that the phrase "no longer than" within Rule VII of the General Procedure for Review of Police Psychological Exam was negative language, and therefore, Rule VII required a mandatory construction); *Lincoln Park Realty, Inc. v. Chicago Comm'n on Human Relations*, 9 Ill. App. 3d 186, 189-90 (1972) (ruling that an ordinance stating that, " 'No report shall be delayed more than sixty days after the date of the issuance of notice for the commencement of the first hearing' " was "clearly negative," and thus, the provision was mandatory). Therefore, we determine that the provision is mandatory.

¶ 24 Sauvageau filed a notice of hearing on November 1, 2013. The next day, she filed an application for Medicaid and the parties agreed to stay the hearing. In January, Sauvageau's Medicaid application was denied and Lakewood requested IDPH to set a hearing date. However, the hearing was not scheduled until March 2014, 68 days after Lakewood's request. Because the provision is mandatory, we find that IDPH lost jurisdiction because it did not conduct a hearing in 10 days. Because we find that IDPH lacked jurisdiction, we need not determine whether IDPH erred when it did not render its decision within 14 days in accordance with the section.

¶ 25 II. Section 3-413

¶ 26 Next, Lakewood alleges that section 3-413 did not give IDPH authority to delay the effective date of its order by 30 days after its issuance. Section 3-413 governs the time period in which a facility may discharge a resident. It states:

> "If the Department determines that a transfer or discharge is authorized under Section 3-401, the resident shall not be required to leave the facility before the 34th day following receipt of the notice required under Section 3-402, or the 10th day following receipt of the Department's decision, whichever is later, unless a condition which would have allowed transfer or discharge in less than 21 days as described under paragraphs (a) and (b) of Section 3-402 develops in the interim." 210 ILCS 45/3-413 (West 2014).

¶ 27 Looking at the plain language of section 3-413, it does not give IDPH authority to approve the notice of transfer and discharge 30 days after the receipt of the final ruling. See *O'Grady v. Cook County Sheriff's Merit Board*, 260 Ill. App. 3d 529, 534 (1994) ("Any power or authority claimed by an administrative agency must find its source within the provisions of the statute by which the agency was created."). The section only requires Lakewood to maintain Sauvageau as a resident for 34 days following the receipt of the notice or 10 days following the receipt of the final ruling. Therefore, we find that IDPH's ruling regarding the 30-day extension is void. See *Walsh v. Champaign County Sheriff's Merit Comm'n*, 404 Ill. App. 3d 933, 938 (2010) (any action beyond the administrative agency's statutory authority is void).

¶ 28 IDPH argues that section 3-418 gave it "broad, discretionary" authority to approve the notice 30 days after the receipt of the final ruling. Section 3-418 states: "The Department shall prepare resident transfer or discharge plans to assure safe and orderly removals and protect residents' health, safety, welfare and rights." 210 ILCS 45/3-418 (West 2014).

¶ 29 "A court presumes that the legislature intended that two or more statutes which relate to the same subject are to be read harmoniously so that no provisions are rendered inoperative." *Knolls Condominium Ass'n v. Harms*, 202 Ill. 2d 450, 458-59 (2002). When a general statutory provision and a specific statutory provision exist in the same act, the specific provision controls and should be applied. *Id.* at 459.

¶ 30 Here, section 3-413 specifically addresses the time period in which a resident is not required to leave the facility. Section 3-418 provides a general provision that allows IDPH to prepare discharge plans for safe and orderly removals. Based on the rules of statutory interpretation, we determine that section 3-413 controls in this case. Therefore, we reject IDPH's argument.

¶ 31 CONCLUSION

¶ 32 The judgment of the circuit court of Will County is reversed.

¶ 33 Reversed.

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

Lakewood Nursing & Rehabilitation Center, LLC, Plaintiff,	)	**No. 14-MR-1184**
v.	)	**John C. Anderson Circuit Judge**
Illinois Dept. of Public Health, *et al.*, Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter having come before the Court on remand, the Court having taken the matter under advisement, the Court finds and orders as follows:

I. BACKGROUND

This is a statutory interpretation case involving the Nursing Home Care Act (the "Act"). 210 ILCS 45/1-101 *et seq*. The Act includes a "bill of rights," under which residents are guaranteed certain rights, such as the right to manage their own finances, the right to refuse treatment, the right to be free from abuse and neglect by nursing home personnel, and a private cause of action against owners and operators of facilities who violate its provisions, among other things. *See Childs v. Pinnacle Health Care, LLC*, 399 Ill. App. 3d 167, 180 (2010). The legislative purpose of the Act "undoubtedly is to protect nursing home residents." *Moon Lake Convalescent Center v. Margolis*, 180 Ill. App. 3d 245, 255 (1989).

On October 16, 2014, this Court dismissed plaintiff's claims as moot. On November 2, 2015, the appellate court issued an opinion in which it agreed the case was moot. However, the appellate court also concluded that this case involves questions of public concern and that it should be decided on the merits pursuant to the public interest exception, and in accordance with the doctrine of "moot but capable of repetition yet evading review." *See Lakewood Nursing & Rehabilitation Center, LLC v. Dept. of Public Health*, 2015 IL App (3d) 140899. The appellate court itself did not, however, entertain the statutory interpretation issues and, instead, remanded the case for consideration by this Court.[1]

[1] The appellate court found that "the issue of whether the timing requirements of the Act are jurisdictional is premature on appeal and is better litigated in the circuit court on administrative review." It is not clear to this Court, however, as to whether the appellate court was directing this Court to take any particular steps to ripen this issue. Regardless, the parties did not adequately pursue any jurisdictional arguments in their briefs on administrative review.

II. ANALYSIS

A. Section 3-411's Hearing Requirement

First, the parties ask "[d]oes [the Act] require [the Illinois Department of Public Health ("IDHP")] to hold an [involuntary transfer of discharge ("ITD")] hearing not later than 10 days after a hearing request is filed?" Section 3-411 of the Act states in pertinent part that IDHP "shall hold a hearing at the resident's facility not later than 10 days after a hearing request is filed ***." 210 ILCS 45/3-411. The issue, then, is whether the statute's use of the word "shall" should be considered mandatory or directory.

In common parlance, "shall" is "used to express a command" and is sometimes interchangeable with "must." *See* MERRIAM-WEBSTER COLLEGIATE DICTIONARY (10th ED.) at 1075. However, in matters of statutory interpretation, this is not always the case. As our supreme court explained in *Andrews v. Foxworthy*, 71 Ill. 2d 13, 21 (1978):

> The use of the words "shall" or "must" is generally regarded as mandatory. However, the term "shall" does not have a fixed or inflexible meaning. It can, in fact, be construed as meaning "may," depending on the legislative intent. However, "(w)here the word is employed with reference to any right or benefit to anyone, and the right or benefit depends upon giving a mandatory meaning to the word, it cannot be given a permissive meaning *** ." Thus, proper interpretation of the provision cannot simply be based on its language; it must be grounded on the "nature, objects and the consequences which would result from construing it one way or another."
>
> In brief summary, when a statute prescribes the performance of an act by a public official or a public body, the question of whether it is mandatory or directory depends on its purpose. If the provision merely directs a manner of conduct for the guidance of the officials or specifies the time for the performance of an official duty, it is directory, absent negative language denying the performance after the specified time. If, however, the conduct is prescribed in order to safeguard someone's rights, which may be injuriously affected by failure to act within the specified time, the statute is mandatory.

(Citations omitted.)

The foregoing passage from *Andrews* identifies two constructive aids that are relevant in this case, and each could arguably support different conclusions. IDPH points to the "negative language" analysis, which is the most commonly-used statutory construction tool in answering a question such as this. In this case, the Act does not identify a consequence for failure to comply with the ten-day hearing requirement, thus suggesting that the period is directory.

However, Lakewood urges the Court to utilize a competing interpretive device. Lakewood relies on the rule in *Andrews*, 71 Ill. 2d at 21, also discussed in *Carrigan v. Illinois*

Liquor Control Comm'n, 19 Ill. 2d 230, 233 (1960), where "shall" has been deemed mandatory because a permissive reading would "injuriously affect public interests or private rights."[2]

The Court finds that IDPH's interpretation is the most appropriate for at least three reasons. First, the Court is required to begin with the presumption that "language issuing a procedural command to a government official indicates an intent that the statute is directory." *Community Living Options v. Dept. of Pub. Health*, 2013 IL App (4th) 121056, ¶50, *citing People v. Delvillar*, 235 Ill.2d 507, 517 (2009). Second, IDPH is tasked with administering the Act, and its interpretation of the Act is to be afforded some deference. *See Abrahamson v. Ill. Dept. of Prof'l Regulation*, 153 Ill.2d 76, 97-98 (1992). Third, and as discussed further herein because it is the most important factor, IDPH's interpretation is consistent with the purpose of the Act. When construing the Act, the Court's focus is "on the legislature's intent and the consequences to nursing home residents, the Act's intended protected class." *Moon Lake*, 180 Ill. App. 3d at 256; *see also UDI No. 2, LLC v. Dept. of Pub. Health*, 2012 IL App (4th) 110691 ("[w]e agree that the welfare of residents is paramount"). IDPH's interpretation provides more protection to residents than does Lakewood's interpretation.

Moreover, even if the Court were to engage in a "injuriously affect public interests or private rights" analysis, it would nonetheless rule in IDPH's favor. Lakewood points to this test and (not unjustifiably) contends that its contractual rights would be injured absent a prompt resolution. The problem with Lakewood's argument is that an ITD determination will impact ***both*** the resident and facility, and the Act requires the Court to weigh the resident's interests more heavily than those of the facility. *See Moon Lake*, 180 Ill. App. 3d at 256 (stating that the interpretive focus must be on protecting residents); *UDI No. 2, LLC v. Dept. of Pub. Health*, 2012 IL App (4th) 110691 at ¶24 (stating "[w]e agree that the welfare of residents is paramount" and finding that a contrary construction "would be more injurious to residents than the benefits the residents would receive.").

Moon Lake involved an interpretation of section 3-702 of the Act (210 ILCS 45/3-702) which likewise sets forth express time requirements. There, even though the court acknowledged that a prompt determination is important to nursing home facilities (just as Lakewood contends here), the interpretive focus must be on protecting residents. That focus, in turn, required a directory interpretation of the term "shall." *Id.* at 256-57.

A permissive interpretation is also consistent with the court's finding in *Grove School v. Dept. of Pub. Health*, 160 Ill. App. 3d 937 (1987). In *Grove School*, the nursing home similarly argued that "shall" was mandatory as used in section 3-704 of the Act (210 ILCS 45/3-704).

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[2] Lakewood points to the appellate court's conclusions that this case indeed impacts the rights of both parties to the case, and suggests that the appellate court's findings in this regard are determinative on the mandatory/directory reading issue. The Court acknowledges that the appellate court's ruling thematically evinces a concern for the injustice that would ensue if Lakewood is required to care for a resident despite compensation for an extended period, but those findings were made in the context of whether to apply exceptions to the mootness doctrine—not to the merits of the case. If the appellate court wished for these concerns to be controlling on the merits, it could have easily and expressly said so.

There, the court engaged in a discussion of whether a mandatory interpretation was necessary to protect rights. *See id.* at 941, *citing Andrews*. However, in analyzing the mandatory/directory question, the *Grove School* did not apply the *Andrews* "safeguarding someone's rights" test in the context of the ***facility's*** rights; rather the focus was on whether a mandatory interpretation was necessary to protect the ***resident's*** rights. There was no question that a mandatory interpretation favored the institution's rights, but that was not determinative. The court observed that the time period "contain[ed] no negative language denying performance if the time requirement is not met, nor will the ***rights of persons the statute is intended to protect*** be adversely affected by delay." *Id.* at 941. (Emphasis added.) *See also Community Living Options v. Dept. of Pub. Health*, 2013 IL App (4th) 121056, ¶50, *citing Delvillar*, 235 Ill.2d at 517 (finding that the "safeguarding someone's rights" test applies "when the ***right the provision is designed to protect*** would generally be injured under a directory reading." (Emphasis added.)

Similar analyses were employed, and similar conclusions reached, in other cases. *See, e.g., UDI No. 10, LLC v. Dept. of Pub. Health*, 2012 IL App (1st) 103476, ¶22 (interpreting section 3-702(d) (210 ILCS 45/3-702(d)) and stating "we do not find that the protection of the residents depends upon a mandatory interpretation of the section[,]" and such a construction would be more injurious to residents than the benefits the residents would receive"); *UDI No. 2 v. Dept. of Pub. Health*, 2012 IL App (4th) 110691 (same).

In short, the Court is required to begin with the presumption that "language issuing a procedural command to a government official indicates an intent that the statute is directory." *Community Living Options*, 2013 IL App (4th) 121056 at ¶50, *citing Delvillar*, 235 Ill.2d at 517. The Court finds that the absence of negative language in section 3-411 supports that presumption, and Lakewood's reliance on a "safeguarding someone's rights" test does not overcome it. Most importantly, a directory interpretation provides a more meaningful safeguard to residents. Admittedly, residents have an interest in a prompt ITD determination too, and therefore a mandatory interpretation of "shall" would benefit them in that regard. However, on balance, "such a construction would be more injurious to residents than the benefits the residents would receive." *UDI No. 10, LLC v. Dept. of Pub. Health*, 2012 IL App (1st) 103476 at ¶22.

B. <u>Section 3-411's Determination Requirement</u>

The parties next ask, "[d]oes the [Act] require IDPH to render a decision on the discharge within 14 days after a hearing request is filed?" Section 3-411, again, contains no negative language or consequence for noncompliance; it merely states that the IDPH must "render a decision within 14 days after the filing of the hearing request." 210 ILCS 45/3-411. The Court finds section 3-411's timing requirements regarding issuance of a determination are directory for the same reasons expressed herein regarding section 3-411's hearing requirements.

In reaching this conclusion, the Court is mindful of the ruling in *Frances House, Inc. v. Dept. of Health*, 269 Ill. App. 3d 426 (1995), in which the court declared that section 3-707's determination deadline is mandatory. However, section 3-707's determination requirements include negative language, while section 3-411 does not. The Court is further mindful of the Court's statement in *Frances House* that a prompt resolution of complaints is in the best interests of residents. That statement, however, takes into account that *Frances House* involved allegations of mistreatment toward a resident, and so it is axiomatic that a swift resolution is critical to the resident's interests under such circumstances. That concern does not exist in this case.

C. Section 3-413 and the Effective Date of Removal

The final question posed by the parties is "[d]oes IDPH have the authority under the [Act] to issue an order directing the nursing facility to allow the [r]esident facing discharge to remain at the facility for a specific period of time after issuing a [f]inal [o]rder?

Lakewood asserts that this issue is controlled by section 3-413 of the Act (210 ILCS 45/3-413) which states as follows:

> If the Department determines that a transfer or discharge is authorized under Section 3-401, the resident shall not be required to leave the facility before the 34th day following receipt of the notice required under Section 3-402, or the 10th day following receipt of the Department's decision, whichever is later, unless a condition which would have allowed transfer or discharge in less than 21 days as described under paragraphs (a) and (b) of Section 3-402 develops in the interim.

Lakewood asserts that the foregoing periods, which effectively constitute a stay, cannot be extended by IDPH. IDPH, however, argues that section 3-413 merely sets a minimum threshold for discharge but does not set a ceiling on the number of days a resident may stay following an adverse ITD decision. IDPH also relies on *Abrahamson* for the proposition that its interpretation should be adopted because it is tasked with enforcing the statute.

The Court finds that IDPH's interpretation is more consistent with the purpose of the Act. Further, the Court observes that section 3-418 provides that IDPH "shall prepare resident transfer or discharge plans to assure safe and orderly removals and protect residents' health, safety, welfare and rights." 210 ILCS 45/3-418. The Court can perceive no reason why IDPH's authority—and ***obligation***—pursuant to section 3-418 does not include the discretion to control scheduling matters relating to orderly and safe patient transfers. As the appellate court observed in this case, Lakewood is free to pursue a resident for the cost of its stay.[3]

[3] Indeed, Lakewood ***did*** pursue the resident for damages. The Court takes judicial notice of a lawsuit Lakewood filed against Helen Sauvageau on July 18, 2014, seeking damages for breach of contract. *See Maddux v. Blagojevich*, 233 Ill.2d 508, 532 n. 18 (2009) (the circuit court is entitled to take judicial notice of its own files and

Lakewood's concerns in this regard are not without justification. Nonetheless, the Act is designed to prioritize the concerns and rights of the ***resident***, and so the Court must interpret the statute with that purpose in mind. That is not to say residents should automatically win in every lawsuit with a nursing home. And, the legislature is always free to clarify the statute if it chooses. If the statute said the "facility shall not be required to keep the resident beyond the 34th day following receipt of the notice required under Section 3-402, or the 10th day following receipt of the Department's decision," the Court's ruling would be different. The Court answers the parties' third question in the affirmative.

III. CONCLUSION

For the reasons set forth herein, the Court answers all three questions in the affirmative. The clerk is directed to mail a copy of this order to all counsel of record.

ENTERED:

Dated: February 10, 2017

John C. Anderson
Circuit Court Judge

records). On November 8, 2016, Ms. Sauvageau agreed to pay Lakewood $20,000 and agreed to a confession of judgment in the event of nonpayment. *See Lakewood Nursing & Rehab. Center v. Helen Sauvageau*, Will County Case No. 14-AR-629.

INVOLUNTARY TRANSFER/DISCHARGE HEARING
UNDER NURSING HOME CARE ACT

DEPARTMENT OF PUBLIC HEALTH
STATE OF ILLINOIS

In re: The matter of	)	
	)	
Helen Sauvageau	)	
Complainant	)	
	)	
Vs.	)	Docket # R7 NH13-0259
	)	
Lakewood Nursing and Rehab Center Plainfield, Illinois	)	
Respondent	)	

FINAL ORDER

The Administrative Law Judge has filed with the Illinois Department of Public Health a report of all of his acts and doings together with his recommendations in this matter. The Director of the Illinois Department of Public Health has delegated to the undersigned the authority to review the record herein and issue a final order. The undersigned, after careful review and consideration thereof, and of the entire record of these proceeding, adopts the entire record of these proceedings, including the recommendations of the Administrative Law Judge contained in the transcript of these proceedings.

Based on the record of the above-referenced proceedings and the adopted recommendations of the Administrative Law Judge herein, the following is hereby ordered:

The Respondent' s Notice of Involuntary Transfer or Discharge of Helen Sauvageau from Lakewood Nursing and Rehabilitation Center, Plainfield, Illinois is affirmed and this action is dismissed.

This order is a final administrative decision within the provisions of the Nursing Home Care Act and the Administrative Review Law. Any petition for judicial review of this decision shall be filed no later than fifteen days after receipt of this decision.

John G. Abrell

Hon. John G. Abrell, [ARDC #3128799]
Chief Administrative Law Judge
Illinois Department of Public Health

Dated this 6th day of May, 2014.

A15

DEPARTMENT OF PUBLIC HEALTH
STATE OF ILLINOIS

In re: The matter of	)	
	)	
Helen Sauvageau	)	
Complainant,	)	
	)	
Vs.	)	Docket # R8 NH13-0259
	)	
Lakewood Nursing and Rehabilitation Center	)	
Respondent.	)	
	)	

ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS

In its Involuntary Transfer or Discharge dated October 28, 2013, Respondent gave notice of its intent to involuntarily discharge the resident, Helen Sauvageau from Lakewood Nursing and Rehabilitation Center (Hereinafter referred to as the Facility). Such notice was issued pursuant to Section 3-401(c) of the Nursing Home Care Act (210 ILCS 45/1-101 et. seq.) and Code of Federal Regulation 42 CFR 483.12 (a)(2)(v), "you have failed, after reasonable and appropriate notice, to pay for your stay at the facility." In response to such notice, a Request for Hearing dated October 28, 2013 was received on behalf of the resident, Helen Sauvageau.

The Department notified the Complainant and Respondent of a pre-hearing that was held on Monday, February 10, 2014, in accordance with the above cited State and Federal regulations and the Department's Rules of Practice and Procedure in Administrative Hearings (77 Ill. Adm. Code 100) held pursuant to Section 3-410 of the Nursing Home Care Act. An evidentiary hearing in this matter was held on Monday, March 24, 2014.

FINDINGS OF FACT

Based upon all of the evidence and exhibits presented, the Administrative Law Judge makes the following findings of fact:

1. Complainant was admitted to the Facility on July 6, 2012 and at that time her primary diagnosis was lower leg arthritis.

2. In his opening statement John F. Argoudelis, Counsel for the Complainant stated that, "in an effort to expedite the hearing, we can stipulate to the fact that there are monies due and owing to Lakewood Nursing Home. I don't think there's nothing to deny there. I don't know that we can stipulate to the exact amount that they are claiming but we can definitely stipulate that we didn't pay because we ran out of money..."

CONCLUSIONS OF LAW

1. The Code of Federal Regulation 42 CFR 483.12 (a)(2)(v) provides that a facility may involuntarily transfer or discharge a resident who has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility.

ALJ RECOMMENDATION

Based upon the findings of fact and the evidence presented it is my recommendation that the Notice of Involuntary Transfer or Discharge be approved 30 days subsequent to the receipt of the final ruling in this mater.

Dated this 17th of April, 2014

Joseph M. Harrington
Administrative Law Judge
Illinois Department of Public Health
(708) 544-5300

TABLE OF CONTENTS TO THE RECORD ON APPEAL

CERTIFICATE OF FILING AND SERVICE

I certify that on March 13, 2019, I electronically filed the foregoing Brief of Defendants-Appellants with the Clerk of the Court for the Illinois Supreme Court by using the Odyssey eFileIL system.

I further certify that a participant in this appeal, named below, is not a registered service contact on the Odyssey eFileIL system, and thus was served by transmitting a copy from my e-mail address to all primary and secondary e-mail addresses of record designated by that participant on March 13, 2019.

Holly Turner
hturner@extendedcarellc.com

I further certify that the other participant in this appeal, named below, is a registered service contact on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Omar Fayez
ofayez@hustonmay.com

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Laura Wunder
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