No. 124019
IN THE
SUPREME COURT OF ILLINOIS

LAKEWOOD NURSING & REHABILITATION CENTER, LLC

Plaintiff-Appellee

v.

THE ILLINOIS DEPARTMENT OF PUBLIC HEALTH,
HELEN SAUVAGEAU

Defendant-Appellants

On Appeal from the Appellate
Court of Illinois, Third Judicial
District, No. 3-17-0177

On Appeal there from the Circuit Court of Will County
12th Judicial Circuit, No. 14-MR-01184
The Honorable John C. Anderson, Judge Presiding

BRIEF AND ARGUMENT OF PLAINTIFF-APPELLEE

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E-FILED
6/26/2019 11:22 AM
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SUPREME COURT CLERK

ORAL ARGUMENTS REQUESTED

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POINTS AND AUTHORITIES

Standard of Review

In re Alfred H.H.
The People of the State of Illinois v Alfred H.H.
331 Ill. Dec. 1 (Ill. Sup. Ct 2009) ……… 2

Cole v IDPH
329 Ill.App. 3d 261 (Ill. App. Ct 1st Dist. 2002) ……… 2

City of Belvidere v IL. State Labor Relations Board ……… 2
181 Ill. 2d 191 (Ill. Supreme Ct 1998).

ARGUMENT

I. Overview of NHCA & Discharge Process

20 ILCS 3960 ……… 8

Nursing Home Care Act
210 ILCS 45/3-601 – 603 ……… 8

Nursing Home Care Act
210 ILCS 45/2-202 ……… 9

Nursing Home Care Act
210 ILCS 45/3-401 ……… 9

Nursing Home Care Act
210 ILCS 45/3-403 ……… 9

Nursing Home Care Act
210 ILCS 45/3-405 ……… 9

Nursing Home Care Act
210 ILCS 45/3-410 ……… 9

Nursing Home Care Act
210 ILCS 45/3-404 ……… 9

Nursing Home Care Act
210 ILCS 45/3-411 ……… 10

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

II. Time provisions are mandatory

1. The statutory provision injuriously affects public and private rights

Nursing Home Care Act
210 ILCS 45/3-411 ……… 11

Carrigan v Ill. Liquor Control Comm.
19 Ill.2d 230 (Ill. Sup. Ct. 1960). ………11

Illinois v. Four Thousand Eight Hundred Fifty Dollars ..…12, 13
352 Ill. Dec. 33 (IL. App. Ct. 4th Dist. 2011)

Nursing Home Care Act
210 ILCS 45/3-601 -603 ……… 16

2. Negative Language

Nursing Home Care Act
210 ILCS 45/3-411 ………18

Frances House v IDPH, ………19
269 Ill.App.3d 426 (3rd Dist. 1995).

III. Legislative Intent

1. Legal standard

Alvarez v Pappas ……… 20
229 Il. 2d 217 (Il. Supreme Ct. 2008).

People of the State of Illinois v $30,700.00,
199 Ill.2d 142, (Ill. Sup. Ct. 2002) ……… 20

Ragano v Civil Service Comm. ……… 20
80 Ill. App.3d 523 (1st Dist. 1980).

2. Plain and Unambiguous language

Nursing Home Care Act
210 ILCS 45/3-411 ……… 21

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

3. Legislature established a mandatory 34-day discharge cycle

Hernon v E.W. Corrigan Const. Co.,
149 Ill. 2d 561 (Ill. Sup. Ct. 1992). ………21

Nursing Home Care Act
210 ILCS 45/3-413 ……... 22
210 ILCS 45/3-410 ……… 22
210 ILCS 45/3-411 ……… 22

Illinois v. Four Thousand Eight Hundred Fifty Dollars ……….23
352 Ill. Dec. 33 (IL. App. Ct. 4th Dist. 2011)

5. No other remedy

Guerrero v Gardner
397 Ill. App.3d 793 (2nd Dist. 2010) ……….27

6. Resident rights would be better met by a mandatory interpretation

Nursing Home Care Act
210 ILCS 45/3-401 ……… 34

III. MANDATORY TIMELINES OF ISSUING THE FINAL ORDER

Hernon v E.W. Corrigan Const. Co.,
149 Ill. 2d 561 (Ill. Sup. Ct. 1992). ………34

IV. MEDICAID REGULATIONS DO NOT APPLY

77 Il. Admin Code 300.270 ……... 35

Nichols v St. Luke Center of Hyde Park ……... 37
800 F. Supp. 1564 (U.S. Dist. Ct. S.D. Ohio 1992).

210 ILCS 45/3-403 ……… 39

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

NATURE OF THE CASE

A nursing home resident discharge hearing was held by IDPH involving Lakewood Nursing & Rehabilitation Center and a resident at Lakewood. IDPH entered its Final Order permitting the discharge but only after it had taken more time than Lakewood alleges the statute permitted.

Lakewood appealed the Final Order, objecting to (1) timeliness of IDPH in having the hearing; (2) timeliness of IDPH in issuing the Final Order after the hearing; and (3) including in the Final Order language commanding Lakewood to keep the resident an additional 30 days after the Final Order was issued. All three questions are questions of law. [Issue #3: including in the Final Order language commanding Lakewood to keep the resident an additional 30 days after the Final Order was issued is not contested by IDPH, so that issue has been resolved. (Appellant's Brief, page 11.)]

As to the remaining two issues: (1) the timeliness of IDPH in having the hearing and (2) the timeliness of IDPH in issuing the Final Order after the hearing (both are part of the same statutory sentence): the Appellate Court decided that IDPH exceeded the mandatory time period for holding the hearing, so did not issue a ruling on the timeliness of issuing the Final Order. [Appellate Court Opinion (2018) C. 13)]

As this is a case of first impression on the statutory section at issue, this Supreme Court accepted the case on appeal.

ISSUE FOR REVIEW

IDPH fails to word the issue in the manner they agreed to in the Stipulated Facts for this Court's review:

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

1. 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?

2. 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?

If the parties are not bound by the wording of the Agreed Stipulations (as IDPH appears to frame the issue to include their argument), the issue to be reviewed as Lakewood see it is:

Does IDPH under 210 ILCS 45/3-411 have the legal authority to require a private nursing home facility to house, feed, clothe, and provide 24 hour medical services against their will to a customer (in violation of their written contract with the customer), solely because IDPH refuses to hold a hearing (for no just cause) within 10 days and issue the Final Order within 14 days?

STANDARD OF REVIEW

The issue in this appeal is the correctness of the court's statutory interpretation of the Nursing Home Care Act. This is entirely a question of law. Therefore, the review of this question is de novo. In re Alfred H.H. (The People of the State of Illinois v Alfred H.H.), 331 Ill. Dec. 1, 5, 233 Ill.2d 345, 351, 910 N.E.2d 74, 78 (Ill. Sup. Ct 2009).

Lakewood disagrees with IDPH's assertion that they should be given considerable deference in their interpretation of a statute. "… an administrative agency's interpretation of a statute is subject to de novo review." Cole v IDPH, 263 Ill. Dec. 183 at 185; 329 Ill.App. 3d 261 at 264, 767 N.E.2d 909 at 911 (Ill. App. Ct 1st Dist. 2002). See also City of Belvidere v IL. State Labor Relations Board, 181 Ill. 2d 191, 205 (Ill. Supreme Ct 1998).

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

STATEMENT OF FACTS

Lakewood is not certain why IDPH violated their agreement of Stipulated Facts and included additional contested and argumentative material in their Statement of Facts. The facts of this case were supposed to be uncontested based on the parties' agreement that was drafted by, signed by and filed by IDPH in the Circuit Court. Those Joint Stipulated Facts (R., C107-109) are as follows:

Joint Stipulated Facts (R. C107-109)

1. On July 6, 2012, Helen Sauvegeau (hereinafter "Resident") became a resident at Lakewood Nursing and Rehabilitation Center (hereinafter "Lakewood) and was a private pay resident (meaning, Resident was not receiving government financial aid; Resident had a pension and Social Security) until August 2013, when Resident no longer paid for her nursing stay.

2. On October 28, 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[1].

[1] It should be noted this Stipulated fact does not mean Lakewood agreed to the stay or that the stay was legally proper (which is why there is no citation). Only that a stay was put in place and Lakewood did not appeal the implementation of that stay for purposes of determining a 10 day timeframe for holding a hearing.

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

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, 2013 (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 the Medicaid denial being issued.

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

13. Lakewood did not consent to the language in the Final Order allowing R1 to remain in the facility for 30 days.

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

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 45/3-3-423) 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 ITD 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 facility to allow a the Resident facing discharge to remain at the facility for a specific period of time after issuing the Final Order?

<u>Additional Facts</u>

After the January 15, 2014 request by Lakewood to IDPH for an immediate discharge hearing (Medicaid had been denied), IDPH took no action and did not schedule the hearing. (See record generally for lack of hearing date scheduled.)

On February 10, 2014, IDPH held a pre-hearing but refused to schedule a hearing date. (R. C117 – shows pre-hearing date of 2/10/14, see record generally for lack of hearing date scheduled.)

On February 10, 2014, after IDPH refused to schedule a hearing at the pre-hearing conference, Lakewood filed a Motion to Dismiss. (R. C183- 184; C 173).

From January 15, 2014 to February 10, 2014, there are no requests for extensions of time in holding the hearing made by any party and no reasons articulated by IDPH why

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

they refused to schedule a hearing. (See Record generally, which is devoid any such evidence or Motions).

IDPH ruled on the Motion to Dismiss (denying it) on February 20, 2014. (R. C177). IDPH still did not set this matter for hearing.

On March 13, 2014, IDPH set the matter for hearing to be held on March 24, 2014. (R. C. 168).

From February 20, 2014 to March 13, 2014, there are no requests for extensions of time in holding the hearing made by any party and no reasons articulated by IDPH why they refused to schedule a hearing. (See Record generally, which is devoid any such evidence or Motions).

IDPH articulated no reasons or just cause for not issuing the Final Order on the discharge proceeding until 43 days after the hearing was held. (See Record generally, which is devoid any such evidence.)

Disputed Facts

So that Lakewood does not waive any dispute with some of IDPH's facts (which are really arguments and conclusion, Lakewood wants to set forth those facts which IDPH alleges that Lakewood disputes:

(1) "…federal law governed the reasons for the involuntary discharge." Appellant's Brief, page 4.[2]

[2] This violates the Stipulated Facts; this is a technically a legal conclusion; and Lakewood disagrees and sets forth its position in the argument section below.

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

(2) "…[resident applied for Medicaid] which the parties agreed stayed the discharge proceedings." Appellant's Brief, page 4.[3]

(3) Foot note 2 of the statement of facts, that the Medicaid application was denied for paperwork errors. Appellant's Brief, page 4.[4]

ARGUMENT

This Court is here to decide if IDPH is required to hold the discharge hearing no later than 10 days after a hearing is requested. It is important to note at the outset that no one is saying a resident should not get a hearing – only that IDPH should hold a hearing within 10 days. IDPH is arguing if this is mandatory no one will be protected and no one would get hearings. That's ridiculous. Of course the residents would get a hearing (and whatever protection the hearing offers) as long as it's held within 10 days. **The issue is not residents will never get a hearing; the issue is the hearing the residents do get needs to be held By IDPH in 10 days.**

I. Overview of NHCA & Discharge Process

The Court here is tasked with interpreting the Nursing Home Care Act (hereinafter "NHCA") as it relates to involuntary discharge. A brief understanding of the NHCA and what the discharge process is necessary.

[3] The Stipulation was only a stay was put in place, Lakewood never agreed to said stay nor does Lakewood agree there even such a legal stay permitted. In this case, Lakewood chose not to appeal the stay that was entered in order to focus on the issue of hearing timeliness.

[4] This is not true and violates the agreed Stipulation of Fact. The application was denied because the resident gifted a house to her daughter. The "omission" in the paperwork was failing to tell Medicaid she owned a house that she gifted to her daughter to avoid telling Medicaid she had an asset.

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

To begin, one cannot just hang out a shingle and open a nursing home. Before a nursing home can even apply for a license under the NHCA, it must first get approval from the Health Facilities and Services Review Board. A Certificate of Need ("CON") is approved, which permits a certain number of beds and a certain type of bed (skilled, non-skilled, rehab, vent) to be permitted in a geographic area, based on state need and feasibility. (20 ILCS 3960).

Once a CON has been received, a facility must apply and have at all times a license issued by the Illinois Department of Public Health (IDPH). That license is issued, and the facility is governed by the NHCA. Compliance with the NHCA is mandatory and failure to comply could result in fine, adverse licensure actions, and revocation of the operating license.

In addition, the NHCA gives a resident the right to a private cause of action, which includes not only damages but the recovery of their attorney's fees in said action as well. (210 ILCS 45/3-601 – 603). The recovery of attorney's fees is significant because often times the attorney fees can exceed any damages in a case. This is important to this instant action because it demonstrates a facility's need (as well as legislative intent) that the NHCA will be followed to a letter. A private cause of action is not only available but has been sought in civil suits for the failure to comply with the NHCA as it relates to discharge (cases filed by the same organizations that have filed amicus briefs in this instant action) (i.e. Steenland v Wheaton Care Center, 2017 CH 1282; Will County case filed by Prairie Legal Services acting on behalf of the Plaintiff; Weiss v Lemont Nursing, 2014 CH 19150, filed by LAF (Legal Aid Foundation acting on behalf of Plaintiff); and Jones v Tri-State

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

Nursing, Cook County, 13 CH 4401.) This shows that the failure to comply with the NHCA to the letter regarding discharges can and will be met with NHCA lawsuits.

Upon admission, all residents of nursing homes are required to have a written contract with the facility that sets forth, in part, the daily rates and their agreement to pay. 210 ILCS 45/2-202.

The NHCA permits only four reasons for involuntarily discharging or transferring a resident from a nursing home: (1) medical reasons; (2) for the resident's physical safety; (3) for the physical safety of other residents, the facility staff or facility visitors; or (4) for either late payment or nonpayment for the resident's stay. 210 ILCS 45/3-401.

To initiate a discharge, a facility must use the specific notice form IDPH created (form can be found on IDPH's website) [C186-189] ["The notice required by Section 3-402 shall be on a form prescribed by the Department… 210 ILCS 45/3-403.] A copy of the Notice of Intent to Transfer or Discharge is also sent to IDPH. 210 ILCS 45/3-405. This Notice includes the form the resident needs to submit for a hearing request, as well as a self-addressed stamped envelope for mailing the hearing request in. 210 ILCS 45/3-403(d).

Once the resident receives said Notice, the resident or their representative has 10 days to submit the form to request a hearing. 210 ILCS 45/3-403(c); 210 ILCS 45/3-410.

Once the request for hearing is made, it stays the transfer or discharge of the resident pending the IDPH hearing. 210 ILCS 45/3-404.

Once a hearing request is made, IDPH is to hold the hearing no later than 10 days after the request is received. ["If you request a hearing, it will be held not later than 10 days after your request…" 210 ILCS 45/3-403(c).] [The Department of Public Health …shall

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

hold a hearing at the resident's facility not later than 10 days after a hearing request is filed… 210 ILCS 45/3-411.]

Following the hearing, IDPH has 4 days to issue its opinion. [The Department of Public Health shall … render a decision within 14 days after the filing of the hearing request. 210 ILCS 45/3-411.]

The issue is to be decided in this case is whether the hearing IDPH is required to hold must be held with 10 days pursuant to the statute:

210 ILCS 45/3-411

> **Sec. 3-411. 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.**

Because the facility (a private nursing home) is being required pursuant to statute to accept responsibility for a resident [in all realms: financial, legal, regulatory, and civil) to house, feed, render medical care and supplies, clothe, supervise, bathe, laundry, housekeeping, provide activities, and provide therapies] against their will (the facility wants to discharge a resident who has not paid; is a safety risk; or has no medical need to remain at the facility), the timeliness of IDPH in holding the discharge hearing is of major public importance - with an impact on both public and private rights, as well as the constitutionality of the statute itself should such a mandate of compulsory care, forced responsibility and financial burden be unchecked.

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

II. Time provisions are mandatory

The time provisions for IDPH holding the ITD hearing and issuing their Final Order are mandatory because (1) the statutory provision injuriously affects public or private rights; (2) the statutory provision contains negative language; and (3) the statutory language specifically and unambiguous sets forth the allowable time periods.

1. The statutory provision injuriously affects public and private rights

While time periods for officials to act are generally regarded as discretionary, there are two exceptions to that rule. The time specified for a State official to perform an act is mandatory if (1) public interests or private rights are affected; or (2) the statute contains negative language. Because 210 ILCS 45/3-411 affects both public interests (nursing home costs, availability of nursing home beds) and private rights (contract rights, a "taking" of property in the form of mandating the facility (against their will) provide medical care/food/housing to a person for free; requiring against their will the providing of compulsory services; exposure to medical malpractice and negligence claims against their will), it should be construed as mandatory.

It should be noted that the Appellate Court began this case by reversing the Circuit Court's opinion that the matter was moot and finding a public interest exception to the mootness doctrine. IDPH did not appeal that finding (that the timeliness issue was a matter of public importance). That alone establishes that this statute speaks to public interests and public rights.

In addition, Carrigan v Ill. Liquor Control Comm., 19 Ill.2d 230 (Ill. Sup. Ct. 1960). In said case, the Supreme Court of Illinois set forth the standard:

> Ordinarily a statute which specifies the time for the performance of an official duty will be considered directory only where the rights of

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

> the parties cannot be injuriously affected by failure to act within the time indicated. However, where such statute contains negative words, denying the exercise of the power after time named, or when a disregard of its provisions would injuriously affect public interests or private rights, it is not directory but mandatory. Id. at 233.

In the case of The People of the State of Illinois v. Four Thousand Eight Hundred Fifty Dollars, 352 Ill. Dec. 33 (IL. App. Ct. 4th Dist. 2011), the Appellate Court offered a detailed and well-reasoned explanation:

> In other words, some statutory procedures have the sole purpose of promoting order and efficiency in governmental operations, and disregarding these procedures generally will not injure anyone's rights but merely will make government less orderly and efficient….
>
> Directory procedures are directions that governmental officials ought to follow if they are doing their job properly, but such procedures are not conditions to the exercise of their power. Mandatory procedures by contrast, limit power. Noncompliance with mandatory procedures invalidates the governmental action to which they relate because mandatory procedures are designed to protect people's rights, such as the right to property.
>
> This is not to say that mandatory procedures are indifferent to order and efficiency. Violating someone's rights could be considered a disorderly way to transact governmental business. Orderliness and individual rights are not mutually exclusive values. Mandatory procedures can promote both values. **While one of the values – government efficiency – is inessential to the validity of the governmental action, the law will not tolerate a sacrifice of the other value, the rights of the citizens. Therefore, the power of the governmental official is conditional on compliance with the mandatory procedure.**
>
> …
>
> To determine whether a procedure is mandatory and therefore a limitation on power, we have to ascertain, by a process of inference, whether the purpose of the procedure include the protection of rights. **This question is to be decided by ascertaining whether any advantage would be lost, or right destroyed, or benefit sacrificed, either to the public or to any individual, by holding the provision directory.**
>
> Id. at 41-43. (emphasis added).

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

In applying this test: will any advantage be lost, or right destroyed, or benefit sacrificed, either to the public or to any individual, by holding the provision directory; the answer is yes.

Advantage/ Right/ Benefit	Public/Other residents	Individual/Facility
Cost of Care & Money	If nonpaying residents are permitted to continue staying an indefinite period of time before IDPH has a hearing or rules on discharge, the unpaid costs will have to be shifted to the public & the other paying residents for the facility to remain viable. Because this impacts all nursing homes (as all homes are licensed by IDPH) this increases the costs industry wide across the state. This means all residents pay more (private pay lose actual money); Medicare/Medicaid resident pay more – thereby increasing costs to the taxpayers – all of IL citizens.	Facility will have to shift the costs to the paying residents/public. This is an industry wide and state wide issue. If the cost is not shifted, then the facility has a direct loss of their money/revenue by the state mandating they render services they are not being compensated for. This is nothing short of an impermissible State taking of the facility's business.
Compulsory Care		When the State takes more than 10 days to have a discharge hearing, every day after the 10th is a day the State is mandating a private facility and their staff render medical and nursing care (therapy, nursing care, dietary, labs, medication administration, wound care, toileting, showering, dental care) with not

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

		only no compensation but also with full exposure to malpractice or negligent care claims (even if accidental – i.e. nurse slips and drops the resident). There is no immunity or protection for the care the State is requiring the facility render against their will. This includes not only the facility itself but the individual staff employees being personally named in these lawsuit.
State taking		If the facility is required to provide housing, food, beds, utilities, housekeeping, laundry, activities, nursing care, medication, and therapy to non-paying residents for an indefinite period of time in excess of the statute, that is nothing short of an improper taking by the State. If the time periods were not mandated, there would have been a constitutional challenge to a statute that requires 24 hours compulsory care by a private

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

		entity for an indefinite period of time.
Staffing Requirements	If staff are busy assisting residents who have no medical need for care (i.e. toileting, medication administration, answering call lights), that is detracting or delaying care the other residents should be getting.	The NHCA mandates staffing requirements that are based on the number of residents. Even if a resident is not paying and/or has no medical need, the facility, it is required to count those residents as patients for mandated increased staffing requirements (number of RNs, CNAs, etc.)
Business Loss	If nursing homes lose enough business they will go out of business. A nursing home is not a hotel, each bed in a facility is licensed based on a CON (certificate of need) for the beds to be offered in a geographic area, if they go out of business, all citizens lose out, including current residents that get displaced and residents who may need services. Also, all the citizens who rely on the facility for their jobs (housekeeping, maintenance, CNA, nurses, food servers, receptionist, activity aids, laundry) would lose their livelihoods. Further, in economically challenged neighborhoods, it is common practice for nursing homes real estate (the brick and mortar building) to be purchased using HUD loans (Housing & Urban Development). If a facility	A facility will go out of business if they do not make a profit. It's simple math. Having to provide extensive medical and nursing services for non-paying customers or residents who don't really need the services for an indefinite period of time will result in facility closures.

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

	goes out of business, the taxpayer backed mortgage goes into default.	
Contract Interference		NHCA requires a written contract for all residents that clearly sets forth the rates charged for care. 201 ILCS 45/3-601 – 603. By allowing a resident to stay beyond the statutory hearing time period, the state is interfering with that contract by granting more rights than the written signed contract allows. The state is also precluding the facility from mitigating its damages by discharging expeditiously a non-paying resident.
Loss of open beds	One basis for discharge is a resident no longer medically qualifies (i.e. does not need nursing home care). A nursing home is not a hotel, each bed in a facility is licensed based on a CON (certificate of need) for the beds to be offered in a geographic area, if a person is occupying a bed that has no need to be there, they are taking beds away from those residents who do need the beds. While in the City of Chicago that may not seem to be a problem, in other areas of the state there are often only 1 (if any) nursing home.	The loss of open beds to residents who have a medical need impact the facility because their specialized services contracted personnel (wound care, therapies: speech, physical therapy, occupational therapy) are deprived of an ability to provide services to eligible and paying customers. This impacts the facility's contracting power

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

		with these service providers.
Chill admissions of Medicare/Medicaid pending residents	See explanation below	See explanation below

In addition to the reasons set forth above, the public and private rights affected by the statutory time period include nursing homes chilling admissions of Medicare or Medicaid pending patients (patients who do not yet have their approval but based on their known income/assets would qualify). This would mean residents could not get the skilled nursing home care This applies to a large population of residents: residents transitioning into a long term care setting for the first time: meaning - transitioning from an acute care setting such a hospital due to (heart attack, fall with fracture); families who after an incident/accident realize they cannot keep their parent safe (fall, wandering, elopement due to mental decline); and homeless shelters (generally for the MI – mentally ill patients). These residents (because they are making the transition for the first time into long term care) often come from an apartment or home of some kind (theirs or staying with their children). They are not yet on Medicare or Medicaid but have applied for such financial assistance and most likely based on the known criteria and their assets/income would qualify. These types of residents are admitted by nursing home and are informally called "Medicare/Medicaid pending" patients. A nursing home is willing to accept these residents knowing there is a chance the financial aid will not go through. That is calculated risk based on knowing that the maximum amount of loss the facility will suffer is the amount of time a discharge proceeding takes. If the financial risk is an unknown amount of time until IDPH decides to hold the hearing and issue the final order, it is just common sense that a business

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

cannot afford to take that risk (nor would their lenders allow it[5].) To chill admissions because a facility would have no way to gauge their financial risk (which the statute limits to 34 days total), would actually harm the very population the NHC Act was designed to protect.

Because 210 ILCS 45/3-411 affects public interests and private rights, it falls solidly within the exception to discretionary agency action, and the timelines are mandatory. The statute should be interpreted to require IDPH to hold the hearings no later than 10 days after a hearing request is filed.

2. **Negative Language**

Although the issue can be resolved with the public and private right exception set forth above, 210 ILCS 45/3-411 also meets the second exception to the statute being deemed discretionary: negative language regarding the time period for holding an ITD hearing.

210 ILCS 45/3-411 clearly states that: IDPH "shall hold a hearing at the resident's facility **not later than** 10 days after a hearing request is received." The argument here is self-evident "not later than" is negative language; therefore, said language is a mandatory

[5] If a complete picture is going to be painted, it needs to said that in Illinois, it is well known the State of Illinois is behind in paying its bills, this includes the payments for Medicare and Medicaid recipients. Because it is the norm for the State to be anywhere from 90 – 180 days behind in payments, nursing homes have lines of credit with banks so they can afford to pay the expenses (payroll, linens, food, utilities) while awaiting payment from the State. These banks audit and assess risk of incoming receivables (sometimes monthly) as part of the line of credit terms. It matters how much "uncollectable debt" a facility has and how for how long they have it.

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

directive and IDPH is required to hold ITD hearings within 10 days of receiving the resident's hearing request.

IDPH keeps citing to Moon Lake but ignores Frances House v IDPH (a case decided years after Moon Lake). The clear language of the statute is IDPH "shall hold a hearing at the resident's facility **not later than** 10 days after a hearing request is received." The word "not" was deemed negative language by this Appellate Court in Frances House (thereby rendering the statutory time period mandatory (" …not to exceed 90 days…). Frances House v IDPH, 269 Ill.App.3d 426, 430, 645 N.E.2d 1009, 1012 (3rd Dist. 1995). Based on the forgoing, because 210 ILCS 45/3-411 contains negative language, it falls within an exception to discretionary agency action, and the timelines should be interpreted as mandatory.

III. LEGISLATIVE INTENT

IDPH alleges the Appellate Court failed to conduct a meaningful inquiry in determining legislative intent. That could not be further from the truth. During oral arguments the Appellate Court asked numerous questions of IDPH, questions they were unable to satisfactorily respond to there or in their Brief to this Court. Those inquiries remain unanswered and form the basis of why an examination of legislative intent evidences that the clear, unambiguous intent of the provision at issue was to mandate that IDPH hold the resident's hearing in 10 days.

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

1. Legal Standard

The Illinois Supreme Court has laid down well established guidelines for determining legislative intent:

> The primary objective in construing a statute is to ascertain and give effect to the intent of the legislature. All other rules of statutory construction are subordinate to this cardinal principle.
>
> In determining legislative intent, the first step is to examine the language of the statute, which is the most reliable indicator of the legislature's objectives in enacting a particular law. The statutory language must be afforded its plain, ordinary, and popularly understood meaning.
>
> Where the language is clear and unambiguous, the statute must be given effect as written without resort to further aids of statutory construction. In construing a statute, we presume that the legislature did not intend absurdity, inconvenience or injustice.
> Alvarez v Pappas, 229 Il. 2d 217, 229 (Il. Supreme Ct. 2008).
>
> …we are bound by longstanding principals of statutory construction. We must give effect to legislative intent, which begins with the plain language of the statute. Where clear and unambiguous, statutory language must be enforced as enacted, and a court may not depart from its plain language by reading into it exceptions, limitations, or conditions not expressed by the legislature. Moreover, where language is express and plain, a court must not search for subtle intentions of the legislature.
> People of the State of Illinois v $30,700.00, 199 Ill.2d 142, 150-151, (Ill. Sup. Ct. 2002).

In addition, as it relates to Administrative Review, "The purpose of judicial review of an administrative agency's decision is to keep the agency within its statutory grant of authority and thus guard the rights of the parties which are guaranteed by the constitution and statutes." Ragano v Civil Service Comm., 35, Ill. Dec. 960, 963; 80 Ill. App.3d 523, 527; 400 N.E.2d 97, 101 (1st Dist. 1980).

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

2. Plain and Unambiguous language

It cannot be stressed enough that this language does not need tortuous examination to interpret. It is clear and unambiguous: "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.

The language of the NHC Act is unambiguous. It sets forth very specific time periods: "10 days" and "14 days." There is nothing unclear or ambiguous about "10" or "14."

This statute does not contain vague language (such as "as soon as possible" or "expedited" or "within a reasonable time"). This statute also does not contain the absence of a numeric time period – it specifically states 10 days and 14 days.

This proves the legislative intent was to have IDPH actually do their jobs and hold the hearings no later than 10 days so that the resident's rights could be determined in a timely fashion. That is a simple interpretation that makes the most sense, protects everyone rights, and still gives the resident an opportunity for a hearing.

3. Legislature established a mandatory 34-day discharge cycle

Legislative's specific intent that the 10 day hearing and 14 day ruling language was mandatory is supported by the plain and unambiguous language of the other discharge provisions in the NHCA, that calculate to form a 34 day discharge period for determination and discharge. "[T]he Courts also will avoid a construction of a statute which would render any portion of it meaningless or void. [cite] The courts presume that the General Assembly, in passing legislation, did not intend absurdity, inconvenience, or injustice." Hernon v E.W. Corrigan Const. Co., 149 Ill. 2d 561, 562-563 (Ill. Sup. Ct. 1992).

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

Section 3-413 of the NHCA, states, in part, "that a resident shall not be required to leave the facility before **the 34th day** following receipt of the [ITD] notice…" 210 ILCS 45/3-413 (emphasis added.) This is significant because 34 days is a very specific, yet uncommon number (not like 30 days or 60 days). That figure was specifically calculated in the discharge process (evidencing the intent of the legislature to create a 34 day discharge cycle):

Number of days	Action	Statute
0	Discharge Notice if given to the resident & IDPH.	
10	Resident has 10 days to request a hearing	210 ILCS 45/3-410
10	IDPH has 10 days to hold a hearing	210 ILCS 45/3-411
4	IDPH has 4 days to issue Final Order (14 days from date of request from hearing – giving max time to hearing of 10, that leaves 4)	210 ILCS 45/3-411
10	Resident has 10 days to leave the facility	210 ILCS 45/3-413
34 days	**TOTAL**	

If the time periods in section 3-411 were not given their ordinary and plain meaning (10 and 14 days), then it would render the specific 34-day time calculation in section 3-413 meaningless. When read as a whole, the statute clearly indicates a specific, continuous intent of the legislature that the time periods prescribed be adhered to.

The legislature's intent, in creating the 34 day ITD cycle, did consider the resident and balanced their protection against requiring the nursing homes to retain individuals at the nursing home's expense and against the nursing home's will (and in violation of the nursing home's contract in cases involving non-payment). In so doing, the legislature found

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

a 34-day maximum cycle for the facility to have to continue provide care free of charge after they issue an ITD to be the correct balance.

To allow IDPH to hold the hearings, issue orders, and determine a random number of days post-hearing a resident could remain, would obfuscate the precise balancing the legislature did in arriving at a palatable solution for both sides [i.e. resident gets a hearing of the propriety of the discharge at the facility's expense; the facility takes a controlled loss of income (cost of doing business), 34 days maximum].

If IDPH is allowed unfettered discretion in setting hearings, issuing orders, and allowing to resident to stay post-hearing, it would render the statute unconstitutional, as it would mandate a private company at its expense to house, feed, and provide activities and 24 hour nursing and personal care services to an individual for an unspecified period of time [one would have no idea when IDPH would hold its hearing or issue its Order].

The only interpretation of the statute that makes complete sense (plain language used, unambiguous, harmonious with all discharge provisions, and providing a hearing right without unconstitutionally abridging the rights of the facility) is that the legislature intended a mandatory 34-day discharge cycle, thereby making IDPH's actions in discharge mandatory under 210 ILCS 45/3-411.

IDPH spends considerable time focusing on the People v Robinson case, but that case was ruled inapplicable by People v Four Thousand Eight Hundred Fifty Dollars ($4,850), 352 Ill. Dec. 33 (IL. App. Ct. 4th Dist. 2011), for the same reasons that would apply to the current case. In determining if the cumulative 97-day cycle for the state to give notice was mandatory or discretionary, the Court ruled that not only that the time period

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

was mandatory, but the 97 day cycle was the maximum length of time, consistent with reasonableness. The Court said:

> Looking at the differences from another angle, the post conviction petitioner in Robinson and the owner of the seized property are not truly comparable. It was only after a hearing that the post conviction petitioner in Robinson incurred a penalty, whereas the owner of seized property has incurred a penalty, i.e. dispossession of property, before being afforded the opportunity for a hearing. The dispossession is itself a financial harm because the use of property had value; being deprived of it, even temporarily, causes hardship. Consequently, the owner of the property is entitled to expect reasonably prompt post deprivation procedures; the opportunity for a hearing at a meaningful time.
>
> ….
>
> [T]he legislative judgment of what is the *maximum* length of time, consistent with reasonableness, that the State may allow to pass between the seizure and the giving of a notice of pending forfeiture to the property owner. By corollary, in the legislative judgment, exceeding those 97 days is unreasonable and injurious. Id. at 42-43.

Similar to the Court above, this case involves depriving the facility of its property (bed) and loss of services and goods associated with that loss. The legislature has defined a cycle for the hearing that reasonably balances the resident getting a hearing and the facility being deprived of its property, and that cycle is a 34 days cycle (that includes a 10 day hearing window). That cycle is the maximum allowable, and the 10 day hearing is mandatory – the maximum amount of time the facility should be deprived of its property and the maximum amount of time IDPH should have to hold the hearing.

It would be absurd to interpret the statute as meaning the legislature intended for the facility to have an to house, feed, and care for (against their will) a resident for an indefinite period of time until IDPH feels like having a hearing. (In our case there was no request for or reason for a delay (resident was not ill, resident had an attorney, facility demanded an immediate hearing within 10 days), IDPH just decided they were not going

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

to schedule the hearing until 68 days after the request – no excuse, no reasoning, just when they felt like it – and issued the opinion 43 days after that – so a total of 112 days – almost 4 months.

The simple question that IDPH has yet to answer (despite having 2 trial court briefs and arguments, 2 appellate court briefs and arguments, and a Supreme Court brief to do so) is if the time period is not infinity for IDPH to hold a hearing what is the time period does IDPH want this court to interpret the statute as allowing?

The only answer that has ever been given is "go ask the legislature." That is an absurd interpretation this Court should not consider.

The less absurd interpretation is the legislature did establish an upper limit: the 34 day discharge cycle (set forth above). And this upper limit can only be applicable if the hearing is required to be held in 10 days and the order issued in 14 days.

In addition, if a statute were passed that required a private business to house, feed, and render 24 care to a person against their will for an indefinite period of time, the legislature knew that statute would be immediately challenged via public comments and a lawsuit for the taking and forced labor issues raised. Legislative intent was to pass a statute that would meet constitutional muster – a limited expense in exchange for a limited protection. But to pass an act for a limited protection and ask it to be borne in the form of forced labor and expense for an indefinite time to only a targeted portion of the population (nursing home owners) – and worst – the expense is for no just cause (IDPH had no excuse for deciding they would take whatever time they wanted to hold the hearing and issue an opinion) seems an absurd interpretation. It is much more reasonable that the legislature's intent was any shifting of forced labor and expense that had to be borne by the nursing

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

home facilities waiting for IDPH to act would be limited to a maximum of 10 days for the hearing and 4 days for the opinion.

4. Paying resident's rights

If the statute was interpreted as discretionary, in instances of non-payment, this court would be weighing the rights of the non-paying customer higher than the paying customer. **If the legislative intent was to protect all nursing home residents, what about the paying resident's right to not have the cost of non-paying residents shifted to them if it takes IDPH longer than 10 days to hold a hearing?** These are not "speculative" issues – this Court does not check common sense at the door when they put on their judicial robes. Sophisticated businesses do not turn away paying customers for no reason. When facilities provide care without remuneration, they lose actual money (the food the resident ate cost money, the rental mattress she is sleeping on cost money, the water used to flush the toilet costs money). Common sense says these costs have to be borne by someone. If the facility passes these cost on to the paying residents, then the paying resident's rights are not being protected. If the facility absorbs these costs, eventually they will be out of business – this isn't speculation its common sense math. If a facility that paying residents live at (that has been determined via their CON to be a need for in the area) goes out of business, how does that protect residents? Isn't the opposite true – **isn't passing the costs on to other residents and going out of business actually hurting the very population IDPH is arguing this statute provision is supposed to protect?**

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

5. No other remedy

The legislature's intent in creating the NHCA 10 day hearing period to be mandatory took into consideration that under the statute (or anywhere else) there is not a remedy for when IDPH delays having a hearing. There is a direct cost and burden to the facility but no remedy for them. It is possible that the legislature considered that there no remedy or legal vehicle available to the facility (who is bearing the cost and burden of forced labor against their will in providing nursing services for a non-paying resident they want to discharge) when IDPH just decides not hold the hearing in 10 days (which is exactly what happened in the instant case.)

There is no provision under the statute for a facility to get the hearing scheduled timely (in the instant case the facility requested the hearing be set within 10 days but IDPH simply said no); there is no right of mandamus available to the facility to get the Court to compel IDPH to hold the hearing timely. No separate proceedings or mandamus is allowable. Guerrero v Gardner, 337 Ill. Dec 406, 408; 397 Ill. App.3d 793,795; 922 N.E.2d 529, 531 (2nd Dist. 2010).

In addition to knowing the lack of ability for the facility to get the hearing held timely, the legislature also knew the NHCA is IDPH's statute, as is the corresponding Administrative Code. If IDPH felt the 10 day hearing period (or any part of the 34 day cycle) was not mandatory and these time periods were detrimental to the residents of IDPH, there is an ability for IDPH to fix this – they simply draft a proposed amendment to their statute or Admin Code and get the mandatory timeline taken out – it their statute.

Legislative intent in making the time periods mandatory took into account the lack of remedy for the facility and the easy ability for IDPH to change the statute of

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

<u>they were unable to meet the deadlines</u>. It would be absurd to interpret the legislature's intent as knowing these proceedings will take longer than 10 days to hold, include that language anyway (in a negative fashion - "not less than" - as part of a detailed 34 day cycle, know there is no remedy for the facility to move the hearing forward even though they are being subject to actual expense and forced labor, and intend for IDPH to just disregard the time period. That is just absurd.

Further, the NHCA has no provision for IDPH to order the resident to make payments of any kind in the interim. In this case (as is often the case), the resident had income – in addition to the house she gifted to her daughter, she had cash coming in every month – she was receiving a pension check and social security (most all geriatric residents will receive some amount of Social Security). The resident collected actual cash money every month for the almost 4 months it took to get a hearing and ruling on discharge and refused to tender a penny of it to the facility. There is no provision under the NHCA to allow an ALJ to order a resident to tender a portion of their incoming receivables pending the hearing outcome. Rather than create a provision for interim known funds to be turned over to the facility, the legislature intended the process to take 10 days for the hearing and 4 days for the order.

The most reasonable interpretation is the legislature intended the hearings to be held in 10 days, had no need to include a remedy or vehicle for the facility to expedite the hearing or request costs or payments due to IDPH's delay because the legislature intended for the hearing to be held no later than 10 days after the hearing request was filed.

While Lakewood agrees that the NHCA allows IDPH to license the facility, it does not give IDPH the right to compel free services to residents of their choosing. Just like

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

DMV (Jessie White) may issue a driver's license, that does not give him the right to compel a license holder have to drive a CTA bus for no money for 4 months. It's really no different.

6. Resident rights would be better met by a mandatory interpretation

IDPH argues the resident's rights are the most important consideration in interpreting the NHCA. Exactly what "rights" are they talking about?

A resident has no protectable legal "interest" in staying at a facility without paying, being a safety risk to others, or not getting their medical needs met (which are the only three criteria under the statute for an involuntary discharge), 210 ILCS 45/3-401.

In the facts specific to this case, the resident has no legal protectable interest in deliberately deciding one day that she no longer wants to pay for her nursing home stay/care (in violation of her contractual agreement with the facility); transferring her assets, and keeping her incoming cash (pension and Social Security) for her own use, while looking to the facility to continue to render skilled nursing care, therapy, charting, daily living activities (shower, toileting, grooming), food, laundry, housekeeping, activities, cable, telephone, and so on.

In fact, the only "interest" under this particular statutory section a resident could have is the hearing itself and a determination by IDPH. The loss of this "right" is what IDPH keeps focusing on. **If the hearing itself is such an important right (a right that was the specific intent and primary concern of the legislature) wouldn't this right be better met with a mandatory determination**? The legislative intent being to have to have the resident's rights determined in a timely fashion. This means that the resident's 'interests" would be better met by an expeditious hearing and determination (ergo, a

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

mandatory interpretation). To have a resident delay in receiving a determination that their medical needs are not being met or that they are a safety risk to others (which usually arises in cases in mental illness with residents) is actually detrimental to them and certainly not protective of them (delaying necessary medical placement and/or creating an opportunity for them to involuntarily impose serious physical harm to others and/or allowing other unsafe residents to impose harm on them).

It should also be noted, there is no constitutionally protected right for a resident to stay at any nursing home. On the other hand, there is a constitutional right to be from mandatory labor, to be free from the state taking profits and beds/business away from a private entity. It seems most likely the legislature considered those competing rights and intended to give the resident a hearing but only balanced by the fact that the hearing had to be held by IDPH in 10 days.

7. Phantom fears

Rather than give this Court an interpretation that addresses how long the hearing should take, IDPH claims that legislative intent was the primary concern about speculative reasons that residents might not get their hearing for a laundry list of reasons (not enough time, obtaining counsel, etc.), so therefore, the statute should be read as directory. But it begs the question asked by the Appellate Court that has never been answered by IDPH: **If these concerns existed and it was the intent of the legislature to avoid them, then why did they specify a 10 day time period in the statute – or any time period at all (much less use negative language?** After all, it was so easy for them to use any other words (as soon as possible, expeditiously) – or no words at all (no time period specified at all).

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

IDPH has offered no explanation for why this 34 day specific cycle was implemented, why the words "no later than" were used if there was an intent to have no time period; or why any number of days was used at all? Under their theory, these were just some kind of mysterious actions taken by the legislature.

On the other hand, Lakewood has offered an explanation of why there is a time period, the balancing and specific thought that went into it, the marriage of the entire discharge proceeding statute, and an explanation that best uses the plain and unambiguously expressed language. This is clearly best evidences the legislative intent of the NHCA discharge statute.

It should also be pointed out that none of these alleged phantom fears occurred here: The resident obtained an attorney within 2 days of getting the Notice of Discharge. (Stipulated Fact #3, R., C107, Appendix A31). The hearing itself took all of a few minutes to conduct; and the transcript totaled only 36 pages. (R., C120-159).

The simple fact of the matter is IDPH is choosing to just not hold the hearing in 10 days because they don't think they have to do so. There is nothing in the record about an equitable continuance being granted or even asked for; that is because that is not what happened here and that is not what is happening in these discharge cases. What is happening is IDPH is saying (with no reason): "Facility – I will give the resident their hearing when feel I like giving it to them." The basis for this attitude and why it is being abused is because in kindred spirit for their sister organizations the Dept. on Aging and the Ombudsmen, IDPH is delaying the discharge proceedings (with no good cause – they are just not even scheduling them) to allow the resident to stay for free on the facility's dime rather than on an agency dime. (This is not speculation – this is EXACTLY what happened

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

here.) It also solves the problem of where to put the residents who refuse to sell their homes or give the nursing home their money but still want nursing home services. It is a legal tactic that is being abused: delay for no reason a hearing and most likely the resident will eventually die and it will be moot (good for both the ALJ's docket and conscience).

Is it in the best interest for the resident to get 24 hour free nursing care, supervision, food, and housing, sure it is, but the legislature did not pass a universal free healthcare program in the NHCA – we don't have free health care – it is not free for the facility to provide this care – the facility does not get grants or other financial aid or incentives to run their business. And if free healthcare was the intent, the legislature cannot impose the cost if that free healthcare onto nursing home operators only by back-dooring in a legislative provision that says once you accept a resident and sign a contract for services/payment you still have to the keep the resident until we feel like giving you a hearing (with no reasons for why we will delay; and no right of legal ability to compel us to even ever have the hearing before the resident dies of old age after you have footed the bills for months/years.) That is just ridiculous and absurd – and certainly could not have been the legislative intent of the discharge proceedings.

It needs to be made clear that these ITD hearings are less than 30 minute hearings for payment and 30 minutes to an hour for safety – these are not week-long trials. There are only three basis for discharging a resident: medical reasons (they do not medically qualify); payment; or safety risk. 210 ILCS 45/3-401. All three are simple, non-complex ITD hearings. The medical reason is simple: do they meet the medical definition of needing skilled care?; did the doctor's evaluation concur?. The payment ITDs are also simple: do they have a balance owed?; what is the balance?; has it been paid? The safety ITD is equally

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

simple: what is the safety risk?; was it documented in the chart?; did the doctor approve discharge?

But regardless of how simple these hearings are, the bottom line is, **the legal question the Court needs to answer is not would having more time to do the hearings be better, but rather does the disregard of the statutory provision injuriously effect public interests or private rights**? If the answer is yes, the statutory timelines are mandatory. This Court should not substitute its opinion or IDPH's opinion on long the process should take for the plain language that is written. **This Court is not tasked with deciding what process is better (10 days or infinite time to have a hearing) – this Court is deciding is the process that is set forth in the statute injuriously effecting public interests or private rights**?

III. MANDATORY TIMELINES OF ISSUING THE FINAL ORDER

Technically, the issue of whether IDPH must issue their Final Order on the discharge hearing is also being reviewed by this Court. The Appellate Court passed on ruling on this issue once they determined IDPH lost jurisdiction. But this de novo review would look at all the issues appealed.

If this Court finds that the 10 day hearing provision is mandatory, it should also find the remainder of the statutory sentence mandatory – that IDPH must issue the Final Order within 14 days after the hearing request is received.

Following the rationale for making the 10 day hearing request mandatory, the time period for issuing the order (14 days after the notice of hearing is received) would be mandatory, as a hearing is useless if no order is issued. It was render meaningless the

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

mandatory urgency to hold the hearing within 10 days if IDPH can take more than 12 times that period to issue its ruling (in the instant case the request for hearing was made after the stay on 1/15/14 (Stipulated Fact #6, R., C108), but the Final Order was not issued until 5/7/14 (Stipulated Fact #9, R., C108).

"[t]he Courts also will avoid a construction of a statute which would render any portion of it meaningless or void. [cite] The courts presume that the General Assembly, in passing legislation, did not intend absurdity, inconvenience, or injustice." Hernon v E.W. Corrigan Const. Co., 149 Ill. 2d 561, 562-563 (Ill. Sup. Ct. 1992).

Therefore, under the negative language exception, the time periods for holding an ITD hearing and issuing a final order should be interpreted as mandatory.

IV. MEDICAID REGULATIONS DO NOT APPLY

The red herring "issue" of Medicaid regulations somehow controlling this case keep cropping up. This is occurring because IDPH cannot win under the plain language of the NHCA statute at issue, so they are hoping to get this Court to focus on another statute. Despite entering into a stipulation that AG drafted, signed, and filed with the Court regarding the exact issue and statute at issue (state), and despite outright stating to the Appellate Court (when asked): "I am not arguing here the Nursing Home Care Act doesn't apply."; the AG files a brief stating the exact opposite ("Here, federal law applied to the proposed discharge….").

The AG begins by claiming, "Moreover, the Act coordinates with and implements federal law, when the latter applies." (note there is no citation to where the NHCA actually does this) That is simply not true. **There is no provision in the Nursing Home Care Act that adopts and incorporates by reference Title XIX of the Social Security Act, 42**

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

USC sec 1396r (hereinafter "CFR"). While some of the provisions of the CFR and the NHCA may mirror one another or reference one another, this does not create some fictional marriage of the statutes so that they are to be read together as part of one cohesive nursing home act. **Nor can the CFR add language to the NHCA that is not there.** That is just plain ridiculous. Each statute is governed by different entities for completely different purposes; the federal statute (CFR) is not even mandatory – it's a voluntary insurance reimbursement program. But even if a facility chooses to participate, it still does not create a blending of the statutes – each statute stands independent of the other.

The CFR (Federal Medicaid Code) is a voluntary reimbursement program (aka insurance program). It does not create standards for providing nursing care – it only creates standards and rules for what will be permissible for reimbursement by the federal government. The CFR does not license or control nursing homes in the State of Illinois, they only reimburse them (or refuse to reimburse them if the CFR is not followed). The idea of Medicaid being a simple reimbursement program is even codified in the NHCA Admin Code: in discussing when a monitor can be placed by the state of Illinois in a facility, the Code states: that a monitor can be placed when: "The Department [IDPH] receives notification that the facility is terminated or will not be renewed for participation **in the federal reimbursement program** under either Title XVIII (Medicare) or Title XIX (Medicaid) of the Social Security Act. (Section 3-501 of the Act) ." 77 Il. Admin Code 300.270. (emphasis added). The NHCA calls Medicaid a "**federal reimbursement program**" because that is what it is – no more and no less.

In addition, just like not all residents of a facility will be Medicaid recipients, not all beds in a state licensed facility will be eligible for participation for Medicaid

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

reimbursement program. The state of Illinois issues a nursing home license for a specific total number of beds (example 220 beds). Of those 220 beds, only a certain number of beds (50 for example) are specifically certified by Medicaid to be eligible for reimbursement. All 220 beds follow the NHCA (they are all state licensed), but only 50 participate in the Medicaid reimbursement program. Another way of saying it: licensure (Nursing Home Care Act) has nothing to do with reimbursement (42 CFR).

A better understanding of the Medicare (CFR) versus state Nursing Home Care Act clearly demonstrates these two very different statutes and why federal law does not apply:

Responsible Agency	Illinois Dept. of Public Health	Dept. of Health & Human Services via contract with the federal government (CMS – Centers for Medicare/Medicaid Services)
Statute	IDPH (Nursing Home Care Act)	Title XIX of the Social Security Act, 42 USC sec 1396r ("CFR" – Code of Federal Regulations)
Law involved	Illinois State law	Federal law
Participation	Mandatory	Voluntary
Type of program	occupational license	reimbursement insurance program
what it governs	Standards for operating a nursing home in the state of Illinois	ability to get money for medical & nursing services rendered
Beds in the facility it covers	100% - all beds	A reduced percentage - Only the number of beds Medicaid certifies to be allowed to be used for reimbursement in their program
Private cause of action available to	Yes	No (Not only does the CFR lack such

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

a resident against the facility for a failure to comply with law/program		language, federal case law also states no private cause of action under Medicaid – <u>Nichols v St. Luke Center of Hyde Park</u>, 800 F. Supp. 1564 (U.S. Dist. Ct. S.D. Ohio 1992).
Pre-emption of Federal law	No	No – (1) no pre-emption language; (2) governs two different things: one is state occupational licensure (IDPH) and the other is reimbursement for services (federal)
Failure to follow statute	Violations of the NHCA issued by IDPH	Deficiencies of CFR issued by CMS
Monetary penalties	Fine issued by IDPH	CMP (civil money penalty) issued by CMS
	A facility can receive both a fine from IDPH for a violation and a CMP for a deficiency from CMS for the same event/issue – each agency issues its own separate	A facility can receive both a fine from IDPH for a violation and a CMP for a deficiency from CMS for the same event/issue – each agency issues its own separate
Hearing if dispute	Prosecuted by IDPH attorneys; Hearings presided over by IDPH ALJs (state of Illinois employees)	Prosecuted by CMS attorneys; Hearings presided over by CMS ALJs (Federal government employees)
Burden of Proof	IDPH must prove by a preponderance of the evidence the facility violated the NHCA	CMS must make a prima facia showing the facility was out of compliance with the program code (42 CFR); burden then shifts to the

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

		facility to prove by a preponderance of the evidence they were in compliance with the program
	State must prove all violations if multiple violations alleged (i.e. weeds are too high in front grass and resident did not get CPR)	CMS must show only that facility was out of compliance on any one item (i.e. if they establish the grass was too high there is no hearing or evidence needed for the lack of CPR to a resident) because the facility is either in or out compliance with the program standards
Why burden/due process difference	State Constitutionally protected occupational license at issue	Voluntary monetary reimbursement program
Appeals of Admin hearings	Illinois State Court system; Circuit Court then up the State Court system	DAB (Departmental Appeals Board) – federal board; then via Federal Court system

The issue in the instant case is not whether the facility will be reimbursed by Medicare for Ms. Sauvageau's stay because of failing to follow CFR requirements for Medicaid beds, (**Ms. Sauvageau was not even on Medicaid; she was not a Medicaid recipient and was not in a Medicaid bed**) - the issue in our case is does the Nursing Home Act require IDPH to hold their hearings and issue their rulings within 10 and 14 days.

The above comparison makes clear the Medicaid reimbursement regulations are not the same as the NHCA, and are not applicable. If the legislature wanted the Medicaid CFR to control, it could have said so (or at a minimum adopted those regulations and/or

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

exact wording in the NHCA), but they do not. Makes their intent pretty clear, the Illinois legislature drafted the legislation for the NHCA that they wanted to govern nursing homes in their state.

The AG tries to cloud the issue here by claiming Lakewood wanted/requested a federal proceeding because the "Federal Proceeding" box was checked on the Notice of Discharge. C186. This is just outright disingenuous. A nursing home is required under the Nursing Home Care Act to use the specific form IDPH publishes [Sec. 3-403. The notice required by Section 3-402 shall be on a form prescribed by the Department …] The facility has no choice but to use that exact form and that form only allows two choices – the nursing home has either: (1) private pay and Medicare/Medicare beds or (2) 100% all private pay beds only. It is IDPH who incorrectly (and with no legal basis under the NHCA or Admin Code for wording it so), who chose to create fake "Federal" and "State" proceeding categories based on bed types. Not only is the form a sham, there is no authority under the NHCA for IDPH to even hold "Federal proceedings" – whatever they are. Lakewood cannot control what wording IDPH uses on its forms or IDPH sua sponte "creating" different types of hearings. IDPH can glue feathers on a pig and call it a bird all it wants but it still won't fly.

What is known is Lakewood is licensed by the NHCA; the NHCA allows the resident a right to hearing; the NHCA allows the resident the option to civilly sue Lakewood if Lakewood does not comply with the NHCA; and IDPH only has jurisdiction over the NHCA. Regardless of what fake "classification" IDPH gives the hearing on their proscribed form, it can only legally be a state hearing under the NHCA.

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

Despite the above, IDPH is still requesting this Court apply federal Medicare law to a resident who was not receiving Medicare and who was discharged from a non-Medicare bed. It simply defies logic, belief, and common sense, much less the law.

Further, there are multiple assertions made that applying for Medicaid or Medicare legally stays a proceeding. This is not accurate. Despite acting as if it so, the NHCA does not actually stay a discharge hearing pending Medicare or Medicaid approval. That said, the issue of whether or not a stay is mandated is not an issue before this Court to decide. The bottom line here is that the issue present today (does IDPH have to hold a discharge hearing within 10 days and issue their ruling within 14 days under the NHCA) is governed by Illinois law, not Medicaid reimbursement program language.

CONCLUSION

Therefore, Lakewood respectably requests This Honorable Supreme Court find that the timelines for IDPH to hold the hearings and issue a Final Order be mandatory, and any other relief this Court deems just and proper. Lakewood asks this Court affirm the Appellate Court's opinion, and any other relief this Court deems just and proper.

Respectfully submitted,

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SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

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SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM

CERTIFICATE OF COMPLIANCE

I 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(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 41 pages.

Holly Turner

SUBMITTED - 5475070 - Angela Broderick - 6/26/2019 11:22 AM