

April 24, 2020

Sent via Electronic Mail Attachment

Patrick Allen
Director, Oregon Health Authority
Patrick.Allen@dhsosha.state.or.us

Lilia Teninty
Director, Office of Developmental Disability Services
LILIA.TENINTY@dhsosha.state.or.us

Mike McCormick
Interim Director, Aging and People with Disabilities
Mike.R.MCCORMICK@dhsosha.state.or.us

RE: Urgent Guidance Needed to Protect Residents From Forced Facility Move Outs

Dear Directors Allen, Teninty, and McCormick:

We, the undersigned, urgently request that your offices together issue clear and consistent guidance regarding resident rights against forcible move outs during this pandemic. We have verified multiple accounts of facilities including adult foster homes, group homes, assisted living, and nursing homes following industry guidance and threatening to force out residents with disabilities in violation of state and federal law. *See* enclosure from the American Health Care Association and National Center for Assisted Living (“industry guidance”).

The Need for Uniform Guidance From ODDS, OHA, and APD

Before we provide our recommendations, we wanted to note that we are asking for this uniform guidance from each of your agencies because of the lack of consistency across each agency and related confusion from the disability community. For example, ODDS should be recognized as having produced clear and effective communication regarding move-out guidance to providers preventing or mitigating move-outs happening in the field. We also learned, just today, that OHA is planning on issuing similar guidance on Monday with the goals of maintaining placements, reviewing notices in advance, ensuring collaboration, providing accommodations, mitigating discharge, and ensuring transition planning is in place if move outs do occur.

We have not seen any APD official guidance regarding move-out notice or communication that has been distributed to providers and counties. To mitigate risks to people with disabilities who are vulnerable to eviction or coercive move out practices during this pandemic, we ask for uniform guidance that addresses the following four points and our recommendations below. We also ask that this information be communicated with providers as soon as practicable.

First, the providers of these facilities and their residents need your leadership before more vulnerable adults are forcibly evicted in violation of the Governor's Order 20-11. *See* enclosure. Governor Brown recognized in this Executive Order that, "This is both a moral and public health imperative. Keeping people in their homes is the right thing for Oregon families, and preventing the further spread of COVID-19." Points 5-7 in the industry guidance read like an instruction sheet on how to evict a person who is unwilling or unable to follow an isolation order. Forcing people with disabilities out of facilities will not only contribute to the public health risk recognized by the Governor but also discriminates against people with disabilities.

Second, the industry guidance is completely silent regarding the obligation of providers to accommodate residents with disabilities by modifying any existing policy or guidance regarding COVID-19 protocols. These modifications may include providing personal protective equipment (PPE) to staff and residents whose disabilities compel them to walk outside the facility or fail to adhere to the six-foot distance from another person. Another example of a reasonable modification is virtual visitation with family members who may help mitigate agitating behaviors. As you likely know, the Americans with Disabilities Act (ADA),¹ Section 504 of the Rehabilitation Act, Section 1557 of the Patient Protection and Affordable Care Act, and their implementing regulations ("Acts") apply to essentially every facility in the State. These Acts prohibit discrimination on the basis of disability and require reasonable accommodations to ensure people with disabilities receive needed modifications to remain in their own homes. There are no exceptions in federal law that suspend these requirements and authorize discrimination during a public health emergency.² The federal Office for Civil Rights within the U.S. Department of Health and Human Services (OCR) issued a bulletin with guidance for states that made it clear that these Acts remain in effect.³

Third, paragraph 4 of the industry guidance seems to suggest seclusion and restraint for residents who don't follow the guidelines even if it's their disability or lack of personal protective equipment (PPE) that is the cause of the risk of spreading the virus. Each of your agencies have implementing regulations that prohibit this suggested use of seclusion or restraint. *See e.g.*, OAR 309-033-0732 to 0730 (OHA); OAR 411-318-0010 (ODDS); and OAR 411-051-0105 (APD). In each of this agency regulations there is an articulated right for residents to be free from restraint or seclusion unless other alternatives have been tried and found ineffective as well as prohibition on these restrictive measures being used for discipline or convenience. Thus, guidance from your office to providers is urgently needed as, again, we have verified that multiple providers are following this industry guidance already.

¹ 42 U.S.C. §§ 12132; 12182(a).

² United States Department of Justice, *Emergency Management Under Title II of the Americans with Disabilities Act*, at 1 (July 26, 2007) available at <http://www.ada.gov/pcatoolkit/chap7/emergencymgmt.htm> ("One of the primary responsibilities of state and local governments is to protect residents and visitors from harm, including assistance in preparing for, responding to, and recovering from emergencies and disasters. State and local governments must comply with Title II of the ADA in the emergency- and disaster-related programs, services, and activities they provide.").

³ HHS Office for Civil Rights in Action, *Bulletin: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19)* (March 28, 2020).

Our Recommendations for Cross Agency Guidance

Our urgent request for this uniform guidance across agencies was only heightened when, on April 22nd, APD seemed to suggest that it was considering similar guidance that limited individual rights ostensibly in the name of “the greater good.” While we appreciate the concern for community health at this time, individual rights should not be eschewed flippantly and without an attempt to accommodate both needs. Such an approach fails to consider whether the lack of compliance by a resident is related to their disability and whether reasonable modifications have been considered. Beyond looking at ODDS and the soon to be released OHA guidance, below are general principles that we collectively ask that each of your offices consider adopting into formal agency guidance to be sent out to providers as soon as practicable:

- The overall focus, for providers and each of your agencies, should be creative problem solving to minimize risk of infection and prevent displacement of vulnerable residents. This must involve a case by case problem-solving process.
- Residents and staff should have access to personal protective equipment to ensure safety both in and outside of the residence.
- Reasonable accommodations under the ADA should be granted for residents whose challenges around complying with social distancing and other COVID-19 safety protocols relate to their disabilities.
- Central office for each agency shall review any proposed notice in advance to ensure compliance with residents’ rights. The process must allow for the time necessary to find an alternative placement and related supports to ensure that residents are not displaced in locations that placed them at greater risk of being exposed to the virus including homeless, jails, or hospitals.

Thank you for your consideration of this urgent request. Collectively, Disability Rights Oregon, the ACLU of Oregon, the Long-term Care Ombudsman, and the Residential Facilities Ombudsman sincerely want to be your partner as we face the days ahead. However, we need clear and consistent guidance from your offices and the Governor if we are going to protect those who appear to be disproportionately impacted by this virus and, indeed, to mitigate the further spreading of the virus due to forcible move outs of residents with disabilities from state run programs.

Sincerely,

Emily Cooper
Disability Rights Oregon

Fred Steele
Long-term Care Ombudsman

Kelly Simon
ACLU of Oregon

Toni Larson
Residential Facilities Ombudsman

Enclosure: AHCA & NCAL Guidance; Governor’s Order 20-11

When Residents Want to Take an Outing into the Surrounding Community During COVID-19

The CDC, CMS and many states have recommended cancelling all group activities outside of the building. However, some residents may want to leave the building on their own or to go out with others into the community at-large, such as to family gatherings. These activities increase the risk of the residents contracting COVID-19 from the community at-large and introducing it into the facility. This guidance provides steps to take when residents or their families want to take the resident out into the community at-large for a brief outing.

We recommend the facility do the following:

1. Explain to the resident the risk of contracting COVID-19, including:
 - a. A large number of cases are being spread from people who are infected but do not have symptoms.
 - b. Several outbreaks have happened by people attending family gatherings and parties.
 - c. The risk not only to their own health but to other residents (COVID-19 has a 15-20% mortality rate for the elderly).
2. Explain to them that while they may not be as concerned about their risk of contracting the virus, if they bring the virus back into the building, they could threaten the lives of other residents and staff by spreading the virus.
 - a. Remaining in the facility is not just for their health but also for the health of all the other residents and staff.
3. Offer them alternative ways to connect with loved ones they wish to see in the community at-large, or to fulfill the reason they wish to leave the building:
 - a. Help residents connect with their families and loved ones through video chat, phone, or other methods of communication.
 - b. If they need essential items, see if staff or a loved one can acquire these items for them. If a loved one is bringing items to a resident, work with them to make sure items are safely exchanged at the main entrance to adhere to restrictions on visitors.
 - c. If family is providing laundry services, assist the resident where you can help via our [guidance on laundry](#).
 - d. If they need to visit with a doctor or other medical professional, see if you can help arrange a telehealth visit instead or reschedule the appointment for a later time.

- e. For other reasons that a resident may want to go out into the community, get creative on helping them find solutions to help them achieve their main purpose for wanting to leave.
4. If they still insist on leaving, explain that if they come back, they will be:
 - a. Confined to their room for 14 days, which is the incubation period for this virus, and
 - b. Asked to wear a mask for those 14 days.
 - c. Note that this is not retaliation but is consistent with guidance on people exposed to COVID-19 and is a practice to protect the health of the other residents.
5. Explain, if they can't comply with the follow-up plan of a 14-day isolation period and wearing a source control mask, they may be discharged to their family against medical advice (AMA) or to the hospital if their family can't care for them, as they are a risk to the health of other residents and staff.
6. Contact the Ombudsman to provide notice that a resident plans to leave the building against medical advice and may be putting other residents and staff at risk.
7. Contact the local or state public health agency and notify them that a resident wants to leave the facility for an outing into the community which may expose them to COVID-19 and puts other residents and staff at risk.

For skilled nursing centers, current CMS regulations and waivers do NOT allow you to discharge a resident against medical advice if they choose to go out and return. However, if they refuse to comply with recommendations to limit exposure to other residents or staff once they return, you may discharge them for putting other residents and staff at risk. You need to make sure they have an appropriate follow up, which may require discharge to the hospital if home care is not possible. For assisted living communities, please consult your specific state regulations regarding resident discharge.



EXECUTIVE ORDER NO. 20-11

TEMPORARY MORATORIUM ON RESIDENTIAL EVICTIONS FOR NONPAYMENT, IN RESPONSE TO CORONAVIRUS (COVID-19) OUTBREAK

On March 8, 2020, I declared an emergency under ORS 401.165 *et seq.* due to the public health threat posed by the novel infectious coronavirus (COVID-19).

On March 11, 2020, the World Health Organization announced that COVID-19 is a global pandemic.

On March 13, 2020, the President of the United States declared the COVID-19 outbreak a national emergency.

The number of presumptive or confirmed COVID-19 cases continues to rise rapidly in Oregon. On March 8, 2020, at the time I declared an emergency, there were 14 presumptive or confirmed cases in Oregon. As of today, there are at least 137 cases and four deaths.

The COVID-19 pandemic has already caused, and is anticipated to continue to cause, sustained global economic slowdown and a significant economic downturn in Oregon, causing a serious economic hardship for many Oregonians in the form of lost wages and the inability to pay basic household expenses, including rent and related costs.

The inability of Oregonians to pay rent and related costs as a result of the COVID-19 pandemic increases the likelihood of evictions from their homes, which in turn increases economic hardship and life, health and safety risks for all Oregonians.

People being evicted from their homes creates an additional risk for the transmission of COVID-19, as they likely will be less able to practice the appropriate social distancing that is necessary to slow the spread of COVID-19 throughout the population.

Under ORS 401.175(2), the Governor's emergency powers include assuming control of police and law enforcement activities, including the activities of all local police and peace officers. Under ORS 401.188(2), the Governor's emergency powers include prescribing and directing activities in connection with the use and conservation of housing.



EXECUTIVE ORDER NO. 20-11 PAGE TWO

At this time, a temporary moratorium throughout Oregon on law enforcement actions relating to residential evictions for nonpayment of rent and related costs will prevent economically vulnerable Oregonians from having to leave their homes to seek temporary or new shelter, and will make it significantly easier for them to continue to practice the effective social distancing that is vital to control the spread of this pandemic. It also will conserve housing resources and help reduce economic hardship and related life, health, and safety risks to Oregonians.

If immediate action is not taken to suspend residential evictions for nonpayment of rent and related costs, there will be increased opportunities for the virus to spread among people displaced from their homes. In addition, Oregon runs the risk that available housing resources will not be efficiently used, and that the already serious economic and other effects of the the COVID-19 pandemic will be even worse for vulnerable Oregonians.

NOW THEREFORE, IT IS HEREBY DIRECTED AND ORDERED THAT:

1. Law enforcement officers in Oregon are prohibited from serving, delivering or acting on any notice, order or writ of termination of tenancy or the equivalent or any judicial action, pursuant to or arising under ORS 105.105 through ORS 105.168, that relates to residential evictions for nonpayment.
2. As used in this Executive Order, the term "nonpayment" means any nonpayment as described in ORS 90.392(2)(a) or (c), ORS 90.394, or ORS 90.630(1)(d) or (10), or any termination without cause under ORS 90.427. All other terms used in this Executive Order shall have the same meanings as set forth in ORS chapters 90 or 105.
3. Nothing in this Executive Order is intended to prohibit law enforcement officers from serving, delivering or acting on any notice, order or writ of termination of tenancy or the equivalent or any judicial action, pursuant to or arising under ORS 105.105 through ORS 105.168, that relates to residential evictions for causes other than nonpayment.
4. Any person found to be in violation of this Executive Order is subject to the penalties described in ORS 401.990.



EXECUTIVE ORDER NO. 20-11
PAGE THREE

This Executive Order is issued under the authority conferred to the Governor by ORS 401.165 to 401.236. Pursuant to ORS 401.192(1), the directives set forth in this Executive Order shall have the full force and effect of law, and any existing laws, ordinances, rules and orders shall be inoperative to the extent they are inconsistent with this exercise of the Governor's emergency powers.

This Executive Order is effective immediately, and remains in effect for 90 days unless extended or terminated earlier by the Governor.

Done at Salem, Oregon this 22nd day of March, 2020.

Kate Brown
GOVERNOR

ATTEST:

Bev Clarno
SECRETARY OF STATE