



April 23, 2022

Comment Regarding Florida’s Statewide Transition Plan Home and Community Based Settings Rule CMS 2249-F and CMS 2296-F

Submitted electronically to comments@ahca.myflorida.com

Dear friends,

We write to urge the Agency for Healthcare Administration (AHCA) to include in its [Statewide Transition Plan](#) a statement that Florida is not currently compliant with 42 C.F.R. 441.530(a)(1)(vi)(A) (HCBS Eviction Rule). AHCA should note in its Plan that in order to come into compliance, the state must amend existing policies, and in some instances, enact legislative changes to those statutory provisions that govern discharge from assisted-living facilities, group homes, and other Home and Community Based Services Waiver (HCBS) settings. These changes will ensure that Florida safeguards essential due process protections to prevent arbitrary, discriminatory, and unilateral discharges from HCBS residential facilities. The undersigned represent non-profit and community-based programs whose missions include protecting the rights of elderly and disabled residents of AHCA licensed assisted-living facilities (ALFs) and Agency for Persons with Disability (APD) licensed group homes to ensure they can access needed medical and habilitative services in the least restrictive setting possible.

In its Statewide Transition Plan, AHCA declares Florida in compliance with the HCBS Eviction Rule.¹ See Statewide Transition Plan, page 91. For the reasons discussed below, we respectfully

¹ Specifically, AHCA’s Statewide Transition Plan asserts that “the State promulgated Rule 59G-13.075, F.A.C. in 2018, making it fully compliant with this regulation.” AHCA Statewide Transition Plan at 92. To the contrary, Rule 59G-13.075, F.A.C. simply states, without setting forth any guidelines, that “All [HCBS] settings must be in compliance with the...[HCBS Settings Rule]” and that the Agency or its designee “will assess residential and non-residential settings for compliance.” Rule 59G-13.075 offers no guidelines about what specific steps settings must undertake to come into compliance or by what standards they will be judged. *Id.*

disagree. As demonstrated by our comments below, while Florida's current statutory and regulatory regime does not comply with the HCBS Eviction Rule, we believe that compliance is achievable and critical to protecting our communities' most vulnerable residents.

Background

Florida's HCBS waiver programs provide comprehensive person-centered long-term care to people with functional limitations and medical needs to allow them to live in their community, rather than languish in an institution. For residents of AHCA-licensed assisted-living facilities, and residents of Agency for Persons with Disabilities licensed-group homes, their HCBS residential facility is the only home that they have. For all people, but particularly for people with disabilities and people of advanced age, a safe, stable, secure home is essential to health and a life of dignity.

On January 16, 2014, the Centers for Medicaid and Medicare Services (CMS) published in the Federal Register a final rule which amended Medicaid regulations to place new requirements on states related to Home and Community-Based Services (HCBS) Waivers. *See* Federal Register Vol. 79, No. 11. These new regulations require all states, *inter alia*, to comply with the HCBS Eviction Rule and ensure that provider-owned or controlled HCBS settings meet the following conditions:

(A) The unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity. For settings in which landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant, and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law. (Emphasis added).

Florida's landlord/tenant law, Chapter 83, Part II of the Florida Statutes ("Chapter 83") specifically excludes HCBS-type settings from its application. *See* 83.42(1), Fla. Stat. Because Chapter 83 does not apply to HCBS settings, Florida must ensure that, at a *minimum*, all resident contracts of both AHCA licensed residential facilities and APD licensed residential facilities provide "protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law." 42 CFR § 441.530(a)(1)(vi)(A).

In insert day, month 2022, the Agency for Healthcare Administration (AHCA) published Florida's Statewide Transition Plan ("Transition Plan") in an effort to demonstrate its compliance with

the new HCBS regulations.² The Transition Plan erroneously states that Florida faces no “significant impediments” to compliance with the HCBS Eviction Rule. *See* Statewide Transition Plan, page 2. Currently, Florida’s current laws and administrative rules governing its HCBS programs and residential settings do not require the provision of a lease or residential agreement which provides “protections that address eviction process and appeals comparable to those provided under the jurisdiction’s landlord tenant law.” Indeed, at the same time the Transition Plan declares its compliance with federal regulations, it admits that Florida’s laws and regulations are “silent” on the protections required by the HCBS Eviction Rule. Florida cannot assess or ensure program compliance with the HCBS Eviction Rule while its laws and administrative rules are silent on the issue and without promulgating rules to guide HCBS facilities toward compliance.³

I. AHCA-Licensed Assisted-Living Facilities: The State Transition Plan, Florida Law, and Applicable Administrative Rules Fall Short of Compliance with the HCBS Eviction Rule

Florida law and administrative rules afford residents of AHCA licensed HCBS residential settings with limited protection from arbitrary discharge. *See* 429.28(k), Fla. Stat.; 59A-36.018, FAC. These limited protections are not “comparable” to the far more expansive protections afforded tenants under Chapter 83. For example, the minimal protection there against arbitrary discharge from one’s *home* under 429.28(k) requires only that an AHCA licensed HCBS residential services provider give residents:

At least 45 days’ notice of relocation or termination of residency from the facility unless, for medical reasons, the resident is certified by a physician to require an emergency relocation to a facility providing a more skilled level of care or the resident engages in a pattern of conduct that is harmful or offensive to other residents. In the case of a resident who has been adjudicated mentally incapacitated, the guardian shall be given at least 45 days’ notice of a nonemergency relocation or residency termination. Reasons for relocation must be set forth in writing and provided to the resident or the resident’s legal representative. The notice must state that the resident may contact the State Long-Term Care Ombudsman Program for assistance with relocation and must include the statewide

² This transition plan, published by AHCA, applies to each of the state’s HCBS settings, including those administered by the APD.

³ As of the date of this letter, more than 8 years have passed since CMS’s promulgation of 42 CFR § 441.530(a)(1)(vi)(A). AHCA and APD are obligated to formulate strategies to bring Florida into compliance with the federal regulation. It is troubling that AHCA has, without promulgation of any new rules, declared the state in compliance while acknowledging that state law and regulation are silent on the requirement that residents of HCBS facilities receive essential due process protections against arbitrary and discriminatory removals from their homes.

toll-free telephone number of the program. In order for a facility to terminate the residency of an individual without notice as provided herein, the facility shall show good cause in a court of competent jurisdiction.

While the protections contained in § 429.28(k) are important, they are not comparable to Chapter 83.

The essential protections afforded to tenants under Chapter 83 include 1) the right to notice; 2) the right to cure deficiencies; 3) the right to an opportunity to be heard by an impartial decisionmaker, and; 4) the right to be free from self-help evictions. By contrast, § 429.28(k) fails to provide residents of AHCA HCBS facilities with *any* of these protections from the arbitrary and discriminatory loss of their *home*. Each essential protection will be analyzed in turn.

1. RIGHT TO NOTICE

Residents of AHCA licensed HCBS residential settings may, pursuant to § 429.28(k), be entitled to 45-days' notice of the termination of a residential agreement. However, there are significant exceptions to this notice requirement that, along with the lack of an opportunity to be heard, discussed below, render the protections of the 45-day notice requirement effectively meaningless. An HCBS residential setting provider need not give the required 45-day notice under the three circumstances outlined below. Each of these exceptions are ripe for abuse and leave HCBS residents without any recourse when they are arbitrarily or discriminatorily removed from their *home*.

a. Physician Certification Exception

An AHCA HCBS residential services provider need not provide a resident with a 45-day notice if a physician certifies that the individual requires "an emergency relocation to a facility providing a more skilled level of care." § 429.28(k). That is, if a resident requires a relocation *for any length of time*, for example due to an actual or perceived mental health crisis or medical emergency, *the resident can permanently lose their home* and will be without any recourse to return to their home absent a written "bed hold" agreement.⁴ In contrast, under Chapter 83, a tenant would not *lose their home* because of a real or perceived mental health crisis or medical emergency. Instead, if rent is current, a tenant can be absent to deal with a medical emergency or any other issue without facing the loss of their home. In fact, the termination of a lease because a person had to address a disability-related concern like a mental health crisis, would be unlawful discrimination under state and federal law.

b. Pattern of Conduct that is Harmful or Offensive Exception

An AHCA licensed HCBS residential setting may, without any notice whatsoever, terminate residency and force a person from their *home*, based upon a purported "pattern of conduct that is harmful or offensive." § 429.28(k). Thus, a disabled and/or elderly individual may be

⁴ Fla. Admin.Code. R. 59A-36.018(1)(h)

kicked out of their *home* without any prior or written notice and the HCBS provider is not required to state the factual basis for the termination of residency. Because no notice is required, § 429.28(k) essentially permits an HCBS provider to terminate a residency for any reason, no reason, or even a discriminatory or retaliatory reason. The resident is not entitled to an explanation and the termination is not subject to any kind of review whatsoever. The extent to which this provision invites abuses and may result in discrimination in violation of the Fair Housing Act cannot be overstated. In contrast, under Chapter 83, a landlord must provide written notice of the reasons for the termination of a tenancy, even under circumstances where there is no opportunity to cure⁵. A tenant is then able to challenge the factual basis of the stated reasons before an impartial decision maker.

c. Good Cause in a Court of Competent Jurisdiction

Section 429.28(k) states that “[i]n order for a facility to terminate a residency of an individual without notice,” including for a pattern of conduct that is harmful or offensive, “the facility shall show good cause in a court of competent jurisdiction.” However, instead of requiring a facility to show good cause before relocating or terminating a residency, the plain language of the statute permits an AHCA HCBS facility to terminate a residency at its sole discretion, without written notice, and without any review if the facility asserts the resident has engaged in a “pattern of conduct that is harmful or offensive”. *Id.* The facility can take this action and take a person’s home without going to court or putting anything in writing. While the “good cause in a court of competent jurisdiction” provision reads as though it is a meaningful protection, in reality and in practice it is completely hollow and does not protect residents from the arbitrary or discriminatory loss of their *home*.

Even if the “good cause in a court of competent jurisdiction” provision were not completely eviscerated by the rest of § 429.28(k), the provision raises significant practical concerns. What is the cause of action under which an HCBS service provider would go to court? What is the definition of “good cause” in this context? In any event, an allegation of good cause cannot vitiate a resident’s right to notice of that cause.

In contrast, there is **no** circumstance pursuant to Chapter 83 under which a landlord may terminate a tenancy without notice. The protections of § 429.28(k) are not comparable to those provided under Chapter 83 and required by the HCBS Eviction Rule.

2. RIGHT TO CURE

When a landlord wishes to terminate a tenancy for cause, such as failure to pay rent or failure to abide by the rental contract, they must first provide the tenant with written notice and, generally, an opportunity to cure. Fla. Stat. §§ 83.56(2)(b), (3), (4).⁶ For example, if a tenant fails

⁵ §83.56 Fla. Stat. (2021)

⁶ There are circumstances under which a landlord is not required to provide an opportunity to cure, including “continuing noncompliance within 12 months of a written warning by the landlord of a similar violation,” and “destruction, damage, or misuse of the landlord’s or other tenants’ property by intentional act or a subsequent or continued unreasonable disturbance.” Fla. Stat. § 83.56(2)(a).

to pay their rent, a landlord must provide them with written notice and no fewer than three days to cure the deficiency. § 83.56(3). If a tenant fails to meet other obligations under the rental agreement, the landlord must, under most circumstances, provide the tenant with written notice and no fewer than seven days to cure the deficiency. § 83.56(2)(b). No comparable protections exist for residents of AHCA licensed HCBS facilities.⁷

3. OPPORTUNITY TO BE HEARD

Under Chapter 83, if a tenant disagrees with the landlord's stated basis for termination of the tenancy, or believes that they adequately cured the deficiency, they can present their case in court, before an impartial decisionmaker. §§ 83.59, 83.60. Residents of AHCA licensed HCBS residential facilities facing *the loss of their home* enjoy no comparable protection under § 429.28(k). Because residents of AHCA facilities no such form in which to present their case, extremely vulnerable individuals have no recourse for arbitrary or even retaliatory or discriminatory removal *from their home*.

4. PROTECTION FROM "SELF-HELP" TERMINATIONS

Chapter 83 forbids "self-help" evictions through which landlords unlawfully regain possession of a residence without going through the required eviction court process. *See* § 83.67. Examples of self-help evictions include changing a resident's locks, turning off utilities, physically barring them from accessing the premises, removing doors, and/or removing windows. § 83.67. Residents of AHCA licensed HCBS residential settings enjoy no comparable protections. In fact, § 429.28(k) permits removal of residents from their homes without notice or court process, actions strictly prohibited by Chapter 83. In sum, Florida law does not provide residents of HCBS settings with protections comparable to those provided under Chapter 83 as required by the HCBS Eviction Rule.

II. **APD-Licensed Group Homes: The State Transition Plan, Florida Law, and Applicable Administrative Rules Do Not Comply with the HCBS Eviction Rule**⁸

Residents of APD-licensed HCBS group homes enjoy important protections from arbitrary terminations of residency and loss of their home. *See* 65G-3.005(1). However, the agency must work to enhance these protections in order to gain compliance with the HCBS Eviction Rule.

1. Notice

Under 65G-3.005(1)(a), "if a provider determines that he or she must terminate or reduce services the provider gives to a client, the provider shall send written notice of intent to terminate or reduce services to the client and their individual representative by certified mail or

⁷ In the context of AHCA licensed HCBS residential facilities, any notice with an opportunity to cure should be provided to the resident, as well as to the resident's guardian and/or representative, if applicable. *See* § 429.28(k).

⁸ While the AHCA-drafted Transition Plan applies to all HCBS settings in Florida, the Transition Plan only addresses compliance with 42 CFR § 441.530(a)(1)(vi)(A) as it relates to AHCA licensed HCBS settings and fails to address compliance by APD licensed facilities. In this comment, we will provide analysis of whether rules and statutes applicable to APD HCBS settings satisfy the federal mandate.

electronic mail.” While this represents an important protection, it is not “comparable” to Chapter 83 because the provider is not required to include any factual and legal basis for the need to terminate or reduce services in its notice. *See* §§ 83.56(2), (3). Without a requirement that the provider give notice of the factual and legal basis for the termination or reduction, a resident, their guardian, and their waiver support coordinator (WSC) cannot determine whether the termination and loss of *home* is based on facts that warrant termination, should be curable, or is potentially discriminatory.

2. Right to Cure

While 65G-3.005(1) does not contain an explicit right to cure deficiencies comparable to that of Chapter 83, the rule does contain provisions for informal dispute resolution, including placing an obligation on the WSC to “evaluate the circumstances that led to the proposed termination or reduction,” and “determine what actions, if any, should be taken to resolve the situation.” Notably, a WSC’s ability to carry out this informal dispute resolution mandate is hampered by the lack of a requirement that a APD HCBS service provider allege a factual and legal basis “that led to the proposed termination or reduction” of services. The informal dispute resolution provision, while important, is not comparable to the mandatory right to cure contained in Chapter 83.⁹

3. Opportunity to be Heard

Residents of APD HCBS group homes have no way to seek review of a termination of residency and resulting loss of their *home* by an impartial decision maker. *See* 65G-3.005(1). Applicable rules do provide for a post-termination notice process, including informal dispute resolution facilitated by a resident’s WSC. 65G-3.005(1)(b), (c). However, this informal resolution process is not comparable to the protections of Chapter 83 because, *inter alia*, it does not provide a right for any dispute to be adjudicated by an impartial decisionmaker. *See* §§ 83.59, 83.60 Fla. Stat. (2021).

4. Protection from “Self-Help” Termination

While 65G-3.005(1) includes requirements for notice and informal dispute resolution, these protections do not prevent illegal “self-help” terminations because residents do not have access to any recourse to restore them to their home. For example, the undersigned have represented people with intellectual and developmental disabilities who say that rather than following the procedures in 65G-3.005(1), their APD HCBS service provider simply forced them to leave their home or constructively terminated their residency by denying them services or harassing them. Residents with disabilities report to us that facilities coerced their guardian to come and pick them up or unilaterally ended their tenancy while the resident was remanded to a Baker Act facility. **In contrast, in housing governed by Chapter 83, the termination of a lease or lockout of a tenant because they were remanded to a Baker Act facility would likely constitute unlawful disability discrimination in violation of the Fair Housing Act.** Without

⁹ § 83.56 Fla. Stat.

some review of terminations, and consequences for bad faith and nefarious actions of service-providers, Florida fails to provide residents of APD HCBS facilities with protections comparable to those of Chapter 83 and fails to protect residents from unlawful self-help terminations.

Without some review of terminations, and consequences for bad faith and nefarious actions of service-providers, Florida fails to provide residents of APD HCBS facilities with protections comparable to those of Chapter 83 and fails to protect residents from unlawful self-help terminations.

III. Real Life Consequences

The HCBS Eviction Rule is intended to protect the elderly and individuals with disabilities from the arbitrary or discriminatory loss of their home. The Transition Plan must require compliance with the HCBS Settings Rule by ensuring individuals with disabilities are living in integrated, community settings where they are able to assert control and enjoy legal protections that maintain housing stability like everyone else. Robust protections from termination and removal are an integral part of this effort and must be reflected in agency rules and the Transition Plan. As advocates for individuals with disabilities, we have seen firsthand the real trauma and suffering caused by the wrongful loss of an HCBS resident's home. We urge AHCA, APD, and the Florida Legislature not to lose sight of the fact that we are talking about people's *homes*. Nothing hits you where you live like hitting you where you live. (The loss of a home has numerous long-lasting consequences, especially for people with disabilities and the elderly who often have low incomes and limited housing options.)

The lack of protections for HCBS residents, as compared to the protections afforded under Chapter 83, invites abuses of the vulnerable residents of these settings. It is not unusual for us to hear from individuals or their guardians who, for example, say that they lost their *home* at an APD licensed group home after they were "Baker Acted." Some of the undersigned organizations have spoken to individuals who allege they are abused or mistreated in an assisted-living facility, but who dare not speak out because they know that they can be kicked out of their *home* in retaliation and without any warning or recourse. The HCBS Eviction Rule demands that Florida provide no less than a bare-minimum floor of due process and dignity for disabled and elderly people in the state. Federal regulations tell us that we, as a state, need to do better. Regardless of the federal mandate, basic human decency tells us that we need to do better. All people should have a right to housing stability and, in the context of HCBS settings, meaningful reform of agency policy and state law is required to afford residents necessary protections that promote housing stability.

IV. Recommendations to Gain Compliance

1. Agencies should engage in formal rulemaking

Most changes mandated by the HCBS Eviction Rule can be accomplished administratively. The Centers for Medicaid and Medicare Services (CMS) "expected that states would establish policy and procedures to assure compliance with [the HCBS Eviction Rule]." Federal Register Vol. 79,

No. 11, Page 14. To the extent that Florida has already enacted administrative rules related to the termination of HCBS residencies, such policies do not assure compliance with federal regulations, as described above. We urge both AHCA and APD to initiate rulemaking to bring the state into compliance with the requirements of the HCBS Eviction Rule.

Specifically, APD and AHCA should initiate rulemaking procedures under Chapter 120 of the Florida Statutes to receive input from stakeholders, particularly members of the disability community, as well as their guardians and advocates, to develop rules to ensure that residents of AHCA and APD HCBS residential facilities enjoy protections from arbitrary terminations of residency similar to those afforded to tenants under Chapter 83, including the essential due process protections of notice, an opportunity to cure, an opportunity to be heard by an impartial decisionmaker, and protections from “self-help” terminations of residency. Florida law is a barrier to the state’s compliance with the HCBS Eviction Rule and AHCA and APD must engage in rulemaking to enact what changes they can to enhance due process protections for their HCBS residents and that bring the state closer to compliance with federal regulation.

2. Model Lease

As a part of formal rulemaking, APD and AHCA should develop a uniform model lease which HCBS residential facilities should be required to utilize as a condition of HCBS funding. The model lease should include protections comparable to those provided under Chapter 83 as required by the HCBS Eviction Rule, including the essential due process protections of notice, an opportunity to cure, an opportunity to be heard by an impartial decisionmaker, and protections from “self-help” terminations of residency.

3. Federally-mandated changes to § 429.28(k)

Florida has a responsibility to bring itself into compliance with the HCBS Eviction Rule. Following our careful review of current law and regulations, Florida must amend or supplement § 429.28(k) in order to comply with federal law. Specifically, Florida must amend § 429.28(k) to provide mandatory notice for *all* terminations from AHCA HCBS residential settings. No less than written notice for terminations under all circumstances can be considered comparable to the protections afforded under Chapter 83. *See* § 83.56. Florida must provide AHCA with a statutory provision similar to § 393.125(2), which provides APD authority to adopt rules “relevant to termination, suspension, or reduction of client services by the service provider” so APD may “ensure the due process rights of service providers and clients.”

While AHCA and APD cannot change Florida’s laws, the agencies can promulgate necessary rules to bring the state closer to compliance with the HCBS Eviction Rule by ensuring residents of HCBS settings have protections comparable to those provided under Chapter 83. These protections are mandated by federal regulation and are necessary to ensure that residents of HCBS settings have the autonomy, dignity, and respect expected in a residential setting.

V. Conclusion

Thousands of Floridians with disabilities call the residential settings that are the subject of the HCBS Eviction Rule home. Residents of HCBS settings must be able to access needed medical and habilitative services in the least restrictive setting possible while maintaining their right to stable housing. Just like a tenant in an apartment or rental home, residents of HCBS settings need housing stability and protection from arbitrary, unlawful, and discriminatory evictions. CMS promulgated the HCBS Eviction Rule to ensure that people who call residential settings home are not treated as second class citizens and have all the same legal protections as people who rent a house or apartment.

Florida's current laws and regulations do not provide the protections required by the HCBS Eviction Rule. AHCA and APD must engage in rulemaking that will bring Florida into compliance with the HCBS Eviction Rule and ensure that residents have the necessary due process protections to ensure housing stability and prevent unlawful terminations and removals. AHCA must also amend its Transition Plan to ensure that AHCA is effectively monitoring HCBS provider compliance with the HCBS Eviction Rule and ensuring that all HCBS providers have policies and procedures that provide all protections offered to tenants under Chapter 83 including written notice, an opportunity to cure, an opportunity to be heard by an impartial decisionmaker, and protection from self-help evictions. Finally, AHCA must identify areas where legislative change is required to bring Florida into compliance with the HCBS Eviction Rule. The undersigned are eager to work with AHCA and APD to ensure residents of HCBS settings are afforded their federally mandated rights.

Respectfully submitted,

Disability Rights Florida
Florida Health Justice Project
Florida Policy Institute
Jacksonville Area Legal Aid
Legal Services of Greater Miami