



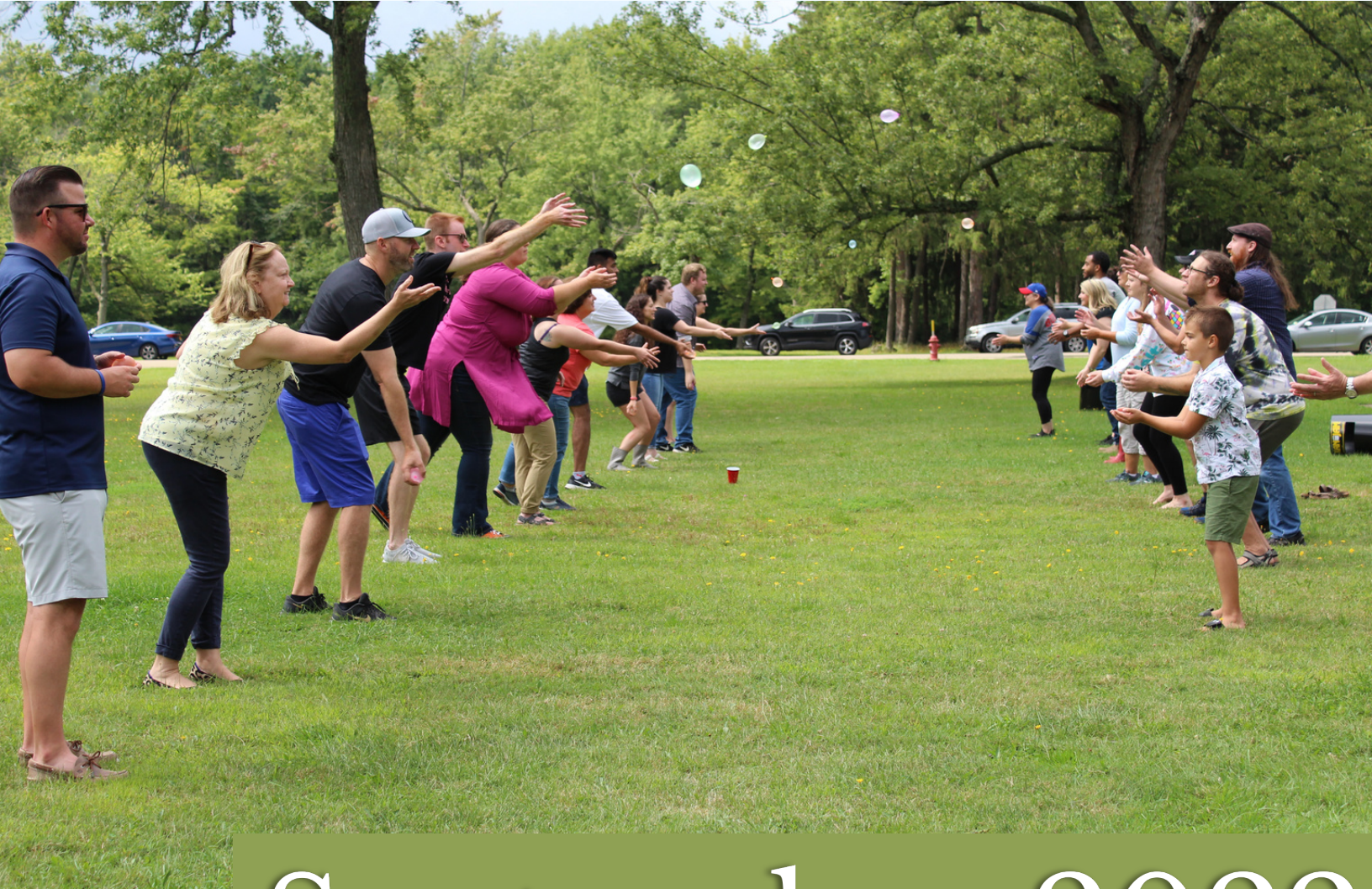
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September 2022 Newsletter

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In this issue...

2 Staff Picnic

3 CELJ Rising Stars Receive High Honors!

4 Lindsay Heckler Featured in Elder Law Journal

8 Board Member Interview

9 CELJ Launches New YouTube Channel

11 Upcoming Events

Fun at the Staff Picnic 2022



RISING STARS 2022

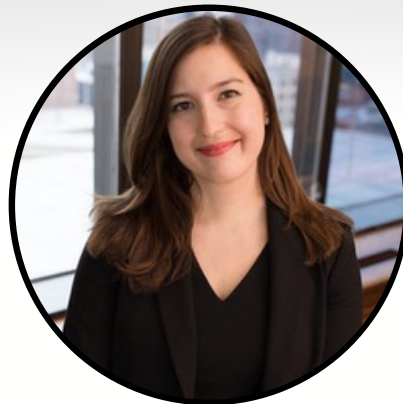


CELJ Staff Named Rising Stars

It is a pleasure to share that some of our hard-working attorneys have been recognized in this year's issue of *Upstate New York Super Lawyers Magazine* (by Thomson Reuters) for the work they've done in our community. The objective of Super Lawyers is to create a credible, diverse, and comprehensible list of attorneys that can be used as a resource for attorneys or consumers seeking legal services. Congratulations!



Kelly Barrett Sarama
Rising Star



Sarah Duval
Rising Star



Jesslyn Holbrook
Rising Star

Board Members:

Alan J. Bozer, Super Lawyer, Business Litigation

Anne Joynt, Super Lawyer, Personal Injury

Steven Bengart, Super Lawyer, Real Estate

From Admission to Discharge: Navigating Short-Term Stays in Nursing Homes

By Lindsay Heckler

The majority of older adults are unwilling to go into a nursing home and look to elder law attorneys for planning assistance to maintain, or support, their ability to age in place in their community homes. However, currently, many will spend at least one night in a nursing home, even if they do not realize it.¹

This is because many older adults are transferred to nursing homes for short-term rehabilitation after a hospital stay.

The process of a transfer from a hospital to a nursing home is fast and stressful. Every patient in a hospital has rights, including the right to participate in all decisions about their treatment while in the hospital and discharge from the hospital.² The hospital is responsible for person-centered discharge planning and if the patient does not want to go to a nursing home, it is important for patients to speak up to assert their rights. However, this is not always possible. When nursing home placement is indicated, the hospital is required to afford the patient the opportunity to participate in the selection of the nursing home.³

This process leaves older adults with little time to plan and to seek guidance from counsel and results in clients reaching out once they are in a nursing home, often when things go wrong. As such, it is important that we, as a profession, know the foundation for resident rights, resources on these rights, and referral options for those who come to elder law practitioners for assistance.

The foundation of resident rights is the Omnibus Reconciliation Act of 1987, also known as the Nursing Home Reform Law. The Nursing Home Reform Law created national nursing home standards for facilities that accept payment from the Medicare or Medicaid programs.⁴ The Centers for Medicare and Medicaid Services (CMS) are responsible for developing standards for nursing home care and ensuring those standards are upheld.⁵ These minimum standards form the basis of resident rights and set forth the nursing home's responsibilities to provide quality care and services to meet the needs of all residents. States may have additional requirements, but they cannot conflict with the federal standards.⁶ Pertinent New York law and regulation are found in New York Public Health Law (PHL) §§ 2801 *et seq.*, and 10 N.Y.C.R.R. §§ 400 *et seq.*

Resident rights and quality care requirements stem from the principles of “person-centered care” whereby the resident is the locus of control, and their goals, values, and preferences must be prioritized and addressed by the nursing home. The fundamentals of person-centered care apply to every resident and the requirements as to quality care and quality of life are set forth in both federal and state laws and regulations.

Nursing homes have an affirmative obligation to protect and promote the rights of each resident, and encourage and assist each resident to exercise these rights. Furthermore, every resident has the right to receive the services and supports needed to attain or maintain their highest practicable, physical, and psychosocial well-being. Residents must not decline because of a nursing home's inability to recruit, retain, and train staff with the appropriate competencies and skills to meet resident care and life needs.

These rights and care standards apply for all residents whether their care is paid for by Medicare, Medicaid, or privately. While each resident's rights and quality of life and care standards are important, this article focuses on a few of the rights that may be of use practitioners who face questions from their clients.⁷

Admissions: Selecting a Nursing Home and Admissions Agreements⁸

Not every older adult has the luxury of being able to make a fully informed decision in selecting a nursing home during the hospital-to-nursing home discharge process. This is for a variety of reasons, including the fast nature of the process and selective nursing home admissions. However, it is important that older adults and their families know where to find information on nursing homes so that they can better self-advocate and make informed decisions. There are a few resources to assist in this research including: CMS Care Compare⁹ and New York State Health Profiles.¹⁰ CMS Care Compare enables current and prospective residents and their representatives to make informed decisions about their health care based on cost, quality of care, volume of services, and other data. The website incorporates CMS' 5-star rating system and includes other information such as health inspection reports and staffing levels. New York State Health Profiles—Nursing Homes, similar to CMS Care Compare, also enables prospective residents to compare facilities and obtain additional information including health inspection reports and enforcement actions.

Nursing homes are mandated under PHL to post their overall CMS star rating on their website homepage and website of the entity that owns or operates the nursing home.¹¹ In addition, nursing homes, as part of the admissions process, must ensure prospective residents and their family are provided with a document that provides information on how to look up complaints, citations, inspections, enforcement actions, and penalties taken against the nursing home.¹² This information is useful for not only selecting a nursing home, but can and should be used by residents and their representatives in advocating for quality of care and life services and supports.

In an effort to afford prospective residents with informed choice, PHL requires each nursing homes post a copy of the entire admissions agreement on its website.¹³ However, because the majority of nursing home residents are admitted from hospitals, residents, or their family member, are often presented with the admissions agreement once the resident is in the facility. Practitioners may be limited to what assistance they can provide when the client has already executed the admissions agreement; however, practitioners can help explain the terms of the agreement and the signor's obligations. For example, while nursing homes cannot require third-party guarantee of payment, nursing homes may require a third party to undertake other kinds of contractual obligations. Practitioners must also be aware of pre-dispute arbitration agreements found in the admissions paperwork. While these agreements are allowed, federal regulation provides the resident with the explicit right to rescind the agreement within 30 days of signing.¹⁴

Care Planning¹⁵

Every resident must undergo a comprehensive assessment which is used to develop the resident's comprehensive care plan. The assessment, which must be completed within 14 days of admission, takes into account the "whole" resident, covering 13 categories including, but not limited to: customary routine, cognitive patterns, communication, vision, mood and behavior patterns, psychosocial well-being, dental and nutritional status, skin condition, activity pursuit, medications, special treatments and procedures, prior medical history, and discharge planning.

The comprehensive care plan must be developed within seven days of the comprehensive assessment. The care plan must be person-centered for each resident, be consistent with resident rights and set forth the services to be provided for the resident to attain or maintain their highest practicable physical, mental, and psychosocial wellbeing, and the resident's goals and desired outcomes.

The comprehensive care plan is the foundation for a resident's care and services at the nursing home. Residents and

their representatives have the right to participate in the development of the care plan and must be viewed as part of the care planning team. The care plan is a fluid document and shall be reviewed at least quarterly by professional staff, and updated as needed, for example, when there is a change in the resident's condition¹⁶ or when a resident has a concern about their care or preferences change.

It is essential that residents and their representatives participate in the care planning process and are prepared to provide to the nursing home's interdisciplinary team any and all information that would help in the development of the resident's plan of care.¹⁷ The care plan is only effective if it is implemented and integrated into the operations of the nursing home such that staff understand and follow it. As such, residents are encouraged to obtain a copy of the care plan and speak up when they are not receiving the services and supports set forth in the plan of care.

Discharge Planning¹⁸

Discharge planning is a required component of the assessment and development of the resident's comprehensive care plan. Discharge planning is a process that generally begins on admission and involves identifying each resident's discharge goals and needs, developing and implementing interventions to address them, and continuously evaluating them throughout the resident's stay to ensure a successful discharge.

Nursing homes are required to prepare the resident (and their representatives as applicable) to be an active partner in the discharge planning process and effectively transition the resident to post-discharge care. There must be staff available to discuss options with the resident, and the plan must indicate where the resident plans to reside, any arrangements that have been made for the resident's follow-up care, and any post-discharge medical and non-medical services.¹⁹ When the proposed discharge location is to the home of another individual, the facility must obtain the written consent of the resident and the other individual, and the other individual must receive and acknowledge the comprehensive discharge plan to address the resident's needs.²⁰

While there are external factors that affect a resident's safe return to the community, for example, availability of home care services and supports and housing, factors that are within the nursing home's control must not impede or prevent the resident's safe return to the community. This means: involving and being communicative with the residents and their representatives, connecting the residents to appropriate community-based services and programs,²¹ and ensuring the residents receive the services and supports needed to achieve their goals. A resident's safe return to the community, or other location of choice, must never be delayed or prevented due to the nursing home's inability to recruit, retain, and train

sufficient staff to meet resident care needs as set forth in each resident's comprehensive person-centered plan of care.

Involuntary Discharge

Every resident has the right to remain in the nursing home and not to be discharged or transferred (collectively referred to as "discharge/transfer") unless the discharge/transfer is made in recognition of the resident's rights to receive considerate and respectful care, to receive necessary care and services, to participate in the development of the comprehensive care plan and in recognition of the rights of other residents in the facility.²²

There are only six legal reasons a nursing home may discharge/transfer a resident and each reason can be involuntary. These reasons are: (1) the discharge/transfer is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation at the facility; (2) the discharge/transfer is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility; (3) the safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident; (4) the health of individuals in the facility would otherwise be endangered; (5) the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare, Medicaid or third-party insurance) a stay at the facility; or (6) the facility ceases to operate.²³

A discharge/transfer is only voluntary and appropriate if it is made in accordance with the resident's individual care and discharge plan, and the reason for discharge/transfer is one of the six legal reasons. When the reason for discharge/transfer is not one of the six legal reasons and/or the resident disagrees with the discharge/transfer, it is an involuntary and the resident has the right to appeal the discharge/transfer to the New York State Department of Health and an administrative hearing will be held.

Information on the resident's right to appeal, and how to do so, will be listed on a written notice. This written notice of discharge/transfer must be issued 30 days prior to the discharge date to the resident and his or her representative in a language and manner they understand, with some exceptions.²⁴ The resident has the right to remain in the nursing home pending the outcome of the appeal.²⁵

While there are only six legal reasons a nursing home may ask a resident to leave, nursing homes will sometimes use inappropriate reasons and scenarios to convince a resident to leave. This directly violates federal and state resident rights. An example of this is when a resident who entered the nursing home for short-term rehabilitation exhausts his or her Medicare skilled nursing facility coverage, now needs "long-

term care," and is asked to move to a different nursing home that has "long-term care" beds available. All nursing home beds in New York State are dually Medicare and Medicaid certified. There is no delineation between short-term rehabilitation and a long-term care bed and the New York State Department of Health is clear that such a transfer is not permissible.²⁶ As such, if residents receive a notice of discharge to another nursing home (or there is discussion of such a transfer) because they have exhausted their Medicare coverage or need long-term care, it is inappropriate, and the residents are encouraged to appeal the discharge in order to remain the nursing home.

Where to Turn When There Is a Complaint

When efforts to address quality of care and quality of life issues with the nursing home fail,²⁷ residents, their representatives, and others can and should turn to outside advocacy and enforcement entities: Long Term Care Ombudsman Program (LTCOP); New York State Department of Health; and New York State Attorney General.

The New York LTCOP is administratively housed within the state Office for the Aging and provides nursing home (and adult care facility) advocacy services through a network of 15 regional LTCOPs. LTCOP is not an enforcement entity. LTCOP helps residents understand and exercise their rights to quality care and life in an environment that promotes and protects their dignity and quality of life. To learn more about, and to request the services of LTCOP, visit <https://aging.ny.gov/long-term-care-ombudsman-program>.

The federal and New York state governments share responsibility for ensuring Medicare and Medicaid certified nursing homes are meeting the minimum conditions of participation in the Medicare and Medicaid programs set forth by federal regulation. As the state survey agency, the New York State Department of Health is responsible to conduct on-site inspections of each nursing home to determine whether the nursing home is in compliance with both the federal minimum conditions of participation and PHL. As part of its responsibilities, the New York State Department of Health is required to review all nursing home complaint allegations and conduct a standard or abbreviated survey to investigate complaints of violations of the federal regulations. For information on how to file a complaint, visit <https://www.health.ny.gov/facilities/nursing/complaints.htm>.

In addition to the DOH, residents and others may file complaints with the New York State Attorney General Medicaid Fraud Control Unit (MFCU). The MFCU investigates and prosecutes Medicaid provider fraud as well as abuse or neglect of residents in nursing homes. Complaints may be filed with the New York MFCU by calling 800-771-7755 or filing out the online form: <https://ag.ny.gov/nursinghomes>.

Endnotes

1. In New York, nursing homes are known by many names: residential health care facility, short-term rehabilitation facility, long-term care facility, skilled nursing facility, and nursing facility. While a minority of states separate and distinguish nursing homes based on whether Medicare (skilled nursing facility) or Medicaid (nursing facility) is the payer of care, New York is not one of them. New York policy dictates that every nursing home bed can be paid for by Medicare, Medicaid, or private pay. See N.Y. Pub. Health Law § 2801.2 and § 2801.3 (McKinney); N.Y. Comp. Codes R. & Regs. tit. 10 § 415.2(k) and §§ 85.41, 86-2.1 *et seq.*
2. N.Y. Pub. Health Law § 2803-c. (McKinney) rights of patients in certain medical facilities; N.Y. Comp. Codes R. & Regs. tit. 10 Part 405-Hospitals-Minimum Standards.
3. N.Y. Comp. Codes R. & Regs. tit. 10 § 405.9(f)(3)(ix).
4. Pub. L. No. 100-203, codified at 42 U.S.C. § 1395i-3 (Medicare), 42 U.S.C. § 1396r (Medicaid).
5. These regulations are found at 42 CFR § 48m *et seq.*, and remained largely unchanged until Oct. 4, 2016 when they underwent the first significant overall in 25 years. See United States, Department of Health and Human Services, *Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities*. Vol 81 Fed. Reg. No. 192, p 68688 (Oct. 4, 2016).
6. For example, see N.Y. Pub. Health Law § 2895-b (McKinney), that sets form minimum nurse staffing levels in nursing homes.
7. There are many resident rights resources available: Long Term Care Community Coalition <https://nursinghome411.org/>; Center for Elder Law & Justice, <https://elderjusticeny.org/resources/long-term-care-resources/>; The National Consumer Voice, <https://theconsumervoice.org/issues/recipients/nursing-home-residents/residents-rights>; and Justice in Aging, <https://justiceinaging.org/our-work/healthcare/long-term-services-and-supports/nursing-facilities/>.
8. See generally 42 C.F.R. § 483.15(a); N.Y. Comp. Codes R. & Regs. tit. 10 § 415.3(b).
9. <https://www.medicare.gov/care-compare>.
10. https://profiles.health.ny.gov/nursing_home/index.
11. N.Y. Pub. Health Law § 2808-e (McKinney) nursing home ratings, as added by L.2021, c. 444 § 1.
12. N.Y. Pub. Health Law § 2803(1) (McKinney) as added by L.2021 c. 344 § 1.
13. N.Y. Pub. Health Law § 2803-y (McKinney) provision of residency agreement.
14. 42 C.F.R. § 483.70(n).
15. See generally 42 C.F.R. § 483.20, § 483.21; N.Y. COMP. CODES R. & REGS. tit. 10 § 415.11.
16. See 42 C.F.R. § 483.20(b)(2), § 483.21(b); N.Y. COMP. CODES R. & REGS. tit. 10 § 415.11.
17. For resources to assist residents and their families in planning for the care plan meeting and communicate concerns, visit <https://nursinghome411.org/forms-advocacy/>.
18. See generally 42 C.F.R. § 483.21(c).
19. 42 C.F.R. § 483.21(c)(2).
20. N.Y. Pub. Health Law § 2803-z(1)(b) (McKinney) as added by L.2021, c. 80 § 1.
21. Nursing homes are required to provide each resident with information on home and community-based services and community transitions programs that may be available to support the resident in returning to the community. See N.Y. COMP. CODES R. & REGS. tit. 10 § 415.3(c); Section Q of the Minimum Data Set requires residents be periodically assessed for their interest in being transitioned to community living. See <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/NHQIMDS30TrainingMaterials>; and 42 C.F.R. § 483.21(c)(1) (viii), The Open Doors Program is the local contact agency in New York. For information on the Open Doors Program, contact 1-844-545-7108 and see www.ilny.org/open-doors.
22. N.Y. COMP. CODES R. & REGS. tit. 10 § 415.3(i)(1); see also 42 C.F.R. § 483.15(c); and N.Y. Pub. Health Law § 2803-z (McKinney), as added by L.2021, c. 80, § 1. Many of the state and federal requirements overlap.
23. N.Y. Pub. Health Law § 2803-z(1) (McKinney); N.Y. COMP. CODES R. & REGS. tit. 10 § 415.3(i)(1); 42 CFR § 483.15(c)(1).
24. N.Y. Pub. Health Law § 2803-z(1)(c) (McKinney); 42 C.F.R. § 483.21(c)(4)(ii)(A); N.Y. COMP. CODES R. & REGS. tit. 10 § 415.3(h)(1)(iv).
25. For information on filing an appeal with the New York State Department of health visit; https://www.health.ny.gov/facilities/nursing/rights/transfer_discharge_appeal.htm. See also these resources and advocacy tips form the Center for Elder Law & Justice, <https://elderjusticeny.org/wp-content/uploads/2020/12/Involuntary-transfer-discharge-guide-2020-12-2.pdf>, Justice in Aging, <https://justiceinaging.org/our-work/healthcare/long-term-services-and-supports/nursing-facilities/>, and a report from Mobilization for Justice <https://mobilizationforjustice.org/wp-content/uploads/Involuntary-Nursing-Home-Discharges.pdf>.
26. See NYS DAL-NH-19-07, "Notice of Transfer or Discharge and Permitting Residents to Return" (Aug. 20, 2019), https://www.health.ny.gov/professionals/nursing_home_administrator/dal/docs/19-07_notice_of_transfer.pdf.
27. For example, through the care plan meeting process or the grievance process. See <https://nursinghome411.org/fact-sheet-resident-grievances-complaints/> and <https://elderjusticeny.org/wp-content/uploads/2019/02/Nursing-Home-Grievance-1.pdf> for additional information.



Lindsay Heckler is a supervising attorney at Center for Elder Law & Justice, where she manages the agency's response to nursing home and long-term care policies and regulations, as well as other issues that impact older adults and vulnerable populations. She is the legal liaison for the partnership between the Center for Elder Law & Justice and People Inc.'s NYS Region 15 Long Term Care Ombudsman Program, and is a certified ombudsman.

In her roles as legal liaison and ombudsman, Heckler is an advocate and resource for information pertaining to long-term care issues for residents in nursing homes, adult homes, and their families. She was previously associate compliance counsel for a Medicare compliance company, assisting clients in navigating the CMS system, policy initiatives and appeals procedures. She graduated from the University of Rochester in 2007, University at Buffalo School of Law in 2010, and the University at Buffalo School of Public Health & Health Professions in 2011.



Leslie Fox

Board Member Interview

Leslie Fox started as a board member with the Center for Elder Law & Justice (CELJ) relatively recently, but her history with the agency started much earlier. She first entered our doors in January 2019 to help hold over the agency during a vacancy in the CFO position.

During that transition Leslie was a vital support to keeping operations running smoothly. Leslie will tell you that she wanted to be on our board throughout that process but it wasn't until after her skillset was no longer needed to stabilize our financial unit that it would become a reality.

"From the people point of view...I could feel right away that most people that I met loved being there, that people worked as a group which is how I like to work."

Leslie brings to her placement on the board a wealth of experience working at schools, for-profits, nonprofits, and other boards.

"Back in 2004 I created my company CFO Business Resources...That came about because I've had a number of different CFO roles over the years and I'm just very organized. I come into a place and I put processes in order. It's always easier to keep things up than to let them pile up and then try to get them done. "

"I've always gotten to a point where you know, what's next, everything is organized...I was like, okay, I need more challenge."

At one point, Leslie will tell you, she was concerned that her resume was beginning to look like that of a "job hopper," but these days she's thankful for the breadth and depth of knowledge and experience that her varied positions grant her. Now she's looking forward to applying that experience to the CELJ mission.


"There's a burden on those of us who are fortunate...for those who haven't been...I owe whatever I can do for people who don't have the same advantage or luck. The mission is pointless if it doesn't have good people behind it. Everybody that the organization supports are people that need support. "

For Leslie, the one thing that you should know about CELJ is that we support you in a multitude of ways. When you come to our agency, you are a person before a client, and our metric becomes did we help this person as much as we could?

"We're providing a whole array of support as opposed to solving one problem."

We're so thrilled to be working with you Leslie and glad that we can be your next challenge. We can't wait to see all the wonderful things in store.

CELJ Launches New YouTube for Legal Explainers

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LEARN

In early August, CELJ started releasing videos on a new YouTube Channel called Elder Law Learn. The focus will be brief legal explainers on all topics related to elder law and **the first 8 videos cover nursing home resident rights**. Check it out and subscribe today!

Check out the Channel



Watch the First Video

Upcoming Events

ALZHEIMER'S AND DEMENTIA COMMUNITY FORUM

Wednesday, September 7, 2022

4:30 PM – 6:30 PM

Isaias Gonzalez-Soto Branch Library

No individual or family should navigate the challenges of Alzheimer's disease alone. This forum is an opportunity to bring together community members affected by the disease and dedicated staff and volunteers to talk about resources, programs and services to support families in their communities. Our staff will be available to answer questions about our services and provide informational materials.

OTED EDI SPOUSE AND CAREGIVER CLINIC

Wednesday, September 14, 2022

11:00 AM – 11:30 AM

Buffalo Naval Park

Our staff will give a presentation on our services. Buffalo Economic Development Initiatives (EDI) is a two-day, in-person conference that will take place September 14-15, 2022, at Buffalo and Erie County Naval and Military Park, located at 1 Naval Park Cove, Buffalo, NY 14202. The goal of EDIs is to improve the total and economic well-being of transitioning Service members, Veterans, their families, and their communities. For more information visit: <https://vaedi.com/event/buffalo-edi-2022/>

MOBILE LEGAL UNIT – NORTH TONAWANDA

Thursday, September 22, 2022

9:30 AM – 11:30 AM

North Tonawanda Senior Center

Free legal consultations for seniors will be available at this mobile legal unit event. Speak with an attorney about your legal questions. Event sponsored by Assemblymember Bill Conrad.

For More Information or to Request Accommodations
(Requests Required 1-Week in Advance):
Liam McMahon - (716) 853-3087 (ext. 257)
lmcmahon@elderjusticenyny.org

(Cont.)

10

Upcoming Events

FINANCIAL COUNSELING PROGRAM PRESENTATION

Monday, September 26, 2022

12:30 PM – 2:00 PM

Orchard Park Senior Center

Learn about our Financial Counseling Program from agency staff. Presentation followed by a Q & A session.

MOBILE LEGAL UNIT – TOWN OF EVANS

Tuesday, September 27, 2022

10:00 AM – 2:00 PM

Evans Senior Center

Join the Center for Elder Law & Justice for a free presentation on our services followed by free one-one legal consultations for seniors on most legal matters. Free legal and financial health checkups will also be available.

MOBILE LEGAL UNIT – WYOMING COUNTY

Wednesday, September 28, 2022

10:00 AM – 11:00 AM

Wyoming County Office for the Aging

Join us for a Mobile Legal Unit event and meet with an attorney for a free one-on-one legal consultation. Representatives from Senator Patrick Gallivan's office will be available for questions as well. Contact the Office for the Aging at 585-786-8833 to reserve your spot.

For More Information or to Request Accommodations
(Requests Required 1-Week in Advance):
Liam McMahon - (716) 853-3087 (ext. 257)
lmcmahon@elderjusticenyc.org

(Cont.) 11

Upcoming Events

WNY STAND DOWN – TABLING EVENT

Thursday, September 29, 2022

10:00 AM – 3:00 PM

Jamestown Community College

Our staff will be available to answer questions about our services and provide informational materials. The Stand Down is a one day event designed to provide services and information to all veterans in the Western New York area. In 2022 there will be four dates and locations to serve all veterans in the Western New York area.

The Stand Down was a principle first introduced during the Vietnam War. It was designed to give those military personnel on the front lines of battle an opportunity to experience a place of safe haven and rest. We invite you, our veterans, to join us for a day where your needs can be met...where you can experience rest and camaraderie with fellow servicemen and women.

For More Information or to Request Accommodations
(Requests Required 1-Week in Advance):
Liam McMahon - (716) 853-3087 (ext. 257)
lmcmahon@elderjusticenyc.org