

Perhaps no nursing home in the U.S. – or the world – has ever received more attention than Life Care Center of Kirkland (Life Care), located in Kirkland, Washington.

Recall that Life Care was the “index” skilled nursing facility regarding the outbreak of COVID-19. It was the first nursing facility with a reported outbreak of COVID-19 in the U.S. and, as far as is known, in the world.

This article describes the legal aftermath of that self-reported outbreak; the governments’ (both federal and State) response; and the decision of a State Administrative Law Judge (ALJ) regarding whether the enforcement actions the government imposed were legally sufficient and supportable.

## Brief Background

The background is largely undisputed. The relevant timeframe is February and March of 2020. After seeing an unusual number of residents display respiratory symptoms, including fevers, on February 26, 2020, Life Care’s infection control nurse reported a possible outbreak to the King County Department of Health. According to the official transcript, the County did not return the nurse’s call that day, so she called again the next day.

The same day the infection control nurse first notified the Department of Health, she spoke with Life Care’s Director of Nursing and its Administrator, and a memo was sent to all staff indicating that the dining room would be closed. The memo reinforced the need to wipe down equipment and noted that group activities were cancelled. All staff were encouraged to stay home and seek medical attention for any flu-like symptoms. The memo also reminded staff to complete hand hygiene before and after patient care and continue implementing Life Care’s flu protocol where appropriate.

Notably, at the time of the February outbreak, Life Care was rated a “Five-Star” nursing facility by the Centers for Medicare and Medicaid Services (“CMS”), the government’s highest score, which meant that it was “much above average.”

Both state and federal surveyors investigated Life Care between March 6 and March 16, 2020. An additional survey was conducted on March 26, 2020. As surveyors typically do, they interviewed facility staff, reviewed residents’ medical records and facility documents, and inspected various areas of the facility.

Based on the findings of the survey, the Washington Department of Social and Health Services (“Department”) issued two enforcement actions on April 1, 2020, a Stop Placement of Admissions Order and conditions on Life Care’s license. Those enforcement actions were appealed and the ALJ’s decision is explained below.

## The Appeals

There are actually two separate but related appeals. CMS imposed a civil money penalty of \$611,325 alleging that “immediate jeopardy” level deficiencies existed at Life Care from February 12, 2020, through March 27, 2020. Life Care appealed the CMS enforcement action. That appeal will not be heard until April 2021. Thus, this article addresses only the Washington State enforcement actions of the Stop Placement of Admissions Order and license conditions.

As the State ALJ noted, the issues he had to decide were:

1. Did Life Care Center of Kirkland violate applicable regulations as alleged in the Statements of Deficiencies dated March 26, 2020, and an April 1, 2020, letter entitled Imposition of a Stop Placement and Conditions on a License, under appeal?
2. Did the Department abuse its discretion in imposing the stop placement of admissions?
3. Did the Department abuse its discretion in imposing the conditions on the license?

ALJ Matt Perkins presided over the Hearing in this matter from June 15 through June 18, 2020. Both Life Care and the State were represented by experienced counsel. The most significant and far-reaching issue was whether the Department abused its discretion in imposing the “Stop Placement of Admissions Order.” As noted below, the ALJ determined that the Department indeed “abused its discretion.”

## The Findings of Fact

Below, are some of the key findings (verbatim) that the ALJ made. They clearly punch a gaping hole in much of the State’s case.

Although the Department alleged that Life Care should have informed the Department earlier, the ALJ agreed with Life Care’s medical experts that “It is common for there to be an outbreak of respiratory disease in a nursing home in winter months, and there is no information to suggest that what they [nursing staff] saw prior to the middle of February 2020 was in some way notably different from what they saw in prior years. The symptoms they observed were rather variable and had not been specifically associated with COVID-19.”

The Department alleged that Life Care delayed in reporting the outbreak. However, the ALJ opined that, again, based on uncontroverted expert medical testimony, “Dr. Katz testified that it would have been reasonable to observe the patients for up to a few weeks in an effort to try to determine what was going on. The evidence does not indicate that [Life Care] could or should have identified the outbreak sooner than they did.”

Moreover, the experts testified that, “A cluster of pneumonia cases, without further indicia of concern, would not be expected to be reported.” Additionally, the ALJ held that “The Department presented no testimony or other evidence to indicate there was any undue delay.”

The Department alleged, “[Life Care’s] response to the outbreak was inadequate because, due to systemic problems, they failed to secure adequate physician and general staff coverage, failed to provide the care their patients required, and failed to contain the outbreak.” The ALJ rejected this contention as well, noting, “the Department presents no evidence of what else they may have done that would have changed the outcomes for their patients.” Further, the ALJ added, “The Department has not shown that their response in terms of their management of the crisis was inadequate.”

Where the allegation was that Life Care “did not consistently perform assessments and sent patients to the hospital without adequate documentation,” the ALJ concluded, “The Department has not shown that assessments were neglected.”

Another allegation was that Life Care “failed to engage in contingency planning to address the situation where the outbreak would require services and interventions beyond their capability.” As with so many of the allegations against Life Care, the ALJ rejected this allegation by concluding, “There is no clear evidence of what the facility could or should have done differently in this regard.”

The above represents only a representative and truncated sampling of the allegations and how the ALJ analyzed and addressed them.

## The Decision

After hearing and weighing all the evidence, including direct and cross-examination testimony and the volumes of exhibits admitted into evidence, the ALJ concluded that Life Care violated some of the regulations which justified the conditions placed on its license. Incidentally, those conditions consisted of retaining an infectious disease expert, which Life Care did. Notably, the expert infectious diseases expert, Dr. Hashisaki, testified at the hearing on behalf of Life Care. Another medical expert, Dr. Morgan Katz, an assistant professor at Johns Hopkins University, also testified on behalf of Life Care.

As to the more significant legal issue, the ALJ determined that “the Department abused its discretion in imposing the stop placement of admissions.” Consequently, the ALJ reversed that action.

## What’s Next?

Technically, a dissatisfied party has 21 days to appeal the ALJ’s decision. It remains to be seen if such an appeal will occur. There is a high legal burden to overturn the ALJ’s findings of facts and conclusions of law.

On the other hand, there is the federal appeal of the \$611,325 civil money penalty that CMS imposed. That hearing, which was “expedited,” is scheduled for April of 2021. No doubt CMS and its attorneys will scrutinize the decision and findings noted above and decide if it wants to defend its action or withdraw the enforcement remedy. If I were still representing CMS, I know what my recommendation would be.

## Epilogue

Much has been written in the aftermath of the Life Care tragedy where more than 40 residents died from COVID-19. However, when a facility is being held to standards that simply did not exist at a prior time, it appears to some that the facility is being scapegoated in a post hoc manner. The punishment should fit the crime, as the old adage goes. But what if there is no crime?

As late as February 24, 2020, only several hundred miles south of Life Care Center of Kirkland, Speaker of the House Nancy Pelosi (D-CA) toured San Francisco’s Chinatown and encouraged people to “Come, because precautions have been taken. The city is on top of the situation.” Also in February 2020, New York City Council Speaker Corey Johnson stated, “But those fears [of coronavirus] are not based on facts and science. The risk of infection to New Yorkers is low.” Speaker Johnson added, “There is no need to avoid public spaces. I urge everyone to dine and shop as usual.”

Likewise, the mayor of New York City in a press conference on March 10, 2020, stated, “if you’re not sick, you should be going about your life.” It wasn’t until the next day, March 11, that the WHO declared a COVID-19 pandemic. That was weeks after Life Care reported its first case to local public health authorities and took appropriate action.

The point above is not to disparage any government official or the WHO. Rather, it is to illustrate how little was actually known about COVID-19’s transmissibility on February 26, 2020, the day Life Care’s infection control nurse first reported the outbreak of an unusual – and, at that point, unidentified – respiratory disease.

It’s easy to point fingers in hindsight, but is it fair to hold anyone accountable for not complying with standards that did not exist at the time?