

# **Protection of Legal Rights: Protections for Nursing Home, Assisted Living and CCRC Residents**

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## **I. NURSING HOME RESIDENTS**

### **General Protections**

Nursing home residents are provided with statutory protections under both federal and New Jersey state law.

Federal protections to nursing home residents are provided by statute and regulation, under the Nursing Home Reform Act ("NHRA").<sup>1</sup> The NHRA requires nursing homes that participate in Medicare or Medicaid to provide various patient rights.<sup>2</sup>

In New Jersey, nursing home residents are also provided with protections under statutes and regulations.<sup>3</sup> In addition, New Jersey has established the New Jersey Office of the Ombudsman for the Institutionalized Elderly to preserve and promote residents' rights.<sup>4</sup>

Federal law requires a nursing home to "care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life" and "dignity and respect in full recognition of his or her individuality."<sup>5</sup>

Nursing home residents are guaranteed the right of self-determination and participation, including the right to choose activities and health care that are consistent with the residents' interests or care plans.<sup>6</sup> They may interact with others of their choosing, both within and outside the nursing facility; and they may make decisions about significant aspects of their lives.<sup>7</sup> Residents, along with their families, are permitted to participate in developing and implementing the residents' care plans.<sup>8</sup>

Residents must be permitted to participate in resident and family groups, and be provided with private space to do so.<sup>9</sup> As long as they do not interfere with other residents' rights, nursing home residents are granted the right to participate in "social, religious, and community activities" of their choosing.<sup>10</sup>

Residents have the right to receive reasonable accommodation of their needs or preferences, assuming other residents' health or safety would not be put at risk. Residents must be given a "safe, clean, comfortable, and home-like environment, allowing [them] to use ... personal belongings to the extent possible," as well as

housekeeping services to maintain a "sanitary, orderly and comfortable" residence.<sup>11</sup>

Quality of care is protected by the mandate that the facility ensure that residents' abilities in activities of daily ("ADLs") living do not decline, except when such decline is clinically unavoidable; and the facility must ensure that residents who cannot carry out their ADLs receive "the necessary services to maintain good nutrition, grooming, and personal and oral hygiene."<sup>12</sup> If residents need assistance with eating, New Jersey regulations require that, for each meal, staff is assigned to assist those residents.<sup>13</sup>

In addition, nursing home residents have the right to be free "from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat ... medical symptoms."<sup>14</sup>

Nursing home residents are guaranteed the right of privacy,<sup>15</sup> and the right "to exercise ... rights as a resident of the facility and as a citizen or resident of the United States." This includes the right to "be free of interference, coercion, discrimination, and reprisal from the facility in exercising his or her rights."<sup>16</sup> Notably, in the case of incapacitated residents, those rights are to be exercised by the guardian or other fiduciary appointed to act on the resident's behalf.<sup>17</sup> Residents are also guaranteed freedom from discrimination based upon age, race, religion, sex or national origin.<sup>18</sup>

Residents must be given equal access to quality care, regardless of whether their care is paid for privately or by Medicaid.<sup>19</sup>

The facility is prohibited from requiring residents to represent that they are not eligible for Medicare or Medicaid, or that they will not apply for those benefits. The facility is also prohibited from requiring a third-party guarantee of payment as a condition for a resident's admission, expedited admission, or continued stay at the facility.<sup>20</sup>

The nursing home resident has the right, upon request, to access all nursing home records relating to that resident within 24 hours, and to purchase a copy of those records upon 2 business days' notice, at no greater than the "community standard" cost.<sup>21</sup>

### **Protections Against Involuntary Discharge**

With respect to involuntary discharge of a resident, the facility may not discharge the resident except under the following circumstances:

The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;

The transfer or discharge is appropriate because the resident's health has improved sufficiently so that the resident no longer needs the services provided by the facility;

The safety of individuals in the facility is endangered;

The health of individuals in the facility would otherwise be endangered;

The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility...; or

The facility ceases to operate..<sup>22</sup>

When the nursing facility intends to discharge a resident, it must give the resident and a family member or representative at least 30 days' written notice, except in limited cases such as where a health or safety issue necessitates otherwise, and the notice must include the reason(s) for the action.<sup>23</sup> Moreover, the facility "must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility." *Id.*

In addition, New Jersey law also prohibits a Medicaid beneficiary (or an individual who "is awaiting resolution of Medicaid eligibility") from being involuntarily transferred for non-payment, as long as the applicant's income is paid as set forth in N.J.A.C. 8:85-1.10. Involuntary transfers are prohibited unless "adequate alternative placement" is available.<sup>24</sup>

In sum, nursing home residents are provided with substantial federal and state protections against involuntary discharge. Unfortunately, as reported in a recent Wall Street Journal article, those protections are often difficult to enforce, and proving federal or state violations can be difficult and costly. As the article notes, formal complaints regarding nursing home evictions have doubled over ten years, and "although facilities 'rarely roll evicted residents out to the curb,' they often 'transfer [residents] to another nursing home or send them to a hospital or psychiatric facility for observation and then refuse to take them back.'"<sup>25</sup>

## **II. ASSISTED LIVING FACILITY RESIDENTS**

### **General Protections**

The main source of federal protection regarding quality of care for assisted living facility ("ALF") residents is the Keys Amendment, 42 U.S.C. §1382e(e), which is "widely considered to be a meaningless failure."<sup>26</sup> Thus, an assisted living facility's practices with respect to its residents is largely defined by contract, rather than by law or regulation.<sup>27</sup>

In New Jersey, the licensing regulations set forth in N.J.A.C. 8:36-1.1 et seq. require that a statement of residents' rights be posted. The resident's rights include the right: to receive care "that addresses the resident's changing physical and psychosocial status"; to "independence and individuality;" "to be treated with respect, courtesy, consideration and dignity," to have family and friends

participate in the resident's care plan; to "be free from chemical and physical restraints" unless used for a limited period of time to protect against injury; to participate in social or religious activities of the resident's choice; and to exercise all "Constitutional, civil and legal rights" afforded to the resident under the law.<sup>28</sup>

### **Protections Against Involuntary Discharge**

With respect to involuntary discharge, residents are entitled to 30 days' advance written notice, except in the case of emergency, or if the resident is being discharged because the resident requires a level of care higher than that which the facility can provide.<sup>29</sup> Transfers may only be in accordance with the terms of the facility's admission agreement, and only as permitted under N.J.A.C. 8:36-5.1(d).

N.J.A.C. 8:36-5.1(d), in turn, provides that an involuntary discharge "shall only be upon grounds contained in the facility's or program's policies and procedures." Thus, the protections that are afforded to nursing home residents with respect to involuntary discharges are notably lacking in the area of assisted living facilities. However, commentators note that federal law, such as the Americans with Disabilities Act or the Fair Housing Amendments Act of 1988, may provide a resident with recourse against an involuntary discharge that is otherwise permissible under state law.<sup>30</sup>

In order to assist consumers, the use of an Assisted Living Disclosure form is being proposed in New Jersey, in which the facility must identify its policies in a uniform format, including its discharge policies and what "higher level of care" criteria, in particular, the facility will consider a basis for involuntary discharge.

### **III. CCRC RESIDENTS**

The primary source of regulation of continuing care retirement communities ("CCRCs") is state law. However, for example, a nursing facility within a CCRC must comply with federal nursing home laws and regulations governing issues such as quality of care, admission and discharge.<sup>31</sup> Likewise, state licensing requirements for assisted living facilities apply to assisted living facilities within a CCRC.<sup>32</sup>

New Jersey enacted the Continuing Care Retirement Community Regulation and Financial Disclosure Act,<sup>33</sup> with a corresponding regulatory framework,<sup>34</sup> the primary emphasis of which focuses on the CCRC's financial stability.<sup>35</sup> However, that Act has been interpreted as protecting residents from involuntary discharges at the whim of a CCRC, and guarantees residents the right to a "plenary hearing" in the event of a threatened discharge.<sup>36</sup>

A CCRC resident's rights were discussed in the New Jersey Supreme Court case of *Seabrook Village v. Murphy*<sup>37</sup>. The *Seabrook Village* case held that a CCRC

resident can be discharged involuntarily only if the facility establishes "just cause," as defined in N.J.S.A. 52:27D-344d and N.J.A.C. 5:19-6.5(c).

#### IV. CONCLUSION

In sum, the federal and state rights afforded to long-term care facilities varies widely, depending upon the type of facility (nursing home, assisted living facility or continuing care retirement community). Moreover, even where protections are strong "on paper,"<sup>38</sup> enforcing those rights may be difficult. It is for these reasons that consumers are well-advised to thoroughly research a facility prior to admission. ■

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<sup>1</sup> 42 U.S.C. §1395i-3, 42 U.S.C. §1396r; 42 C.F.R. §483. see Carlsen, E., *Long-Term Care Advocacy*, §2.02[2] (2005); Begley, T. and Jeffreys, J., *Representing the Elderly Client: Law and Practice*, §3.02[A] (Aspen 2008).

<sup>2</sup> *Id.*; Frolik, L. and Brown, M., *Advising the Elderly or Disabled Client*, 15.02[1] (2d ed. 2003).

<sup>3</sup> N.J.S.A. 30:13; N.J.A.C. 8:39-1 *et seq.*; 8:85-1 *et seq.*

<sup>4</sup> See N.J.S.A. 52:27G-1.

<sup>5</sup> 42 C.F.R. §483.15. See also N.J.S.A. 30:13-5; N.J.A.C. 8:39-4.1.

<sup>6</sup> 42 C.F.R. §483.15; N.J.A.C. 8:39-4.1.

<sup>7</sup> 42 C.F.R. §483.15.

<sup>8</sup> N.J.A.C. 8:39-13.2.

<sup>9</sup> 42 C.F.R. §483.15.

<sup>10</sup> *Id.*; N.J.S.A. 30:13-5; N.J.A.C. 8:39-4.1.

<sup>11</sup> *Id.*

<sup>12</sup> 42 C.F.R. §483.25; see N.J.A.C. 8:39-4.1.

<sup>13</sup> N.J.A.C. 8:39-17.3.

<sup>14</sup> 42 C.F.R. §483.13. See also N.J.S.A. 30:13-3; N.J.A.C. 8:39-4.1.

<sup>15</sup> N.J.S.A. 30:13-5.

<sup>16</sup> 42 C.F.R. §483.10.

<sup>17</sup> *Id.*

<sup>18</sup> N.J.A.C. 30:13-3.

<sup>19</sup> 42 C.F.R. §483.12.

<sup>20</sup> 42 C.F.R. §483.12.

<sup>21</sup> 42 C.F.R. §483.10.

<sup>22</sup> 42 C.F.R. §483.12.

<sup>23</sup> *Id.*

<sup>24</sup> N.J.A.C. 8:85-1.10. See also N.J.A.C. 8:39-4.1.

<sup>25</sup> Quoted in Elder Law Answers, [www.elderlawanswers.com/resources/article.asp?id=7089&Section=4&state=](http://www.elderlawanswers.com/resources/article.asp?id=7089&Section=4&state=)

<sup>26</sup> Carlsen, E., *Long-Term Care Advocacy*, §5.04[2] (2005).

<sup>27</sup> *Id.* at §5.07.

<sup>28</sup> N.J.A.C. 8:36-4.1.

<sup>29</sup> *Id.*; N.J.A.C. 8:36-5.1(d), 5.14(a).

<sup>30</sup> Carlsen, E., *Long-Term Care Advocacy*, §5.06 (2005).

<sup>31</sup> Carlsen, E., *Long-Term Care Advocacy*, §6.03 (2005).

<sup>32</sup> Begley, T., and Jeffreys, J., *Representing the Elderly Client*, at §3.09[B] (Aspen 2008).

<sup>33</sup> N.J.S.A. 52:27D-330.

<sup>34</sup> N.J.A.C. 5:19-1.1 *et seq.*

<sup>35</sup> *Seabrook Village v. Murphy*, 371 N.J. Super. 319 (2004).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Elder Law Answers, [www.elderlawanswers.com/resources/article.asp?id=7089&Section=4&state=](http://www.elderlawanswers.com/resources/article.asp?id=7089&Section=4&state=)