

Elder Care Neglect & Abuse

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Ways to ID Abuse and/or Neglect:

Look -

- Is resident well cared for?
- Has resident lost weight?
- Does resident have bruises or bed sores?

Listen –

- What is the resident saying? Complaints?
- Do you hear staff engaging in verbal abuse?
- Is the resident no longer interested in pursuing activities he/she used to participate in?

Smell -

- Is there a urine odor in the resident's room?
- Are there foul smells in the resident's room?



Statutes and Regulations Protecting NH Residents:

- Federal Law – **The Nursing Home Reform Act (OBRA 1987)** – (42 USC§1395i-3, 1396 r) – Congress passed and President Reagan signed new law. (1987)
- Federal Regulations – Department of Health and Human Services – **42 CFR Part 483** – established specific standards and regulations governing nursing home care.
- New York State Statutes – Public Health Law Article 28 (**PHL§2801-d** – private right of action for violation of rights).
- New York State Regulations:
 - **10 NYCRR Part 415** – Nursing Homes
 - **18 NYCRR Parts 487 – 490** – Adult Homes
 - Regulations Governing Home Care

New York State Public Health Law §2801-d(1):

- “Any residential health care facility that deprives any patient of said facility of *any right or benefit, ..., shall be liable* to said patient *for injuries suffered* as a result of said deprivation, except as hereinafter provided.”
- “For purposes of this section a “right or benefit” of a patient of a residential health care facility shall mean any right or benefit created or established for the well-being of the patient by the terms of any contract, by any *state* statute, code, *rule or regulation* or by any applicable federal statute, code, rule or regulation,...”
- Once injury sustained by patient, for facility not to be liable, they must plead and prove that they exercised *all care reasonably necessary* to prevent and limit the injury.

Immunity Legislation:

On March 23, 2020, Governor Cuomo issued **Executive Order 202.10** that afforded all physicians, physician assistants, nurse practitioners and nurses immunity from civil liability for any injury or death alleged to have been sustained as a result of an act or omission by such medical professional in the course of providing medical services in support of the State's response to the COVID-19 outbreak, unless it is established that such injury or death was caused by the *gross negligence* of such medical professional.

The NYS Legislature then passed the **Emergency or Disaster Treatment Protection Act** on April 2, 2020 that in essence expanded Governor Cuomo's Executive Order regarding immunity to include "health care facilities", which were defined to include nursing homes, and "health care professionals", which were defined to include nursing attendants and certified nurse aides. Immunity was also now afforded for criminal liability and for "arranging for" health care services with this Act.

Immunity Legislation: (Continued)

On August 3, 2020, the Governor signed the **NYS Legislature's Bills (S. 8835/A.10840)** into law, thereby *amending* the immunity provisions that were enacted in the Emergency or Disaster Treatment Protection Act. Immunity will now be limited to healthcare professionals/facilities providing diagnosis or treatment/care for *confirmed and suspected COVID-19 patients*, and will not apply to the *prevention of COVID-19*, the care of *non-COVID patients* or the *arranging* of healthcare services.

This legislation took effect immediately and applies prospectively to cases accruing after its enactment.

On the Federal level, **Senators Cornyn and McConnell** have introduced an *extreme* COVID-19 Immunity Bill, and were pushing to include this Bill in the next stimulus bill. Prior to the election, it did not appear to be moving. It would be catastrophic if passed.

Analysis:

- The standard of good and accepted nursing home care, under the Federal and New York State regulations, involves a repetitive analysis:
 - Did the home fulfill its duty to properly **assess** the resident and the resident's risks for certain injuries?
 - After assessment, was a proper **plan of care** (or care plan) designed?
 - Did the "care plan" call for appropriate **interventions** to avoid or lessen the specific risk of injury?
 - Was the "care plan" actually **implemented**?
 - Was the "care plan" appropriately **updated and kept current**?
 - After a passage of time; or
 - Due to intervening changes of condition; or
 - Due to incidents of injuries to the resident.

WHAT types of **cases** do we handle?

- “We just found out that mom developed these terrible **bed sores** at the nursing home”
- “We never saw them”
- “The nurse at the hospital just told us about them”



Federal Regulations

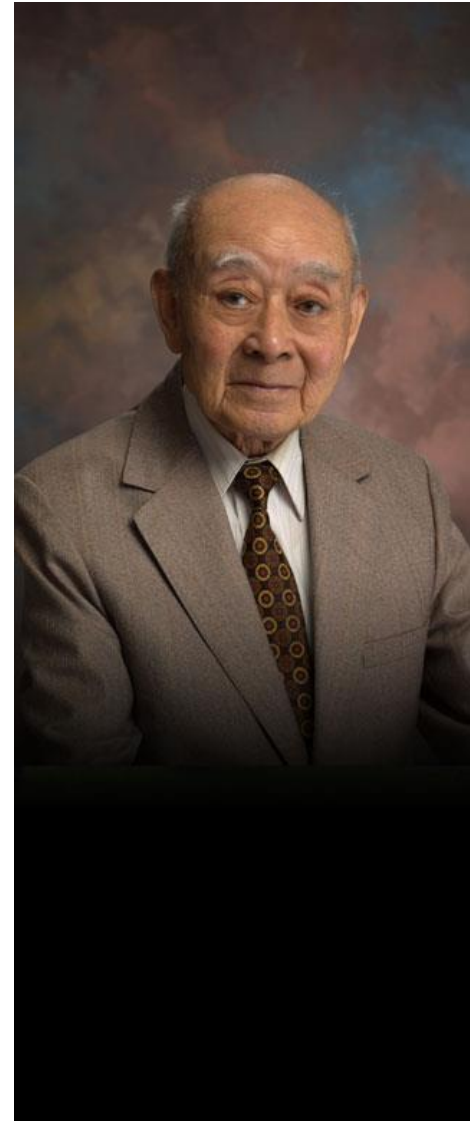
Treatment/Services to Prevent/Heal Pressure Ulcers [42 CFR 483.25(b)(1), F-686]

*Based on the comprehensive assessment of a resident, the facility must **ensure** that:*

- *A resident receives care, consistent with professional standards of practice, to prevent pressure ulcers and does not develop pressure ulcers unless the individual's clinical condition demonstrates that they were unavoidable; and*
- *A resident with pressure ulcers receives necessary treatment and services, consistent with professional standards of practice, to promote healing, prevent infection and prevent new ulcers from developing.*

WHAT types of **cases** do we handle?

- “Dad just **fell and fractured his hip**”
- “They called us three times in the past month about dad falling”
- “Dad had bruises on his legs”
- “Dad had bruises on his face”



Federal Regulations

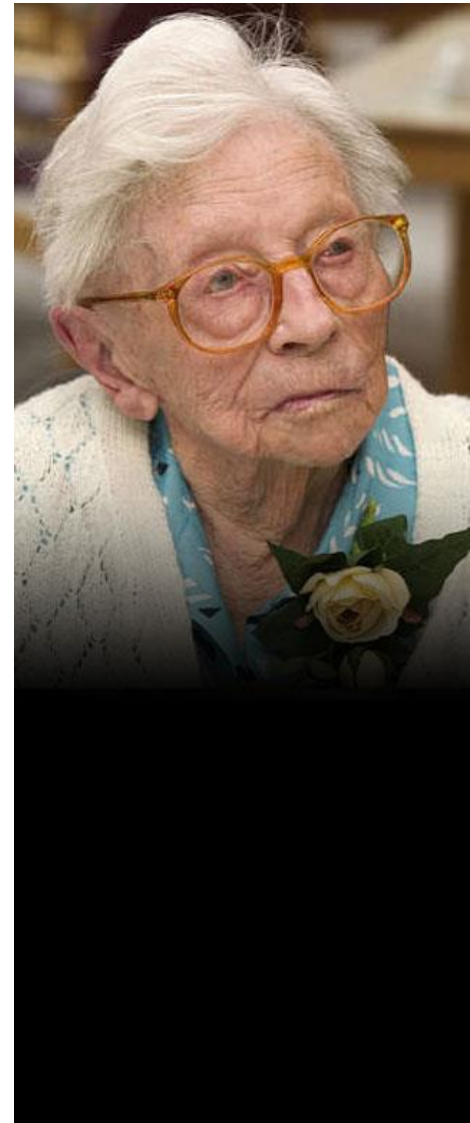
Free of Accident Hazards/Supervision/Devices [42
CFR 483.25(d), F-689]

Accidents. The facility must **ensure** that—

- (1) The resident environment remains as free of accident hazards as is possible; and
- (2) Each resident receives adequate supervision and assistance devices to prevent accidents.

WHAT types of **cases** do we handle?

- “My aunt has **lost 30 pounds** and has no energy”
- “She can barely move now”
- “She is **dehydrated** and has kidney damage”



Federal Regulations

Maintain Nutrition Status Unless Unavoidable [42
CFR 483.25(g), F-692]

Based on a resident's comprehensive assessment, the facility must ensure that a resident:

- (1) Maintains acceptable parameters of nutritional status, such as usual body weight or desirable body weight range and electrolyte balance, unless the resident's clinical condition demonstrates that this is not possible or resident preferences indicate otherwise;*
- (2) Is offered sufficient fluid intake to maintain proper hydration and health; and*
- (3) Is offered a therapeutic diet when there is a nutritional problem and the health care provider orders a therapeutic diet.*

New York State Public Health Law §2801-d(5)

Will a recovery in a lawsuit impact future Medicaid eligibility?

Medicaid

- The amount of any damages recovered by a patient, in an action brought pursuant to this section shall be *exempt for purposes of determining initial or continuing eligibility for medical assistance* under title eleven of article five of the social services law; and
- Shall neither be taken into consideration nor required to be applied toward the payment or part payment of the cost of medical care or services available under said title eleven.

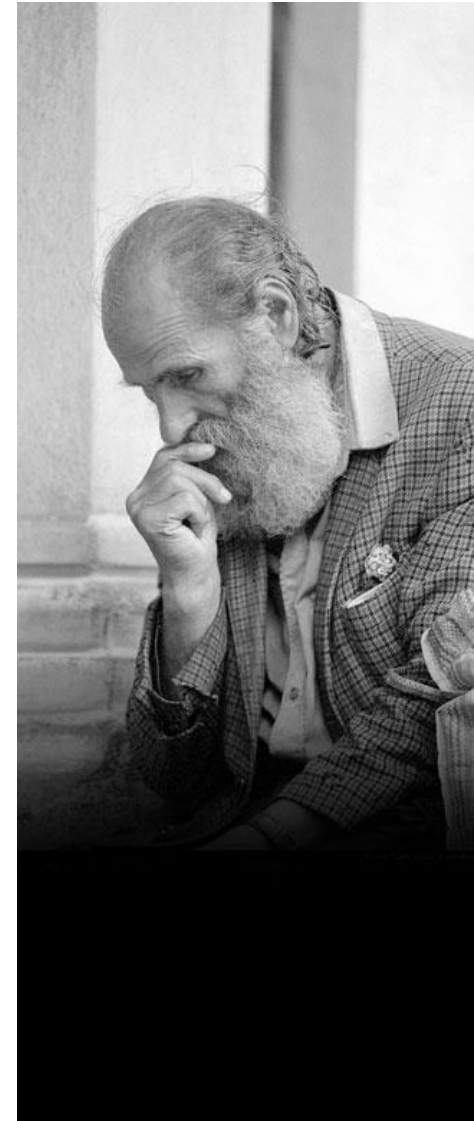
New York State Public Health Law §2801-d(10)

- No person shall discriminate against any *patient* of a residential health care facility because such patient has brought or caused to be brought any action pursuant to this section
- Or against any patient or *employee* of a residential health care facility because such patient or employee has given or provided or is to give or provide testimony or other evidence for purposes of said action
- This is the “Whistle blower protection”

Ways to **prevent** Abuse and Neglect

What we advise families of residents to do:

- Be *involved* in the resident's care; *ask questions*.
- *Don't leave the room* when the resident is being changed.
- Find out about the *resident's diet, activities and medications*.
- Ask for *meetings* with the Director of Nursing if you don't feel the resident is being properly cared for.
- *Visit resident* as often as possible.
- Review www.Medicare.gov and www.profiles.health.ny.gov to find out the history of complaints/inspections involving a facility and quality indicators before a loved one is admitted.



How can we work together to **improve the quality of care** in nursing homes?

- Residents and their families need to be empowered and to know the rights and services available to them;
 - i.e. **Ombudsman Program, Family Councils, Filing Complaints with the DOH and Medicaid Fraud Control Unit, and pursuing PHL §2801-d claims.**
- The more PHL §2801-d and all of the rights and services available to families are utilized, the greater the likelihood that facilities will improve their quality of care.

Our **Goals:**

- *Systemic changes* at facilities so abuse or neglect does not happen to someone else (our clients specifically ask for this).
- To *improve* the overall quality of care for residents.
- *Maximize compensation* for injured residents or their families.
- We also welcome residents and their families to contact us, and to view our website: www.YourNYAdvocate.com where we have many frequently asked questions regarding Neglect and Abuse and other topics.
- By *empowering residents and their families* to hold nursing homes accountable, this will increase the likelihood that the quality of care will improve.

For further information:

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Thank you for your time and attention!