

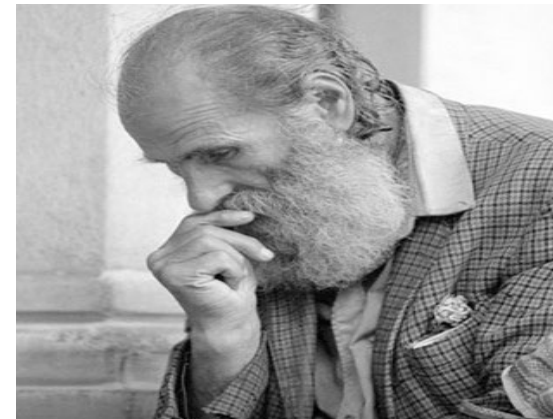
Senior Law Day Collaborative

THE RIGHTS OF NURSING HOME RESIDENTS AND THEIR FAMILIES AMIDST THE COVID-19 PANDEMIC

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Statutes and Regulations Protecting NH Residents:

- Federal Law – **The 1987 Nursing Home Reform Act** – (42 USC§1395i-3, 1396 r) – The basic objective is to ensure that residents of nursing homes receive **quality care** that will result in their achieving or maintaining their "highest practicable" physical, mental, and psychosocial well-being. Established a **survey/certification process w/enforcement**. (Updated 2016)
- 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
 - **10 NYCRR Part 100** – Assisted Living Residences
 - **10 NYCRR Parts 763 & 766** – Home (Health) 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.

THE INSTITUTION IS LIABLE FOR ALL INJURIES SUFFERED WHERE THERE IS A VIOLATION OF A NEW YORK STATE RULE or REGULATION or VIOLATION OF FEDERAL REGULATIONS

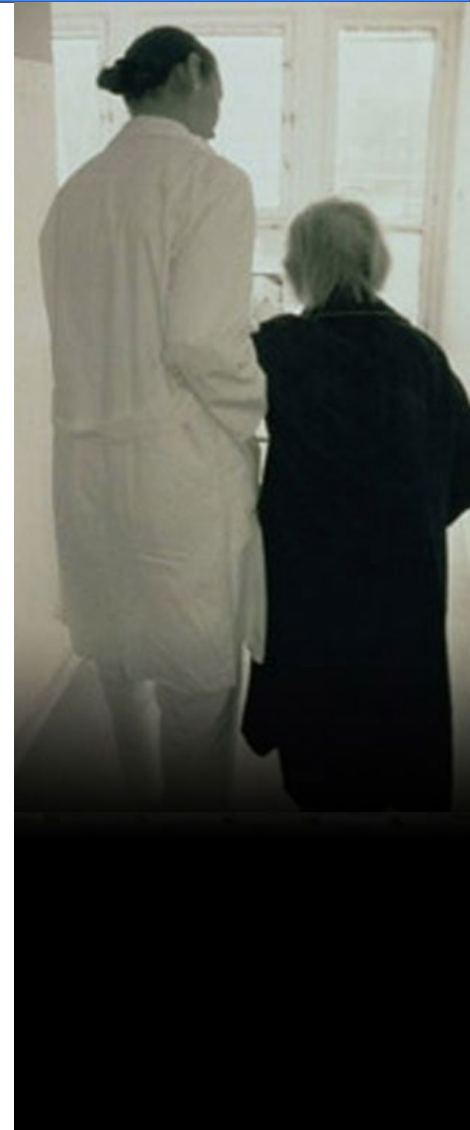
Analysis:

- 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.

New York Codes, Rules and Regulations

Regulation 10 NYCRR 415.12 **Quality of Care**

Each resident must receive and facility must provide the **necessary care and services** to attain or maintain the **highest practicable physical, mental and psychosocial well-being**, in accordance with the comprehensive assessment and plan of care subject to the resident's right of self-determination.



New York Codes, Rules and Regulations

Regulation 10 NYCRR 415.12 **Quality of Care**

- (c) **Pressure sores.** Based on the comprehensive assessment of a resident, the facility shall *ensure* that:
- (1) a resident who *enters the facility without pressure sores* does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable *despite every reasonable effort to prevent them*; and
 - (2) a *resident having pressure sores* receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing

New York Codes, Rules and Regulations

Regulation 10 NYCRR 415.12 **Quality of Care**

(h) **Accidents**. The facility shall *ensure* that:

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

New York Codes, Rules and Regulations

Regulation 10 NYCRR 415.12 **Quality of Care**

- (i) **Nutrition**. Based on a resident's comprehensive assessment, the facility shall *ensure* that a resident:
 - (1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible; and
 - (2) Receives a therapeutic diet when there is a nutritional problem.
- (j) **Hydration**. The facility shall provide each resident with sufficient fluid intake to maintain proper hydration and health

Tips During and After The COVID-19 Pandemic

- Utilize **any visitation methods** available, i.e. indoor visits, window visits, different internet apps that offer video visits, phone calls.
- **Don't leave the room** when the resident is being changed.
- Be **involved** in the resident's care; **ask questions**.
- Ask to attend **care plan meetings**, by phone or internet app. during pandemic.
- Ask for a **copy of the care plan**.
- Ask for a **list of medications** resident has been prescribed. Ask about resident's **diet** and **activities**.
- **Look, Listen** and **Smell** while visiting.

Tips During and After The PANDEMIC (CONT'D)

- Ask for a meeting with the **Director of Nursing** or **Administrator** if you feel the resident isn't being properly care for.
- Go with your **"gut instinct"** if you feel something is wrong with resident.
- A Health Care Agent, Guardian of Person or Surrogate under the Family Health Care Decisions Act can request that resident be **transferred to a hospital**.
- Enlist the help of the **Long Term Care Ombudsman Program** if you are not getting adequate responses from staff at nursing home. The number for Westchester County Ombudsman is: **(914) 500-3406**.
- Participate in the **Family Council** at the facility.
- 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. Make sure to look at the **"staffing"** ratings.

How to File a Complaint if Neglect or Abuse Occurs at a Nursing Home:

NYS Department of Health:

- Call the **Nursing Home Complaint Hotline** at **1-888-201-4563**.
- Fill out the **Nursing Home Complaint Form** online at www.health.ny.gov.
- Print out the **Nursing Home Complaint Form** and do one of the following:
 - **Fax** the Complaint form to: 518-408-1157
 - Scan the form and **E-mail** to: nhintake@health.ny.gov
 - **Mail** the Complaint form to:

NYSDOH DRS/SNHCP
MAILSTOP: CA/LTC
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12237

Medicaid Control Fraud Unit of the NYS Attorney General's Office:

- Call the **General Help Line** at **(800)771-7755** or the **Medicaid Fraud Control Unit** at **212-417-5397**.
- Fill out the **Medicaid Fraud Control Unit Complaint Form** online at www.ag.ny.gov/nursinghomes.

Ways to Identify Neglect and/or Abuse

Look -

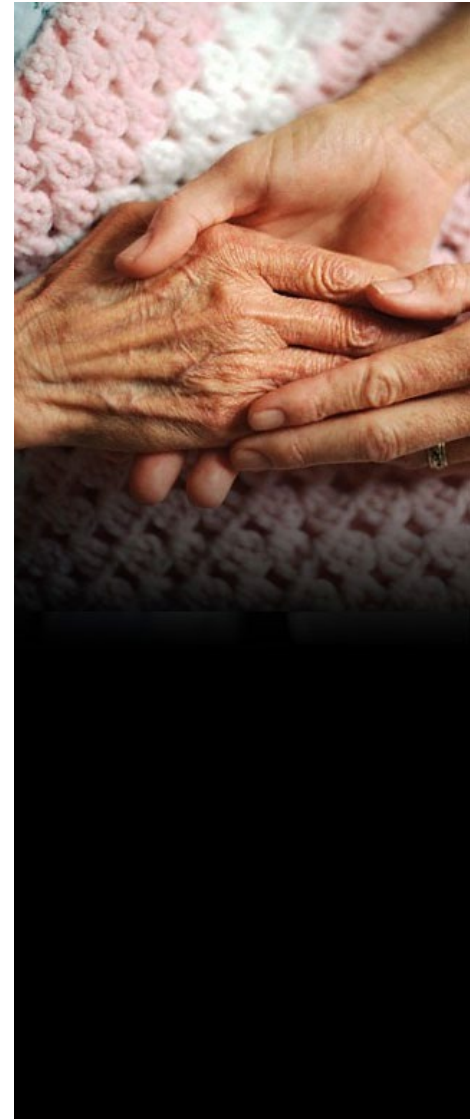
- Is resident well cared for?
- Has resident lost weight?
- Does resident have bruises or bed sores?

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?



Immunity Legislation in New York State:

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 in New York State: (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.

Visitation During The COVID-19 Pandemic:

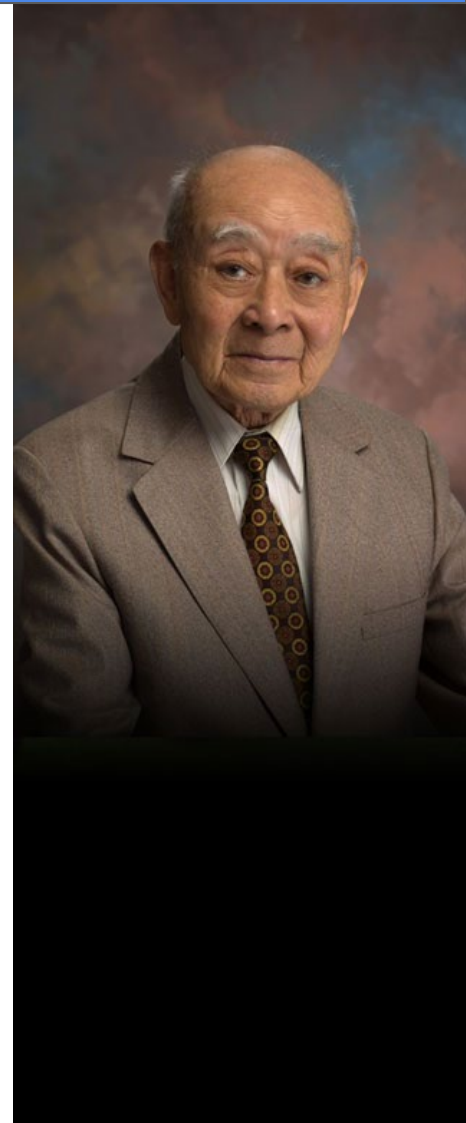
CMS and NYSDOH Guidelines

Center for Medicare & Medicaid Services (CMS) issued **new nursing home guidelines** on *September 17, 2020* that superseded and replaced previously issued guidance and recommendations regarding visitation. The **New York State Department of Health** (NYSDOH) also released **new guidelines** on *September 15, 2020*. There are some discrepancies between the CMS and NYSDOH guidelines.

The purpose of this guidance was to provide **reasonable ways** a nursing home **can safely facilitate in-person visitation** to address the psychosocial needs of residents.

CMS allows both **indoor** and **outdoor visitation**; however, regardless of the type of visitation, the following **Core Principles of COVID-19 Infection Prevention** must be met, including:

- Screening of all who enter the facility for signs and symptoms of COVID-19, and denial of entry of those with signs or symptoms
- Hand hygiene
- Face covering or mask
- Social distancing at least six feet between persons



Visitation During The COVID-19 Pandemic: (Continued)

Outdoor Visitation:

As per CMS, **outdoor visitation is preferred**. Therefore, all visits should be held outdoors whenever practicable. Aside from weather considerations, an individual resident's health status (e.g. medical condition(s), COVID-19 status), or a facility's outbreak status, outdoor visitation should be facilitated **routinely**.

Indoor Visitation:

As per the CMS guidance, facilities should **accommodate and support indoor visitation**, including visits for reasons beyond compassionate care situations, based on several specific guidelines, including, that there has been **no new onset of COVID-19 cases in the last 14 days** and **the facility is not currently conducting outbreak testing**. In addition, if the county's **positivity rate is over 10%**, indoor visitation should only occur for compassionate care situations.

Note: The **CMS guidelines allow for in-room visitation** if the resident does not have a roommate and with a roommate if the resident's health status prevents them from leaving room if the core principles of COVID-19 infection prevention are adhered to. The **NYSDOH guidelines strictly prohibit in-room visitation** except if the resident is bed bound or for end of life visits.

Visitation During The COVID-19 Pandemic: (Continued)

Testing:

CMS does **not require visitors to be tested**. However, they encourage facilities in medium or high-positivity counties to test visitors, if feasible. NYSDOH **requires visitors to present a verified negative test result within the last week (7 days)**.

Compassionate Care Visits:

CMS confirmed that the term “compassionate care situations” **does not exclusively refer to end-of-life situations**. Examples of other types of compassionate care situations include, but are not limited to:

- A resident, who was living with their family before recently being admitted to a nursing home, is struggling with the change in environment and lack of physical family support.
- A resident who is grieving after a friend or family member recently passed away.
- A resident who needs cueing and encouragement with eating or drinking, previously provided by family and/or caregiver(s), is experiencing weight loss or dehydration.
- A resident, who used to talk and interact with others, is experiencing emotional distress, seldom speaking, or crying more frequently (when the resident had rarely cried in the past).

The NYSDOH guidelines refer to **medically necessary (i.e. visitor is essential to the care of the patient)** and **end of life situations**.

Visitation During The COVID-19 Pandemic: (Continued)

Required Visitation:

As per CMS, except for on-going use of virtual visits, facilities may still restrict visitation due to:

- COVID-19 county positivity rate
- Facility's COVID-19 status
- Resident's COVID-19 status
- Visitor symptoms
- Lack of adherence to proper infection control practices
- Other relevant factors



However, facilities may not restrict visitation without a reasonable clinical or safety cause, consistent with 42 CFR §483.10(f)(4)(v) (Resident's right to visitation). If the facility does improperly restrict visitation, the facility would be subject to citation and enforcement actions.

What Can We Expect After COVID-19 Vaccination?

As per the CDC (Centers for Disease Control and Prevention), **Remember:**

- Side effects may feel like flu and even affect your ability to do daily activities, but they should go away in a few days.
- With most COVID-19 vaccines, you will need 2 shots in order for them to work. Get the second shot even if you have side effects after the first shot, unless a vaccination provider or your doctor tells you not to get a second shot.
- It takes time for your body to build protection after any vaccination. COVID-19 vaccines that require 2 shots may not protect you until a week or two after your second shot.

It's important for everyone to **continue using all the tools available to help stop this pandemic** as we learn more about how COVID-19 vaccines work in real-world conditions:

- Cover your mouth and nose with a mask when around others.
- Stay at least 6 feet away from others, avoid crowds.
- Wash your hands often.

For further information:

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DT@YourNYAdvocate.com

Thank you for your time and attention!

Note Additional Resource: – Healthcare Providers or the members of the public with an urgent information need can call the CDC at 800 232 4636