

**MODULE 4**  
**RESIDENT RIGHTS**

I. Nursing Home Residents' Rights Protection

- A. Purpose
- B. Reasons Why Residents Do Not Exercise Their Rights
- C. Obstacles to Implementation of Residents' Rights in Nursing Homes
- D. What Nursing Homes Can Do To Promote Rights

II. Empowerment

- A. Role of the Ombudsman
- B. Resident Participation
- C. Resident Councils
- D. Family Councils

III. OBRA '87

- A. Provisions of the Law
- B. Specific Rights

IV. Discussion Of Selected Rights

- A. Freedom of Association and Access
- B. Privacy and Confidentiality
- C. Use of Restraints
- D. Transfer/Discharge Protections
- E. Protection Against Medicaid Discrimination
- F. Protection of Personal Funds

V. Enforcement Of Resident Rights

## **I. Nursing Home Residents' Rights Protection**

### **A. Purpose**

The purpose of residents' rights is to safeguard and promote dignity, choice, and self-determination of residents in nursing homes and to protect civil, personal, and privacy rights, the right to information, rights related to health care, due process and life in the nursing home, transfer and discharge rights, the handling of personal finances, and the right to be free from abuse and restraints.

### **B. Reasons Why Residents Do Not Exercise Their Rights**

Most residents do not know that they have specified rights and do not know what their rights are in a nursing home.

Most residents do not even think about their problems and concerns in any context related to their "rights."

Residents are intimidated by the idea of criticizing the nursing home.

Residents face physical, emotional, psychological, social, and mental disabilities that make it difficult for them to voice their concerns.

Residents have very few opportunities to exercise control over their lives or to have intellectual discussions and have few relationships with which to practice interactive or assertiveness skills or negotiate their rights.

Even residents who are aware of their rights must choose their "battles" and often put up with daily violations of their individuality and dignity because; a) it requires too much strength to challenge each encounter; b) they are easily labeled troublemakers; c) they are dependent for their care on those very people against whom they have complaints, and they are, therefore, hesitant to criticize, and often d) they experience a sense of defeatism.

Residents' autonomy is undermined from the start by the very fact that most residents would rather not be in a nursing home; many did not have much of a role or choice in the decision to be there, and most have no other options.

Since many of the rights are violated as a part of the daily nursing home routine, most residents don't even articulate them as rights-related problems or problems about which anything can be done.

Residents often feel more comfortable championing another's problem than asking for help for themselves.

### **C. Obstacles To Implementation Of Residents' Rights In Nursing Homes**

To exercise their rights, residents need the physical care necessary to promote self-reliance and renewed strength, such as appetizing food to suit their nutritional needs, rehabilitative and restorative therapy, meaningful activities, and freedom from over-medication and restraints.

Residents who do assert their rights often face tremendous resistance and become discouraged.

Most residents do not have the social supports within the home or outside the home to encourage or assist them to assert their rights.

Most resident councils do not receive the leadership development they need to function effectively.

Many resident councils meet resistance from staff when they voice concerns.

Few families understand residents' rights or know how to empower their relatives to maintain self-determination.

Most nursing homes are run in a very regimented, institutional fashion, leaving little room for individuality, free expression, personal autonomy, or choice.

Most nursing homes provide few opportunities to foster supportive relationships.

Very few supervisory personnel understand residents' rights.

Staff are poorly trained in, and feel threatened by, residents' rights.

Most staff, and others, see residents' disabilities instead of their abilities.

Short-staffing prevents staff from taking the time necessary to treat residents respectfully in routine care and treatment.

Staff are used to "caring for" residents and do not know how to empower and enable residents to care for themselves.

Many staff members do not have the time or inclination to elicit residents' views on the services they provide, such as food or activities.

#### **D. What Nursing Homes Can Do To Promote and Implement Residents' Rights**

Educate residents and their families about their rights.

Educate and sensitize every level of staff about residents' rights.

Incorporate resident participation and self-determination into every aspect of nursing home services (i.e., resident advisory committees for food services, activities, housekeeping, etc.).

Provide more support to workers, including sufficient staffing ratios, training, better supervision, dignified working conditions, and increased salaries and benefits.

Orient aides to the residents they will work with and promote relationship building between staff and aides.

Utilize the information and wisdom of residents and their representatives to help develop and conduct training programs for staff.

Help staff, residents, and families overcome the tension between dependence and empowerment. Residents need assistance, but the help they receive should increase their ability to help themselves.

Establish a grievance committee comprised of residents, family and staff representatives, and administration.

Encourage and promote open exchange of ideas, recommendations, and concerns throughout the facility among residents, families, staff, and administration.

Promote a sense of community within the nursing home, for example, by organizing activities for each wing and each floor and designing activities that promote interaction and intellectual and emotional stimulation.

## **II Empowerment**

Empowerment means to give power to another or to take it for oneself. The dictionary definition is “to give authority to, to authorize.” This concept includes an advocate’s conscious decision to enable a disadvantaged person or group to become capable of self-advocacy.

### **A. The Role Of The Ombudsman**

Ombudsmen are in a unique position to empower residents to exercise their rights. Ombudsmen can help residents and facilities overcome the obstacles to the exercise of residents’ rights by educating residents, facility personnel, and family members about residents’ rights; encouraging residents to exercise their rights in very specific ways; supporting residents in the exercise of their rights; modeling/demonstrating a respect for residents’ rights; and maintaining a continuous awareness of, and sensitivity to, residents’ rights. The ombudsman role also includes empowerment skills in working with complaints. Encouraging residents to engage in self-advocacy is discussed in the module on the complaint process.

### **B. Resident Participation**

The 1987 Nursing Home Reform Amendments (OBRA ‘87) provide the following to support resident self-determination:

**FREE CHOICE**: The right to choose a personal attending physician, to be fully informed in advance about care and treatment, to be fully informed in advance of any changes in care or treatment that may affect the resident’s well-being, and (except with respect to a resident adjudged incompetent) to participate in planning care and treatment or changes in care and treatment.

**ACCOMMODATION OF NEEDS**: The right to reside and receive services with reasonable accommodation of individual needs and preferences, except where the health or safety of the individual or other residents would be endangered, and to receive notice before the room or roommate of the resident in the facility is changed.

**GRIEVANCES**: The right to voice grievances with respect to treatment or care that is (or fails to be) furnished, without discrimination or reprisal for voicing the grievances, and the right to prompt efforts by the facility to resolve grievances the resident may have, including those with respect to the behavior of other residents. Current federal regulations provide that residents be “encouraged and assisted” to voice grievances and recommend changes in facility policies, and require facilities to maintain in-house grievance procedures. All too often one resident’s rights, for example, a resident whose privacy is disturbed by her roommate’s visitor, are denied because they conflict with the rights of another resident.

PARTICIPATION IN RESIDENT AND FAMILY GROUPS: The right of the resident to organize and participate in resident groups in the facility and the right of the resident's family to meet in the facility with the families of other residents in the facility. In addition, the law requires the facility's management to assure resident and advocate participation in the administration of the home.

### **C. Resident Councils**

Resident councils provide a vehicle for resident participation in decision making and for residents to voice their grievances and participate in resolving problems. The Nursing Home Reform Law (OBRA '87) and federal regulations require nursing homes to assist in the establishment of resident councils.

A resident council can be a vital force if it has support. Resident councils can make valuable contributions to decisions within facilities as well as at the state and national policy level, particularly where coalitions of resident councils help individual councils to function more effectively and provide a voice for residents on policy issues.

However, resident councils need tremendous support within and outside the facility to work effectively as mechanisms for resident participation:

- The administration must be committed to regular input from residents.
- Resident councils need staff time and resources.
- Residents need training in assertiveness, communication, and leadership skills.
- Staff need training to understand the importance of resident input and to teach them interpersonal skills to promote input in daily activities and care.

An ombudsman can help stimulate and support the development of resident councils in facilities without councils. Where a resident council exists, an ombudsman can strengthen the functioning of the council by providing information and education on a variety of topics and meeting with the council regarding problems within the facility. The ombudsman must remember, however, that the resident council is the residents' group and should meet their needs, not be shaped to serve the ombudsman's needs.

### **D. Family Councils**

A family council in a nursing home or board and care home is a consumer group, composed of the friends and relatives of the home's residents.

Although each family council is unique, a typical council:

- has 5 to 10 active members;
- meets monthly at the home;
- is run by relatives and friends or residents;
- has an adviser (usually a staff person of the home) who assists the council but is not considered a member); and
- has a variety of activities.

The main purposes for having a family council are: (1) to protect and improve the quality of life in the home and within the long-term care system as a whole, and (2) to give families a voice in decisions that affect them and their resident loved ones.

Beyond these general goals, specific purposes exist, such as:

- support for families;
- education and information;
- services and activities for residents;
- joint activities for families and residents;
- action on concerns and complaints;
- legislative action.

Effective family councils benefit families, residents, and the homes in which they are involved. Family councils allow families to give each other the support, encouragement, and information they need. Council involvement helps to resolve feelings of helplessness because families have a channel to express their concerns and ideas and a way to work for positive change. By being involved in issues that affect their resident loved ones, families feel less isolated and powerless.

Studies have repeatedly shown that residents receive better care in homes where families and friends visit and are involved. In addition, family involvement makes a nursing or board and care home more like a home and less like an institution. Because family council activities benefit all residents, even those who do not have concerned families are helped. Family involvement also protects residents who are physically or mentally unable to voice their concerns and needs for themselves.

The nursing or board and care home also benefits. Councils allow administration and staff to deal directly with family concerns and ideas, to convey needed information to families, and to decrease resident and staff turnover by creating workable ways to deal with family dissatisfaction. Many administrators have shared instances when they were unaware that families had a concern, but because the concern was raised at a council meeting, it was easily resolved. Administrators have also shared examples of problems that were solved because of the good ideas or assistance of a council.

While family councils give families, administrators, and staff opportunities to get to know each other better and to establish meaningful lines of communication, family councils is none of the following:

**FAMILY NIGHT EVENT:** Family night is a name used in many homes for occasional educational or social functions planned and hosted by nursing home staff for families and friends of the home's residents. While these programs may be beneficial, they are not substitutes for family councils.

**RESIDENT COUNCIL:** Many homes have resident councils. It may seem, at first glance, that the two groups are the same. Combining the home's resident and family councils into one group may even be considered. However, this ignores the fact that residents and their families have different interests, needs, and abilities. Combined

resident/family councils are usually dominated by the families, who are quicker and better able, in many cases, to express themselves. Residents and families need their own councils, geared to their special situations and interests.

**VOLUNTEER GROUP OR AUXILIARY:** Occasionally, a family council will be started to meet a need within the home. Family councils provide many valuable services to residents, but they must never be replacements for adequate staff. Also, a council should not provide items or services that the home is required by law to provide.

An ombudsman should provide information and encouragement to family councils and jointly work with family councils on problem resolution when requested. However, the ombudsman should not run the family council and should wait to be invited to attend family council meetings.

### **III. OBRA '87**

#### **A. Provisions Of The Law**

The Nursing Home Reform Amendments of OBRA '87 require that nursing facilities “promote and protect the rights of each resident.” Several important provisions of the law set the stage for protection of these rights.

##### 1. Quality of Life

The law requires each nursing facility to “care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident.” An emphasis is placed on dignity, choice and self-determination for nursing home residents.

##### 2. Provision of Services and Activities

The law requires each nursing facility to “provide services and activities to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident in accordance with a written plan of care which.. .is initially prepared, with participation to the extent practicable of the resident or the resident’s family or legal representative.”

##### 3. Resident Assessment

The law requires nursing homes to conduct a “comprehensive, accurate, standardized, reproducible assessment of each resident’s functional capacity” upon a resident’s admission to the home and periodically thereafter. The results of the assessment must be used “to develop, review, and revise” a “comprehensive plan of care for each resident that includes measurable objectives and timetables to meet a resident’s medical, nursing, and mental and psychosocial needs that are identified in the comprehensive assessment.”

##### 4. Participation in Facility Administration

The law makes “resident and advocate participation” a criteria for assessing a facility’s compliance with administration requirements.

#### 5. Assuring Access to the Ombudsman Program:

The law (a) grants immediate access by ombudsmen to residents and reasonable access, in accordance with state law, by ombudsmen to records; (b) requires facilities to inform residents how to contact ombudsmen to voice complaints or to request help in the event of a transfer or discharge from the facility; (c) requires state agencies to share inspection results with ombudsmen.

#### **B. Specific Rights**

Under the law (OBRA'87), each nursing facility must "protect and promote the rights of each resident" including:

##### 1. Right to Self-Determination

Nursing home residents have the right to choose their personal physician; to full information, in advance, and participation in planning and making any changes in their care and treatment; to reside and receive services with reasonable accommodation by the facility of individual needs and preferences; to voice grievances about care or treatment they do or do not receive without discrimination or reprisal, and to receive prompt response from the facility; and to organize and participate in resident groups (and their families have the right to organize family groups) in the facility.

##### 2. Personal and Privacy Rights

Nursing home residents have the right to participate in social, religious, and community activities as they choose; to privacy in medical treatment, personal visits, accommodations, written and telephone communications, and meetings of resident and family groups; and to confidentiality of personal and clinical records.

##### 3. Rights Regarding Abuse and Restraints

Residents have the right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, or disciplinary use of restraints; to be free of restraints used for the convenience of staff rather than the well-being of residents; to have restraints used only under written physician's orders to treat a resident's medical symptoms and ensure her safety and the safety of others; and to be given psychopharmacologic medication only as ordered by a physician as part of a written plan of care for a specific medical symptom, with annual review for appropriateness by an independent, external expert.

##### 4. Rights to Information

Nursing homes must upon request provide residents with the latest inspection results and any plan of correction submitted by the facility; notify residents in advance of any plans to change their room or roommate; inform residents of their rights upon admission and provide a written copy of the rights, including their rights regarding personal funds and their right to file a complaint with the state survey agency; inform residents in writing, at admission and throughout their stay, of the services available under the basic rate and of any extra charges for extra services, including, for Medicaid residents, a list of services covered by Medicaid and those for which there is an extra charge; and prominently display and provide written and oral information for residents

about how to apply for and use Medicaid benefits and how to receive a refund for previous private payments that Medicaid will pay retroactively.

#### 5. Rights to Visits

The nursing home must permit immediate visits by a resident's personal physician and by representatives from the licensing agency and the Ombudsman Program; permit immediate visits by a resident's relatives, with the resident's consent; permit visits "subject to reasonable restriction" for others who visit with the resident's consent; and permit ombudsmen to review resident's clinical records if a resident grants permission.

#### 6. Transfer and Discharge Rights

Nursing homes must permit each resident to remain in the facility and must not transfer or discharge the resident unless the move is necessary to meet the resident's needs or to protect the resident or others from danger, or unless the resident has failed after reasonable notice to pay.

Notice of a transfer or discharge must be given to residents and their representatives at least 30 days before transfer, or as soon as possible if more immediate changes in health require more immediate transfer. A facility must also prepare and orient residents to ensure a safe and orderly transfer or discharge from the facility.

#### 7. Protection of Personal Funds

A nursing facility must not require residents to deposit their personal funds with the facility; and if it accepts written responsibility for resident's funds, it must:

- keep funds over \$50 in an interest bearing account, separate from the facility account;
- keep other funds available in a separate account or petty cash fund;
- keep a complete and separate accounting of each resident's funds, with a written record of all transactions, available for review by residents and their representatives;
- notify Medicaid residents when their balance comes within \$200 of the Medicaid limit and the effect of this on their eligibility;
- upon a resident's death, turn funds over to the resident's trustee;
- purchase a surety bond to secure residents' funds in its keeping; and
- do not charge a resident for any item or service covered by Medicaid, specifically including routine personal hygiene items and services.

#### 8. Protection Against Medicaid Discrimination

Nursing homes must establish and maintain identical policies and practices regarding transfer, discharge, and the provision of services required under Medicaid for all individuals regardless of source of payment; not require residents to waive their rights to Medicaid, and must provide information about how to apply for Medicaid; not require a third party to guarantee payment as a condition of admission or continued stay; and not "charge, solicit, accept or receive" gifts, money, donations, or

“other consideration” as a precondition for admission or for continued stay for persons eligible for Medicaid.

## **IV. Discussion Of Selected Rights**

### **A. Freedom Of Access**

There are a number of issues related to access:

**ACCESS FOR OMBUDSMEN** for purposes of investigating a complaint. The 1987 Nursing Home Reform Amendments require nursing facilities to permit immediate access to any resident by ombudsmen.

**ACCESS FOR OTHER VISITORS** is not always flexible enough to allow people with various work schedules and personal needs to see their loved ones at mutually convenient times and particularly for family members if a resident is critically ill. The federal law requires facilities to:

- “permit immediate access to a resident, subject to the resident’s right to deny or withdraw consent at any time, by immediate family or other relatives of the resident;
- “permit immediate access to a resident, subject to reasonable restrictions and the resident’s right to deny or withdraw consent at any time, by others who are visiting with the consent of the resident; and
- “permit reasonable access to a resident by any entity or individual that provides health, social, legal, or other services to the resident, subject to the resident’s rights to deny or withdraw consent at any time.”

Current regulations provide that residents should have opportunities for private visits with their guest. The federal law reaffirms the importance of privacy, requiring facilities to protect and promote “the right to privacy with regard to accommodations, medical treatment, written and telephonic communications, visits, and meetings of family and of resident groups.”

Facilities should, according to current regulations, encourage and assist residents to participate in activities and make visits outside the facility. The law (OBRA ‘87) provides for “the right of the resident to participate in social, religious, and community activities that do not interfere with the rights of other residents in the facility.”

Transportation is a critical factor in the execution of this right. Many facilities now have their own wheelchair accessible van. Others try to use community transportation systems. The 1984 revisions to the Older Americans Act give Area Agencies on Aging explicit responsibility to be more responsive to the needs of nursing home residents.

### **B. Privacy And Confidentiality**

**ACCESS TO RESIDENT’S RECORD:** Each resident’s health and personal records must be treated confidentially in accordance with residents’ bill of rights.

IN CASES NOT INVOLVING MEDICAL RECORDS: A standard authorized representative and release of information form would be adequate. Many agencies, such as the Social Security Administration, require their own forms to be used. In any case, residents should be fully informed and comfortable with how the ombudsman will use the information in the record.

PRIVATE PHONE CONVERSATION: Is included in the federal law. In some facilities residents have difficulty accessing telephones in private places that are wheelchair-accessible and in sufficient numbers for the home's population. Often residents do not have access to their funds if they need money for phone calls.

### C. Use Of Restraints

Although restraints are rarely the best care option available, they are often the most familiar method used by nursing homes to address such situations as 'wandering,' 'falling,' and 'behavior problems.' Facilities have commonly used physical restraints in fear of litigation should a resident fall. Although physical restraint use has declined in the U.S. through advocacy efforts and restraint reduction programs pushed by CMS, some facilities still overuse them. **Chemical restraints are also a continuing problem in many nursing homes.**

CMS regulations define restraints as "any medication given to control mood, mental status, or behavior. Physical restraints are any manual method or physical or mechanical device, material, or equipment attached to or adjacent to the resident's body that the individual cannot remove easily, which restricts freedom of movement or normal access to one's body. Leg restraints, arm restraints, hand mitts, soft ties or vests, wheelchair safety bars, and geri-chairs are physical restraints. Bedrails, when used to keep someone from getting out of bed voluntarily, may also be considered restraints."

OBRA '87 provides protection from restraints, providing that residents have "the right to be free from physical or mental abuse, corporate punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms." Restraints may be imposed only:

- to ensure the physical safety of the resident or other residents; and
- upon the written order of a physician that specifies the duration and circumstances under which the restraints are to be used (except in emergency circumstances specified by the Secretary) until such an order could reasonably be obtained.

Psychopharmacologic drugs may be administered:

- only on the orders of a physician;
- only as part of a plan designed to eliminate or modify the symptoms for which the drugs are prescribed;
- only if, at least annually, an independent, external consultant reviews the appropriateness of the drug plan of each resident receiving such drugs.

Federal regulations and federal interpretative guidelines state that RESTRAINTS

## MAY NOT BE USED:

- as a means of retaliation or coercion;
- because staff shortages make staff unable to give proper attention to a resident; or
- instead of alternatives such as a safe area for wanderers, restorative care to regain function, and social services to treat depression.

Federal guidelines have also been established for physical restraints. They require that residents in restraints be **checked and released from restraints every two hours**, and that **the check and release be documented in the resident's clinical record on each nursing shift** during which the restraints are in use. Federal regulations further require that physicians' orders for use of restraints be reviewed during the required review of the care plan.

Progressive nursing homes have been able to reduce drastically the use of restraints through alternative care programs. Restraints have such a devastating psychological impact on most residents that their physical benefits are sometimes outweighed by the emotional costs. Residents are also injured by improperly applied and infrequently checked restraints or injure themselves attempting to get free of them. Restraints are the most obvious substitute for sufficient numbers of staff, but staff shortages make it more difficult to monitor restraints. Moreover, poor training of staff leaves them unable to recognize signs that harm is being done by the restraints or to apply restraints properly.

### **D. Transfer/Discharge Protections**

Residents come to view the nursing home and even their room in the facility as their own home. Moving out of the facility, or to another room, can be a traumatic upheaval with damaging results for the resident. Studies have identified important steps that can be taken to mitigate the negative impact of a relocation. The steps include:

- preliminary discussion and preparation period;
- involvement of resident and his/her family in the decision to move, the choice of new location, and the arrangements;
- visit to proposed new location prior to move; and
- orientation to new location.

To minimize transfer trauma, residents need time to adapt to a change in environment and need involvement in decisions surrounding a relocation. In one landmark case, a New York state court ruled that if the resident refused the transfer, she should not be made to go because the damage to her health would be greater if she were moved against her will than it would be if she remained in her current location with a lower level of service.

Transfer from one room to another can also be traumatic. Nursing homes move residents around regularly to be able to respond to their care needs or those of other residents. Homes also move residents to other rooms when they exhaust their resources and convert to Medicaid. The District's discharge and transfer law requires nursing

homes to provide residents and their representatives with advance notice of a room change and an opportunity to appeal the relocation. However, residents generally have little opportunity to participate in a decision to move; nor do they often have a choice of where to move or of whom their roommate will be.

OBRA and federal regulations specify permissible reasons for transfer and establish protection such as advance notice, the right to appeal a transfer; and the right to return to the nursing home if appropriate.

#### Permitted Reasons for Transfer

- facility is unable to meet the resident's medical needs;
- resident's health has improved such that s/he no longer needs nursing home care;
- health or safety of other residents is endangered;
- resident has failed, after reasonable notice, to pay for her stay in the facility; and
- facility ceases to operate.

#### Notice to Residents and Their Representatives Before Transfer

At least 30 days in advance, or as soon as possible when:

- the health or safety of individuals in the facility would be endangered;
- the resident's health has improved such that s/he no longer needs nursing home care;

#### Required Content of Notice

- reasons for transfer;
- the effective date of transfer;
- the location to which the resident is to be transferred or discharged;
- the resident's right to appeal the transfer;
- the name, address and phone number of the Ombudsman Program (or the Protection and Advocacy Program for the Mentally Ill and/or the Developmentally Disabled).

#### Returning to the Facility

If the resident is transferred to a hospital for treatment, the notice must inform the resident of how many days Medicaid will pay to hold his/her bed, the facility's bedhold policy, and the right to return to the next available semi-private bed if Medicaid bedhold coverage ends.

#### Orientation

A facility must prepare and orient residents to ensure a safe and orderly transfer from the facility.

## **E. Protection Against Medicaid Discrimination**

Discrimination against Medicaid beneficiaries occurs in admissions, in transfers, and in the provision of services. Some of the practices clearly violate the Social Security Act and Medicaid regulations while others require development of further protection.

OBRA prohibits discrimination in treatment of residents and protects residents from fraudulent activities at admission. Under the law, a nursing facility must:

- have identical policies and practices regarding the provision of services required for all individuals regardless of source of payment;
- provide information on how to apply for Medicaid and how to receive refunds for previous payments covered by such benefits;
- not request, require or encourage residents to waive their rights to Medicaid;
- not transfer or discharge residents solely because they have changed their payment source from private pay to Medicaid;
- not require another person (commonly known as a “responsible party”) to guarantee payment as a condition of a resident’s admission or continued stay;
- not “charge, solicit, accept or receive gifts, money, donations or other considerations” as a precondition for admission or continued stay for persons eligible for Medicaid.

Medicaid law prohibits any nursing home receiving Medicaid payments from soliciting or accepting any initial or ongoing contributions beyond charges for services not covered by Medicaid. Yet, the acceptance of contributions is a common practice, particularly among religious nursing homes. Medicaid Fraud Units in several states have sued nursing homes that have solicited donations.

One of the most difficult Medicaid discrimination issues to resolve is the requirement that identical policies and practices regarding the provision of services mandated under the state plan for all individuals regardless of source of payment. The scope of this provision has yet to be defined or tested. Only a few states have developed regulations to address the problem.

Nursing homes are required to provide a variety of services to residents such as nursing, medical, pharmaceutical, dietary, activities, and social services. These services must be of good quality and must meet residents’ needs. In order to attract private pay residents and justify the higher basic rate charged to them, some nursing homes offer more variety and better quality services to private pay residents, such as different menus, activities, room choices, and amenities.

Current federal law and regulations require that services be provided “to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident...” This does not set a basic level of services nor define quality. Trying to distinguish what services (including scope and quality) must be provided to meet the

standard set in the law from those that are considered “enhancements” is an issue that must be resolved.

#### **F. Protection Of Personal Funds**

The law provides the opportunity to address, through federal and state regulation, problems many nursing home residents face with their funds:

- they may not receive their funds or have access to them;
- a facility may spend a resident’s funds or allow family to do so, without the resident’s permission; and
- a facility may not return the funds to the resident upon transfer or the resident’s family upon death.

Management of personal funds is at the discretion of the resident. A facility may not require residents to deposit their personal funds with the facility. However, once a facility accepts written authorization from a resident to deposit his/her funds with the facility, the facility must:

- keep funds over \$50 in an interest bearing account, separate from the facility account;
- keep other funds available in a separate account or petty cash fund;
- keep complete and separate accounting of each resident’s funds, with a written record of all transactions, available for review by residents and their representatives;
- not charge resident for items or service covered by Medicaid, specifically, routine personal hygiene items and services;
- notify Medicaid residents when their balance comes within \$200 of the Medicaid limit and the effect of this on their eligibility;
- upon a resident’s death, turn funds over to the resident’s trustee; and
- purchase a surety bond to secure residents’ funds in its keeping.

The law also requires facilities to provide residents with certain information about personal funds:

- written copy of their rights, including rights regarding personal funds, at admission;
- written information at admission and throughout their stay, about the services available under the basic rate and any extra charges for extra services (and for Medicaid residents, a list of services covered by Medicaid and those for which there is an extra charge).

#### **V. Enforcement Of Residents’ Rights**

The Federal Survey and Certification Process under Medicaid is the primary mechanism established for the enforcement of residents’ rights. However, enforcement is hampered by surveyors’ lack of understanding and sensitivity to residents’ rights and by

their failure to understand their seriousness. Even when surveyors are sensitive to residents' rights, they find them hard to quantify compared with other regulations and hard to prove. Correction is also hard to monitor.

Some states, recognizing that residents' rights need more enforcement clout, impose monetary penalties and other sanctions for violations of residents' rights. The amounts vary and the violations are still difficult to prove. Collecting fines is also difficult in nursing home enforcement because of a lack of legal support for such actions and because of overwhelming appeal rights given to nursing homes in most states. Nevertheless, the almost total absence of citations for residents' rights violations in D.C. nursing homes by HRA surveyors is shocking.

Some states, including D.C., do provide residents by law with a private right of action to enforce nursing home regulations. This right allows the court to focus on an individual who has been wronged instead of judging the facility's overall performance by its treatment of one individual. Residents have successfully sued under private rights of action and received monetary awards as well as corrective orders. Because such suits require tremendous energy and resources to pursue, in many cases, residents or their families do not even consider going to court. Also, because residents' rights suits require a heavy burden of proof of harm, they are generally more successful in particularly egregious circumstances.

Some states provide specific mechanisms to protect specific rights, most frequently in discharge/transfer situations. The District's discharge/transfer law (D.C. Law 6-108, D.C. Code §§ 44-1003.01-1003.13) contains an appeal procedure in which the ombudsman can serve as the resident's representative to bring the case to court. In the past in D.C., if the court ruled in the resident's favor, the resident was returned to his/her facility. Recently, the administrative court has held that it has no authority to order the return of an illegally discharged or transferred resident. The court's position is currently under appeal in the D.C. Court of Appeals.

Courts have also been used in other ways to help residents. Advocates have gone to court successfully for restraining orders and injunctions to prevent transfers. Residents have also brought nursing homes to small claims court over lost or stolen possessions and won monetary awards based on facilities' negligence in failing to protect items.

While regulatory and legal mechanisms have an increasing role in assuring protection of residents' rights, the Ombudsman Program is the most effective mechanism for protecting residents' rights because corrective action in residents' rights violations most often takes the form of prevention. Although an insult or violation of dignity cannot be erased, it may be prevented from recurring through education and sensitization. Because ombudsmen are local, and their presence is regular and ongoing, ombudsmen can and do provide this education and sensitization of management and staff. Ombudsmen often become involved in staff training activities that support residents in their assertion of their rights. Training may take the form of teaching residents about their rights, assisting residents' councils promote residents' right, and educating families.