



MASSBAR

A S S O C I A T I O N

2018 ELDER LAW EDUCATION PROGRAM Taking Control of Your Future: A Legal Checkup

NINTH EDITION



Presented with the generous assistance and continued collaboration of the
Massachusetts Chapter of the National Academy of Elder Law Attorneys

www.MassNAELA.com

CHAPTER 7

LONG-TERM CARE

Regulations and Resident Rights

NURSING HOME CARE

A. What is Nursing Home Care and for Whom is it Suited?

Nursing homes provide around-the-clock nursing care and assistance with daily living activities.

Nursing homes, technically long-term care facilities, are subject to state and federal regulations issued by the Massachusetts Department of Public Health, the state Medicaid program (MassHealth), the Office of the Attorney General and the federal Center for Medicare and Medicaid Services (CMS). Many of the regulations will be discussed below.

B. Department of Public Health Regulations

The Massachusetts Department of Public Health (DPH) monitors and licenses nursing home facilities throughout the commonwealth.¹ To determine whether an applicant for a nursing home license is responsible and suitable for licensing, the DPH will look to the applicant's criminal history, if any; financial capacity to operate a long-term care facility; and the applicant's history and experience in providing long-term care.²

The DPH sets out rules and regulations governing medical and nursing care, the maintenance of medical records, the handling of patient funds, the prevention of loss or damage to patients' personal possessions, and standards of facility sanitation.³ The DPH surveyors have the right to visit and inspect any nursing home institution at any time to monitor compliance with regulations.⁴ Such inspections are unannounced, and occur at least twice per year.⁵ If violations are found, the nursing home facility may be subject to a monetary fine, and will be expected to submit a plan of correction to the DPH within a certain time period. At the expiration of such time period, the violation will be made public if no correction plan has been submitted.⁶ The DPH also fields complaints by or on behalf of nursing home residents through its website and telephone hotline.

In consultation with the Alzheimer's Disease and Related Disorders Association, the DPH is required to establish regulations for so-called "dementia special care units" (DSCUs) to ensure safety and quality of services provided to residents with dementia. The regulations require dementia-specific training for all direct-care providers, dementia-specific activities, and guidelines for physical design, including anti-wandering methods and promoting a therapeutic environment in DSCUs.

The DPH also requires nursing homes to obtain written informed consent to treat with any psychotropic medications. The consent must be signed by the resident, the resident's health care agent or duly authorized guardian. The written informed consent must be documented on a form approved by the DPH, kept in the resident's medical record, and must include, at a minimum, the purpose for administering the psychotropic drug, the prescribed dosage and any known side effect of the medication.

C. Medicaid Regulations

To be certified for participation in MassHealth and Medicare programs, a nursing home facility must also follow regulations set out by the Office of Medicaid.⁷ Otherwise, the nursing home will not be reimbursed for any services the nursing home provides to MassHealth or Medicare eligible residents.⁸

D. Attorney General's Regulations

Nursing home facilities must also follow regulations set out by the Attorney General's Office which state that it will be considered an "unfair and deceptive" act, in violation of Mass. G.L. ch. 93A, for a nursing home to fail to comply with any federal or state statute or regulation protective of resident rights, or for a nursing home to fail to disclose the policies of the facility to a resident or prospective resident.⁹ Further, a nursing home will be in violation of Chapter 93A if it discriminates against a Medicaid-eligible resident on the basis of that resident's source of payment for nursing home services.¹⁰

The Attorney General's regulations also prohibit nursing homes from requiring residents to have a third-party guarantor, or requiring residents to waive the facility's liability for personal injury or loss of personal property.¹¹

Nursing homes may not limit a resident's choice of physician or, for that matter, his or her choice of pharmacy. (*See Chapter 6, section 3, regarding prescription drug coverage for nursing home residents.*)¹²

Nursing home facilities cannot require residents to pay a non-refundable deposit.¹³

Other Chapter 93A violations include a nursing home's refusal to permit a resident to have privacy during medical treatment or other daily living activities, or refusal to allow a resident to live in the same unit with his or her spouse, if both consent.¹⁴

While this is hardly an exhaustive list of the regulations as set out by the Attorney General's Office, it provides an overview of standards by which nursing homes must operate in order to prevent liability.

E. Nursing Home Resident Rights

Nursing home residents are entitled to certain rights with regard to quality of care, treatment and safety.¹⁵ Nursing home residents have the right:

- To obtain, upon admittance to the facility, written notice of their rights as residents;¹⁶
- To freedom of choice of a physician, facility and health care mode;¹⁷
- To obtain, upon request, an itemized bill for nursing home services;¹⁸
- To have all medical records and communications kept confidential to the extent provided by law;¹⁹
- To have all reasonable requests responded to promptly within the capacity of the facility;²⁰
- To access all of their medical records upon request;²¹
- To refuse to be examined, observed, or treated without jeopardizing access to other medical care;²²
- To have privacy during medical exams or treatment;²³ and
- To informed consent to the extent provided by law.²⁴

A nursing home resident is also entitled to certain rights relating directly to his or her personal freedoms. A nursing home resident is entitled:

- To communicate with persons of one's choice, privately and without restriction;²⁵
- To make a complaint or express a grievance free from reprisal, restraint, coercion or discrimination;²⁶
- To be free from any requirement to perform any service for the facility not in his or her individual care plan, unless one volunteers or is paid for such service;²⁷
- To participate in social, religious and community groups;²⁸
- To manage one's own financial affairs;²⁹
- To keep and use personal possessions and clothing as space permits, and to have personal possessions reasonably safeguarded and secured;³⁰
- To be permitted to share a room with his or her spouse;³¹ and
- To receive at least 48 hours' notice of a roommate change, barring any emergency.³²

F. Choosing a Nursing Home

Once a health care practitioner has determined the level of care you need, you are able to make choices on which nursing home to use. The Centers for Medicare and Medicaid (CMS) has a website and tool that allows you to compare nursing homes and select the most appropriate ones. (*See www.medicare.gov/nursinghomecompare/search.html.*) This website provides a wealth of information, including data on health inspections, staffing, quality measures, and quality ratings. The nursing home reports this information to CMS, so it is important to visit the nursing home in person before you make a final decision.

Additionally, not all nursing homes accept Medicaid patients, so a patient may only be able to stay in that facility as long as he/she is able to pay for the required care. In order to use a Medicaid benefit to pay for nursing home care, the nursing home must be Medicaid certified.³³

G. Dementia Care Standard for Nursing Homes

Massachusetts law provides further safeguards for dementia patients in nursing homes in the form of regulations which require dementia unit workers to have eight hours of initial training and an additional four hours of training annually. In addition, dementia units must have at least one “therapeutic activities director” who is responsible for developing and implementing activities for residents. These regulations ensure that dementia units are staffed with appropriately trained workers.³⁴

Additionally, the regulations mandate that a fence or barrier surround the facility to prevent injury and elopement of dementia care patients. Another significant change to the laws that aim to protect those on dementia units is the prohibition against overhead paging systems, which often scare patients. Facilities can now use such systems only for emergencies.³⁵ The DPH has promulgated guidance with respect to the administration of anti-psychotic medications which require the written consent of the resident, the resident’s health care proxy agent or a duly authorized guardian.

ASSISTED LIVING

A. What is Assisted Living and for Whom is it Suited?

Assisted living is a residential arrangement providing room and board for eligible elders as an alternative to nursing home care.³⁶ It suits elders who require some aid, support, or supervision with activities of daily living such as meal preparation, medication regimen, housekeeping, clothes laundering, dressing or bathing, grocery shopping and transportation needs.³⁷ However, elders in assisted living do not require 24 hours of skilled nursing home care.³⁸ Assisted living provides the security of having assistance available 24 hours a day as needed, but encourages the maintenance of elders’ autonomy and privacy.³⁹

B. Assisted Living Regulations

The Executive Office of Elder Affairs certifies all assisted living residences in Massachusetts.⁴⁰ An assisted living residence must provide only single or double living units with lockable doors and a kitchenette within the unit or access to cooking facilities.⁴¹

Any newly constructed assisted living residence must provide a full bathroom for each unit, while existing assisted living residences must provide, at minimum, a private half-bathroom.⁴² After evaluation of eligibility and assessment of appropriateness of assisted living services for an elder, the elder should receive an individualized service plan which sets out the services provided, who will provide them, how often and for how long the services will be provided, the payment terms and reimbursement source for such services, the way the residence will provide for the presence of 24-hour on-site staff capability and information regarding self-administered medication management.⁴³ In addition to a service plan, each resident and sponsor of the assisted living residence must execute a written agreement setting out the responsibilities and rights of the resident and sponsor with regard to the charges for services, a grievance procedure, and termination conditions.⁴⁴

C. Assisted Living Resident Rights

Massachusetts law specifies that a resident of an assisted living facility has the right:

- To live in a decent, safe, and habitable environment;⁴⁵
- To be treated with consideration and respect;⁴⁶
- To have one’s personal dignity and privacy observed;⁴⁷
- To retain and use personal property in one’s unit;⁴⁸
- To communicate privately and without restriction;⁴⁹
- To contract or engage with health care professionals in one’s unit as needed;⁵⁰
- To engage in community services and activities as one chooses;⁵¹
- To manage one’s own financial affairs;⁵²
- To present grievances and recommendations without reprisal;⁵³
- To have all one’s records kept confidential;⁵⁴
- To have privacy during medical treatment or other services;⁵⁵
- To have reasonable requests responded to promptly and adequately; and⁵⁶
- * To be free from involuntary discharge or eviction.

tion without judicial process (summary process eviction proceedings).

D. Ombudsman Program

In the case of a complaint or violation, a resident, the family member of a resident, or the representative of a resident may contact a statewide ombudsman trained by the Executive Office of Elder Affairs. The ombudsman will enter the assisted living residence to review and examine the situation.⁵⁷ In order to maintain certification, each assisted living facility must comply with the Ombudsman Program and facilitate the ombudsman's right to enter and investigate the residence.⁵⁸ The assisted living ombudsman acts as a mediator and attempts to resolve problems or conflicts that arise between an assisted living residence and one or more of its residents. To contact an assisted living ombudsman, you may call Elder Affairs at (617) 727-7750 or (800) AGE-INFO (1-800-243-4636).

CONTINUING CARE RETIREMENT COMMUNITIES

A. What is a Continuing Care Retirement Community?

A continuing care retirement community is a housing option which offers single and married elders a continuum of housing, services and nursing care which allows them to age in place as their services are adjusted and altered depending upon their needs.⁵⁹ It is a comprehensive and individualized plan offering such services as nursing and health care, housekeeping, transportation, meals and special diets, recreational activities and emergency help.⁶⁰

B. Continuing Care Retirement Community Oversight

The Executive Office of Elder Affairs registers and regulates continuing care retirement communities (CCRCs) in Massachusetts pursuant to Mass. G.L. ch. 93, § 76, which sets out disclosure requirements regarding the contractual rights of the parties. There are no regulations governing CCRCs, except for any part of the CCRC which is licensed by the DPH as a skilled nursing facility. Any skilled nursing facility accommodations are subject to the same laws, rules and regulations as any long-term care facility.

OTHER IMPORTANT ELDER PROGRAMS⁶¹

A. Massachusetts Senior Care Options (SCO)

Senior Care Options (SCO) is a comprehensive health care plan that covers all of the services normally paid for through Medicare and MassHealth. SCO combines health services and social support services. SCO offers an important advantage for eligible members over traditional fee-for-service care. There are no copays for members enrolled in SCO. Members enrolled in SCO have 24-hour access to care and active involvement in decisions about their health care. This is a voluntary program, and patients can disenroll any month of the year, but you must be eligible to enroll. Patients can live at home or in a long-term care facility. See the Massachusetts SCO website for more program, and eligibility and enrollment information.⁶²

B. Statewide Nutrition Programs

The Elderly Nutrition Program, administered by the Executive Office of Elder Affairs, allows local elderly agencies to provide nutritious meals to senior citizens. Meals are provided at congregate meal sites, such as senior centers, churches, schools and other locations. The congregate setting provides opportunities for socialization and companionship. It also offers programs related to nutrition education, exercise activities, health promotion and disease prevention. Some programs also offer meals on weekends. Transportation is often available for those who have trouble getting around on their own. The Elderly Nutrition Program also provides home-delivered meals to senior citizens (aged 60 or older) and handicapped or disabled people under age 60 who live in housing facilities occupied primarily by the elderly where congregate meals are served.

Each meal contains at least one-third of the current daily Recommended Dietary Allowance of nutrients and considers the special dietary needs of the elderly. In addition to providing meals, the Elderly Nutrition Program also provides access to social and rehabilitative services.

To apply for one of the elderly nutrition programs, contact the Executive Office of Elder Affairs at (800) 882-2003 to find the elderly nutrition agency nearest to you.

C. Prescription Advantage

Prescription Advantage is a prescription drug insurance plan available to all Massachusetts residents age 65 and older, as well as younger individuals with disabilities who meet income and employment guidelines. An elder is eligible for the program if he or she is not receiving prescription drug benefits under Medicaid. Individuals receiving Medicare benefits may be eligible for assistance with paying for prescription drug costs (also known as “Extra Help”) from Social Security. In order to receive this assistance, an application must be submitted to Social Security.

D. Pharmacy Outreach Program

The purpose of the Pharmacy Outreach Program is to work closely with local and statewide health care resources, physicians and elders to help relieve the burden of medication expenses. The Pharmacy Outreach Program is a public service to the people of the commonwealth. Any Massachusetts resident may utilize the MCPHS University Pharmacy Outreach Program toll-free telephone number, (866) 633-1617 and website, www.MCPHS.edu/PharmacyOutreach, to inquire about prescription drug medication support programs that are available at low cost or free of charge. Consumers can ask any questions regarding their medications and general health.

E. Serving the Health Information Needs of Everyone Program

The Serving the Health Information Needs of Everyone (SHINE) program provides health insurance counseling services to elderly and disabled adults. SHINE counselors are trained to handle complex questions about Medicare, Medicare supplements, Medicare Health Maintenance Organizations, public benefits with health care components, Medicaid, free hospital care, prescription drug assistance programs, drug discount cards and long-term health insurance.

SHINE counselors help elders and Medicare beneficiaries understand their rights and benefits under Medicare and other health insurance coverage. Counselors can identify and compare current options, and protect elders from paying too much for their medical care. SHINE counselors also help elders learn how to fill out insurance claims forms and public benefits applications.

SHINE counselors are available at most councils on aging, senior centers and Aging Services Access Points, hospitals and libraries. Counselors are also available for home-bound clients. To locate a SHINE counselor in your community, contact your regional SHINE program at www.mass.gov/service-details/find-a-shine-counselor.