Imprisoned in Their Homes

How Nursing Homes' Restrictive Day Pass Policies Violate Residents' Right to Community Integration

MOBILIZATION FOR JUSTICE

2017

Acknowledgements

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Special thanks to the many others who contributed to this report, including:
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I. Introduction

Before entering a nursing home, a prospective resident might assume that she will be able to leave and return as she pleases throughout the day. After all, the nursing home will be her new home, and residents of nursing homes are not prisoners. To the contrary, Mobilization for Justice ("MFJ") receives many complaints from nursing home residents who are restricted from leaving their nursing homes. This practice violates the civil rights of residents. The Americans with Disabilities Act ("ADA"), as well as state and federal regulations, protect the independence of nursing home residents and promote community inclusion. Overly restrictive policies that prohibit residents from going outside violate residents' right to community integration.

This paper details the barriers that nursing home residents face when they attempt to leave their home and offers proposals to address these serious and ongoing problems. We propose several recommendations, including the issuance of official guidance by the New York State Department of Health on day pass related matters, creation of a model leave of absence policy for nursing homes, and strengthening the state's nursing home regulations.

II. Summary of Findings: Nursing Homes Improperly Detain Residents

Through our work in New York City nursing homes, MFJ has discovered that nursing homes are detaining residents, in violation of federal and state law. Most nursing homes in New York require that a resident formally requests a "day pass" (also known as an "outside pass"), which the home may or may not approve and issue, each time a resident wants to leave the nursing home. Nursing homes regularly require that day passes be issued for any short daytime excursion, as well as for longer, overnight trips. For example, a nursing home resident might need a day pass in order to simply eat lunch at a nearby restaurant with a visiting family member. Often, a request for a pass must be made several days in advance. Unless a resident requests and is granted a pass beforehand, she is not able to exit the home. Many nursing homes arbitrarily deny requests for passes or only grant "escorted passes," which typically require that the resident be accompanied by a "responsible party" at all times.

As a result of overly restrictive day pass policies, nursing home residents end up isolated, unable to attend family functions, visit with friends, attend religious services, spend time outdoors or participate in community activities. They are stripped of their freedom, simply by virtue of their living in a nursing home. Moreover, the arbitrary denial of passes disproportionately affects some of the most vulnerable residents, including those without friends or family who live nearby.

New York State regulations assume that nursing home residents have the right to interact with the community. In addition, the ADA prohibits unnecessary confinement of individuals with disabilities and the state is responsible for ensuring compliance by licensed facilities statewide. However, New

York State has not acknowledged or taken any action to protect the rights of nursing home residents who are held against their will. This disturbing and widespread practice has received relatively little attention, despite its enormous impact on the lives of nursing home residents.

III. THE IMPORTANCE OF COMMUNITY INTEGRATION FOR NURSING HOME RESIDENTS

Nursing homes are not prisons or locked psychiatric facilities. For individuals who live in nursing homes – a population ranging widely in age, level of need, and length of nursing home stay – the right to leave the home temporarily is essential. Without the right to leave, residents cannot participate in any number of everyday tasks and activities necessary for maintaining community ties. Residents need access to the community to see friends and family, shop for personal items, attend religious services, attend cultural and social events, eat out at restaurants, exercise, and simply breathe fresh air.

> *"I use it in my case for shopping. I visit my mom. I go to religious services. Everyone should have the time and space to practice their own individual things. On a beautiful day like this, why can't I go out? People need to get out. We need to be out and enjoying the sunshine just like any other human being. We're not prisoners."*
> ***–Mr. M, nursing home resident in NYC on why he needs to leave the nursing home.***

Community integration is especially crucial for nursing home residents, because residents live within a highly regimented and institutionalized setting. Life within a nursing facility can be dehumanizing, particularly when a resident is isolated from the outside world. Atul Gawande summarizes the sterilized nature of nursing home life in his book "Being Mortal": "Our elderly are left with a controlled and supervised existence, a medically designed answer to unfixable problems, a life designed to be safe but empty of anything they care about."[1]

In general, the "institutionalization" of individuals with disabilities is a centuries-long practice that typically refers to the removal of people with disabilities from mainstream society to treat and house them in segregated facilities.[2] During the 1970s and 1980s, a wave of deinstitutionalization litigation in the U.S. resulted in the closures of many large state-operated institutions that were previously used to house people with psychiatric and developmental disabilities.[3] Then, after the passage of the Americans with Disabilities Act, the Supreme Court, in Olmstead v. L.C., held that the unnecessary segregation of people with disabilities is unlawful discrimination.[4] Since Olmstead, advocates have been working to help individuals with disabilities leave institutions, and to connect them with the supports and services that they need to integrate into the community.

Many people with disabilities who might have previously lived in state-operated institutions now live in other segregated settings, including privately-owned nursing homes. Advocates have increasingly recognized nursing facilities as institutions and prioritized helping people move out of them and into the community.[5] Similarly, for the past few decades, an ongoing culture-change movement has been working to humanize and deinstitutionalize long-term care settings, such as nursing homes. Advocates of nursing home culture change recommend improvements to the physical, social, psychological, and cultural environment of nursing facilities.[6] The culture-change movement emphasizes person-centered care and the importance of resident choice, relationships, individuality, and autonomy within the facility.[7] An essential part of successful culture change is to permit residents to enjoy activities outside of the nursing facility and to come and go without unnecessary restrictions. Although a resident might require nursing care, this factor alone should not prevent the resident from enjoying outside activities and social relationships, as well as developing new interests and connections.

Smaller, more home-like nursing facility models have gradually been gaining popularity.[8] However, the majority of potential nursing home residents and their families are not aware of the culture-change movement and most homes continue to enforce overly restrictive policies. As reforms advance and the population continues to age, all nursing home residents, and not just a select few, should be able to benefit from less institutionalized long-term care. As is true for anyone, being able to socialize with family, friends, or other acquaintances is vital for nursing home residents' quality of life and overall well-being. As one nursing home resident said, "I am trying to make the best of [nursing home life]. It's clean and nice, but it's just not home. It will be if your family comes and kids can spend the night. But we can't do it here, and it breaks my heart."[9] Studies have confirmed that nursing home residents are especially at risk for becoming socially isolated, resulting in depression and other negative health outcomes.[10] Simply having access to outdoor spaces increases the general quality of life of residents.[11] Unfortunately, many nursing facilities overlook this aspect of resident health and err on the side of confining residents.

The right to leave the nursing home is also necessary for nursing home residents to maintain financial independence. Nursing home residents who are capable of managing their own money have the right to keep outside bank accounts. Economic independence is important for many residents, and it is crucial that they have the right to bank outside of the nursing facility.

> *"It is important because it helps me relax, gives me something to look forward to, allows me to visit my family and reconnect with friends. Especially having something to look forward to, that's one of the main reasons."*
> ***–Ms. L, nursing home resident in NYC on why leaving the nursing home is important.***

IV. LEGAL BACKGROUND: NURSING HOME RESIDENTS HAVE THE RIGHT TO COMMUNITY INTEGRATION UNDER FEDERAL AND STATE LAW AND REGULATIONS

Pursuant to federal and state law, nursing home residents have the right to community integration. The right to community integration assumes the right of nursing home residents to leave the facility if it is reasonably safe to do so. Federal disability rights laws, such as the ADA and the Fair Housing Act, promote community inclusion and protect against discrimination based on disability. Federal nursing home regulations, as well as the corresponding New York regulations, protect nursing home residents' basic civil rights, including freedom from physical restraints, access to outside activities, and the exercise of civil liberties. The nursing home regulations also require facilities to engage in ongoing care planning to maximize resident well-being. The law in analogous contexts, including psychiatric commitment and the use of chemical or physical restraints, infers a very high threshold for involuntarily detaining a resident.

a) Federal Civil Rights Law

The Americans with Disabilities Act, the Rehabilitation Act of 1973, and the Fair Housing Act protect the rights of individuals with disabilities, require community integration of individuals with disabilities, and prohibit discriminatory policies. The language and spirit of these laws establish that nursing home residents should be free from overly burdensome, blanket restrictions on their right to leave the nursing home.

i. New York State's Obligations

The ADA is a sweeping civil rights law passed in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[12] Title II of the ADA prohibits discrimination by state and local government entities and requires community integration of people with disabilities. New York oversees and regulates nursing homes and is obligated to comply with Title II's requirements. The New York State Department of Health ("DOH") is the public agency specifically responsible for ensuring that nursing homes comply with federal and state regulations. The DOH monitors quality in nursing homes, investigates complaints, imposes fines when necessary, and periodically issues Dear Administrator letters to provide nursing facilities with guidance on their responsibilities.

Title II's implementing regulations require that "a public entity shall administer services, programs, and activities, in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[13] The Title II regulations define the most integrated setting as one "that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible."[14] To comply with Title II's integration mandate, public entities must reasonably modify their policies,

procedures, or practices when necessary to avoid discrimination, except for where the reasonable modification would "fundamentally alter" its service system.[15]

The Title II regulations state that a public entity is not required to "permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a *direct threat* to the health or safety of others."[16] A "direct threat" is defined as a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services."[17] The regulations go on to state that:

> In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.[18]

In the landmark Olmstead decision, the Supreme Court held that "unjustified isolation" is discrimination based on disability in violation of Title II's integration mandate.[19] The Court held that Title II's integration mandate required the placement of persons with mental disabilities in community settings when appropriate.[20] In the majority opinion, Justice Ginsburg explained that institutional placement of persons who can handle and would benefit from community placement "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."[21]

All individuals with disabilities have the right to live in the most integrated setting, and New York State is obligated to afford them this right. Olmstead confirmed that Title II prohibits improper confinement and segregation of persons with disabilities. When a nursing home arbitrarily prohibits residents from leaving the facility, it subjects them to unnecessary isolation. This practice perpetuates the very assumptions that Olmstead aimed to eliminate, including that individuals with disabilities cannot participate in community life. As detailed in section V-d below, the DOH violates Title II by permitting nursing homes to enforce overly restrictive day pass policies without any oversight. Title II requires that nursing homes allow residents to leave the facility unescorted, unless there has been an individualized assessment indicating that leaving the facility would constitute a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures or the provision of auxiliary aids or services..

ii. Nursing Homes' Obligations

Nursing homes themselves must also comply with federal civil rights regulations. Title II of the ADA applies only to public nursing homes. But, because they receive funds through Medicaid and

Medicare, private nursing homes must comply with the Rehabilitation Act ("RA"), which has similar requirements to the ADA. The RA states that no person "shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[22]

In enacting the RA, Congress found that disability does not diminish the right of individuals to "enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society."[23] The implementing regulations for the RA further provide that recipients of federal funds "shall administer programs or activities in the most integrated setting appropriate to the needs of qualified handicapped persons."[24] As recipients of Medicaid and Medicare funding, nursing homes are required under the RA to ensure that their programs do not discriminate based on disability and are administered in the most integrated setting.

Nursing homes must also comply with the Fair Housing Act ("FHA"). The FHA prohibits discrimination in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities in connection with a dwelling because of a person's disability.[25] Nursing homes are "dwellings" and are therefore subject to the FHA's requirements.[26] Pursuant to the FHA, nursing homes cannot discriminate in the provision of their services or facilities based on disability. This means that nursing homes must ensure that their day pass policies do not discriminate against residents based on their disabilities.

b) The Federal Nursing Home Reform Act

The Nursing Home Reform Act of 1987 ("NHRA") was enacted following a 1986 study by the Institute of Medicine, conducted at the request of Congress. The study found that residents of nursing homes were being subjected to abuse, neglect, and inadequate care.[27] The NHRA, which applies to nursing homes that receive money from Medicare or Medicaid, sets nationwide standards to ensure that residents of all nursing homes receive a minimum level of care and services. The NHRA explicitly provides for the right to interact with members of the community and to participate in community activities. The right to leave is clearly implied by the NHRA's focus on community integration and resident self-determination and personal choice.

Under the NHRA, nursing home residents have the right to:

- "A dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility."[28]
- "Exercise his or her rights as a citizen or resident of the United States."[29]
- "Choose activities, schedules (including sleeping and waking times), health care and providers of healthcare services consistent with his or her interests, assessments, [and] plan of care."[30]

- "Interact with members of the community and participate in community activities both inside and outside the facility."[31]
- "Make choices about aspects of his or her life in the facility that are significant to the resident."[32]
- "Participate in other activities, including social, religious, and community activities that do not interfere with the rights of other residents in the facility."[33]

In October 2016, the Centers for Medicare and Medicaid Services ("CMS") released revisions to the NHRA regulations. The revisions retained all of the existing rights and restructured the regulations so that all of the above-listed rights are included in the same section on Resident Rights.[34] The revised regulations also state that the nursing facility must provide residents with activities that "encourage[e] both independence and interaction in the community."[35] CMS's comments to the revised regulations further explain that:

> Some residents may not, realistically, be able to participate in activities outside the facility. However, many may be able to do so, particularly with family or other assistance or planning. The facility has a responsibility to promote and facilitate resident self-determination, rather than act as a hindrance or barrier. At the same time, we recognize that there may be safety and security concerns with unfettered access to outside spaces and in and out of the facility. These competing interests must be balanced, taking into consideration the needs and preferences of residents in the facility.[36]

The revisions also added a new section on comprehensive person-centered care planning.[37] Under the new section, nursing homes must develop a baseline person-centered care plan for all residents within 48 hours of their admission to the nursing home. "Person-centered care" is defined as "to focus on the resident as the locus of control and support the resident in making their own choices and having control over their daily lives."[38] The person-centered care plan must be consistent with the resident rights set forth in the regulations and "be furnished to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being."[39]

In order to comply with the NHRA, nursing homes should engage in individualized assessments of whether residents should be permitted to go outside, which include consideration of the positive health benefits of outside access.

c) New York State Nursing Home Regulations

Many states, New York among them, have enacted their own laws or regulations modeled after the NHRA. The New York nursing home regulations replicate and expand upon the resident rights already included in the NHRA.[40] Pursuant to both the NHRA and the New York regulations, every nursing home resident must be provided with "the necessary care and services to attain or maintain

the highest practicable physical, mental, and psychosocial well-being, consistent with the resident's comprehensive assessment and plan of care."[41]

The New York regulations further emphasize self-determination, personal decision-making, individuality, and access to persons and services outside the facility.[42] For example, the New York regulations require nursing facilities to provide each resident with "considerate and respectful care designed to promote the resident's independence and dignity in the least restrictive environment commensurate with the resident's preference and physical and mental status."[43] Also, the facility's environment must "maintain[] or enhance[] each resident's dignity and respect in full recognition of his or her individuality."[44]

The New York regulations specifically provide that nursing home residents have the right to:

- "A dignified existence, self-determination, respect, full recognition of the resident's individuality, consideration and privacy in treatment and care for personal needs and communication with and access to persons and services inside and outside the facility."[45]
- "Exercise his or her civil and religious liberties, including the right to independent personal decisions and knowledge of available choices, which shall not be infringed."[46]
- "Meet with, and participate in activities of social, religious and community groups at his or her discretion."[47]

The New York regulations clearly establish the right to leave the nursing facility. Full realization of the rights listed above is not possible if a resident is prevented from participating in community activities of cultural, recreational, social, religious, or other personal significance.

Other States:

A few states have adopted more expansive regulations that provide clear guidance on when residents can leave. These regulations establish the right to leave as the default, recognizing that nursing home residents have a general right to leave the nursing facility as they wish.

• ***Georgia:*** *"Each resident shall be free to enter and leave the facility as the resident chooses."[48] A nursing home may suspend this right only if a physician examines the resident and determines that leaving the nursing home would pose a danger to other residents or an immediate and substantial danger to the resident himself.[49] Under the regulations, suspension of rights should not exceed 35 days.*

• ***Iowa:*** *"Residents shall be permitted to leave the facility and environs at reasonable times unless there are justifiable reasons established in writing by the attending physician, qualified intellectual disabilities professional or facility administrator for refusing permission."[50]*

• ***Kentucky:*** *"No responsible resident shall be detained against his will. Residents shall be permitted and encouraged to go outdoors and leave the premises as they wish unless a legitimate reason can be shown and documented for refusing such activity."*[51]

In these states, it would not be necessary for a resident to acquire a day pass in order to leave the nursing home for a short trip, unless there was a contraindicative medical order in place. In practice, the opposite default is most common in New York. New York nursing homes commonly assume that residents cannot leave and permit them to do so only after aggressive advocacy.

d) Analogous Legal Frameworks

In other situations, New York has created safeguards where an individual's personal liberty or freedom of movement is at stake. These legal frameworks offer greater protection for the rights of individuals with disabilities. The absence of any similar safeguards in the context of nursing home confinement is inconsistent with the law in these analogous contexts.

i. Involuntary Civil Commitment

Involuntary commitment refers to the practice of admitting a person into a mental health facility against her will. In New York, there are procedural protections for people facing this action. Under New York's Mental Hygiene law, if an individual's mental illness is "likely to result in serious harm to himself and others," a qualified professional can petition an involuntary "emergency admission" for up to fifteen days."[52] Anyone seeking the involuntary commitment of a person beyond fifteen days must obtain two medical certificates by physicians who have examined the citizen, provide written notice, and afford the person an opportunity to request a hearing on the matter.[53]

The safeguards in the civil commitment context have been interpreted to set a standard of clear and convincing evidence in order to subject any individual to involuntary commitment.[54] Moreover, at least one court in New York has recognized that private hospitals are acting as state actors when initiating involuntary commitment proceedings and that civil commitment constitutes a significant deprivation of liberty requiring constitutional due process protections.[55]

Since nursing home residents are treated as though they are subject to involuntary commitment, the lack of any similar protections and procedures is a serious problem. For example, MFJ has spoken to at least one nursing home resident who was discharged from involuntary commitment to a nursing home. Although that individual was deemed fit to leave the mental health facility, the nursing home required that he wear an electronic tracking device at all times and refused to ever let him leave the nursing home.

***Mr. S** is a resident of a nursing home in the Bronx who contacted MFJ after he was told upon admission that he could not leave the facility at any time. Mr. S has a diagnosis of schizophrenia, but was deemed psychiatrically stable and fit to live in the nursing home, where he receives treatment for his cardiac conditions. MFY was told by staff of the nursing home that residents cannot just "come and go" as they please since some cannot care for themselves.*

ii. Chemical and Physical Restraints

Residents of nursing homes have the right to be free from physical and chemical restraints.[56] Physical restraints are defined as "any manual method or physical or mechanical device, material or equipment attached 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."[57] For example, physical restraints refer to arm or leg restraints, hand mitts, vests, lap cushions, trays, belts, ties, or safety bars, which are intended to restrict movement.[58] Chemical restraints refer to psychotropic drugs, which can only be used to treat a medical condition and not for discipline or convenience.

Freedom from unnecessary restraints was one of the major cornerstones of the NHRA. Prior to the reforms in the NHRA, the use of restraints to manage wandering or agitated residents was widespread in nursing homes.[59] The Department of Health and Human Services has since recognized that the use of restraints was unsafe and caused depression and loss of dignity.[60]

New York's nursing home regulations also protect against unnecessary restraints. Pursuant to New York law, physical restraints can be "used only to protect the health and safety of the resident and to assist the resident to attain and maintain optimum levels of physical and emotional functioning."[61] New York law also provides that "an integral part of the interdisciplinary care plan that is individualized as to the type of restraint, release schedules, type of exercise, necessary skin care and ambulation to be provided, and is intended to lead to less restrictive treatment to manage the problem for which the restraint is applied."[62]

The regulations are clear that restraints be used only when all less-restrictive alternatives have been considered and are infeasible.[63] Restraints can be implemented only in "unusual" emergency situations or if the resident or their legal representative agrees to the treatment.[64] Furthermore, if physical restraints are to be used due to an emergency, the restraints must: (1) be approved by the medical director, attending physician or nursing director, or in his or her absence, by a registered professional nurse; (2) be used for that specific emergency and for a limited period of time with physician consultation regarding the physical measure or safety device obtained within 24 hours; (3) applied under the direction of a licensed nurse who documents in the clinical record the circumstances necessitating the physical restraint and the resident's response; and (4) monitored

frequently by a licensed nurse until the resident is seen by a physician.[65] New York law requires that facilities have "written policies specifying and defining each type of physical restraint that is acceptable and available in the facility and the purpose for which each shall be used."[66]

Preventing residents from leaving nursing homes is essentially another form of restraint. However, unlike with direct physical and chemical restraints, there are no explicit requirements in the regulations that require facilities to consider less-restrictive alternatives before preventing a resident from leaving.

V. DAY PASS PRACTICES AND POLICIES IN NEW YORK

Despite these laws and regulations, nursing homes in New York continue to regularly deny residents the right to leave the home. Nursing homes consistently implement restrictive and arbitrary day pass policies and fail to engage in individualized and comprehensive assessments of residents. Nursing homes commonly rely on unfounded liability concerns when deciding to restrict residents from leaving the facility. The DOH, which is responsible for monitoring nursing homes in New York, has failed to offer any oversight over day pass issuance.

a) New York Nursing Homes Unnecessarily Detain Residents

Nursing homes in New York typically require that residents be issued a day pass in order to leave, but regularly deny day passes and do not afford residents any opportunity to appeal denials. Nursing homes also place burdensome restrictions on day pass issuance, such as limiting day passes to certain hours or requiring that residents plan out their exact whereabouts and time schedule in advance. Through these restrictions, nursing homes keep residents isolated and prevent them from maintaining ties to the community.

> *"I don't like it, because I don't have control over anything. I feel like I'm incarcerated being in this place."*
> ***Mr. H, a nursing home resident in New York.***

The restriction of residents' right to leave the nursing home and the lack of consistent policies violate the civil rights of nursing home residents. Since there are no uniform procedures or formalized policies in New York governing when residents can leave the nursing home, the decision whether to issue a day pass is often arbitrary. Our experience suggests that nursing homes make assumptions about the abilities of residents based on their diagnoses, without any supporting medical documentation. In addition, the common requirement that a resident leave only with an "escort" is particularly unfair for the estimated 60% of residents who do not receive regular visitors[67] or who otherwise might not have any remaining friends or family in the area who are able to travel to the nursing home.

Residents have reported to MFJ the following day pass restrictions:

- Requiring an escort at all times.
- Only granting day passes for hours between 10:00am and 5:00pm or during "daylight" hours.
- Only granting day passes three days a week.
- Only granting one day pass per day per resident.
- Only granting day passes for medical appointments.
- Forbidding day pass access when a resident is on antibiotics, regardless of the nature or severity of the underlying illness.
- Forbidding unescorted day pass access because a resident uses a walking cane, walker, or other walking aid.
- Forbidding day pass access when a resident is diagnosed with a mental illness.
- Requiring a physician consultation and medical order stating that the resident is "mentally cleared and medically stable."
- Requiring a resident to provide notice of exactly where they are going and a specific timeframe of their planned excursion.
- Indefinitely revoking day pass privilege as punishment if a resident is "noncompliant" with internal policies, including policies unrelated to day passes.
- Forbidding day pass access when the facility suspects that the resident is engaging in activities it does not approve of, including buying cigarettes, drinking alcohol, or visiting friends at homeless shelters.
- Revoking day pass privileges for all residents due to weather conditions like rain, heat, or cold.

Some nursing homes claim to have formal policies, but residents report that, in many homes, the policies are inconsistent, arbitrarily enforced, or frequently changed. In many cases, the policies themselves contain harsh restrictions or state that residents cannot leave without an escort. The following are excerpts from actual written policies in New York City nursing homes that were obtained by MFJ:

- "Residents are permitted to leave the premises unescorted if they have a doctor's order to do so."
- "The team will determine as to what privilege will be considered appropriate for the resident and document in the comprehensive care plan: (a) Independent privilege; (b) Privilege with

responsible party; [or] (c) No privilege. When a resident is granted a privilege, a physician's order must be in place before the resident leaves the facility."

- "Residents who are non-compliant with their plan of care or who bring or use contraband (i.e. smoking materials, alcohol, illegal substances) may have their OOP [out on pass] privileges suspended for a minimum of thirty (30) days."
- "Residents who go out unescorted (or escorted) are subject to random search and may be required to submit to a check for urine toxicology and/or transferred to the hospital for evaluation, if showing signs and symptoms of illicit drugs and alcohol intoxication."
- "All residents who returned intoxicated or under the influence of drugs are considered to have violated the terms of the "Out On Pass" policy."
- "If a resident has a need to be out of the facility for an extended period of time, they must receive prior approval from the Social Services department or, if not available, the Nursing Director or the Administrator. The resident must provide information as to where they are going, the purpose and when they expect to return."
- "I further understand that failure to return to the facility by the time I specified above will be considered as non-compliant with the facility's Pass Policy and may affect the issuance of future passes."
- "Repeated non-compliance (returning after 8pm without prior authorization) will result in the suspension of OOP and LOA (leave of absence) privileges for a minimum of 30 days."
- "If a resident is regularly or frequently receiving controlled medications the team must consider the resident's need for observation/monitoring, i.e., for signs or symptoms of pain, lethargy, gait or mental status changes, etc. Residents who require observation/monitoring for the effect of controlled medications should not be issued independent OOP privileges. Exceptions will be authorized by the Medical Director, Attending Physician, DNS, or ADNS."

From what MFJ has observed, New York nursing homes commonly prohibit residents from leaving the nursing home unless there is a contraindicative medical order. Nursing home residents also report lengthy delays in scheduling the necessary doctor's appointments and comprehensive care planning meetings required to obtain a contraindicative medical order in support of their ability to leave the facility. This practice makes it very difficult for residents to ever leave. This is the opposite of the law in other states, such as Georgia, that establish the right to leave as the default. In those states, residents typically do not require a day pass to come and go from the nursing home for short trips, unless there is a medically documented reason why they are restricted from going outside. Residents in those states can simply sign themselves out without having to acquire prior approval from the nursing home.

New York nursing homes also commonly reserve the right to withhold or revoke a resident's day pass privileges due to the resident's noncompliance with their plan of care or the home's internal day pass policies. For example, we have spoken to residents who were denied day passes because the nursing home accused them of smoking marijuana or drinking alcohol while out on pass. In another instance, a nursing home resident was forced to sign a behavior contract with the nursing home after she was involved in a verbal altercation with a staff member. Although the verbal altercation was completely unrelated to day passes, the behavior contract suspended the resident's day pass privileges "until further notice." Other policies state that the nursing home can revoke a resident's day pass privileges if the resident returns to the facility late, which can mean either after the nursing home's official day pass hours or outside of the timeframe that the resident had initially specified that her or she would be gone.

> ***Ms. B*** *is a resident of a nursing home in the Bronx who is not permitted to leave the home without an escort and has repeatedly been prevented from leaving altogether. Ms. B is legally blind and uses a walking cane. She uses her passes primarily to attend services at her mosque and is typically accompanied by her partner, who also lives at the nursing home. The nursing home has given a number of reasons for denying Ms. B day passes to leave the home with her partner, including the side effects of her antibiotics, her use of a cane, and the cold weather outside. After alleged misbehavior in the nursing home, the home also had Ms. B sign a "Resident Behavior Contract" that stated that she would refrain from verbal and physical altercations and be respectful to staff and peers, and that her "pass privileges [would] be suspended until further notice from Administration."*

b) Nursing Homes Fail to Make Individualized Determinations of Whether Residents Can Leave the Nursing Home

Nursing facilities regularly fail to complete individualized assessments of residents' needs, progress, and abilities. Instead, they often assume that residents are unable to travel outside alone and therefore cannot leave the nursing home. Most nursing homes completely ignore the positive health benefits of letting residents go outside, focusing rather on fear of litigation or their potential liability. On the other hand, some nursing homes use frequent day pass usage as evidence that a resident no longer needs a nursing home level of care.[68] In at least one case handled by MFJ, a nursing home attempted to discharge a resident to a homeless shelter, and claimed that the resident's requests for day passes were evidence that she had become healthy enough to leave. The resident had many ongoing health problems and reported that she typically used her day passes to sit on the sidewalk bench outside of the nursing home to get fresh air.

While it is true that nursing homes must provide a safe environment for their residents, they are also required to respect the civil rights of residents and to take into account their overall health and

quality of life. Under New York and federal law, nursing facilities are required to develop a comprehensive care plan with an interdisciplinary team, including a physician, nurse, and other appropriate staff, for each resident.[69] The purpose of the care plan is to ensure that residents achieve maximum well-being. However, day pass discussions are usually not a topic of conversation at these meetings, unless the resident specifically raises the topic. As a result, care planning fails to take into account the necessity of community interaction and access to the outdoors for most residents.

> ***Mr. W** contacted MFJ after a nursing home in Manhattan had revoked his right to go outside. Mr. W had lived at the nursing home for 7 years. He is a wheelchair user who received day passes regularly to attend services at his mosque, visit friends, and play basketball in Central Park. The nursing home's sudden reason for denying Mr. W the right to leave was because the home believed that Mr. W smoked marijuana when he was outside. As a result, the home stopped permitting Mr. W to receive day passes. Not only was Mr. W deprived of his freedom to travel outside, he also lost his right to practice his religion at the mosque of choice and to exercise outdoors. After several months, Mr. W was tired of feeling like a prisoner and voluntarily discharged himself from the nursing home and moved into a homeless shelter.*

c) Nursing Homes Overstate Their Potential Liability

When making the decision whether to permit a resident to leave, nursing homes tend to focus on potential liability, rather than on making an individualized, person-centered determination. Nursing homes frequently reference fears about resident safety when defending their decision to deny residents the right to leave. However, in many cases, these fears are based on false assumptions and misunderstandings about the home's obligations.

Nursing homes should address safety concerns on an individual basis, ideally in the context of care planning. Determinations regarding day pass issuance should be individualized. For example, it might be unsafe for one resident to walk on uneven sidewalks but not unsafe for the same resident to visit family using door-to-door paratransit service or car service. As long as the nursing facility engages in proper care planning and risk assessment, it can comply with its duties while respecting the civil rights of residents.

i. Temporary Leave Does Not Affect Medicare or Medicaid Coverage

Nursing homes falsely claim that they could risk losing certification under the Medicare or Medicaid programs if they permit residents to leave unescorted. Medicaid and Medicare regulations actually ensure that residents who temporarily leave a nursing home for social visits do not risk losing coverage, even if they stay overnight.[70] The Medicare Benefit Policy Manual states that "the fact that a patient is granted an outside pass or short leave of absence for the purpose of attending a special

religious service, holiday meal, family occasion, going on a car ride, or for a trial visit home" does not constitute evidence that the resident does not need a nursing home level of care.[71] It also specifically admonishes nursing homes for relying on a misinterpretation of Medicare or Medicaid rules to scare residents from leaving a facility due to fear of losing coverage. As the manual explains, a "conservative approach to retain the presumption for limitation of liability may lead a facility to notify patients that leaving the facility will result in denial of coverage. Such a notice is not appropriate."[72]

In addition, the Department for Health & Human Services ("HHS"), which is authorized to impose civil money penalties ("CMPs") for fraud and abuse involving Medicaid and Medicare programs, has confirmed that a nursing home will not be liable for CMPs when a resident is hurt while out on pass if the home engaged in adequate risk assessment. As HHS explains, the potential for risk should not prevent a nursing home from issuing outside passes. Rather, the nursing home should have a policy for individually assessing and tracking potential risks associated with residents' day pass access and keep a record documenting instances when residents leave against medical advice.[73] If a home adequately and individually assesses risk, it will avoid being subject to CMPs if an accident occurs.

ii. Facilities That Exercise Reasonable Care Will Not Be Liable for Resident Injuries

Many facilities have cited concerns that they will be legally liable for injuries if a resident slips and falls or suffers a medical emergency outside of the nursing home. In reality, a nursing home will not be held liable if it exercises reasonable care and incorporates an individualized assessment of the resident's physical and mental capacity into their determinations on whether to permit a resident to leave the nursing home.

The duty of medical facilities in New York does not extend beyond the duty to exercise reasonable care. Hospitals and medical facilities have the duty to exercise "reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his or her own safety."[74] Nursing homes are required to provide adequate supervision to residents within the facility[75] but are not responsible for supervising residents who are deemed capable of using a day pass for an independent outing.

New York courts generally defer to doctor's orders against restraining patients, and refrain from finding liability where there is no evidence of negligent supervision.[76] At least one New York court has found that if there is no medical reason that a resident cannot leave, a health facility is not liable for the actions of the resident while they are outside of the facility.[77] Therefore, where there is no documented medical reason that a resident should not be permitted to leave, a nursing home is unlikely to be found liable for accidents that occur while the resident is out on pass independently.

iii. Wandering Risks Should Be Considered on a Case-By-Case Basis

Although wandering and elopement are legitimate concerns for nursing homes, these concerns should not stop nursing homes from issuing day passes under all circumstances. The "Elopement Resource Manual," which was published in 2005 by the Healthcare Association of New York in conjunction with the DOH and representatives from nursing facilities and long-term care providers, recommends best practices for facilities in conducting risk assessments for residents who might be at risk of wandering.[78] The manual provides a general model policy for issuing day passes to residents for therapeutic purposes, which states that:

"The facility recognizes the rights of residents, for whom _____ is their home, to leave the campus for limited periods for therapeutic reasons. The facility also recognizes the need of rehabilitation patients for therapeutic leave in preparation for discharge."[79]

The manual further explains that questions about the resident's decision-making capability and history of wandering be asked during quarterly comprehensive care assessments "to ensure an effective, individualized plan of care." Based on this guidance, nursing homes should grant outside passes to residents who might be at risk of wandering on a case-by-case basis and incorporate risk assessment into their determinations of whether to grant residents day pass privileges.

d) The Department of Health Has Failed to Ensure Proper Day Pass Procedures in Violation of the ADA

The day pass problem in New York persists largely due to a lack of formal oversight, guidance, or enforcement. There is a desperate need for oversight of day pass policies in nursing homes. To our knowledge, the DOH has not issued any guidance or taken any enforcement actions regarding day pass policies in nursing homes. In at least one case, the DOH outright refused to provide any guidance on a day pass matter.

Day pass issues clearly fall within the DOH's areas of oversight and enforcement. As was already discussed, the DOH is charged with monitoring the quality of care in nursing homes, as well as ensuring that nursing homes comply with federal and state regulations including those related to resident rights. Furthermore, the DOH is a public entity and must comply with Title II of the ADA. It is a violation of the ADA for the DOH to allow nursing homes to unnecessarily restrict resident's right to community integration.[80]

The DOH already has a system in place for receiving complaints regarding nursing homes through its Nursing Home Complaint Hotline. However, while some complaints made to the hotline are transferred to an intake unit for further investigation, others are handled and disposed of by a call center. Based on our experience, it seems that day pass complaints fall into the latter category. MFJ submitted a Freedom of Information Law request to the DOH in January of 2016 requesting records pertaining to any complaints filed regarding day pass issues, as well as any official guidance

that the DOH has issued on day passes. The DOH denied our request due to the "broad scope," noting that their records are not categorized by topic of outside pass or short leave of absence.

> ***Ms. L:*** *In 2015, MFJ submitted a complaint to the DOH on behalf of Ms. L, a nursing home resident in the Rockaways who contacted MFJ because she wished to be able to leave the nursing home unescorted to get exercise, eat out at local restaurants, and visit family in the Bronx and Staten Island. The nursing home refused based on an alleged schizophrenia diagnosis. MFJ filed a DOH complaint on Ms. L's behalf regarding the matter. After reviewing Ms. L's case file, the DOH concluded that their "investigation did not reveal any violation of State and Federal regulations." A DOH official explained to MFJ: "That's not something that we would get involved in. We don't direct the care and if the facility determined that there is not going to be a pass because of safety issues or whatever reason they determine, that's not something that we would override ever or dispute with them."*
>
> *Soon after, MFJ filed a petition for a writ of habeas corpus on behalf of Ms. L, alleging that the nursing home was wrongfully detaining her. The judge signed the writ of habeas corpus and the matter was settled after experts agreed that Ms. L had no cognitive constraints preventing her from going out unescorted. Ms. L is now able to leave the home without an escort.*

VI. STRATEGIES FOR NURSING HOME RESIDENTS, FAMILY MEMBERS, AND ADVOCATES

Before admission to a nursing home, residents and their loved ones should ask whether the home has an official policy on day passes and/or residents' right to leave the facility. If day pass problems arise after admission, residents should attempt to address the problem with the nursing facility and remind the facility of their civil rights. When staff members are unresponsive, it is best to try to speak with a manager or operator of the facility. If the problem still cannot be resolved, residents should file a complaint with the DOH and contact MFJ for further advice or assistance.

If a resident is represented by an attorney, they can consider filing a lawsuit against the nursing home. One possibility is for the resident to sue based on false imprisonment. Unauthorized detainment is illegal and residents who have been denied the right to leave may have a civil legal claim against the nursing home. A person who has been unlawfully detained may seek a common law writ of *habeas corpus* based on a false imprisonment claim.[81] In New York, a civil *habeas corpus* petition alleging unlawful imprisonment can also be brought under statute.[82]

Residents can also sue based on violation of their civil rights. New York law provides for a private right of action against a residential health care facility if the facility deprives a patient of "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."[83] Since, as discussed above, federal law and New York's nursing home regulations protect the right to communicate with outside parties and participate in outside activities, a private claim could be brought based on violation of these rights.[84] Claims under the RA and FHA might also be made against the nursing home.

Finally, nursing home residents and loved ones affected by day pass problems can advocate for policy reform. Residents, family members, and advocates can contact their local representatives to inform them of this important problem and request policy changes, including clearer state regulations and improved guidance and enforcement from the DOH and other state agencies. Local representatives likely are unaware of this issue so it is important to inform them and to share firsthand experiences and stories from within their districts' nursing homes.

VII. RECOMMENDATIONS

There clearly is a need for action. Since the DOH is responsible for regulating and monitoring nursing homes, we believe that the DOH should take the lead in addressing the day pass problem. In addition, the DOH has obligations under the ADA to ensure that nursing homes in New York are not unnecessarily confining their residents. We offer the following recommendations for DOH action, as well as recommendations for state legislative reform:

1) **Issue official guidance on day pass related matters.** The DOH should issue clear guidance on day pass related matters, including:
    - Nursing home liability and Medicaid eligibility when residents leave for short trips, either with a day pass or "against medical advice."
    - Revocation of day pass privileges is an unacceptable form of punishment.
    - The benefits of community integration, including that access to the community is not necessarily in conflict with a resident needing a nursing home level of care.
    - The requirements under relevant state and federal laws, including the NHRA and the ADA.

2) **Develop a model policy for day pass access and formulate best practices.** The DOH should publish best practices and/or policies for nursing facilities to refer to in reforming their own internal practices. An official model policy should:
    - Establish a baseline presumption that a resident can leave the facility unescorted.
    - Require supporting medical documentation anytime a nursing home overrides the baseline presumption that a resident can leave the facility unescorted.

- Emphasize the duty of nursing homes to engage in individualized assessments of residents through comprehensive care planning, and to take into account the positive health benefits associated with leaving the nursing home.

3) **Track complaints regarding day pass access and prioritize investigation into day pass complaints.** We recommend that the DOH investigate day pass-related complaints and develop a system of tracking complaints about day passes. Complaints made to the Nursing Home Complaint Hotline regarding day passes should be referred to the central intake unit. Specifically, the DOH should investigate and issue violations regarding complaints about:

   - Denial or restriction of day pass rights where there is no documentation of a significant risk of harm to the health or safety of the resident or others.
   - Revocation of day pass rights as punishment.
   - Nursing homes encouraging residents to sign off on any contract, stipulation, settlement, or form that limits their day pass rights.

4. Implement an appeal procedure. We recommend that the DOH establish an appeal process for nursing home residents who have been denied day passes. The appeal system should include a method for appealing denials before an impartial board or committee or administrative law judge, with the option to appeal via writing, phone, or at an informal in-person hearing. Residents should have the opportunity to have an attorney or other advocate represent or assist them for the appeal.

2. Strengthen New York's nursing home laws and regulations. New York should consider modeling legislative changes after states like Georgia and Iowa, and explicitly establish the right of residents to leave the facility unescorted as the baseline presumption, which can be overridden only by contraindicative medical documentation. The regulations on this matter should also more closely resemble the current law on involuntary commitment and physical and chemical restraint by including similar procedural protections.

VIII. CONCLUSION

Even though the right to go outside is crucial for a person's overall health and well-being, nursing homes use their power over residents to restrict their right to leave, often under the auspices of protecting resident safety. Many nursing homes in New York continue to treat their residents like prisoners, in violation of their right to community integration. The reality is that many residents are capable of and would benefit from greater independence and access to the community. Residents should never have to choose between receiving the nursing services they need and sacrificing their civil rights. MFJ strongly urges the Department of Health and other stakeholders to take immediate steps to stop this serious violation of rights. The unnecessary confinement of nursing home residents cannot continue to be overlooked.

[1] Atwul Gawande, BEING MORTAL 109 (2014).

[2] Licia Carlson, Institutions, in KEYWORDS FOR DISABILITY STUDIES 109 (Rachel Adams, Benjamin Reiss, and David Serlin eds., New York University Press 2015).

[3] See generally Samuel R. Bagenstos, The Past and Future of Deinstitutionalization Litigation, 34 CARDOZO L. REV. 1 (2012)

[4] 527 U.S. 581 (1999).

[5] Id,

[6] See, e.g., Lois J. Cutler & Rosalie A. Kane, Practical Strategies to Transform Nursing Home Environments: Towards Better Quality of Life Manual (2004).

[7] Mary Jane Koren, Person-Centered Care For Nursing Home Residents: The Culture-Change Movement, HEALTH AFFAIRS, 29, no.2 (2010):312-317 (January 7, 2010).

[8] See, e.g., Constance Gustke, Small Residences for the Elderly Provide More Personal, Homelike Care, NY TIMES, Nov. 20, 2015, http://www.nytimes.com/2015/11/21/your-money/small-residences-for-the-elderly-provide-more-personal-homelike-care.html?_r=0.

[9] Namkee G. Choi, et al., Depression in older nursing home residents: The influence of nursing home environmental stressors, coping, and acceptance of group and individual therapy, 12 Aging & Mental Health 536, 541 (2008).

[10] Tracy Marx & Vickie Ball-Seiter, Social isolation and telecommunication in the nursing home: A pilot study, GERONTECHNOLOGY 2010; 10(1):51-58, available at http://gerontechnology.info/index.php/journal/article/viewFile/gt.2011.10.01.004.00/1489; Social Isolation Among Seniors: An Emerging Issue, British Columbia Ministry of Health (March 2004), available at http://www.health.gov.bc.ca/library/publications/year/2004/Social_Isolation_Among_Seniors.pdf

[11] Lois J. Cutler & Rosalie A. Kane, As great as all outdoors: A study of outdoor spaces as a neglected resource for nursing home residents, University of Minnesota School of Public Health, available at http://www.hpm.umn.edu/ltcresourcecenter/research/QOL/Cutler_Kane_outdoor_space_and_QOL_2005.pdf.

[12] 42 U.S.C.A. § 12101(b)(1).

[13] 28 CFR § 35.10(d).

[14] Id. § 35.130(d), App. A.

[15] Id.§ 35.130(b)(7). See also Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 607 (1999).

[16] 28 C.F.R. § 35.139.

[17] Id. § 35.104.

[18] Id. § 35.139.

[19] Olmstead, 527 U.S at 597.

[20] Id. at 587 ("Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.").

[21] Id. at 600-601.

[22] 29 U.S.C.A. § 794.

[23] 29 U.S.C.A. § 701.

[24] 28 C.F.R. § 42.503. See also 45 C.F.R. § 84.4 (Department of Health and Human Services implementing regulations).

[25] 42 U.S.C.A. § 3604(f).

[26] See, e.g., Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1102 (3d Cir. 1996).

[27] Martin Klauber & Bernadette Wright, The 1987 Nursing Home Reform Act, AARP, February 2001, available at http://www.aarp.org/home-garden/livable-communities/info-2001/the_1987_nursing_home_reform_act.html.

[28] 42 CFR § 483.10.

[29] Id.

[30] Id.

[31] Id.

[32] Id.

[33] Id.

[34] Id.

[35] Id. § 483.24(c).

[36] Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,718-19.

[37] 42 CFR § 483.21.

[38] Id. § 483.5.

[39] Id. § 483.21(b).

[40] See 10 NYCRR 415.3.

[41] See 42 C.F.R. § 483.24; 10 NYCRR 415.12.

[42] See 10 NYCRR 415.3.

[43] Id. at 415.4.

[44] Id. at 415.5.

[45] Id. at 415.3.

[46] Id.

[47] Id.

[48] Ga. Code Ann. § 31-8-112.

[49] Ga. Code Ann. § 31-8-117.

[50] Iowa Admin. Code r. 481-58.47(135C).

[51] Ky. Rev. Stat. Ann. § 216.515.

[52] N.Y. Mental Hyg. Law § 9.39.

[53] N.Y. Mental Hyg. Law §§ 9.27; 9.29; 9.31(a).

[54] People v. Escobar, 462 N.E.2d 1171, 1176 (N.Y. 1984) (holding this standard applicable to NY Mental Hygiene Laws by citing Addington v. Texas, 441 U.S. 418 (1979)).

[55] See Rubenstein v. Benedictine Hosp., 790 F. Supp. 396 (N.D.N.Y. 1992).

[56] See 42 CFR § 483.12; 10 NYCRR § 415.3.

[57] 10 NYCRR § 415.4.

[58] Evan M. Meyers, Physical Restraints in Nursing Homes: An Analysis of Quality of Care and Legal Liability, 10 ELDER L.J. 217, 220 (2002).

[59] See Freedom from Unnecessary Physical Restraints: Two Decades of National Progress in Nursing Home Care, CENTERS FOR MEDICARE & MEDICAID SERVICES (July 2008), available at https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/downloads/SCLetter09-11.pdf.

[60] Id.

[61] See 10 NYCRR § 415.4(a)(2)(1).

[62] Id. at 415.4(a)(2).

[63] Id. at 415.4(a)(3).

[64] Id. at 415.4(a)(2).

[65] Id. at 415.4(a)(6).

[66] Id. at 415.4(a)(7).

[67] See Carina Storrs, The 'elder orphans' of the Baby Boomer generation, CNN, http://www.cnn.com/2015/05/18/health/elder-orphans

[68] Although many nursing home residents both require a nursing home level of care and have the ability and desire to leave the facility for short trips, it is worth noting that nursing homes are often an expensive alternative to affordable housing for people with disabilities. Affordable housing for people with disabilities continues to be very limited in New York despite evidence that expansion of supported housing saves money on other services, such as nursing home care. See Supportive Housing Reduces Spending on Services, Supportive Housing Network of New York, available at http://shnny.org/images/uploads/Cost-Studies-two-pager.pdf; Ehren Dohler et al., Supportive Housing Helps Vulnerable People Live and Thrive in the Community, CENTER ON BUDGET AND POLICY PRIORITIES, available at http://www.cbpp.org/research/housing/supportive-housing-helps-vulnerable-people-live-and-thrive-in-the-community.

[69] 14 NYCRR 415.11; 42 C.F.R. § 483.21.

[70] 42 C.F.R. § 483.12(b); 18 NYCRR § 505.9(d)(7).

[71] CENTER FOR MEDICARE AND MEDICAID SERVICES, MEDICARE BENEFIT POLICY MANUAL, Chapter 8 § 30.7.3 (April 2014) available at: http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/bp102c08.pdf.

[72] Id.

[73] See Van Duyn Home and Hospital, Dep't of Health and Human Serv., Docket No. A-100104 (March 24, 2011), available at http://www.hhs.gov/dab/decisions/dabdecisions/dab2368.pdf ("The facility here was not held responsible for the poor decisions made by the two residents nor for the unfortunate consequences of those decisions. The facility rather was held responsible for its own failures to fully assess the particular risks of accidents and injuries that each resident faced leaving the facility on pass, to plan and offer reasonable alternatives to minimize the risks (especially as they became more obvious after each outing), and to document that the residents, despite being informed of the risks and alternatives, chose to refuse care.").

[74] D'Elia v. Menorah Home & Hosp. for Aged & Infirm, 859 N.Y.S.2d 224, 226 (2008).

[75] See 42 CFR § 483.25; 10 NYCRR § 415.12.

[76] See Abrahams v. King St. Nursing Home, Inc., 245 A.D.2d 251, 251, 664 N.Y.S.2d 479, 480 (App. Div. 2nd Dep't 1997) (finding no evidence that a nursing home's failure to restrain a resident was negligent); Purdy v. Pub. Adm'r of Westchester Cty., 72 N.Y.2d 1,

526 N.E.2d 4 (1988) (finding no duty of a medical facility to restrain a resident who fell asleep driving and caused an automobile accident during an unaccompanied leave).

[77] See id. The court in Purdy noted that that the patient had "the right to make independent personal decisions . . . to exercise civil and religious liberties . . . and the right to be free from physical restraint, except where emergency dictates otherwise." Id. at 9.

[78] Available at www.nccdp.org/ElopementManual.doc.

[79] The elopement manual also provides the following example: "[a] short-term resident leaves on a day pass to visit with his brother, but doesn't return by the end of the day. The facility locates the resident in the evening, and he returns safely with his brother." The manual goes on to explain that, in determining whether the nursing home needs to report the incident, "[r]esident rights will dictate in this situation. If the resident makes the decision to stay away longer than what was originally told to the facility he/she has that right and, consequently, the DOH does not need to be notified, as long as the facility knows the whereabouts of the resident."

[80] See 28 C.F.R. § 35.139.

[81] Within the healthcare context, *habeas corpus* relief has typically been sought by individuals who have been involuntarily committed to a facility. See, e.g., People ex rel. Delia v. Munsey, 41 N.E.3d 1119 (N.Y. 2015); People ex rel. King v. McNeill, 30 Misc. 2d 566 (N.Y. Sup. Ct. 1961).

[82] N.Y. C.P.L.R. § 7002. New York's habeas statute employs broad language authorizing any person "illegally imprisoned or otherwise restrained in his liberty within the state" to petition. Id.; see also People ex rel. Schreiner v. Tekben, 160 Misc. 2d 34, 36 (N.Y. Sup. Ct. 1993) ("The writ of habeas corpus has been characterized as one of great flexibility and vague scope.").

[83] N.Y. Pub. Health Law § 2801-d.

[84] Outside of New York, a private right of action might not exist, depending on the language in the state's nursing home regulations. While multiple federal courts have confirmed that the federal Nursing Home Reform Act contains "rights-creating" language, there is no explicit federal private cause of action promulgated in NHRA. See, e.g., Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel, 570 F.3d 520, 525 n. 2 (3d Cir.2009). In the case of state or county-owned nursing homes, some courts have found that the rights created by the NHRA are enforceable through a civil rights action under 42 U.S.C.A. § 1983. See Soto v. Lene, 2011 WL 147679 (E.D.N.Y. Jan. 18, 2011) (holding that in the context of nursing homes acting under color of state law, NHRA confers "individual rights that are presumptively enforceable through § 1983."); Joseph S. v. Hogan, 561 F. Supp. 2d 280, 304 (E.D.N.Y. 2008) (finding that the NHRA confers individual rights enforceable through a § 1983 action). But see Baum v. N. Dutchess Hosp., 764 F. Supp. 2d 410, 425 (N.D.N.Y. 2011) ("FNHRA lacks the rights-creating language critical to reflecting Congress's intent to create a new federal right or individual entitlement that would be enforceable under § 1983."). However, in private nursing homes, a § 1983 action is not an option since § 1983 actions can only be brought against state actors. Another option might be to bring a Rehabilitation Act or Fair Housing Act against the nursing home.