

- Prohibiting a resident from participating in group activities as a form of reprisal or discrimination. This includes prohibiting a resident from group activities without clinical justification or evaluation of the impact the resident's participation has on the group.
- A resident's rights, not addressed elsewhere (for example, religious expression, voting, or freedom of movement outside the facility in the absence of a legitimate clinical need) are impeded in some way by facility staff.
- Requiring residents to seek approval to post, communicate or distribute information about the facility (for example, social media, letters to the editor of a newspaper).
- Acting on behalf of the pertinent law enforcement or criminal justice supervisory authority by enforcing supervisory conditions or reporting violations of those conditions to officials for justice involved residents.

POTENTIAL TAGS FOR ADDITIONAL INVESTIGATION

For deficiencies regarding lack of visual privacy for a resident while that resident is receiving treatment or ADL care from staff in the bedroom, bathroom, or bathing room, refer to §483.10(e), F583, Privacy and Confidentiality.

For deficiencies regarding a resident's lack of self-determination to make decisions about things that are important in his or her life, refer to §483.10(f)(1)-(3), (8), F561, Self-determination.

For deficiencies related to failure to keep residents' faces, hands, teeth, fingernails, hair, and clothing clean, refer to §483.24(a)(2), F677, Activities of Daily Living (ADLs).

If there are indications that a resident is in a secured/locked area without a clinical justification and/or placement is against the will of the resident, their family, and/or resident representative, review regulatory requirements at §483.12 and §483.12(a), F603, Involuntary Seclusion.

If the survey team identifies potential compliance issues related to social services, refer to §483.40(d), F745, Social Services.

F551

(Rev. 173, Issued: 11-22-17, Effective: 11-28-17, Implementation: 11-28-17)

§483.10(b)(3) In the case of a resident who has not been adjudged incompetent by the state court, the resident has the right to designate a representative, in accordance with State law and any legal surrogate so designated may exercise the resident's rights to the extent provided by state law. The same-sex spouse of a resident must be afforded treatment equal to that afforded to an opposite-sex spouse if the marriage was valid in the jurisdiction in which it was celebrated.

- (i) The resident representative has the right to exercise the resident's rights to the extent those rights are delegated to the representative.**
- (ii) The resident retains the right to exercise those rights not delegated to a resident representative, including the right to revoke a delegation of rights, except as limited by State law.**

§483.10(b)(4) The facility must treat the decisions of a resident representative as the decisions of the resident to the extent required by the court or delegated by the resident, in accordance with applicable law.

§483.10(b)(5) The facility shall not extend the resident representative the right to make decisions on behalf of the resident beyond the extent required by the court or delegated by the resident, in accordance with applicable law.

§483.10(b)(6) If the facility has reason to believe that a resident representative is making decisions or taking actions that are not in the best interests of a resident, the facility shall report such concerns when and in the manner required under State law.

§483.10(b)(7) In the case of a resident adjudged incompetent under the laws of a State by a court of competent jurisdiction, the rights of the resident devolve to and are exercised by the resident representative appointed under State law to act on the resident's behalf. The court-appointed resident representative exercises the resident's rights to the extent judged necessary by a court of competent jurisdiction, in accordance with State law.

- (i) In the case of a resident representative whose decision-making authority is limited by State law or court appointment, the resident retains the right to make those decisions outside the representative's authority.**
- (ii) The resident's wishes and preferences must be considered in the exercise of rights by the representative.**
- (iii) To the extent practicable, the resident must be provided with opportunities to participate in the care planning process.**

DEFINITIONS §483.10(b)(3)-(7)

"Court of competent jurisdiction" means any court with the authority to hear and determine a case or suit with the matter in question.

"Resident representative" For purposes of this subpart, the term resident representative may mean any of the following:

1. An individual chosen by the resident to act on behalf of the resident in order to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications;
2. A person authorized by State or Federal law (including but not limited to agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident in order to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications; or
3. Legal representative, as used in section 712 of the Older Americans Act; or
4. The court-appointed guardian or conservator of a resident.
5. Nothing in this rule is intended to expand the scope of authority of any resident representative beyond that authority specifically authorized by the resident, State or Federal law, or a court of competent jurisdiction.

GUIDANCE §483.10(b)(3)-(7)

When reference is made to “resident” in the Guidance, it also refers to any person who may, under State law, act on the resident’s behalf when the resident is unable to act for themselves. That person is referred to as the resident representative. If the resident has been formally declared incompetent by a court, the representative is whomever the court appoints (for example, a guardian or conservator).

A competent resident may wish to delegate decision-making to specific persons, or the resident and family may have agreed among themselves on a decision-making process. To the degree permitted by State law, the facility staff must respect the delegated resident representative’s decisions regarding the resident’s wishes and preferences so long as the resident representative is acting within the scope of authority contemplated by the agreement authorizing the person to act as the resident’s representative.

In the case of a resident who has been formally declared incompetent by a court, a court appointed resident representative may be assigned. Facility staff must confer with the appointed resident representative.

State laws and court orders authorizing guardians, conservators, etc., vary considerably. Many statutes and court orders limit the scope of the authority of the representative to act on behalf of the resident.

Facility staff must obtain documentation that the resident’s representative has been delegated the necessary authority to exercise the resident’s rights and must verify that a court-appointed representative has the necessary authority for the decision-making at issue as determined by the court. For example, a court-appointed representative might have the power to make financial decisions, but not health care decisions. Additionally, the facility must make reasonable efforts to ensure that it has access to documentation of any change related to the delegation of rights, including a resident’s revocation of delegated rights, to ensure that the resident’s preferences, are being upheld.

Whether a resident has or has not been judged incompetent by a court of law, if it is determined that the resident understands the risks, benefits, and alternatives to proposed health care and expresses a preference, then the resident’s wishes should be considered to the degree practicable, including resident input into the care planning process.

The involvement of a representative does not relieve facility staff of their duty to protect and promote the resident’s interests. For example, a representative does not have the right to insist that a treatment be performed that is not medically appropriate or reject a treatment that may be subject to State law. Surveyors must confirm delegation of resident rights to a resident representative. Surveyors must also determine, through interview and record reviews, whether or not the resident’s delegation of rights has been followed by facility staff.

If a resident’s representative is a same-sex spouse, he or she must be treated the same as an opposite-sex spouse with regard to exercising the resident’s rights. In *Obergefell v. Hodges*, 576 U.S. ___ (2015), the Supreme Court of the United States also ruled that all States must recognize

a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

PROCEDURES §483.10(b)(3)-(7)

Surveyors must check whether there has been a delegation of resident rights or designation of a resident representative. Surveyors must also determine, through interview and record reviews, whether or not the resident's delegation of rights has been followed by facility staff.

Determine through interview and record review if the resident has been found to be legally incompetent by a court in accordance with state law.

If yes:

- Verify the appropriate legal documentation for a court-appointed resident representative is present in the resident's medical record.
- Review court orders or other legal documentation to determine the extent of the court-appointed resident representative's authority to make decision on behalf of the resident and any limitations on that authority that may have been ordered by the court.
- Determine if the court-appointed representative is making decisions for the resident beyond the scope of the resident representative's decision-making authority and the facility is relying on that authority as the basis of a practice (e.g., health care treatment, managing resident funds, discharge decision). If so, a deficiency may be cited under this regulation.
- Determine if the resident was involved in care planning activities and able to make choices, to the extent possible.
- Observe resident care and daily activities (e.g., participation in activities) for adherence to resident's or court-appointed resident representative's goals, choices, and preferences. Even when there is a court-appointed resident representative, the facility should seek to understand the resident's goals, choices, and preferences and have honored them to the extent legally possible.

If no:

- Determine how decisions are being made for the resident. Does the resident maintain all of his/her rights, even if he/she has designated a representative to assist with decision-making unless a court has limited those rights under state law, and only to the extent that has been specified by a court under state law? Has the resident designated a resident representative and is facility staff respecting the authority of this designate surrogate decision-maker to act on behalf of the resident?
- Are all residents informed of their plan of care or treatment in the most understandable manner possible, and given an opportunity to voice their views? Autonomy is also expressed through gestures and actions and this also should be recognized. Residents even without capacity or declared incompetent may be able to express their needs and desires.
- Determine whether same-sex spouses are treated in the same manner as an opposite-sex spouse in all states and territories.
- If the resident has delegated a resident representative, verify the appropriate documentation is present in the resident's medical record.