Assistive Technology for Nursing Facility Residents Frequently Asked Questions

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Introduction

Despite significant increases in Medicaid-funded home and community based services over the past two decades, large numbers of older individuals and people with disabilities continue to reside in nursing facilities (NFs). In 2014, more than 1.4 million people lived in approximately 15,000 NFs across the United States.[1] Medicaid was the primary payer for nearly 63 percent of these residents.[2]

Of the approximately 1.4 million NF residents in 2014, more than 15 percent were under 65 years of age.[3] Among this group of younger NF residents, 2,758 residents were children and youth under the age of 21, 4,509 individuals were between 22 and 30, and 210,655 were between 31 and 64 years of age.[4] Within the overall NF population, more than 24,000 residents were identified as having intellectual disabilities.[5]

For many NF residents with disabilities, assistive technology (AT) devices and services are an essential component of the health care and long term services and

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[1] CMS, "Nursing Home Data Compendium 2015 Edition." pp.1- 2. Available online at https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/nursinghomedatacompendium_508-2015.pdf.
[2] C. Harrington, H. Carrillo, and R. Garfield, "Nursing, Facilities, Staffing, Patients, and Facility Deficiencies, 2009 Through 2014," (Figures 5-6). Available online at The Henry J. Kaiser Family Foundation, http://kff.org/medicaid/report/nursing-facilities-staffing-residents-and-facility-deficiencies-2009-through-2014/.
[3] CMS, "Nursing Home Data Compendium 2015 Edition." p. 2. Available online at https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/nursinghomedatacompendium_508-2015.pdf.
[4] *Id.* Table 3.2.d.
[5] University of Minnesota, Residential Information Systems Project, "In-Home and Residential Long-Term Supports and Services for Persons with Intellectual Disabilities or Developmental Disabilities: Status and Trends through 2013." U.S. Profile p.1. Available online at https://risp.umn.edu/.

supports they require.[6] Although NF residents cannot obtain AT devices through the home health medical equipment benefit as Medicaid beneficiaries residing in the community do, federal Medicaid requirements governing NFs strongly support the right of these residents to obtain the AT devices and services they require to maintain their functional abilities and preserve their health and well-being.

The purpose of this document is to identify relevant NF requirements and to describe some of the issues NF residents confront when seeking AT devices and services.[7] While this FAQ may not answer all of your questions concerning access to AT by NF residents in your state, it should provide a good starting point for your advocacy efforts on behalf of these individuals.

What is Assistive Technology?

Assistive technology is an expansive term used in the Assistive Technology Act of 2004[8] to describe devices and services of critical importance to many individuals with disabilities. AT devices may be needed by people with disabilities of any age and in any environment. As explained in the AT Act, such devices allow individuals with disabilities to increase their "involvement in, and reduce expenditures associated with, programs and activities that facilitate communication, ensure independent functioning, enable early childhood development, support educational achievement, provide and enhance employment options, and enable full participation in community living . . ."[9]

The AT Act broadly defines AT devices as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities."[10] AT services include "any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device."[11]

Medicaid programs do not typically use the the terms "assistive technology" or "AT" when describing available benefits. Nonetheless, AT devices and services may be available to Medicaid-eligible NF residents under several other descriptions including medical equipment, specialized rehabilitative services, prosthetic devices or specialized

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[6] *See* CMS, "Long Term Services and Supports" for an overview of these services. Available online at https://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/long-term-services-and-supports.html.

[7] The focus of this FAQ is on NF residents who have no current plan to leave the facility. For residents transitioning to the community, there may be additional sources of Medicaid funding for AT devices. *See* CMS, "Money Follows the Person (MFP)." Available online at https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Balancing/Money-Follows-the-Person.html. Presently, more than 40 states operate various MFP initiatives to support the transition of NF residents to the community.

[8] 29 U.S.C. § 3001 *et seq.* The original version of this law was known as the Technology Related Assistance for Individuals with Disabilities Act of 1988. Pub. L. 100-407, 102 Stat. 1044, former 29 U.S.C. § 2201 *et seq.*

[9] 29 U.S.C. § 3001(a)(5).

[10] 29 U.S.C. § 3002(4).

[11] 29 U.S.C. § 3002(5).

services. Examples of such AT devices include custom manual and power wheelchairs, speech generating devices, specialized mattresses, and standing equipment. These AT devices, and others, should be available to individuals with disabilities residing in NFs when necessary to address their medical and functional needs.

What are Medicaid Nursing Facilities?

Nursing facilities are one of several institutional long term care settings covered by Medicaid.[12] The Centers for Medicare and Medicaid Services (CMS) describe these institutional settings, including NFs, as having the following characteristics:

- Institutions are residential facilities, and assume total care of the individuals who are admitted.

- The comprehensive care includes room and board. Other Medicaid services are specifically prohibited from including room and board.

- The comprehensive service is billed and reimbursed as a single bundled payment. (Note that states vary in what is included in the institutional rate, versus what is billed as a separately covered service, for example physical therapy may be reimbursed as part of the bundle or as a separate service.)

- Institutions must be licensed and certified by the state, according to federal standards.[13]

- Institutions are subject to survey at regular intervals to maintain their certification and license to operate.

- [Financial] [e]ligibility for Medicaid may be figured differently for residents of an institution, and therefore access to Medicaid services for some individuals may be tied to need for institutional level of care.[14]

Nursing facility services are a mandatory Medicaid benefit that all states must make available when medically necessary for eligible beneficiaries.[15] Consequently, states cannot operate a waiting list for this service. As defined in the Medicaid Act:

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[12] 42 U.S.C. § 1396d(a)(4)(A). Other Medicaid-funded institutional settings include Intermediate Care Facilities for Individuals with Intellectuals Disabilities (ICFs-IID) and Institutions for Individuals with Mental Disease (IMDs).

[13] In 2014, slightly more than 92 percent of Medicaid NFs were also certified as Skilled Nursing Facilities (SNFs) through Medicare. *See* CMS, "Nursing Home Data Compendium 2015 Edition," p.2. Available online at https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/nursinghomedatacompendium_508-2015.pdf.

[14] This quoted language is taken from CMS, "Long Term Services and Supports." Available online at https://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/long-term-services-and-supports.html.

[15] 42 U.S.C. § 1396d(a)(4)(A).

the term nursing facility means an institution (or a distinct part of an institution) which—

(1) is primarily engaged in providing to residents—

(A) skilled nursing care and related services for residents who require medical or nursing care,

(B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons, or

(C) on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities,

and is not primarily for the care and treatment of mental diseases.[16]

Nursing facilities must comply with all federal and state Medicaid requirements in order to receive Medicaid payment.[17] As noted above, Medicaid reimbursement to NFs differs from other benefit categories due to the fact that NF services are typically reimbursed through a bundled payment known as the "per diem" or daily rate. This payment mechanism for NF services should not establish barriers to medically necessary AT devices and services for NF residents with disabilities.

What Nursing Facility Requirements Support Access to Assistive Technology?

In 1986, the Institute of Medicine (IOM) investigated the care of NF residents and found numerous instances of deplorable conditions and widespread neglect.[18] As described in the resulting report, "individuals who are admitted receive very inadequate - sometimes shockingly deficient - care likely to hasten the deterioration of their physical, mental and emotional health." Recommendations in the IOM report led to the passage of the Nursing Home Reform Act (NHRA) as part of the Omnibus Budget Reconciliation Act of 1987.[19] These amendments to the Medicaid Act established several important requirements affecting the rights of individuals residing in Medicaid NFs.[20]

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[16] 42 U.S.C. § 1396r(a)(1).

[17] 42 U.S.C. § 1396r(d)(4)(A). *See also* 42 C.F.R. Part 483.

[18] Institute of Medicine, Committee on Nursing Home Regulation, "Improving the Quality of Care in Nursing Homes." (1986). Available online at www.books.nap.edu/books. On March 15, 2016, the IOM was renamed the Health and Medicine Division (HMD) of the National Academies of Sciences, Engineering, and Medicine.

[19] P.L. No. 100-203, § 421(c), 101 Stat. 1330-198 (1987).

[20] Numerous courts have found provisions of the NHRA to be enforceable through 42 U.S.C. § 1983 by Medicaid beneficiaries against state Medicaid agencies. *See, e.g.*, *Grammer v. John J. Kane Reg'l Centers-Glen Hazel,* 570 F. 3d. 520,525 (3rd Cir. 2009); *Rolland v. Romney,* 318 F.3d 42, 51-56 (1st Cir. 2003); *Grant ex. rel. Family Eldercare v. Gilbert,* 324 F.3d. 383,387 n.5 (5th Cir. 2003) (NHRA

First, the NHRA mandates a high standard of care for NF residents, stating that "[a] nursing facility must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident."[21] To ensure this standard of care is met, the NHRA entitles NF residents to, among other things, services and activities that allow them "to attain or maintain the highest practicable physical, mental, and psycho-social well-being."[22] It is not uncommon that NF residents with disabilities will require AT devices and services to ensure this high standard of care is met.

Second, the NHRA clarifies that NFs must "protect and promote the rights of each NF resident."[23] These rights include the right to choose one's own physician, to receive advance notice of any changes in care and treatment, and the right to participate in the planning of one's own care.[24] NF residents also have the right to privacy and confidentiality, to be free from restraints that are not necessary to address a medical condition, to participate in social, religious and community activities, the right to "assistive devices" to prevent accidents, and the right to register grievances concerning one's care and treatment without fear of retaliation. Again, access to AT devices and services may be one way for NF residents to realize these rights.

Third, the NHRA requires states to protect against the inappropriate placement of individuals with mental illness (MI), intellectual disability (ID), and related conditions (RC) in NFs.[25] To this end, states must implement a PreAdmission Screening and Resident Review (PASRR) process.[26] As explained by the PASRR Technical Assistance Center (PTAC), the purpose of the PASRR requirement is to: "(1) identify individuals with mental illness (MI), and/or intellectual disability (ID), [or related conditions (RC)];[27] (2) ensure they are placed appropriately whether in the community

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enforceability assumed without deciding.). Other courts have determined that the NHRA is not enforceable against nursing facilities as these facilities are not typically state actors subject to Section 1983. *Stewart v. Bernstein,* 769.F.2d.1088, 1092 (5th Cir.1985); *Baum v. N. Dutchess Hosp.,*764 F. Supp. 2d 410, 425 (N.D. N.Y. 2011).

[21] 42 U.S.C. § 1396r(b)(1)(A).

[22] 42 U.S.C. § 1396r(b)(2); 42 C.F.R. § 483.25.

[23] 42 U.S.C. § 1396r(c)(1)(A).

[24] 42 U.S.C. § 1396r(c); 42 C.F.R. § 483.10.

[25] 42 U.S.C. § 1396r(e)(7)(A); 42 C.F.R. § 483 Subpart C.

[26] The PASRR process involves two levels of review. The first, referred to as the Level I screen, applies to all individuals seeking admission to a NF, regardless of their payment source for NF services. The purpose of the Level I screen is to indicate the possibility of MI, ID or RC. The next step or Level II evaluation is conducted only when the Level I screen indicates an individual may have one of these disabilities. If any of these diagnoses is established through the Level II evaluation, a decision must be made whether NF placement is appropriate and, if so, what specialized services, in addition to NF services, are necessary to address the individual's specific disability.

[27] The terms "mental illness" and intellectual disability are defined for PASRR purposes at 42 C.F.R. § 102. The term "persons with related conditions" is defined at 42 C.F.R. § 435.1010. As explained by the PASRR Technical Assistance Center, related conditions are those that are "not a form of intellectual disability, but which often produce similar functional impairments and require similar treatment or services (hence the term "related"). Related conditions must emerge before the age of 22; they must be expected to continue indefinitely; and they must result in substantial functional limitations in 3 or more [ ] major life

or in a NF; and (3) ensure that they receive the services they require for their MI or ID wherever they are placed."[28] This latter group of disability-specific services is known as "specialized services" and must be provided to PASRR-eligible residents in addition to NF services, when necessary to meet their individualized needs. Oftentimes, specialized services can provide an additional source of AT devices and services for PASRR-eligible residents.

What Services are Medicaid Nursing Facilities Required to Provide?

Federal law identifies the NF services to which Medicaid-eligible residents are entitled.[29] These NF services must "meet professional standards of quality" and include:

- nursing and related services[30]
- specialized rehabilitative services
- medically-related social services
- pharmaceutical services
- dietary services
- activities programs
- routine dental services (to the extent covered under the State plan) and emergency dental services treatment and
- services required by residents who have mental illness or intellectual disabilities that are not provided or arranged for by the State [31]

Many of these NF services are defined or described in federal regulations.[32] Of particular relevance to the acquisition of AT devices are specialized rehabilitative services. This category of service includes physical therapy, occupational therapy and speech language pathology services.[33] Typically, one or more of these therapy providers are necessary to evaluate NF residents and to document their need for AT devices such as custom wheelchairs or speech generating devices.

Specialized rehabilitative services should not be confused with the specialized services that are available to PASRR-eligible NF residents. Specialized rehabilitative services are one of the many NF services that must be provided when medically necessary for any Medicaid-funded NF resident. These services may be part of the Medicaid daily rate paid to NFs.

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activities, [including] self-care, the understanding and use of language, learning, mobility, self-direction, [and the] capacity for independent living." *See* *http://www.pasrrassist.org/resources/federal-regulations/pasrr-plain-english*.

[28] PASRR Technical Assistance Center, "Introduction to PASRR." Available online at http://www.pasrrassist.org/resources/laws-and-rules/introduction-pasrr.

[29] 42 U.S.C. § 1396r(b)(4)(A).

[30] As explained in 42 C.F.R. § 483.40, physician services must also be available to residents on a regular basis and to address the need for emergency care.

[31] Nursing facilities must provide MI or ID services "of a lesser intensity than specialized services to all residents who need such services." 42 C.F.R. § 483.120(c).

[32] 42 C.F.R. §§ 483.30-483.60.

[33] 42 C.F.R. § 483.45.

In contrast, specialized services are a distinct group of services that are only available to NF residents who have been identified as having serious mental illness, intellectual disabilities, or related conditions.[34] Specialized services are those that "*exceed* the services ordinarily provided by the NF under its per diem rate."[35] These services are provided to increase the level of independent functioning of PASRR-eligible residents and to preserve their optimal functional status. For individuals with ID or RC, specialized services are part of the program of continuous active treatment to which they are entitled.[36] The cost of specialized services is not included in the NF daily rate paid by the state.

How are the Assistive Technology Needs of Nursing Facility Residents Identified?

Pursuant to the NHRA, NFs are required to conduct comprehensive assessments of each resident's "functional capacity." This assessment must be completed on an annual basis or when there is a significant change in the resident's physical or mental condition.[37] Such assessments should consider whether AT devices will assist the resident in attaining or maintaining their "highest practicable" well-being. Quarterly examinations of residents are also required to ensure "continued accuracy of the assessment."[38]

These assessments and reassessments form the basis for the individualized plan of care that must be established for each resident.[39] Developed by a team, including the attending physician, a registered nurse, and the resident or his or her family, the plan of care must include "measurable objectives and timetables to meet [the] resident's medical, nursing, and mental and psychosocial needs that are identified in the comprehensive assessment."[40] In addition to preserving each resident's general health and well-being, the plan of care must provide services to ensure each resident's ability to perform activities of daily living - - bathing, dressing, grooming, transferring and ambulation, toileting, eating, and the use of speech, language or "other functional communication systems" -- does not decline, unless such decline is "unavoidable."[41]

Additional requirements exist for PASRR-eligible residents. Assessments for NF residents with MI, ID, or RC must also include specific considerations that may be relevant to the acquisition of AT. For example, assessment of a NF resident with ID or RC must consider, among other things, motor, speech, and social development, academic, vocational, and independent living skills, and "the extent to which prosthetic,

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[34] 42 C.F.R. § 483.120.
[35] CMS, "Services and Supports Required for NF Residents with MI and ID: Meaning of PASRR 'Specialized Services." 2013. Available online at http://www.pasrrassist.org/resources/specialized-services-mental-illness-intellectual-disability-nf/services-and-supports.
[36] 42 C.F.R. § 483.120(a)(2).
[37] 42 U.S.C. §§ 1396r(b)(3)(A; 1396r(b)(3)(C); 42 C.F.R. § 483.20.
[38] 42 U.S.C. § 1396r(b)(3)(C)(ii); 42 C.F.R. § 483.20(c).
[39] 42 U.S.C. § 1396r(b)(2); 42 C.F.R. § 483.20(k).
[40] 42 U.S.C. § 1396r(b)(2);42 C.F.R. § 483.20(k).
[41] 42 C.F.R. § 483.25(a)(1).

orthotic, corrective, or mechanical support devices can improve the individual's functional capacity."[42] An assessment of a resident with serious mental illness must, at a minimum, review the individual's ability to perform activities of daily living, self-monitor health and nutritional status, and his or her need for "specific therapies and activities for the treatment of an acute episode of mental illness."[43] If these assessments indicate a need for additional specialized services, NF residents with MI, ID, or RC must receive these necessary devices and services.

How Do Nursing Facility Residents Obtain Assistive Technology?

The process for obtaining AT devices while residing in a NF varies from state to state. As previously explained, state Medicaid agencies or their designees pay for NF services as a single bundled payment to the facility. This bundled payment includes numerous services, as specified in federal and state law. How NF residents actually obtain AT devices may depend on whether the requested equipment is included within the daily rate, is reimbursed separately from the daily rate, or is a specialized service that is available to PASRR-eligible residents only.

Typically, the specific items of medical equipment included in the NF daily rate are identified in state law, policy or in the state's contract with its licensed and certified NFs. For example, in Texas, NFs are required to provide "equipment that can be used by more than one person, such as wheelchairs, adjustable chairs, crutches, canes, mattresses, hospital-type beds, enteral pumps, trapeze bars, walkers, and oxygen equipment" as part of the daily rate.[44] Conversely, medically necessary custom power wheelchairs and speech generating devices are available to NF residents outside of the daily rate.[45] The process to obtain these AT items is similar to the prior authorization process available to beneficiaries residing in the community.

Other states have similar rules and policies. Nebraska Medicaid rules expressly state that:

> Air fluidized beds, non-standard wheelchairs and wheelchair accessories, options, and components, including power operated vehicles, and negative pressure wound therapy (wound VAC) will be reimbursed separately to the nursing facility . . . . All other items necessary for the care of clients residing in nursing facilities [ ] are included in payments to the facility and cannot be billed directly by a DMEPOS provider to Medicaid.[46]

[42] 42 C.F.R. § 483.136.
[43] 42 C.F.R. § 483.134.
[44] 40 Tex. Admin. Code §19.2601(b)(8).
[45] 40 Tex. Admin. Code §19.2613 (speech generating devices); §19.2614 (custom power wheelchairs).
[46] Nebraska HHS Finance and Support Manual, 471 NAC 7-005.

In Mississippi, NF residents who require custom manual or power wheelchairs can obtain this equipment outside of the NF daily rate when medically necessary and prior authorized by the state Medicaid agency or its designee.[47]

California Medicaid also provides a separate payment mechanism for certain medical equipment provided to NF residents.[48] As explained in state regulations:

> Canes, crutches, wheelchairs, wheelchair cushions, and walkers may be authorized only when the item must be custom made or modified to meet the unusual medical needs of the patient and the need is expected to be permanent.[49] A custom wheelchair, either manual or power, is one which has been uniquely constructed or assembled to address a particular patient's individual medical needs for positioning, support and mobility . . . Suction and positive pressure apparatus may be authorized only when the item will be continuously used by the patient or must be immediately available to the patient for one month or more

The process for accessing AT devices as PASRR specialized services also may differ from state to state. This process should be explained in state law or policy and should be clear that these services supplement NF services and are not included in the Medicaid daily rate. Medicaid payment is available for certain specialized services, however, when necessary to meet the needs of a NF resident with MI, ID, or RC.

Given the different payment methods used by state Medicaid agencies for providing equipment to NF residents, you will need to research your state's NF policies concerning coverage of medical equipment, the prior authorization procedures for such equipment, and any other long term care policies governing services for NF residents. You also may want to consider access through other categories of service *(e.g.* prosthetics) that may include the type of equipment needed by your NF client. While the payment mechanisms established by your state may dictate the specific process NF residents must pursue to obtain medically necessary AT devices, these mechanisms should not prevent access to AT devices and services.[50]

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[47] Ms. Admin. Code, Part 207, Rule 3.10.

[48] Title 22 CCR 51321(h)(2-3).

[49] California regulations further explain that this equipment must be "necessary for the continuous care of the patient to meet the unusual medical needs of that patient. A patient may be considered to have unusual medical needs when a disease or medical condition is exacerbated by physical characteristics such as height, weight, and body build. Physical characteristics, in and of themselves, shall not constitute an unusual medical condition." Title 22 CCR 51321(h)(1).

[50] Advocacy efforts, including litigation, have been effective in addressing some of the barriers to custom medical equipment that confront NF residents. As a result of such advocacy, several states have implemented prior authorization procedures and direct Medicaid payment outside of the daily rate for certain custom equipment to increase access by NF residents.

What If a Nursing Facility Resident is Denied Assistive Technology?

The procedures available for challenging denials of AT devices for NF residents may differ from state to state. Nonetheless, federal law mandates several procedures that NF residents may access if denied medically necessary care. First, federal Medicaid regulations establish the right of NF residents to "voice grievances without discrimination or reprisal . . . with respect to treatment which has been furnished as well as that which has not been furnished."[51] NFs are required to promptly respond in an effort to resolve such grievances.[52]

Next, state survey agencies are required to maintain a system for NF residents or their representatives to file complaints concerning abuse, neglect and misappropriation of resident property.[53] For purposes of this complaint system, the term "neglect" is defined as the "failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.[54] The state must have written procedures governing the timely investigation and resolution of such complaints and must provide written notice of any substantiated findings resulting from the state's investigation.[55]

Finally, state Medicaid fair hearing procedures may be available to NF residents who are denied the AT devices and services needed "to attain or maintain [their] highest practicable physical, mental, and psycho-social well-being." Some state agencies expressly provide access to their Medicaid fair hearing system by NF residents when state policy covers individualized or customized medical equipment outside of the daily rate. Typically, these state policies require a NF resident to secure prior authorization for the requested equipment. If denied, the resulting notice of adverse action should inform the resident of his or her right to a Medicaid fair hearing.[56] The same is true for NF residents "who have been adversely affected by any PASARR determination made by the State . . . ."[57] Federal requirements are clear that such individuals are also entitled to a Medicaid fair hearing to challenge these PASRR determinations.

Conclusion

The high standard of care mandated by the NHRA should enable Medicaid-funded NF residents to access AT devices that are necessary to "to attain or maintain the highest practicable physical, mental, and psycho-social well-being." Providing AT devices that improve mobility, enhance communication, or maintain or otherwise avoid the decline of functional skills, is consistent with the rights of NF residents and the underlying purpose of the NHRA. For some NF residents, access to AT devices and

[51] 42 C.F.R. § 483.10(f)(1).
[52] 42 C.F.R. § 483.10(f)(2).
[53] 42 C.F.R. § 488.332.
[54] 42 C.F.R. § 488.301.
[55] 42 C.F.R. § 488.335.
[56] 42 U.S.C. § 1396a(a)(3); 42 C.F.R.§ 440.200 *et seq.*
[57] 42 C.F.R. § 483.204.

the increased independence they bring may also open the door to the possibility of life in the community.

Dated: September 20, 2016

The National Assistive Technology Advocacy Project is funded through a grant received from the Administration on Community Living, U.S. Department of Health and Human Services (HHS), to the Rehabilitation Engineering and Assistive Technology Society of North America (RESNA) (with a subcontract to Neighborhood Legal Services, Inc.) under contract number H224B100001. The opinions expressed herein do not necessarily reflect the position of the HHS and no official endorsement by HHS of the opinions expressed herein should be inferred.