interface
comunicação, saúde, educação
https://www.interface.org.br
eISSN 1807-5762

Articles

Environmental restraint of the elderly in long-term care facilities in times of Covid-19: theoretical reflection

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Contención ambiental de ancianos en las instituciones de larga permanencia en tiempos de Covid-19: reflexión teórica (resumen: p. 15)

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A theoretical and reflexive study addressing the phenomenon of environmental restraint in long-term care facilities for the elderly, presenting the topic under the light of human rights and the legislation in force, which postulate good care practices to institutionalized elderly even in the face of the Covid-19 situation. By considering the negative impacts of environmental restraint on the physical and mental health of the elderly, it is suggested that the technical team of long-term care institutions for the elderly should be better trained, and that the phenomenon needs to be explored to guarantee more dignified conditions that respect the freedom of the elderly.

Keywords: Elderly. Human rights. Physical restraint. Environment. Long-term care facility for the elderly.

Barros PFA, Almeida LCC, Carvalho ACS, Santana RF, Istoe RSC. Environmental restraint of the elderly in long-term care facilities in times of Covid-19: theoretical reflection. Interface (Botucatu). 2022; 26: e210206 https://doi.org/10.1590/interface.210206

Introduction

The complexity of human relations present challenges to societies such as caring for the elderly, contrasting the human achievement of aging with the need for public policies and economic arrangements in order to meet the population aging with limitations to activities of daily living[1].

Therefore, an increasing number of elderly people need institutional care, either due to physical limitations for daily life activities, insufficiencies or shortcomings on the part of the family, or even to solve structural violence[f], getting better housing for the last moments of their lives[3].

Institutionalization provides a certain depersonalization, and many times the schedules and preferences of the elderly are left aside in favor of their organization and of the collective[3], as well as the responsibility assigned to the Long-term care facility for the Elderly-LTCF for the physical integrity of its guests.

The risk suffered by the elderly is even greater since most of them suffer from some pre-existing comorbidity considering the Covid-19 scenario. In addition, it is estimated that the number of elderly people killed by the pandemic will reach one hundred thousand, and that the most vulnerable elderly will be most affected[4].

Owing to the pandemic, the personalized nature of health care has been put to the backburner, due to the high cost for the institutionalized elderly, such as those who need the concomitant assistance of their families (or volunteers), or even in the worsening of the health status of patients in palliative care, who, for being away from their loved ones, experience abandonment at the time of death.

In this sense, studies suggest technological engagement to connect the elderly with their families and the outside world, telemedicine, as well as, on the part of the government, more inclusive actions to provide internet to the population[5].

This is because social isolation, as the strongest predictor of abuse, shows depression and anxiety as negative consequences. Furthermore, risk factors for elderly suicide have been identified with confinement, in addition to mental health repercussions[6].

In this way, the challenge for health care professionals and family members involves a tenuous, but important, balancing of interests between the elderly's right to come and go and their right to health care that provides them safety.

It is important and needed to bring legal professionals closer to the reality of care provided in homes for the elderly in order to avoid distortions regarding the legislation in force and the restrictions of the right of the elderly to come and go, without appreciating essential human rights issues.

[f] Structural violence carries in itself aspects resulting from social inequality, the scarcity caused by poverty and misery, and the discrimination that those deprived of material goods feel most. Inequality is not a privilege of the elderly population, as in general, the poorest have been poor throughout all their lives. But it is at this stage of life that indigence or lack of material resources take a higher toll2. (p. 59)

Method

This is a theoretical and reflexive study that proposes discussions and reflections on the theme of environmental restraint of the elderly, considering the premises of the current legislation and public policies for the elderly, based on empirical observations of the daily supervision of homes for the elderly in the State of Rio de Janeiro by the Public Prosecutor's Office.

This reflexive study, focused on the theoretical concept, proposes an in-depth discursive formulation, citing practical or theoretical points of view, albeit not translating into a systematic review[7]. In this sense, the articles and legislation cited in this article arose from the authors' own considerations, emerging as a strategy to raise awareness about the subject. All the authors have experience in teaching and researching on the topic, and the first and the second authors work as Legal Advisor and Public Prosecutor, respectively, both in the Public Prosecutor's Office of the State of Rio de Janeiro, having practice in the inspection of LTCF.

The inspections of the LTCF are annual, being carried out not only to verify the documental regularity of the institutions, such as the license, sanitary licensing, technical responsibility term, among others, but, mainly, to assess the care provided to the resident elderly people.

The article is structured along the following axes: Results and discussion divided in: legal framework of the LTCF; the institutional environment; Environmental restraint; some legal considerations about the practice of environmental restraint. The final part details the conclusions.

Results and discussion

Legal framework of the LTCF

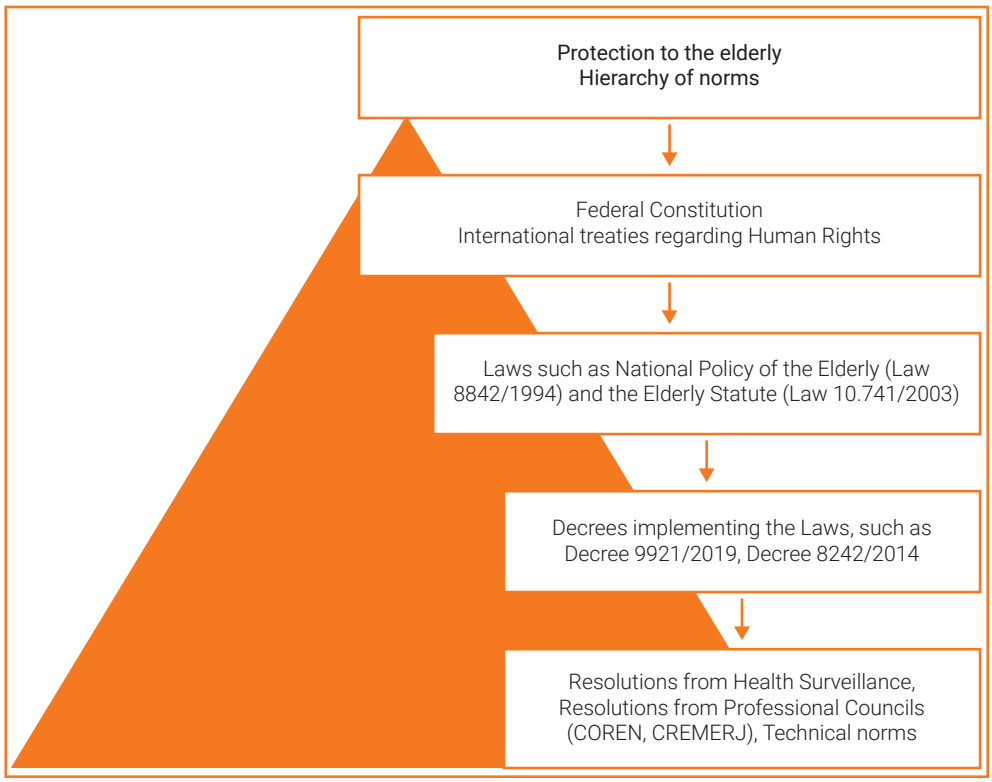
The Brazilian LTCF are hybrid by nature, since they are characterized not only by the hospitality offered to their elderly guests, but also by the provision of health professional services, using a multi-professional approach, such as those listed by Ordinance 810/1989 of the Ministry of Health[8].

They may or may not be for-profit, and, despite their high maintenance costs, not all non-profit LTCF are part of the Unified Social Assistance System (SUAS). They are however, part of the SUAS special social protection network, the non-profit LTCF that provide assistance to the elderly and, in accordance with Law 8742/93[9], are duly registered in this type of assistance with the CNEAS (National Registry of Social Assistance Entities), which is currently linked to the Ministry of Citizenship.

In the case of non-profit organizations, it is possible, by meeting the requirements of Law 12.101/2009, regulated by Decree 8.242/2014[10], to obtain the Certification of Charitable Organization and Social Assistance (CEBAS) - granting them some tax benefits. On the other hand, the for-profit institutions, despite their essential social role, are not beneficiaries of tax exemptions or benefits.

The fact is that despite being public, private for-profit or non-profit, all must respect the Federal Constitution[11], the international treaties on human rights accepted by the Brazilian legal system and other legal provisions in force, the Federal Constitution[11] and the International Treaties on Human Rights being hierarchically superior to the other norms, as shown in the figure below.

Frame 1. Hierarchy of Protection Norms for the Elderly



Source: Authors, Niterói, 2021.

This hybrid way in the provision of services still needs clearer legislation. Despite that, there are several mentions in the legislation about the need for articulation of the LTCF with the health secretariats, such as the Ordinance 810, 1989 of the Ministry of Health[8], which regulated norms and standards for the operation of the LTCF (in general, without distinction of nature); or the National Policy for Elderly, which highlights the need for sharing responsibilities between social assistance and health for the implementation of comprehensive care to the elderly in LTCF (Annex 5.3, paragraph "g")[12].

In this same sense, Decree 9921/2019, amended by Decree 10.604/2019[13], addresses the express need for articulation of the LTCF with the health unit of the programmatic area for the maintenance of an elderly person with a "disease" (*sic*) that requires care, and the competence of the Brazilian National Health System (SUS) to adopt and apply operating standards in the LTCF, and to supervise them (article 9, item IX of Decree 9921/2019[13]).

Additionally, there is the clear mention of the quality of care provided, cited by the Elderly Statute, especially regarding the training of human resources in geriatrics and gerontology (paragraph 1 of Article 3, item VI of Law 10. 741/2003[14]); in Ordinance

810/1989 of the Ministry of Health[8], which lists the professionals who must provide care; in the National Policy for Elderly, which provides multidisciplinary and interdisciplinary care to the Elderly (approved by Ordinance 2528/2006, item 3.2[12]); besides establishing the minimum number of professionals according to the degree of dependency in the Health Surveillance RDC 502/2021[15].

In the state of Rio de Janeiro, for example, there is progress in legislation through Law 8.049/2018[16], which determines the minimum composition of care professionals depending on the degree of dependence of the elderly residents.

The primary purpose of care is to promote autonomy and independence for the elderly, focusing on the prevention of functional decline and rehabilitation (Ordinance 2528/2006 of the Ministry of Health that approved the National Policy for Elderly[12]).

Regarding this purpose, the LTCF have the duty to prepare an Individual Care Plan for the Elderly (article 50, item V of the Statute of the Elderly[14]) and a Comprehensive Plan for the Elderly's Health Care (articles 36 and 37, of the RDC 502/2021[15]), with an individual approach, focused on the needs and capabilities of the elderly, stimulating their autonomy.

The Brazilian reality shows that elderly people with different degrees of dependence reside in the same institution since their admission. And the Statute of the Elderly[14], among its principles, lists the maintenance of the elderly person in the same institution in order to avoid that, when facing bigger functional decline, the elderly person has to be transferred to another LTCF. For this reason, some LTCF opt to admit only independent elderly people in order to balance their costs regarding human resources.

There is a need to think and implement a Brazilian care policy to include long-term care, considering the complexity they demand[17]. Publication of the ELSI-BRASIL study highlights that the multi-morbidity index, which is the occurrence of two or more simultaneous chronic diseases, affects 64% of the elderly and is associated with functional decline, mortality and low quality of life[18].

In this sense, a recent publication with the conclusions of the "Forum on Innovation, Care and Public Policies", held in Argentina in 2020, bringing together thirty civil society organizations, educational institutions, public and private organizations, to discuss and encourage the implementation of public policies to care for the elderly within the pandemic context. This meeting pointed out the need, among other of similar relevance, to provide home care for the elderly, their caregivers, training caregivers, whether family members or health professionals, as a way to respect the human rights of the elderly[19].

The institutional environment and environmental restraint

The individual rights of the elderly must be observed in the care environments, especially in the homes for the elderly, including their rights as users of health services, avoiding the institution to become a "waiting room for death"[20] or a place with human behaviors that restrict rights on the grounds that they offer protection.

The entrance into a LTCF implies an adaptation to new routines, of sharing living spaces and privacy, and the elderly begin to mold themselves to the institution. The elderly are isolated from the world that surrounds them from the role they had in society, and are deprived of their interpersonal relationships[21].

Institutionalized elderly people present lower cognitive performance than those who are not institutionalized, which can lead to increased depression or decreased functional capacity, which implies the loss of independence and autonomy[22].

Environmental restraint is defined by preventing an individual from leaving a space, which can be a room or the LTCF as a whole, with or without the use of security devices, such as padlocks or locks[23].

A more comprehensive concept of environmental restraint includes isolation or absence of communication with the outside world; community and social withdrawal, or even the use of a single means of communication (a single TV channel on view in the facility, a single printed newspaper or radio station, or even the existence of services or meetings of a single religion to the detriment of other faiths)[24].

In the current context, in which measures to restrict freedom are necessary, studies have already warned about the mental health problems that such restrictions cause and will cause to individuals, since they evoke feelings of loneliness, insomnia, anxiety, loss of appetite, and depression, threatening dignity and good health care[25].

The challenge is serious; it goes through the lack of financial and human resources, and lack of electro-electronic equipment (no screens, tablets) or internet signal in all the care spaces of the LTCF; the need to have professionals to perform this new routine of keeping alive the contact of the elderly who are not able, by themselves, to keep in touch with their families, for example; and to establish rotations in common spaces of the institutions.

The use of restraint is associated with problems related to mobility, functional and cognitive decline[26] and its use causes physical and psychological damage; it favors social isolation, provides humiliation, fear, sadness, feeling of helplessness, and other feelings to the restrained individual, affecting in a harmful way the person's dignity[24].

Many senior citizens staying in LTCF do not have preserved decision-making capacity, having such cognitive decline that they cannot decide where to go, discern danger, or how they will return to a safe place. For this reason, health care professionals redouble their attention for safety.

The LTCF have the duty to care for the physical integrity of its guests in such a way that one cannot conceive that an elderly person with dementia, with cognitive decline, can enter and leave the institution without a companion, for example; or that the doors of the LTCF are always open so that any passer-by can enter, for obvious security reasons, which would put everyone at risk.

However, the reality of the LTCF's guests is not only elderly dependent regarding basic or instrumental activities of daily living (ADL or IADL). Data from the Institute of Applied Economic Research - IPEA show that 34% of the elderly residents are independent[27]. Therefore, the rule cannot be the same for all guests.

Under normal care conditions, it is iatrogenic to keep an individual without contact with the outside world, with the community that surrounds him, unable to exercise his faith, to make his choices about his favorite newspaper or the TV channel he//she prefers to watch the news, even if the elderly has been compulsorily housed in an LTCF (by judicial order) or if they suffer from a psychic illness that prevents them from making decisions to come and go wherever they please.

The iatrogenic nature of environmental restraint in the LTCF lies in its maintenance even when all the negative repercussions are known. Restraint is not treatment; it is not a practice of caregiving[23].

On the other hand, one must distinguish between measuring dependence (or independence) and measuring the ability of the elderly to make decisions. The latter is assessed by evaluating (i) if the person understands and is able to retain information, (ii) if he/she is able to weigh the information and (iii) if he/she understands the consequences of making a certain decision, and also (iv) his/her ability to communicate the decision made[28].

Those elderlies with the ability to decide, independent or not for DLAs, who reside in an LTCF, are guaranteed the exercise of their freedom, the ability to come and go. And this right is not removed if the elderly walk with help; if they are in a safe neighborhood; if they have or not a family member who respects their choices. It is up to the LTCF's multidisciplinary team and, mainly, to the legal representative to respect the elderly's decision and support it, according to the law in force that prioritizes the elderly's autonomy and independence, providing personalized care that is appropriate to their characteristics and needs (article 49, item II of the Statute of the Elderly[14]).

Some legal considerations on the practice of environmental restraint

The lawsuits that reach the Brazilian courts regarding the provision of services by the LTCF are judged based on the Consumer Defense Code or the Brazilian Civil Code, and, in particular, using civil liability for damage repair.

Although Consumer Law enshrines basic rights such as the protection of life, safety, and health (Art. 6, item I, Law No. 8.078/90[29]), it does not pay attention to issues related to bioethics or public policies of care that dialog directly with the daily issues that arise in the management of an LTCF.

It is noted that theories such as the one developed by Aline Albuquerque and Cohen & Ezer, specifically regarding the human rights of the patient and the prohibition of torture or inhumane treatment, based on the right to life, health, privacy, right to not be subjected to torture or inhuman or degrading treatment, participation in care, information and non-discrimination[30], have premises that seem to be closer and more appropriate to the context of care provided in LTCF.

This is because the logic of care seeks the wellbeing, comfort, and dignity of the patient, as stated by the theory of the patient's human rights. It puts the patients as the protagonists of the care, and it also involves the health professionals, not only as service providers, but also with concern regarding their working conditions. As a

consequence, it emphasizes the respect for the records and progression in the medical records, besides other issues that imply in the care and relations with the patients, protecting patients and professionals, reinforcing the premise of quality care[31].

Although the Brazilian National Congress is still dealing with a specific legislation on the patient's human rights (Bill of Law 5559/2016, which originated the Patients' Bill of Rights[32]), the Universal Declaration on Bioethics and Human Rights[33] has a concrete legal value in the Brazilian legislation and must be observed in the care provided to the elderly, patients of the services provided by the LTCF, and may be used by law operators in legal claims.

This approach is increasingly common, private sector included, with the creation of patient experience offices, which aim at improving the concept of care (which used to be focused on the consumer relation) to practices of care centered on the person of the patients, placing them as protagonists of their own treatment, involving health professionals and family members. In these offices, starting from the patient's journey, conclusions are reached as to the most appropriate treatment to his or her will, his or her history, respecting his or her autonomy[34].

In homes for the elderly (LTCF), the need to keep individualized records of all elderly residents by the multiprofessional team is emphasized (information and data record of Ordinance No. 810/1989 of the Ministry of Health[8]). The Elderly Health Care Plans, as well as the multidisciplinary medical records, with professional developments and prescriptions that are essential for a better follow-up of the institutionalized elderly; and to pursue the maintenance and improvement of the functional and cognitive capacity of the elderly (recommended by the National Policy for Elderly, Law 8842/1984[12]).

That is the reason why, with the maintenance of records and periodic evaluations, the health professionals of the LTCF are able to verify and implement an eventual intervention regarding the limitation of leaving the institution without supervision, remembering that article 10, paragraph 1 of the Statute of the Elderly[14] emphasizes the elderly's right to come and go and their community participation.

Even in the current exceptionality situation, it is possible and mandatory (if we consider the negative repercussions) to give the elderly access to services and Masses on TV or through social networks; to schedule videoconference conversations with the elderly's relatives and friends, in reserved rooms for greater intimacy and sharing; as well as to perform social activities in the LTCF respecting the elderly's references and health recommendations, rotating through the common areas.

In more complex cases of care, the institution must prioritize the establishment of an action plan that meets the interests and physical and mental needs of the elderly, in partnership with their families or support network, avoiding worsening the physical and cognitive condition of the elderly. It is about weighing interests, respecting human rights, and the dignity of the people involved and directly affected.

It is key to emphasize the distinction between the emergency social distancing measures that are in place with Covid-19, which also involve the preservation of other elderly residents, from the regular and unjustified practices of preventing the free movement of the elderly in order to avoid the mistake of classifying such preventive actions as a type of environmental restraint.

Despite the current situation facing Covid-19, the human rights of patients must be respected. In this sense, the Observatory for Patients' Rights highlights, among other actions as important as the right to freedom, the right to avoid freedoms to be arbitrarily restricted, without scientific basis, the right to receive adequate information, to daily family contact, and, even when in isolation due to infection, the right to human contact[35].

The restriction of an individual's freedom is always exceptional. The idea that providing comprehensive assistance to institutionalized elderly people translates into the model of closed institutions, known as total institutions, which are founded on isolation and total management of their guests' lives, is mistaken[36].

The need for caution in respect to the full exercise of the elderly's freedom can be recorded in the Health Care Plan, a requirement of the RDC 502/2021[15], which must address the promotion, protection, and prevention of the elderly's health, in an individualized way. Thus, the multidisciplinary team of the LTCF, as a protective measure in favor of the elderly, may register in the document the requirement that the elderly only leave the facility with a companion, for example, because they are not capable of full or intermittent decision-making capacity.

It is worth pointing out that the measure that restricts the right to freedom of the elderly is always exceptional and must be protected by a document signed by qualified professionals, with gerontological knowledge, paying attention to the best care techniques, without leaving aside the elderly's will, dignity, and pleasure.

Of course, it cannot be ignored the objective civil responsibility of the LTCF that maintains a service provision contract with the elderly. However, when leaving the facilities of the LTCF, the place where the services are provided, there are no credible reasons to hold the institution responsible for an accident that occurred on a public road, for example, completely outside the scope of the services provided by the LTCF, except if the multidisciplinary medical records or the Health Care Plan for the Elderly contain a remark related to the fulfillment of a judicial order, or suspected or already confirmed cognitive decline, which would attract the responsibility of the LTCF.

In this sense, the Brazilian legislation, besides incorporating with the force and status of the federal constitution the international treaties on human rights, contains vast legislative references that advocate autonomy and respect for the freedom of the elderly (Federal Constitution[11], National Policy for Elderly[12], the Inter-American Convention on the Rights of the Elderly[14], the RDC 502/2021[15]).

More recently, Resolution nº 33 of the National Council for the Rights of the Elderly was published to establish guidelines and parameters for article 35 of the Elderly Statute[37], which deals with the contract for the provision of services of the elderly with the LTCF. The straight reading of this document allows to see the intention of emphasizing that it is the elderly person himself who must sign the contract with the LTCF, accepting its terms and, once again, through the sole paragraph of Article 2, it is the LTCF 's obligation to respect the right to come and go of its guests[37].

It is possible for the elderly person and the person financially responsible to sign the service provision contract jointly. But, only in the case of loss of the capacity to decide, the legislation provides for the contract to be signed by the legal representative of the elderly.

For these reasons, the contracts signed between the LTCF and the "guardian" or "family member" of the elderly with the ability to decide, and also the existence of clauses that provide for the exit of the elderly without a companion only in case of express authorization of the "guardian" or "family member" of the elderly with preserved decision-making capacity, are far from respecting the current legislation and the right to freedom of the elderly.

Conclusion

Despite being traditionally seen as places of isolation and environmental restraint, LTCF actually have legal parameters that require them to provide services based on caring for the elderly and valuing their potential to remain within the community.

In this context, the Brazilian Federal Constitution[11], Law 8.842/94, which provides for the National Policy for Elderly[12], and the Elderly Statute[14] consubstantiate the legal framework that establishes the need for a paradigm shift in the practices developed within nursing homes, especially regarding the deconstruction of the naturalization of the figure of the apathetic and isolated elderly person in a confinement and the adoption of concrete and effective actions to guarantee the resident the right to freedom and integration in the community.

The institutional welcoming and admission of the elderly cannot be mistaken with a kind of incarceration, under penalty of characterizing an illicit act perpetrated by the welcoming entity, within the normative parameters in force.

What generates some difficulty for the manager and the technical staff of these entities is to elaborate strategies to guarantee rights related to autonomy and freedom for elderly people with some neurocognitive impairment, when freedom can be translated into risk. However, even in these situations, the LTCF has to have strategies in place for community insertion and to combat isolation.

Strictly speaking, the characterization of environmental restraint is linked to the inexistence of protocols, strategies, and action planning aimed at fostering community insertion of the elderly housed in the LTCF. These may vary according to the elderly person's degree of dependence and require multiple competencies from the technical team, ranging from the pure and simple guarantee of the right to come and go for the elderly who are able to decide, up to periodic external activities for the elderly with neurocognitive impairment.

The context of Covid-19 imposed restrictions on freedom not previously faced by the LTCF. However, it must be emphasized that the restrictions resulting from the pandemic are not the same as the violations resulting from mistaken practices that limit the potentialities of elderly residents. The practices based on sanitary criteria may even lead to the disconnection of the elderly who do not respect them, since the goal is to prevent the spread of the virus and this is not to be confused with environmental restraint.

Outside the context of the pandemic, however, it is the legal duty of the entities to guarantee the right of the elderly to come and go, to the extent of their decision-making capacity, as well as the maintenance of community ties, and, in the most complex cases, strategies must be developed to avoid social isolation.

Mandatory tools such as the Individual Care Plan for the Elderly[14] and the Comprehensive Health Care Plan for the Elderly[15], already mentioned, may be useful for the technical team. However, the training of the staff and a closer look at the routine inside the institution are the tools that will generate beneficial effects for the wellbeing and guaranteed rights of the elderly residents.

Authors' contribution

All authors actively participated in all stages of preparing the manuscript.

Funding

The first author received a Master's scholarship from Capes, process number 88887.464506/2019-00 of the Social Demand Program/SD Regulation (unified).

Acknowledgments

Our eternal thanks to Dr. Arianna Kassiadou Menezes, who has fed our bodies and minds with deep reflections on the world, and who rests full in our hearts, inspiring us in the struggle for restraint-free care.

Conflict of interest

The authors have no conflict of interest to declare.

Editor
Denise Martin
Associated editor
Josefina Leonor Brown

Translator
Félix Héctor Rígoli

Submitted on
04/07/21
Approved on
10/15/21

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Estudo teórico de cunho reflexivo que aborda o fenômeno da contenção ambiental em instituições de longa permanência para idosos, apresentando o tema à luz dos direitos humanos e da legislação em vigor, que pregam boas práticas de cuidado aos idosos institucionalizados, inclusive frente ao cenário de enfrentamento à Covid-19. Considerando os impactos negativos da contenção ambiental na saúde física e mental dos idosos, sugere-se maior capacitação da equipe técnica das instituições de longa permanência para idosos e prospecção do fenômeno para garantia de condições mais dignas e que respeitem a liberdade dos idosos.

Palavras-chave: Idoso. Direitos humanos. Restrição física. Ambiente. Instituição de longa permanência para idosos.

Estudio teórico de cuño reflexivo que aborda el fenómeno de la contención ambiental en instituciones de larga permanencia para ancianos, presentando el tema a la luz de los derechos humanos y de la legislación en vigor que proponen buenas prácticas de cuidado para los ancianos institucionalizados, incluso ante el escenario del enfrentamiento a la Covid-19. Considerando los impactos negativos de la contención ambiental en la salud física y mental de los ancianos, se sugiere mayor capacitación del equipo técnico de las instituciones de larga permanencia para ancianos y prospección del fenómeno para garantía de condiciones más dignas y que respeten la libertad de los ancianos.

Palabras clave: Anciano. Derechos humanos. Restricción física. Ambiente. Institución de larga permanencia para ancianos.