



# Involuntary Transfer/Discharge

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## Disclaimer

- ▶ Please note: The following content is for informational purposes only. It is not intended to be construed as legal advice and may not be applicable to your specific circumstances.



# Agenda

## Nursing Home

- ❖ Legal Reasons for Discharge and Other Requirements
- ❖ Overview of Right to Appeal Discharge
- ❖ Issue Examples and Advocacy Tips
  - “Patient Dumping” at Hospital
  - Termination of Skilled Therapies
  - Transfer for Long Term Care
  - Failure to Pay
- ❖ Non-Attorney Advocacy at NYS Discharge Hearings

## Adult Care Facility Evictions

## Resources



## 6 Allowable Reasons for Involuntary Discharge/Transfer

1. Necessary for the resident's welfare and resident's needs cannot be met at the facility;
2. Resident's health has improved sufficiently so resident no longer needs nursing home level of care;
3. Safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;
4. Health of individuals in the facility would otherwise be endangered;
5. Resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility\*; or
6. Facility closes.



## Other Requirement: Written Notice

### Timing of Notice

- ❖ General rule is 30 days
- ❖ “As soon as practicable” but no later than the date on which the determination was made

### Content of Notice

- ❖ Reason for discharge;
- ❖ Specific regulations that support the discharge or change in law that requires it;
- ❖ Effective date for the discharge;
- ❖ Location to where the resident is being discharged;
- ❖ Statement the resident has the right to appeal to New York State Department of Health; and
- ❖ Name, address, and phone number of the State Long Term Care Ombudsman Program



## Other Requirement: Safe Discharge

Discharge location must be safe

- ❖ Questionable discharges:
  - ❖ Hotel
  - ❖ Shelter
  - ❖ DSS
- ❖ Home of relative or friend
  - ❖ Does the relative/friend want the resident in his/her home?
  - ❖ Is the home safe for the resident?

Facility must engage in proper discharge planning!



# Appealing Nursing Home Discharge In New York State

Step 1: Call New York State Department of Health (NYS DOH) and state you are appealing the discharge. (Be specific it is the same # as the complaint hotline!)

- ❖ 1-888-201-4563

Step 2: NYS DOH will request a copy of the notice from the facility to review it for validity 'on its face'.

- ❖ If notice is invalid, facility will be informed it cannot discharge resident
  - ❖ i.e. Discharge location is "TBD"
- ❖ If valid → Step 3

Step 3: NYS DOH Bureau of Adjudication

- ❖ Sets the date/time/place of the hearing before an Administrative Law Judge (ALJ)
- ❖ Hearing will typically be where the resident is located.



## Issue: “Patient Dumping” at Hospitals

*When nursing home transfers the resident to a hospital and refuses to readmit them to the first available bed.*

Reasons why facility would do this?

- ❖ Resident (or family) is labeled as ‘difficult’
- ❖ Resident has ‘behaviors’ that the facility chooses not to properly treat/provide care for

Reason used by facility for discharge:

- ❖ Necessary for resident’s welfare and resident’s needs cannot be met
- ❖ Safety/Health of individuals in facility is endangered

Things to remember:

- ❖ It is extremely rare that a discharge to a hospital is appropriate!
- ❖ Decision to discharge a resident should not be made based on the time of transfer to the hospital!
- ❖ Discharge notice must be issued to the resident (and designated representative)!





# Advocacy Tips

## For Ombudsman Programs

- ❖ Track calls/complaints and look for patterns.
- ❖ Reach out to Hospital Discharge Planner and explain resident right to return to the facility and appeal rights.

## For Residents and Family/Supporters

- ❖ Assess: do I want to return to the nursing home? Are there other nursing homes that could provide better care and quality of life?
- ❖ If no: appeal the discharge notice to Department of Health
  - ❖ Nursing home, under pressure, may agree to accept resident prior to ALJ hearing.
  - ❖ Nursing home has to prove it conducted proper discharge planning.



## Issue: Termination of Skilled Therapies

When Medicare coverage of the nursing home stay is exhausted or terminated by Medicare, the Medicare Plan, or the facility.

- ❖ If this occurs, the resident is responsible to ensure the facility is still paid whether it is through private funds or Medicaid.
  - Non-payment is a reason for discharge \*

**Jimmo: there is no improvement standard for Medicare coverage!**

- ❖ An assessment of the resident's clinical condition shows specialized judgment, knowledge, and skills of a qualified therapist are necessary for the performance of a safe and effective program.
- ❖ This includes a maintenance program!

For more information visit the Center for Medicare Advocacy:

<https://www.medicareadvocacy.org/medicare-info/improvement-standard/>



## Advocacy Tips

- ❖ Am I being discharged from the facility or am I being terminated from a therapy program?
  - ❖ Facility discharge → start the appeal process with NYS DOH
- ❖ Terminated from therapy program:
  - Did resident receive written notice?
  - Expedited appeals process with Medicare.
  - Care plan meeting?
  - Is there a plan for discharge? Can the resident receive services in the community?



## Issue: Nursing Home ↔ Nursing Home Transfer

- ❖ Common legal reasons for discharge that are used:
  - Resident's welfare and resident's needs cannot be met at the facility.
  - Resident's health has improved sufficiently so the resident no longer needs the services provided by the facility.
- ❖ Transfer for Long Term Care "LTC" is not one of the 6 legal reasons a facility can move a resident to another facility.
  - Nursing homes cannot discriminate on basis of payer source.
  - Every nursing home in NYS is dually Medicare & Medicaid certified.
    - ❑ This means if a resident exhausts his/her Medicare coverage of the nursing home stay and is now classified as someone who needs "LTC" or "custodial" care, the facility cannot claim they do not have any beds available for "LTC" and transfer the resident.

Tips for ombudsmen and residents/family/supporters:

- ❖ If a resident is being transferred to another nursing home, ask why.
- ❖ It is likely the transfer is inappropriate and resident is encouraged to appeal the transfer.



## Issue: Discharge for Failure to Pay

10 NYCRR 415(h)(1)(i)(b)

- ❖ Transfer and discharge shall also be permissible when the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare, Medicaid or third-party insurance) a stay at the facility.
- ❖ For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid.
- ❖ Such transfer or discharge shall be permissible only if a charge is not in dispute, no appeal of a denial of benefits is pending, or funds for payment are actually available and the resident refuses to cooperate with the facility in obtaining the funds.



## Advocacy Tips

Is there a safe discharge location?

Prior to appeal/hearing - be proactive- ask questions!

- ❖ Why is the resident's stay not being covered?
  - Financial exploitation by POA, family/friend?
  - Insurance coverage denial?
  - Resident refusing to cooperate?

At hearing:

- ❖ Is there a dispute of the charges?
- ❖ Is there an appeal of a denial of benefits?
- ❖ Are funds actually available and is the resident refusing to cooperate with the facility in obtaining the funds?



# Non-Attorney Advocacy at Discharge Hearing

Residents are not entitled to an attorney at discharge hearings.

Non-attorneys may represent (ADVOCATE) on behalf of a resident at the hearings.

- ❖ 10 NYCRR 415.3(h)(2)(i)(e): The resident has the right to “represent him or herself, or use legal council, a relative, a friend or other spokesman.”

Advocacy includes enabling the resident (or advocate) to:

- ❖ Examine prior to the hearing, the contents of the resident’s file including medical records; and all documents and records to be used by the facility at the hearing on appeal;
- ❖ Bring witnesses;
- ❖ Establish all pertinent facts and circumstances;
- ❖ Present an argument without undue interference; and
- ❖ Question or refute any testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses.

10 NYCRR 415.3(h)(2)(ii)



# NYS Adult Care Facility: Evictions

There are only 6 reasons when an Adult Care Facility can terminate a resident's Admission/Residency Agreement:

1. Resident requires continual medical/nursing care or supervision which the facility is not licensed to provide;
2. Resident's behavior poses imminent risk of death or imminent risk of serious physical harm to self or others;
3. Resident failed to make timely payment for all authorized charges, expenses and other assessments...which the resident agreed to pay pursuant to the
4. Resident repeatedly behaves in a manner which directly impairs the well-being, care or safety of the resident or other residents, or which substantially interferes with the orderly operation of the facility;
5. Facility has had its operating certificate limited, revoked or temporarily suspended or the operator has voluntarily surrendered the operating certificate;
6. A receiver has been appointed pursuant to NYS Social Services Law.





## Termination of Adult Care Facility Admission Agreements

Process:

- ❖ Facility issues 30 day notice of termination mandated by NYS DOH (DOH-5237)
- ❖ Resident (or representative) informs facility he/she is not in agreement with the notice of termination and is refusing to move.
- ❖ Facility is responsible to initiate a special court proceeding in accordance with NYS Social Services Law Section 461-h.



# Nursing Home vs Adult Care Facility Discharges/Evictions in New York State

## Nursing Home

Written notice is required

- No NYS DOH mandated form.

6 legal reasons for discharge/eviction

Resident initiates appeal with the NYS DOH before an ALJ

## Adult Care Facility

Written notice is required

- Facilities must use DOH mandated form

6 legal reasons for discharge/eviction

Resident has no appeal right via the notice

- Facility is responsible to initiate a special court proceeding.



## Resources

### Nursing Home Discharge/Transfer Resident Rights Materials:

- ▶ <https://elderjusticenyc.org/wp-content/uploads/2019/02/Nursing-Home-Transfer-Discharge-Guide.pdf>
- ▶ <https://nursinghome411.org/faq-sheet-involuntary-discharge-from-a-nursing-home/>
- ▶ <https://nursinghome411.org/fact-sheet-nursing-home-transfer-discharge-rights/>
- ▶ <https://nursinghome411.org/fact-sheet-nursing-home-transfer-discharge-rights-ii/>
- ▶ <https://theconsumervoice.org/issues/other-issues-and-resources/transfer-discharge>
- ▶ [https://www.justiceinaging.org/wp-content/uploads/2017/01/Revised-Nursing-Facility-Regulations\\_Involuntary-Transfer-and-Discharge.pdf](https://www.justiceinaging.org/wp-content/uploads/2017/01/Revised-Nursing-Facility-Regulations_Involuntary-Transfer-and-Discharge.pdf)
- ▶ <https://justiceinaging.salsalabs.org/25signup/index.html>



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