Nursing Home (Rehabilitation Facility): Involuntary Transfer/Discharge

Every nursing home resident, regardless whether their stay is for short-term rehabilitation services or long-term care, has the right to advance written notice prior to being transferred or discharged to a different location. In addition, every resident has the right to appeal the transfer or discharge. The purpose of this guide is to provide an overview on Federal and New York State legal resident rights protections and where to turn when a resident wants to appeal the discharge.

Summary of Rights

- There are only 6 times a nursing home may involuntarily transfer/discharge a resident.

- The resident is entitled to written notice.

- Written notice must include resident’s right to appeal, reason for transfer/discharge, location of transfer/discharge and other information.

- Nursing home is required to provide various documentation.

- Nursing Home must ensure the resident receives sufficient orientation and preparation for the transfer discharge.

- Resident has the right to appeal the transfer/discharge to the New York State Department of Health by calling 1-888-201-4563.

1 In NY there are no Medicare only certified facilities. As such every nursing home that is Medicare certified is also Medicaid certified; meaning each facility shall provide both short-term (rehabilitation services) and long-term care.

The above is for informational purposes only and does not constitute an attorney-client relationship, nor is it legal advice.
There are only 6 times a nursing home may move to involuntarily transfer/discharge a resident:²

1. The transfer/discharge is necessary for the resident’s welfare and the resident’s needs cannot be met at the facility;

2. The transfer/discharge is appropriate because the resident’s health has improved sufficiently so the resident no longer needs the services provided by the facility;

3. The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;

4. The health of individuals in the facility would otherwise be endangered;

5. The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility;
   a. Nonpayment applies if the resident does not submit the necessary paperwork for third party payment or after third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for his or her stay.
   b. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid.
   c. 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; or

6. The facility ceases to operate.

*If the notice does not list any of the 6 reasons it is invalid.*

² See 42 CFR 483.15(c)(1)(i) and 10 NYCRR 415.3(i)(1).
The general rule is written notice must be provided 30 days before the resident is discharged/ transferred. However 30 day written notice is not required when:

1. The safety of other individuals in the facility would be endangered;
2. The health of other individuals in the facility would be endangered;
3. The resident’s health has improved sufficiently to allow for a more immediate discharge/transfer;
4. The discharge/transfer is due to the resident’s urgent medical needs; or
5. The resident has not resided in the facility for 30 days.

In the above situations written notice may be given as “soon as practicable” but no later than the day the facility made the decision to transfer/discharge the resident. This means the nursing home cannot provide you with written notice as you are being escorted out of the facility!

The facility must give notice to the resident and the resident’s representative (if any) of the transfer/discharge and the reasons for the move in writing and in a language and manner they understand.

Content of Notice

Nursing homes are required to provide written notice of the discharge/transfer to the resident and must include the below components. If the notice is missing any such component, it is invalid.

Required components of written notice are as follows:

1. Reason for the discharge/transfer;
2. Specific regulations that support the transfer/discharge, or the change in Federal/State Law that requires the action;

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3 42 CFR 483.15(c)(4); 10 NYCRR 415.3(i)(1)(iv)
4 42 CFR 483.15(c)(3); 10 NYCRR 415.3(i)(1)(iii)
5 See 42 CFR 483.15 (c)(5) and 10 NYCRR 415.3(i)(1)(v)

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3. Effective date for the discharge/transfer;

4. Location to where resident is being transferred/discharged;

5. Statement the resident has the right to appeal to New York State Department of Health;\(^6\) and

6. Name, address, and phone number of the State Long Term Care Ombudsman.

**Required Documentation**\(^7\)

Nursing homes are required to ensure the discharge/transfer is documented in the resident’s record which includes:

1. The basis of the transfer;

2. The documentation must be done by the resident’s physician when the basis is due to the resident’s health has improved sufficiently so that the resident no longer needs nursing home level of care.

3. If the basis is due to the resident’s need(s) cannot be met at the facility, the documentation must be done by the resident’s physician and must include:
   a. The specific resident need(s) that cannot be met;
   b. How the facility attempted to meet the resident need(s); and
   c. The service available at the receiving facility to meet the need(s).

4. The documentation must be done by a physician if the basis is due to safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident, or the health of individuals in the facility would otherwise be endangered.

5. Ensure appropriate information is communicated to the receiving health care institution or provider which must at the minimum include:

\(^6\) 10 NYCRR 415.3(i)(1)(v)(e) requires that the statement regarding the right to appeal to NYS DOH include specific language.

\(^7\) 42 CFR 483.15(c)(2); 10 NYCRR 415.3(i)(1)(ii)
Sufficient Orientation/Discharge Plan

Nursing homes are required to provide and document that sufficient orientation and preparation for the resident to ensure a safe and orderly discharge/transfer from the facility. This orientation must be provided in a form and manner that the resident can understand. This includes enabling the resident, their legal representative or health care agent the opportunity in deciding where the resident will reside after discharge from the facility.

Frequent Questions and Answers

Q: Can the facility discharge/transfer a resident because the resident is being reclassified as “long-term” from “short-term/rehab”?

A: No. In New York State, every nursing home that accepts Medicare is also dually certified to accept Medicaid as payment. As a result, a nursing home cannot designate x number of beds as “Medicare only”. This means every nursing home in New York State (unless it is one that is not Medicare and Medicaid certified) cannot discriminate between short-term and long-term care residents.

If a nursing home is trying to transfer a resident to a different facility because he/she needs “long-term care,” this is against Federal and New York State law and the resident should strongly consider appealing the transfer. Every nursing home is required to provide both short-term (usually for rehabilitation) and long-term care.

*Resident room to room transfers within the nursing home are not subject to Nursing Home Transfer/Discharge rules.*

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8 42 CFR 483.15(c)(7); 42 CFR 483.21(c); 10 NY CRR 415.3(i)(1)(vi) and (vii)

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**Q:** Can the facility discharge/transfer a resident during an appeal?

**A:** No. The new federal regulation states that a facility may not transfer or discharge a resident while the appeal is pending. However, if the failure to discharge or transfer would endanger the health or safety of the resident or others in the facility, the resident may be discharged/transferred during the appeal. In that situation the facility must document the danger the failure to transfer/discharge would pose.  

**Q:** What is involved in an appeal?

**A:** The resident has the right to an evidentiary hearing to appeal the proposed transfer/discharge. The resident can choose to retain an attorney. (An attorney will not be appointed.)

Request an appeal by calling the New York State Department of Health (NYS DOH) (1-888-201-4563) or the phone # listed on the discharge notice. An appeal can also be requested by emailing nhintake@health.ny.gov.

The NYS DOH will request a copy of the notice from the facility to review it for validity. If the notice is not valid, the facility cannot discharge the resident. The facility will need to issue a new discharge/transfer notice, and the resident can file another appeal. The NYS DOH Bureau of Adjudication is the entity that conducts the hearing and will set the date/time/place of the hearing. Typically the hearing is at the facility where the resident resides. The facility has the burden to prove the discharge/transfer is necessary and the discharge plan is appropriate.

**Q:** How long does a resident have to request an appeal?

**A:** A resident can request a hearing to appeal the transfer/discharge at any time within 60 days from the date the notice of transfer/discharge is received by the resident.

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9 42 CFR 483.15(c)(1)(ii)
10 10 NY CRR 415.3(i)(2)(i)(a)
Q: **What happens if a resident goes to the hospital (acute-care facility)?**

A: The resident’s return to the nursing home from an emergent transfer to a hospital is generally expected. However, if the nursing home chooses to discharge a resident who is in the hospital, the nursing home is required to fully evaluate the resident and not base the discharge on the resident’s status at the time of the transfer to the hospital.

Q: **Can a nursing home discharge a resident who is ‘difficult’ to care for?**

A: No. A resident who is classified by the facility as ‘difficult’ (i.e. the resident is argumentative, does not follow facility policies, refuses treatment, or is disruptive), is not a basis for discharge. In addition, a facility cannot discharge a resident who needs more supervision, higher needs, or is more expensive to care for than other residents. It is the nursing home’s responsibility to properly assess every potential resident and only admit those they can properly care for. Instead of blaming the resident, the facility should work with the resident on an appropriate plan of care and ensure its staff follow through with the plan of care.

Q: **What about bed holds?**

A: Nursing homes are required to issue two notices related to the facility’s bed hold policies. The first notice should be given well in advance of any transfer (typically in the admissions paperwork—must be reissued if state law or facility policy changes); the second notice, which is required to specify the duration of the bed hold policy, should be given to the resident (or representative) at the time of transfer.

Medicare does not pay for bed holds and neither does Medicaid in NYS. As such, absent private paying for the bed or other agreement with the nursing home, if a resident is sent to a hospital, the nursing home, pursuant to its policy, can fill the bed/room with a different resident. If this happens, the nursing home must readmit the hospitalized resident to the first available bed. This may mean that resident no longer has a private room, or they will have a new roommate.
Q: Can a nursing home discharge a resident for nonpayment?

A: Nursing home care is not free. While a nursing home may proceed with issuing 30 day written notice for nonpayment, a nursing home cannot transfer/discharge a resident while a third-party payor is considering a claim. For example, a nursing home cannot discharge a resident who has applied for Medicaid and is “Medicaid pending.”

Q: The nursing home is trying to discharge me to a hotel or a shelter, what can I do?

A: Regardless of the reason for transfer/discharge, it is the nursing home’s responsibility to make sure the transfer/discharge is safe. If a resident does not feel that the transfer/discharge location is safe, they should strongly consider appealing the transfer/discharge to the NYS Department of Health. Once an appeal is filed, the facility cannot move the resident absent a rare endangerment situation.

Q: The Center for Elder Law & Justice (CELJ) has a Health Care Advocacy Unit, can they help?

A: Yes. CELJ’s Health Care Advocacy Unit may be able represent the resident in their appeal of the discharge/transfer notice. If a resident has been issued written (or verbal) notice, contact CELJ today: (716) 853-3087.