



## Long-Term Care Regulation Provider Letter

<b>Number:</b> PL 2022-25 (replaces PL 2020-04)
<b>Title:</b> Nursing Facility Resident Discharge and Appeal
<b>Provider Types:</b> Nursing Facility (NF)
<b>Date Issued:</b> September 29, 2022

### 1.0 Subject and Purpose

The purpose of this letter is to provide guidance to NFs regarding resident discharges and discharge appeal hearings. Providing clear notice and documentation during a discharge are legal requirements and essential to protecting the rights and dignity of residents.

### 2.0 Policy Details & Provider Responsibilities

A discharge is defined in rule as the movement of a resident to a bed outside the nursing facility.<sup>1</sup> A NF must adhere to state and federal regulations when discharging a resident and must provide adequate notice to the resident who is being discharged and (if applicable) to the resident's representative.

NF staff should also be familiar with the process for a fair hearing and with their obligation to provide evidence during an appeal if a resident or the resident's representative contests the discharge. It is the responsibility of the NF to prepare an evidence packet for the fair hearing and to ensure that the resident, the resident's representative, and the hearings officer receive the evidence packet.

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<sup>1</sup> See 26 Texas Administrative Code (TAC) [§554.502\(a\)](#).

## 2.1 Reasons for Discharge Permitted by Rule

A NF must determine its capacity and ability to care for a resident **upon admission**. The facility must allow a resident to remain in the facility and **may not** involuntarily discharge the resident unless:

- the transfer or discharge is necessary for the resident's welfare, and the resident's needs cannot be met in the facility;
- the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
- the safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;
- the health of other individuals in the facility would otherwise be endangered;
- 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. Nonpayment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for the resident's stay. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid;
- the resident or resident representative requests a voluntary transfer or discharge; or
- the facility ceases to operate as a nursing facility and no longer provides resident care.

## 2.2 Proper Discharge Notification

If a NF initiates a resident discharge, the facility must provide written notification of the discharge—**in a language and manner the resident can understand**—to the resident, the resident representative (if applicable), and a representative of the Long-Term Care Ombudsman Program, **at least 30 days before the intended discharge date**<sup>2</sup>

The discharge notification must include:

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<sup>2</sup> See 26 TAC [§554.502\(d\)\(1\)](#) and 26 TAC [§554.502\(e\)\(1\)](#).

- the reason for the discharge;
- the effective date of the discharge;
- the location to which the resident is being discharged;
- a statement that informs the resident of his or her rights to appeal the discharge by requesting a hearing through the Health and Human Services Commission (HHSC) within 90 days;
- information on how to obtain an appeal form and assistance in completing and submitting it;
- contact information of the managing local ombudsman and the toll-free number for the Long-Term Care Ombudsman Program, which is 1-800-252-2412;
- if applicable, for residents with a mental illness, contact information of the state mental health authority; and
- if applicable, for residents with an intellectual or developmental disability (IDD), contact information for the authority for individuals with IDD, along with the contact information for the agency responsible for the protection and advocacy of individuals with IDD.<sup>3</sup>

A NF must provide a discharge notice as soon as practicable before the 30-day period described above if:

- the safety of an individual in the facility would be endangered;
- the health of an individual in the facility would be endangered;
- the resident's health improves sufficiently to allow a more immediate discharge;
- the discharge is necessary for the resident's welfare because the resident's needs cannot be met in the facility; or
- the resident has not resided in the facility for 30 days.<sup>4</sup>

A NF should provide as much specific information as possible in the discharge notice to notify the resident why he or she is being discharged and how the discharge meets discharge criteria **as outlined in rule**. The statement of the resident's appeal rights must:

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<sup>3</sup> See 26 TAC [§554.502\(f\)\(1\)-\(7\)](#).

<sup>4</sup> See 26 TAC [§554.502\(e\)\(3\)](#) and 42 Code of Federal Regulations (CFR) [§483.15\(c\)\(4\)\(ii\)\(A\)-\(E\)](#).

- inform the resident that he or she has the right to appeal the action as outlined in HHSC's Fair and Fraud Hearings Handbook by requesting a hearing within 90 days of the date of the notice;
- provide information on how to obtain an appeal form and assistance in completing the form and submitting the fair hearing request; and
- inform the resident that, if the resident requests the hearing before the discharge date, the resident has the right to remain in the facility until the hearings officer makes a final determination unless failure to discharge would endanger the health or safety of the resident or individuals in the facility.<sup>5</sup> The facility must document how a failure to discharge a resident would present a danger to the resident or others.

NF staff must record the reason for discharge in the resident's clinical record.<sup>6</sup>

A NF provides the discharge notice to the resident and the resident's authorized representative. When notifying the resident and the representative, it is imperative to ensure that the representative's contact information is current.

If a resident in the NF is married to another resident in the same NF and the facility proposes to discharge one spouse to another facility, the NF must give the other spouse notice of his or her right to be discharged to the same facility. If the spouse notifies the NF in writing that he or she wishes to be discharged to the other facility, the NF must discharge both spouses on the same day, pending availability of accommodations.<sup>7</sup>

### **2.3 Preparation and Discharge Planning**

A NF is required to provide a resident with enough preparation regarding his or her discharge so that it may be safe and orderly.<sup>8</sup> Appropriate preparation can include:

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<sup>5</sup> See 26 TAC [§554.502\(f\)\(4\)](#).

<sup>6</sup> See 26 TAC [§554.502\(d\)\(3\)](#).

<sup>7</sup> See 26 TAC [§554.502\(k\)](#).

<sup>8</sup> See 26 TAC [§554.502\(h\)](#).

- explaining the discharge to the resident in a manner that he or she can understand;
- working with the resident or the resident's representative to ensure all the resident's personal belongings are collected; and
- ensuring NF staff handle the discharge in a way that will ease the transition for the resident.

A NF must provide the resident with a discharge summary that includes:

- a summary of the resident's overall stay;
- the status of his or her permanent medical necessity under the Medicaid program with a new medical necessity determination; and
- a post-discharge plan of care that will assist the resident to adjust to the new living environment.<sup>9</sup>

#### **2.4 Resident's Right to a Fair Hearing**

Regardless of the reason for discharge, a resident has the right to appeal a discharge within 90 days of a discharge notice.<sup>10</sup> If the resident appeals before the discharge date, the facility may not discharge the resident while the appeal is pending. A NF is required to allow the resident to remain in the facility until the hearing officer makes a final determination unless:<sup>11</sup>

- 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. Nonpayment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for the resident's stay;
- the safety of individuals in the facility would be endangered;
- the health of individuals in the facility would be endangered;
- the resident's health improves sufficiently to allow a more immediate transfer or discharge;
- the transfer and discharge is necessary for the resident's welfare because the resident's needs cannot be met in the facility and the

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<sup>9</sup> See 26 TAC [§554.803\(b\)](#).

<sup>10</sup> See 1 TAC [§357.3\(b\)\(2\)\(B\)](#).

<sup>11</sup> See 26 TAC [§554.502\(j\)\(1\)](#), 42 CFR [§483.15\(c\)\(1\)\(ii\)](#), 26 TAC [§554.502\(b\)\(5\)](#), and 26 TAC [§554.502\(e\)\(3\)](#).

resident's urgent medical needs require an immediate transfer or discharge; or

- a resident has not resided in the facility for 30 days.

## **2.5 Fair Hearings Processes and Procedures**

HHSC's Uniform Fair Hearings rules guide discharge appeal hearings.<sup>12</sup> Under these rules, a NF is responsible for preparing an evidence packet to be reviewed at the fair hearing. The evidence packet should contain all forms and notices related to the hearing, along with documents that demonstrate that the NF met the legal criteria to discharge the resident.

The evidence packet must demonstrate how the resident's discharge meets the discharge criteria in rule. The evidence may include:

- the policy being followed;
- excerpts from progress notes;
- doctor's orders;
- prescriptions;
- recommendations from other professional staff about the resident's needs;
- documentation of alternative room assignments;
- documentation of other steps the facility may have taken to address the resident's status or situation; and
- any other documentation supporting the need for discharge.

A NF must send copies of the evidence packet to the hearings officer via the fax, email, or address listed on the hearing notice and to the resident appealing the discharge and the resident's representative.<sup>13</sup> The recipients of the evidence packet, such as the resident and his or her authorized representative, should be determined on a case-by-case basis. Failure to provide a packet to either party may be grounds for rescheduling the hearing and may delay the appeal process.

A NF is encouraged to send the evidence packet as soon as possible before the hearing date. While there are no federal or state regulations regarding how far ahead of the hearing to send the packet, NFs are

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<sup>12</sup> 1 TAC [Chapter 357, Subchapter A.](#)

<sup>13</sup> 1 TAC [§357.7\(b\)\(2\).](#)

encouraged to send it no less than five business days before the hearing date and document its delivery to the resident, his or her representative, and the hearings officer. While permitted, sending an evidence packet the day of the hearing could result in exclusion of the evidence or hearing postponement for lack of sufficient time to review it.

If the resident or the representative indicate they did not receive the evidence packet with sufficient time to review it, the hearing officer may reconvene the hearing at a later date to allow sufficient time for evidence packet to be reviewed by all parties.

A NF representative must appear at the scheduled hearing, be prepared to defend the decision to discharge the resident, and implement the hearing officer's final order.<sup>14</sup> During a fair hearing, the NF should present documentation to show the discharge notice was provided to the resident and the representative. The NF has the burden of proof at an appeal hearing and must provide evidence that the resident's discharge **meets state or federal requirements**.<sup>15</sup>

## 2.6 Fair Hearing Determinations and Notifications

A hearing officer will determine if a discharge is appropriate and will provide a written decision to the facility and the resident.<sup>16</sup> Medicaid must recoup any payments made on behalf of the resident after the date of discharge or decision, whichever is later, must be recouped.<sup>17</sup>

If a hearing officer determines the discharge is inappropriate, the facility, upon written notification by the hearing officer, must readmit the resident immediately to the facility or to the next available bed.<sup>18</sup> If the NF has not discharged the resident, the NF is required to allow the resident to remain at the facility.

The hearing officer will report the findings to HHSC Long-term Care Regulation. Failure to readmit or allow the resident to remain at the

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<sup>14</sup> See 1 TAC [§357.7\(b\)\(3\)-\(5\)](#).

<sup>15</sup> 26 TAC [§554.502\(b\)](#) and 42 CFR [§483.15\(c\)\(1\)\(i\)](#).

<sup>16</sup> See 15 TAC [§357.5\(c\)\(3\)\(D\)](#).

<sup>17</sup> See 26 TAC [§554.502\(j\)\(3\)](#).

<sup>18</sup> See 26 TAC [§554.502\(j\)\(2\)](#).

facility is subject to an investigation of noncompliance and potential enforcement remedies if noncompliance is found.

### **3.0 Background/History**

This letter is being issued to remind NF providers of the rules and regulations for proper discharges and to clarify the necessary content of discharge notices, the expectations for a NF to provide evidence as part of the fair hearing should a resident appeal the discharge, and the requirement of a facility to comply with a hearing officer's order.

### **4.0 Resources**

[HHSC Fair and Fraud Hearings](#)

[HHSC Form 4800 Fair Hearing Request Summary](#)

[HHSC Form 4800-A Fair Hearing Request Summary Addendum](#)

[HHSC Office of the Long-Term Care Ombudsman](#)

### **5.0 Contact Information**

If you have any questions about this letter, please contact the Policy and Rules Section by email at [LTCRPolicy@hhs.texas.gov](mailto:LTCRPolicy@hhs.texas.gov) or call (512) 438-3161.