

Representing Residents During Nursing Facility Discharge Appeal Hearings: The Basics

Purpose

The purpose of this fact sheet is to provide a basic overview about residents' rights in appealing nursing facility discharges and tips for Ombudsman program advocacy considerations before, during, and after an appeal hearing.

Before Using This Resource

For an understanding of residents' rights and facility responsibilities regarding discharge and/or the role of the Long-Term Care Ombudsman program and legal assistance providers we recommend the following:

- ✓ Read [Enhancing Your Advocacy Toolbox: Protecting Residents from Nursing Facility-Initiated Discharges](#).
- ✓ Read the [Long-Term Care Ombudsman Program \(LTCOP\) and Legal Assistance Developers Collaboration Toolkit](#).
- ✓ Consult applicable state Ombudsman program policies and procedures.

Key Points About Nursing Facility Discharge Appeals

- Residents have the right to appeal a discharge.¹ The discharge notice must include a statement of the resident's appeal rights, information about how to appeal, and their right to assistance in completing and submitting a request for an appeal.²
- States must provide a system for residents in nursing facilities to appeal facility-initiated transfers and discharges³ and an opportunity for an appeal hearing.⁴
- The nursing facility cannot discharge a resident before the appeal hearing, if the appeal is requested timely, or pending the hearing decision.⁵
- Residents have the right to appeal a hearing decision that was not in their favor.⁶ The appeal process and terminology varies by state.

¹ 42 CFR §483.15(c)(5)(iv)

² 42 CFR §483.15(c)(5)(iv)

³ 42 CFR §483.204

⁴ 42 CFR §431.220(a)(2)

⁵ 42 CFR §483.15(c)(1)(ii). The regulations make an exception if the failure to discharge or transfer would endanger the health or safety of the resident or others in the facility.

⁶ 42 CFR §431.245

Who Can Represent a Resident at the Discharge Hearing?

Residents have the right to represent themselves in a hearing or seek representation by:⁷

- An attorney
- A relative or friend
- Another spokesperson, including an Ombudsman program representative

Residents have a right to legal representation during the hearing, but an attorney is not required or automatically afforded to the resident.

If the resident is working with an attorney, the Ombudsman representative may seek permission from the resident to coordinate with the attorney during the hearing process and be part of the resident's advocacy team. If the resident does not have an attorney, there are several legal entities that may represent residents who have received a notice of discharge.⁸

Per the Older Americans Act, the Ombudsman program shall "represent the interests of the residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents."⁹ Therefore, if no legal representation is available to the resident, the Ombudsman program representative may represent the resident in an administrative hearing (with resident consent).¹⁰

Advocacy Considerations for Appeal Hearings

Questions to Consider Prior to the Hearing

- Can the resident attend the hearing in person?
- If the hearing is held in person, is the location accessible to the resident?
- If the hearing is held via phone, does the resident have difficulty hearing?
- Is there a video conference option?
- Does the resident need any assistance with language or communication barriers during the hearing?
- Are there witnesses that could be called to strengthen the resident's case?

Action Steps Prior to the Hearing

- Explain the process to the resident in a factual and realistic manner and in a way the resident can understand.
- Gather facts to support the resident's case as well as information that the provider might use.
- Review documents such as:

⁷ 42 CFR §431.206(b)(3)

⁸ Refer to this resource for descriptions of available nonprofit legal services

https://ltombudsman.org/omb_support/pm/collaboration/legal-assistance-developers-toolkit

⁹ Older Americans Act Section 712 (a)(3)(e)

¹⁰ States vary in procedures for Ombudsman program representation. If you are unsure about your role in hearings, review your state program policies and procedures and consult your supervisor and/or State Ombudsman.

- The discharge notice to identify problems with procedure or the discharge notice content.
- Relevant regulatory sources (e.g., federal nursing facility regulations, CMS State Operations Manual Appendix PP, the Critical Element Pathways, and examples of deficiency citations) to identify transfer/discharge and other pertinent requirements that were not met.
- The resident's medical record to identify any issues with the facility's discharge process, documentation, or the reason for discharge. For example, check to see if the documentation met regulations as required in 42 CFR §483.15(c)(2).
- Documents the facility will use at the hearing.
- Examples of hearings where residents prevailed.
- Determine if witnesses will be called and, if so, prepare the witnesses by sharing the questions you will ask during the hearing and questions the provider might ask.
- Consult with the Ombudsman program legal counsel or someone experienced with appeal hearings.
- If the individual presiding over the hearing is known, check with other Ombudsman representatives about how that hearing officer handles hearings and any tips for advocacy.
- Prepare a memo to submit at the hearing that fully articulates the arguments supporting the resident's case. The memo is helpful in case you are not able to address all important points during the hearing and it lays the groundwork for any future appeal.
- Prepare enough copies of documents you will use so that the provider and hearing officer will have copies.
- Ensure all facts you want to present during the hearing are ready to submit verbally or in writing.

During the Hearing

Your role representing a resident in a hearing is the same as other Ombudsman program duties – as an advocate. During the hearing, you will present the case and speak on behalf of the resident and/or encourage the resident to speak on their own behalf. While there are some tasks during the hearing that Ombudsman program representatives do not regularly do, such as cross-examine witnesses, you are experienced in asking questions and presenting facts, pointing out regulations, and presenting the resident's perspective.

Federal Regulations Pertaining to Procedures of Fair Hearings

All hearings must be conducted at a "reasonable time, date, and place" and only after "adequate written notice of the hearing" and by an impartial official or another individual who has not been directly involved with the notice of discharge. A hearing officer may request to have an impartial medical assessment of the resident conducted at the state Medicaid agency's expense.¹¹

¹¹ 42 CFR §431.240

Residents have the following procedural rights during the hearing:¹²

- Examine the documents and records the facility is using at the hearing prior to and during the hearing.
- Bring witnesses.
- Establish facts.
- Present an argument to stay in the facility.
- Question or dispute any testimony or evidence and to cross-examine witnesses.
- Request an expedited fair hearing (§ 431.224 Expedited appeals).

All facts of the case must be submitted either verbally or in writing prior to or during the hearing for the administrative law judge/hearing officer to take into consideration for a recommendation. Evidence should not be allowed to be admitted after the hearing is over.

After the Hearing¹³

Hearing decisions must be based only on evidence introduced at the hearing and all parties will receive the decision in writing.

Federal regulations allow residents to stay in the facility until a decision is made.¹⁴

Even when residents prevail in a hearing, there may still be additional advocacy needed, especially if the facility refuses to follow the hearing decision. If a facility refuses to adhere to the hearing decision or readmit a resident from the hospital while waiting for an appeal hearing, with the resident's consent you may need to file a complaint with the state survey agency or seek an immediate court order. If pursuing legal remedies is the next step, it is critical to consult with a knowledgeable attorney for those options.

If the hearing decision upholds the discharge, the nursing facility is still required to properly orient and prepare the resident for the discharge in a manner that the resident can understand and ensure it is a safe and orderly discharge.¹⁵

If the hearing decision is not in the resident's favor, the resident has the right to appeal the decision.¹⁶ The appeal process and terminology varies by state. If the resident wants your assistance appealing the hearing decision, speak with your supervisor and/or State Ombudsman and/or seek legal support.

Resources

National Ombudsman Resource Center (NORC) <https://ltcombudsman.org/>

National Center on Law and Elder Rights (NCLER) <https://ncler.acl.gov/>

Find a Long-Term Care Ombudsman Program: https://theconsumervoice.org/get_help

Locate Nonprofit Legal Aid Programs <https://www.lsc.gov/grants/our-grantees>

¹² 42 CFR §431.242

¹³ 42 CFR §431.244

¹⁴ 42 CFR §483.15(c)(1)(ii). The regulations make an exception if the failure to discharge or transfer would endanger the health or safety of the resident or others in the facility.

¹⁵ 42 CFR §483.15(c)(7)

¹⁶ 42 CFR §431.245