How to Avoid Inappropriate Transfers and Discharges

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State Long-Term Care Ombudsman Program

Agenda

1. Inappropriate discharge examples
2. Requirements in TAC, CFR, and SOM
3. Appropriate discharge examples
4. Discharge planning
5. Discharge notice requirements
6. Discharge for non-payment
7. Discharge for inability to meet needs, safety, or health risk
8. Immediate discharges
9. Transfers and refusing to allow residents to return
10. The appeal process
11. Resources

Housekeeping

We will have time for questions at the end. If you have questions during the presentation, please raise your hand or type in the chat.

Inappropriate Discharges

Examples of Inappropriate Discharges

A nursing facility sends a resident to an emergency room or behavioral health facility with no intention of allowing them to return to the nursing facility.

A discharge notice is given with no specific discharge location

The discharge location is not aware the resident will be arriving

The discharge location cannot provide the appropriate level of care required to keep the resident safe

Which Residents are Most Likely to Experience an Inappropriate Discharge?

- Those on Medicaid or with no payor source
- Those who exhibit behaviors the facility considers unsafe or
- Those who utilize a disproportionate amount of staff time

September 12, 2022. Office of Behavioral Health, Disability, and Aging Policy: Resident and Facility Factors Associated with High Risk of Discharge from Nursing Facilities, 2012-2017

Inappropriate Discharge to a Shelter

Inappropriate Discharge to a Hotel

SHERATON [redacted]

October 18, 2023

To Whom it may concern,

This letter is in regard to the patient in your care that you are trying to discharge and send to the Sheraton [redacted] Hotel, located at [redacted]. It has come to my attention that the care facility is attempting to drop the patient off at our property. Unfortunately, this is a hotel and place of business, not a private residence. Given the magnitude of care required for this patient, including being bed-ridden and in need of a Hoyer lift, on a feeding tube, and with special needs care, we are absolutely not equipped to handle him as a guest of our hotel. Additionally, due to the severe nature of care needed, this patient would pose a significant risk in the event of a fire or life-safety situation for which we are far from being able to accommodate. I cannot, and will not, knowingly put his life at risk nor accept the liability on the business to meet the needs required in such an event knowing fully well we do not have the equipment, medically trained staff, and resources to meet this patient's needs. It would be simply reckless to submit a patient of this caliber to this type of risk. We are not a care facility of any kind, have no training in this field and no equipment to maintain the level of care required by this patient.

Respectfully,

[redacted]
Area Vice President & General Manager
Sheraton [redacted]

Inappropriate Discharge to an Acute Care Facility

Requirements in TAC, CFR, and SOM

Texas Administrative Code (TAC)

What is the TAC?

- The TAC is a compilation of all *state* agency rules in Texas.
- TAC, Title 26, Part 1, Chapter 554 contains the Nursing Facility Requirements for Licensure and Medicaid Certification
- Applies to ALL licensed nursing facilities in Texas.
- https://texas-sos.appianportalsgov.com/rules-and-meetings?chapter=554&interface=VIEW_TAC&part=1&title=26

HHSC Long-Term Care Regulation (LTCR) Provider Letter

What is an LTCR Provider Letter?

- A provider letter is a communication from HHSC to providers of long-term care services that provides guidance, updates, or clarifications on specific topics, policies, or regulations
- PL 2022-25 provide guidance to NFs regarding resident discharges and discharge appeal hearings.
- Applies to ALL licensed nursing facilities in Texas.
- https://www.hhs.texas.gov/sites/default/files/documents/pl2022-25.pdf

Code of Federal Regulations (CFR)

What is the CFR?

- The CFR is a codification (arrangement of) the general and permanent rules published in the Federal Register by the executive departments and agencies of the *Federal* Government.
- CFR, Title 42, Part 483 contains the Nursing Facility Requirements for Licensure and Medicaid Certification
- Applies to ALL nursing facilities that are Medicare or Medicaid Certified.
- https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-G/part-483/subpart-B

State Operations Manual (SOM) Appendix PP

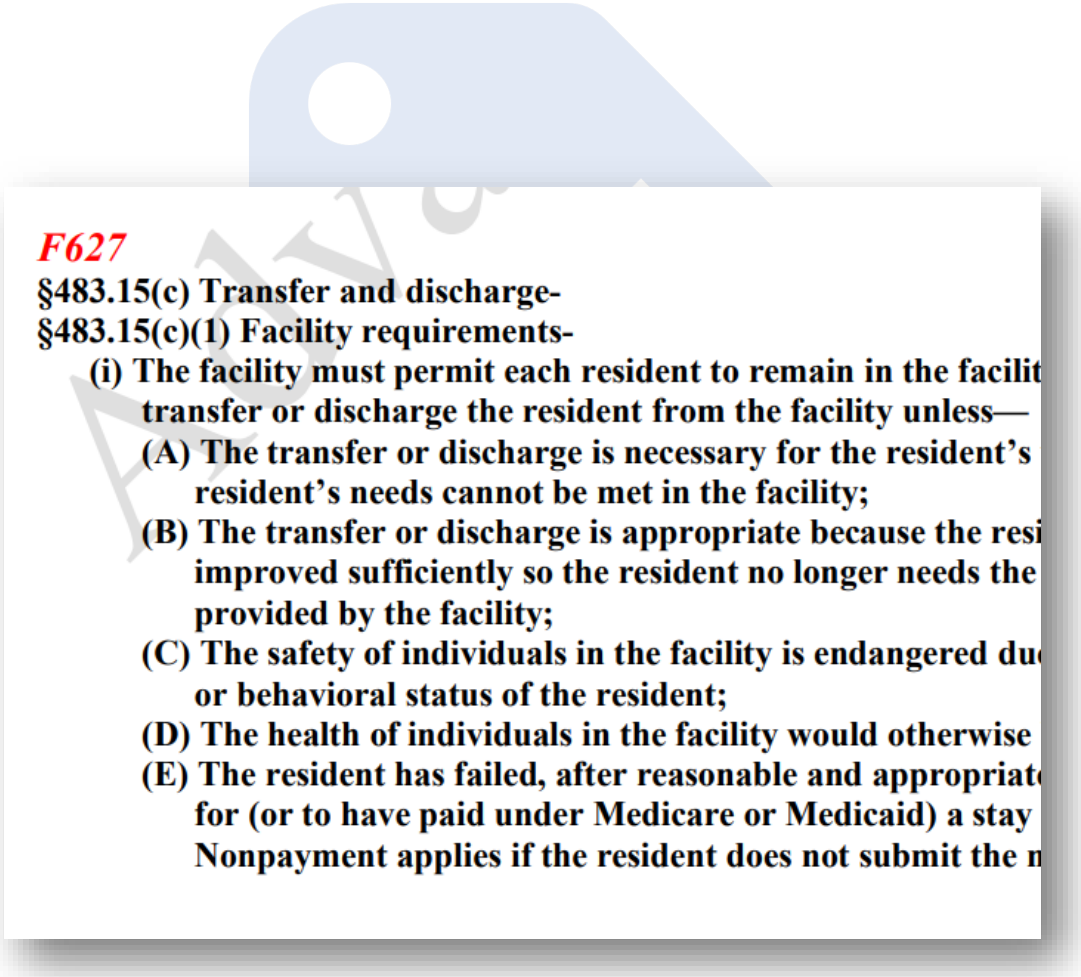
What is the SOM?

- The Centers for Medicare and Medicaid Services publishes the SOM.
- The SOM Appendix PP provides guidance for state surveyors to identify non-compliance with the federal CFR.
- revised-long-term-care-ltc-surveyor-guidance-significant-revisions-enhance-quality-and-oversight-ltc.pdf

What is an F-tag?

F-tags identify a deficiency or area of non-compliance which is also given a scope and severity by the surveyor.

The SOM Appendix PP organizes guidance by F-Tag.



Rules for Appropriate Discharge and Discharge Planning

Allowable Reasons for Discharge

- (i) The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless—
  - (A) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility; ǂ
  - (B) 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;*
  - (C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;*
  - (D) The health of individuals in the facility would otherwise be endangered;*
  - (E) 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. Non-payment 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 his or her 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; or
  - (F) The facility ceases to operate.

  42 CFR 483.15(c)(1)

ǂ Physician documentation about receiving facility's services and discharging facility's attempts to meet needs required

*Physician documentation required

Resolving Issues Before Attempting Discharge

Long-term care Ombudsman Protocol 17-01

a. Did the facility investigate for underlying causes of the issue?
   i. Did the problem exist at the time of the resident's admission?
   ii. Is there a medical problem?
   iii. Is there a psychological problem?
   iv. Does the resident need outside services or programs?
   v. Is action or inaction by the facility contributing to the problem?

b. Does the facility have a policy regarding this issue?
   i. Was the resident informed of this policy? If yes, when?
   ii. Has this policy been applied in the same way to other residents?
   iii. Does the policy comply with state and federal regulations?

Resolving Issues Before Attempting Discharge

CMS guidance to surveyors:

Identify the extent to which the facility has developed and implemented interventions to avoid transferring or discharging the resident, in accordance with the resident's needs, goals for care and professional standards of practice.

SOM Appendix PP, F627

E. Discharge Planning

Per 26 TAC §554.803, discharge planning must be done by **appropriate facility staff**. A facility must provide sufficient **preparation and orientation** to residents to ensure **safe and orderly** transfer or discharge from the facility.

Per 42 CFR §483.15(c)(7); SOM Appendix PP, F627 Ensure a facility does not transfer or discharge a resident in an **unsafe manner, such as a location that does not meet the resident's needs, does not provide needed support and resources, or does not meet the resident's preferences** and, therefore, should not have occurred.

Note: "Discharge to a location of the resident's choice" for example, is not acceptable.

Code of Federal Regulations and Texas Administrative Code

The discharge plan must:

Involve	Consider	Involve	Address
Involve the **interdisciplinary team** in **the ongoing process** of developing the discharge plan.	Consider caregiver availability and the resident's or caregiver's **capacity and capability to perform required care**, as part of the identification of discharge needs.	**Involve** the resident and resident representative in the development of the discharge plan. **Inform** them of the plan.	Address the **resident's goals** of care and treatment preferences.

SOM Appendix PP, F627

Discharge Planning Documentation

- (2) Documentation. When the facility transfers or discharges a resident under any of the circumstances […] of this section, **the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider.**
- In situations where there is no continuing care provider (e.g., resident has no primary care physician in the community), **the facility is expected to document in the medical record efforts to assist the resident in locating a continuing care provider.**
- **Discharge instructions and accompanying prescriptions provided to the resident,** and if applicable, the resident representative must accurately reflect the reconciled medication list in the discharge summary.

26 TAC *§554.502(c); §483.15(c)(2); F627*

Discharge Notices

Requirement to Provide Resident a Discharge Notice

(d) Notice before transfer or discharge. Before a facility transfers or discharges a resident, the facility must:

> (1) notify the resident and the resident representative about the transfer or discharge and the reasons for the move in writing and in a language and manner the resident understands;

26 TAC §554.502(d)

Contents of the Discharge Notice

the written notice specified in subsection (d) of this section must include the following:

the reason for the transfer or discharge

the effective date of transfer or discharge;

the location to which the resident is transferred or discharged

a statement of the resident's appeal rights, including:

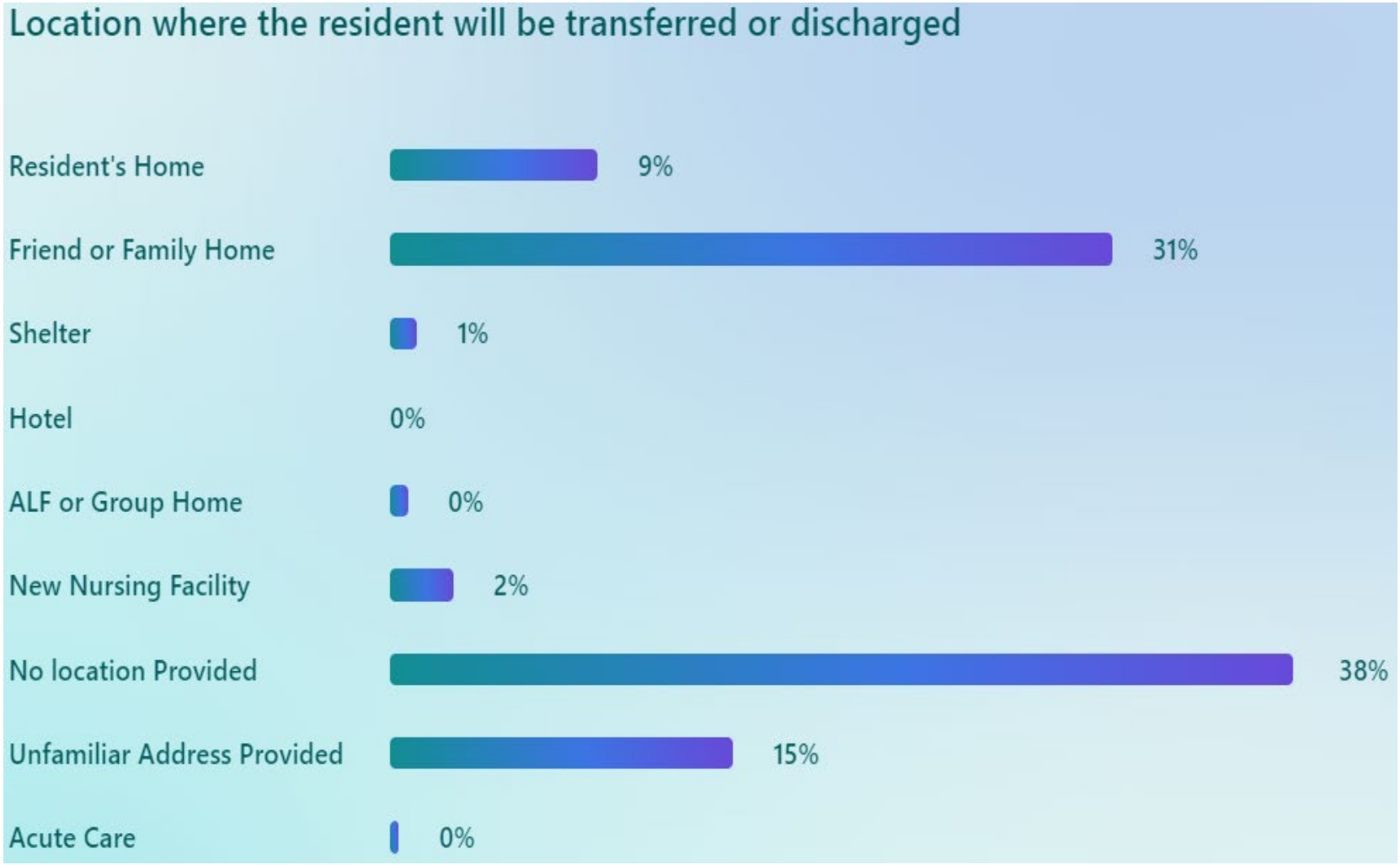
the name, address, email address, and telephone number of the managing local ombudsman and the toll-free number of the Ombudsman Program;

in the case of a resident with mental illness, the address, email address, and phone number of the state mental health authority; and

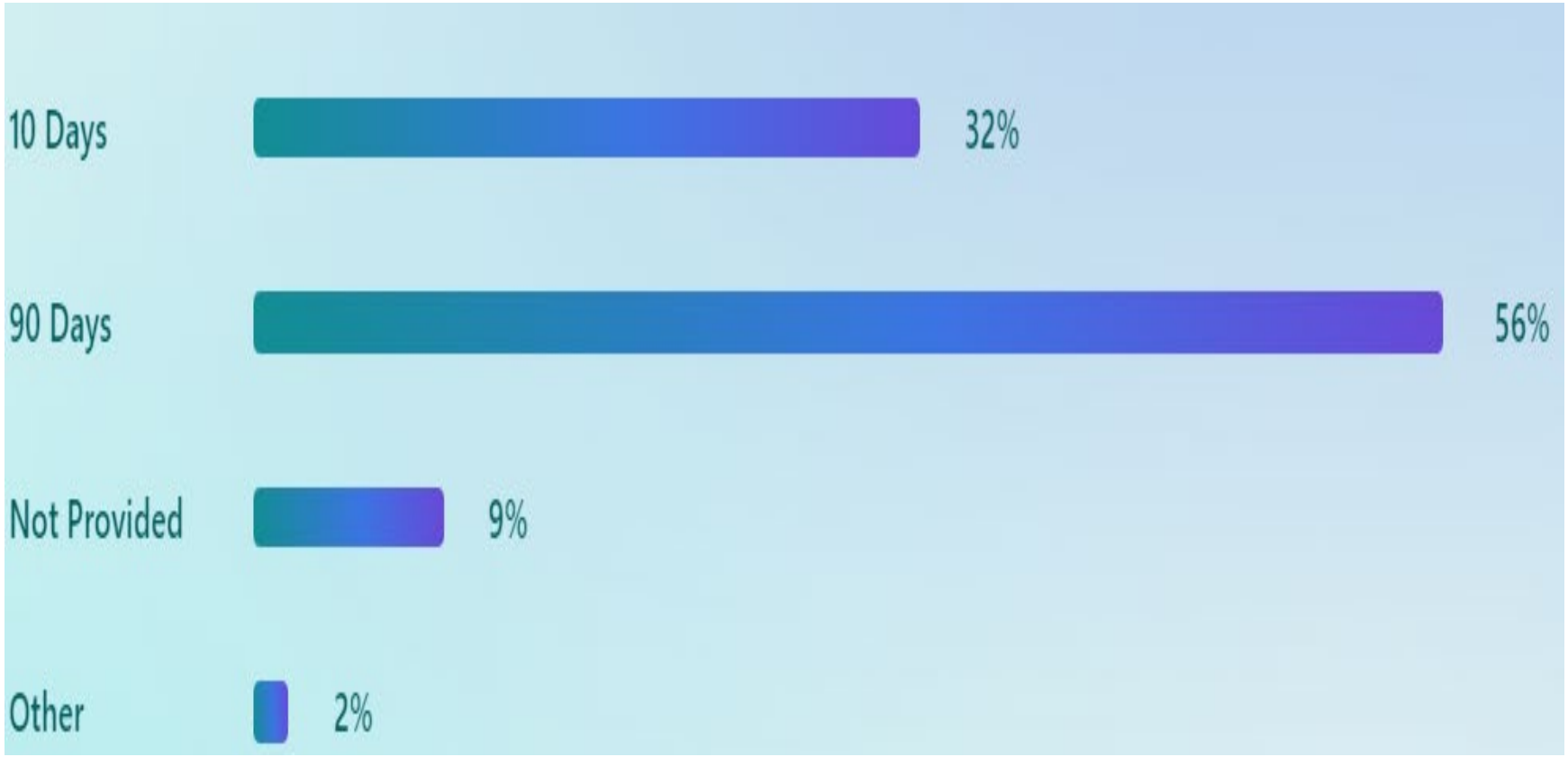
in the case of a resident with an intellectual or developmental disability, the authority for individuals with intellectual and developmental disabilities, and the phone number, address, and email address of the agency responsible for the protection and advocacy of individuals with intellectual and developmental disabilities.

26 TAC §554.502(f)(1-7)

Out of over 1600 discharge notices received throughout the state of Texas in 2024, 38% did not provide a discharge location.



Out of over 1600 discharge notices received throughout the state of Texas in 2024, only 56% provided accurate information on appeal rights.



Notice to the ombudsman

Before a facility transfers or discharges a resident, the facility must […] if the discharge or transfer is initiated by the facility, **send a copy of the notice to a representative of the Ombudsman Program at the time a discharge notice is presented to the resident** and resident representative

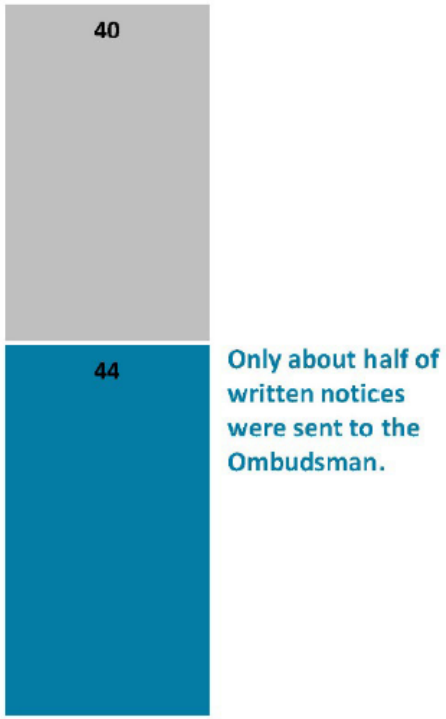
Notice to the ombudsman must be made as soon as practicable **before the discharge** in the event of an immediate discharge.

26 TAC §554.502(d)(2)

Operators with Multiple Facilities

Each facility should have individualized discharge notices that clearly identify the name of the facility. Individualized notices will ensure the notice requirements are met, such as the contact information for the *local* ombudsman.

Exhibit 8: When nursing homes in our review provided the resident with a facility-initiated discharge notice, only about half sent a copy of the notice to the Ombudsman, as required (n=84)



Source: OIG analysis of medical record review data, 2023.

Informing the Ombudsman of a Discharge

TAC 554.502(e)

*A call must be made immediately to the State Long-term Care Ombudsman at 800-252-2412 to report an immediate discharge. TAC 554.502(e)(4)(A)

Immediate Discharge

Immediate Discharge

When discharging a resident immediately, or when dropping a resident off at a hospital or behavioral health facility with no intent of accepting them back, the facility must also call the state office of the Long-Term Care Ombudsman at 800-242-2412.

26 TAC §554.502(e)(4)(A)

Like 30-day discharge notices, the immediate discharge notice must contain all required elements and must be sent to the resident, resident's representative, and the local ombudsman.

26 TAC §554.502(d-f)

CMS Guidance to Surveyors

If the condition or risks were present at the time of the required comprehensive assessment, **did the facility comprehensively assess the resident's physical, mental, and psychosocial needs to identify the risks and/or to determine underlying causes,** to the extent possible, and the impact upon the resident's function, mood, and cognition?

SOM Appendix PP, F636

Transfers and discharges must meet the transfer and discharge requirements at §483.15(c)(1) - (5) by having a valid basis for the transfer or discharge. **There may be rare situations, such as when a serious crime (e.g., attempted murder or rape) has occurred, that a facility initiates a discharge immediately, with no expectation of the resident's return.**

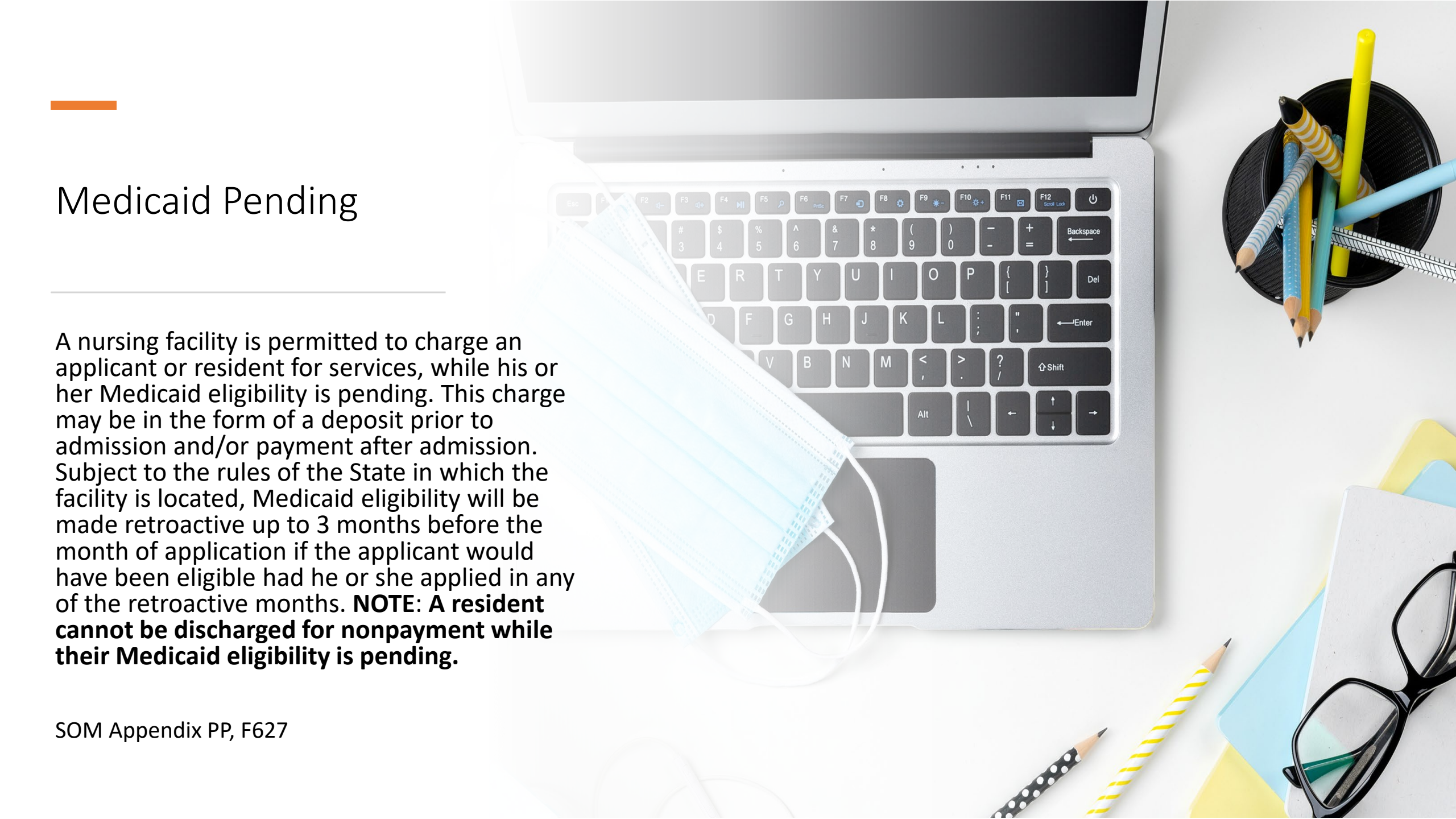
SOM Appendix PP, F627

Discharge for Non-payment

Medicaid Pending

A nursing facility is permitted to charge an applicant or resident for services, while his or her Medicaid eligibility is pending. This charge may be in the form of a deposit prior to admission and/or payment after admission. Subject to the rules of the State in which the facility is located, Medicaid eligibility will be made retroactive up to 3 months before the month of application if the applicant would have been eligible had he or she applied in any of the retroactive months. **NOTE**: **A resident cannot be discharged for nonpayment while their Medicaid eligibility is pending.**

SOM Appendix PP, F627



Receiving a discharge notice is traumatic for residents.

While ombudsman do not encourage or support a resident's intentional decision to not pay, we do want to remind facilities to:

Assist

The facility must provide medically-related social services to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident.

§483.40(d); SOM Appendix PP, F745

Educate

Educate residents on the potential consequences of refusing to pay and refusing to participate in the application for funding process

Facilitate

Facilitate a care plan meeting prior to issuing a discharge notice (choosing to not use discharge notices as a fear-based collections practice)

Investigate

Prior to issuing a discharge notice, facilities should investigate potential causes of non-payment such as exploitation, inability to access records, lack of understanding, etc.

Common Concern: The resident's family is not being responsive during a Medicaid application

- Preparation is key
- Upon admission, get as much information as possible
- What has the facility done to reach out to family? Has there been BOM turnover?
- If resident has capacity, can the facility take the resident to the bank without relying on family?
- Is the resident being exploited? Has APS been called?
- It is critical to submit the Medicaid application to set the retroactive payment date. Don't delay

Common Concern: The Medicaid office is delayed

Report the problem to your Medicaid contract contact

Report processing times **over 45 days and** other concerns to the HHS Ombudsman at 877-787-8999

Ask your ombudsman for assistance

The Ombudsman as a Resource

- Facilitating communication with the resident or family about the application process
- Providing information to the facility about the HHS Ombudsman
- Contacting the Medicaid office on behalf of the resident
- Contacting the Disability Determination Unit to assist individuals waiting for an SSI determination

Discharge for Inability to Meet Needs, Safety, or Health Risk

§483.15(c)(1)(i)(A), (C) or (D) - Discharge when Needs Cannot be Met, or when Safety or Health of Individuals is Endangered

Facilities are required to determine their capacity and capability to care for the residents they admit. Therefore, facilities should not admit residents whose needs they cannot meet based on the Facility Assessment requirements at §483.70(e)

A Resident's Right to Refuse Treatment

Resident decisions to refuse care should not be considered a basis for transfer or discharge unless the refusal poses a risk to the resident's or other individuals' health and/or safety. In situations where a resident's choice to refuse care or treatment poses a risk to the resident's or others' health or safety, **the comprehensive care plan must identify the care or service being declined, the risk the declination poses to the resident, and efforts by the interdisciplinary team to educate the resident and the representative**, as appropriate.

SOM F656; §483.21(b)(1)(ii)

Documentation

If the facility is discharging for the inability to meet the resident's needs, the documentation *made by the resident's physician* must include:

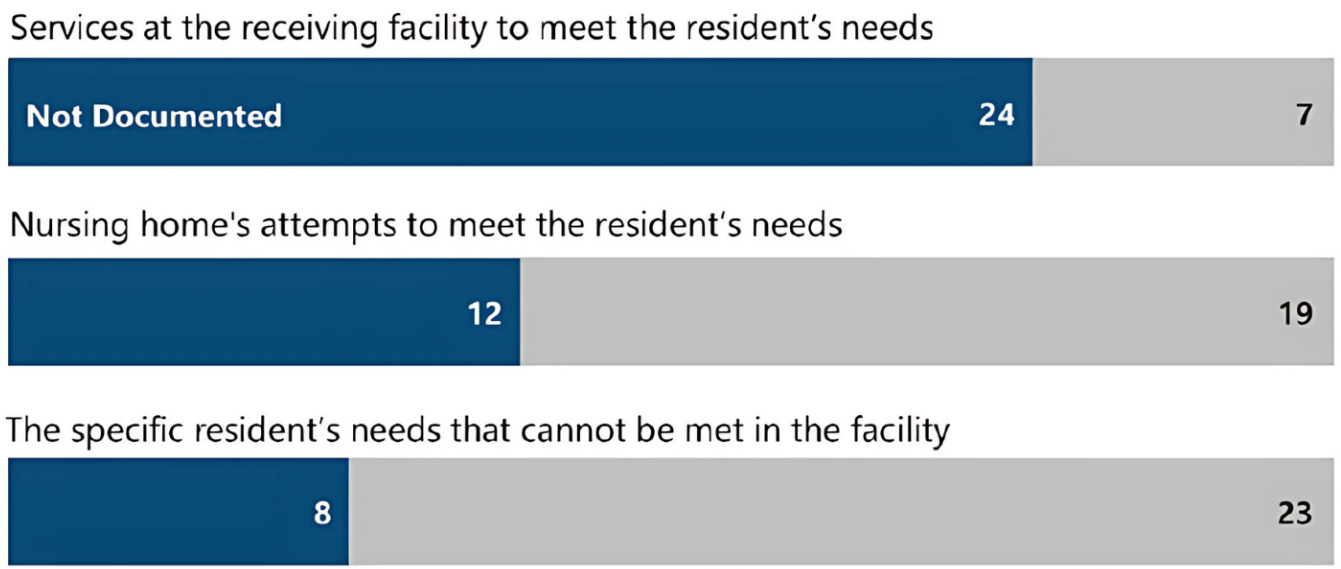
1. The specific resident needs the facility could not meet;
2. The facility efforts to meet those needs; and
3. The specific services the receiving facility will provide to meet the needs of the resident which cannot be met at the current facility.

In situations where the facility determines a resident's clinical or behavioral status endangers the safety or health of individuals in the facility, documentation regarding the reason for the transfer or discharge must be provided by a physician, not necessarily the attending physician.

- SOM Appendix PP, F627, 42 CFR 483.15(c)(2)(i)

Discharge Due to Unable to Meet Needs

Exhibit 5: Nursing homes fell short in documenting required information when discharging residents for not being able to meet their needs (n=31)



Source: OIG analysis of medical record review data, 2023.

Transfers and Refusing to Allow Residents to Return

Permitting Residents to Return to the Facility

A facility must establish and follow a written policy on permitting residents to return to the facility after they are hospitalized or placed on therapeutic leave.

(ii)If the facility that determines that a resident who was transferred with an expectation of returning to the facility, cannot return to the facility, the facility must comply with the requirements of paragraph (c) as they apply to discharges.

42 CFR §483.15(e)(1) SOM Appendix PP, F627

Not Permitting Residents to Return is a Discharge

Not permitting a resident to return following hospitalization or therapeutic leave constitutes a discharge and requires a facility to meet the requirements as outlined in 42 CFR §483.15(c)(1)(ii).

Because the facility was able to care for the resident prior to the hospitalization or therapeutic leave, **documentation related to the basis for discharge must clearly show why the facility can no longer care for the resident**.

Assessment of a Resident's Ability to Return to the Facility

A nursing facility should not base the discharge on the resident's status at the time of transfer to an acute care facility.

***Without an assessment of the resident's status and needs at the time of proposed return to the facility**, there can be no determination of (A), the resident's needs cannot be met, or (C) and (D), that the safety or health of individuals would be endangered.*

SOM Appendix PP, F627

If the facility determines it will not be permitting the resident to return, the medical record should show evidence that the facility made efforts to:

SOM Appendix PP, F627

Determine if the resident still requires the services of the facility and is eligible for Medicare skilled nursing facility or Medicaid nursing facility services.

Ascertain an accurate status of the resident's condition through communication between hospital and nursing home staff and visits by nursing home staff to the hospital.

Find out what treatments the hospital provided to improve the resident's condition. If the facility is unable to provide the same treatments the facility may not be able to meet the resident's needs. For example, a resident who has required IV medication or frequent blood monitoring while in the hospital and the nursing home is unable to provide this same level of care.

Work with the hospital to ensure the resident's condition and needs are within the nursing home's scope of care, based on its facility assessment, prior to hospital discharge.

The Appeal Process

Resident's Appeal Rights

(A) the resident has the right to appeal the action as outlined in HHSC's Fair and Fraud Hearings Handbook by requesting a hearing within **90 days** after the date of the notice;

(B) if the resident requests the hearing before the discharge date, **the resident has the right to remain in the facility until the hearing officer makes a final determination** unless failure to transfer or discharge would endanger the health or safety of the resident or individuals in the facility. The facility must document the danger failure to discharge would present.

26 TAC §554.502(f)(4)(A-B)

Discharge While an Appeal is Pending

When a facility does not allow the resident to return and the facility has initiated a discharge, the facility must comply with Transfer and Discharge Requirements at 42 CFR §483.15(c). **The resident must be permitted to return and resume residence in the facility while an appeal of the discharge is pending.**

State Operations Manual Appendix PP, F627

Questions?

Resources

Resource for Nursing Facilities

Provider Letter

Texas Administrative Code

Code of Federal Regulations

State Operations Manual Appendix PP

Additional Resources

Texas Health and Human Services Office of the Long-Term Care Ombudsman

State Office: 800-252-2412

Find your Local Long-Term Care Ombudsman: LTC Ombudsman: Ombudsman Search | HHS

Texas Health and Human Services Office of the Ombudsman

Call: 877-787-8999

Texas Health and Human Services Complaint and Incident Intake:

Call: 800-458-9858

File Online: Home

File by email: ciicomplaints@hhs.texas.gov

Texas Legal Services

Call: 800.622.2520, Option

Online Assistance: Intake | TLSC

Disability Determination Unit (DDU)

D-2200, When a Medical Determination Is Required | Texas Health and Human Services

Disability Rights Texas

Call: 1-800-252-9108

Online Intake: DRTx Online Intake

Videophone: 1-866-362-2851

Thank you

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