

Nursing Home Transfer and Discharge Rights

Effective Date: 9/23/15

Summary of Express Terms

The amendments to section 415.3 of Title 10 (Health) NYCRR are required to clarify the requirements for transfer and discharge of residents from nursing homes as mandated by federal law. The amendments more clearly define what constitutes a transfer or discharge, specify the elements that must be included in a notice of transfer or discharge to the resident and the deadlines for service of notice, and clarify the rights of a resident at a hearing should one be requested. These amendments do not change existing requirements; they simply ensure that the Department's regulations clearly reflect the existing federal requirements.

Pursuant to the authority vested in the Public Health and Health Planning Council and the Commissioner of Health by sections 2801, 2801-a and 2803(2) of the Public Health Law, Section 415.3(h) of Part 415 of Subchapter A (Medical Facilities-Minimum Standards) of Chapter V, Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulations of the State of New York are hereby amended to be effective upon publication of a Notice of Adoption in the State Register, to read as follows:

(h) *Transfer and discharge rights.* Transfer and discharge shall include movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not. Transfer and discharge shall not refer to movement of a resident to a bed within the same certified facility, and does not include transfer or discharge made in compliance with a request by the resident, the resident's legal representative or health care agent, as evidenced by a signed and dated written statement, or those that occur due to incarceration of the resident.

(1) With regard to the transfer or discharge of residents, the facility shall:

i) permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless such transfer or discharge is made in recognition of the resident's rights to receive considerate and respectful care, to receive necessary care and services, and to participate in the development of the comprehensive care plan and in recognition of the rights of other residents in the facility:

a) The resident may be transferred only when the interdisciplinary care team, in consultation with the resident or the resident's designated representative, determines that:

1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in the facility;

2) 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;

3) the [health or] safety of individuals in the facility [would otherwise be] is endangered[, the risk to others is more than theoretical and all reasonable alternatives to transfer or discharge have been explored and have failed to safely address the problem];
or

4) The health of individuals in the facility is endangered;

b) transfer and discharge shall also be permissible when the resident has failed, after reasonable and appropriate notice, to pay for (or 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;

c) transfer or discharge shall also be permissible when the facility discontinues operation and has received approval of its plan of closure in accordance with subdivision (i) of section 401.3 of this Title;

ii) ensure complete documentation in the resident's clinical record when the facility transfers or discharges a resident under any of the circumstances specified in subparagraph (i) of this paragraph. The documentation shall be made by:

a) the resident's physician and, as appropriate, interdisciplinary care team[, as appropriate], when discharge or transfer is necessary under subclause (1) or (2) of clause (a) of subparagraph (i) of this paragraph; and

b) a physician when transfer or discharge is necessary due to the endangerment of the health of other individuals in the facility under subclause (3) of clause (a) of subparagraph (i) of this paragraph;

iii) before it transfers or discharges a resident:

a) Notify the resident, designated representative, if any, and, if known, family member of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner the[y] resident and/or family member understand;

- b) record the reasons in the resident's clinical record; and
- c) include in the notice the items described in paragraph (v) of this paragraph;
- iv) provide the notice of transfer or discharge required under subparagraph (iii) of this paragraph at least 30 days before the resident is transferred or discharged, except that notice shall be given as soon as practicable before transfer or discharge, but no later than the date on which a determination was made to transfer or discharge the resident, under the following circumstances:
 - (a) the safety of individuals in the facility would be endangered;
 - (b) the health of individuals in the facility would be endangered;
 - (c) the resident's health improves sufficiently to allow a more immediate transfer or discharge;
 - (d) an immediate transfer or discharge is required by the resident's urgent medical needs;
[or]
 - (e) [the transfer or discharge is being made in compliance with a request by the resident;]
the transfer or discharge is the result of a change in the level of medical care prescribed

by the resident's physician; or

(f) the resident has not resided in facility for 30 days.

v) include in the written notice specified in subparagraph (iii) of this paragraph the following:

(a) The reason for transfer or discharge;

(b) The specific regulations that support, or the change in Federal or State law that requires, the action;

(c) The effective date of transfer or discharge;

(d) The location to which the resident will be transferred or discharged;

([a]e) [for transfers or discharges] a statement that the resident has the right to appeal the action to the State Department of Health, which includes: [in accordance with paragraphs (2) and (3) of this subdivision. The statement shall include a current phone number for the department which can be used to initiate an appeal];

(1) an explanation of the individual's right to request an evidentiary hearing appealing the decision;

(2) the method by which an appeal may be obtained;

(3) in cases of an action based on a change in law, an explanation of the circumstances under which an appeal will be granted;

(4) an explanation that the resident may remain in the facility (except in cases of imminent danger) pending the appeal decision if the request for an appeal is made within 15 days of the date the resident received the notice of transfer/discharge;

(5) in cases of residents discharged/transferred due to imminent danger, a statement that the resident may return to the first available bed if he or she prevails at the hearing on appeal; and

(6) a statement that the resident may represent him or herself or use legal counsel, a relative, a friend, or other spokesman;

(b)f) the name, address and telephone number of the State long term care ombudsman;

(c)g) for nursing facility residents [who are mentally ill or who have] with developmental disabilities, the mailing address and telephone number of the [Commission on Quality of Care for the Mentally Disabled which is responsible for the

protection and advocacy of such individuals] agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; [and]

(h) for nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act;

[(d) a statement that, if the resident appeals the transfer or discharge to the Department of Health within 15 days of being notified of such transfer or discharge, the resident may remain in the facility pending an appeal determination. This clause shall not apply to transfers or discharges based on clauses (iv) (a), (b), (d), or (e) of this paragraph; and]

(vi) provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility [including an opportunity to participate in deciding where to go], in the form of a discharge plan which addresses the medical needs of the resident and how these will be met after discharge, and provide a discharge summary pursuant to section 415.11, subdivision (d) of this Title; and

(vii) permit the resident, their legal representative or health care agent the opportunity to participate in deciding where the resident will reside after discharge from the facility.

(2) The department shall grant an opportunity for a hearing to any resident who requests it because he or she believes the facility has erroneously determined that he or she must be transferred or discharged [Appeals of transfer and discharge decisions to the Department of Health as permitted by clause (a) of subparagraph (v) of paragraph (1) of this subdivision shall be] in accordance with the following:

(i) The resident has the right to:

(a) [a pre-transfer on-site appeal determination under the auspices of the Department of Health, provided that the resident has appealed the transfer or discharge within 15 days of the notice, except in cases involving imminent danger to others in the facility; and] request a hearing to appeal the transfer or discharge notice at any time within 60 days from the date the notice of transfer or discharge is received by the resident;

(b) remain in the facility pending an appeal determination if the appeal request is made within 15 days of the date of receipt of the transfer or discharge notice; [or]

(c) a post-transfer/discharge appeal determination [within 30 days of transfer] if the resident did not request an appeal determination [prior to transfer] within 15 days of the date of receipt of the transfer or discharge notice;

(d) return to the facility to the first available semi-private bed if the resident wins the appeal, prior to admitting any other person to the facility; and

(e) represent him or herself, or use legal counsel, a relative, a friend or other spokesman.

[examine his/her medical records.]

(ii) [The presiding officer shall have the power to obtain medical and psychosocial consultations.]The resident or the resident's representative as described in (2)(i)(e) of this paragraph must be given the opportunity to:

(a) examine at a reasonable time before the date of the hearing, at the facility, and during the hearing, at the place of the hearing:

1) the contents of the resident's file including his/her medical records; and

2) all documents and records to be used by the facility at the hearing on appeal;

(b) bring witnesses;

(c) establish all pertinent facts and circumstances;

(d) present an argument without undue interference; and

(e) question or refute any testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses.

(iii) [The nursing home shall have the burden of proof that the transfer is/was necessary and the discharge plan appropriate.]All hearings must be conducted in accordance with Article 3 of the State Administrative Procedure Act, and in accordance with the following:

(a) the presiding officer shall have the power to obtain medical assessments and psychosocial consultations, and the authority to issue subpoenas;

(b) the nursing home shall have the burden of proof that the discharge or transfer is/was necessary and the discharge plan appropriate;

(c) an administrative hearing must be scheduled within 90 days from the date of the request for a hearing on appeal; and

(d) the parties must be notified in writing of the decision and provided information on the right to seek review of the decision, if review is available.

[(iv) in cases involving imminent danger to others in the facility, an involuntary transfer may be arranged before a hearing. However, the facility shall be required to hold the resident's bed until after the hearing decision. If the transfer is found to be appropriate, the facility may charge a private pay resident for the time the bed was held. If the transfer is found to be inappropriate, the facility shall readmit the resident to his or her bed on a

priority basis the first available bed,]

[(v) the department shall conduct a review and render a decision on the appeal as required in clause (a) of subparagraph (i) of this paragraph within 15 days of the request.]

[(3) If an appeal decision rendered after discharge finds the discharge or transfer to be inappropriate, the facility shall readmit the resident prior to admitting any other person.]

[(4)3] The facility shall establish and implement a bed-hold policy and a readmission policy that reflect at least the following:

(i) at the time of admission and again at the time of transfer for any reason, the facility shall verbally inform and provide written information to the resident and the designated representative that specifies:

(a) the duration of the bed-hold policy during which the resident is permitted to return and resume residence in the facility; and

(b) the facility's policies regarding bed-hold periods, which must be consistent with subparagraph (iii) of this paragraph, permitting a resident to return;

(ii) At the time of transfer of a resident for hospitalization or for therapeutic leave, a nursing home shall provide written notice to the resident and the designated

representative, which specifies the duration of the bed-hold policy described in subparagraph (i) of this paragraph.

(iii) a nursing home shall establish and follow a written policy under which a resident whose hospitalization or therapeutic leave exceeds the bed hold period is readmitted to the facility immediately upon the first availability of a bed in a semi-private room if the resident:

(a) requires the services provided by the facility; and

(b) is eligible for Medicaid nursing home services.

(iv) a nursing home shall establish and follow a written policy under which a resident who has resided in the nursing home for 30 days or more and who has been hospitalized or who has been transferred or discharged on therapeutic leave without being given a bed-hold is readmitted to the facility immediately upon the first availability of a bed in a semi-private room if the resident:

(a) requires the services provided by the facility; and

(b) is eligible for Medicaid nursing home services.

([5]4) With regard to the assurance of equal access to quality care, the facility shall

establish and maintain identical policies and practices regarding transfer, discharge and the provision of all required services for all individuals regardless of source of payment.

Regulatory Impact Statement

Statutory Authority:

The statutory authority for this rule is Public Health Law, Sections 2801, 2801-a and 2803(2), which require the Public Health and Health Planning Council to promulgate regulations, subject to the Commissioner's approval, governing the standards and procedures followed by nursing homes. Those standards and procedures must, at a minimum, meet federal standards.

Legislative Objectives:

To clarify, in accordance with a Stipulation of Settlement in *Gautam, et. al. v. Novello, et. al.*, SDNY 03 Civ. 2473(THK), the requirements that must be met by nursing homes in connection with the transfer or discharge of residents. The state's regulations governing transfer and discharge must meet, at a minimum, federal standards.

Needs and Benefits:

Since July 2005, transfer and discharge of nursing home residents has been in accordance with an interim policy that clarifies state requirements in a way that ensures compliance with federal requirements. Amending 10 NYCRR 415.3 in accordance with the interim policy will permanently clarify the requirements that must be met by nursing homes prior to transferring and discharging patients and will ensure that all required policies and procedures are clearly included in the Department's regulations.

Costs:

Costs to Regulated Parties for the Implementation of and Continuing Compliance with the Rule:

Nursing homes are already required to comply with federal regulations prior to transferring and discharging residents. These regulations do not expand upon already existing requirements.

Costs to the Agency, the State and Local Governments for the Implementation and Continuation of the Rule:

The amendments to 10 NYCRR 415.3 will not increase any costs currently borne by the Department or state and local governments. The amendments clarify existing requirements that all facilities are required to follow.

The information, including the source(s) of such information and the methodology upon which the cost analysis is based:

Cost analysis is based on the substance of the regulations and the interim policy clarifying those regulations. There has been no change in the requirements that must be met by all affected entities.

Local Government Mandates:

Local governments that operate nursing homes are already complying with the requirements clarified by these amendments.

Paperwork:

The paperwork required by these amendments has not changed.

Duplication:

These amendments do not duplicate existing regulations or requirements.

Alternatives:

None. The amendments simply clarify state requirements by ensuring the Department's regulations clearly incorporate existing federal mandates.

Federal Standards:

Federal requirements, upon which these amendments are based, are located at 42 CFR Parts 431 and 483. These amendments do not expand upon these requirements.

Compliance Schedule:

Affected entities are already required to comply with the proposed amendments.

Contact Person:

Katherine Ceroalo
New York State Department of Health
Bureau of House Counsel, Regulatory Affairs Unit
Corning Tower Building, Rm. 2438
Empire State Plaza
Albany, New York 12237
(518) 473-7488
(518) 473-2019 (FAX)
REGSQNA@health.ny.gov

Regulatory Flexibility Analysis for Small Businesses and Local Governments

Effect of Rule:

Local governments will not be affected by this rule except to the extent that they operate a nursing home. There are 34 counties that operate nursing homes. The Department does not have information regarding the number of small business nursing homes in NYS readily available. As the amendments do not add to or change existing requirements, and are mandated by federal law, small businesses and local governments will not be affected.

Compliance Requirements:

There are no new reporting and record keeping requirements. The regulations simply clarify state requirements by ensuring the Department's regulations clearly incorporate existing federal mandates.

Professional Services:

No additional professional staff is expected to be needed as a result of the regulations.

Compliance Costs:

There are no new or additional costs associated with these proposed rules.

Economic and Technological Feasibility:

These regulations simply clarify existing requirements. They do not require any new technology and should not affect the routine cost of doing business.

Minimizing Adverse Impact:

The Department has no flexibility with respect to these regulations as all requirements are mandated by federal law. Nonetheless, the rule will have no adverse economic impact on small businesses or local governments since it simply clarifies state requirements by ensuring the Department's regulations clearly incorporate existing federal mandates.

Small Business and Local Government Participation:

The Department will meet the requirements of SAPA § 202-b(6) in part by publishing a notice of proposed rulemaking in the State Register with a comment period. Input was not requested with respect to these amendments since they reflect federal mandates. The proposed rules are not expected to have a deleterious effect on small businesses and local governments, since these requirements are already in effect. Accordingly, opposition is not expected.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The proposed amendment will apply statewide, including the 43 rural counties with less than 200,000 inhabitants, and the 10 urban counties with a population density of 150 per square mile or less.

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

There are no new or additional requirements as a result of this rule. The regulations simply clarify state requirements by ensuring the Department's regulations clearly incorporate existing federal mandates.

Costs:

There are no capital costs associated with these rules. There are no additional operational costs as providers are currently required to have policies and procedures in place to implement existing transfer and discharge requirements. Any administrative costs associated with transfer or discharge are mandated by federal law.

Minimizing Adverse Impact:

The Department has no flexibility with respect to these regulations as all requirements are mandated by federal law. Nonetheless, the rule will have no adverse economic impact on

rural area providers since it simply clarifies state requirements by ensuring the Department's regulations clearly incorporate existing federal mandates.

Rural Area Participation:

The Department will meet the requirements of SAPA Section 202-bb(7), in part, by publishing a notice of proposed rulemaking in the State Register with a comment period. The Department did not solicit input regarding these amendments since they reflect federal mandates. The proposed rules are not expected to have a deleterious effect on rural areas, since these requirements are already in effect. Accordingly, opposition is not expected.

Job Impact Statement

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities.