



INVOLUNTARY DISCHARGES IN NEW JERSEY ASSISTED LIVING FACILITIES

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May 14, 2019

every step of the way

INVOLUNTARY DISCHARGES IN ASSISTED LIVING

If, when, and how to facilitate the involuntary discharge.



WHEN DO YOU FIRST THINK ABOUT INVOLUNTARY DISCHARGE?

- Before the resident moves into the facility
- If they move-in, will they be able to pay, and if necessary, will I be able to discharge

ISSUES TO CONSIDER TO AVOID INVOLUNTARY DISCHARGE

- Financial due diligence
- Resident/family member interview
- Medical exam/evaluation – level of care analysis
- Availability of beds

WHEN SHOULD AN INVOLUNTARY DISCHARGE BE CONSIDERED?

- Nonpayment
- Level of Care
- Disruption to the facility – resident or family member
 - Resident – Acceptable given adherence
 - Family member – Generally not recognized by NJLTCO
- Resident Safety
- Closure of facility N.J.A.C. 8:36-2.6

VOLUNTARY VS. INVOLUNTARY DISCHARGE

VOLUNTARY DISCHARGE

Cooperation of resident or family member of resident.

- Resident Capacity
- Guardian/Attorney-in-Fact
- Responsible Person

INVOLUNTARY DISCHARGE

Lack of consent from resident or family member of resident.

- Grounds for discharge
- Notice to NJ Long-Term Care Ombudsman
- Safe discharge
 - Family or facility

WHAT IS AN INVOLUNTARY DISCHARGE?

N.J.A.C. 8:36-5.14:

- a) Written notification by the administrator shall be provided to a resident and/or his or her family, guardian, or designated responsible person, of a decision to involuntarily discharge the resident from the facility or program. Such involuntary discharge shall only be upon grounds contained in the facility's or program's policies and procedures and shall occur only if the resident has been notified and informed of such policies in advance. The notice of discharge shall be given at least 30 days in advance and shall include the reason for discharge and the resident's right to appeal. This 30 day advance notice shall not apply if the discharge is for reasons in accordance with the criteria specified at N.J.A.C. 8:36-5.1(d). A copy of the notice shall be entered in the resident's record.
- (b) In an emergency situation, as stated in N.J.A.C. 8:36-5.1(d), for the protection of the life and safety of the resident or others, the facility or program may transfer the resident without 30 days notice. The Department shall be notified in the event of such discharge.

NOTIFICATION REQUIREMENTS

N.J.A.C. 8:36-5.15:

- (a) The resident's family, guardian, and/or designated responsible person or community agency shall be notified, when known, and with the resident's consent, immediately after the occurrence, in the event of the following:
 - 1. The resident acquires an acute illness requiring medical care;
 - 2. Any serious accident, criminal act or incident occurs which involves the resident and results in serious harm or injury or results in the resident's arrest or detention;
 - 3. The resident is transferred from the facility; or
 - 4. The resident expires.
- (b) Notification of any occurrence noted in (a) above shall be documented in the resident's record. The documentation with regard to an occurrence noted in (a)4 above shall include confirmation and written documentation of that notification.

ADMISSION AND RETENTION OF RESIDENTS

N.J.A.C. 8:36-5.13:

(c) If a facility or program has reason to believe, based on a resident's behavior, that the resident poses a danger to himself or herself or others, and that the facility or program is not capable of providing proper care to the resident, then the attending physician or the physician on call, in consultation with facility or program staff and a resident representative, shall determine whether the resident is appropriately placed in that facility or program. The facility or program or resident representative shall initiate the mental health screening process in accordance with [N.J.S.A. 30:4-27.1 et seq.](#), and N.J.A.C. 10:31, Screening and Screening Outreach Process, and, based on the results and recommendations of that screening process, shall attempt to locate a new placement if necessary.

SERVICES THAT AN ASSISTED LIVING MUST PROVIDE TO RESIDENTS

N.J.A.C. 8:36-5.1:

- Personal care and services based on individual needs to promote assisted living values
- At least the following: assistance with personal care, nursing, pharmacy, dining, activities, recreational, and social work services to meet the individual needs of each resident
- Supervision of self-administration of medications, and administration of medications by trained and supervised personnel, as needed by residents
- Shall be capable of providing nursing services to maintain residents, including residents who require nursing home level of care

CRITERIA FOR DISCHARGE

N.J.A.C. 8:36-5.1:

The facility may, but is not required to transfer from the facility or program if it is documented in the resident record that a higher level of care is required, as demonstrated by one or more of the following characteristics:

1. The resident requires 24-hour, seven day a week nursing supervision;
2. The resident is bedridden for more than 14 consecutive days;
3. The resident is consistently and totally dependent in four or more of the following activities of daily living: dressing, bathing, toilet use, transfer, locomotion, bed mobility, and eating;
4. The resident has a cognitive decline severe enough to prevent the making of simple decisions regarding activities such as bathing, dressing and eating and cannot respond appropriately to cueing and simple directions;

CRITERIA FOR DISCHARGE (cont.)

The facility may, but is not required to transfer from the facility or program if it is documented in the resident record that a higher level of care is required, as demonstrated by one or more of the following characteristics:

5. The resident requires treatment of a stage three or four pressure sore or multiple stage two pressure sores. However, a resident who requires treatment of a single stage two pressure sore shall be retained and a plan of care developed and implemented to stabilize the pressure sore and the condition which caused it;
6. The resident requires more than “assistance with transfer”;
7. The resident is a danger to self or others; or
8. The resident has a medically unstable condition and/or has special health problems, and a regimen of therapy cannot be appropriately developed and implemented in the assisted living environment.

CRITERIA FOR DISCHARGE RESIDENT AGREEMENT

All resident agreements should identify criteria for discharge

- Recite regulations
- Include non-payment of fees and expenses
- Behavioral issues
- Family members – disruption (proper grounds?)
- Identify level of care to be provided

BEST PRACTICES

Tips to avoid challenges to involuntary discharge:

- Accurate and detailed recordkeeping
- Incident notes
- Communications with DOH/Ombudsman
- Communications with residents/family members
- Monitor level of care – communicate with resident/family
- Monitor financial circumstances – communicate with resident/family
- Separate Medicaid policies with spend-down provision

DISCHARGE NOTICE – REQUIREMENTS

1. 30 days written notice of discharge
2. Reason for discharge
3. Right to appeal
4. Name, address and number for Long-Term Care Ombudsman
5. Location of transfer – safe discharge
6. Provide a copy to Long-Term Care Ombudsman

APPEAL OF DISCHARGE

- Resident Agreement
- Assisted Living Resident Rights (N.J.S.A. 26:2H-128(10): “Appeal an involuntary discharge as specified in department regulations.”
- N.J.A.C. 8:36-5.14: “The notice of discharge shall be given at least 30 days in advance and shall include the reason for discharge and the resident's right to appeal.”
- Discharge notice
- Executive Director hears appeals unless designated otherwise.

WHO PREPARES THE NOTICE

- Should be prepared by the administrator or counsel for the facility
- Signed by the Administrator
- Coordinate with nursing staff – discuss
- Provide a copy to resident/family member
- Send a copy to Long-Term Care Ombudsman
- Maintain a copy for file/resident chart

WHEN TO SEND THE NOTICE

- Generally, should not come as a surprise to resident/family member
- Send before it is too late
 - Anticipate financial issues – resident agreement should provide flexibility
 - Closely monitor care
- Can be avoided in an emergency

FREQUENT CHALLENGES

- Objection by family member
- Ombudsman
 - Ombudsman: Laurie Brewer
 - General Counsel: Audrey Anderson
- Lack of payor source
- Safe discharge – where to transfer resident
- Regulatory criteria
- Resident Agreement

WAYS TO MITIGATE THE LOSS

- Facilitate Medicaid process
- Discontinue accrual of incidentals (family meals, beauty care, etc.)
- Representative payee of SSI
- Personal guaranty of financial obligation
- Room changes

POTENTIAL LIABILITY

- Resident risk: Can the facility provide the level of care required
- Financial risk: Continued cost of care
- Claims of staff
- Claims from other residents/family members
- Litigation
- Claims of discrimination
- Claims of neglect/abuse

LITIGATION

- Parties involved
- Where to file
- Relief being sought – Money, discharge, guardianship, etc.
- Agencies involved in case
- Claims – Akin to landlord/tenant relationship
- Order to Show Cause – Emergent relief

GUARDIANSHIP

- Incapacity – N.J.S.A. 3B-1-2: Individual impaired by reason of mental illness or mental deficiency to the extent he lacks sufficient capacity to govern himself and manage his affairs.
 - Certification from two physicians examining within 30 days
 - Assets of alleged incapacitated
 - Filed in County where alleged incapacitated is domiciled – may not be County of facility!
- Types of guardianship – Person and/or financial affairs.
- *Pendente lite* – N.J.S.A. 3B-12-24.1: Emergent guardian pending hearing

OFFICE OF THE PUBLIC GUARDIAN

- Public Guardian acts as surrogate decision maker for residents sixty (60) years of age and over those who have been deemed incapacitated by the Superior Court of New Jersey.
- OPG does not petition to become guardian, but rather accepts judicial appointments on a discretionary basis.

OFFICE OF THE PUBLIC GUARDIAN

- Residents who do not have a willing and responsible family member or friend to serve as guardian are eligible for the services of the public guardian. N.J.S.A. 52:27G-26
 - Reasons:
 - Unavailability of person
 - Financial exploitation of guardian, attorney-in-fact, family member
 - Not acting in best interests of individual
 - Neglect/abuse
 - Costs charged against estate. If none, facility may be responsible.

SIMILARITIES AND DIFFERENCES BETWEEN ASSISTED LIVING AND SKILLED NURSING

The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless:

1. The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility pursuant to 42 C.F.R. § 483.15 (a)(6);
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 safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;

SIMILARITIES AND DIFFERENCES BETWEEN ASSISTED LIVING AND SKILLED NURSING (cont.)

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. 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; or
6. The facility closes.

SIMILARITIES AND DIFFERENCES BETWEEN ASSISTED LIVING AND SKILLED NURSING (cont.)

- A facility may not transfer or discharge a resident while an appeal is pending, unless the failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility. The facility must also be sure to document the danger that failure to transfer or discharge would pose. 42 C.F.R. § 483.15(c)(1).
- 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. 42 C.F.R. § 483.15(c)(2).

SIMILARITIES AND DIFFERENCES BETWEEN ASSISTED LIVING AND SKILLED NURSING (cont.)

- Notice must identify the location to which the resident will be transferred or discharged. This too, must be specific. Vague language such as “to other facility” or “home” is not sufficient.
- Transfer/discharge – 30 days. Closure – 60 days.

OTHER DEFENSES TO INVOLUNTARY DISCHARGE

- Fair Housing Amendments Act: Bars discrimination based on race, color, sex, religion, or national origin.
- Americans with Disabilities Act: Prohibits disability discrimination and requires reasonable accommodations unless resulting in an undue hardship.
- Rehabilitation Act (section 504): Predecessor to ADA. Prohibits discrimination against people with disabilities in programs that receive federal financial assistance.

SUMMARY OF INVOLUNTARY DISCHARGE

1. Importance of communication
2. Criteria for discharge
3. Importance of documentation
4. Comprehensive resident agreement
5. Involuntary discharge notice
6. Litigation

QUESTIONS OR DISCUSSION?

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