



# Involuntary Nursing Home Discharges

## A Fast Track from Nursing Homes to Homeless Shelters

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**Spring 2021**

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# Introduction

For nursing home residents with medical needs, the prospect of an involuntary discharge can be terrifying. Residents who have lived in a nursing home for years may suddenly face discharge, with little or no help to identify a safe, appropriate setting with the necessary services in place. In New York City, too often nursing homes seek to discharge residents to homeless shelters as a first option instead of as a last resort. While residents have the right to appeal the discharge, the hearing process is daunting. Even filing the appeal of the Notice of Discharge can be a challenge. In the hearing, the resident faces a gauntlet of medical and social service professionals testifying and submitting documentation to justify the discharge. The resident is often unaware of the intricacies of the regulations governing care planning and involuntary discharges procedures. This paper will present the common problems in the nursing home discharge notice and hearing process, as well as proposed solutions to ensure a fair process that results in a safe and appropriate discharge.

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***A Manhattan nursing home informed a resident of the decision to discharge her to a homeless shelter and delivered her to the shelter on the same day. The shelter found that she was medically unstable and she was immediately hospitalized.***

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## Overview of Findings

Through Mobilization for Justice’s (“MFJ”) representation of nursing home residents and a review of New York State nursing home involuntary discharge hearing decisions issued in 2018 and 2019,<sup>1</sup> we found serious problems in the involuntary nursing home discharge hearing process, both procedural and substantive, at every step of the process, including:

- Nursing homes fail to conduct discharge planning as part of comprehensive, person-centered care planning;
- The New York State Department of Health (“DOH”) fails to enforce standards for discharge planning and fails to require nursing homes to follow involuntary discharge procedures;
- Notices of Discharge do not include legally required information and are not understandable to many residents;
- The DOH system for requesting an appeal of an involuntary discharge is inaccessible for many residents;

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<sup>1</sup> MFJ was not able to include 2019 decisions in the data presented below, because we did not receive those decisions from the DOH until March 2021, more than one year after we requested them pursuant to the Freedom of Information Law. That being said, based on our initial review, the 2019 decisions are consistent with our findings based on our more comprehensive review of the 2018 decisions. We have also requested 2020 decisions, but we have yet to receive them from the DOH.

- Residents generally do not have access to legal counsel and are often unable to participate effectively in the hearings pro se;
- Administrative Law Judges (“ALJ”) apply erroneous legal standards; and
- In violation of federal law, the DOH fails to publish involuntary discharge decisions.

MFJ reviewed all seventy-three decisions rendering final determinations following discharge hearings in 2018. Of these, forty-one (56%) ruled in favor of the nursing home, thirty-one (42%) ruled in favor of the resident, and one decision memorialized a settlement.<sup>2</sup>

In thirty-one of these cases, where a nursing home proposed discharge to a homeless shelter, the resident prevailed in challenging the discharge only 19% of the time (six cases) and the nursing home prevailed 81% of the time (twenty-five cases).

Further, only a small proportion of discharges to homeless shelters go through the hearing process: in 2018, according to New York City Department of Homeless Services’ (“DHS”) records, 1,294 individuals new to the New York City shelter system were discharged from nursing homes to homeless shelters.<sup>3</sup> Yet only 31 residents who faced discharge to a shelter in 2018 had a hearing. Residents are routinely discharged to shelter without any hearing at all.

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***A Bronx nursing home proposed to discharge a resident to a homeless shelter and the DOH upheld that plan, even though there is nothing in the decision indicating that the nursing home made any attempt to find housing for the resident.***

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<sup>2</sup> In MFJ’s experience, many cases are resolved via settlement with an agreed-upon discharge plan when residents are represented by counsel, but such settlements are not generally memorialized in a decision by the ALJ.

<sup>3</sup> N.Y. CITY DEP’T OF HOMELESS SERVICES, “LOCAL LAW 114 OF 2017 REPORT ON MEDICAL HEALTH SERVICES IN SHELTERS,” 2018 REPORT (hereinafter “DHS 2018 REPORT”), at 13, available at: <https://www1.nyc.gov/assets/dhs/downloads/pdf/Local-Law-114-2018-Report.pdf>. This is the best available data on discharges from nursing homes to the New York City shelter system. There are, however, two caveats: 1) although the data is labeled “number of individuals new to the shelter system discharged from a nursing home to a shelter,” a footnote states that the numbers may include discharges from “other non-hospital facilities and programs”; and 2) the report likely undercounts the magnitude of the problem because it counts only individuals who are “new to” the shelter system (i.e., individuals who have never lived in a shelter or who have not lived in a shelter during the previous 12 months). This is almost a 10% increase from 2017, in which 1,187 individuals new to the New York City shelter system were discharged from nursing homes to homeless shelters. See N.Y. City Dep’t of Homeless Services, “Local Law 114 of 2017 Report on Medical Health Services in Shelters,” 2017 Report, at 11, available at: <https://www1.nyc.gov/assets/dhs/downloads/pdf/Local-Law-114-2017-Report.pdf>.

# Statutory and Regulatory Background

## Nursing Homes and Person-centered Care Planning

Involuntary discharge hearings must be viewed in the context of the overall function and obligations of nursing homes. The federal Nursing Home Reform Act of 1987 made the concept of person-centered care planning a centerpiece of the regulations governing nursing homes.<sup>4</sup> “Person-centered care means to focus on the resident as the locus of control and support the resident in making their own choices and having control over their daily lives.”<sup>5</sup> This principle applies to discharge planning, which must center on the resident’s discharge goals.

“The facility must develop and implement an effective discharge planning process that focuses on the resident’s discharge goals, the preparation of residents to be active partners and effectively transition them to post-discharge care, and the reduction of factors leading to preventable readmissions.”<sup>6</sup> The facility must “(i)nvolve the resident and resident representative in the development of the discharge plan and inform the resident and resident representative of the final plan.” The discharge plan must “(a)ddress the resident’s goals of care and treatment preferences.”<sup>7</sup> Before a determination is made to discharge a resident, the nursing home is required to consult with the resident or their designated representative. The determination to discharge must be made by “the interdisciplinary care team, in consultation with the resident or the resident’s designated representative.”<sup>8</sup> Nursing homes must provide sufficient orientation and preparation for a resident to ensure a safe and orderly discharge from the facility. Such orientation must be provided in a form and manner understandable to the resident.<sup>9</sup>

Discharge planning, including assessment of residents’ interest in community-based housing, is a required component of a facility’s comprehensive assessment and care planning obligations not only toward the end of a resident’s stay, but throughout the time a resident is in a nursing home.<sup>10</sup>

Facilities are required to assess residents at least quarterly, using an assessment tool called the Minimum Data Set (“MDS”). Section Q of the MDS is designed to give “residents a direct voice in expressing preference” and “the facility a means to assist residents in locating and transitioning to the most integrated setting.”<sup>11</sup> If the resident expresses an interest in returning to the community, the nursing home must refer them to a Local Contact Agency, an organization that helps residents of nursing homes access community-based housing and services.<sup>12</sup> Local Contact Agencies are tasked with helping nursing home residents navigate home and

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<sup>4</sup> Pub. L. No. 100-203, 101 Stat. 1330 (1987), codified at 42 U.S.C.A. §§ 1395i-3(a)-(h) and 1396r(a)-(h).

<sup>5</sup> 42 CFR § 483.5.

<sup>6</sup> 42 CFR § 483.21(c).

<sup>7</sup> *Id.*

<sup>8</sup> 10 NYCRR § 415.3(i)(1)(i)(a).

<sup>9</sup> 42 CFR § 483.15(c)(7).

<sup>10</sup> 42 CFR § 483.20(b)(1)(xvi); 10 NYCRR § 415.11(a)(2)(vii).

<sup>11</sup> U.S. DEP’T OF HEALTH AND HUMAN SERV., OFFICE FOR CIVIL RIGHTS, GUIDANCE AND RESOURCES FOR LONG TERM CARE FACILITIES: USING THE MINIMUM DATA SET TO FACILITATE OPPORTUNITIES TO LIVE IN THE MOST INTEGRATED SETTING 1 (April 2016), available at: <https://www.hhs.gov/sites/default/files/mds-guidance-2016.pdf>.

<sup>12</sup> *Id.*; 10 NYCRR § 415.3(c).

community-based services through Medicaid and other programs, and refer residents to assistance locating affordable housing in the community.

Specific assessments are required for residents with known or suspected mental health or developmental disabilities to ensure that they are not unnecessarily institutionalized in long-term care settings in violation of the Americans with Disabilities Act.<sup>13</sup> Nursing homes are required to conduct Preadmission Screen Resident Review (PASRR) referrals for such residents prior to admission, at least annually, and upon a significant change in condition.<sup>14</sup> If the resident is assessed as able to live in a community setting, the nursing home is directed to “immediately develop, implement, facilitate and coordinate an active discharge plan in accordance with the individual's needs and desires. This includes the safe and orderly discharge of the resident to the most integrated, appropriate Community Housing with appropriate Community Services.”<sup>15</sup> Supportive housing for people with mental health disabilities is among the types of community housing that may be considered.<sup>16</sup>

## Discharge Procedure

### Allowable Bases for Discharge

Nursing homes cannot involuntarily discharge residents without cause. The six bases for involuntary discharge or transfer<sup>17</sup> from a nursing home are:

- (A) The transfer or discharge is necessary for the resident’s welfare and the resident’s needs cannot be met in the facility;
- (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....; or
- (F) The facility ceases to operate.<sup>18</sup>

New York State regulations specify that the first basis applies “after reasonable attempts at accommodation in the facility.”<sup>19</sup> A discharge on the basis of non-payment is 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.”<sup>20</sup>

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<sup>13</sup> 42 U.S.C. §§ 12131 et seq.

<sup>14</sup> N.Y. STATE DEP’T OF HEALTH, DEAR ADMINISTRATOR LETTER, PREADMISSION SCREEN RESIDENT REVIEW (PASSR) LEVEL II FOR MENTAL ILLNESS – PROCESS CHANGES (November 30, 2017); 42 CFR § 483.106(a); 10 NYCRR § 415.11(e).

<sup>15</sup> N.Y. STATE DEP’T OF HEALTH, DEAR ADMINISTRATOR LETTER, REQUIREMENTS REMINDER FOR INDIVIDUALIZED DISCHARGE CARE PLANNING FOR PASRR PURPOSES (February 25, 2013).

<sup>16</sup> *Id.*

<sup>17</sup> The regulations describe transfer and discharge as follows: “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....” 10 NYCRR § 415.3(i). This report will use the term “discharge” to refer to discharge or transfer.

<sup>18</sup> 42 CFR § 483.15(c)(l)(i).

<sup>19</sup> 10 NYCRR § 415.3(i)(1)(i)(a)(1).

<sup>20</sup> 10 NYCRR § 415.3(i)(1)(i)(b).



## Required Notice and the Right to Appeal

Residents are entitled to a thirty day notice of discharge, with a few exceptions, including: (1) if the safety or health of other individuals in the facility would be endangered; (2) if the resident's health has improved sufficiently to allow for a more immediate discharge or transfer; (3) the discharge is due to the resident's urgent medical needs; or (4) the resident has not resided in the facility for 30 days. If one of the exceptions apply, the facility may give notice as "soon as practicable."<sup>21</sup>

The Notice must be provided to the resident and her representative(s) in a "language and manner they understand."<sup>22</sup> A copy of the Notice also must be provided to the Long Term Care Ombudsman Program ("LTCOP") "at the same time the notice of discharge is provided to the resident and resident representative..."<sup>23</sup> The Notice must set forth: 1) the reasons for the discharge, 2) the regulations that support the discharge, 3) the effective date of the discharge, 4) the location to which the resident is being discharged, 5) a statement on the right to appeal the discharge, 6) information on how to file an appeal, and 7) contact information for the LTCOP.<sup>24</sup> For residents with developmental disabilities or mental health disabilities, contact information for the state's designated Protection and Advocacy Program must be included in the Notice.<sup>25</sup>

The resident may appeal the decision to discharge within 60 days of receiving the notice. If the appeal is filed before the resident has been discharged, the discharge is stayed until a hearing can be held and a decision rendered.<sup>26</sup> The only exception is if failure to discharge would endanger the resident or others in the facility. If the facility alleges imminent danger, it "must document the danger that failure to transfer or discharge would pose."<sup>27</sup>

## Documentation

When a nursing home makes the determination to discharge a resident, it must document the basis for the discharge in the resident's record.<sup>28</sup> The resident's physician must complete the documentation if the basis for the discharge is either: (1) the resident's health has improved sufficiently so that the resident no longer needs the facility's services; or (2) the resident's needs cannot be met at the facility. If the facility alleges that the resident's needs cannot be met, the physician must document what needs the facility is unable to meet, what efforts the facility made

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<sup>21</sup> 10 NYCRR § 415.3(i)(1)(iv); 42 CFR § 483.15(c)(4)(ii).

<sup>22</sup> 10 NYCRR § 415.3(i)(1)(iii)(a); 42 CFR § 483.15(c)(3)(i).

<sup>23</sup> *Id.*; CENTERS FOR MEDICARE & MEDICAID SERVICES, MEMORANDUM ON IMPLEMENTATION ISSUES, LONG-TERM CARE REGULATORY CHANGES: SUBSTANDARD QUALITY OF CARE (SQC) AND CLARIFICATION OF NOTICE BEFORE TRANSFER OR DISCHARGE REQUIREMENTS 4 (May 12, 2017), available: <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-27.pdf>

<sup>24</sup> 42 CFR § 483.15(c)(5); *see also* N.Y. STATE DEP'T OF HEALTH DEAR ADMINISTRATOR LETTER DAL-NH 19-07, NOTICE OF TRANSFER OR DISCHARGE AND PERMITTING RESIDENTS TO RETURN (August 20, 2019) (reminding nursing homes of federal requirements for Notices and providing contact information to be provided on the Notices for county LTCOPs and Disability Rights New York).

<sup>25</sup> *Id.* §§ 483.15(c)(5)(vi) and (vii); 10 NYCRR § 415.3(i)(1)(v)(g) and (h). In New York State, the designated agency is Disability Rights New York.

<sup>26</sup> 42 CFR § 483.15(c)(1)(ii). The New York regulations state that the discharge is stayed if the resident requests the appeal within 15 days. 10 NYCRR § 415.3(i)(2)(i)(b). New York follows the more lenient federal rule in practice, but confusingly mandates that the Notice provide "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." 10 NYCRR § 415.3(i)(1)(v)(e)(4).

<sup>27</sup> 42 CFR § 483.15(c)(1)(iii).

<sup>28</sup> *Id.* § 483.15(c)(2); 10 NYCRR § 415.3 (i)(1)(ii).

to meet those needs, and what services will meet those needs in the facility to which the resident is being discharged.<sup>29</sup>

A physician (but not necessarily the resident's treating physician) must complete the documentation if the basis for the discharge is a danger to the safety or health of individuals in the facility.<sup>30</sup>

## **The Hearing**

If the resident appeals, a hearing on the proposed discharge is scheduled. In New York, the administrative hearing to appeal an involuntary discharge is heard by a New York State Department of Health ("DOH") administrative law judge ("ALJ"). The hearings are conducted on the record, are typically audio-recorded, and usually take place at the nursing home. During the COVID-19 pandemic, the hearings have been conducted via Webex.

The nursing home bears the burden of proving two elements: (1) the discharge is necessary; and (2) the discharge plan is appropriate.<sup>31</sup>

Residents have a right to represent themselves, be represented by counsel, "or use a relative, a friend or other spokesman."<sup>32</sup> At a reasonable time before the date of the hearing, the facility must give the resident or representative the opportunity to examine the resident's file, including medical records, and all documents to be used by the facility at the hearing.<sup>33</sup> During the hearing, the resident may bring witnesses, question or refute testimony, including by cross-examination, "establish all pertinent facts and circumstances," and "present an argument without undue interference."<sup>34</sup>

ALJs have the power to obtain "medical assessments and psychosocials" and issue subpoenas.<sup>35</sup> If the ALJ determines that an impartial medical assessment is necessary, it must be obtained at the expense of the State Medicaid agency.<sup>36</sup>

Decisions are issued in writing and inform the parties of the process for appeal of the decision: the filing of an Article 78 proceeding in State Supreme Court.

Unlike many administrative hearings, involuntary discharge hearings are closed to the public.<sup>37</sup>

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<sup>29</sup> 42 CFR § 483.15(c)(2).

<sup>30</sup> 10 NYCRR § 415.3(i)(1)(ii); 42 CFR § 483.15(c)(2)(ii).

<sup>31</sup> 10 NYCRR § 415.3(i)(2)(iii)(b).

<sup>32</sup> 10 NYCRR § 415.3(i)(2)(i)(e); 42 CFR § 431.206(b)(3).

<sup>33</sup> 10 NYCRR § 415.3(i)(2)(ii)(a); 42 CFR § 431.242(a).

<sup>34</sup> 10 NYCRR. § 415.3(i)(2)(ii); 42 CFR § 431.242(b)-(e).

<sup>35</sup> *Id.* § 415.3(i)(2)(iii)(a).

<sup>36</sup> 42 CFR § 431.240(b).

<sup>37</sup> The DOH favors closed hearings, regardless of a resident's wishes. MFJ represented a client whose invitation to a reporter to attend his involuntary discharge hearing was opposed by counsel for the nursing home. After opposing counsel objected, the ALJ denied the resident's request on the basis of confidentiality and potential liability to the nursing home, even though the resident was willingly authorizing disclosure of his confidential health information to the reporter in the hearing. Decision on Motion, Matter of [redacted], Beth Abraham Ctr. for Rehab. & Nursing (N.Y. State Dep't of Health Feb. 6, 2019).

## **Other Rules Governing the Proceeding: New York State Administrative Procedures Act (SAPA) and the Manual for Administrative Law Judges and Hearing Officers**

Nursing home involuntary discharge hearings are adjudicatory proceedings governed by SAPA.<sup>38</sup> The statute provides for notice of the hearing and directs agencies to adopt rules to govern hearings.<sup>39</sup> The standard of proof is substantial evidence.<sup>40</sup>

New York State publishes a Manual for Administrative Law Judges, with guidance on topics such as due process, conduct of the hearing, and handling evidence.<sup>41</sup> The Manual addresses the role of the ALJ when a litigant is unrepresented, noting that “[w]ithout favoring the unrepresented party, the ALJ must guide the party through the hearing.”<sup>42</sup>

When a party appears at the hearing without representation and it is apparent that the party has little understanding as to the nature of the hearing, and lacks familiarity with its procedures, the ALJ must act carefully. On the one hand, the ALJ cannot become the party's advocate. That would cast the ALJ in an adversary role rather than as a neutral. On the other hand, the ALJ cannot just sit back and let the unrepresented party be taken advantage of or lose the hearing merely because the party did not know what to do.<sup>43</sup>

Given their duty to develop the record,

The ALJ may also have the responsibility of questioning the unrepresented party, not only to develop all the facts but also to assist the party in presenting the party's case fully. As to other witnesses called by the party, the ALJ may need to question them, especially when it is obvious the party does not know how to conduct a meaningful examination. This responsibility also extends to cross-examination of the represented party and that party's witnesses. Additionally, the ALJ may need to protect the party from objectionable cross examination.<sup>44</sup>

Once the decision is rendered, it must be made available to the public. Federal regulations require that the public have access to all agency hearing decisions on involuntary discharges.<sup>45</sup> New York State law requires that each state agency rendering decisions in adjudicatory proceedings publish an index by name and subject of its decisions, with each decision indexed “within sixty days after being rendered.”<sup>46</sup>

## **Rules Governing Shelter Placements in New York City**

Homeless shelters in New York State are prohibited from placing an individual in a shelter who “has a mental or physical condition that makes such placement inappropriate”; “requires services beyond those that the shelter is authorized to provide”; or “is in need of a level of

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<sup>38</sup> N.Y.A.P.A. § 301 et seq.

<sup>39</sup> N.Y.A.P.A § 301 (2); (3).

<sup>40</sup> N.Y.A.P.A § 306(1).

<sup>41</sup> Manual for Administrative Law Judges and Hearing Officers, (N.Y. State Dep't of Civil Serv. 2002), available at: [https://www.cs.ny.gov/pio/publications/manual\\_for\\_hearing\\_officers.pdf](https://www.cs.ny.gov/pio/publications/manual_for_hearing_officers.pdf).

<sup>42</sup> *Id.* at 119-21.

<sup>43</sup> *Id.* at 119.

<sup>44</sup> *Id.* at 120-21.

<sup>45</sup> 42 CFR § 431.244(g); 42 CFR § 431.202.

<sup>46</sup> N.Y.A.P.A. § 307(3)(a).

medical, mental health, nursing care or other assistance that cannot be rendered safely and effectively by the facility, or that cannot be reasonably provided by the facility through the assistance of other community resources....”<sup>47</sup>

The New York City Department of Homeless Services (“DHS”) has a specific policy that governs referrals from healthcare facilities, including nursing homes. The DHS Referral Policy warns that, “in general, clients residing in skilled nursing facilities or receiving long-term care have a high likelihood of being medically inappropriate for shelter.”<sup>48</sup> The Policy further notes that “[e]xcept under special circumstances, residents of LTCFs [Long-term Care Facilities] who were admitted for long-term care have a significant likelihood to be unfit for shelter or Safe Haven. Given the typical length of stay in a LTCF, their staff are expected to work with homeless clients to apply for permanent housing for those who expect to recover and function independently.”<sup>49</sup>

Per the Policy, individuals are “de facto inappropriate for DHS facilities” if they are unable to “independently manage activities of daily living” or “independently manage chronic illnesses or medication administration, schedule, and reminders, including inability to self-administer insulin,” among other things.<sup>50</sup> Individuals are not eligible for shelter placement if they need “home care or nurse visits beyond wound care or IM/IV medication administration and beyond 2 weeks.”<sup>51</sup>

The Policy requires that healthcare facilities, including nursing homes, assess patients’ housing needs and assist those who are unstably housed or at risk of homelessness to access homelessness prevention services.<sup>52</sup> The Policy makes it clear that referral to a homeless shelter should be a last resort: “HCF are expected to make every effort to prevent a client from entering the homeless shelter system and assist the client in returning to his or her pre-admission housing setting or another form of non-shelter housing.”<sup>53</sup> The Policy includes a housing referral checklist for facility staff to detail their attempts to obtain housing, including applications to a range of settings including adult homes, assisted living, residential treatment programs, and rental subsidies, among others.<sup>54</sup>

If all other options have been exhausted, the Policy requires that a referral be sent in advance to the DHS, with the client’s consent, and that a Reasonable Accommodation Request Form be submitted for “patients with a disabling condition due to a medical condition or disability,” including patients who need such accommodations as wound care or nursing visits, the use of mobility devices, or an oxygen concentrator.<sup>55</sup>

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<sup>47</sup> 18 NYCRR § 491.9(c)(1); (2); and (4).

<sup>48</sup> REFERRAL FROM HEALTHCARE FACILITIES POLICY (hereinafter “DHS REFERRAL POLICY”), N.Y. CITY DEP’T OF HOMELESS SERVICES, DHS-PB-2018-009 (June 28, 2018) at 3, available at: [https://www1.nyc.gov/assets/dhs/downloads/pdf/DHS-%20Institutional\\_referral\\_procedure\\_7182018.pdf](https://www1.nyc.gov/assets/dhs/downloads/pdf/DHS-%20Institutional_referral_procedure_7182018.pdf).

<sup>49</sup> *Id.* at 22.

<sup>50</sup> *Id.* at 7.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 11.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*, Appendix 1.

<sup>55</sup> *Id.* at 6; Appendix 5.

# Procedural Problems

The procedural problems with Notices of Discharge, the process of requesting an appeal, and the hearings themselves, point to a lack of due process for nursing home residents, very few of whom are even able to get to the hearing stage. When they do, the odds are stacked against them, with nursing homes having witnesses and documentary evidence readily available, and much more likely to have legal counsel.

## Notices

Notices of Discharge can be difficult for residents to understand and they offer few resources to residents.

Although the majority of nursing home residents are elderly, and many have poor eyesight, Notices of Discharge are generally in regular-sized type. Unlike Notices of Termination in adult care facilities,<sup>56</sup> the DOH does not provide a standard form and does not require that Notices include legal resources for nursing home residents to contact for advice or to request counsel. While facilities' forms vary, they generally contain check off boxes for the six potential bases for discharge, providing no detail on the alleged facts underlying the basis for the discharge asserted by the nursing home. As a result, residents have little information about why the facility seeks to discharge them.

Because the format of the Notices can be confusing, it is not always clear who to contact to request an appeal versus who to contact for advocacy assistance. Many Notices have not been updated with accurate information for the LTCOP or Disability Rights New York. But even when facilities' Notices are up-to-date, it is not always clear that the DOH is the entity to call to request an appeal. As a result of this confusion, the LTCOP regularly receives calls from residents who think they are calling to file for an appeal.<sup>57</sup> Residents with limited English proficiency frequently receive the Notice in English only.<sup>58</sup> Moreover, residents with visual impairments are not provided Notices in a format accessible to them. All of these problems are violations of state and federal requirements, yet the DOH generally permits nursing home discharges to proceed despite these Notice deficiencies.

## Lack of Access to Advocacy or Legal Representation

Two of the greatest problems are: (1) lack of access to advocacy to request an appeal of a Notice of Discharge; and (2) the lack of access to legal representation in hearings.

### The Need for Advocacy to Request an Appeal

We will never know how many nursing home residents who have been discharged to homeless shelters and other unsafe environments would have appealed the discharge if they had had access to advocates to assist them. The vast majority of nursing home residents facing discharge never have the opportunity to present their case at a hearing. As stated above, there

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<sup>56</sup> 18 NYCRR § 487.5(f)(5) (requiring that operators of adult care facilities provide residents a list of agencies that provide free legal services and advocacy services in the relevant geographic region, provided or approved by the DOH).

<sup>57</sup> Interview with Deirdre Garrett-Scott, Director, N.Y. City Long Term Care Ombudsman Program, Center for the Independence of the Disabled of N.Y. (Mar. 4, 2021) (hereinafter "Garrett-Scott interview").

<sup>58</sup> *Id.*

were 73 hearings held in New York State in 2018. Yet that same year, 1,294 residents were discharged from nursing homes to homeless shelters in New York City alone.<sup>59</sup> There is no telling how many residents were involuntarily discharged to other settings without the opportunity for a hearing.

Requesting an appeal can be difficult for a number of reasons, including:

- Nursing homes often fail to timely provide Notices to residents, their representatives, and the LTCOP, despite the regulatory requirements;<sup>60</sup>
- Nursing homes that do provide Notice often do not do so in a clear format with a large enough font, in the resident's primary language, or in alternate formats for residents with visual impairments;
- Many nursing home residents are isolated, with limited access to telephones and typically no access to computers;
- The DOH Nursing Home Complaint hotline that residents must call to file appeals is inaccessible. To request an appeal, nursing home residents must call the DOH Nursing Home Complaint hotline or submit an online form. In our experience, few nursing home residents have telephone or internet access; and
- If they get through to the hotline, after speaking with an intake representative, they are transferred to another line, which often goes to voicemail, even during business hours. But receiving a return telephone call can be a challenge in a nursing home. When residents do not have their own phones – and many do not – callers must navigate the central switchboard for the nursing home and, in many instances, the system for putting calls through to residents is to ring the nurse's station on the resident's floor. It can be difficult to get through to the nurse's station and, at times, even if nursing staff do pick up, they may be too busy to connect the caller with the resident.

The LTCOP has limited capacity due to lack of funding to contact residents for whom they receive a copy of the Notice. While the federal regulations were amended in 2016 to require that Notices be sent to the LTCOP, this requirement does not ensure resident access to advocacy services. The regulatory requirement to notify LTCOPs was not accompanied by additional funding for the programs. Further, nursing homes do not always comply with the CMS requirement that such notice be provided to the LTCOP program “at the same time the notice of discharge is provided to the resident and resident representative...”<sup>61</sup> In New York City, the LTCOP often receives the Notice a day or two before discharge, and sometimes not at all.<sup>62</sup>

Even when facilities give timely notice to the LTCOP, the program's ability to contact residents who are facing involuntary discharge to advise them of their rights and assist them to file an appeal, if needed, is sorely limited because the New York's LTCOP is underfunded and

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<sup>59</sup> DHS 2018 REPORT, *supra* note 3 at 13.

<sup>60</sup> Numerous 2018 decisions note that facilities failed to provide residents and their representatives with Notices of Discharge prior to their refusal to allow the resident to return from the hospital; Garrett-Scott interview, *supra* note 57.

<sup>61</sup> CENTERS FOR MEDICARE & MEDICAID SERVICES, MEMORANDUM ON IMPLEMENTATION ISSUES, LONG-TERM CARE REGULATORY CHANGES: SUBSTANDARD QUALITY OF CARE (SQC) AND CLARIFICATION OF NOTICE BEFORE TRANSFER OR DISCHARGE REQUIREMENTS, May 12, 2017 at 4, available at: <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-27.pdf>.

<sup>62</sup> Garrett-Scott interview, *supra* note 57.

understaffed.<sup>63</sup> The LTCOP's ability to help residents is further limited because the DOH has refused to accept appeals filed on behalf of residents, taking the position that the residents must make the calls themselves.<sup>64</sup>

### **Challenges in the Hearing for Pro Se Residents**

While nursing home residents have the right to cross examine witnesses, examine records, and "establish all facts and circumstances," exercising those rights is very difficult without legal representation.

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*According to our analysis of the 2018 involuntary discharge decisions, nursing homes were more than twice as likely as residents to have legal counsel:*

- Nursing homes had counsel in nineteen cases;*
- Residents (or their guardians) were represented by counsel in seven cases*

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Several of the hearing decisions note that residents did not show up for the hearing or stayed in their rooms, reporting that they did not feel well.<sup>65</sup>

Facing an array of nursing home staff and the nursing home's attorney can be a daunting experience for pro se nursing home residents. Medical records and testimony by nursing home staff are the evidence facilities use to meet the burden of proving that a proposed discharge is necessary and proper. Refuting nursing home records requires knowing what documents to request from the nursing home or other sources, and where to look for information that might contradict the nursing home's assertions. It can be difficult, if not impossible, for a resident to request records without access to phones or internet. Cross examining a doctor, nurse, or social worker, is also not an easy task for a layperson. More fundamentally, without detailed knowledge of the regulatory requirements that apply to care planning and discharge planning procedures, describing one's needs in terms of the elements to be proven at the hearing is also difficult, if not impossible, for a layperson.

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<sup>63</sup> OFFICE OF THE N.Y. STATE COMPTROLLER, LONG TERM CARE OMBUDSMAN PROGRAM 10-12, REPORT 2018-S-48 (finding that nursing home residents have limited access to ombudsman services because the program is understaffed generally in New York State, and severely understaffed in New York City); see also N.Y. CITY COMPTROLLER, PROTECTING OUR MOST VULNERABLE: THE CASE FOR STRENGTHENING NEW YORK'S LONG TERM CARE OMBUDSMAN PROGRAM 11 (June 2020) (hereinafter "NYC Comptroller Report"), available at: <https://comptroller.nyc.gov/wp-content/uploads/documents/Ombudsman-Report.pdf> (finding that in 2018, New York State's program ranks 40<sup>th</sup> among 50 states for the number of full-time ombudsmen per long term care bed). Although they have a broad mandate to identify quality of life issues, advocate for residents of long term care facilities, and work with resident councils, in 2018 there was only one full-time paid ombudsman for every 8,650 residents in New York City, far below the ratio of one per every 2,000 residents recommended by the Institute of Medicine. *Id.* at 4. The NYC Comptroller report found New York City needed a full-time staff of 25 to adequately serve residents of long term care facilities, compared to the actual full-time staff of 6. *Id.* at 14. In 2018, the LTCOP program in New York City received 1,500 Notices of Discharge per month. *Id.* at 13.

<sup>64</sup> Garrett-Scott interview, *supra* note 57.

<sup>65</sup> See e.g., Matter of [redacted], Brookside Multicare Nursing Ctr. (N.Y. State Dep't of Health, Feb. 16, 2018) (resident tried to adjourn the proceeding and eventually participated from her room); Matter of [redacted], Triboro Ctr. for Rehab. & Nursing (N.Y. State Dep't of Health, March 7, 2018) (resident expressed the belief that he would wind up back in the hospital if discharged to a shelter, raised his voice, and was "unable to regain his composure to participate in the hearing").

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*Attorneys make a big difference:*

- Residents won their case every time they had counsel.*
  - Nursing homes won their cases every time they had counsel, except in cases involving discharges to acute care hospitals.*
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### **Evidentiary Challenges for Pro Se Nursing Home Residents**

Several decisions from 2018 note that the resident was afforded the opportunity to present documents on their own behalf in the hearing or call witnesses to refute facility evidence but did not. In each of those instances, the resident was not represented by counsel.<sup>66</sup> It is not realistic to expect residents to be able to marshal documents supporting their defenses, when the existing documents are only available from the facility, voluminous, rife with medical terminology, and in many instances, prepared with the express purpose of proving the nursing home's case.

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*Of the thirteen non-hospital discharge decisions in which the resident prevailed, five had counsel or an ombudsperson advocating on their behalf, and another five had family members or others advocating or testifying on their behalf.*

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Nursing home records themselves are inaccessible to many residents. Facilities sometimes refuse to provide records or illegally demand payment for copying records. When they do provide records, font sizes are often significantly smaller than the standard 12 point type. When MFJ requests records relevant to discharge notices, we often receive hundreds, and sometimes thousands, of pages.

A close examination of a large quantity of medical records from the nursing home is a critical task in preparing for hearings, one that is difficult for many nursing home residents, whose conditions may include visual impairments or cognitive impairments. Even putting aside a resident's disabilities, many of the records are difficult for laypeople to understand.

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*Only three residents who appeared on their own behalf, with no assistance at the hearing from an advocate or testimony by any witness on their behalf, prevailed in their appeal of a Notice of Discharge.*

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<sup>66</sup> See, e.g., Matter of [redacted], Triboro Ctr. for Rehab. & Nursing (N.Y. State Dep't of Health, March 7, 2018); Matter of [redacted], Briarcliff Manor Ctr. for Rehab. & Nursing Ctr. (N.Y. State Dep't of Health, July 3, 2018).



For example, when a nursing home asserts that the resident is independent in their activities of daily living, a close review of documents from the nursing home record may tell a different story. It is important to review not just the most recent MDS, which may have been prepared with an eye toward justifying a discharge, but earlier MDS reports, which are used to justify the facility's billing of Medicaid or Medicare for services. There are additional records that may refute a conclusory statement that the resident no longer needs nursing home services. For example, the nursing home's Accountability Reports, which document the tasks nursing aides performed at every shift, usually indicate the degree of assistance provided with activities of daily living. A nursing home resident is unlikely to know these records exist or that they could help them prepare for a hearing.

Nursing home records and testimony can be unreliable. For example, in one decision following a hearing on a discharge proposed by a Brooklyn nursing home, the ALJ noted that the doctor's assessment that the resident could be discharged to an assisted living facility was written before the resident's cognitive abilities had been assessed. That very resident was unable to answer the ALJ's questions in the hearing, and the Ombudsman and a family member testified that because of her cognitive impairment, she needed supervision.<sup>67</sup>

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***Almost two-thirds (27 of 42) of the residents who lost their hearings had no advocate, witness, or family member present in the hearing with them.***

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While ALJs have the power to request assessments and issue subpoenas, and federal regulations require that Medicaid pay for such assessments, we have never seen an ALJ exercise that power. They have given residents time to obtain documentation from outside entities, but have not issued a subpoena to aid the resident in procuring such documentation.<sup>68</sup> In one case, even when a resident's guardian failed to appear for the second day of the hearing, the ALJ did not issue a subpoena to ensure that the resident's guardian appear on their behalf for the proceeding.<sup>69</sup>

### **Challenges with Remote Hearings during the COVID-19 Pandemic**

In New York State and nationally, nursing homes have continued to seek to discharge residents to homeless shelters and other unsafe settings during the COVID-19 pandemic.<sup>70</sup> Neither the national nor the New York State moratoria on evictions from all other types of housing<sup>71</sup> has been applied to nursing home involuntary discharge proceedings.

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<sup>67</sup> Matter of [redacted], Dumont Ctr for Rehab. (N.Y. State Dep't of Health, March 5, 2018).

<sup>68</sup> Matter of [Redacted], Bronx Park Rehab. & Nursing Care (N.Y. State Dep't of Health, April 18, 2018) (hearing held open to enable resident to obtain documentation of housing acceptance; discharge affirmed when resident did not produce the document).

<sup>69</sup> Matter of [Redacted], Mary Manning Walsh Nursing Home (N.Y. State Dep't of Health, August 14, 2018).

<sup>70</sup> Jessica Silver-Greenberg and Amy Julia Harris, 'They Just Dumped Him Like Trash': Nursing Homes Evict Vulnerable Residents, N.Y. TIMES, June 21, 2020.

<sup>71</sup>Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 86 FR 16731 (Mar. 31, 2021); Covid-19 Emergency Eviction and Foreclosure Prevention Act of 2020 ("CEEPPA"), L.2020, Ch. 381.

Because visitation in nursing homes has been severely restricted during the COVID-19 pandemic, involuntary discharge hearings in New York have been held via Webex, posing challenges for some residents with disabilities. One difficulty is that neither the judge nor advocates nor witnesses for the resident can be present in the room with the resident. The resident is often alone in the room with personnel from the nursing home, an intimidating arrangement. If the resident has counsel, they are generally unable to have private conversations during the hearing or discuss testimony or other evidence presented by the facility in real time. The DOH has not issued any guidance on how hearings should be conducted virtually.

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***MFJ represented a resident during the height of the COVID-19 pandemic who faced discharge to a homeless shelter because the nursing home was trying to empty beds to make space for COVID-19 patients. The nursing home continued to issue discharge notices to our client, even after an ALJ had ruled that he needed the services of the nursing home. The nursing home then tried to transfer the patient to another nursing home. After issuing a fourth discharge notice to a homeless shelter, they convinced the resident to accept the transfer to another nursing home.***

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## **Substantive Problems**

Substantive problems in nursing home discharge cases include: (1) the failure of facilities to engage in proper discharge planning, coupled with the DOH's failure to enforce discharge planning standards; and (2) ALJ's applying an incorrect standard for eligibility for a nursing home level of care.

### **Failure of Nursing Homes to Engage in Proper Discharge Planning**

A widespread problem MFJ sees in our representation of nursing home residents in involuntary discharge hearings is the nursing home's failure to fulfill its obligations regarding discharge planning, a problem that is longstanding and well-documented.<sup>72</sup>

Involuntary discharge hearing decisions point to failures in discharge planning, including: (1) failure to apply for or obtain needed benefits, services, or housing; (2) failure to comply with shelter referral requirements; and (3) failure to ensure that the resident moves to the least restrictive setting appropriate to their needs.

These problems stem from a fundamental infirmity: the DOH fails to ensure that nursing homes involve residents in the discharge planning process. The DOH fails to do this despite the

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<sup>72</sup> OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF HEALTH & HUMAN SERVS., SKILLED NURSING FACILITIES OFTEN FAIL TO MEET CARE PLANNING AND DISCHARGE PLANNING REQUIREMENTS, February 2013, OEI-02-09-00201, available at: <https://oig.hhs.gov/oei/reports/oei-02-09-00201.pdf>.

requirement that nursing homes “(i)nvolve the resident and resident representative in the development of the discharge plan and inform the resident and resident representative of the final plan.” The discharge plan must “(a)ddress the resident’s goals of care and treatment preferences.”<sup>73</sup>

The purpose of discharge planning bears repeating here: “The facility must develop and implement an effective discharge planning process that focuses on the resident’s discharge goals, the preparation of residents to be active partners and effectively transition them to post-discharge care, and the reduction of factors leading to preventable readmissions.”<sup>74</sup> If the DOH required nursing homes to comply with these requirements, working together with residents to make discharge plans designed to reduce factors leading to preventable readmissions, many problematic discharge plans, including placement in homeless shelters, would cease or significantly decline.

### **Failure to Ensure that the Discharge Plan Includes Necessary Care and Services**

Involuntary discharge hearing decisions contain myriad examples of nursing homes failing to: arrange for necessary care and services for residents, involve the resident in the discharge plan, and develop a discharge plan that addresses the resident’s goals of care and treatment preferences. For example:

- A resident of a Tarrytown nursing home faced discharge to a shelter despite needing assistance with activities of daily living and requiring physical and occupational therapy prior to obtaining surgery.<sup>75</sup>
- A facility in Brooklyn proposed to discharge a resident, who needed a wheelchair to ambulate, to an assisted living facility that did not accept residents who use wheelchairs.<sup>76</sup>
- A Manhattan nursing home proposed discharging a resident to her apartment without ascertaining whether home care was available or what devices were needed to maintain her safety at home, even though the resident had suffered numerous falls and needed constant supervision.<sup>77</sup>

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<sup>73</sup> 42 CFR § 483.21(c)(1)(vi).

<sup>74</sup> *Id.* § 483.21(c)(1).

<sup>75</sup> Matter of [redacted], Tarrytown Hall Care Ctr. (N.Y. State Dep’t of Health, Aug. 7, 2018).

<sup>76</sup> Matter of [redacted], Brooklyn Ctr. for Rehab. & Residential Healthcare (N.Y. State Dep’t of Health, July 13, 2018).

<sup>77</sup> Matter of [redacted], New Gouverneur Hosp. SNF (N.Y. State Dep’t of Health, Oct. 24, 2018).

- The same Manhattan nursing home proposed discharging a resident to his apartment, even though he did not have transportation to go to medical appointments and could not navigate the stairs to his home. The ALJ approved the discharge plan even though the nursing home made no effort to obtain paratransit services for the resident or explore whether a reasonable modification, such as a ramp, would make his home physically accessible.<sup>78</sup>

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***One of MFJ’s clients was convinced by the nursing home’s social worker to leave the facility the next day, with assurances that a safe discharge plan was in place. Our client found herself in an apartment with no furniture, no personal care services, an insufficient supply of medications, and no durable medical equipment. The one referral the nursing home had provided was to a primary care physician who did not accept her insurance.***

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### **Failure to Comply with Shelter Referral Requirements and Admission Criteria**

The DOH Office of Adjudication now encloses with its Notice of Hearing state regulations on shelters as well as excerpts from DHS Policy on shelter referrals from healthcare facilities. Yet shelter placements persist and 81% of the 2018 DOH decisions affirm nursing home plans to discharge residents to shelters.

For good reason, the DHS prohibits placing individuals in shelter who need “a level of medical, mental health, nursing care or other assistance that cannot be rendered safely and effectively by the facility, or that cannot be reasonably provided by the facility through the assistance of other community resources.”<sup>79</sup> While some of the decisions include findings that a shelter can provide needed services to a resident,<sup>80</sup> the DHS policy suggests otherwise, making it clear that nursing homes should help residents apply for housing, and that, in the vast majorities of cases, placement in a homeless shelter from a nursing home is inappropriate.<sup>81</sup>

Unfortunately, MFJ’s experience and the 2018 hearing decisions suggest that nursing homes routinely make little or no effort to avoid shelter placements. The 2018 DOH decisions include numerous examples of nursing homes discharging residents to shelters, having made scant effort to seek appropriate housing, including:

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<sup>78</sup> Matter of [redacted], New Gouverneur Nursing Facility (N.Y. State Dep’t of Health, Dec. 5, 2018).

<sup>79</sup> 18 NYCRR § 491.9(c)(1); (2); and (4).

<sup>80</sup> See, e.g., Matter of [Redacted], Bay Park Ctr. for Nursing & Rehab., (March 27, 2018) (“The Shelter would place Appellant in a setting appropriate for his needs. A social worker would be assigned to Appellant and would assist Appellant with finding permanent housing and obtaining other services he might need.”)

<sup>81</sup> DHS REFERRAL POLICY, *supra* note 48 at 7, 11.

- A Manhattan nursing home informed a resident of the decision to discharge her to a homeless shelter and delivered her to the shelter on the same day. The shelter found that she was medically unstable and she was immediately hospitalized.<sup>82</sup>
- A Syracuse nursing home proposed discharge to a shelter after the assisted living program where the resident formerly resided refused to readmit him. The placement was upheld by the ALJ, even though there is no indication in the decision that the nursing home made any other attempts to place the resident in housing.<sup>83</sup>
- A Bronx nursing home proposed discharge to a shelter and that plan was upheld, although there is nothing in the decision indicating that the nursing home attempted to find any other housing for the resident.<sup>84</sup>

In our experience representing nursing home residents who face involuntary discharge to homeless shelters, nursing homes almost uniformly fail to adhere to the DHS policy. They frequently fail to comply with the referral requirements, or they send an incomplete or inaccurate referral that misrepresents the service needs of the resident.

In addition, the DHS does not appear to closely scrutinize referrals from nursing homes. Instead, the DHS accepts incomplete and inappropriate referrals, after what appears to be a cursory review.

### **Failure to Comply with Obligation to Seek the Least Restrictive Setting**

The discharge hearing process often reveals the failure of nursing homes to refer residents to community housing as part of the comprehensive care planning process, or to use the PASSR process to enable residents with mental health disabilities or developmental disabilities to access the least restrictive setting. To comply with the requirements of the Americans with Disabilities Act, the DOH must ensure that nursing home are helping residents access integrated settings.

Instead, nursing homes are doing the opposite: their discharges to homeless shelters actually put residents' plans to move to community housing in jeopardy, and placements in shelters put residents at risk of reinstitutionalization.

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*MFJ represented a nursing home resident who had applied for public housing and, with the help of counsel, had successfully appealed the denial of her application. To move off the waitlist and be assigned an apartment, she needed to complete paperwork and other tasks, but was unable to do so because of her disability. The nursing home offered her no assistance. Instead, it gave her a Notice of Discharge to the shelter system, without having informed DHS that the resident required a weekly injectable medication that she could not administer herself.*

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<sup>82</sup> Matter of [redacted], Terence Cardinal Cooke Health Care Center (July 12, 2018).

<sup>83</sup> Matter of [redacted], Bishop Rehab. & Nursing Ctr. (June 25, 2018).

<sup>84</sup> Matter of [redacted], Fordham Nursing & Rehab. Ctr. (Sept. 7, 2018).

MFJ has represented residents who were close to obtaining their own apartment with personal care services through the Open Doors program, but faced discharge to homeless shelters before the placement process was complete. If the facilities' plans to discharge to homeless shelters had proceeded, our clients would have lost the opportunity to obtain community housing, because once they leave the nursing home they are no longer eligible for some programs designed to transition nursing home residents to the community.

### **Erroneous Understanding by ALJs of the Standard for Nursing Home Eligibility**

Nursing homes seeking to discharge residents routinely take the position that once a resident no longer needs "skilled nursing" services, they are no longer eligible for a nursing home level of care. This assertion is meant to show that the nursing home has satisfied a common basis for discharge: "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."<sup>85</sup> But the assertion that a resident does not need skilled nursing services is a red herring: needing skilled nursing services is not a requirement for nursing home eligibility. Nursing homes provide custodial, non-skilled care to many residents, such as assistance with activities of daily living.<sup>86</sup> New York abolished the difference between "Skilled Nursing Facilities" and "Health Related Facilities" thirty years ago,<sup>87</sup> and replaced the terms with "Residential Health Care Facilities." The different level of residents' needs is now accounted for through a case-mix resource utilization tool that sets reimbursement rates, with lower reimbursement rates for residents receiving lesser levels of care.

The facilities' motivation for seeking to discharge a resident who no longer needs "skilled nursing" services but does need custodial care is financial: facilities are reimbursed at a lower rate for providing custodial care. While Medicare covers the first 100 days of skilled care, with reimbursement rates far higher than Medicaid pays, facilities are barred from discharging residents when their Medicare coverage runs out and they become dependent on Medicaid.<sup>88</sup> When they conduct surveys, nursing home surveyors are instructed to look at whether there were "any changes to care or services when [the resident's] payor source changed..."<sup>89</sup>

Some of the involuntary discharge hearing decisions perpetuate the misconception that needing skilled services is a prerequisite to nursing home eligibility. In one decision, the ALJ ruled that the discharge was proper because the facility established that "the Resident has reached his maximum rehabilitation potential," but there was no discussion of whether the resident needed any other non-rehabilitation services provided by the nursing home.<sup>90</sup> Similarly, a Brooklyn nursing home argued that discharge was necessary because the resident no longer needed "skilled services;" the judge in that case adopted the nursing home's legally erroneous description of the basis for discharge. The ALJ wrote that "the Appellant's health has improved

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<sup>85</sup> 42 CFR § 483.15(c)(1)(i); 10 NYCRR § 415.3(i)(1)(i)(a)(2).

<sup>86</sup> For an explanation of the difference between custodial care and skilled care, see CUSTODIAL CARE VS. SKILLED CARE INFOGRAPH, CENTER FOR MEDICAID AND MEDICARE SERVICES, available at: <https://www.cms.gov/Medicare-Medicaid-Coordination/Fraud-Prevention/Medicaid-Integrity-Education/Downloads/infograph-CustodialCarevsSkilledCare-%5BMarch-2016%5D.pdf>.

<sup>87</sup> See 10 NYCRR §§ 85.41, 86-2.1 et seq. (adopted or revised in 1990); see also 10 NYCRR § 415.2(k) (defining a nursing home as synonymous with a "residential health care facility").

<sup>88</sup> See 10 NYCRR § 415.3(b)(3-5); 42 CFR § 483.10(a)(2).

<sup>89</sup> CENTERS FOR MEDICARE & MEDICAID SERVS., MEDICARE STATE OPERATIONS MANUAL, CHAPTER 7, SURVEY AND ENFORCEMENT PROCESS FOR SKILLED NURSING FACILITIES AND NURSING FACILITIES 166, Rev. 185 (Nov. 16, 2018).

<sup>90</sup> Matter of [redacted], New Gouverneur Nursing Facility (N.Y. State Dep't of Health, Dec. 5, 2018).

sufficiently so that the Appellant no longer required skilled care in a nursing home and that the Appellant's condition has improved to the point that the Facility can discharge the Appellant safely to the community."<sup>91</sup> Neither of these findings addresses whether the resident "needs the services provided by the facility," which is the standard set forth in the regulations. The fact that a resident might be able to obtain the services she needs in a community-based setting implicates New York State's obligation to comply with the ADA and *Olmstead v. L.C.*;<sup>92</sup> however, it does not constitute a proper basis for an involuntary discharge.

The same decision further states "If the Appellant is well enough to live in an apartment in the community, the Appellant does not need to be in a nursing home."<sup>93</sup> This conclusion is not legally supported. The fact that a resident could live in the community does not mean that she is ineligible for nursing home services. Indeed, at least two New York State programs are intended to enable nursing home residents to move to community-based settings with services in place, and both *require* that residents need a nursing home level of care in order to be eligible.<sup>94</sup>

Similarly, some ALJs are under the misimpression that an Assisted Living Program (ALP) is a viable alternative for a nursing home resident who is being involuntarily discharged because she allegedly no longer needs the services of a nursing home.<sup>95</sup> But ALPs can *only* admit individuals who qualify for a nursing home level of care.<sup>96</sup> When a nursing home assesses a resident as appropriate for an ALP, the nursing home by definition cannot meet its burden of showing that the resident's health has improved such that she no longer needs the services of the nursing home. The medical evaluation form that must be submitted with all ALP applications, form DSS-4449C, requires verification that the individual is eligible for a nursing home level of care, but can be cared for safely in an ALP. Therefore an ALJ can *never* uphold a discharge on that basis if the nursing home proposes to discharge the resident to assisted living.

## Recommendations

### **Establish a Right to Counsel in Nursing Home Discharge Hearings**

An involuntary discharge hearing is akin to an eviction proceeding: the resident faces the potential loss of the place she has called home, often for years. Without legal representation, residents are at risk of losing the roof over their head. Many residents are elderly and have serious medical conditions and risk losing vital services. Leaving them to fend for themselves in these proceedings is a recipe for unsafe discharges, with residents' physical well-being at risk.

All residents should be assigned counsel if they elect to appeal a Notice of Discharge. If residents had a right to legal representation in involuntary discharge hearings, they would have

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<sup>91</sup> Matter of [redacted], Cobble Hill Health Care Ctr. at 7 (N.Y. State Dep't of Health, Nov. 21, 2018).

<sup>92</sup> 527 U.S. 581 (1999).

<sup>93</sup> Matter of [redacted], Cobble Hill Health Care Ctr., *supra* note 91.

<sup>94</sup> DIV. OF HOME AND CMTY BASED SERVS., N.Y. STATE DEP'T OF HEALTH, OFFICE OF LONG TERM CARE, NURSING HOME TRANSITION & DIVERSION MEDICAID WAIVER, PROGRAM MANUAL 10 (2018), available at:

[https://www.health.ny.gov/facilities/long\\_term\\_care/waiver/nhtd\\_manual/section\\_02/part\\_02\\_a.htm](https://www.health.ny.gov/facilities/long_term_care/waiver/nhtd_manual/section_02/part_02_a.htm); see also S. 1932 of the Deficit Reduction Act. S.6075 Money Follows the Person Rebalancing Demonstration, available at:

[https://www.health.ny.gov/health\\_care/medicaid/redesign/docs/mfp\\_statutory\\_text\\_section6071\\_dra.pdf](https://www.health.ny.gov/health_care/medicaid/redesign/docs/mfp_statutory_text_section6071_dra.pdf).

<sup>95</sup> See, e.g., Matter of [redacted], Bay Park Ctr. for Rehab. & Nursing (N.Y.S. Dep't of Health, March 27, 2018).

<sup>96</sup> 18 NYCRR § 494(d)(1); see also N.Y. STATE DEP'T OF HEALTH DEAR ADMINISTRATOR LETTER 15-08, ALP ELIGIBILITY (June 18, 2015) (discussing the minimum Nursing Facility Level of Care score required to be eligible for assisted living programs).

a fair chance to present their defenses effectively and be discharged to safe and appropriate settings. Our review of the 2018 discharge hearing decisions is consistent with studies from housing court that show having counsel substantially improves outcomes for tenants.<sup>97</sup> Since at least 2018, none of the nursing home residents who we have represented in involuntary discharge hearings have been discharged to homeless shelters.

### **Strengthen and Enforce Discharge Planning Regulations**

Nursing home discharge planning regulations should be strengthened and enforced. Assisted living regulations may provide a guide: they contain more defined requirements before a facility may bring a proceeding to terminate a resident's admission agreement on the basis that the resident is no longer eligible for services. Assisted living facilities are required to "make persistent efforts to secure appropriate alternative placements and must document such efforts."<sup>98</sup> "Persistent efforts" are defined as:

- **(i)** assisting the resident or resident's representative to file five applications for each such resident with appropriate facilities;
- **(ii)** following up by telephone every two weeks on the status of the applications;
- **(iii)** if an application is rejected, assisting the resident or resident's representative to file an application with another facility within five working days of the date of rejection; and
- **(iv)** if the resident is not placed, notifying the appropriate regional office of the department in writing, every 90 days from the filing of the first application, of the name of the resident and any pending and rejected applications.<sup>99</sup>

Nursing homes, which often provide services to a frailer population than assisted living facilities, should be required to meet similarly well-defined standards in their discharge planning. Recent legislation requiring that a facility "use its best efforts, including compliance with applicable federal and state regulations, to secure appropriate placement or a residential arrangement for the resident, other than "temporary housing assistance" such a homeless shelter, is a good first step.<sup>100</sup> The DOH should promulgate regulations pursuant to this new law setting forth specific requirements for such "best efforts."

The DOH must also enforce the existing discharge planning regulations. The hearing decisions are rife with examples of nursing homes failing to comply with regulatory requirements concerning discharge planning, especially the requirements to "develop and implement an effective discharge planning process that focuses on the resident's discharge goals, the preparation of residents to be active partners and effectively transition them to post-discharge care, and the reduction of factors leading to preventable readmissions."<sup>101</sup>

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<sup>97</sup> See, e.g., Oksana Miranova, Right to Counsel and Stronger Rent Laws Helped Reduce Evictions in 2019, Community Service Society (Feb. 24, 2020) (finding that evictions declined by 29% over three years in zip codes where tenants have a right to counsel); BOSTON BAR ASSOC. TASKFORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS PREVENTION 15, March 2012 (finding that two-thirds of represented tenants in a pilot project were able to stay in their homes, compared with one-third of unrepresented tenants).

<sup>98</sup> 18 NYCRR § 494.4(k)(1).

<sup>99</sup> *Id.* § 494.4(k)(2).

<sup>100</sup> N.Y. Pub. Health Law § 2803-z(1)(b), L. 2021 ch 80, § 1, effective March 19, 2021.

<sup>101</sup> 42 CFR § 483.21(c).



## **Report Regulatory Violations to the DOH's Division of Nursing Home Surveillance and the Attorney General's Medicaid Fraud Control Unit**

To deter unlawful conduct, facilities must face adverse consequences when they improperly discharge residents without notice, attempt to discharge without a proper basis, or fail to fulfill their discharge planning obligations. ALJs should forward to the Department's Division of Nursing Home Surveillance and the Attorney General's Medicaid Fraud Control Unit (MFCU) any hearing decisions in which there is evidence of regulatory violations, and the DOH and MFCU should prioritize investigations and enforcement actions for such violations.

## **Immediately Intervene in Cases Involving Discharge to an Acute Care Hospital**

The eighteen instances of nursing homes attempting to discharge residents to hospitals, where the residents clearly did not need inpatient hospital care, are prime examples of nursing homes utterly failing to engage in discharge planning or to comply with involuntary discharge procedures. Some of the same nursing homes appear to be repeat offenders. For example, on May 25, 2018, the DOH issued a decision affirming a resident's appeal of Oceanview Nursing and Rehabilitation Center's attempt to discharge the resident to Kingsbrook Hospital. The judge held that "discharge to an acute care hospital is not an appropriate discharge plan."<sup>102</sup> Less than three months later, a different ALJ affirmed an appeal against Oceanview; this time the facility sought to discharge a resident to Methodist Hospital.<sup>103</sup> Despite its attempt to improperly discharge residents to acute care hospitals twice in a period of a few months, the facility was not cited in 2018 or 2019 for violating its discharge planning obligations.<sup>104</sup>

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***Attempts to Discharge to Acute Care Hospitals***  
***Of the thirty-one decisions granting the resident's appeal, eighteen (58%) involved involuntary discharges by nursing homes to hospitals, which clearly violates the procedure for discharge. In all of these cases, hospital personnel and sometimes counsel for the hospital appeared and testified on behalf of the resident. In fact, every discharge hearing that involved the discharge to a hospital was decided in favor of the resident.***

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If a facility is attempting to discharge a resident to an acute care hospital, the DOH Division of Nursing Home Surveillance should be notified immediately and should intervene to instruct the facility that if they pursue the improper discharge, they will face enforcement action. There is no reason for ALJs to waste resources conducting hearings when the outcome is a foregone conclusion.

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<sup>102</sup> Matter of [redacted], Oceanview Nursing & Rehab. Ctr., (N.Y. State Dep't of Health, May 25, 2018).

<sup>103</sup> Matter of [redacted], Oceanview Nursing & Rehab. Ctr., (N.Y. State Dep't of Health, August 13, 2018).

<sup>104</sup> Nursing home complaint and certification surveys for 2018 and 2019 are available for review on the New York State Health Profiles website.

## **Simplify the Appeal Request Process**

To alleviate the confusion and anxiety that ensues when residents are required to navigate the general DOH telephone line for all complaints, speak to multiple people and leave voicemail messages in their attempts to file an appeal, the DOH should enable residents to call a dedicated telephone line or, in the alternative, directly contact the Bureau of Adjudication, to request an appeal. The DOH should also accept appeals filed by the LTCOP or other advocates or family members or loved ones, when the individual filing the appeal verifies that they are doing so with the permission of the resident.

## **Rule on Improper Discharge Plans, Even if the Nursing Home Proves a Basis for the Discharge**

ALJs seem reluctant to grant appeals based on improper discharge plans, when the nursing home has met its burden of showing it has a basis to discharge. It is a rare decision that holds that the discharge is necessary but the discharge plan is not proper.<sup>105</sup> Few of the decisions examine whether the nursing home complied with its obligation to involve the residents in the discharge plan. The DOH decisions on proposed discharges to acute care hospitals point to a useful approach that should be applied in the decisions on discharges to homeless shelters and other improper settings: if the discharge plan is improper, there is no need to even reach the question of whether the nursing home has shown a basis to discharge.

The DOH and its ALJs must hold nursing homes to their obligation to “develop and implement an effective discharge planning process that focuses on the resident’s discharge goals, the preparation of residents to be active partners and effectively transition them to post-discharge care, and the reduction of factors leading to preventable readmissions.”<sup>106</sup> Discharge planning is part of the care nursing homes are required to provide and cannot be an afterthought. If nursing homes are permitted to neglect discharge planning obligations, the cycle of hospitalization and preventable placements in nursing homes will continue.

## **Provide a Standard Notice of Discharge in Clear, Readable, Large Print and Accessible Formats**

The DOH should create a standard Notice of Discharge, to be used by every facility, with the following features:

- Large font size
- Clearly delineates who to call for an appeal, and who to contact for assistance
- Includes legal services providers, as required of adult homes
- Includes space for and requires an individualized explanation of the basis for the discharge

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<sup>105</sup> The only 2018 decision that granted a resident’s appeal solely on the basis of the inadequacy of the discharge plan that was not proposing discharge to an acute care hospital is Matter of [redacted], Rockaway Care Ctr. (N.Y. State Dep’t of Health, May 9, 2018). In that decision, the ALJ found that although there were proper bases for discharge, the plan to discharge to a shelter was not safe, given the resident’s medical condition and inability to maintain his health when he had previously stayed in a homeless shelter. Another more recent example is Matter of [redacted], Brooklyn Gardens Nursing & Rehab. (N.Y. State Dep’t of Health, June 10, 2020), which held that the discharge plan was improper where the discharge plan had been developed without the participation of the resident or his family.

<sup>106</sup> 42 CFR § 483.21(c).

Facilities should be instructed to provide translated, audio, and/or large print versions of the standard notice as necessary to comply with the requirement that the Notices be provided in a language and manner residents understand.<sup>107</sup> Notices should notify residents of their right to request a reasonable accommodation.

ALJs should strictly enforce the Notice requirements in the regulations, requiring the facility to show proof that the Notice included all required information, was timely served on the resident, their representative and the LTCOP, and that it was provided in a language and manner understandable to the resident. In the absence of such a showing, as a matter of due process, the resident's appeal should be granted. In addition, the Division of Nursing Home Surveillance should be notified and should investigate and cite nursing homes for violations.

The DOH should regularly review records from the LTCOP to verify when discharge notices were transmitted to the LTCOP and cite nursing homes that fail to timely transmit notices.

The DOH should stop requiring facilities to provide on the Notice "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."<sup>108</sup> This creates unnecessary confusion. Federal requirements do not require that the appeal be made within 15 days; the Notice should comport with the more liberal, governing standard, which allows residents to remain in the facility if an appeal is pending on the discharge date.<sup>109</sup>

### **Increase funding to the LTCOP program**

Funding to the LTCOP should be increased to a level that enables all residents of long-term care facilities to access LTCOP services. If the LTCOP had sufficient funding and staff, they would be in a better position to advocate for effective discharge planning, rendering many hearings unnecessary. Keeping track of notices, contacting residents to inform them of their rights, advocating with nursing homes when discharge notices are defective, and helping residents appeal the notices are time-intensive activities, on top of the advocacy the LTCOP is charged with doing around other quality of care issues and residents rights.<sup>110</sup> New York City and New York State must expand funding for the program. It is shameful that New York State is in the bottom tier of states in funding advocacy services for nursing home residents and that New York City, unlike other localities in New York State and localities in other states, contributes no funds to the LTCOP.<sup>111</sup>

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<sup>107</sup> 10 NYCRR § 415.3(i)(1)(iii)(a); 42 CFR § 483.15(c)(3)(i).

<sup>108</sup> 10 NYCRR § 415.3(i)(1)(v)(e)(4) (emphasis added).

<sup>109</sup> 42 CFR § 483.15(c)(1)(ii).

<sup>110</sup> NYC COMPTROLLER REPORT, *supra* note 61, at 13 (noting that the NYC LTCOP program receives over 1,500 notices of discharges from nursing home, and has "insufficient capacity" to review them).

<sup>111</sup> *Id.* at 11-12 (citing data from The National Long Term Care Ombudsman Resource Center, 2017 NORS Tables, available at: [https://ltcombudsman.org/omb\\_support/nors/nors-data](https://ltcombudsman.org/omb_support/nors/nors-data)).

## **Prohibit Discharges to Homeless Shelters**

Allowing nursing homes to discharge residents to homeless shelters is a short-sighted healthcare policy that prioritizes profit over positive health outcomes, enabling nursing homes to flout their obligation to engage in person-centered care planning and discharge planning. Nursing homes should be prohibited from this practice. Nursing homes are, above all, a healthcare provider, and homelessness is a proven healthcare risk.<sup>112</sup> Nursing homes' social services staff must arrange for a safe discharge plan as part of the comprehensive care planning process. If nursing homes are permitted to discharge to homeless shelters, they are being reimbursed for services, including discharge planning, that they are failing to provide. From a policy perspective, this results in poor health outcomes and a revolving door between shelters, hospitals, and nursing homes, at a high fiscal cost to the State and, most importantly, an acutely high human cost to residents. Effective discharge planning from hospitals prevents homelessness.<sup>113</sup> Nursing homes, with comparatively longer lengths of stay, are arguably even better positioned to place residents in appropriate housing than hospitals are.

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*Discharge planning is part of the care nursing homes are required to provide and cannot be an afterthought. If nursing homes are permitted to neglect discharge planning obligations, the cycle of hospitalization and preventable placements in nursing homes will continue.*

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## **Publish Hearing Decisions, as Required by Law**

The DOH should comply with federal regulations requiring that it make involuntary discharge decisions public, and comply with state law requiring it to publish an index of decisions. Advocates and residents should have access to past decisions to prepare for hearings and obtain past authority for arguments. MFJ and other advocates have waited over a year to receive decisions in response to FOIL requests.<sup>114</sup> The DOH complies with the obligation to publish decisions in other types of administrative proceedings, such as Medicaid ALJ decisions, which are available on the DOH website, along with an index of decisions from 1977-2010. According to the website, new decisions are posted "within thirty days from the date DOH serves the decisions on the parties." There is no reason to treat involuntary discharge decisions differently, given the DOH's legal obligations, and the fact that Medicaid decisions also typically require redaction. The DOH should similarly post discharge decisions on a rolling basis.

## **Train ALJs**

ALJs need regular training on subjects relevant to involuntary discharge hearings and discharge planning. Such training should include, for example:

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<sup>112</sup> See, e.g., James J. O'Connell, *Premature Mortality in Homeless Populations: A Review of the Literature*, National Healthcare for the Homeless Council 13 (December 2005) (noting that homeless individuals are 3-4 times more likely to die than the general population).

<sup>113</sup> Thomas E. Backer, et al., *The Role of Effective Discharge Planning in Preventing Homelessness*, THE JOURNAL OF PRIMARY PREVENTION 28, 229-43 (2007).

<sup>114</sup> MFJ recently waited over a year to receive copies of 2019 discharge decisions in response to a Freedom of Information Law request.

- Federal and state regulatory requirements for comprehensive care planning, discharge planning, and the discharge hearing process;
- Types of services provided by nursing homes, including skilled services and custodial care;
- Standards for admission to assisted living programs;
- Standards for admission to shelters;
- The PASSR process;
- When to seek assessments and issue subpoenas;
- Medicaid waiver and other programs designed to assist nursing home residents' transition to community settings; and
- Community budgeting,<sup>115</sup> which enables residents to use their benefits to continue to pay rent on their apartments in the community when they intend to return home.

Federal regulations contain some provisions that do not appear in the state regulations, so it is imperative that ALJs are familiar with both.<sup>116</sup> All of the topics listed above relate to State policies and regulations, with which hearing officers are required to be familiar.<sup>117</sup>

## Conclusion

The involuntary nursing home discharge process is overdue for reform. The way the process functions now, nursing home residents often have little opportunity to meaningfully challenge involuntary discharges. As a result, for too many residents, discharge hearings have become a fast track to homeless shelters. The DOH must hold nursing homes accountable: creating and requiring clear Notices so that residents understand their rights; investigating and enforcing existing standards for discharge planning and the involuntary discharge process; and updating the regulations to prohibit unsafe discharges. ALJs should exercise their full powers, seeking fair and objective assessments and issuing subpoenas as necessary, and viewing evidence from nursing home as, in many instances, self-serving. The New York State Legislature and New York City Council should fund legal representation for residents and enhance funding for the LTCOP. In the absence of these changes, New York's vulnerable nursing home residents will continue to be subject to a lopsided process that favors the whims and financial interests of the nursing home industry over the health and safety of nursing home residents.

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<sup>115</sup> 18 NYCRR § 360-1.4(k).

<sup>116</sup> For example, federal regulations provide that ALJs should order impartial medical assessments, where they deem them necessary, and that such assessments must be paid for by the State Medicaid program. 42 CFR § 431.240(b). ALJs should be aware of this requirement when the resident disputes the facility's records or the records appear to be unreliable.

<sup>117</sup> 42 CFR § 431.240(c).