

# **Swing Bed Admission, Transfer, and Discharge Rights**



## **Questions & Answers**

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The NDLTCA requested that answers to commonly asked questions regarding the Requirements for Transfer and Discharge be provided to all facilities in writing.

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## **Disclaimer**

The information provided in this document is only intended to be a general summary, and not intended to take the place of statutes, regulations, rules, and/or other policy materials. We encourage readers to review the specific statutes, regulations, rules, and other interpretive materials for a full and accurate statement of their contents. Any future revisions/updates made by the Centers for Medicare and Medicaid Services (CMS) and/or the North Dakota Department of Human Services could result in portions of this document no longer being correct/accurate.

## **483.5 Definitions**

(a) Facility defined. For purposes of this subpart “facility” means, a skilled nursing facility (SNF) or a nursing facility (NF) which meets the requirements of 1819 or 1919(a), (b), (c), and (d) of the Social Security Act, the Act. “Facility” may include a distinct part of an institution specified in §440.40 of this chapter, but does not include an institution for the mentally retarded or persons with related conditions described in §440.150 of this chapter. For Medicare and Medicaid purposes (including eligibility, coverage, certification, and payment), the “facility” is always the entity which participates in the program, whether that entity is comprised of all of, or a distinct part of a larger institution. For Medicare, a SNF (see §1819(a)(1)), and for Medicaid, a NF (see §1919(a)(1)) may not be an institution for mental diseases as defined in §435.1009.

42 CFR §483.12 (a)(1) states, transfer and discharge includes 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 does not refer to movement of a resident to a bed within the same certified facility.

### **\*50-10.2-01. Definitions.**

"Department" means the department of human services.

"Facility" means a skilled nursing care facility, basic care facility, assisted living facility, or swing-bed hospital approved to furnish long-term care services.

### **§485.620(a) Standard: Number of Beds for Critical Access Hospitals**

Except as permitted for Critical Access Hospitals (CAH) having distinct part units under §485.647, the CAH maintains no more than 25 inpatient beds. Inpatient beds may be used for either inpatient or swing-bed services.

## 1. QUESTION:

Do swing bed units with fewer than 100 hospital beds, excluding beds for newborns and beds in intensive care type inpatient units need to follow the same requirements as nursing facilities do in regard to transfer or discharge?

## ANSWER:

Swing bed units with fewer than 100 hospital beds must follow the requirements listed below:

1. 42 CFR §483.12 Admission, Transfer and Discharge Rights.

- 42 CFR §483.12 (a)(1) Definition
- 42 CFR §483.12 (a)(2) Transfer and discharge requirements
- 42 CFR §483.12 (a)(3) Documentation
- 42 CFR §483.12 (a)(4) Notice before transfer or discharge
- 42 CFR §483.12 (a)(5)(i) Timing of notice
- 42 CFR §483.12 (a)(6) Contents of the notice
- 42 CFR §483.12 (a)(7) Orientation for transfer or discharge

2. Swing bed units with fewer than 100 hospital beds must meet the requirements in the \*N.D. Administrative Code, Chapter 75-01-03.

- 75-01-03-06.2. Giving of notice.
- 75-01-03-07. Explanation of right to fair hearing.
- 75-01-03-08.1 Notice of facility's intention to transfer or discharge a resident.
- 75-01-03-09.1. Facility responsibility prior to a fair hearing concerning transfer or discharge.

3. Swing beds units with fewer than 100 hospital beds must also meet the requirements of \*North Dakota Century Code Chapter 50.10.2.

## 2. QUESTION:

Define a transfer and discharge.

## ANSWER:

42 CFR §483.12 (a)(1) states, transfer and discharge includes 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 does not refer to movement of a resident to a bed within the same certified facility.

### 3. QUESTION:

Define a transfer versus a discharge.

#### ANSWER:

\*N.D. Administrative Code 75-01-03-08.1 (1) defines discharge and transfer as:

"Discharge" means movement from a facility to non institutional setting when the discharging facility ceases to be legally responsible for the care of the resident. (Examples include but are not limited to: resident's home, adult foster care, children's home).

"Transfer" includes movement from a facility to another institutional setting when the legal responsibility for care of the resident changes from transferring facility to the receiving institutional setting. (Examples include but are not limited to: hospital, another nursing facility, swing bed unit, ICF for Individuals with Intellectual Disabilities (IID)).

### 4. QUESTION:

What does the contents of the written notice for transfer or discharge need to include?

#### ANSWER:

There are both federal and state requirements with respect to what must be included in the transfer or discharge written notice.

The federal requirements related to swing-beds at 42 CFR §483.12 (a)(6) specifies the contents of the notice for transfer or discharge to include:

- The reason for transfer or discharge;
- The effective date of transfer or discharge;
- The location to which the resident is transferred or discharged;
- A statement that the resident has the right to appeal the action to the State;
- The name, address, and telephone number of the State long-term care ombudsman;
- For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals;
- For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals;

\*N.D. Administrative Code, Chapter 75-01-03-08.1 requires the contents of the transfer or discharge notice for a swing-bed resident to also include:

- A statement that the facility intends to transfer or discharge the resident, as the case may be;
- If the Medicaid program is paying for some or all of the cost of services furnished to the resident by the facility, a statement that those Medicaid payments will continue until after the hearing unless:
  - 1) The sole issue at the hearing is one of state or federal law or policy and the resident is so informed in writing; or
  - 2) Some change in circumstances affects the resident's eligibility for medical benefits and the resident is so notified in writing;
- A statement that the transfer or discharge will be delayed, if a request for fair hearing is filed before the effective date of the transfer or discharge:
  - 1) In the case of a discharge for nonpayment of facility charges, at least until the hearing officer recommends a decision that the charges were due and unpaid at the time the facility issued a notice of discharge; and
  - 2) In all other cases, until the fair hearing decision is rendered; and
- A statement that the resident may represent him or herself at the hearing, or may use legal counsel, a relative, a friend, or other spokesperson.

\*NDCC 50-10.2-02 (1.)(m) states that residents in a skilled nursing care facilities, basic care facility, assisted living facility and swing-bed hospital have the right to receive at least a thirty-day written advance notice of any transfer or discharge when the resident is being discharged to another facility or the resident's own home, or when the resident is being transferred or discharged because of a change in the resident's level of care; however, advance notice of transfer or discharge may be less than thirty days if the resident has urgent medical needs that require a more immediate transfer or discharge, or a more immediate transfer or discharge is required to protect the health and safety of residents and staff within the facility.

\*PLEASE NOTE: The contents of the transfer or discharge notice should contain the contents described above with the following exception: There are no appeal rights for basic care and assisted living residents, so information related to appeals should not be included in their transfer or discharge notices.

## 5. QUESTION:

A 30 day notice must be issued for a change in a resident's level of care. Can a resident be transferred to a higher level of care prior to 30 days if the resident agrees to the transfer?

**ANSWER:**

Yes. A 30 day notice must be issued for a change in the resident's level of care. However, the resident can agree to the transfer prior to the end date of the notice.

**6. QUESTION:**

At what point in time is the written transfer or discharge notice given?

**ANSWER:**

The federal requirements specific to swing-bed units are as follows:

42 CFR §483.12 (a)(5)(i) states a notice of transfer or discharge must be made by the facility at least 30 days prior to a move occurring.

42 CFR §483.12 (a)(5)(ii) states the exception to the 30 day notice is: a notice may be made as soon as practicable before transfer or discharge when:

- The safety of individuals in the facility would be endangered;
- The health of individuals in the facility would be endangered;
- The resident's health improves sufficiently to allow a more immediate transfer or discharge;
- An immediate transfer or discharge is required by the resident's urgent medical needs;
- A resident has not resided in the facility for 30 days.

The state requirements are as follows:

\*NDCC 50-10.2-01 (3) defines facility as “a skilled nursing care facility, basic care facility, assisted living facility, or swing-bed hospital approved to furnish long-term care services.” The rights of residents in these health care facilities related to provision of the written transfer or discharge notes is as follows:

\*NDCC 50-10.2-02 (1.)(m) states the right to receive at least a thirty-day written advance notice of any transfer or discharge when the resident is being discharged to another facility or the resident's own home, or when the resident is being transferred or discharged because of a change in the resident's level of care; however, advance notice of transfer or discharge may be less than thirty days if the resident has urgent medical needs that require a more immediate transfer or discharge, or a more immediate transfer or discharge is required to protect the health and safety of residents and staff within the facility.

\*North Dakota Division of Health Facilities finds it acceptable if, for example a resident is transferred on an emergent basis for medical reasons, or incompatibility which affects a resident's welfare or that of another on Saturday early a.m. but the transfer notice is not given until Monday

morning (approximately 32-36 hours later). This will meet the requirements for provision of the written transfer notice in skilled nursing facility, basic care facility, assisted living facility, or swing-bed hospital consistent with NDCC 50-10.2-02(1)(m) discussed above.

\*There are also times when a resident is transferred to a hospital, and based on assessment, the determination is made that the resident's needs exceed the services that can be provided by the skilled nursing facility, basic care facility, assisted living facility, or swing-bed hospital on more than a temporary basis. In this instance, the facility should notify the resident/legal representative as soon as the determination is made and then issue a written discharge notice which contains the content described above.

\*This will also not affect the swing-bed hospital resident's right to appeal, as NDAC 75-01-03-08.1 (2) states, the date of issuance is the day notice is delivered or mailed to the resident.

## **7. QUESTION:**

Who has to receive the transfer notice when a resident is hospitalized?

### **ANSWER:**

The federal requirements at 42 CFR §483.12 (a)(4)(i) state, before a facility transfers or discharges a resident, the facility must notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

\*The state requirements for skilled nursing care facilities, basic care facilities, assisted living facilities and swing-bed hospitals at NDCC 50-01.2-02 (1) identify that:  
The resident and member of the resident's immediate family or any existing legal guardian of the resident should be notified of the resident's rights. This would include notification of transfers and discharges.

## **8. QUESTION:**

Will a telephone call to the hospital's discharge planner constitute a discharge or transfer notice?

### **ANSWER:**

No. 42 CFR §483.12 (a)(4)(i) states the notification must be in writing and in a language and manner the appropriate parties understand. Therefore a telephone call does not constitute an acceptable transfer or discharge notice.

## 9. QUESTION:

If facility staff feel a resident is not capable of understanding the discharge or transfer notice, then does a notice need to be given to the resident?

### ANSWER:

Yes a notice still must be given to the resident. 42 CFR §483.12 (a)(4)(i) states the resident must receive a written notice and in a language and manner they understand. This requirement does not allow for facility staff to determine which residents have the cognitive or physical status to receive a transfer or discharge notice.

## 10. QUESTION:

Should facilities be developing one form or various forms to address transfer or discharge notices?

### ANSWER:

42 CFR §483.12 (a)(4)(i) only states the written notice must in a language and manner the resident and family member or legal representative understands. Key issues to consider would be language barriers, visual handicaps, and physical limitations.

## 11. QUESTION:

Do all transfer or discharge notices need to include both the Ombudsman Program, and Protection and Advocacy with respect to obtaining assistance for an appeal? Or should the notice be relevant, so a resident with a developmental disability or a mental illness has a pertinent notice which includes the mailing address and telephone number for protection and advocacy?

### ANSWER:

No. 42 CFR §483.12 (a)(6) states all notices **must** include: The name, address and telephone number of the State Long-Term Care Ombudsman:

State Long-Term Care Ombudsman  
Aging Services Division  
1237 W. Divide Ave, Suite 6  
Bismarck, ND 58501-1208  
701.328.4617 or 1.855.462.5465  
[dhsagingombud@nd.gov](mailto:dhsagingombud@nd.gov)

If a resident has an intellectual and developmental disability or related disabilities, or a mental disorder or related disabilities, the notice must also include the mailing address, and telephone number of the Office of Protection and Advocacy:

Office of Protection and Advocacy  
400 East Broadway, Suite 409  
Bismarck, North Dakota 58501-4071  
701.328.2950 or 1.800.472.2670  
[panda\\_intake@nd.gov](mailto:panda_intake@nd.gov) (underscore between panda and intake)

## 12. QUESTION:

Does anyone, including a resident's representative, a Durable Power of Attorney for Health Care, or a Guardian, have to sign the transfer/discharge form?

## ANSWER:

No. 42 CFR §483.12 (a)(4)(i) states, the resident **and**, if known, a family member or legal representative of the resident must be notified of a transfer or discharge and the reasons for the move in writing and in a language and manner they understand. This requirement **does not** define the type of legal representative that must be notified, or that a transfer or discharge notice form must be signed by a resident, a family member or a legal representative.

The facility **does** need to demonstrate that the requirements in 42 CFR §483.12 Admission, Transfer, and Discharge Rights are met, however the facility has various options available to demonstrate compliance with these regulations. The provision that a resident, a family member or a legal representative must sign the notices would be a facility policy to demonstrate that a transfer or discharge notice was given to the resident.

## 13. QUESTION:

Can a facility transfer or discharge a resident due to a "significant change" in the resident's condition, or if a resident "refuses treatment?"

## ANSWER:

The facility is prohibited from initiating a transfer or discharge unless at least one of the six criteria stated in 42 CFR §483.12 (a)(2) are met. The six criteria are:

- The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
- 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;
- The safety of individuals in the facility is endangered;
- The health of individuals in the facility would otherwise be endangered;

- 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. For a resident who becomes eligible for Medicaid after admission to a nursing facility, the nursing facility may charge a resident only allowable charges under Medicaid; or
- The facility ceases to operate.

Therefore, unless a "significant change" in the resident's condition or unless a resident who is "refusing treatment" meets at least one of the six criteria listed above, the facility may not transfer or discharge a resident.

Furthermore, the facility may not transfer or discharge the resident while the appeal is pending, pursuant to § 431.230 of this chapter, when a resident exercises his or her right to appeal a transfer or discharge notice from the facility pursuant to § 431.220(a)(3) of this chapter, 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 document the danger that failure to transfer or discharge would pose.

#### **14. QUESTION:**

Does a transfer notice have to be given to a resident who is being transferred to a psychiatric unit in a hospital because their welfare cannot be met in the swing bed unit? When should this notice be given?

#### **ANSWER:**

- Yes. A facility is prohibited from initiating a transfer or discharge unless at least one of six criteria, 42 CFR §483.12 (a)(2) are met. One of these criteria is if the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility. If the facility initiates a transfer or discharge based on this reason or any of the other criteria outlined at section 42 CFR §483.12 (a)(2) [F201], the facility must provide notice in accordance with the requirements at section 42 CFR §483.12 (a)(4); and
- The timing of the notice depends upon specific circumstances regarding the resident condition. In cases where the safety of individuals in the facility would be endangered, the health of individuals in the facility would be endangered, the resident's health improves sufficiently to allow a more immediate transfer or discharge, an immediate transfer or discharge is required by the resident's urgent medical needs, or a resident has not resided in the facility for 30 days; 42 CFR §483.12 (a)(5)(ii) states the notice may be made as soon as practicable before transfer or discharge.

#### **15. QUESTION:**

Does a transfer or discharge notice have to be given if it is the resident's choice to be discharged to their home, a board and care facility, another nursing facility, etc.?

**ANSWER:**

42 CFR §483.12 (a) applies when the facility **initiates** the transfer or discharge. The purposes of the requirements are to ensure that residents remain in the facility in the absence of any of the six criteria in 42 CFR §483.12 (a)(2) [F201] and to inform residents of their rights to question the decision of a facility relating to their transfer. If a resident or a resident's representative **initiates** a transfer or discharge voluntarily, then these requirements do not apply.

**16. QUESTION:**

Clarify the difference between a resident's choice to be transferred or discharged, and a facility's choice to transfer or discharge a resident.

**ANSWER:**

A resident's choice to be transferred or discharged is when a resident or a resident's representative **initiates** the transfer or discharge voluntarily. Transfer and discharge requirements in 42 CFR §483.12 (a) do not apply in this circumstance. If there is documentation in the resident clinical record that the resident or resident's representative **initiated** the transfer or discharge and is in total agreement with the transfer or discharge, then this is sufficient.

A facility's choice to transfer or discharge a resident is when the facility **initiates** the transfer or discharge. The facility is prohibited from initiating a transfer or discharge **unless** at least one of six criteria stated in 42 CFR §483.12 (a)(2) are met. If the facility **initiates** a transfer or discharge based on at least one of the six criteria, the facility must provide notice in accordance with the requirements in 42 CFR §483.12 (a)(4).

- ✓ Initiated **voluntarily** (by a resident or a resident's representative) means **the facility has not influenced the decision to transfer or discharge in any way.**

**17. QUESTION:**

When does a facility **not** need to provide a notice of transfer or discharge?

**ANSWER:**

\*N.D. Administrative Code 75-01-03-08.1 (4)(a) states a facility need **not** provide a notice if:

- The resident provides a clear written statement, signed by the resident, that the resident does not object to a proposed transfer or discharge; or
- The resident gives information that requires a transfer or discharge, and indicates that the resident understands that a transfer or discharge will result.

**18. QUESTION:**

What is the fair hearing process for involuntary transfer or discharge?

**ANSWER:**

42 CFR §483.12 (a)(6)(iv) states the written notice must include a statement that the resident has the right to appeal the action. The Department of Human Services is implementing the federal requirement that the Medicaid agency provide a "fair hearing" for involuntary transfer or discharge appeals.

\*ND Administrative Code 75-01-03-01(10) defines a "fair hearing" as an appeal hearing, established pursuant to federal regulation or law, that specifically requires the Department of Human Services to provide a dissatisfied claimant an opportunity for a hearing that meets the requirements for due process of law, namely notice and an opportunity to be heard.

One provision in the written notice is informing the resident where to appeal. All written requests for appeals must be sent to:

Appeals Supervisor  
Department of Human Services  
600 East Boulevard Avenue, Dept. 325  
Bismarck, North Dakota 58505  
[dhslau@nd.gov](mailto:dhslau@nd.gov)  
701.328.2311

**19. QUESTION:**

When a resident goes on therapeutic leave, does a discharge or transfer notice need to be given?

**ANSWER:**

A transfer or discharge notice does **not** need to be given when a resident goes on therapeutic leave.

**20. QUESTION:**

How many days does a resident and family member or legal representative have to appeal a transfer or discharge?

**ANSWER:**

There are two provisions in North Dakota Administrative Code 75-01-03-08.1 (2) that address this question:

- A resident has thirty days after the date of issuance of a transfer or discharge notice to appeal.

- The first day of that thirty day period is the day after the date of issuance. The date of issuance is the day notice is delivered or mailed to the resident.

**21. QUESTION:**

Is a written bed-hold policy given in a swing bed unit?

**ANSWER:**

The requirements for bed-hold do not apply for a Medicare only hospital based distinct part nursing facility or a swing bed unit.

**22. QUESTION:**

Can a resident waive his/her right to an involuntary 30 day transfer or discharge notice?

**ANSWER:**

No. A resident cannot waive any of his/her rights under the regulations.

**23. QUESTION:**

Does a notice of transfer need to be provided to a resident and a resident's representative, when a resident is going to receive outpatient services?

**ANSWER:**

A notice of transfer for hospitalization does not need to be provided when a resident is going to receive outpatient services if the resident is not staying overnight in the hospital.

- ✓ A notice of transfer does not need to be given for a 23 hour hold.

**24. QUESTION:**

If the swing bed unit (with fewer than 100 hospital beds) has a written policy, explained to the resident on admission and agreed to by the resident, that they will move the resident to a local nursing facility upon being notified of an opening, must the facility provide a 30-day notice to the resident? This question was posed to the Centers for Medicare and Medicaid Services (CMS) regional office in Denver and the following answer was provided.

**ANSWER:**

Section 42 CFR §483.12 (a)(2) requires the facility to permit each resident to remain in the facility, and not transfer or discharge the resident unless one of the six criteria are met. Written policies of the facility do not meet these criteria. Thus, a swing bed unit that transfers a resident only because it's their policy to do so, is in violation of the regulations.

**25. QUESTION:**

Does the resident have the right to remain in a swing bed unit until the appeals process is complete?

**ANSWER:**

If the transfer or discharge meets the criteria at 42 CFR §483.12 (a)(2), the resident has the right to remain in the facility during the 30-day notice period. If the transfer or discharge does not meet these criteria, the resident has the right to remain in the facility until one of the criteria is met. If there is a dispute as to whether a criterion is met, the resident has the right to remain in the facility until the appeals process is complete.