



December 9, 2020

By E-mail: [dohweb@health.ny.gov](mailto:dohweb@health.ny.gov)  
and Certified Mail: Return Receipt Requested

Howard A. Zucker, M.D., J.D.  
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Dear Commissioner Zucker:

We write on behalf of the nursing home residents we represent throughout New York State to request that the Department of Health make nursing home discharge administrative appeal hearing decisions available to the public in a searchable online database. Federal and state law require these decisions to be accessible to the public. The creation of the online database will not cause undue burden on the Department and is good public policy.

Federal regulation 42 CFR § 431.244(g) requires that the public must have access to all agency hearing decisions. Additionally, 42 CFR § 431.202 requires that a State Plan must provide that the requirements of §§ 431.205 through 431.246 are met. The provisions of 42 CFR § 431.202 apply to nursing home discharge appeal hearing decisions.<sup>1</sup>

Furthermore, Section 307(3)(a) of the State Administrative Procedure Act (SAPA) states:

***Each agency shall maintain an index by name and subject of all written final decisions, determinations and orders rendered by the agency in adjudicatory proceedings.*** For purposes of this subdivision, such index shall also include by name and subject all written final decisions, determinations and orders rendered by the agency pursuant to a statute

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<sup>1</sup> The basis and scope of the regulation implements an appeals process for any person who is subject to a proposed transfer or discharge from a nursing facility (42 CFR § 431.200(c)(1)). A decision by a skilled nursing facility or nursing facility to transfer or discharge a resident is a matter to be considered at a hearing (42 CFR § 431.241(b)). Moreover, a hearing is required upon request of a resident who believes a skilled nursing facility or nursing facility has erroneously determined that he or she must be transferred or discharged (42 CFR § 431.220(a)(2)).

providing any party an opportunity to be heard, other than a rule making. ***Such index and the text of any such written final decision, determination or order shall be available for public inspection and copying.*** Each decision, determination and order shall be indexed within sixty days after having been rendered. (Emphasis added.)

The New York State Attorney General's Office, moreover, has determined that SAPA requires indexing. In its view, "the amendment is clear on its face in requiring indexing as to determinations, decisions and orders in which a statute [has provided] any party with an opportunity to be heard."<sup>2</sup> As you know, your department has, under its authority over supervision and regulation of nursing homes contained in N.Y. Pub. Health Law § 2862, promulgated resident hearing rights at 10 NYCRR 415.3. These rights grant a right to a hearing to dispute a nursing home discharge that are consistent with and expand upon federal protections.

To meet the requirements of both federal regulations and SAPA, New York has made available its administrative decisions about Medicaid and the New York State of Health Marketplace through searchable online databases maintained by the Office of Temporary and Disability Assistance and the Department of Health, respectively. These databases have met federal and state requirements to make administrative hearing decisions available to the public and enabled parties and administrative law judges to reach more equitable and consistent outcomes. Yet the Department of Health has neglected to publish its administrative hearing decisions regarding nursing home discharge appeals in a similar manner.

While consumers are able to request nursing home discharge appeal hearing decisions under the Freedom on Information Law (FOIL), requesting these hearing decisions under FOIL does not give the public the same access to these records. The process under FOIL is time-consuming and burdensome. It also does not give consumers, attorneys, and others sufficient time to research precedent prior to a hearing. Posting nursing home discharge hearing decisions online in a searchable format will ensure resident rights are protected and will greatly reduce the Department's administrative burden of responding to sporadic FOIL requests.

Due to the burden on the public to obtain records through freedom of information requests, and the administrative ease of such databases, Connecticut entered into a federal court settlement last year and now posts all SNAP and Medicaid hearing decisions, including all long-term care facility decisions online in a searchable format. We urge the Department of Health to follow Connecticut's lead and post nursing home discharge appeal hearing decisions online in a searchable format. It is the law, it will not cause undue burden on the Department, and it is good public policy.

Thank you for your attention to this matter.

Sincerely,

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<sup>2</sup> 1995 N.Y. Op. Att'y Gen. 23 (1995)

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