

## REPORT OF THE JUDICIAL COUNCIL AD HOC ADVISORY COMMITTEE ON ADULT CARE HOME INVOLUNTARY DISCHARGE APPEALS

December 2, 2022

In December 2021, Representative Susan Concannon asked the Judicial Council to study the issues raised in 2021 H.B. 2004, regarding the creation of the right to appeal an involuntary discharge or transfer from an adult residential care facility. The Judicial Council created an ad hoc advisory committee to complete this study.

### COMMITTEE MEMBERSHIP

The members of the Ad Hoc Advisory Committee on Adult Care Home Involuntary Discharge Appeals are:

**Hon. Edward Bouker**, Chair, Hays; Retired Chief District Court Judge in the 23<sup>rd</sup> Judicial District.

**Dustin Baker**, Ottawa; Advanced Practice Registered Nurse, Family Nurse Practitioner, and Nurse Educator.

**Sen. Brenda Dietrich**, Topeka; State Senator for District 20.

**Alexandra English**, Kansas City; Managing Attorney at Kansas Legal Services.

**Lacey Hunger**, Topeka; Commissioner of the Kansas Department for Aging and Disabilities Services Survey, Certification & Credentialing.

**Erica Keener**, Russell; Regional Vice President of Midwest Health.

**Rep. Megan Lynn**, Olathe; State Representative for District 49.

**Linda MowBray**, Topeka; President and CEO of Kansas Health Care Association and Kansas Center for Assisted Living.

**Rachel Monger**, Topeka; Attorney with Leading Age Kansas.

**Camille Russell**, Topeka; State Long-term Care Ombudsman.

**Catherine Walberg**, Topeka; Attorney at Goodell Stratton Edmonds & Palmer LLP.

**Molly Wood**, Topeka; Attorney at Stevens & Brand; President of the KABC Board.

## RECOMMENDATIONS

- If the legislature enacts an appeal process for a 30-day notice of involuntary transfer or discharge from an assisted living, residential healthcare, home plus, or boarding care home facility, the Committee recommends the appeal process be structured as set out beginning on page 18.
- If the legislature enacts an appeal process for an emergency involuntary transfer or discharge from an assisted living, residential healthcare, home plus, or boarding care home facility, the Committee recommends the appeal process be structured as set out beginning on page 25.
- The Committee recommends KDADS enacts a regulation requiring the emergency written notice of involuntary transfer or discharge to include information about the resident's right to appeal.
- During the legislative process, the Committee recommends the addition of a liability limiting provision to provide some amount of protection for the facility from an action based on negligence if the facility does not provide services to a resident that are outside the scope of the negotiated service agreement.

## EXECUTIVE SUMMARY

At any time, a resident of an adult care home<sup>1</sup> may need to be transferred or discharged from the facility. A transfer or discharge of a resident can be voluntary or involuntary. Involuntary transfers or discharges occur when the facility transfers or discharges the resident without the resident's agreement. Involuntary transfers or discharges can only occur in certain situations and there are multiple steps required before such a transfer or discharge ensues.

If an adult care home facility determines that the involuntary transfer or discharge requirements<sup>2</sup> have been met, neither state regulations nor statutes outline a process by which a resident may challenge the involuntary transfer or discharge. The Committee was asked to draft an appeal process for involuntary transfers or discharges. The Committee drafted an appeal process for a *standard 30-day notice* of involuntary transfer or discharge, and for an *emergency* involuntary transfer or discharge.

---

<sup>1</sup> An "adult care home" means any nursing facility, nursing facility for mental health, intermediate care facility for people with intellectual disability, assisted living facility, residential healthcare facility, home plus, boarding care home and adult day care facility; all of which are classifications of adult care homes and are required to be licensed by the secretary for aging and disability services." KAN. STAT. ANN. 39-923(a)(1).

<sup>2</sup> KAN. ADMIN. REGS. 26-39-102(d).

When a resident's care needs no longer fit within the parameters set by the Negotiated Service Agreement (the contract between the facility and the resident), the resident's safety is at risk, as well as the licensing status of the facility. The Committee agreed a quick resolution to an appeal in this context is essential. The Committee's goal was to craft appeal processes that balanced the resident's right to due process, the health and safety of the resident, and the licensing and liability issues of the facility.

The Committee's *30-day notice* of involuntary transfer or discharge appeal process:

- Increases dialogue and problem solving by requiring the facility and resident to have a meeting regarding the reasons for involuntary transfer or discharge prior to the facility issuing the notice of involuntary transfer or discharge;
- Requires the Kansas Department of Aging and Disability Services (KDADS) to review the notice of involuntary transfer or discharge for compliance;
- Increases the amount of information provided to the resident on the notice itself;
- Requires the filing of the appeal within 15 days of the date the notice of involuntary transfer or discharge was issued;
- Authorizes the state long term care ombudsman's office to file the appeal when requested to do so by the resident;
- Authorizes an informal conference be held by KDADS prior to the administrative hearing if requested by the resident;
- Requires the administrative hearing be held within 15 days of the filing of the appeal;
- Requires the administrative judge's decision be issued 10 business days after the administrative hearing concludes; and
- Allows the resident to remain in the facility while the appeal is pending.

If the legislature enacts an appeal process for a *30-day notice* of involuntary transfer or discharge, it should also enact an appeal process for an *emergency* involuntary transfer or discharge. An emergency involuntary transfer or discharge notice does not give the resident the 30-day waiting period; therefore, having an appeal process for both types of involuntary transfer or discharges deters a facility from claiming a situation is an emergency to avoid the 30-day wait period and associated appeal process.

The Committee's emergency involuntary transfer or discharge appeal process is similar to the 30-day notice of involuntary transfer or discharge appeal process except that it:

- Involves shortened timeframes;
- Does not require the facility meet with the resident or have KDADS review the notice of involuntary transfer or discharge prior to issuing the notice;
- Requires the emergency of involuntary transfer or discharge notice be made prior to or within 48 hours after the emergency transfer or discharge occurred; and
- Does not include the opportunity for an informal conference to be held by KDADS prior to the administrative hearing.

The Committee's recommendations were not unanimously approved by all members. The report notes some of the minority's views and concerns.

## **METHOD OF STUDY**

The Committee met five times between June and November 2022. A drafting subcommittee also met numerous times during that period to draft statutory language. During this study, the Committee reviewed all legislative testimony and hearings related to 2021 H.B. 2004; received information and presentations from the Department of Aging and Disabilities Services Survey, Certification & Credentialing Commission, the state long-term care ombudsman, and the Office of Administrative Hearings; reviewed federal and other states' statutes and regulations; and relied on the expertise of its members.

When reviewing the appeal processes from other states, the Committee was careful to remember that each state has a unique licensing structure for adult care homes. However, the Committee found reviewing other states' appeal processes helpful to facilitate its discussion of how the process might look in Kansas. The Committee specifically reviewed the involuntary transfer or discharge appeal processes in the states of Colorado, Connecticut, Georgia, Idaho, Iowa, Maine, Minnesota, Montana, North Carolina, Oregon, and Utah.<sup>3</sup>

---

<sup>3</sup> COLO. REV. STAT. 25-27-104.3 (2022); CONN. GEN. STAT. 19a-490 & 19a-535a (2022); GA. CODE ANN. 31-8-116 & 31-8-125 (2022); MINN. STAT. 114G.52 & 114G.54 (2022); N.C. GEN. STAT. 131D-4.8 (2022); IDAHO ADMIN. CODE R. 16.03.22.217 (2021); IOWA ADMIN. CODE R. 481-57.14(135C) (2022); 10-144 ME. CODE R. 113 L1R, SEC. 5 (2022); MONT. ADMIN. R. 37.106.2824 (2022); 10A N.C. ADMIN. CODE 13F.0702 (2022); OR. ADMIN. R. 411-054-0080 (2022); UTAH ADMIN. CODE R. 432-270-10 & 432-270-11 (2022).

## **BACKGROUND**

### *Appealing an Involuntary Transfer or Discharge*

At any time, a resident of an adult care home may need to be transferred or discharged from the facility. A transfer or discharge of a resident can be voluntary or involuntary. A resident may voluntarily transfer from or be discharged from a facility for a variety of reasons. For example, the resident may need a different level of care or the resident may no longer be able to pay for the facility's services. Involuntary transfers or discharges occur when the facility transfers or discharges the resident without the resident's consent. Involuntary transfers or discharges can only occur in certain situations and there are multiple steps required before such a transfer or discharge ensues. These steps are explained later in this report.

If an adult care home facility determines that the involuntary transfer or discharge requirements<sup>4</sup> have been met, neither state regulations nor statutes outline a process by which a resident may challenge the involuntary transfer or discharge. However, nursing facilities who accept payment through Medicaid or Medicare, are subject to the federal law regarding involuntary transfer or discharge. Federal law establishes an appeal process for challenging an involuntarily transfer or discharge from any nursing facilities that accept payment from Medicaid or Medicare.<sup>5</sup> The federally mandated appeal process does not apply to nursing facilities that do not accept Medicaid or Medicare payments, or to other categories of adult care home facilities, such as an assisted living facility, a residential healthcare facility, a home plus facility, or a boarding care home.

### *2021 H.B. 2004 & the Study Request*

In the 2021 and 2022 legislative sessions, the Kansas legislature considered 2021 H.B. 2004. H.B. 2004 would have moved the language of the regulations regarding transfer or discharge from KAN. ADMIN. REGS. 26-39-102 into statute and created a right for a resident of an assisted living facility, residential healthcare facility, home plus, or boarding care home to challenge an involuntary transfer or discharge through an appeal process. The House Committee on Children and Seniors held a hearing on the bill and passed it out favorable for passage by the House; however, the House never considered the bill and the bill died. The chair of the House Committee on Children and Seniors requested the Judicial Council study the legal issues involved in creating an appropriate appeal process that would balance the rights of residents with the rights of the facilities.

In response to the study request, the Judicial Council created an ad hoc advisory committee. The Committee understood that its charge was to create a procedure for an appeal

---

<sup>4</sup> KAN. ADMIN. REGS. 26-39-102(d).

<sup>5</sup> 42 C.F.R. 431.220(a) (2022).

process for involuntary transfer or discharges from assisted living, residential healthcare, home plus, or boarding care home facilities without opining on whether Kansas should enact such a process.

*Types of Facilities*

It is important to understand the types of adult care homes defined, licensed, and regulated in Kansas. The types of adult care homes are defined in statute and regulated by the Department for Aging and Disability Services (KDADS).<sup>6</sup> Each type of facility provides different services to its residents. These definitions, levels of care, and regulations are unique to Kansas. Each state names and structures the regulations of its adult care homes in different ways.

*Licensed Adult Care Homes*

<b>Type of Facility</b>	<b>Description</b>
<b>Nursing Facilities</b>	Nursing facilities provide the highest level of care. Services in nursing facilities are performed by or under the immediate supervision of a registered professional nurse and additional licensed nursing personnel. <sup>7</sup>
<b>Assisted Living Facilities (ALF)</b>	Assisted Living Facilities (ALF) care for 6 or more people in an apartment-type building. ALFs provide or coordinate a range of services for residents who may need personal care and may need supervised nursing care to compensate for activities of daily living limitations. <sup>8</sup> Skilled nursing services may be provide but those services “shall be provided on an intermittent or limited term basis, or if limited in scope, a regular basis.” <sup>9</sup>

---

<sup>6</sup> An “‘adult care home’ means any nursing facility, nursing facility for mental health, intermediate care facility for people with intellectual disability, assisted living facility, residential healthcare facility, home plus, boarding care home and adult day care facility; all of which are classifications of adult care homes and are required to be licensed by the secretary for aging and disability services.” KAN. STAT. ANN. 39-923(a)(1).

<sup>7</sup> KAN. STAT. ANN. 39-923(a)(2) & (11).

<sup>8</sup> KAN. STAT. ANN. 39-923(a)(5).

<sup>9</sup> *Id.*

Type of Facility	Description
<p><b>Residential Healthcare Facilities (RHCF)</b></p>	<p>Residential Healthcare Facilities (RHCF) care for 6 or more people in individual living units and provide the same level of services as an ALF.<sup>10</sup> The main difference between ALF and RHCF is that a RHCF is not required to provide kitchens in each living unit.</p>
<p><b>Home Plus (HP)</b></p>	<p>Home Plus (HP) facilities care for 12 or fewer people and are usually, though not always, located in a private residence. The level of care provided by the facility depends on the type of professional training of the staff.<sup>11</sup></p>
<p><b>Boarding Care Homes (BCH)</b></p>	<p>Boarding Care Homes (BCH) provide care for 10 or fewer people who need supervision of activities for daily living, but who are able to move about and are capable of managing their own care and affairs.<sup>12</sup> The facility must have qualified staff to meet the needs of the residents, but generally, the residents must make their own arrangements for medical care.</p>
<p><b>Adult Day Care Facilities</b></p>	<p>Adult Day Care facilities provide the lowest level of care to individuals. Adult Day Care facilities operate less than 24 hours a day and care for individuals who, due to functional impairment, need supervision of or assistance with activities of daily living.<sup>13</sup></p>

In this report, the term “**ALF/RHF/HP/BCH**” will be the term to refer to assisted living, residential healthcare facilities, home plus, and boarding care home facilities as a group.

*Independent Living Facilities*

Kansas does not include any “independent living” type facility in its definition of adult care homes; therefore, KDADS does not license or have regulations for “independent living” facilities.

---

<sup>10</sup> KAN. STAT. ANN. 39-923(a)(6).

<sup>11</sup> KAN. STAT. ANN. 39-923(a)(7). *See also* KAN. ADMIN. REGS. 28-39-411.

<sup>12</sup> KAN. STAT. ANN. 39-923(a)(8).

<sup>13</sup> KAN. STAT. ANN. 39-923(a)(9).

### *The Current Involuntary Transfer or Discharge Process*

KDADS regulates all adult care homes.<sup>14</sup> The regulations are found in Kansas Regulations Agency 26, Articles 39-42. Article 39 includes regulations that apply to all adult care homes. Article 40 regulations only apply to nursing facilities. Article 41 regulations apply to Assisted Living Facilities and Residential Health Care Facilities. Article 42 regulations apply to Home Plus facilities. The regulations govern topics such as, licensing of the facility, staff qualifications, resident criteria, resident admission requirements, resident rights, fees, service agreements, and the transfer or discharge of a resident.

These regulations govern when a resident may be involuntarily transferred or discharged from a facility. In all types of adult care homes, a resident may not be transferred or discharged from the facility unless one of the following conditions is met:

- (1) The transfer or discharge is necessary for the resident's welfare, and the resident's needs cannot be met in the current adult care home;
- (2) The safety of other individuals in the adult care home is endangered;
- (3) The health of other individuals in the adult care home is endangered;
- (4) The resident has failed, after reasonable and appropriate notice, to pay the rates and charges imposed by the adult care home; or
- (5) The adult care home ceases to operate.<sup>15</sup>

Before a resident can be involuntary transferred or discharged, the facility must (1) notify the resident, the resident's legal representative, and if known, a designated family member of the transfer or discharge and the reasons for the transfer or discharge; and (2) record the reasons for discharge in the resident's clinical record and include documentation of the rationale for the transfer or discharge from the resident's physician.<sup>16</sup> The notice to the resident, the resident's legal representative, and if known, a designated family member, must be provided in writing at least 30 days before the resident is transferred or discharged.<sup>17</sup> In this report, this type of involuntary transfer or discharge will be referred to as a 30-day notice of involuntary transfer or discharge.

There are exceptions to the 30-day notice requirement. The facility is not required to give the resident 30 days' notice before the involuntary transfer or discharge if (1) the safety of other individuals in the adult care home is endangered, or (2) the resident's urgent medical

---

<sup>14</sup> An "'adult care home' means any nursing facility, nursing facility for mental health, intermediate care facility for people with intellectual disability, assisted living facility, residential healthcare facility, home plus, boarding care home and adult day care facility; all of which are classifications of adult care homes and are required to be licensed by the secretary for aging and disability services." KAN. STAT. ANN. 39-923(a)(1).

<sup>15</sup> KAN. ADMIN. REGS. 26-39-102(d).

<sup>16</sup> KAN. ADMIN. REGS. 26-39-102(e)

<sup>17</sup> KAN. ADMIN. REGS. 26-39-102(f).



needs require an immediate transfer to another health care facility.<sup>18</sup> In this report, this type of involuntary transfer or discharge will be referred to as an emergency involuntary transfer or discharge.

The regulations set out what must be included in the written notice, and include, the reason for transfer or discharge, the effective date of the transfer or discharge, the contact information for the complaint program of the Kansas Department on Aging, the contact information for the state long-term care ombudsman, and, for residents with developmental disabilities or who are mentally ill, the contact information for the Kansas advocacy and protection organization.<sup>19</sup> The facility is also required to ensure the development of a discharge plan and transfer of information to the resident's next facility.<sup>20</sup>

## DISCUSSION

The Committee reviewed the current nursing facility involuntary transfer or discharge appeal process. The appeal is heard by the Office of Administrative Hearings (OAH) and is governed by the Kansas Administrative Procedure Act. OAH informed the Committee that there are generally two categories of involuntary transfer or discharge appeals. One category is an involuntary transfer or discharge due to lack of payment. These cases often involve an issue with Medicaid or Medicare and generally take longer to resolve because the case must wait for the issue with Medicaid or Medicare to be resolved. The other category of cases involves a disagreement about a resident's care needs. These cases present a greater need for a quick resolution because there are implications for the resident's health and safety or the health and safety of others in the facility.

There is no required timeframe for how quickly a hearing on a nursing facility involuntary transfer or discharge appeal must occur or when a decision must be entered. OAH provided the Committee with data about the nursing facility involuntary transfer or discharge appeals it has handled in the last six fiscal years.

In fiscal year 2017 through fiscal year 2022, OAH handled 88 nursing facility involuntary transfer or discharge appeals. Nursing facilities are required to send a copy of the notice of involuntary transfer or discharge to the state long term care ombudsman's office. ALF/RHF/HP/BCH facilities<sup>21</sup> do not report their involuntary transfers or discharges to a centralized entity. Therefore, there was no accurate way for the Committee to estimate how many ALF/RHF/HP/BCH facility involuntary transfers or discharges occur each year or to

---

<sup>18</sup> *Id.*

<sup>19</sup> KAN. ADMIN. REGS. 26-39-102(g).

<sup>20</sup> KAN. ADMIN. REGS. 26-39-102(i) & (j).

<sup>21</sup> These include assisted living facilities, residential healthcare facilities, home plus, or boarding care homes. See chart above.

estimate how many of those involuntary transfers or discharges would be appealed if an appeal process was established.

OAH reported that the average length of time from the beginning of the nursing facility involuntary transfer or discharge appeal to the issuance of the decision was 68.7 days. On average, the hearing was held 43 days after the date the notice of appeal was filed. The average length of time that it took for a decision to be issued after the hearing was 26 days.

The Committee also reviewed various other states' processes which had varying numbers of how many days it would take from the issuance of the notice until an appeal would be resolved. For example, in Colorado and Idaho, an appeal could take over 60 days from the time the notice of transfer or discharge was issued.<sup>22</sup> However, in Connecticut and Iowa, the appeal system is set up to resolve the case within 30-40 days from the time the notice of transfer or discharge was issued.<sup>23</sup>

When a nursing facility accepts a resident, the facility agrees to meet all the resident's needs as identified at the time of admission as well as any needs identified in the future. This is very different from ALF/RHF/HP/BCH facilities. The services provided to a resident in a ALF/RHF/HP/BCH facility are governed by a Negotiated Service Agreement, the contract between the facility and the resident. When an ALF/RHF/HP/BCH facility admits a resident, the facility is only agreeing to provide or coordinate the limited services identified at that time and as set out in the Negotiated Service Agreement. Later, if a resident wants the facility to provide or coordinate different or additional services, the facility and the resident must complete a new Negotiated Service Agreement contract. If a resident's needs go beyond the services offered by the facility and the resident's needs are not able to be otherwise met by family, friends, or a third-party provider, a resident is unable to remain in the facility.<sup>24</sup>

When a resident's care needs no longer fit within the parameters set by the Negotiated Service Agreement, the resident's safety is at risk, as well as the licensing status of the facility. The Committee agreed a quick resolution to an appeal is essential. A 60–70-day resolution of a nursing facility involuntary transfer or discharge appeal does not necessarily increase the risk to the resident's health and safety as much as in a ALF/RHF/HP/BCH facility. The nursing facility has agreed to meet any and all needs of the resident; however, when an ALF/RHF/HP/BCH facility cannot meet the needs of the resident, the resident's continued presence in the facility could mean the resident's health and safety are in danger.

With this in mind, the Committee's goal was to balance the need for a quick resolution of an appeal with the due process rights of all parties involved.

---

<sup>22</sup> COLO. REV. STAT. 25-27-104.3 (2022), IDAHO ADMIN. CODE R. 16.03.22.217 (2021).

<sup>23</sup> CONN. GEN. STAT. 19A-490 & 19A-535A (2022), IOWA ADMIN. CODE R. 481-57.14(135C) (2022).

<sup>24</sup> See KAN. ADMIN. REGS. 26-41-202.

### **30-Day notice of involuntary Transfer or Discharge Process**

The Committee drafted a process for the standard 30-day notice of involuntary transfer or discharge process. The Committee drafted statutory language for a 30-day notice of involuntary transfer or discharge process. References to each “Section” below correspond to the labeled sections of the recommended statutory language beginning on page 18.

The Committee worked to craft a short appeal process while also protecting the due process rights of the parties in the following ways.

#### *Increasing dialogue and problem solving prior to issuing the notice*

Prior to the issuance of the notice, Section 2 requires the facility and the resident, resident’s legal representative, and other relevant persons to meet to discuss the reasons for the impending involuntary transfer or discharge. An involuntary transfer or discharge may be avoided if the parties are able to resolve the issue or the resident understands the facility’s concerns. A minority of the Committee was against creating this obligation because any action the facility could take to avoid the involuntary transfer or discharge would require the facility to renegotiate its service agreement, alter its scope of services, or change its resident criteria policies.

#### *Requiring KDADS review of the notice*

Section 3 requires the facility to submit the notice to KDADS before issuing the notice. KDADS would have two business days to determine whether the notice contains all the required information and inform the facility whether it can issue the notice. The goal of this preliminary process is to minimize the number of appeals filed due to a facility’s failure to include the required information in the written notice, decrease the strain on the Office of Administrative Hearings, and ultimately avoid unnecessary delays in a resident obtaining the services required to meet the resident’s needs.

A minority of the Committee argued that additional administrative layers before the issuance of the notice would lead to unnecessary and dangerous delays. The minority was concerned that the two-day response timeline set for KDADS was unrealistic. Any delay would be to the detriment of the facility, which would be without recourse, as well as exacerbate the danger to the resident.

Section 1 requires KDADS create a standardized form for the 30-day notice of involuntary transfer or discharge notice. The creation of a standardized form would hopefully decrease the likelihood of a facility failing to include the required information in the notice. While many facilities would likely choose to use KDADS form, some facilities may choose to

include more than the required minimum information in the notice. Therefore, Section 1 allows facilities to choose whether to use KDADS form.

*Increasing the amount of information provided in the notice*

Section 1 requires the written notice to include the reasons for the transfer or discharge, the facts and evidence supporting each reason, and the actions taken to avoid the transfer or discharge. The Committee agreed that including this information was essential to promoting the resident's understanding of the facility's reasoning. It also decreases the need for a long discovery process during the appeal.

*Requiring the filing of the notice of appeal within 15 days of the issue date of the notice*

Section 6 requires the notice of appeal be filed within 15 days after the issue date of the notice. The Committee discussed requiring a resident to file the notice of appeal within 15 days versus 30 days. Because the facility and the resident should have already met to discuss the reasons for the involuntary transfer or discharge, the issuance of the notice and decision to appeal should not be a surprise to the resident. Requiring the notice of appeal be filed within the shorter timeframe facilitates the expedited resolution of the appeal.

The Committee debated whether the timeframe for filing the notice of appeal should begin when the notice is issued or when the notice is received by the resident. Section 4 requires the facility to deliver the notice to the resident in person and on the same day, send the notice to the resident's legal representative and the state long term care ombudsman. Therefore, any lag time between the issuance of the notice and the receipt of the notice should be minimal.

*Allowing the state long-term care ombudsman to file the notice of appeal*

Section 6 contemplates the notice of appeal being filed directly by the resident or the resident's legal representative, but the Committee also included an option for the resident or the resident's legal representative to contact the state long-term care ombudsman to request that the state long-term care ombudsman file the notice of appeal on behalf of the resident. Providing this option assists in minimizing procedural hurdles for a resident to access the resident's legal rights.

*Requiring the administrative hearing be held within 15 days and a decision issued within 10 business days after the hearing*

Section 6 sets out the timeframes for the administrative hearing and the issuance of a final decision. The Committee acknowledged that holding the hearing within 15 days is a very short timeframe; however, the short timeframe is essential to promote the safety of the resident and protect the facility from violating its licensing regulations by providing services beyond the Negotiated Service Agreement with the resident. The Committee recognized that the short timeframe does not leave much time for the parties to exchange discovery prior to the hearing. It was the Committee's hope that requiring the meeting between the facility and the resident prior to the issuance of the notice and the additional information in the notice itself would make a lengthy discovery process unnecessary.

Due to the short appeal timeframe and because unique and unforeseen situations arise, Section 6 authorizes KDADS to extend the time to file a notice of appeal if KDADS determines that good cause exists for the failure to make a timely request.

A minority of the Committee was concerned that Office of Administrative Hearings would be unable to adhere to the required timeframes due to a lack of resources, which would cause delays in the appeals process. The majority of the Committee acknowledged that the Office of Administrative Hearings would need additional resources due to the increased number of cases and the expedited timeframe in which these appeals must be completed.

*Allowing an informal conference prior to the administrative hearing*

Section 7 permits a resident to request an informal conference be held during the period of time before the administrative hearing. The informal conference would be facilitated by KDADS and, if request, would be held within 5 business days of KDADS receiving the request for the informal conference. This conference is an optional step that could allow for an accelerated resolution of the appeal. It was important to the Committee that having an informal conference would not extend the timeframe in which the administrative hearing must be held.

*Summary of timeline*

The Committee understood that having an appeal extend a resident's potential involuntary transfer or discharge beyond 30 days from the issuance of the notice, may have dangerous consequences for the resident's health and safety and becomes a risk to a facility's licensing status. Additionally, if the appeal process for a 30-day notice of involuntary transfer or discharge notice might result in the resident remaining in the facility for 30 or more days

beyond the original involuntary transfer or discharge date, a facility may be more likely to utilize the emergency involuntary transfer or discharge process.

The Committee’s recommendations do add time to the entire involuntary transfer or discharge process because it adds new requirements for the facility to take prior to issuing the notice. However, a majority of the Committee agreed that such steps are necessary in order to have an expedited appeal process.

<b>Event</b>	<b># of Days Since 30-Day Notice Issued</b>
Facility and resident meet to discuss reasons for involuntary transfer or discharge	N/A
Facility submits notice to KDADS for review	N/A
KDADS reviews and approves notice within 2 business days	N/A
Facility issues notice	Day 1
Resident files notice of appeal	Day 15 (resident may file the notice of appeal sooner)
Involuntary Conference ( <i>optional</i> )	Held between Day 16 and Day 29
Administrative hearing held	Day 30 (hearing may be held sooner)
Administrative hearing decision issued	Day 44 (10 business days including 4 weekend days) (decision may be issued sooner)

*Resident’s right to remain in the facility*

Section 6 provides that a resident will be allowed to continue to reside in the facility until the appeal process is complete. The Committee agreed that it would be unfair to require a resident to move out of the facility before the appeal has been decided. The Committee strongly supported the policy that a resident who remains in the facility must be responsible to pay for any additional services provided by the facility while the appeal is pending. The Committee was concerned about the potential danger to a resident’s health and safety if the resident remains in a facility that cannot meet the resident’s needs. In addition, a facility that tries to provide adequate care for a resident that is beyond the facility’s contractual obligations may be a detriment to the facility’s ability to continue providing affordable rates and services to all residents.

In order to address these concerns, the Committee recommends a liability limiting provision be enacted. The Committee agreed that a facility should have some kind of protection from an action based on negligence if the facility does not provide services to a resident that are outside the scope of the negotiated service agreement. The Committee did not have the expertise necessary to adequately research and include such a provision in statutory language included in this report.

## **Emergency Involuntary Transfer or Discharge Process**

Kansas regulations authorize a facility to issue an *emergency* involuntary transfer or discharge notice without requiring a 30-day waiting period before the resident is transferred or discharged, if (1) the safety of other individuals in the adult care home would be endangered, or (2) the resident’s urgent medical needs require an immediate transfer to another health care facility.<sup>25</sup> The Committee agreed that if the legislature enacted an appeal process for a 30-day notice of involuntary transfer or discharge, it should also enact an appeal process for an emergency involuntary transfer or discharge. Because an emergency involuntary transfer or discharge notice does not give the resident the 30-day waiting period, having an appeal process deters a facility from claiming a situation is an emergency to avoid the 30-day wait period and associated appeal process. The Committee drafted statutory language for an emergency involuntary transfer or discharge process. References to each “Section” below correspond to the labeled sections of the recommended statutory language beginning on page 25.

### *Timeframe*

The Committee’s recommendations in the 30-day notice of involuntary transfer or discharge process regarding the facility and resident meeting and the KDADS review prior to issuing the notice are not applicable in an emergency involuntary transfer or discharge situation. Due to the emergent nature of the situation, the Committee agreed the appeal process for an emergency involuntary transfer or discharge should be quicker than the 30-day notice of involuntary transfer or discharge appeal process. Shortening the appeal process includes reducing the number of days between each step and eliminating the optional informal conference. The chart below shows the difference between the timeframes for the 30-day notice of involuntary transfer or discharge appeal and the emergency involuntary transfer or discharge appeal.

---

<sup>25</sup> KAN. ADMIN. REGS. 26-39-102(f).

	<b>30-Day notice of involuntary Transfer or Discharge Appeal</b>	<b>Emergency Involuntary Transfer or Discharge Appeal</b>
<b>Resident must file Notice of Appeal</b>	Within 15 calendar days after the issue date of the notice	Within 7 calendar days after the receipt of the notice
<b>Informal Conference</b>	Within 5 business days of the secretary receiving the request <i>(excluding holidays, could be up to 7 calendar days)</i>	N/A
<b>Administrative Hearing</b>	Within 15 calendar days after receipt of the notice of appeal by the Office of Administrative Hearings	Within 14 calendar days after receipt of the notice of appeal by the Office of Administrative Hearings
<b>Issuance of a written decision by Office of Administrative Hearings</b>	Within 10 business days of the completion of the administrative hearing <i>(excluding holidays, could be up to 14 calendar days – 10 business days plus 4 weekend days)</i>	Within 5 business days of the completion of the administrative hearing <i>(excluding holidays, could be up to 7 calendar days – 5 business days plus 2 weekend days)</i>
<b>Total # of Days in the Appeal Process</b>	44 days	28 days

*Written notice*

In an emergency transfer or discharge situation, current regulations are silent on whether a resident must be given notice in writing and when the notice must be issued. Section A in the proposed statutory language requires the facility give the resident written notice prior to or within 48 hours following the transfer or discharge. A minority of the Committee was concerned that there are many emergency situations in which a facility could not issue notice within 48 hours following the transfer or discharge; however, a majority of the Committee was in favor of setting timeframe to issue the notice.

*Holding of space by facility*

Section A also specifically requires the facility to hold a space for the resident pending receipt of the administrative decision of any appeal. The Committee did not want a facility to use an emergency involuntary transfer or discharge to inappropriately remove a resident and if



the resident wins the appeal, to then have the resident be unable to return to the facility. If a resident chooses to contest the involuntary transfer or discharge through an appeal, the Committee agreed the resident should be responsible to continuing paying for the space held at the facility.

A minority of the Committee argued that under this requirement, facilities will sustain serious financial losses with no legal avenue to recoup losses when the resident appeal is unsuccessful. Even if a legal obligation was created for the unsuccessful resident to pay for the time the space was held, providers may not be able to collect on the debt.

#### *Changes to regulations*

Implementing the emergency involuntary transfer or discharge appeals process recommended by the Committee would necessitate changes to the KDADS regulations governing the content of the emergency notice. The Committee recommends the regulations require the emergency involuntary transfer or discharge notice form include:

- (1) A statement that the resident or resident's legal representative, has the right to appeal the involuntary transfer or discharge within 7 days after receipt of the notice;
- (2) The procedure for the resident or resident's legal representative to file the notice of appeal; and
- (3) A copy of the adult care home emergency involuntary transfer or discharge notice of appeal form.

## **CONCLUSION**

The Committee was asked to draft a procedure for an appeal process for involuntary transfer or discharges from ALF/RHF/HP/BCH facilities. After reviewing other state's processes and hearing from KDADS and the Office of Administrative hearing, the Committee drafted an appeal procedure for a 30-day notice of involuntary transfer or discharge and an emergency involuntary transfer or discharge from a ALF/RHF/HP/BCH facility. The Committee's goal was to create an appeal process that balanced the resident's right to due process, the health and safety of the resident, and the licensing and liability issues of the facility.

## STATUTORY DRAFT

### 30-DAY NOTICE OF INVOLUNTARY TRANSFER OR DISCHARGE APPEAL PROCESS

#### Section 1. Contents of Notice

- (a) The administrator or operator, or the designee, is not required to use a 30-day involuntary transfer or discharge notice form prescribed by the secretary, but the secretary shall make a 30-day involuntary transfer or discharge notice form available.
  
- (b) The 30-day involuntary transfer or discharge notice shall be written and, at a minimum, include the following:
  - (1) The reason for the transfer or discharge;
  - (2) Facts and evidence supporting each reason for the transfer or discharge and actions taken to avoid the transfer or discharge and the timing of those actions;
  - (3) The name and contact information of the facility issuing the notice;
  - (4) The name and contact information of the person employed by the facility with whom the resident or resident's legal representative may discuss the notice;
  - (5) The issue date of the notice;
  - (6) The effective date of the transfer or discharge;
  - (7) The location where the resident will be transferred or discharged, if known;
  - (8) A statement that the resident or resident's legal representative, has the right to appeal the involuntary transfer or discharge within 15 days after the issue date contained in the notice;
  - (9) The procedure for the resident or resident's legal representative to file the notice of appeal;
  - (10) A copy of the adult care home 30-day involuntary transfer or discharge notice of appeal form;

- (11) A list of the names and contact information of each recipient of the notice, and how the notice is being given to each recipient;
  - (12) The contact information for the state long-term care ombudsman;
  - (13) A section where the recipient of the notice signs the form to acknowledge receipt of the form if receiving the form in person;
  - (14) For a resident with an intellectual or developmental disability, dementia or another cognitive-limiting condition, the contact information for the agency responsible for the protection and advocacy of individuals with such conditions; and
  - (15) For a resident with a mental disorder or related disability, the contact information for the agency responsible for protection and advocacy of individuals with a mental disorder or related disability.
- (c) The adult care home 30-day involuntary transfer or discharge notice of appeal shall be in a form and manner prescribed by the secretary.
- (d) The adult care home 30-day involuntary transfer or discharge notice of appeal form, at a minimum, shall include the following:
- (1) The name and contact information of the resident;
  - (2) The name and contact information of the person appealing the 30-day involuntary transfer or discharge notice and the person's relationship to the resident;
  - (3) The name of the facility issuing the 30-day involuntary transfer or discharge notice;
  - (4) The date the 30-day involuntary transfer or discharge notice was issued;
  - (5) The date of discharge listed on the 30-day involuntary transfer or discharge notice; and
  - (6) Whether the personal appealing the 30-day involuntary transfer or discharge notice requests the secretary to facilitate an informal conference before the administrative hearing.

## **Section 2. Before issuing notice**

Before issuing a 30-day involuntary transfer or discharge notice, the administrator or operator, or the designee, shall perform the following:

- (a) Notify the resident and the resident's legal representative in writing of the transfer or discharge and the reasons;
- (b) Hold a meeting with the resident and the resident's legal representative regarding the reason for the involuntary transfer or discharge and attempt to resolve the reason for the involuntary transfer or discharge. The administrator or operator, or the designee, must notify the resident and the resident's legal representative in writing that the resident or the resident's legal representative may invite family members, relevant health professionals, the state long-term care ombudsman, or other persons of the resident's or the resident's legal representative's choosing to participate in the meeting; and
- (c) Record the reason for the transfer or discharge under any of the circumstances specified in Section 1(a)(1) through (3) in the resident's clinical record, which shall be substantiated as follows:
  - (1) The resident's physician shall document the rationale for transfer or discharge in the resident's clinical record if the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met by the adult care home; and
  - (2) A physician shall document the rationale for transfer or discharge in the resident's clinical record if the transfer or discharge is necessary because the health or safety of other individuals in the adult care home is endangered.

## **Section 3. KDADS Review of Notice**

Before the administrator or operator, or the designee, issues a 30-day involuntary transfer or discharge notice to the resident, the administrator or operator, or the designee, must first submit the written notice to the secretary for review and receive a written response from the secretary stating whether the notice and other documentation submitted by the administrator or operator, or the designee, complies with the requirements contained in this statute.

- (a) At a minimum, the administrator or operator, or the designee, must provide to the secretary the following written information concerning the proposed transfer or discharge:
  - (b) A copy of the proposed 30-day involuntary transfer or discharge notice which complies with the requirements listed in Section 2;
  - (c) After receiving all information required under subsection (1) and requested under subsection (2), within two business days the secretary will provide written notice to the administrator or operator, or the designee, with a determination of whether the proposed transfer or discharge notice complies with the requirements contained in this statute. If the secretary determines the requirements of the statute are not met, the administrator or operator, or the designee, may not issue the transfer or discharge notice.
  - (d) Nothing shall prohibit an administrator or operator, or the designee, from submitting or resubmitting a transfer or discharge notice that satisfies the requirements contained in this statute.
  - (e) The administrator or operator, or the designee, may issue the notice if the secretary determines the requirements of the statute are met.

#### **Section 4. Sending Notice**

The administrator or operator, or the designee, shall deliver the notice to the resident in person and place a copy in the resident's record. On the same day, administrator or operator, or the designee, shall send the notice to:

- (a) the resident's legal representative in person, by return receipt delivery, or by email, read-receipt requested; and
- (b) the state long-term care ombudsman in person or by email.

#### **Section 5. Acknowledgment of receipt**

- (a) The administrator or operator, or the designee, shall document acknowledgment of receipt of the 30-day involuntary transfer or discharge notice by all required recipients in any of the following ways:

- (1) Obtaining and maintaining the recipient's signature on the 30-day involuntary transfer or discharge notice form;
  - (2) Obtaining and maintaining the return receipt affirming delivery of the notice; or
  - (3) Obtaining and maintaining an electronic read receipt from the recipient's email.
- (b) If the recipient refuses receipt of the notice, the administrator or operator, or the designee, shall give the document to the recipient through a different method of delivery. The administrator or operator, or the designee shall document the refusal. After attempting delivery by two different methods, if the recipient refuses delivery through both methods, the notice is deemed as received by the recipient.

### **Section 6. Administrative Hearing**

- (a) Except when a facility has had its license revoked, not renewed, voluntarily surrendered, a resident who receives a 30-day involuntary transfer or discharge notice is entitled to an administrative hearing, provided the resident or the resident's legal representative requests an administrative hearing in a timely manner.
- (b) A resident who receives an involuntary transfer or discharge notice or the resident's legal representative may appeal such transfer or discharge by filing a notice of appeal with the office of administrative hearings within 15 calendar days after the issue date printed on the notice. The secretary may extend the time allowed requesting an administrative hearing if the secretary determines that good cause exists for failure to make a timely request.
- (c) If the resident is incapacitated and does not have a legal representative, the state long-term care ombudsman may file a notice of appeal on behalf of the resident.
- (d) A notice of appeal may be filed by:
- (1) completing the notice of appeal form and filing it with the office of administrative hearings; or
  - (2) contacting the state long-term care ombudsman and requesting the state long-term care ombudsman complete and file the notice of appeal form with the office of administrative hearings on behalf of the resident or the resident's legal representative.

- (e) If the resident or the resident's legal representative submits the notice of appeal form to the office of administrative hearings, on the same day the resident submits the notice of appeal to the office of administrative hearings, the resident shall give a copy of the completed notice of appeal to the administrator or operator, or the designee, and the state long-term care ombudsman.
- (f) If the state long-term care ombudsman completes or submits the notice of appeal form at the request of the resident or the resident's legal representative, at the same time the state long-term care ombudsman submits the notice of appeal to the office of administrative hearings, the state long-term care ombudsman shall give a copy of the completed notice of appeal to the resident, and the administrator or operator, or the designee, and with resident's consent, to the resident's legal representative.
- (g) Within 15 calendar days after the receipt of the notice of appeal, the office of administrative hearings shall hold a hearing, in accordance with the provisions of the Kansas administrative procedure act.
- (h) The office of administrative hearings shall issue a written decision within 10 business days of the completion of the administrative hearing.
- (i) The resident who has received a 30-day involuntary transfer or discharge notice will be allowed to continue to reside in the facility until the hearing process is completed. The resident will be responsible to pay for any services provided by the facility to the resident until the hearing process is completed.

**Section 7. Informal conference, if requested**

- (a) The following people may request the secretary facilitate an informal conference before the administrative hearing, to discuss the transfer or discharge:
  - (1) the resident,
  - (2) the resident's legal representative,
  - (3) the administrator or operator, or the designee, or
  - (4) the state long-term care ombudsman, if requested by the resident or resident's legal representative.
- (b) If an informal conference is requested, the conference shall be scheduled within 5 business days of the secretary receiving the request for the informal conference.
- (c) (1) The informal conference shall include:
  - (A) the secretary, or the secretary's designee;

(B) the resident or the resident's legal representative; and

(C) the administrator or operator, or the designee.

(2) The informal conference may include:

(A) health care professionals; and

(B) the state long-term care ombudsman.

(d) No administrative hearing shall be held if the resident or the resident's legal representative is satisfied with the outcome of the informal conference.

(e) The scheduling or holding of an informal conference shall not extend the number of days after the receipt of the notice of appeal in which the office of administrative hearings shall hold a hearing.



## STATUTORY DRAFT

### EMERGENCY INVOLUNTARY TRANSFER OR DISCHARGE APPEAL PROCESS

#### Section A. Notice

- (a) In the case of an emergency transfer or discharge, the resident must be given a written notice prior to or within 48 hours following transfer or discharge. A copy of the notice shall be provided to the secretary and the state long term care ombudsman.
- (b) If the resident has already been transferred or discharged on an emergency basis, the provider shall hold a space available for the resident pending receipt of an administrative decision. If the resident appeals the transfer or discharge, the resident is responsible to pay for the space held by the provider pursuant to this subsection.

#### Section B. Administrative Hearing

- (a) A resident who receives an emergency involuntary transfer or discharge notice is entitled to an administrative hearing, provided the resident or the resident's legal representative requests an administrative hearing in a timely manner.
- (b) The filing of a notice of appeal or appeal process shall not delay or change the date of the emergency involuntary transfer or discharge.
- (c) A resident who receives an emergency involuntary transfer or discharge notice or the resident's legal representative may appeal such transfer or discharge by filing a notice of appeal with the office of administrative hearings within 7 calendar days of receiving the written notice. The secretary may extend the time allowed requesting an administrative hearing if the secretary determines that good cause exists for failure to make a timely request.
- (d) If the resident is incapacitated and does not have a legal representative, the state long-term care ombudsman may file a notice of appeal on behalf of the resident.
- (e) A notice of appeal may be filed by:
  - (1) completing the notice of appeal form and filing it with the office of administrative hearings; or

- (2) contacting the state long-term care ombudsman and requesting the state long-term care ombudsman complete and file the notice of appeal form with the office of administrative hearings on behalf of the resident or the resident's legal representative.
- (f) If the resident or the resident's legal representative submits the notice of appeal form to the office of administrative hearings, on the same day the resident submits the notice of appeal to the office of administrative hearings, the resident shall give a copy of the completed notice of appeal to the administrator or operator, or the designee, and the state long-term care ombudsman.
- (g) If the state long-term care ombudsman completes or submits the notice of appeal form at the request of the resident or the resident's legal representative, at the same time the state long-term care ombudsman submits the notice of appeal to the office of administrative hearings, the state long-term care ombudsman shall give a copy of the completed notice of appeal to the resident, and the administrator or operator, or the designee, and with resident's consent, to the resident's legal representative.
- (h) Within 14 calendar days after the receipt of the notice of appeal, the office of administrative hearings shall hold a hearing, in accordance with the provisions of the Kansas administrative procedure act.
- (i) The office of administrative hearings shall issue a written decision within 5 business days of the completion of the administrative hearing.

### **Section C. Emergency Involuntary Transfer or Discharge Notice Form**

The administrator or operator, or the designee, is not required to use an emergency involuntary transfer or discharge notice form prescribed by the secretary, but the secretary shall make an emergency involuntary transfer or discharge notice form available.

#### **Section D. Notice of Appeal Form**

- a) The emergency involuntary transfer or discharge notice of appeal shall be in a form and manner prescribed by the secretary.
  
- b) The emergency involuntary transfer or discharge notice of appeal form, at a minimum, shall include the following:
  - (1) The name and contact information of the resident;
  
  - (2) The name and contact information of the person appealing the emergency involuntary transfer or discharge notice and the person's relationship to the resident;
  
  - (3) The name of the facility issuing the emergency involuntary transfer or discharge notice;
  
  - (4) The date the emergency involuntary transfer or discharge notice was issued; and
  
  - (5) The date of transfer or discharge listed on the emergency involuntary transfer or discharge notice.

State of Kansas  
House of Representatives

State Capitol  
Topeka, Kansas 66612  
(785) 296-7644  
Toll Free: 1-800-432-3924  
susan.concannon@house.ks.gov



921 North Mill Street  
Beloit, Kansas 67420  
(785) 738-8087  
sconcannon@nckcn.com

Susan Concannon  
Representative, 107th District

December 14, 2021

Nancy Strouse, Executive Director  
Kansas Judicial Council  
301 SW 10<sup>th</sup> Avenue  
Topeka, Kansas 66612

Dear Nancy:

I am writing to request Judicial Council study of a topic that arose during the consideration of legislation by the House Committee on Children and Seniors during the 2021 Session. I believe that in-depth consideration of the issues raised by the legislation by the Judicial Council would be appropriate and helpful before further action by the Legislature on the bill.

**HB 2004 – Creating the right to appeal an involuntary discharge or transfer from an adult residential care facility**

HB 2226 was introduced by Representative Ron Highland. In the House Committee hearing on January 28, 2021, family members of residents of assisted living and long-term care facilities who had been involuntarily discharged testified in favor of the bill, stating such residents need the right to file an appeal and have a hearing when informed that they are going to be involuntarily discharged or transferred. Representatives of the Disability Rights Center of Kansas, Kansas Trial Lawyers Association, Kansas Advocates for Better Care, Kansas Alzheimer's Association, Kansas State Nurses Association, and the State Long-Term Care Ombudsman also submitted testimony supporting the bill.

Opponents testifying at the hearing included representatives of LeadingAge Kansas, Kansas Health Care Association and Kansas Center for Assisted Living, and Kansas Adult Care Executives. The opponents expressed concern that the appeal process in the bill could force assisted living facilities to continue to provide care for a resident for whom the facility is no longer qualified to provide care.

On March 25, 2021, our Committee discussed the bill, including a proposed amendment that would have narrowed the scope of the appeal provision. After discussion, the sense of the Committee was that it would be desirable to seek Judicial Council study of the legal issues involved in creating an appropriate appeal process that would balance the rights of residents with the concerns of the facilities. However, the Committee also thought it desirable to refer the bill for further consideration to the Senior Care Task Force, which was in the process of

creation. As the Senior Care Task Force is now nearing the end of its work for the year without having been able to take a detailed look at the bill, I wanted to initiate this request for Judicial Council study before the 2021 Session, in the hope that a study could be completed by the beginning of the 2022 interim period.

The testimony and minutes from our hearing and committee discussion, as well as the proposed amendment, are available on the bill page at [http://www.kslegislature.org/li/b2021\\_22/measures/HB2004/testimony](http://www.kslegislature.org/li/b2021_22/measures/HB2004/testimony).

Please let me know if I can provide any further information or answer any questions regarding this request.

Thank you.

Sincerely,



Representative Susan Concannon  
Chairperson, House Committee on Children and Seniors

cc: Representative Charlotte Esau, Vice Chair, House Committee on Children and Seniors  
Jarrod Ousley, Ranking Minority Member of the House Committee on Children and Seniors  
Senator Richard Hildebrand, Vice Chair, Kansas Senior Care Task Force  
Representative Ron Highland