

**FILED**

Feb 27, 2019

STATE OF FLORIDA  
DEPARTMENT OF CHILDREN AND FAMILIES  
OFFICE OF APPEAL HEARINGS

Office of Appeal Hearings  
Dept. of Children and Families

[REDACTED]

APPEAL NO. 18N-00157

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened before the undersigned on January 22, 2019 at 10:00 a.m. at [REDACTED]

[REDACTED] located in [REDACTED].

**APPEARANCES**

For the Petitioner: [REDACTED], petitioner's daughter

For the Respondent: [REDACTED], Administrator

**ISSUE**

At issue is whether or not the nursing home's action to discharge the petitioner is an appropriate action based on the federal regulations. The nursing home is seeking to discharge the petitioner because she no longer needs nursing home services.

The facility has the burden of proof to establish by clear and convincing evidence that the discharge is appropriate under federal regulations found in 42 C.F.R. § 483.15 and Section 400.0255, Florida Statutes.

### **PRELIMINARY STATEMENT**

By notice dated November 29, 2018, the respondent informed the petitioner that it was seeking to discharge/transfer her from its facility. The notice was also signed by a physician or designee. The petitioner timely requested a hearing on the matter.

Appearing as witnesses for the respondent were [REDACTED] - Director of Social Services, [REDACTED] - Business Manager, [REDACTED] - Rehabilitation Manager, and [REDACTED] - Unit Manager. Also present telephonically as an observer for the hearing on behalf of the respondent was [REDACTED].

The petitioner did not submit any documents as evidence for the hearing.

The facility's notice of discharge was entered into evidence as Respondent Exhibit 1.

The respondent also submitted a packet of documents, which was marked as Respondent's composite Exhibit 2. These documents consisted of progress notes, records of communications between the parties, and medical records.

### **FINDINGS OF FACT**

1. The petitioner was admitted into the respondent's skilled nursing facility on November 19, 2018 for rehabilitation after a hospital stay. She needed occupational therapy services and physical therapy services. She received those services at the

facility from November 20 through November 30, 2018, made excellent progress, and met all her therapy goals.

2. The petitioner has been diagnosed with [REDACTED]. She exhibited some aggressive behavior and needed re-direction and 1 to 1 supervision. She made attempts to exit the facility and sometimes took other residents' food trays.

3. The petitioner was covered by Medicare as well as by Medicaid. Her Medicaid coverage was for the Long-Term Care (LTC) program, which is considered Community Medicaid rather than Institutional Medicaid. She was evaluated by the Department of Elder Affairs CARES program. The CARES evaluation concluded she did not meet the level of care required for institutional (nursing home) coverage.

4. The petitioner's last coverage date for Medicare was initially November 30, 2018. This was subsequently changed to December 7, 2018. Since she has not been approved for Institutional Medicaid, the facility has not received any payment from the Medicaid program for nursing home services.

5. The petitioner's daughter believed her mother's transfer to the respondent's facility was for a permanent placement rather than for temporary rehabilitation. She claimed the facility told her it was short-staffed on the weekend and she needed to hire a sitter to supervise her mother on the weekends. Her mother is covered by Humana for her LTC Medicaid and she believed that Humana would cover her nursing home services.

6. The petitioner's daughter attempted to telephone a Humana representative during the hearing to address the coverage issue. However, the representative was

unable to testify as a witness. The daughter held an off-the-record conversation with the Humana representative. She thereafter stated on the record the Humana representative had confirmed her mother had not received an Institutional level of care evaluation from the CARES program.

### **CONCLUSIONS OF LAW**

7. The Department of Children and Families, Office of Appeal Hearings, has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Section 400.0255(15), Florida Statutes. In accordance with said authority, this order is the final administrative decision of the Department of Children and Families.

8. Federal Regulations appearing at 42 C.F.R. § 483.15 set forth the reasons a facility may involuntarily discharge a resident, as follows: Admission, transfer and discharge rights.

(c) Transfer and discharge---(1) Facility requirements---(i) The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless--

(A) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;

(B) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;

(C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;

(D) The health of individuals in the facility would otherwise be endangered;

(E) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or

(F) The facility ceases to operate.

(ii) 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.

(2) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (c)(1)(i)(A) through (F) of this section, the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider.

(i) Documentation in the resident's medical record must include:

(A) The basis for the transfer per paragraph (c)(1)(i) of this section.

(B) In the case of paragraph (c)(1)(i)(A) of this section, the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s).

(ii) The documentation required by paragraph (c)(2)(i) of this section must be made by—

(A) The resident's physician when transfer or discharge is necessary under paragraph (c)(1)(A) or (B) of this section; and

(B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) of this section.

(iii) Information provided to the receiving provider must include a minimum of the following:

(A) Contact information of the practitioner responsible for the care of the resident

(B) Resident representative information including contact information.

(C) Advance Directive information.

(D) All special instructions or precautions for ongoing care, as appropriate.

(E) Comprehensive care plan goals,

(F) All other necessary information, including a copy of the resident's discharge summary, consistent with §483.21(c)(2), as applicable, and any other documentation, as applicable, to ensure a safe and effective transition of care.

(3) Notice before transfer. Before a facility transfers or discharges a resident, the facility must—

(i) Notify the resident and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. The facility must send a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman.

(ii) Record the reasons for the transfer or discharge in the resident's medical record in accordance with paragraph (c)(2) of this section; and

(iii) Include in the notice the items described in paragraph (c)(5) of this section.

(4) Timing of the notice. (i) Except as specified in paragraphs (c)(4)(ii) and (8) of this section, the notice of transfer or discharge required under this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(ii) Notice must be made as soon as practicable before transfer or discharge when—

(A) The safety of individuals in the facility would be endangered under paragraph (c)(1)(i)(C) of this section;

(B) The health of individuals in the facility would be endangered, under paragraph (c)(1)(i)(D) of this section;

(C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (c)(1)(i)(B) of this section;

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (c)(1)(i)(A) of this section; or

(E) A resident has not resided in the facility for 30 days.

(5) Contents of the notice. The written notice specified in paragraph (c)(3) of this section must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged;

(iv) A statement of the resident's appeal rights, including the name, address (mailing and email), and telephone number of the entity which receives such requests; and information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;

(v) The name, address (mailing and email) and telephone number of the Office of the State Long-Term Care Ombudsman;

(vi) For nursing facility residents with intellectual and developmental disabilities or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with developmental disabilities established under

Part C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (Pub. L. 106-402, codified at 42 U.S.C. 15001 et seq.); and (vii) For nursing facility residents with a mental disorder or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with a mental disorder established under the Protection and Advocacy for Mentally Ill Individuals Act.

9. Florida Statutes, Section 400.0255, Resident transfer or discharge;

requirements and procedures; hearings, states in part:

...

(3) When a discharge or transfer is initiated by the nursing home, the nursing home administrator employed by the nursing home that is discharging or transferring the resident, or an individual employed by the nursing home who is designated by the nursing home administrator to act on behalf of the administration, must sign the notice of discharge or transfer. Any notice indicating a medical reason for transfer or discharge must either be signed by the resident's attending physician or the medical director of the facility, or include an attached written order for the discharge or transfer. The notice or the order must be signed by the resident's physician, medical director, treating physician, nurse practitioner, or physician assistant.

...

(c) If the hearing decision is favorable to the resident who has been transferred or discharged, the resident must be readmitted to the facility's first available bed....

...

**(7) At least 30 days prior to any proposed transfer or discharge, a facility must provide advance notice of the proposed transfer or discharge to the resident and, if known, to a family member or the resident's legal guardian or representative, except, in the following circumstances, the facility shall give notice as soon as practicable before the transfer or discharge:**

(a) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility, and the circumstances are documented in the resident's medical records by the resident's physician, or

(b) The health or safety of other residents or facility employees would be endangered, and the circumstances are documented in the resident's medical records by the resident's physician or the medical director if the resident's physician is not available.

(8) The notice required by subsection (7) must be in writing and must contain all information required by state and federal law, rules, or regulations applicable to Medicaid or Medicare cases. The agency shall develop a standard document to be used by all facilities licensed under this part for purposes of notifying residents of a discharge or transfer. Such document must include a means for a resident to request the local long-term care ombudsman council to review the notice and request information about or assistance with initiating a fair hearing with the department's Office of Appeals Hearings. **In addition to any other pertinent information included, the form shall specify the reason allowed under federal or state law that the resident is being discharged or transferred, with an explanation to support this action.** Further, the form must state the effective date of the discharge or transfer and the location to which the resident is being discharged or transferred. The form must clearly describe the resident's appeal rights and the procedures for filing an appeal, including the right to request the local ombudsman council review the notice of discharge or transfer. A copy of the notice must be placed in the resident's clinical record, and a copy must be transmitted to the resident's legal guardian or representative and to the local ombudsman council within 5 business days after signature by the resident or resident designee. (Emphasis added).

10. In this case, the nursing facility's discharge notice was dated November 29, 2018 with a proposed discharge date of November 30, 2018. The facility also submitted a discharge notice with a discharge date of December 7, 2018. Neither of these discharge notices is in compliance with the 30-day advance notice requirement specified in the statutory provisions cited above.

11. In addition, both discharge notices provided by the facility were completely blank as to the reason for the discharge and did not contain any explanation for the discharge. The applicable authorities require that the discharge notice contain an explanation of the reason for the discharge.

12. After review of the cited authorities and evidence, the undersigned concludes that the facility's action in discharging the petitioner was improper, as the facility failed to provide a proper notice of discharge to the petitioner.

**DECISION**

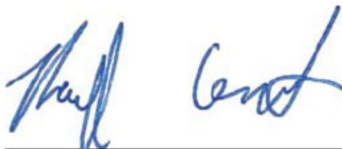
Based on the foregoing Findings of Fact and Conclusions of Law, this appeal is GRANTED. The respondent has not established that this discharge was in compliance with Federal or State regulations.

**NOTICE OF RIGHT TO APPEAL**

The decision of the hearing officer is final. Any aggrieved party may appeal the decision to the district court of appeals in the appellate district where the facility is located. Review procedures shall be in accordance with the Florida Rules of Appellate Procedure. To begin the judicial review, the party must file one copy of a "Notice of Appeal" with the Office of Appeal Hearings, Bldg. 5, Rm.255, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The party must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The department has no funds to assist in this review, and any financial obligations incurred will be the party's responsibility.

DONE and ORDERED this  27  day of  February , 2019,

in Tallahassee, Florida.



---

Rafael Centurion  
Hearing Officer

FINAL ORDER (Cont.)

18N-00157

PAGE - 10

Building 5, Room 255  
1317 Winewood Boulevard  
Tallahassee, FL 32399-0700  
Office: 850-488-1429  
Fax: 850-487-0662  
Email: Appeal.Hearings@myflfamilies.com

Copies Furnished To: [REDACTED], Petitioner

[REDACTED], Respondent

Agency for Health Care Administration  
[REDACTED].