

FILED

May 30, 2019

Office of Appeal Hearings
Dept. of Children and Families

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

[REDACTED]

APPEAL NO. 19N-00023

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing in the above-referenced matter convened on April 26, 2019 at 10:00 a.m. at [REDACTED] located in [REDACTED].

APPEARANCES

For the Petitioner: [REDACTED], pro se

For the Respondent: [REDACTED], Facility Administrator

STATEMENT OF ISSUE

At issue is the facility's intent to discharge the petitioner; a Nursing Home Transfer and Discharge Notice was issued on February 12, 2019 with an effective date of March 13, 2019. The nursing home is seeking to discharge the petitioner due to her health improving sufficiently that she no longer needs the services provided by the facility. The facility has the burden of proof to establish by clear and convincing

evidence that the petitioner's discharge is in accordance with the requirements of the Code of Federal Regulations at 42 C.F.R. § 483.15 and Florida Statutes, Section 400.0255.

PRELIMINARY STATEMENT

██████████, Director of Nursing; ██████████, Unit Manager; and ██████████ ██████████, Director of Social Services appeared as witnesses for the respondent.

The petitioner presented one exhibit which was accepted into evidence and marked as Petitioner's Exhibit "1". On March 25, 2019, the respondent submitted a copy of the Nursing Home Transfer and Discharge Notice, which was accepted into evidence and marked as Respondent's Exhibit "1". On April 19, 2019, the Office of Appeal Hearings received a letter from the Agency for Health Care Administration (AHCA) which informed that an unannounced visit to the nursing facility was completed and there were no violations. This letter was entered into evidence and marked as Hearing Officer's Exhibit 1. The record was left open until close of business on May 7, 2019 for the respondent to submit evidence. On May 3, 2019, the respondent submitted a packet of documents, which was entered into evidence and marked as Respondent's Exhibit "2". These documents consisted of the petitioner's hospital stay on June 2018, progress notes, records of communications between the parties, and medical records. The record closed on May 7, 2019.

FINDINGS OF FACT

1. The petitioner was admitted into the respondent's skilled nursing facility on June 18, 2018 for rehabilitation after a hospital stay. The petitioner has been diagnosed with

█ and █. She needed occupational and physical therapy services. She received those services at the facility.

2. The respondent explained the petitioner made progress and met her therapy goals. She was evaluated by the attending physician. The evaluation concluded that her health improved and she no longer needed the services provided at the facility.

3. On February 12, 2019, the respondent issued a Nursing Home Transfer and Discharge Notice to the petitioner with an effective date of March 13, 2019. The notice allows for a brief explanation to support the action and explains a physician/designee's signature or a physician's written order for discharge are required if the facility is seeking to discharge a resident because he/she no longer require the services provided by the facility. The brief explanation of the action and physician/designee's signature were blank on the notice provided to the petitioner. The notice indicated the following:

The following reasons require either this form be signed by a physician or a physician's written order for discharge or transfer be attached. The signing physician may be the resident's attending or treating physician, the facility medical director, or a nurse practitioner or physician's assistance as a physician designee.

4. The respondent confirmed the attending physician did not sign the Nursing Home Transfer and Discharge Notice; the administrator was not aware a physician's signature was a requirement. The respondent contends they have made several attempts to assist the petitioner by offering to purchase a ramp and a wheelchair for her home, she refused the offer. No evidence was submitted by the respondent regarding the facility medical director, or a nurse practitioner or physician's assistant as a physician designee agreeing to discharge the petitioner on February 12, 2019 (Respondent Exhibit 2).

5. The petitioner explained she is gradually improving but cannot stand on her feet. She requests more time at the facility to heal and get better. The petitioner submitted a statement, dated February 21, 2019, from her podiatrist, [REDACTED], DPM from [REDACTED] clinic which indicates; "Please keep [REDACTED] at [REDACTED] 4 more weeks" (Petitioner Exhibit 1).

CONCLUSIONS OF LAW

6. 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.

7. Federal Regulations at 42 C. F. R. § 483.15, Admission, transfer and discharge rights, states in relevant part:

...
(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—

...
(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;

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

(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;

...

8. On February 12, 2019, the facility issued a Nursing Home Transfer and Discharge Notice to the petitioner. The reason listed for discharging the petitioner was that her health had improved sufficiently so that she no longer needed the services provided by the facility, which is a reason permitted for discharge from a facility, in accordance with the above federal regulations.

9. Section 400.0255, Florida Statutes, Resident transfer or discharge; requirements and procedures; hearings in part states:

...

(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.** (emphasis added)

...

(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,...

...

(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.

...

(15) (a) The department's Office of Appeals Hearing shall conduct hearings under this section...

...

(d) The decision of the hearing officer shall be final. Any aggrieved party may appeal the decision to the district court of appeal in the appellate district where the facility is located. Review procedures shall be conducted in accordance with the Florida Rules of Appellate Procedure.

...

10. In accordance with the above federal regulation and statute, when a discharge or transfer is initiated by a facility and the notice indicates a medical reason for the transfer or discharge, the notice must be signed by the resident's physician, medical director, treating physician, nurse practitioner, or physician assistant. The respondent acknowledged the physician did not sign the discharge notice. The evidence submitted by the respondent does not demonstrate that the petitioner's health has improved

sufficiently so that she no longer requires the services provided at the facility.

Furthermore, the Nursing Home Transfer and Discharge Notice issued to the petitioner is inadequate and does not meet the requirements set forth in the above-cited regulations.

11. The controlling authorities require a higher standard of proof in nursing home discharge hearings; there must be substantial and credible evidence at the level of clear and convincing¹. The undersigned concludes the respondent's evidence does not rise to the level of clear and convincing.

12. The undersigned reviewed the findings and evidence regarding the discharge reason. The undersigned concludes the respondent has NOT met the burden of proof, by clear and convincing evidence, to show the petitioner should be discharged for this reason.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is hereby GRANTED. The facility has not established that this discharge is permissible under federal or state regulations; therefore, the facility may NOT proceed with the discharge at this time.


¹ State v. Graham, 240 So.2d 486 (1974), states, "Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. (Id. quoting Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983))."

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 30 day of May, 2019,

in Tallahassee, Florida.



Cassandra Perez
Hearing Officer
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Copies Furnished To: [REDACTED], Petitioner

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Agency for Health Care Administration