

Jun 17, 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-00033

PETITIONER,

vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative nursing home discharge hearing in the above-referenced matter on May 14, 2019, at 2:05 P.M., at [REDACTED], Florida (hereinafter referred to as "the Facility").

APPEARANCES

For the Petitioner: [REDACTED],
Petitioner's Daughter and Representative

For the Respondent: [REDACTED] Nursing Home Administrator, NHA

STATEMENT OF ISSUE

Petitioner appeals Respondent's action discharging her from the Facility.
Respondent carries the burden of proof by clear and convincing evidence in this appeal.

PRELIMINARY STATEMENT

██████████, Director of Nursing; ██████████, Social Services Director; and ██████████, Regional Nurse/Clinical Support also appeared on behalf of Respondent.

No representative from the Agency for Health Care Administration (hereinafter referred to as "AHCA") was present. On March 27, 2019, the Office of Appeal Hearings received a letter from AHCA stating, in part, that it opened up an on-site inspection.

The reason for the discharge, given in the Nursing Home Transfer and Discharge Notice (hereinafter referred to as "Discharge Notice"), is: (1) Petitioner's "needs cannot be met in this facility."

The Discharge Notice and the letter from AHCA were introduced and marked as Hearing Officer's Exhibits 1 and 2, respectively. Petitioner did not present any exhibits. Respondent introduced six exhibits which were accepted into evidence. Said evidence was received and marked as: Respondent's Composite Exhibit 1 and Respondent's Exhibits 2 through 6.

The record was left open until the close of business, May 25, 2019, for Respondent to submit additional evidence and for Petitioner to respond. Said evidence was submitted by Respondent on May 14, 2019, was marked, and was admitted into evidence as Respondent's Exhibit 7. The record subsequently closed on May 25, 2019.

Respondent provided a document which was identified as a federal regulation. The undersigned initially advised of taking administrative notice of the document as Section 483.25 (d). Upon further review of the document, it appears to provide more of a summary of portions of federal regulations in lieu of actual being a federal regulation.

It appears that the document that Respondent has provided is referring, in part, to the Code of Federal Regulation, Title 42, Section 483.25. Accordingly, the undersigned takes administrative notice of 42 CFR Section 483.25.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Petitioner has dementia (Petitioner's Oral Testimony, Respondent's Oral Testimony, Respondent's Composite Exhibit 1, and Respondent's Exhibit 4).
2. Petitioner is ambulatory (Respondent's Oral Testimony).
3. Petitioner is prone to wandering (Respondent's Oral Testimony, Respondent's Composite Exhibit 1, and Respondent's Exhibit 4).
4. Petitioner not only wanders, but she is also "exit seeking" (Respondent's Oral Testimony).
5. On January 24, 2019, Petitioner was seen exiting the Facility through its front door (Respondent's Oral Testimony and Respondent's Composite Exhibit 1).
6. As a result of the above referenced elopement, on January 24, 2019, Petitioner was put on one-to-ones (individual supervision) for 72 hours, and hourly door checks were instituted (Respondent's Oral Testimony and Respondent's Exhibit 6).
7. On February 21, 2019, Petitioner once again exited the Facility through the front door (Respondent's Oral Testimony and Respondent's Composite Exhibit 1).
8. Again, Petitioner was placed on one-to-ones (Respondent's Oral Testimony and Respondent's Exhibit 6).

9. The Facility is unable to provide continuous one-to-ones for Petitioner (Respondent's Oral Testimony).
10. The Facility is not a secure or "lock down" facility (Respondent's Oral Testimony).
11. The Facility opens out to State Road 17, which poses a safety risk to Petitioner (Respondent's Oral Testimony).
12. On March 15, 2019, Petitioner was given a Discharge Notice (Hearing Officer's Exhibit 1).
13. Pursuant to the Discharge Notice, Petitioner is to be discharged [REDACTED] [REDACTED]. (*Id.*).
14. [REDACTED] has a secured unit (Respondent's Exhibit 3 and Respondent's Oral Testimony).
15. Altering Petitioner's medication has not helped to abate the elopements (Respondent's Oral Testimony).
16. It is recommended that Petitioner be transferred to a secured/dementia unit (Respondent's Oral Testimony, Respondent's Composite Exhibit 1, and Respondent's Exhibit 4).

CONCLUSIONS OF LAW

17. The Florida Department of Children and Families (hereinafter referred to as "the Department"), 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 that section, this order is the final administrative decision of the Department.

18. The Code of Federal Regulations, Title 42, Section 483.15, Admission, transfer and discharge rights in relevant part states:

- ...
- (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. Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for his or her stay. 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. (Emphasis added).

19. Florida Statutes, Title 29, 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.

...

(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...

...

(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 Hearings shall conduct hearings under this section. The office shall notify the facility of a resident's request for a hearing.

(b) The department shall, by rule, establish procedures to be used for fair hearings requested by residents. These procedures shall be equivalent to the procedures used for fair hearings for other Medicaid cases, chapter 10-2, part VI, Florida Administrative Code. The burden of proof must be clear and convincing evidence. A hearing decision must be rendered within 90 days after receipt of the request for hearing.

20. In accordance with the above federal regulation and state statute, the Discharge Notice was signed by the facility administrator and physician/designee. A copy was also provided to Petitioner. The Discharge Notice also indicated the reason and effective date of the discharge, the location to which Petitioner was to be discharged, and Petitioner's appeal rights along with other required assistance information.

21. The evidence submitted establishes that Petitioner's medical records were documented pursuant to The Code of Federal Regulations, Title 42, Section 483.15. The evidence further indicates that Petitioner is a wanderer who is prone to "exit seeking." The evidence also shows that Respondent has tried implementing safety strategies such as one-to-ones. Yet, as the Facility is not a secured facility, the one-to-ones would have to be continuous in nature in order to ensure Petitioner's safety, and Respondent is unable to provide continuous one-to-ones. This leaves the only option available, to ensure Petitioner's safety, to be a secured facility. Respondent has identified a secured facility that would meet the needs of Petitioner.

22. The evidence submitted establishes that Petitioner's clinical records were well documented that the facility cannot meet her needs.

23. 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 convincing. The undersigned concludes Respondent's evidence does rise to the level of clear and convincing.

24. Establishing that the reason(s) for a discharge is lawful is just one step in the discharge process. The Facility must also identify an appropriate transfer or discharge location and a safe and orderly transfer or discharge from the facility. The Hearing Officer cannot and has not considered either of these issues. The Hearing Officer only considered whether the discharge was for a lawful reason(s) and that the requirements of the controlling authorities have been met.

25. Discharge by the Facility must comply with all applicable Federal Regulations, Florida Statutes, and Agency for Health Care Administration requirements. Should Petitioner have concerns about the appropriateness of the discharge location or the discharge process, she may contact the Agency for Health Care Administration's health care facility complaint line at (888) 419-3456.

26. After careful review of the cited authorities and evidence, the undersigned concludes that Respondent did meet the burden of proof by clear and convincing evidence. The undersigned concludes that Respondent's action discharging Petitioner is proper, as the Facility has proven that it could not meet Petitioner's needs.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, this appeal is DENIED. Respondent has established that this discharge is permissible under federal regulations or state statutes. Therefore, Respondent may proceed with the discharge, in accordance with all applicable AHCA requirements.

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 17 day of June, 2019,

in Tallahassee, Florida.



Leonard Jackson
Hearing Officer
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Copies Furnished To:

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