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

Dec 18, 2020

Office of Appeal Hearings
Dept. of Children and Families

APPEAL NO. 20N-00072

PETITIONER,

Vs.

ADMINISTRATOR

RESPONDENT.
_________________________________/

FINAL ORDER

Pursuant to notice, the undersigned convened a nursing home discharge hearing via Microsoft Teams video conferencing in the above-referenced matter on September 8, 2020 at 2:45 p.m. The hearing was reconvened via Microsoft Teams video conferencing on September 24, 2020 at 2:03 p.m.

APPEARANCES

For the Petitioner:
Attorney with Peter J. Snyder, P.A.

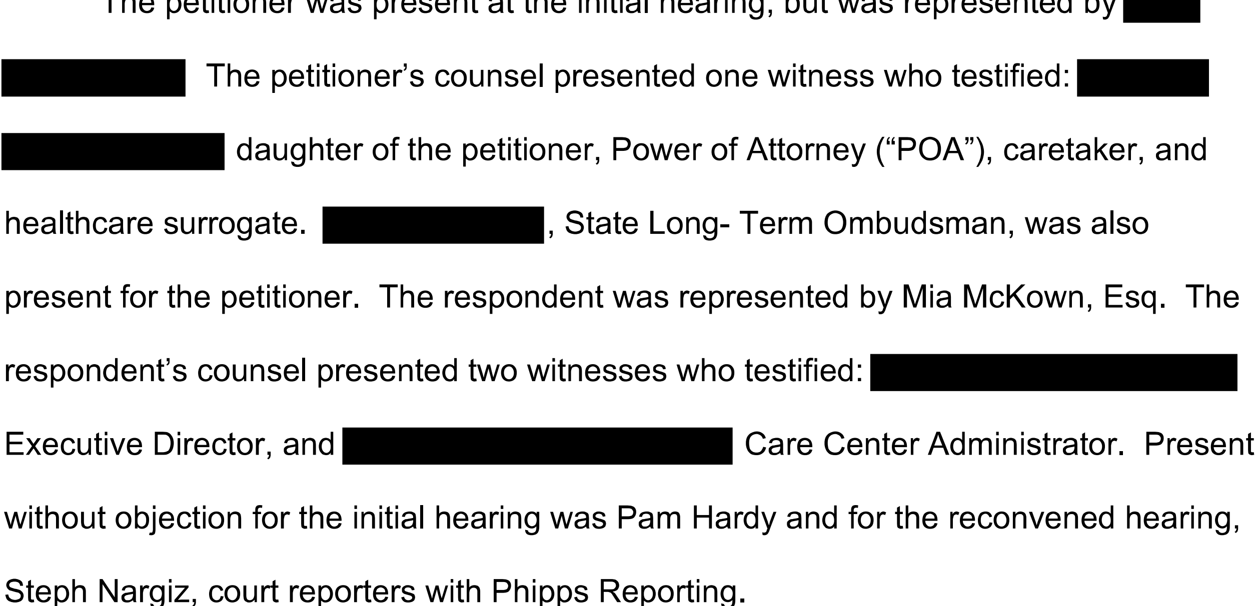
For the Respondent: Mia McKown, Esq.
Attorney with Holland and Knight LLP

STATEMENT OF ISSUE

The petitioner appeals the respondent's action to discharge her from (the "Facility"). The respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

To ensure the safety of all individuals during the Coronavirus pandemic and per the Governor's directive, this hearing was changed from an in-person hearing to a telephone hearing. One continuance was granted as the petitioner's representative requested that the hearing be held via Microsoft Teams video conferencing. This appeal was then continued one time per the respondent's request.



The petitioner was present at the initial hearing, but was represented by The petitioner's counsel presented one witness who testified: daughter of the petitioner, Power of Attorney ("POA"), caretaker, and healthcare surrogate. , State Long- Term Ombudsman, was also present for the petitioner. The respondent was represented by Mia McKown, Esq. The respondent's counsel presented two witnesses who testified: Executive Director, and Care Center Administrator. Present without objection for the initial hearing was Pam Hardy and for the reconvened hearing, Steph Nargiz, court reporters with Phipps Reporting.

The petitioner's evidence packet was marked and entered as Petitioner's Exhibits "1" through "4" at the reconvened hearing. The respondent's evidence packet was marked and entered as Respondent's Exhibits "1" through "3," "6" and "10" through "13" at the initial hearing. The record was held open through October 26, 2020 for the parties to submit proposed orders. On October 23, 2020, the respondent filed an Unopposed Motion for Extension for Submission of Proposed Final Order requesting one more day to submit the proposed Final Order. On October 26, 2020, the undersigned issued an Order Granting Respondent's Unopposed Motion for Extension

for Submission of Proposed Final Order allowing the proposed orders to be submitted by October 27, 2020. The proposed orders were received timely and the record was subsequently closed.

The undersigned took Administrative Notice of State of Florida, Division of Emergency Management Order No. 20-006, Emergency Order dated March 15, 2020, and Chapter 400, Florida Statutes.

Petitioner's Position

The petitioner's counsel took the position that it would be in the best interest for the petitioner to stay at the Facility. [redacted] was never notified or alerted that the petitioner's needs could not be met by the Facility or that the petitioner was a safety or health risk to anyone at the Facility.

Respondent's Position

The respondent's counsel took the position that [redacted] claims the petitioner is not getting the proper care that she needs at the Facility. The Facility has had to increase staffing over the last six months to help cover additional needs for the petitioner as the petitioner requires two nurses to be assigned to her every shift. The staff members are being pulled from other residents to help assist the petitioner, which puts the health and safety of other residents in danger. The petitioner needs one on one care and the Facility does not offer that type of care. The respondent has requested that the petitioner be discharged on the basis that her needs cannot be met at the facility, the health of other individuals in the facility are endangered, and the safety of other individuals in the facility are endangered.

FINDINGS OF FACT[1]

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

1. The Facility is a Continuing Care Retirement Community that allows residents access to multiple levels of care on a single campus. (Resp't Counsel September 8, 2020.)

2. The petitioner is 92 years old and currently resides in the Care Center, which is the skilled nursing setting. The petitioner is legally blind, immobile and essentially non-verbal; has been unable to communicate effectively; does not initiate directions regarding her needs; is unable to use the call button and does not make her own health care decisions. (*Id.*)

3. The petitioner has been a resident of the Facility since [redacted] The Facility and the petitioner signed an agreement that the Facility would provide long term care services to the petitioner. This includes basic skilled nursing services, but does not include one-on-one care. (Resp't Ex. 2.) The petitioner was transferred over to the Care Center in January 2014. (Resp't Counsel September 8, 2020.)

4. On or about March 16, 2020, the residents' family members were no longer allowed on the property based on the Department of Emergency Management's order No. 20-006, related to the COVID-19 pandemic. (*Id.*)

5. While the Facility was not able to let visitors in to see the residents, [redacted] had a camera installed in the petitioner's room, so she could see and hear all activity that went

[1] Citations within the Findings of Fact and Conclusions of Law in this order follow Florida Rules of Appellate Procedure 9.800 and *The Bluebook: A Uniform System of Citation* as the standard for citation.

on in her mother's room. ███ was able to monitor the petitioner's care and advise the Facility when something was needed for the petitioner. (Resp't Wit. L.G. Test. September 8, 2020.)

6. On April 4, 2020, ███ spoke with the petitioner's doctor, ███ through text messages, and he informed her that she should keep the petitioner at the Facility and the petitioner seems to be her usual self the last time he saw her. (Pet'r Ex. 2.)

7. On July 1, 2020, the respondent issued a Nursing Home Transfer and Discharge notice ("Notice") to the petitioner informing her that she was to be discharged from the facility effective ███ The reasons cited were:

(1) "Your needs cannot be met in this facility."

(2) "The health of other individuals in this facility is endangered."

(3) "The safety of other individuals in this facility is endangered." (Resp't Ex. 1 at 5-6.)

8. The Notice designates the petitioner would be released to ███'s residence and was signed by ███ and Physician ███ (*Id.*) The Notice also included a four-page letter signed by ███, summarizing the reasons the Facility is requesting a discharge of the petitioner. (Resp't Ex. 1 at 1-4.)

9. The petitioner's witnesses have had little contact with the petitioner and little knowledge of her medical condition. (Resp't Wit. ███ and ███ Test. September 8, 2020.)

10. ███ has been threatened by multiple staff members that they will quit working at the Facility if the petitioner stays at the Facility. Losing tenured staff would be

very dangerous to the wellbeing and safety of the residents. At the time of the hearing, no staff members have quit working at the Facility. (Resp't Wit. ███ Test. September 8, 2020.)

11. When ███ notices a need for the petitioner, the staff feels they must stop what they are doing while caring for other residents to go to attend to the petitioner's needs. ███ has requested that the nursing staff check in on the petitioner every 30 minutes and the Facility agreed to checking on the petitioner every hour. There is no limit on the number of times a resident can turn the call light on, make a request, nor how many complaints they can make. (Resp't Wit. ███ Test. September 8, 2020.)

12. The Facility currently has two nurses scheduled each shift to check on and assist the petitioner, as opposed to the other residents that are assigned one nurse. This double-staffing model is insufficient to meet the one-on-one care demanded by ███ and endangers other residents since staff members are pulled away from other resident's care. The Facility currently meets the staffing standards required by the state. (*Id.*)

13. ███ believes the Facility can provide appropriate activities for her mother as they are currently lacking in that area. She has provided a schedule to the staff of the Facility to help them improve on caring for the petitioner. (Pet'r Wit. Test. September 8, 2020)

14. Medical records that are maintained by the respondent in the regular and usual course of its business dated November 2019 through July 2020 were compiled. The records include notes from staff members at the Facility stating ███ yells at staff regarding her repeated complaints as to the Facility's ability to provide care or the care

provided to the petitioner. On December 18, 2019, wanted to specify timing of care, which could impact the care of others. On March 21, 2020, contacted staff eight times to articulate AHCA regulations, pulling staff from helping other residents. On May 13, 2020, spoke with the Facility on the phone to discuss complaints that they were unable to provide the required care. The medical records indicate that has advised the Facility that nurses speak too loudly to the petitioner, the Facility continues to fail to meet the petitioner's social, intellectual, and psychological well-being and has informed the facility as to which nurses cannot feed the petitioner. A possible discharge is not stated at any point in the medical records. (Resp't Ex. 6.)

15. reviewed the medical records of the petitioner and did not know if the petitioner's doctor had documented that the petitioner's needs could not be met by the facility. (Resp't Wit. Test. September 8, 2020.)

16. The most recent Care Plan for the petitioner dated August 6, 2020, does not indicate that the petitioner is a danger to herself or staff and does not notate a possible discharge. The Care Plan doesn't state one on one care is needed for the petitioner and the respondent did not claim that has requested one on one care. (Pet'r Ex. 1.) The respondent believes one on one care would be needed to meet the petitioner and 's needs and expectations. (Resp't Wit. Test. September 8, 2020.)

17. The Facility states they can care for the petitioner, however one on one care may be needed for 's needs and expectations to care for the petitioner. (*Id.*)

18. The petitioner has never been hostile, demeaning or threatening to anyone at the Facility. (*Id.*)

19. The Facility did not discuss a possible discharge or any alternatives to the discharge with the petitioner or ███ prior to issuing the Notice. (Pet'r Wit. Test. September 24, 2020.)

20. ███ admitted that she is not on board with the model of care in nursing homes but she would like the petitioner to stay at the facility as this is the type of senior living and healthcare the petitioner has requested. The Facility has "helped with a lot of the heavy lifting" with caring for the petitioner and the petitioner has grown to love some of the staff members there. (*Id.*)

CONTROLLING LAW

21. Section 400.0255(15), Florida Statutes, provides the Department of Children and Families, Office of Appeal Hearings, jurisdiction over the subject matter of this proceeding and the parties. This section further prescribes this order as the final administrative decision of the Department of Children and Families.

22. Section 400.0255(15), Florida Statutes, addresses hearings related to nursing homes and related health care facilities and the burden of proof to be met by stating:

> (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.
> (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**.

(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.

[**Emphasis added**]

23. 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.
…
(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.

…

24. Title 42 Code of Federal Regulations Section 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—

(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.

…

(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.

[**Emphasis added**]

25. Title 42 Code of Federal Regulations Section 483.24, Quality of life, states in relevant part:

> Quality of life is a fundamental principle that applies to all care and services provided to facility residents. Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with the resident's comprehensive assessment and plan of care.
> (a) Based on the comprehensive assessment of a resident and consistent with the resident's needs and choices, the facility must provide the necessary care and services to ensure that a resident's abilities in activities of daily living do not diminish unless circumstances of the individual's clinical condition demonstrate that such diminution was unavoidable. This includes the facility ensuring that:
> (1) A resident is given the appropriate treatment and services to maintain or improve his or her ability to carry out the activities of daily living, including those specified in paragraph (b) of this section,
> (2) A resident who is unable to carry out activities of daily living receives the necessary services to maintain good nutrition, grooming, and personal and oral hygiene, and
> (3) Personnel provide basic life support, including CPR, to a resident requiring such emergency care prior to the arrival of emergency medical personnel and subject to related physician orders and the resident's advance directives.
> …

26. Title 42 Code of Federal Regulations Section 483.35, Nursing services, states in relevant part:

> The facility must have sufficient nursing staff with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as

determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with the facility assessment required at §483.70(e).
(a) Sufficient staff. (1) The facility must provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans…
…

27. Title 42 of the Code of Federal Regulations § 483.70, Administration, in part states:

A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident…
(e) Facility assessment. The facility must conduct and document a facility-wide assessment to determine what resources are necessary to care for its residents competently during both day-to-day operations and emergencies. The facility must review and update that assessment, as necessary, and at least annually. The facility must also review and update this assessment whenever there is, or the facility plans for, any change that would require a substantial modification to any part of this assessment. The facility assessment must address or include:
(1) The facility's resident population, including, but not limited to,
(i) Both the number of residents and the facility's resident capacity;
(ii) The care required by the resident population considering the types of diseases, conditions, physical and cognitive disabilities, overall acuity, and other pertinent facts that are present within that population;
(iii) **The staff competencies that are necessary to provide the level and types of care needed for the resident population**;
(iv) The physical environment, equipment, services, and other physical plant considerations that are necessary to care for this population; and
(v) Any ethnic, cultural, or religious factors that may potentially affect the care provided by the facility, including, but not limited to, activities and food and nutrition services…
(i) Residents will be transferred from the facility to the hospital, and ensured of timely admission to the hospital when transfer is medically appropriate as determined by the attending physician or, in an emergency situation, by another practitioner in accordance with facility policy and consistent with state law…

[**Emphasis added**]

CONCLUSIONS OF LAW

28. The above cited authority explains six allowable reasons for discharge from a nursing facility. On July 1, 2020, the Facility issued a notice of discharge to the petitioner, citing three reasons for the discharge as follows: (1) the petitioner's needs cannot be met at the facility; (2) the health of other individuals in the Facility is endangered and (3) the safety of other individuals in the Facility is endangered.

29. In accordance with the above cited authorities, the Notice was signed by the Facility administrator and physician, including the reason for discharge and effective date of the discharge and appeal rights.

30. 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 undersigned cannot and has not considered either of these issues. The undersigned only considered whether the discharge was for a lawful reason(s) and that the requirements of the controlling authorities have been met.

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

The first condition will now be discussed:

The petitioner's needs cannot be met at the facility.

32. The Facility seeks to involuntarily discharge the petitioner, claiming that based on [redacted]'s requests, the petitioner needs one on one care and the Facility does not offer this service.

33. While the petitioner's physician did sign the Notice, he did not testify or have the petitioner's Care Plans notated that her needs cannot be met or that one on one services are needed for the petitioner. [redacted] did not request for one on one care service for the petitioner.

34. The Facility is required to provide quality of life to all residents as stated in the Statute above. [redacted]'s requests to the Facility are to enhance the petitioner's quality of life and to advocate for her, since she is not able to do so herself.

35. At no point did the Facility's witnesses state they are unable to care for the petitioner. [redacted] stated that the Facility has been doing a lot of the heavy lifting when it comes to caring for the petitioner and the petitioner has grown to love some of the staff members there. However, [redacted] believes the Facility can improve the programming for her mother. [redacted] did not wish for her mother to leave the Facility.

36. 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.

37. After careful review of the evidence and testimony, the undersigned concludes that the respondent has not met its burden of proof regarding the first condition as indicated on the Notice.

<u>The second and third condition will now be discussed:</u>

<u>The health and safety of other individuals is endangered.</u>

38. The next two reasons for discharge will be discussed together due to their similarity.

39. The petitioner is blind, immobile, and unable to initiate any communication or requests. The respondent's witness testified that the petitioner has never been hostile, demeaning or threatening to anyone at the Facility.

40. The Facility's reasoning for wanting to discharge the petitioner on these two conditions is staff have to step away form helping other patients to tend to ███'s requests. The respondent's witness explained that they have had to increase staffing as the petitioner needs to have two nurses per shift to meet the additional needs of ███ As stated in the Statute above, the Facility must have "sufficient nursing staff with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care." The petitioner's medical record and care plan do not state that the petitioner needs additional or one on one care. The extra time the petitioner may need or costs to hire additional nurses is not notated in the regulations as a reason for transfer or discharge of a resident.

41. The respondent's witness testified that there is not a limit on the number of times the resident can make a request, turn on the call light, nor make a complaint. Due to the petitioner's limitations, these actions are voiced through ███, who then passes that information onto the Facility. The petitioner may require additional time and effort

compared to other residents; however, this not an acceptable reason for transferring or discharging the petitioner.

42. After careful review of the evidence and testimony, the undersigned concludes that the respondent has not met its burden of proof regarding the second and third condition indicated on the Notice. The respondent's action to discharge the petitioner is solely based on their contentious relationship with ███ This does not meet one of the six requirements allowable under regulation for discharge.

43. Based on the evidence, testimony, and cited authorities, the undersigned concludes that the respondent's decision to discharge the petitioner was not within rule of the program.

DECISION

Based upon the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility is ORDERED to not discharge the petitioner, if she has not yet been discharged. If the petitioner has already been discharged, the respondent is ordered to readmit her to the Facility to the first available bed.

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 __18__ day of __December______, 2020,

in Tallahassee, Florida.

Ashley Brunelle
Hearing Officer
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: Petitioner
Respondent
Agency for Health Care Administration
Mia McKown