

Feb 27, 2023

Office of Appeal Hearings  
Dept. of Children and Families

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

[REDACTED]  
[REDACTED]  
[REDACTED]

APPEAL NO. 22N-00109

PETITIONER,  
VS.

ADMINISTRATOR

[REDACTED]  
[REDACTED]  
[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on January 19, 2023 at 3:09 p.m.

**APPEARANCES**

For Petitioner: [REDACTED]

For Respondent: [REDACTED]

**STATEMENT OF ISSUE**

Petitioner appeals Respondent's action to discharge her from [REDACTED] [REDACTED] (the "Facility"). Respondent carries the burden of proof by clear and convincing evidence.

**SUMMARY OF PROCEEDINGS**

On December 2, 2022, Petitioner timely requested a Fair Hearing regarding a Nursing Home discharge. Petitioner is a resident of the Facility but did not appear.

[REDACTED] ("Pet'r Wit. 1"), Petitioner's son; and [REDACTED] (Pet'r Wit. 2"), Petitioner's son and Power of Attorney ("POA"), appeared as Petitioner's witnesses.

██████████ (“Resp’t. Wit. 1”), Director of Clinical Services; ██████████  
 (“Resp’t Wit. 2”), Director of Social Services; ██████████ (“Resp’t Wit. 3”),  
 Petitioner’s attending physician, appeared as Respondent’s witnesses.

██████████, ██████████ appeared  
 as a Spanish translator for Petitioner’s witnesses with no objection.

Petitioner submitted portions of an evidence packet, which were marked and  
 entered into the record as Petitioner’s Exhibits one (“1”) through eighteen (“18”).  
 Respondent submitted one document, it was marked and entered into the record as  
 Respondent’s Exhibit one (“1”).

#### **Petitioner’s Position**

Petitioner took the position that she wishes to remain at the Facility. She is on  
 the memory care unit and receives care for her conditions. Petitioner does not believe  
 her family can care for her in their home.

#### **Respondent’s Position**

Respondent took the position that the safety of the staff and residents are  
 endangered by Petitioner; her inappropriate behaviors requiring one-on-one supervision  
 at the Facility, and she should be discharged to a more appropriate setting. Petitioner  
 no longer has a medical need to be in the Facility and can return to the family’s care  
 with community support services.

#### **FINDINGS OF FACT<sup>1</sup>**

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:

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<sup>1</sup> Citations within the Findings of Fact and Conclusions of Law in this order follow Florida Rule of  
 Appellate Procedure 9.800 and *The Bluebook: A Uniform System of Citation* as the standard for citation.

1. Petitioner was admitted to the Facility on July 21, 2022 with multiple diagnoses including, but not limited to, dementia, psychosis, mood disorder, anxiety, and depression. (Pet'r Ex. 3; Pet'r Ex. 6; Hr'g R.)
2. Respondent believes Petitioner is fixated on one male resident who reminds Petitioner of her deceased husband. (Pet'r Ex. 6; Hr'g R.)
3. On July 31, 2022, the Facility completed an immediate and five-day report because of inappropriate behavior by Petitioner toward another resident. After this July 2022 incident, Facility requested Petitioner's family provide one-on-one supervision of Petitioner and they did so for a period of time. Subsequently, Petitioner's family stopped providing one-on-one supervision and the Facility staff has had to provide one-on-one supervision of Petitioner with no assistance from the family. (Hr'g R.)
4. The July 2022 incident of inappropriate behavior by Petitioner was very upsetting to staff and residents on the unit. The other residents should not be subjected to Petitioner's inappropriate behavior. (Resp't. Wit. 1. Test.)
5. On September 22, 2022, the attending physician, signed a Medical Certification for Medicaid Long-Term Care Services and Patient Transfer Form indicating the following: "I certify the individual requires nursing facility (NF) services." The Rehab Potential was indicated as "fair". Additionally, the form indicates there are two patient risk alerts: 1) falls and 2) elopement. (Pet'r Ex. 2 at 2.)
6. On October 4, 2022, Respondent had discussions with [REDACTED] regarding lack of willingness by Petitioner's family to move her to a more appropriate "all female" facility. Respondent believes the [REDACTED] advised them of the "thirty-day DC notice" if the Facility cannot meet patient's needs. (Hr'g R.)

7. On October 5, 2022, a Registered Nurse signed a "Notification of Level of Care" form indicating the Petitioner's level of care needed was "skilled" and the placement recommendation was "Nursing home." The effective level of care date was July 21, 2022. (Pet'r Ex. 2 at 1.)

8. On October 12, 2022, the Social Services Director made the following Progress Notes entry:

SSD did ask permission to involve [REDACTED]...to assist with ALF placement. Both sons gave verbal consent. All parties, staff and family, understand that a transfer will happen as soon as it can, once [REDACTED]. [REDACTED] is Medicaid approved...Will f/u with [REDACTED] in hopes of securing a more appropriate place of residence.

(Pet'r Ex. 18.)

9. On October 25, 2022, a psychiatric evaluation note indicates the following:

As per report, the patient consistently displays manipulative tendencies, engages in staff splitting behaviors, and stealing a therapeutic items from peers in an attempt to provoke them. The patient has also been hypersexual if the including flashing peers and masterbating [sic] in visible areas to attract male attention. The patient is fixated on a male peer, has tried to hurt patient.

(Pet'r Ex. 16.)

10 Respondent believes Petitioner's sons delayed responding to the Facility regarding Petitioner's medication changes recommended by a mental health professional. Respondent believes this caused a delay in treatment. (Hr'g R.)

11. Petitioner's son wished to know the side effects of any new medication because he was concerned about his mother falling. The son wished to get an opinion from a doctor outside of the Facility, and he was awaiting the appointment with this doctor.

(Pet'r. Wit. 2 Test.)

12. Respondent believes [REDACTED] is the attending physician, not the off-site doctor. (Hr'g R.)

13. Respondent attempted to contact Petitioner's sons regarding medication every day between November 22, 2022 and November 25, 2022; and on November 30, 2022 with no response. On Thanksgiving, when Petitioner's son took Petitioner home for the holiday, he advised Respondent he was going to discuss the medication changes with his brother. Respondent believes they did not hear back from Petitioner's sons regarding the medication. (Resp't Wit. 1 Test.)

14. On November 30, 2022, the Director of Nursing entered Facility Progress Notes for Petitioner indicating potential Hospice services for Petitioner and a potential room change off the unit. (Pet'r Ex. 3 at 2.) Petitioner is unstable requiring psychiatric assessment, and "continues with aggressive behaviors toward staff, including hitting, kicking, punching." (*Id.* at 3.)

15. On December 2, 2022, the Respondent issued Petitioner a Nursing Home Transfer Discharge Notice ("Notice"), indicating that Petitioner's needs cannot be met in this facility and the health and safety of other individuals in this facility is endangered. It was noted that "POA/son have delayed physician recommended treatment which has impeded our ability to care for this patient." (Pet'r Ex. 1 at 3-4.)

16. The notice was signed by the [REDACTED]. (*Id.*)

17. On December 3, 2022, the following miscellaneous note was made regarding Petitioner's behavior:

Spoke to unit nurse about pt behaviors to assess for possibility of Baker Act. Per staff, patient had barricaded herself in her room and was using a garbage bag as leverage to hold door closed. When staff entered the room, patient took back and wrapped it around her neck. Staffed notified

that [REDACTED] social worker would be calling to discuss Baker Act. Per [REDACTED] staff decided not to let him assess patient as they believe they can keep her safe on the unit. ...

(Pet'r Ex. 14.)

18. On December 22, 2022, the Respondent completed an assessment and determined Petitioner is no longer at risk for elopement. (*Id.*)

19. Respondent believes Petitioner is independent and can physically care for herself. Respondent believes Petitioner's behaviors have impacted other patients' daily lives and interfered with their visitation from loved ones. Respondent believes Petitioner has physically confronted another patient's visitor. (Hr'g R.)

20. Petitioner is the only patient on the memory care unit who can dress herself. (*Id.*)

21. Respondent believes they cannot continue to provide one-on-one supervision to Petitioner. (Resp't Wit. 3 Test.)

22. Respondent believes Petitioner's family made two complaints to the Agency for Healthcare Administration regarding Petitioner's care. (Hr'g R.)

#### **CONTROLLING LAW**

23. Section 400.0255(15), Florida Statutes (F.S.), 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.

24. Title 42 Code of Federal Regulations Section 483.15 sets 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. 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;**

...

[Emphasis added].

25. Section 90.801(c), F.S. defines hearsay as "... a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

26. Section 90.802, F.S. states that, "[e]xcept as provided by statute, hearsay evidence is inadmissible."

27. Section 90.803(6), F.S., Hearsay exceptions states:

RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY. —  
(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of

trustworthiness. The term “business” as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

...

28. Section 400.0255, F.S., Resident transfer or discharge; requirements and procedures; hearings, in relevant 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... 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...**

(15)(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.**

[Emphasis added].

29. Florida Administrative Code Rule 28-106.213(3) sets forth that “Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Sections 90.801-.805, F.S.”

### **CONCLUSIONS OF LAW**

30. Respondent’s reasons for issuing Petitioner the Notice are, 1) Your needs cannot be met in this facility, 2) The health of other individuals in this facility is endangered, and

3) The safety of other individuals in this facility is endangered. These are all included in the reasons listed in the above authority as a valid reason for a transfer discharge.

31. The above authority specifies that 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. There is one signature on the Notice. That signature is [REDACTED].

Respondent submitted no written discharge orders attached to the Notice. The undersigned finds the Notice did not contain the required medical personnel signatures.

32. The above authority explains that the Facility must ensure that the transfer discharge is documented in the resident's medical record when there are medical reasons for the discharge. The findings show only one Progress Note entry referencing a future transfer from the Facility. This entry was made by the [REDACTED] on October 12, 2022 and indicates all parties understand a transfer will happen once [REDACTED] becomes Medicaid eligible. The findings show that there were no medical orders submitted documenting a written order for Petitioner's discharge. The undersigned finds there was insufficient medical record documentation regarding Petitioner's transfer or discharge from the Facility.

33. The above controlling authority requires a higher standard of proof in nursing home hearings; there must be substantial and credible evidence at the level of clear and convincing.

34. Regarding Respondent's discharge reasons that the health and safety of others in the facility being endangered, Respondent offered no direct witness testimony to the alleged incidents. Respondent's testimony provided no dates or times of the alleged

incidents. Respondent submitted no corroborating exhibits to support their testimony that the health and safety of others at the Facility is endangered. The testimony provided by Respondent is hearsay. The above authority shows that hearsay may be used to supplement or explain other evidence but shall not be sufficient in itself to support a finding. The undersigned finds there is insufficient evidence supporting that the health and safety of others in the Facility are endangered.

35. Regarding Respondent's discharge reason of Petitioner's needs cannot be met at the Facility, the findings show Respondent believes Petitioner's sons are impeding the Facility's ability to provide medical care by delaying authorization of medication changes. Petitioner's sons believed they wished to obtain outside medical advice before authorizing the new medication. The findings also show Respondent believes Petitioner can be discharged to her family's care now that Medicaid has been approved. The findings show that at a date and time near the issuance of the Discharge Notice, Respondent opted to care for Petitioner in their Facility rather than having her evaluated for possible Baker Act, this supports that the Facility can meet Petitioner's needs. The findings also show the Facility was considering moving Petitioner to a different unit within the Facility on November 30, 2022, which was two days prior to Respondent issuing the Discharge Notice. The above authority explains Documentation in the resident's medical record must include the basis for the transfer, 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). The undersigned concludes Respondent's testimony does not meet this requirement. The exhibits submitted by Petitioner indicate the Facility was able to meet Petitioner's needs.

38. In careful review of the cited authorities and evidence, the undersigned concludes Respondent did NOT meet its burden of proof by clear and convincing evidence.

### **DECISION**

Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility is ORDERED to immediately readmit Petitioner to the Facility. If a bed is not currently open to readmit Petitioner, the Facility must readmit Petitioner as soon as a bed becomes available.

### **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, Suite I, Room 129, 2415 North Monroe Street, Tallahassee, FL 32303-4190. 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. 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, 2023,

in Tallahassee, Florida.



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