

May 24, 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. 23N-00030

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 April 25, 2023 at 2:04 p.m.

APPEARANCES

For Petitioner: [REDACTED]), Authorized Representative

For Respondent: [REDACTED], Social Services Director

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 March 7, 2023, Petitioner timely requested a Fair Hearing regarding a Nursing Home discharge. Petitioner is a resident of the Facility but did not appear.

██████████”), Petitioner’s granddaughter, appeared as Petitioner’s witnesses. ██████████, Director of Nursing appeared as Respondent’s witness.

Petitioner submitted two documents which were marked and entered into the record as Petitioner’s Exhibits one (“1”) and two (“2”). Respondent submitted no exhibits. The undersigned marked and entered one document, the “Nursing Home Transfer and Discharge Notice” (“Notice”) as Administrative Exhibit one (“1”).

Petitioner’s Position

████ took the position that she wishes Petitioner to remain at the Facility. Facility is near her family, and she has been advised she will be moved four (4) hours away, with no local family support system. █████ agrees that Petitioner has wandering behaviors, but this was reported to the Facility before Petitioner was admitted. █████ took the position that Petitioner should be able to stay at the Facility until the Medicaid is approved and Petitioner can be moved to a different facility in █████.

Respondent’s Position

Respondent took the position that they can no longer meet the needs of Petitioner. Since her admission, her condition has changed, and she is displaying wandering and exit-seeking behaviors. Petitioner has been placed on one-on-one supervision for her exit-seeking behavior. Facility is not a locked unit and does not have the appropriate resources or staffing to accommodate exit-seeking behaviors. Respondent has found more appropriate accommodations in █████. Petitioner can be admitted to the █████ memory care facility until her Medicaid is approved, then she can be transferred back to a local memory care facility in █████.

FINDINGS OF FACT¹

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. On September 11, 2022, Petitioner was admitted to a hospital with a diagnosis of dementia with behavioral disturbance, but that improved over the course of her hospitalization. (Resp't Wit. Test.; Hr'g R.)
2. Petitioner was hospitalized on September 11, 2022, as the result of an incident which occurred while wandering from her private home. (Pet'r Wit. Test.)
3. On September 13, 2022 and September 21, 2022, the hospital records show "improvement of her behaviors." (Resp't Wit. Test.)
4. Petitioner's family was advised by the social worker at the hospital that Petitioner could not be released to home because of her wandering and exit-seeking behaviors. The family was further advised Petitioner was to remain at the hospital until an appropriate facility was able to admit and care for her. (Pet'r Wit. Test.)
5. Petitioner believes the family and the hospital notified the Facility of Petitioner's wandering behaviors prior to admission to the Facility. (*Id.*)
6. On September 22, 2022, Petitioner was admitted to the Facility on a stretcher. The Facility progress notes report Petitioner is "ambulatory without assistance and alert with confusion, pleasant and cooperative, but needs to be redirected often". (Hr'g R.)
7. On November 3, 2022, the Facility's psychiatric notes indicate Petitioner is not having abnormal exit-seeking behaviors. (*Id.*)

¹ 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.

8. On November 4, 2022, the Facility behavior notes Petitioner was observed wandering and requiring redirection. (*Id.*)
9. On November 8, 2022, the Facility notes indicate Petitioner is on “one-on-one” observation. Petitioner has a continuous sitter for the acts of exit-seeking and wandering. (*Id.*)
10. On November 11, 2022, the Facility conducted a telephonic care plan with [REDACTED] and [REDACTED] to discuss discharge plans as the Facility is unable to continue the one-on-one indefinitely. (*Id.*)
11. On November 22, 2022, the Facility’s psychiatric notes indicate Petitioner is exit-seeking and is on “one-on-one.” (*Id.*)
12. On December 22, 2022, the Facility sent Petitioner’s info to a sister facility in [REDACTED]. Respondent has been unable to place Petitioner in [REDACTED] due to her Medicaid pending status. (*Id.*)
13. On January 9, 2023, the Facility contacted Petitioner’s family regarding Petitioner’s transfer options. (*Id.*)
14. On January 23, 2023, Respondent discussed with Petitioner’s family the possibility of transferring Petitioner to a sister facility, [REDACTED], until Medicaid is approved, and she can be placed locally at a Facility with a memory care unit. (*Id.*)
15. On February 14, 2023, the Facility advised Petitioner’s family that the Discharge Notice was being issued. (*Id.*)
16. Respondent believes the Facility was initially able to meet Petitioner’s needs based upon the hospital’s diagnosis and her behaviors at admission. However, Petitioner’s behaviors declined shortly after being admitted into the Facility. The Facility

is not a locked memory care facility and they do not have the resources to provide one-on-one supervision of Petitioner. (*Id.*)

17. ■■■ agrees that Petitioner has wandering behaviors, but the Facility should be able to manage these behaviors with simple redirection. (*Id.*)

18. Petitioner's spouse is in a different long-term care facility in ■■■■.

Petitioner has no family or friends at the proposed transfer facility in ■■■■, Florida.

Petitioner's family believes it would create a hardship on them to move her so far away, and they do not wish her to be alone. Petitioner's family believes Petitioner is adapting to the Facility. Petitioner's family believes the Facility can continue to care for Petitioner until the Medicaid is approved and she can be transferred to a closer facility. (Pet'r Ex 2; Hr'g R.)

19. The Facility should not have admitted Petitioner knowing her history if they could not care for her. They should have allowed her to remain at the local hospital until the Medicaid was approved for a facility with a memory care unit. (Pet'r Wit. Test.)

CONTROLLING LAW

20. 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.

21. 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].

22. 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."

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

24. 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.

...

25. 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].

26. 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

27. Respondent’s reason for issuing Petitioner the Notice is “Your needs cannot be met in this facility.” This is included in the reasons listed in the above authority as a valid reason for a transfer or discharge from the Facility.

28. 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. The Notice was signed by [REDACTED], M.D. The undersigned concludes the Notice was properly signed.

29. 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 Respondent provided testimony of progress and psychiatric notes from the Facility. Respondent submitted no exhibits and provided no documentation to support their position. The findings show no medical orders were submitted documenting a written order for Petitioner's discharge. The undersigned finds there was insufficient evidence of medical record documentation regarding Petitioner's transfer or discharge from the Facility.

30. 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, the Facility's attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s). The findings show Respondent provided testimony of portions of the medical record, but no supporting evidence from the medical record itself. The undersigned concludes Respondent's testimony does not meet this requirement.

31. Regarding Respondent's discharge reason "Your needs cannot be met in this facility" with the explanation that Petitioner is exit-seeking and requires appropriate memory care unit. The findings show Respondent offered no direct witness testimony

to the alleged exit-seeking incidents. Respondent's testimony provided no dates or times of the alleged incidents. The findings show that the Facility's Progress notes show Petitioner was placed on one-on-one supervision as of November 8, 2022.

Respondent submitted no corroborating exhibits to support their testimony that they are unable to meet the resident's needs. 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 to support a finding. The undersigned finds there is insufficient evidence supporting that Petitioner's needs cannot be met in the Facility.

32. 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. 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. 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 24 day of May, 2023,

in Tallahassee, Florida.



Judith Schneider
Hearing Officer
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