

Nov 20, 2023

Office of Appeal Hearings
Dept. of Children and Families

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

[REDACTED]

APPEAL NO. 23N-00081

PETITIONER,

VS.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on August 22, 2023, at 11:44 a.m. The hearing reconvened to October 17, 2023, at 3:08 p.m.

APPEARANCES

For Petitioner: [REDACTED], *pro se*

For Respondent: [REDACTED], Nursing Home Administrator

STATEMENT OF ISSUE

Petitioner appeals Respondent’s action discharging Petitioner from [REDACTED] [REDACTED] (the “Facility”). Respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

The initial hearing was scheduled and convened on August 22, 2023, at 11:44 a.m. Petitioner was not present; he was represented by his niece, [REDACTED]. Witnesses for Respondent was [REDACTED], Director of Nursing, and [REDACTED], [REDACTED], Hearing Officer Supervisor, Office of Appeal Hearings, appeared as an observer. Once on record, Petitioner indicated she had not received Respondent's evidence. Respondent explained it did not mail the evidence to Petitioner and assumed she would pick up the evidence at the Facility. Petitioner was advised that her due process rights allowed her the opportunity to review Respondent evidence prior to the hearing. Petitioner elect instead of picking up the evidence, disclosed her email address as a method to receive the evidence. During the hearing, Respondent email to Petitioner the evidence. Upon receipt, Petitioner determined additional time was needed to prepare and requested a continuance.

The request was granted, and the hearing reconvened on October 17, 2023, at 3:08 p.m. [REDACTED] appeared for Petitioner. [REDACTED], Director of Nursing, ("Wit 1") and [REDACTED], Social Services Director ("Wit 2"), appeared as witnesses for Respondent. [REDACTED] did not appear at the October 17, 2023 hearing.

Petitioner initially submitted no exhibits.

Respondent submitted one exhibit, which was marked and entered as Respondent's Exhibit one ("1").

The record was held open for seven days to allow the parties to supplement the record with additional evidence. Respondent submitted additional evidence which was marked and entered as Respondent's Exhibit two ("2"). Petitioner provided a response

to Respondent's evidence, which was marked and entered as Petitioner's Exhibit one ("1").

Petitioner's Position

Petitioner's Representative took the position that she was only made aware of the behavioral issues of Petitioner after she requested an appeal for the discharge that was initiated six days after he arrive at the Facility. Petitioner's Representative argues she cannot take Petitioner into her home as she does not have the proper equipment or ability to care for Petitioner. Petitioner's Representative believes Respondent should assist in locating another Facility for Petitioner that can meet his needs.

Respondent's Position

Respondent took the position that Petitioner becomes agitated and combative. Petitioner has also broken several windows while at the Facility, causing injury to himself, Petitioner has been transported to the hospital on several occasions and has been required to be baker acted during his short stay. Respondent has requested that Petitioner be discharged on the basis that his needs cannot be met at the Facility, and the safety of other individuals in the Facility are endangered.

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. Petitioner [REDACTED] was admitted into the facilities locked, secure unit on June 13, 2023, for long term care. (Hr'g R. October 17, 2023.)

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.

2. On June 14, 2023, Respondent's progress notes completed by the Facility nurse addresses an incident occurred where Petitioner was observed crying and became very agitated. Petitioner was transferred to [REDACTED] hospital for increased agitation.

(Resp't Ex. 2 at 28.)

3. On June 16, 2023, Petitioner was readmitted to the Facility after being transported to [REDACTED] Hospital. (*Id.* at 24.)

4. On June 17, 2023, Petitioner broke out his room window. When Facility staff attempted to assist Petitioner, he became increasingly aggressive. Local law enforcement was called due to the level of his aggression. Petitioner began holding his chest, and the law enforcement officers had him transferred to the hospital for medical care. (*Id.* at 21.)

5. On June 19, 2023, Respondent issued a Nursing Home Transfer and Discharge Notice to the petitioner with an effective date of July 19, 2023. 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 the safety of other individuals in this facility is endangered or your needs cannot be met in the facility. The brief explanation of the action by [REDACTED], MD. included the following: "Due to Resident's aggression and combative behavior". (*Id.*)

6. Respondent submitted Progress Notes from the Facility registered nurse, Licensed Practical Nurse and Registered dietitian. (Resp't Ex. 2 at 1- 29.) Respondent presented Psychiatric Progress notes from [REDACTED] and [REDACTED] [REDACTED] witnessing Petitioner's behavior. The Psychiatric Progress notes were

all dated after the date the discharge notice was issued. There was no testimony from the attending physician and no medical records regarding the correlation of Petitioner's behaviors, how it endangered others and the recommendation of discharge. (*Id.* at 31 – 49.)

7. The record was held open to allow Respondent an opportunity to submit doctor notes or medical records to support Respondent's contention that Petitioner's Needs could not be met at the Facility and that the safety of other individuals in the Facility was endangered. (Hr'g R.)

CONTROLLING LAW

8. 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.

9. 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.

...

(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:

(Emphasis added)

(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, (emphasis added) 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;
- ...

10. Florida Statutes, Title 29, Section 400.0255, 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, 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:

...

(b) The health or safety of other residents or facility employees would be endangered, and the circumstances are documented in the resident's medical records by the resident's physician or the medical director if the resident's physician is not available. (emphasis added)

(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.

...

(10)...

...

(b) If a resident requests a hearing within 10 days after receiving the notice from the facility, the request shall stay the proposed transfer or discharge pending a hearing decision. The facility may not take action, and the resident may remain in the facility, until the outcome of the initial fair hearing, which must be completed within 90 days after receipt of a request for a fair hearing.

...

(11) Notwithstanding paragraph (10)(b), an emergency discharge or transfer may be implemented as necessary pursuant to state or federal law during the time after the notice is given and before the time a hearing decision is rendered. Notice of an emergency discharge or transfer to the resident, the resident's legal guardian or representative, and the State Long-Term Care Ombudsman Program or the local ombudsman council if requested pursuant to subsection (9) must be by telephone or in person. This notice shall be given before the transfer, if possible, or as soon thereafter as practicable. The State Long-Term Care Ombudsman Program or a local ombudsman council conducting a review under this subsection shall do so within 24 hours after receipt of the request. The resident's file must be documented to show who was contacted, whether the contact was by telephone or in person, and the date and time of the contact. If the notice is not given in writing, written notice meeting the requirements of subsection (8) must be given the next working day.

(12) After receipt of any notice required under this section, the State Long-Term Care Ombudsman Program or local ombudsman council may request a private informal conversation with a resident to whom the notice is directed, and, if known, a family member or the resident's legal guardian or designee, to ensure that the facility is proceeding with the discharge or transfer in accordance with this section. If requested, the State Long-Term Care Ombudsman Program or the local ombudsman council shall assist the resident with filing an appeal of the proposed discharge or transfer.

...

(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]

11. Title 42 of the Code of Federal Regulations Section 483.40, Behavioral

health services, states in part:

Each resident must receive and the facility must provide the necessary behavioral health care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care. Behavioral health encompasses a resident's whole emotional and mental well-being, which includes, but is not limited to, the prevention and treatment of mental and substance use disorders.

(a) The facility must have sufficient staff who provide direct services to residents 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 wellbeing 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 §483.70(e). These competencies and skills sets include, but are not limited to, knowledge of and appropriate training and supervision for:

(1) Caring for residents with mental and psychosocial disorders, as well as residents with a history of trauma and/or post-traumatic stress disorder, that have been identified in the facility assessment conducted pursuant to §483.70(e), and

(2) Implementing non-pharmacological interventions.

(b) Based on the comprehensive assessment of a resident, the facility must ensure that—

(1) A resident who displays or is diagnosed with mental disorder or psychosocial adjustment difficulty, or who has a history of trauma and/or post-traumatic stress disorder, receives appropriate treatment and services to correct the assessed problem or to attain the highest practicable mental and psychosocial well-being;

12. Title 42 of the Code of Federal Regulations Section 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 facilitywide 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...

CONCLUSIONS OF LAW

13. The above regulations stipulate that before the Facility discharges a resident under any of the circumstances referenced above, the resident's medical records must be documented by the resident's physician showing the reason for the discharge/transfer, in accordance with the above federal regulations. The Nursing Home Transfer and Discharge Notice was issued to Petitioner on June 19, 2023 with the discharge to be effective July 19, 2023 signed by the Dr. [REDACTED]. No documentation pertaining to Petitioner's behavior and action in correlation with the intent to discharge was submitted to support the Facility's decision to discharge Petitioner. The documents must establish that the Petitioner's clinical records were documented, pursuant to the above authority, prior to the discharge notice. Respondent presented progress notes from the nursing staff and psychiatric notes from the APRN. The evidence submitted does not establish that Petitioner medical records were well documented and demonstrate that Petitioner's his needs cannot be met in the Facility.

Additionally, the psychiatric progress notes addressed dates from June 29, 2023 through August 10, 2023 of communications with Petitioner after the June 19, 2023 discharge notice was issued.

14. Respondent failed to adequately articulate and explain the evidence submitted to establish that Petitioner's actions indicated that his needs could not be met in the Facility or that the welfare of others in the Facility were endangered by Petitioner's actions.

15. The undersigned concludes that the reason for the discharge was provided in Federal Regulation (42 C.F.R. § 483.15); however, the facility failed to provide adequate documentation to support the discharge in the medical records by the physician, as required by the regulations.

16. 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 not rise to the level of clear and convincing.

17. After careful review of the evidence and cited controlling authorities, the undersigned concludes the Facility has not met its burden to prove, by clear and convincing evidence, that Petitioner's needs cannot be met at the Facility or that the safety of other individuals in the Facility is endangered. The facility's intent to discharge the petitioner is not upheld at this time.

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

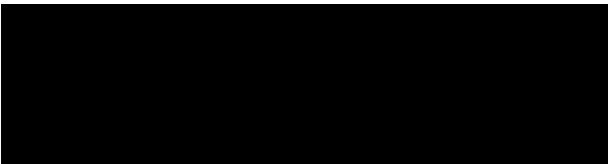
Petitioner to the Facility. If a bed is not currently open to readmit Petitioner, the Facility must readmit Petitioner as soon as a bed becomes available.

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 20 day of November, 2023,

in Tallahassee, Florida.



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