



Defending Evictions from Florida Nursing Facilities

Eviction¹ is permitted only if one or more of these six reasons occurs: ²

1. The resident's needs cannot be met in the facility;
2. The resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
3. The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;
4. The health of individuals in the facility is endangered by the resident's presence;
5. The resident has failed to pay to stay at the facility, despite reasonable and appropriate notice; or
6. The facility ceases to operate.

PRACTICE TIPS

- If the reason for the eviction is medical, the discharge notice must be signed by the resident's physician, medical director, treating physician, nurse practitioner, or physician assistant.³
- Facilities may not use a Notice of Medicare Non-Coverage (NOMNC) as a discharge notice since the NOMNC requirements are separate and unrelated to those for eviction.⁴
- The resident cannot be discharged for failure to pay while the resident's Medicaid eligibility is being determined.⁵
- Consider raising the facility's obligation to (1) inform the resident of the right to apply for Medicaid and (2) ensure the resident has the necessary assistance to apply as a defense for non-payment.⁶
- The nursing facility may not charge an amount above the patient liability as determined by DCF.⁷
- A facility initiates a discharge if it does not allow a resident to return to the facility after hospitalization or therapeutic leave, and it must comply with the legally-mandated discharge requirements.⁸

A nursing facility's written notice of a proposed eviction must:

- Be given to (1) the resident, (2) the resident's representative(s), and (3) Florida's Long-Term Care Ombudsman program ("Ombudsman").⁹
- Be provided at least 30 days prior to the proposed eviction, or "as soon as practicable" when it is related to the welfare/needs of the resident, the health or safety of others at the facility would be endangered, or a resident has not resided in the facility for 30 days.¹⁰
- State the (1) legal grounds for the proposed eviction, (2) proposed effective date, (3)

specific location to which the resident is to be evicted, (4) resident's appeal rights, (5) procedures to file an appeal, and (6) contact information for the Ombudsman.¹¹

- Be signed by the nursing home administrator.¹²
- Include the contact information for Disability Rights Florida, the state protection & advocacy agency, for residents with intellectual and developmental disabilities or those with mental illness.¹³

PRACTICE TIPS

- Check the written notice carefully for any deficiencies in the requirements above.
- If a "significant" change is made to the information in the discharge notice, e.g., a change in the discharge location, a new notice that describes the change(s) must be given to the resident as soon as practicable and the discharge date "resets" to provide 30 days' notice.¹⁴

The documentation of an eviction in a resident's medical record must:

- State the reason for the transfer or discharge.¹⁵
- Be performed by the resident's physician if the reason for eviction is that the facility is unable to meet the resident's needs or that the resident's condition has improved sufficiently to no longer need the facility's services.¹⁶
- Be performed by a physician if the eviction is based on the resident endangering others.¹⁷
- Include "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)" if the eviction is based on the facility's inability to meet the resident's needs.¹⁸

A resident can challenge an eviction in an administrative hearing

- A resident has 90 days after receiving notice of eviction to request an administrative hearing to challenge the proposed eviction.¹⁹
- If a request for a fair hearing is made within 10 days of receiving the eviction notice, the facility cannot make the resident leave the facility while awaiting a hearing or a hearing decision unless an emergency eviction is necessary pursuant to state or federal law.²⁰
- The DCF Office of Appeal Hearings conducts discharge administrative hearings.²¹
- The procedures are equivalent to those used for Medicaid fair hearings.²²
- The resident (or a legal representative) and the facility administrator (or a legal representative) must be present at all hearings.²³
- A representative of the Ombudsman may also be present at the hearing.²⁴
- The resident or a legal representative has the right to present, question, or refute evidence and testimony, including the opportunity to bring witnesses and cross-examine adverse witnesses.²⁵
- The nursing facility has the burden of proof to establish by clear and convincing evidence that the proposed eviction is legal.²⁶
- Final orders must be issued in writing within 90 days of a hearing request.²⁷
- A resident may appeal an adverse hearing decision to the district court of appeal (DCA) in the district where the facility is located.²⁸

PRACTICE TIPS

- The discharge notice includes an appeal form that the resident can complete and file with the Office of Appeal Hearings of the Department of Children and Families (DCF): [Fair Hearing Request For Transfer or Discharge From a Nursing Home](#).
- A hearing request should be emailed to appeal.hearings@myflfamilies.com.
- A facility must provide residents reasonable access to a telephone, the internet, and items to send mail for them to communicate.²⁹
- Nursing home final orders can be located at <https://www.doah.state.fl.us/FLAIO> by narrowing the search of “Agency” to “Department of Children and Families” and “Subject” to “Nursing Home Discharge” (2020 to current), “Public Assistance - Medicaid” (2019), or “Public Assistance - Other” (2018 and earlier). One can review these orders for a better understanding of legal issues & advocacy strategies.

Additional Resources & Authority

- **State Operations Manual–Guidance to Surveyors for Long Term Care Facilities:** <https://www.cms.gov/files/document/appendix-pp-guidance-surveyor-long-term-care-facilities.pdf> (CMS’ program issuances, operating instructions, policies, and procedures provide a relevant source of Medicare and Medicaid information; updated guidance issued on June 29, 2022 will go into effect on October 24, 2022). *See also:*
 - **Understanding CMS’s New Nursing Facility Guidance** <https://justiceinaging.org/wp-content/uploads/2022/07/Understanding-CMSs-New-NF-Guidance-Issue-Brief.pdf> (2022 issue brief by Eric Carlson, Justice in Aging)
 - **Summary of CMS’s Updated Nursing Home Guidance** <https://theconsumervoice.org/uploads/files/issues/phase-3-summary.pdf> (2022 reference guide by the National Consumer Voice for Quality Long-Term Care)
- **NCLER Defending Evictions from Nursing Homes and Assisted Living Facilities:** <https://ncler.acl.gov/pdf/LTC%20and%20Evictions%20PowerPoint.pdf> (2017 PowerPoint presentation by Eric Carlson, Justice in Aging)
- **Nursing Home Resident Rights Advocacy:** https://www.floridahealthjustice.org/uploads/1/1/5/5/115598329/2018_nursing_home_residents_rights_handout.pptx (2018 PowerPoint presentation by Edwin M. Boyer, Florida Elder Law Attorney)
- **Fair Hearing Request For Transfer or Discharge From a Nursing Home:** https://ahca.myflorida.com/MCHQ/Health_Facility_Regulation/Long_Term_Care/DOCs/Nursing_Home_Docs/Hotline_Posters/FINAL_AHCA31200003TransferDischargeFairHearingRequestApril2014.pdf (Official form requesting an administrative hearing appeal of nursing facility transfer or discharge)
- **DCF Program Policy Manual Calculation of Benefits:** <https://www.myflfamilies.com/service-programs/access/docs/esspolicymanual/2600.pdf> (Manual to assist with determining the amount of an individual’s income which is designated as a Personal Needs Allowance by program)

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1. The term “eviction” is used to refer to involuntary transfers or discharges.
 2. Under the federal Nursing Home Reform Law (NHRL), which governs all nursing facilities that accept Medicare and/or Medicaid, these six reasons are specified as the only legal grounds for eviction. Generally, the law applies to all residents of a certified nursing facility, regardless of how any single resident pays for his or her care. *See*, 42 C.F.R. §483.15(c)(1)(i).
 3. Fla. Stat. § 400.0255(3).
 4. Surveyor’s Guideline to 42 C.F.R. § 483.10(g)(17)-(18) (Tag F582), Appendix PP to CMS State Operations Manual.
 5. Surveyor’s Guideline to 42 C.F.R. § 483.10(c)(1)-(2) (Tag F622), Appendix PP to CMS State Operations Manual.
 6. 42 C.F.R. §§ 483.10(g)(4)(i)(B), (iii); Surveyor’s Guideline to 42 C.F.R. § 483.15(c) (Tag F622), Appendix PP to CMS State Operations Manual.
 7. 42 C.F.R. § 483.15(c)(1)(i)(E); DCF CFOP 165-22, Chapter 2600, Section 2640.0118.
 8. 42 C.F.R. § 483.15(e)(1)(ii); Surveyor’s Guideline to 42 C.F.R. § 483.15(e)(Tag F626), Appendix PP to CMS State Operations Manual.
 9. 42 C.F.R. § 483.15(c)(3)(i); Fla. Stat. §§ 400.0255(7)–(8).
 10. 42 C.F.R. § 483.15(c)(4); Fla. Stat. § 400.0255(7). *See also* 400.0255(11).
 11. 42 C.F.R. § 483.15(c)(5); Fla. Stat. § 400.0255(8).
 12. Fla. Stat. § 400.0255(3).
 13. 42 C.F.R. §§ 483.15(c)(5)(vi)-(vii)
 14. 42 C.F.R. § 483.15(c)(6); Surveyor’s Guideline to 42 C.F.R. § 483.15(c)(3)-(6) (Tag F623), Appendix PP to CMS State Operations Manual.
 15. 42 C.F.R. § 483.15(c)(2)(i)(A).
 16. 42 C.F.R. § 483.15(c)(2)(ii).
 17. *Id.*
 18. 42 C.F.R. § 483.15(c)(2)(i)(B).
 19. Fla. Stat. § 400.0255(10)(a).
 20. Fla. Stat. §§ 400.0255(10)(b)–(11).
 21. Fla. Stat. § 400.0255(15)(a).
 22. Fla. Stat. § 400.0255(15)(b).
 23. Fla. Stat. § 400.0255(13).
 24. *Id.*
 25. 42 C.F.R. §§ 431.242, 483.204; Fla. Admin. Code R. 65-2.057(2)–(3).
 26. Fla. Admin. Code R. 65-2.060(1); Fla. Stat. § 400.0255(15)(b).
 27. Fla. Admin. Code R. 65-2.066(5); Fla. Stat. § 400.0255(15)(b).
 28. Fla. Stat. § 400.0255(15)(d).
 29. 42 C.F.R. § 483.10(g)(7).



TRANSITION FROM A FLORIDA NURSING FACILITY INTO THE COMMUNITY



If you are a nursing facility resident on Medicaid, and you have resided in a Florida-licensed skilled nursing facility for at least 60 consecutive days, you are entitled to priority enrollment in the Long-term Care (LTC) Waiver, a program which provides home and community-based services (HCBS) to eligible individuals.

HOW TO REQUEST A TRANSITION INTO THE COMMUNITY



Generally, there is a wait list for the LTC Waiver, but if you have lived in a nursing facility for 60 consecutive days, you do not have to go on the wait list. Instead, you should be automatically enrolled in the LTC Program and receive assistance in selecting a plan that best suits your needs.

Contact your Medicaid Managed Care Plan case manager to make your transition request to the Department of Elder Affairs (DOEA). You will need to have your licensed health care provider complete the AHCA Medical Certification for Medicaid LTC form, which will be provided to the DOEA CARES team to determine if you are medically eligible for the LTC Waiver.

Once you are found eligible, your case manager will assist you in developing your personal Care Plan, which includes home and community-based services.



YOU DO NOT HAVE TO:

- Complete the initial screening process
- Participate in the wait-list process

Also ask about your plan's **Participant Directed Option** to choose your own home caregiver: a family member, friend, trusted provider, neighbor, etc.

YOU COULD RECEIVE THESE HOME & COMMUNITY-BASED SERVICES:

- Adult Companion Care
- Adult Day Health Care
- Assistive Care
- Assisted Living
- Attendant Nursing Care
- Behavioral Management
- Caregiver Training
- Case Management
- Home Accessibility Adaptation
- Home-Delivered Meals
- Homemaker
- Intermittent and Skilled Nursing
- Medical Equipment & Supplies
- Medication Management
- Nutritional Assessment
- Personal Care
- Emergency Response System
- Respite Care
- Therapies
- Transportation to Services

**PLEASE CONTACT FLORIDA HEALTH JUSTICE PROJECT
IF YOU ARE EXPERIENCING PROBLEMS APPLYING FOR THE LTC WAIVER**



<https://www.floridahealthjustice.org/contact.html>



info1@floridahealthjustice.org

An Overview of Nursing Home Discharge Final Orders

How to Find Nursing Home Discharge Final Orders

The Department of Children and Families' (DCF) Office of Appeal Hearings is responsible for conducting administrative fair hearings for nursing home residents who are appealing a discharge action. The administrative hearing officer's written decision comes in the form of a Final Order. DCF has chosen to post these final orders on the State of Florida Division of Administrative Hearings (DOAH) website. Nursing home discharge final orders can be found using the Florida Agency Indexed Orders Search portal (<https://www.doah.state.fl.us/FLAIO/>) as they are agency orders which have not been referred to DOAH.

To locate these final orders, select "Department of Children and Families" under the "Agency" dropdown menu. The relevant "Subject" will depend on the year of the final order. To view final orders filed between 2015 and 2018, select "Public Assistance- Other." The oldest final order available on DOAH was filed September 14, 2015. For final orders filed in 2019, the appropriate subject is "Public Assistance- Medicaid." All nursing home discharge final orders are distinguished by an "N" in the case number after a two digit number corresponding to the year the hearing was requested. DCF has recently created a new "Subject" labeled "Nursing Home Discharge", which includes the nursing home discharge final orders filed between 2020 up to the present. As of this date, the most recently published final order was filed June 15, 2022.

Summary of Final Orders and Rate of Success

There have been 125 nursing home discharge final orders filed between 2018 and June 15, 2022, posted on the DOAH website. This includes: 21 final orders filed in 2018, 40 in 2019, 27 in 2020, 23 in 2021, and 14 for 2022 as of this date.

Of these 125 final orders, the hearing officer granted the resident petitioner's appeal 32 times. This reflects a 25.6% success rate for those residents who have appealed.

Reasons Given for Discharge

- The resident has failed, after reasonable and appropriate notice, to pay for stay at the facility: 57 (45.6%)
- The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident: 33 (26.4%),
- The resident's needs cannot be met in the facility: 28 (22.4%)
- The resident's health has improved sufficiently so the resident no longer needs the services provided by the facility: 18 (14.4%)

- The health of individuals in the facility would be endangered: 11 (8.8%)
- The facility ceases to operate: 1 (0.8%)

Note: In 23 instances, the nursing facility selected more than one reason on the discharge notice.

Facilities Often Raise New Reasons for Discharge at the Hearings

It is of note that in some hearings the facility has raised different or additional reasons for discharging the resident than those marked on the discharge notice. In all but one of these instances, the hearing officer has refused to make a decision on a reason that was not marked on the notice, *see* 18N-00057. In the one departure, the officer affirmed the eviction for the reason that the safety of others at the facility was endangered (not the reason marked on the notice) because she found that the facility had provided sufficient evidence to support this exception to the 30-day notice requirement.

Factors in Successful Appeals

There were three other notable instances in which the nursing facility did not comply with the rationale requirement of the discharge notice. In one instance, the nursing facility provided a reason on the discharge notice that is not permissible under 42 C.F.R. § 483.15. Another nursing facility provided a resident a discharge notice with no reason selected or provided. Lastly, one nursing facility did not provide any discharge notice when it would not accept a resident back who was temporarily transferred. The residents' appeals were granted in each of these three circumstances.

In other successful appeals, the notices given to residents were defective because they did not include the required physician's signature or order, or they were not given to the resident 30 days prior to the proposed discharge. Residents also had their appeals granted for the following reasons:

- The facility did not provide any documentation or medical records to support the discharge reason
- The resident's medical records were not well-documented
- The basis for the discharge was actually a contentious relationship with a family member
- The facility did not provide specific dates or times for the alleged safety violations
- No testimony was provided to support allegations
- The facility did not provide evidence that a payment arrangement was discussed or that the resident was properly billed

Representation: Few Residents Have Attorneys

Overwhelmingly, these 125 residents have either represented themselves as pro se petitioners (51) or have been represented by a family member (52). Only four residents were represented by an attorney and six were represented by an ombudsman. In two instances, both a family member and an ombudsman represented the resident during the hearing. As many of these final orders were redacted, some heavily, there were two orders which only indicate that the resident had a “representative,” one that listed “health care proxy” as the representative, one that listed “power of attorney”, and nine where it is completely unclear whether there was any representation for the petitioner.

Eleven (11) of the pro se residents successfully appealed their discharge notices: a 21.6% success rate. Residents represented by their families were successful slightly more often: 25-26.9% success rate (13 family-only and one with an ombudsman). Two of the four residents represented by an attorney had their appeals granted, and three ombudsman-represented residents successfully appealed (one ombudsman was co-representative with the resident’s family member). These numbers can be slightly affected by the three instances where the appeal was affirmed but the representation is unknown due to redaction.

2018 (21 total):

- 8/21 successful appeals (38%)
- Represented by attorney (0), represented by ombudsman (1), represented by other advocate (0), represented by family (13), pro se (5), Unknown–redacted (2)
 - 1 pro se resident, 0 attorney-represented resident, 5 family-represented residents, 1 ombudsman-represented resident were successful (other 1 had redacted representation)
- Reason for discharge: Failure to pay (6), Needs cannot be met (7), Health has improved (3), Safety of others endangered (5), Health of others endangered (1), No notice (1)
 - 3 had multiple reasons for discharge
- 9 orders were not redacted at all (shows resident’s name, health info, facility, etc.)

2019 (40 total):

- 11/40 successful appeals (27.5%)
- Represented by attorney (1), represented by ombudsman (1), represented by other advocate (0), represented by family (15), pro se (15), “Representative”–redacted (2), Unknown–redacted (7)
 - One resident was represented by ombudsman and wife
 - 5 pro se residents, 1 attorney-represent resident, 2 family-represented residents, 1 family & ombudsman-represented resident were successful (other 2 had redacted representation)
- Reason for discharge: Failure to pay (13), Needs cannot be met (10), Health has improved (6), Safety of others endangered (15), Health of others endangered (3), Reason not marked on notice (1- for health has improved)
 - 7 had multiple reasons for discharge
 - One notice had the wrong reason marked (needs cannot be met) but eviction was still affirmed eviction for “real” reason of safety of others endangered (case counted under needs cannot be met)

2020 (27 total):

- 5/27 successful appeals (18.5%)
- Represented by attorney (3), represented by ombudsman (1), represented by other advocate (1), represented by family (9), pro se (13), “Power of attorney” (1)
 - One resident was represented by ombudsman manager and family
 - 2 pro se residents, 1 attorney-represent resident, 2 family-represented residents were successful
- Reason for discharge: Failure to pay (16), Needs cannot be met (6), Health has improved (5), Safety of others endangered (5), Health of others endangered (4), Non- Approved reason (1)
 - 9 had multiple reasons for discharge

2021 (23 total):

- 5/23 successful appeals (21.7%)
- Represented by attorney (0), represented by ombudsman (3), represented by other advocate (0), represented by family (8), pro se (12)
 - 2 pro se residents, 2 family-represented residents, 1 ombudsman-represented resident were successful
- Reason for discharge: Failure to pay (13), Needs cannot be met (2), Health has improved (4), Safety of others endangered (7), Health of others endangered (3)
 - 4 had multiple reasons for discharge

2022 (14 total for now):

- 3/14 successful appeals (21.4%)
- Represented by attorney (0), represented by ombudsman (0), represented by other advocate (0), represented by family (7), pro se (6), “Health care proxy” (1)
 - 1 pro se resident, 2 family-represented residents were successful
- Reason for discharge: Failure to pay (9), Needs cannot be met (3), Health has improved (0), Safety of others endangered (1), Health of others endangered (0), the facility ceases to operate (1)

Overall 2018-current (125 total):

- **32/125 successful appeals (25.6%)**
- **Represented by attorney (4), represented by ombudsman (6)***, represented by other advocate (1), represented by family (52)*, pro se (51), “Health care proxy” (1), “Power of attorney (1), “Representative”–redacted (2), Unknown–redacted (9)
 - *Two residents were represented by an ombudsman and a family member
 - 11 pro se residents, 2 attorney-represented resident, 13 family-represented residents, 2 ombudsman-represented, 1 family & ombudsman-represented resident were successful (other 3 had redacted representation)
- Reason for discharge: **Failure to pay (57)**, Needs cannot be met (28), Health has improved (18), Safety of others endangered (33), Health of others endangered (11), Facility ceases to operate (1); Non-approved reason (1), Not marked on notice (1), No notice (1)
 - 23 had multiple reasons for discharge
 - **Failure to pay (45.6%)**, Safety of others endangered (26.4%), Needs cannot be met (22.4%), Health has improved (14.4%), Health of others endangered (8.8%), Facility ceases to operate (.8%)

Apr 09, 2019

Office of Appeal Hearings
Dept. of Children and Families

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

[REDACTED]

APPEAL NO. 19N-00005

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on March 8, 2019 at 12:48 p.m. at the [REDACTED]

[REDACTED]

APPEARANCES

For the Petitioner: [REDACTED], pro se

For the Respondent: [REDACTED] Social Services Director

ISSUE

At issue is the facility's intent to discharge the petitioner due to non-payment of a bill for services. A Nursing Home Transfer and Discharge Notice was issued on January 4, 2019. The facility has the burden of proof to establish by clear and convincing evidence that the discharge is appropriate under federal regulations found in 42 C.F.R. § 483.15.

PRELIMINARY STATEMENT

The petitioner submitted no exhibits at the hearing. The petitioner presented one witness who testified: [REDACTED], District Ombudsman Manager. The respondent presented one witness who testified: [REDACTED], administrator with the facility. The respondent submitted two exhibits, which were accepted into evidence and entered as Respondent's Exhibits "1" – "2".

The record was left open until March 22, 2019 to allow the respondent to submit additional evidence. On March 21, 2019, the respondent submitted the additional evidence, which was entered and marked as Respondent's Exhibit "3".

FINDINGS OF FACT

1. The petitioner entered the facility on April 30, 2018.
2. On November 14, 2018, the Department of Children and Families (DCF) mailed the petitioner a notice indicating her Medicaid application dated October 17, 2018 was denied as "You or a member(s) of your household do not meet the disability requirements." (Respondent's Exhibit 2) The petitioner's Medicaid case with DCF remains closed.
3. On January 4, 2019, the facility issued the petitioner a Nursing Home Transfer and Discharge Notice. The reason for the discharge was "your bill for services at this facility has not been paid after reasonable and appropriate notice to pay." The notice also indicated the petitioner's date of discharge as January 4, 2019. (Respondent's Exhibit 1)
4. The respondent submitted a statement, dated February 25, 2019, that indicated the petitioner's outstanding balance (Respondent's Exhibit 3) as follows:

Date	Description	Charges	Credits	Balance
	BALANCE FORWARD			\$63,626.19
03/01/2019	Room & Board charges Mar 01-31 2019 (STD) (31@235.00)	\$7,285.00		
01/31/2019	Medical Supplies (1@436.35)	\$436.35		
02/25/2019	Medical Supplies (1@351.21)	\$351.21		
03/01/2019	Incontinent Supplies (1@350.00)	\$350.00		
	BALANCE DUE			\$72,048.75

This statement only includes transactions up to 02/25/2019. All Transactions processed after 02/25/2019 will appear on your next statement.

Total	Current 3/2019	30 2/2019	60 1/2019	90 12/2018	120 11/2018	150 10/2018	180 9/2018	210 + 8/2018
\$72,048.75	\$7,635.00	\$7,281.21	\$8,472.54	\$48,660.00	\$0.00	\$0.00	\$0.00	\$0.00

5. The petitioner has not made any payments toward either the ongoing balance or outstanding balance. The petitioner alleged the respondent never provided her with monthly bills. The respondent and the petitioner discussed if the petitioner was able to pay \$450 per month, however, at the hearing, the respondent explained that both parties never discussed or agreed to a payment arrangement.

6. The respondent explained another reason for the petitioner's discharge was because she does not meet the Level of Care for skilled nursing.

7. The petitioner wishes to remain in the facility until she is able to secure a place to live when she leaves the facility.

CONCLUSIONS OF LAW

8. The Department of Children and Families, Office of Appeal Hearings, has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Section 400.0255(15), Florida Statutes. In accordance with said authority, this order is the final administrative decision of the Department of Children and Families.

9. Federal Regulations, appearing at 42 C.F.R. § 483.15, set 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—

...

(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;

10. The reason for the petitioner's discharge is she had not paid her bill for services to the facility. The petitioner's current outstanding balance is \$72,0248.75. In February 2019, the facility billed the petitioner \$7,285 per month for room and board; \$436.35 per month for medical supplies; \$351.21 per month for additional medical supplies; and \$350 per month for incontinent supplies.

11. The respondent explained another reason for the discharge was because she does not meet the Level of Care for skilled nursing. This is irrelevant as the discharge notice indicated the reason for the discharge was non-payment. The undersigned will only rule on whether the facility's discharge due to nonpayment is valid.

12. The evidence indicates the respondent and the petitioner never discussed a payment arrangement toward her outstanding balance and the petitioner never made any payments toward her ongoing and outstanding balances.

13. 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 convincing¹. The undersigned concludes the respondent's evidence does not rise to the level of clear and convincing and the evidence submitted does not indicate the petitioner has failed, after reasonable and appropriate notice, to pay for her stay at the facility.

14. Establishing that the reason for a discharge is lawful is just one step in the discharge process. The nursing home must also provide discharge planning, which includes identifying an appropriate transfer or discharge location and sufficiently preparing the affected resident for a safe and orderly transfer or discharge from the facility. The hearing officer in this case cannot and has not considered either of these issues. The hearing officer has considered only whether the discharge is for a lawful reason.

15. Any discharge by the nursing facility must comply with all applicable federal regulations, Florida Statutes, and Agency for Health Care Administration requirements. Should the resident have concerns about the appropriateness of the discharge location or the discharge planning process, the resident may contact the Agency for Health Care Administration's health care facility complaint line at (888) 419-3456.

¹ State v. Graham, 240 So.2d 486 (1974), states, "Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. (Id. quoting Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983))."

16. Although the petitioner's appeal is granted, her financial debt to the facility is apparent and undisputed, this order does not relieve the petitioner of her debt to the facility and it does not relieve her of any future debts incurred while at the facility. This order does not preclude any future discharge actions to be taken by the facility.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is GRANTED. The facility has not established that this discharge is permissible under federal or state regulations; therefore, the facility may not proceed with the discharge at this time.

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.

FINAL ORDER (Cont.)

19N-00005

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DONE and ORDERED this 09 day of April, 2019,
in Tallahassee, Florida.

[REDACTED]

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: [REDACTED], Petitioner
[REDACTED] Respondent
[REDACTED]
Agency for Health Care Administration
[REDACTED]

FILED

Nov 16, 2018

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

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 18N-00100

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing by phone in the above-referenced matter on October 23, 2018 at 10:59 a.m.

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner

For the Respondent:

[REDACTED]

STATEMENT OF ISSUE

At issue is the facility's intent to discharge the petitioner due to "your health has improved sufficiently so that you no longer need the services provided by this facility." A Nursing Home Transfer and Discharge Notice was issued on August 1, 2018. The facility has the burden of proof to establish by clear and convincing evidence that the discharge is appropriate under federal regulations found in 42 C.F.R. § 483.15.

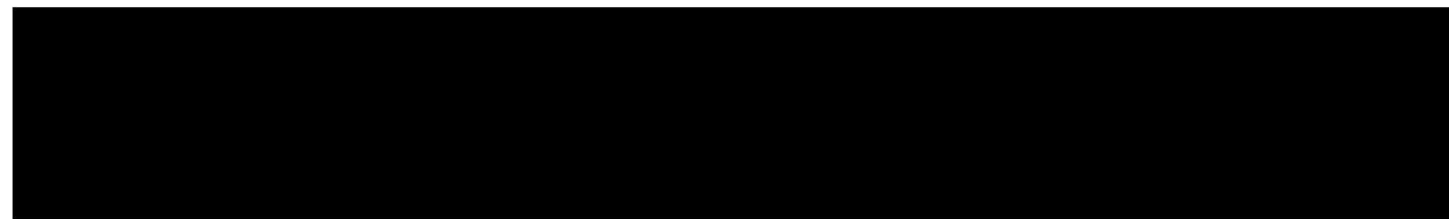
PRELIMINARY STATEMENT

The petitioner requested one continuance as he wanted his hearing to be a phone hearing instead of a face-to-face hearing. The petitioner submitted no exhibits at the hearing. The respondent submitted two exhibits, which were accepted into evidence and entered as Respondent's Exhibits "1" and "2." The hearing officer entered one exhibit, which was accepted into evidence as Hearing Officer's Exhibit "1."

FINDINGS OF FACT

1. The petitioner entered the facility sometime in May 2018. He was discharged from the facility sometime in the same month; however, he returned to the facility at the end of May 2018.

2. The petitioner's diagnoses include:



3. On August 1, 2018, the facility issued a Notice Home Transfer and Discharge Notice indicating the reason for the discharge was "your health has improved sufficiently so that you no longer need the services provided in the facility."

4. On August 1, 2018, [REDACTED] ordered the petitioner to be discharged to the community.

5. The petitioner received occupational and physical therapies while in the facility and finished both therapies on or around August 2, 2018.

6. On August 28, 2018, the petitioner was involved in an incident with another resident, which resulted in police involvement. The facility contacted the police who

were going to arrest the petitioner and trespass him from the facility. The respondent asked the police if the petitioner could be escorted from the facility without arresting him. The police removed the petitioner from the facility on the same day.

7. The respondent explained the petitioner left the facility as he was deemed a danger to others due to the incident with another resident.

8. The petitioner explained the respondent told him to sign some paperwork and voluntarily leave the facility or he would be arrested. The petitioner left on his own accord and he currently resides with a friend. He wishes to return to the facility.

9. On September 4, 2018, the respondent wrote a letter that states in part:

We are requesting that this appeal not be granted to [REDACTED]. It is clear from his record and from the physician's perspective that [REDACTED] is not in need of 24 hour care, skilled care, long term care, nor is he in need of any type of nursing care or services. He most recently took approximately \$1000 of his money and went shopping with a friend for a good part of the day with no need for a wheelchair or assistive device. He is better suited for an independent apartment, hotel, or other living arrangements. He refused to participate in his discharge planning to get him to a lower level of care.

10. The respondent explained the petitioner can ambulate independently; manage his medications independently; and manage his finances independently. The respondent further explained the petitioner is oriented four times and scored a [REDACTED]

11. The petitioner explained he requires physical therapy; is a very sick man whose health is getting worse; believes he is dying; requires the use of a walker and wheelchair for ambulation; requires a payee for his Social Security income; requires assistance with showering, cooking meals, washing clothes, cleaning his room, making his bed, and taking his medications as he often forgets to take his pain medications; and

occasionally requires the use of a back brace to his straighten his back. The petitioner explained he can groom and dress himself independently.

12. The respondent did not submit any of the petitioner's medical records into evidence.

CONCLUSIONS OF LAW

13. The Department of Children and Families, Office of Appeal Hearings, has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Section 400.0255(15), Florida Statutes. In accordance with that section, this Order is the final administrative decision of the Department of Children and Families.

14. The Code of Federal Regulations 42 C.F.R. § 483.15 limits the reasons for which a Medicaid or Medicare certified nursing facility may discharge a patient. In this case, the petitioner was sent notice indicating his health had improved sufficiently so that he no longer needed the services provided in the facility. The Regulation states in 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.

15. The respondent's reason for the discharge was that the petitioner's health has improved so much he could be discharged to the community. The respondent argues the petitioner could ambulate independently; manage his medications independently; and manage his finances independently. The respondent also argues petitioner also is oriented four times and scored a fifteen out of fifteen on a cognitive test.

16. The petitioner argues he is a very sick man who health is getting worse; is dying; requires the use of a walker and wheelchair for ambulation; requires a payee for his Social Security income; requires assistance with showering, cooking meals, washing clothes, cleaning his room, making his bed, and taking his medications as he often forgets to take his pain medications; and occasionally requires the use of a back brace to his straighten his back.

17. The hearing officer concludes the petitioner's health has not improved sufficiently enough to be discharged from the facility as the evidence does not indicate the petitioner has made any improvements with his health since May 2018. The evidence indicates the petitioner was escorted by the police from the facility due to his incident with another resident; however, the respondent did not submit any evidence, such as medical records, to indicate he should be discharged from the facility due to his improved health.

18. The facility has not met the burden of proof to establish the petitioner's health has improved sufficiently to be discharged from the facility. The petitioner does not reside in the facility, but he wishes to return to the facility for a variety of reasons.

19. 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 convincing¹. The undersigned concludes the respondent's evidence does not rise to the level of clear and convincing and the evidence submitted does not indicate the petitioner's health has improved sufficiently so that he no longer need the services provided in the facility.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is GRANTED. The facility has not established that this discharge is permissible under federal or state regulations; therefore, the facility may not proceed with the discharge at this time. Since the petitioner has already been discharged, the respondent is ORDERED to readmit him to the facility to the first available bed.

¹ *State v. Graham*, 240 So.2d 486 (1974), states, "Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. (Id. quoting *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983))."

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.

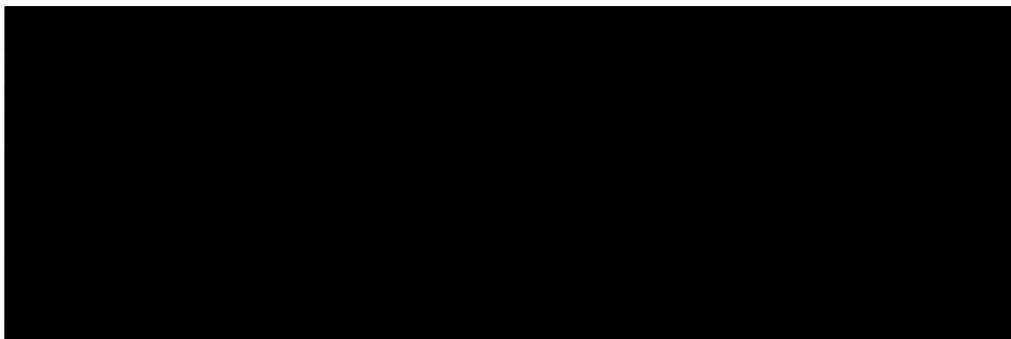
DONE and ORDERED this 16 day of November, 2018,

in Tallahassee, Florida.

Mary Jane Stafford

Mary Jane Stafford
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
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Copies Furnished To:



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

FILED

Nov 19, 2020

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]
[REDACTED]
[REDACTED]

APPEAL NO. 20N-00093

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 November 2, 2020, at 9:06 a.m.

APPEARANCES

For Petitioner: [REDACTED] *pro se*

For Respondent: [REDACTED] Executive Director

STATEMENT OF ISSUE

Petitioner appeals Respondent's proposed action to discharge him from [REDACTED] [REDACTED] (the "Facility"). In addition, Petitioner appeals Respondent's action to not allow him to remain in the facility, pending the outcome of the appeal. Respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

On September 22, 2020, Petitioner timely filed an appeal to challenge Respondent's action.

██████████ Director of Nursing, appeared as a witness for Respondent.

██████████ Director of Social Services, appeared as a witness for Respondent.

██████████, Long-Term Care Ombudsman, appeared as a witness for Petitioner.

██████████, Long-Term Care Ombudsman, appeared as a witness for Petitioner.

Susan Dixon, with the Office of Appeal Hearings, appeared as an observer.

Respondent submitted evidence marked and entered as Respondent Exhibits "1" through "11." Petitioner was prevented from submitting evidence as he did not have access to his records, which remained in the Facility. The record was left open until close of business on November 10, 2020, to allow Petitioner and Respondent to supplement the record. The record was closed on November 10, 2020.

On November 5, 2020, the undersigned issued an Emergency Order for Petitioner to Return to Facility Pending Outcome of Appeal. The order was a result of the emergency discharge action taken by Respondent, due to "safety of other individuals is endangered."

On November 10, 2020, the undersigned issued a Notice of Ex-Parte Communication due to communications received by the undersigned from both Petitioner and Respondent. The parties were reminded of the requirement to copy the opposing party.

On November 12, 2020, the undersigned issued an additional Notice of Ex-Parte Communication, due to communication received from Petitioner, prior to his receipt of the earlier Notice.

On November 17, 2020, the written discharge notice following the emergency verbal discharge was received from Petitioner and entered into the record as Petitioner Exhibit "1."¹

Petitioner's Position

Petitioner took the position that his needs can be met at the Facility and the staff were still coming in and treating him even while being recording. Petitioner does not have a record of violence, and he has not been found guilty of the incident that lead to his arrest.

Respondent's Position

Respondent took the position that Petitioner's needs cannot be met at the Facility due to Petitioner's action of recording staff; he may not receive the care that he needs. Respondent also took the position that the health and safety of other individuals in the Facility is endangered, after Petitioner's arrest on [REDACTED] 2020.

FINDINGS OF FACT²

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 undersigned accepted this into the record, after it closed, due to its relevance, and Petitioner could not have anticipated receipt, to request for an enlargement of time, prior to record closing.

² Citations within the Findings of Fact, Controlling Law, 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.

1. For the undersigned's findings related to the emergency discharge action, see the Emergency Order issued on November 4, 2020. (Appeal R.)
2. Petitioner became a resident of the Facility on [REDACTED] 2016. Petitioner has missed numerous appointments due to transportation issues. Under previous administrations, Petitioner could use Lyft ride services to get to and from appointments when there were issues with transportation; he was no longer allowed to use Lyft under the new administration. (Hr'g R.)
3. On September 15, 2020, Petitioner posted a notice on his door informing anyone that entered the room that he was recording both visually and audibly and that by entering the room the individual would be consenting to being recorded. (Resp't Ex. 3.)
4. Numerous Facility witness statements, dated September 15, 2020, recorded at the time of incident, state that Petitioner became angry, he began using profanities, racial slurs and hand gestures, after being informed of the company policy and state law regarding recordings. (Resp't Ex. 4-8.)
5. Petitioner filed numerous grievances and attempted to get signatures from staff consenting to being recorded. No signatures were obtained. He was unable to get statements from the Facility staff for this hearing, due to the possibility of retaliation. (Hr'g R.)
6. By a written Nursing Home Transfer and Discharge Notice, dated September 18, 2020, Respondent informed Petitioner that he was to be discharged from the Facility, effective [REDACTED] 2020. The reason stated for discharge or transfer was, "Your needs cannot be met in this facility." The location Petitioner was to be discharged to was shown as [REDACTED] in [REDACTED] Florida. (Resp't Ex. 10.)

7. On October 16, 2020, Ombudsman Ms. [REDACTED] spoke with Petitioner's physician who signed the discharge notice and was informed that Petitioner had no medical or health reasons for discharge. (Pet'r Wit. Test.)

8. To support the discharge reason, the Executive Director believes because Petitioner is recording staff he is creating a toxic environment and the nurses will be afraid of what is going on; she is unsure that he would be getting the same care he was getting prior to recording staff. She was also afraid of what his behavior would be if he again got upset. To explain how a different facility could meet his needs, the Executive Director believes he could get a new start. (Hr'g R.) Director of Social Services believes that not all facilities have the same policies regarding recording, therefore Petitioner may not face the same difficulties with receiving care. (Resp't Wit. Test.)

9. On October 23, 2020, Ombudsman Ms. [REDACTED] participated in a zoom meeting with the Facility that included the Executive Director, Director of Nursing, Regional Vice President, and Regional Clinical. She informed the Facility that there were no documents to show Petitioner's needs could not be met at the Facility. She sought to resolve the issues before the hearing and informed the Facility that Petitioner would sign a document and agree to not record anything or anyone again. She believed they could resolve the underlying issues dealing with transportation. Petitioner was not in this meeting. (Pet'r Wit. Test.)

CONTROLLING LAW

10. 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.

11. Section 400.0255(15)(b), Florida Statutes, sets forth the burden of proof and requires that it must be met at the clear and convincing evidence threshold.

12. 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.

13. Title 42 of the Code of Federal Regulations § 483.15, Admission, transfer and discharge rights, in relevant part states:

(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). (emphasis added)

(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.

14. 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.

...

(10)(a) A resident is entitled to a fair hearing to challenge a facility's proposed transfer or discharge. The resident, or the resident's legal representative or designee, may request a hearing at any time within 90 days after the resident's receipt of the facility's notice of the proposed discharge or transfer.

(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.

(c) If the resident fails to request a hearing within 10 days after receipt of the facility notice of the proposed discharge or transfer, the facility may transfer or discharge the resident after 30 days from the date the resident received the notice.

(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.

15. Title 42 of the Code of Federal Regulations § 483.40, Behavioral health services, states in relevant 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;

16. 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; (emphasis added)
 - (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

17. The Facility issued its initial discharge notice based on its belief that Petitioner's needs could not be met in the Facility. This is one of the six reasons provided in the controlling federal regulations for which a nursing facility may involuntarily discharge a resident.

18. The Findings show that the initial discharge was addressed in a written notice and was signed by the Facility Executive Director and physician. A 30-day advance notice was given, and a discharge location of [REDACTED] was given.

19. Establishing that the reason for a discharge is lawful is just one step in the discharge process. The Facility must also provide discharge planning, which includes identifying an appropriate transfer or discharge location and sufficiently preparing the resident for a safe and orderly transfer or discharge from the Facility. The undersigned cannot and has not considered either of these issues. The undersigned has considered only whether the discharge is for a lawful reason and meets the requirements of the controlling authorities.

20. Any discharge by the Facility must comply with all applicable federal regulations, Florida Statutes, and Agency for Health Care Administration (AHCA) requirements. Should the resident have concerns about the discharge process, he may contact AHCA's health care facility complaint line at (888) 419-3456.

21. The Facility seeks to involuntarily discharge Petitioner asserting that his needs cannot be met. The findings show that because Petitioner began recording staff, it was believed he was creating a toxic environment and the nurses would be afraid of what was going on; she was unsure that he would be getting the same care he was getting prior to recording staff. In addition, the Executive Director was afraid of what his behavior would be, if he again got upset.

22. 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.

23. While the Facility contended that Petitioner's needs cannot be met, there were no findings made or evidence presented to show this; only a hypothetical situation described by the Executive Director. The record is void of Petitioner's medical record

showing 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), as required by the regulation. The only testimony given regarding the receiving facility is that Petitioner would get a new start. Therefore, the undersigned concludes the Facility's evidence does not rise to the level of clear and convincing to support the discharge action under the reason that the resident's needs cannot be met.

DECISION

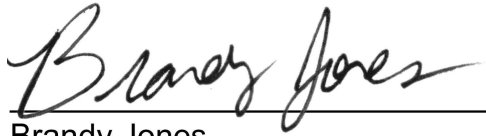
Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility was previously ordered under an Emergency Order to allow Petitioner to return to the Facility, pending the outcome of this appeal. The result of the Final Order is also an ORDER for the Facility to immediately readmit Petitioner. In the event of no current availability, the Facility must readmit Petitioner 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 19 day of November , 2020,

in Tallahassee, Florida.



Brandy Jones
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
Office: 850-488-1429
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Email: Appeal.Hearings@myflfamilies.com

Copies Furnished To: [REDACTED] Petitioner

[REDACTED]

[REDACTED] Respondent

[REDACTED]

[REDACTED] Agency for Health Care Administration

[REDACTED]

May 23, 2019

Office of Appeal Hearings
Dept. of Children and Families

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

[REDACTED]

APPEAL NO. 19N-00017

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on April 16, 2019 at 2:24 p.m. in Carrabelle, Florida.

APPEARANCES

For the Petitioner: [REDACTED]

For the Respondent: [REDACTED], Facility Administrator

ISSUE

Petitioner is appealing the Nursing Home Transfer and Discharge Notice issued to the petitioner on February 13, 2019 by the Respondent. The Notice indicates the intent to discharge the petitioner as the health and safety of other individuals in the facility is endangered. The respondent carries the burden of proof by clear and convincing evidence.

PRELIMINARY STATEMENT

██████████, District Ombudsman, appeared as a witness for the petitioner. ██████████
██████████, Ombudsman administrative assistant, appeared as an observer with no
objections from the parties.

██████████, Director of Nursing; ██████████, Director of Social Services; and
██████████, Unit Manager; appeared as witnesses for the respondent.

The Nursing Home Transfer and Discharge Notice was entered as Administrative
Exhibit 1. The Agency for HealthCare Administration Complaint report was entered as
Administrative Exhibit 2.

The respondent provided evidence at the hearing which was entered as
Respondent's Exhibits 1 through 9.

The record was held open for additional information from both parties through
April 30, 2019.

The petitioner submitted evidence on April 24, 2019 which was entered as
Petitioner's Exhibit 1.

The respondent submitted supplemental evidence in two parts on April 19, 2019.
The documents were combined and entered as Respondent's Exhibit 10.

The petitioner submitted a Proposed Final Order on April 30, 2019.

The record closed on 4/30/2019.

FINDINGS OF FACT

1. The petitioner has been a resident of ██████████
██████████ for approximately nine years.

2. The petitioner is presently [REDACTED]. He is limited in movement to his motorized wheelchair.

3. The petitioner uses an electronic vape pen which requires charging in lieu of other smoking paraphernalia.

4. The respondent issued a Nursing Home Transfer and Discharge Notice on February 13, 2019 indicating the petitioner being discharged under "The health of other individuals in the facility is endangered" and "The safety of other individuals in the facility is endangered". The respondent noted in the Brief Explanation section "Refusing to follow tobacco policy, aggressive in motorized wheelchair". The form was signed by the facility administrator and [REDACTED]. The petitioner refused to sign this form. (Administrative Exhibit 1)

5. The respondent has a smoking policy with last revision May 15, 2018. The policy specifies the residents may only smoke in the designated location. The policy specifies that resident smoking materials will be retained and distributed by facility staff to the residents. (Respondent's Exhibit 4, pages 3 and 4)

6. The respondent submitted a Smoking Contract signed by the petitioner on January 4, 2019. The contract specifies the use and possession of smoking tobacco at the facility. The contract indicates designated locations are "designated smoking area". The contract discusses cigarettes lighters and/or other smoking materials and where they are to be stored. In a long-term care unit, the contract states residents are prohibited from keeping smoking materials in the resident's room or possession but kept secured by the facility. The respondent identified the "designated smoking area" as a courtyard near the petitioner's room. The respondent confirmed there is no limitation on

smoking after leaving the front of the building as long as you are going off property.

(Respondent's Exhibit 4, page 1 and 2)

7. The respondent explained the facility's considers "smoking" and "vaping" the same activity and use one policy for both activities. The respondent explained they use the definition as found in section 877.112, Florida Statutes, Nicotine products and nicotine dispensing devices...

(1) DEFINITIONS.—As used in this section, the term:

(a) "Nicotine dispensing device" means any product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product, any replacement cartridge for such device, and any other container of nicotine in a solution or other form intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.

8. The respondent presented a Behavior Contract to the petitioner on July 21, 2016. This contract specifically states: "all cigarettes and smoking materials (ie [sic] lighters) may not be kept on me, they are to be locked up by the facility per policy and released to me during scheduled smoking periods and when I leave the facility on an leave of absence. When I return from a leave of absence I understand I must turn in my cigarettes and lighters to staff who will lock items up in designated area/location." The petitioner refused to sign this contract. (Respondent's Exhibit 3, page 2)

9. The respondent presented an undated typed statement from an ARNP. The administrator identified the ARNP author as [REDACTED], who works with [REDACTED]. The statement does not show the complete name of the ARNP. The statement indicates the petitioner has been educated on behavioral expectations at the facility to ensure that all residents have a safe and stable environment. The statement

describes the petitioner as non-compliant with safety measures and causing mental anguish to other in the care of the facility. The statement also indicates the petitioner's behaviors endanger other residents and staff physically and mentally. The statement shows the writer as knowing the petitioner is vaping in his room and exposing others to the fumes which may affect their physical health. (Respondent's Exhibit 1)

10. The respondent presented results of a [REDACTED] testing from sample collected on September 21, 2018. The results indicate the petitioner was [REDACTED] for [REDACTED], [REDACTED], and [REDACTED]. (Respondent's Exhibit 2, pages 1 and 2)

11. The respondent presented a KePro Florida PASRR Level II Determination Summary Report dated May 9, 2017. The report shows the petitioner having [REDACTED] [REDACTED]. The report shows the petitioner as having an increase in [REDACTED] symptoms that had not responded to ongoing treatment. (Respondent's Exhibit 2, pages 3 and 4)

12. The respondent presented the Behavior Contracts which were presented to the petitioner on June 1, 2016, November 17, 2016, and February 12, 2018 and the petitioner did not sign. Each of these Behavior Contracts lists five options the facility would address with a resident. The facility marked on each of these contracts "I am not permitted to curse, yell at, or treat staff with disrespect. If I have a problem with a staff member, I know I can speak with either the social worker or administrator about this issue." Additionally, handwritten on these contracts is "Must use electric w/c safely at all times!" (Respondent's Exhibit 3, pages 1, 3 and 4)

13. The petitioner stated he refused to sign each of these contracts as he did not understand they were only meaning this one item. He thought the facility was seeking to address all items, including he could not even shake hands with people.

14. The respondent presented a Behavior contract dated June 26, 2017 which reviewed the "use/possession of illegal substances (ie [*sic*] marijuana, crack-cocaine, wet, etc) on the premise." Additionally, handwritten on the contract is "alcohol". The petitioner refused to sign this document. (Respondent's Exhibit 3, page 5)

15. The respondent presented a Behavior Contract, Illegal Substance which was presented to the petitioner on September 24, 2018 but not signed by the petitioner. (Respondent's Exhibit 5)

16. The respondent presented a Nursing Note dated February 10, 2018 indicating a staff member believed the petitioner would try to run them over with his wheelchair. (Respondent's Exhibit 9)

17. The respondent provided an Episodic Behavior Note dated February 9, 2019. In the note, the author described the petitioner as cursing and calling a staff member and her mother explicit names. The author also documented the petitioner "charging" at the individual with his motorized wheelchair. The author documented the petitioner charging at her with his wheelchair when she attempted to intervene. (Respondent's Exhibit 6, page 2)

18. The respondent provided Episodic Behavior Notes from February 22, 2019. In the note, the author describes the petitioner as vaping in his room and refusing to lock up vaping materials. The author noted the petitioner had just signed a behavior

agreement and was aware of impending discharge for refusal to comply with smoking policy. (Respondent's Exhibit 6, page 2)

19. The respondent provided Episodic Behavior Notes from February 26, 2019. In this note, the author describes the petitioner as vaping in room. The author also describes the petitioner's unwillingness to release his vape to staff as he had to charge it. (Respondent's Exhibit 6, page 1)

20. The respondent provided Episodic Behavior Notes from the petitioner's record. In the note dated March 17, 2019 the author describes the petitioner obtaining his vape, signing himself out. The note further describes the petitioner keeping his vape until staff asked for the vape. The petitioner would not provide the charger until around 1 pm. (Respondent's Exhibit 6, page 1)

21. The respondent provided a Social Services note dated April 5, 2019. The Social Services Director was the author of the note. The note documented the petitioner being loud in the hallway to the point of disrupting a therapy session for another resident. The note describes the petitioner as becoming upset and cursing at the author when she approached to intervene. The note indicates the petitioner's response that his ombudsman had told him he did not have to talk to her. (Respondent's Exhibit 7, page 6)

22. The petitioner explained he liked to go to the "Grill" and have several beers while he is there visiting with friends. The petitioner does not believe it is wrong for him to have beers while he is away from the facility.

23. The petitioner stated he has agreed for his vape to be locked up in a box which he has a key to be able to access his vape when he needs it.

24. The petitioner stated that he charges his vape on his laptop and did not want to turn his laptop over to the facility. He is aware that the facility has a charger they can use to charge vape pens for residents.

25. The parties reported at hearing a meeting between the respondent, the petitioner, ombudsman and a representative from AHCA occurring on or about February 18, 2019. The parties all state there was an agreement reached. There was no written documentation of the meeting. There was no signed agreement as to the specifics goals or outcomes documented regarding, providing a lock box and key for his vaping materials, expected behavior changes, limitations or restrictions for interaction with specific staff, who seem to trigger outbursts from the resident, completed at the time of that meeting. The parties concur the petitioner requested [REDACTED] at that meeting.

26. The first meeting regarding [REDACTED] did not occur until April 5, 2019 due to difficulties with obtaining a counselor. The petitioner requested to receive one-hour sessions biweekly and receive his medications prescribed due to [REDACTED] from Florida Counseling Center.

27. The respondent stated counseling and interventions have not worked with the petitioner in the past. The respondent is concerned that the petitioner's behaviors will continue to escalate until he does cause harm to the safety of others.

28. The respondent stated that staff and residents have complained regarding the odor from the petitioner's vaping in his room. The respondent states they are unable to place a roommate in the petitioner's room due to his behavior and vaping.

29. The petitioner stated that he previously had a roommate for two and a half years.

30. The petitioner stated he found out one of the medications he was prescribed, [REDACTED], does not work well with someone who has [REDACTED] issues.

31. The petitioner stated that he believes that the items he vapes are sweet smelling.

32. The petitioner stated he did refuse drug treatment when he tested positive for marijuana. He stated his doctor removed a pain medication for 100 days when that happened. He reports he has since had lab work done showing he no longer tests positive for marijuana.

33. The petitioner stated he is frustrated with his situation and believes he is being "railroaded" out of the facility.

34. The petitioner has a history of using foul language. The petitioner stated during hearing he previously did not consider his foul language could be viewed as threatening, but through the course of the hearing, he now understood that others may view his foul language as threatening. The petitioner further admitted that calling people derogatory names is not appropriate.

CONCLUSIONS OF LAW

35. The Department of Children and Families, Office of Appeal Hearings, has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Section 400.0255(15), Florida Statutes. In accordance with said authority, this order is the final administrative decision of the Department of Children and Families.

36. Federal Regulations appearing 42 C.F.R. § 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.

37. Based on the evidence presented, the nursing facility has established that the reasons for requesting this discharge is due to the safety of others in the facility is endangered and health of others in the facility is endangered. These are two of the six reasons provided in federal regulation (42 C.F.R. § 483.15) for which a nursing facility may involuntarily discharge a resident.

38. The findings show the respondent's desire to discharge related is related to two activities. The first is the petitioner's vaping habits. The second is due to the petitioner's [REDACTED] issues and aggression with his wheelchair. The undersigned will review each situation upon its own merits.

39. The undersigned will first review the allegations regarding the petitioner's vaping habits. The findings show the respondent has a Smoking Policy. The findings also show the respondent's statement that the policy for smoking also applies for vaping activities as they are using the definition found in section 877.112, Florida Statutes, Nicotine products and nicotine dispensing devices. The findings show the Smoking Policy and contract signed by the petitioner on January 4, 2019 discuss the use and possession of smoking tobacco at the Facility. The undersigned finds no mention of vaping or vaping materials within the documents. The undersigned concludes the facility's use of the Florida Statute definition is not clearly identified for the resident signing the contract.

40. The undersigned reviewed the records provided from PRIOR to the Notice of Discharge and Transfer issuance and found NO instances in any of the Progress Notes of the petitioner's use of his vape materials inappropriately. The findings show three instances AFTER the Notice of Discharge and Transfer was issued on February 13, 2019 where the petitioner was documented for having possession of his vape in his room rather than returning it immediately to the lock box as required in the policy. The undersigned notes as the "Smoking Contract" was signed on January 4, 2019, and the "lock box" was not provided until February 2019. The incidents documented occurred approximately within a month of the lock box being provided. The undersigned notes

this was a new process for him at the time of documentation and an allowance for that period of adjustment should be made. The undersigned concludes now that the lock box and key have been provided and the procedure in place for the petitioner for a period of time, this activity does not constitute endangering the safety or health of others in the facility.

41. The undersigned reviews the allegation regarding the petitioner [REDACTED] and aggressive use of his wheelchair. The findings show two instances where the petitioner demonstrated aggressive actions either verbally or with his wheelchair. The first instance documented was February 10, 2018 and the second on February 9, 2019. The undersigned concludes these incidents were isolated incidents documented by staff nearly a year apart in occurrence. The undersigned concludes this does not constitute a danger to the health or safety of others as they appear to be isolated events.

42. The undersigned notes the physician, [REDACTED], signed the Discharge and Transfer Notice on February 13, 2019. This is the only instance where [REDACTED] name appears within the documentation presented by the respondent to substantiate the respondent's claim that the petitioner endangers the health or safety of other individuals in the facility.

43. The undersigned notes the respondent's concern for the petitioner's use of alcohol. The findings show the petitioner has signed out of the facility and gone somewhere else to consume alcohol. The respondent provided no policy that limits an individual's right to consume alcohol when they sign out of the facility.

44. The findings show the petitioner requested [REDACTED] therapy/counseling and medication. The findings also show the petitioner is now receiving these services. The undersigned concludes the respondent has failed to meet the burden of proof by clear and convincing evidence to show the petitioner endangers the health or safety of others in the facility on an ongoing basis.

45. Establishing that the reason for a discharge is lawful is just one step in the discharge process. The nursing home must also provide discharge planning, which includes identifying an appropriate transfer or discharge location and sufficiently preparing the affected resident for a safe and orderly transfer or discharge from the facility. The hearing officer in this case cannot and has not considered either of these issues. The hearing officer has considered only whether the discharge is for a lawful reason.

46. Any discharge by the nursing facility must comply with all applicable federal regulations, Florida Statutes, and Agency for Health Care Administration requirements. Should the resident have concerns about the appropriateness of the discharge location or the discharge planning process, the resident may contact the Agency for Health Care Administration's health care facility complaint line at (888) 419-3456.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the appeal is granted. The Discharge and Transfer Notice is voided.

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 23 day of May, 2019,

in Tallahassee, Florida.



Melissa Roedel
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: [REDACTED], Petitioner
[REDACTED], Respondent
[REDACTED], Agency for Health Care Administration

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

FILED

Dec 18, 2020

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]
[REDACTED]
[REDACTED]

APPEAL NO. 20N-00072

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]
[REDACTED]
[REDACTED]

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:

[REDACTED]
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 [REDACTED] [REDACTED] (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 [REDACTED]. The petitioner's counsel presented one witness who testified: [REDACTED] daughter of the petitioner, Power of Attorney ("POA"), caretaker, and healthcare surrogate. [REDACTED], 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: [REDACTED] Executive Director, and [REDACTED] 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 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. 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. [REDACTED] 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, [REDACTED] spoke with the petitioner's doctor, [REDACTED] 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 [REDACTED]. 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 [REDACTED]'s residence and was signed by [REDACTED] and Physician [REDACTED] (*Id.*) The Notice also included a four-page letter signed by [REDACTED], 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. [REDACTED] and [REDACTED] Test. September 8, 2020.)

10. [REDACTED] 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, [REDACTED] wanted to specify timing of care, which could impact the care of others. On March 21, 2020, [REDACTED] contacted staff eight times to articulate AHCA regulations, pulling staff from helping other residents. On May 13, 2020, [REDACTED] spoke with the Facility on the phone to discuss complaints that they were unable to provide the required care. The medical records indicate that [REDACTED] 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. [REDACTED] 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. [REDACTED] 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 [REDACTED] 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 [REDACTED]'s needs and expectations. (Resp't Wit. [REDACTED] Test. September 8, 2020.)

17. The Facility states they can care for the petitioner, however one on one care may be needed for [REDACTED]'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 [REDACTED] prior to issuing the Notice. (Pet'r Wit. Test. September 24, 2020.)

20. [REDACTED] 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 ■■■■■'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. ■■■■■ 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. ■■■■■'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. ■■■■■ 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, ■■■■■ believes the Facility can improve the programming for her mother. ■■■■■ 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.

The second and third condition will now be discussed:

The health and safety of other individuals is endangered.

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 from helping other patients to tend to [REDACTED]'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 [REDACTED]. 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 [REDACTED], 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 [REDACTED]. 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

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: [REDACTED] Petitioner
[REDACTED] Respondent

[REDACTED]
Agency for Health Care Administration

[REDACTED]
Mia McKown
[REDACTED]

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

FILED

Nov 30, 2018

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 18N-00120

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, a hearing in the above-referenced matter was convened on November 2, 2018 at 10:00 a.m. at the [REDACTED] located in [REDACTED]

APPEARANCES

For the Petitioner: [REDACTED], petitioner's daughter

For the Respondent: [REDACTED]

ISSUE

At issue is the facility's intent to discharge the petitioner due to the facility not being able to meet his needs; a Nursing Home Transfer and Discharge Notice was issued on August 3, 2018 with an effective date of August 3, 2018.

The facility has the burden of proof to establish by clear and convincing evidence that the petitioner's discharge is in accordance with the requirements of the Code of Federal Regulations at 42 C.F.R. § 483.15 and Section 400.0255, Florida Statutes.

PRELIMINARY STATEMENT

By a notice dated August 3, 2018, the respondent informed the petitioner that the facility was seeking to discharge/transfer him due to the facility not being able to meet his needs. On August 24, 2018, the petitioner (through his daughter) timely requested a hearing to challenge the discharge/transfer.

Appearing as witnesses for the respondent were his daughters [REDACTED] and

[REDACTED] (appeared telephonically), and his wife, [REDACTED]

The petitioner did not submit any documents as evidence for the hearing.

Appearing as witnesses for the respondent were [REDACTED] nursing assistant, [REDACTED] nursing assistant, [REDACTED] assistant administrator, [REDACTED]

The respondent submitted a physician's letter and medical order as evidence for the hearing, which were marked as Respondent Exhibit 1. The respondent also submitted the notice of transfer/discharge and the facility's bed-hold policy. These documents were marked as Respondent Exhibit 2.

After the hearing was concluded, the Agency for Health Care Administration (AHCA) submitted a letter dated November 15, 2018 which indicated that it found no

violations during an unannounced visit on November 5, 2018 to the facility. This was entered into the record as the Hearing Officer's Exhibit 1.

FINDINGS OF FACT

1. The petitioner was admitted to the nursing facility in November, 2016. He was diagnosed with [REDACTED] and he is currently 74 years old. At that time, his condition was stable and the facility had no issues with his behavior. The facility administrator reports that the petitioner's behavior became progressively worse and he began hitting staff members. The petitioner was transferred to the hospital on August 3, 2018 due to aggressive behavior. According to the facility administrator, the facility could no longer meet the petitioner's needs because it does not have a lock-down unit to control his behavior.

2. The facility's nursing assistants described how the petitioner would kick or hit them. They also reported he was aggressive with both male and female nursing assistants and he had a very strong physical condition. One of the nursing assistants also stated the nurses could not assist the petitioner with his daily living activities when he was in an aggressive mood.

3. The Director of Nursing stated the petitioner was diagnosed with unspecified [REDACTED] when he was taken to the hospital. He had been previously transferred to the hospital in January, 2018 for aggressive behavior but the facility had taken him back at that time.

4. The petitioner's representative reported her father spent 20 days in the hospital following his transfer from the nursing facility in August, 2018. When he left the

hospital, he began residing at a different nursing facility in [REDACTED]. She reports her father has not had any [REDACTED] or any incidents of aggressive behavior in the new facility.

CONCLUSIONS OF LAW

5. The Department of Children and Families, Office of Appeal Hearings, has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Section 400.0255(15), Florida Statutes. In accordance with said authority, this order is the final administrative decision of the Department of Children and Families.

6. Federal Regulations, appearing at 42 C.F.R. § 483.15, set forth the reasons a nursing 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 [emphasis added];

(B) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;

(C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;

(D) The health of individuals in the facility would otherwise be endangered;

(E) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility.

Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for his or her stay. For a resident who becomes eligible for Medicaid after

admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or

(F) The facility ceases to operate.

(ii) The facility may not transfer or discharge the resident while the appeal is pending, pursuant to §431.230 of this chapter, when a resident exercises his or her right to appeal a transfer or discharge notice from the facility pursuant to §431.220(a)(3) of this chapter, unless the failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility. The facility must document the danger that failure to transfer or discharge would pose.

(2) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (c)(1)(i)(A) through (F) of this section, the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider.

(i) Documentation in the resident's medical record must include:

(A) The basis for the transfer per paragraph (c)(1)(i) of this section.

(B) In the case of paragraph (c)(1)(i)(A) of this section, the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s).

(ii) The documentation required by paragraph (c)(2)(i) of this section must be made by—

(A) The resident's physician when transfer or discharge is necessary under paragraph (c)(1)(A) or (B) of this section; and

(B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) of this section.

(iii) Information provided to the receiving provider must include a minimum of the following:

(A) Contact information of the practitioner responsible for the care of the resident

(B) Resident representative information including contact information.

(C) Advance Directive information.

(D) All special instructions or precautions for ongoing care, as appropriate.

(E) Comprehensive care plan goals,

(F) All other necessary information, including a copy of the resident's discharge summary, consistent with §483.21(c)(2), as applicable, and any other documentation, as applicable, to ensure a safe and effective transition of care.

(3) Notice before transfer. Before a facility transfers or discharges a resident, the facility must—

(i) Notify the resident and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. The facility must send a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman.

(ii) Record the reasons for the transfer or discharge in the resident's medical record in accordance with paragraph (c)(2) of this section; and

(iii) Include in the notice the items described in paragraph (c)(5) of this section.

(4) Timing of the notice. (i) Except as specified in paragraphs (c)(4)(ii) and (8) of this section, the notice of transfer or discharge required under this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(ii) Notice must be made as soon as practicable before transfer or discharge when—[emphasis added]

(A) The safety of individuals in the facility would be endangered under paragraph (c)(1)(i)(C) of this section;

(B) The health of individuals in the facility would be endangered, under paragraph (c)(1)(i)(D) of this section;

(C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (c)(1)(i)(B) of this section;

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (c)(1)(i)(A) of this section;

[emphasis added] or

(E) A resident has not resided in the facility for 30 days.

(5) Contents of the notice. The written notice specified in paragraph (c)(3) of this section must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged;

(iv) A statement of the resident's appeal rights, including the name, address (mailing and email), and telephone number of the entity which receives such requests; and information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;

(v) The name, address (mailing and email) and telephone number of the Office of the State Long-Term Care Ombudsman;

(vi) For nursing facility residents with intellectual and developmental disabilities or related disabilities, the mailing and email address and

telephone number of the agency responsible for the protection and advocacy of individuals with developmental disabilities established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (Pub. L. 106-402, codified at 42 U.S.C. 15001 et seq.); and (vii) For nursing facility residents with a mental disorder or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with a mental disorder established under the Protection and Advocacy for Mentally Ill Individuals Act.

7. 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.** [Emphasis added] The notice or the order must be signed by the resident's physician, medical director, treating physician, nurse practitioner, or physician assistant.

...

(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....

...

(7) At least 30 days prior to any proposed transfer or discharge, a facility must provide advance notice of the proposed transfer or discharge to the resident and, if known, to a family member or the resident's legal guardian or representative, except, in the following circumstances, the facility shall give notice as soon as practicable before the transfer or discharge:

(a) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility, and the circumstances are documented in the resident's medical records by the resident's physician...

...

(8) The notice required by subsection (7) must be in writing and must contain all information required by state and federal law, rules, or regulations applicable to Medicaid or Medicare cases. The agency shall develop a standard document to be used by all facilities licensed under this part for purposes of notifying residents of a discharge or transfer. Such document must include a means for a resident to request the local long-term care ombudsman council to review the notice and request information about or assistance with initiating a fair hearing with the department's Office of Appeals Hearings. In addition to any other pertinent information included, the form shall specify the reason allowed under federal or state law that the resident is being discharged or transferred, with an explanation to support this action. Further, the form must state the effective date of the discharge or transfer and the location to which the resident is being discharged or transferred. The form must clearly describe the resident's appeal rights and the procedures for filing an appeal, including the right to request the local ombudsman council review the notice of discharge or transfer. A copy of the notice must be placed in the resident's clinical record, and a copy must be transmitted to the resident's legal guardian or representative and to the local ombudsman council within 5 business days after signature by the resident or resident designee. (Emphasis added).

8. In this case, the nursing facility discharged the petitioner to the hospital on August 3, 2018 on the basis of not being able to meet his needs. The discharge notice was also dated August 3, 2018. Although a 30-day advance notice was not given, the 30-day requirement does not apply where the discharge is based on not being able to meet the individual's needs.

9. However, as clearly specified in both the actual notice form and the authorities set forth above, in cases where the discharge is based on the facility not being able to meet the individual's needs, the notice must be signed by a physician or have an attached physician's order. The notice was not signed by a physician. Although the facility produced the physician's order on the day of the hearing, it was required to provide this to petitioner and/or his family as part of the discharge notice on August 3,

2018. Having failed to do so, the facility did not comply with the discharge requirements set forth above.

10. After review of the cited authorities and evidence, the undersigned concludes that the facility's action in discharging the petitioner was improper, as the facility failed to provide a proper notice of discharge to the petitioner on August 3, 2018.

11. Since the petitioner is no longer residing in the nursing facility at issue, the respondent must allow the petitioner to return (if he so desires) pursuant to the facility's bed hold policy.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, this appeal is GRANTED. The respondent has not established that this discharge was in compliance with Federal or State regulations.

Establishing that the reason for a discharge is lawful is just one step in the discharge process. The nursing home must also provide discharge planning, which includes identifying an appropriate transfer or discharge location and sufficiently preparing the affected resident for a safe and orderly transfer or discharge from the facility. The hearing officer in this case cannot and has not considered either of these issues. The hearing officer has considered only whether the discharge is for a lawful reason.

Any discharge by the nursing facility must comply with all applicable federal regulations, Florida Statutes, and Agency for Health Care Administration requirements.

Should the resident have concerns about the appropriateness of the discharge location or the discharge planning process, the resident may contact the Agency for Health Care Administration's health care facility complaint line at (888) 419-3456.

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.

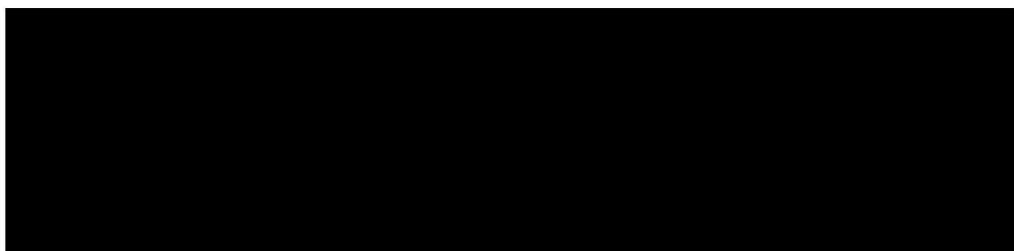
DONE and ORDERED this 30 day of November, 2018,

in Tallahassee, Florida.



Rafael Centurion
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
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FINAL ORDER (Cont.)
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Agency for Health Care Administration
Olivia Bernal
Sandra Bernal