

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

FILED

JUL 9 1 2009

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09N-00074

PETITIONER,

Vs.

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing convened before the undersigned hearing officer on June 9, 2009, at 9:30 a.m., in Fort Pierce, Florida, at the respondent's facility. The petitioner was not present. He was represented by his sister, _____, and his father, _____, _____, nursing home administrator, represented the respondent. Appearing as witnesses for the respondent were _____, director of nursing, _____, assistant director of nursing, and _____, director of social services.

ISSUE

At issue is whether or not the nursing home's action to transfer and discharge the petitioner is an appropriate action based on the federal regulations at 42 C. F. R. § 483.12. The nursing home is seeking to transfer and discharge the petitioner because his "needs cannot be met in this facility". The nursing facility has the burden of proof to

establish that the transfer and discharge action is consistent with the federal regulations.

FINDINGS OF FACT

1. The petitioner is a resident of a nursing facility. He has been a resident at this facility since September 12, 2007. The facility issued a Nursing Home Transfer and Discharge Notice on April 23, 2009. The effective date of the transfer was May 23, 2009. The reason cited on the notice was "Your needs cannot be met in this facility".
2. The notice was signed by the social services director on April 23, 2009, and by the petitioner's father on April 27, 2009. The Nursing Home Transfer and Discharge Notice was not signed by a physician nor was a physicians' written order attached to it (Respondent's Exhibit 1).
3. At the hearing, the facility did not submit any physician's written order or documentation from the clinical record that the discharge is necessary for the petitioner's welfare and the petitioner's needs cannot be met in the facility. The respondent asserts that there will be no doctor's order until a safe location for transfer is found. The respondent asserts that the doctor is aware of the plan to discharge the petitioner, and that the notice was issued to notify the petitioner's family that they are actively looking for another place for the petitioner.
4. The reasons cited for the discharge include increased aggressive behaviors, destruction of property, false accusations of abuse against staff members, urinating on couches, and taking things off of the walls and destroying them. He climbs on the desk, destroys flowers on the table in the front area of the facility, and the other residents constantly complain about him for things he has done. He seems to be driven by

negative behaviors, and is not easily directed at times. He is high functioning and needs more stimulation. He has refused showers, shaves, and doctor's appointments (Respondent's Exhibit 2). The facility is trying to get him into an assisted living facility or group home since they have a less institutional setting.

5. The petitioner's family stipulated that they were made aware of all of the petitioner's behaviors. He seems to act a little better after his sister speaks to him. The family understands that his needs cannot be met here. The family asserts the hearing was requested because the original discharge notice had the petitioner's father's residence as the discharge location. The petitioner's father is 80 years old, hard of hearing, and has glaucoma. He cannot take care of the petitioner and neither can the petitioner's sister. The family has been working with the director of social services to find an appropriate location and an application for an Emergency Medicaid Waiver through the Agency for Persons with Disabilities has been submitted.

CONCLUSIONS OF LAW

Jurisdictional boundaries to conduct this hearing have been assigned to the Department by Federal Regulations appearing at 42 C.F.R. § 431.200.

Federal Regulation limits the reason for which a Medicaid or Medicare certified nursing facility may discharge a patient. In this case, the petitioner was sent notice indicating that he would be discharged from the facility in accordance with Code of Federal Regulations at 42 C.F.R. § 483.12:

(a)(2)(i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility

The Code of Federal Regulations at 42 C.F.R. § 483.12 sets forth the required documentation:

...(2) ***Transfer and discharge requirements.*** The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless-

(i) **The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;** (emphasis added)

(ii) 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; (iii) The safety of individuals in the facility is endangered;

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

(v) 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. 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

(vi) The facility ceases to operate.

(3) ***Documentation.*** When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (a)(2)(i) through (v) of this section, the resident's clinical record must be documented. The documentation must be made by-

(i) **The resident's physician when transfer or discharge is necessary under paragraph (a)(2)(i) or paragraph (a)(2)(ii) of this section; and**

(ii) A physician when transfer or discharge is necessary under paragraph (a)(2)(iv) of this section. (emphasis added)

(4) ***Notice before transfer.*** Before a facility transfers or discharges a resident, the facility must-

(i) Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

(ii) Record the reasons in the resident's clinical record; and

(iii) Include in the notice the items described in paragraph (a)(6) of this section.

(5) ***Timing of the notice.*** (i) Except when specified in paragraph (a)(5)(ii) of this section, the notice of transfer or discharge required under paragraph (a)(4) of this section must be

- made by the facility at least 30 days before the resident is transferred or discharged.
- (6) *Contents of the notice.* The written notice specified in paragraph (a)(4) 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...
- (7) *Orientation for transfer or discharge.* A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

In addition to the regulations, the Nursing Home Transfer and Discharge Notice stated on page one: "The following reasons require either this form be signed by a physician or a physician's written order for discharge or transfer be attached. The signing physician may be the resident's attending or treating physician, the facility medical director, or a nurse practitioner or physician's assistant as a physician designee". The Nursing Home Transfer and Discharge Notice issued on April 23, 2009 was not signed by a physician nor was a physician's written order or other documentation attached. At the hearing, the facility did not submit any physician's written order or documentation from the clinical record that the discharge is necessary for the petitioner's welfare and the petitioner's needs cannot be met in the facility. Therefore, the undersigned concludes that the requirements of the above controlling federal authorities have not been met.

DECISION

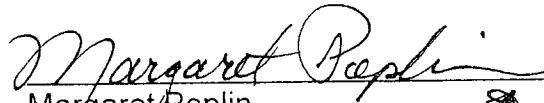
This appeal is granted. The facility may not proceed with the discharge as indicated in the Nursing Home Transfer and Discharge Notice of April 23, 2009.

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 Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 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 15th day of July, 2009,

in Tallahassee, Florida.



Margaret Poplin
Hearing Officer
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850-488-1429

Copies Furnished T.