



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 2590
Fairmont, WV 26555-2590

Joe Manchin III
Governor

February 16, 2005

_____ for

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your nursing home discharge hearing held February 3, 2005. Your Hearing request was based on the proposal of [REDACTED] to involuntarily discharge your daughter.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

Federal regulations require that long term care facilities permit each resident to remain in the facility and not discharge or transfer the resident from the facility unless one of six specified circumstances exist. One of those circumstances exists when the safety of individuals in the facility is endangered. (42 CFR § 483.12)

Information submitted at the hearing fails to demonstrate that your daughter endangers the safety of other individuals in the facility. In addition, the Notice of Involuntary Discharge fails to meet the notification requirements found in the Code of Federal Regulations.

It is the decision of the State Hearing Officer to **reverse** the proposal of [REDACTED] to discharge you daughter.

Sincerely,

Thomas E. Arnett
State Hearing Officer
Member, State Board of Review

Pc: Chairman, Board of Review
[REDACTED]

**WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES
SUMMARY AND DECISION OF THE STATE HEARING OFFICER**

_____, Resident, [REDACTED]

I. INTRODUCTION

This is a report of the State Hearing Officer resulting from a fair hearing concluded on February 16, 2005 for _____. This hearing was held in accordance with the provisions found in the Common Chapters Manual, Chapter 700 of the West Virginia Department of Health and Human Resources. This fair hearing was convened on February 3, 2005 on a timely appeal filed November 29, 2004.

It should be noted here that the proposal to discharge the resident has been postponed pending a hearing decision.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE

Nursing facilities participating in Medicaid must meet requirements contained in 42 CFR, Part 483, Subpart B. The provisions therein serve as the basis for determining whether a facility meets the requirements for participation in Medicaid.

III. PARTICIPANTS

_____, Resident's mother and MPOA

_____, Resident's friend, observing

_____, Resident's friend, observing

[REDACTED]

Presiding at the hearing was Thomas E. Arnett, State Hearing Officer and a member of the State Board of Review.

IV. QUESTION(S) TO BE DECIDED

The question to be decided is whether [REDACTED] is acting in accordance with applicable regulations in its proposal to involuntarily discharge the resident, _____.

V. APPLICABLE POLICY

42 Code of Federal Regulations § 483.12

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Brightwood- 1 A chronological summary of episodes the facility has cited to support involuntary discharge.

- ___-1 PAS-2000 (Eligibility Determination, for _____ completed on 12/29/04
- ___-2a Notice of involuntary discharge dated October 6, 2004.
- ___-2b Correspondence from [REDACTED] dated October 30, 2004.
- ___-2c Correspondence from [REDACTED] dated November 10, 2004.
- ___-2d Correspondence from [REDACTED] dated November 22, 2004.
- ___-2e Department of Health and Human Services, Center for Medicare & Medicaid Services Survey complete on 12/9/04.
- ___-3 Behavior Management Plan for _____ completed on 1/17/05.
- ___-4 Report of Consultation from Dr. [REDACTED] M.D., dated 12/10/04.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Resident’s mother, ____, was notified in a letter dated October 6, 2004 (___-2a) that [REDACTED] was proposing an involuntary discharge of her daughter, ____, from [REDACTED]. This notice states:

As we have discussed many times, [REDACTED] has an obligation to all of our residents to keep them safe. We are very concerned regarding the aggressive and combative behavior of your daughter _____. Despite hospitalizations and psychiatric monitoring, we have been unsuccessful in preventing your daughter from demonstrating aggressive behavior toward our residents. As we have discussed, She has slapped, shoved, pulled hair, etc. I feel it is our obligation to officially notify you that we are unable to provide adequate care to your daughter, ____, due to her violent and unpredictable behavior, therefore you must transfer her within 30 days of this notification.

This notice advises of the right to appeal and provides the name and phone number of the Ombudsman as well as a phone number and address to a WVDHHR office in Charleston.

2. Information included in exhibits ___-2b thru ___-2d verifies that [REDACTED] was notified of the Resident’s intent to appeal the proposed involuntary discharge in a letter dated October 30, 2004, and that she would be represented by [REDACTED] Attorney at Law. Exhibits ___-2c and 2d are correspondence between [REDACTED] and [REDACTED] addressing the issue of improper notice.
3. Representatives testifying on behalf of [REDACTED] indicated that the Resident has exhibited aggressive, and sometimes uncontrollable, violent behaviors. Exhibit Brightwood-1, a documented chronological record of incidents involving the Resident, was entered into evidence to support their claim that they cannot keep other residents safe. [REDACTED] representatives contend that they cannot provide the one-on-one care that the Resident requires due to the staff / resident ratio. They have tried redirection and medication to modify aggressive behaviors but this has been unsuccessful, in part, because ___ is not always supportive of their efforts. They are proposing that ___ be transferred to a facility in [REDACTED] that is better suited to address behavioral issues.

4. Exhibit____-1, PAS-2000 completed on 12/29/04, reveals the results of a Level II evaluation completed on January 10, 2005. [REDACTED] Ph.D, Licensed Psychologist, made the determination that ____ is appropriate for nursing facility care and she provided the following conclusion in the Summary and Recommendations section of her evaluation - “Regardless, her primary diagnosis is a dementia. She is not a member of the Level II population. The determination of the Level I screening, nursing facility services eligible, is binding.”
5. There is no evidence to indicate the introduction or implementation of a formal Behavior Management Plan prior to the Notice of Involuntary Discharge, however, a Behavior Management Plan was drafted on January 17, 2005 (____-3), which provides goals and interventions to address and divert aggressive behaviors. Representative testifying on behalf of [REDACTED] were uncertain if this plan was going to work, however, [REDACTED] indicated that the implementation of this plan could be effective in addressing undesirable behaviors.
6. The October 6, 2004 notice fails to meet the requirements found in the Code of Federal Regulations found at 483.12(a) (4)-(6). This notice fails to include the location to which the resident was being discharged, it fails to outline the correct appeal process, and the notice does not include contact information for the agency responsible for the protection of developmentally disabled individuals or the agency responsible for the protection and advocacy of mentally ill individuals, both of which are required when an individual has a diagnosis of mental illness and mental retardation. These discrepancies are noted in exhibit____-2e.
7. According to Federal Regulations at 42 CFR § 483.12(a)(2), a nursing 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;
 - (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 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.

8. The Code of Federal Regulations, 42 § CFR § 483.12(a)(6), states that 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;
 - (iv) A statement that the resident has the right to appeal the action to the State;
 - (v) The name, address and telephone number of the State long term care ombudsman;
 - (vi) For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and
 - (vii) For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

VIII. DECISION

The Code of Federal Regulations allows for the involuntary discharge of a resident when the safety of individuals in the facility is endangered. While the documented episodes of combative and aggressive behavior introduced by [REDACTED] are clearly safety concerns, the difficulty in upholding [REDACTED] proposed discharge weighs heavily on three very important facts; 1) There is no evidence to indicate that a “Behavior Management Plan,” or any formalize plan, was implemented to address the Resident’s behaviors prior to the proposed involuntary discharge, 2) The Resident underwent a Level II evaluation and was determined to be appropriate for nursing facility care, and 3) The Notice of Involuntary Discharge fails to meet notification requirements found in the Code of Federal Regulations.

Based on the evidence submitted, it is the decision of the State Hearing Officer to **reverse** the proposal of Brightwood Center to discharge ____.

IX. RIGHT OF APPEAL

See Attachment.

X. ATTACHMENT

The Claimant's Recourse to Hearing Decision.