



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
State Board of Review
2699 Park Avenue, Suite 100
Huntington, West Virginia 25704
February 3, 2005

Joe Manchin III
Governor

Dear Ms. _____,

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 18, 2005. Your hearing request was based on _____ proposal to discharge you from the nursing care facility.

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.

Eligibility and benefit levels for the Nursing Care Program are determined based on current regulations. One of these regulations is that clear and convincing evidence must be documented by the resident's physician that a transfer or discharge is necessitated by the needs of the resident rather than by an accommodation of the facility's needs and the facility must ensure a safe and orderly transfer or discharge for the resident (Medicaid Program Instruction MA-94-23 5-1-94) and documentation by the resident's physician must be made in the resident's clinical record if the transfer/discharge is due to the facility's inability to meet the resident's needs (Federal Regulations Title 42, Part 483.12(a)(3)(i).

The information which was submitted at the hearing revealed that there was no documentation presented by _____ to show that Ms. _____'s physician recommended a transfer/discharge and the notification of transfer/discharge dated October 29, 2004 did not provide a specific location to which Ms. _____ was to be transferred/discharged and did not provide a specific date for transfer/discharge.

It is the decision of the State Hearing Officer to reverse the proposal of Sunbridge Care and Rehabilitation for Putnam to discharge you from the facility.

Sincerely,

Thomas M. Smith
State Hearing Officer
Member, State Board of Review

cc: Board of Review

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IV. QUESTION TO BE DECIDED

The question to be decided is whether [REDACTED] proposed the correct action to discharge the claimant, _____, from the nursing care facility.

V. APPLICABLE POLICY

Medicaid Program Instruction MA-94-23 5-1-94.

Memorandum from Ann Stottlemeyer, Director, Office of Medical Services 5-5-94 RE: Transfer, Discharge, and Appeal Rights of Nursing Home Residents.

Code of Federal Regulations, Title 42, Parts 483.12 and 483.25.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Exhibit #CI-1 Copy of notice of discharge 10-29-04.

- " #CI-2 Copy of physician orders 10-1-04 through 10-31-04 (2 pages).
- " #CI-3 Copy of social progress notes 5-26-04 & 8-28-04.
- " #CI-4 Copy of Resident Care Plan 5-26-04 to 8-24-04 (18 pages).
- " #CI-5 Copy of Resident Care Plan 9-3-04 to 12-3-04 (16 pages).

VII. FINDINGS OF FACT

1. The claimant is a resident of [REDACTED] nursing facility and her representative was notified of proposed discharge from the facility on 10-29-04 (Exhibit #1) due to her behavior causing a risk to the health and safety of the claimant and other residents and because the facility could not meet her needs.
2. The claimant's sister-in-law (____) requested a hearing on 11-8-04 and the claimant remains in [REDACTED]
3. Mr. [REDACTED] testified that [REDACTED] does not have the ability to manage the claimant's behaviors as it is a skilled nursing facility and does not have a behavior management unit or a locked unit.
4. Ms. [REDACTED] testified regarding incidents on 10-28-04, 10-27-04, 10-20-04, and 10-18-04 in which the claimant was ambulating in the hallway and attempting to go into other patients' rooms, that the claimant's behavior was explosive at times, that she threatened to break the glasses on another patient, that there was an incident with another patient's wallet which the claimant took and money was missing when it was found, and that psychotropics were prescribed for her.
5. Ms. [REDACTED] stated that written notification was issued to _____ but not to the claimant as she cannot read, that placements are usually made at [REDACTED] WV but they had no bed, that the next available facility was [REDACTED] which has a lock-down unit and the claimant could have been maintained on a waiting list in West Virginia, that the claimant's mother had resided in the nursing facility until she died and the claimant may have been jealous of the person who was placed in her mother's room, that the doctor would not write a discharge order until the time of actual discharge, that the claimant did have a bed at [REDACTED] at the time of proposed discharge but she would have to start over with finding her another place now, that no one from [REDACTED] talked to experts with mental retardation (MR) or with WV Advocates.
6. Ms. [REDACTED] testified that they cannot redirect the claimant or reason with her and it is not a safe environment for the other residents, that on 4-12-04, the claimant was restless, had explosive behavior and

was verbally abusive, that the plan of care involved approaching her calmly, explaining her care, keeping things in simple term, that they tried to deal with her behavior, that she was referred to ____ medicine adjustment was made but there was no change in her behavior, that there was no notation of discharge on the physician's orders but that is not where it would be, that there was nothing in the notes that said SCRP could not meet the claimant's needs, that the Resident Care Plan lists her problems and the things that the nursing facility needs to do, that the Plan of Care is completed in simple terms and the claimant is observed, that the facility probably has 30-40% of patients with Alzheimer's or dementia and that some of them also wander around, that the claimant's behavior escalated after her mother died but she did not seem to process that her mother had died.

7. Ms. [REDACTED] testified that they used stop signs and other methods to try to stop the claimant from going in other residents' rooms, that there was no change after the recording of 8-28-04 in the Social Progress Notes, that she did talk to the claimant about her mother's death.

8. Mr. ____ testified that his sister has days that she is lovable and off-days, that he did not attend any plan of care meetings, that he would hate to see her moved to [REDACTED] that he talked to the resident about the glasses incident and she told him she was not hurt, that she talked to his sister about the wallet incident and she told him someone placed it in her bag, that she would never hurt anyone although she had slapped him a couple times, that ____ called several times and he talked to her, that his sister had a hard time adjusting to her mother's death, that he has been told since his sister came back from [REDACTED] that they can now redirect her, that he would like for his sister to stay at [REDACTED] if they can take care of her

9. Mrs. ____ testified that she has attended all of the plan of care meetings except maybe one, that the claimant does not respond well to change, that money means nothing to her, that she would like for the claimant to stay somewhere in the state, and that she was not informed that the claimant would be placed on a waiting list for [REDACTED] WV.

10. It should be noted that Ms. [REDACTED] requested an opportunity to provide written arguments and Mr. [REDACTED] stated that he would also provide a written argument and both parties agreed to provide their statements by February 1, 2005. The State Hearing Officer received Ms. [REDACTED] written arguments on 2-1-05 and Mr. [REDACTED] on 2-2-05.

CONCLUSIONS OF LAW

1. Medicaid Program Instruction MA-94-23 5-1-94 states, in part:

"A resident has the right to remain within the nursing facility unless:

1. A transfer or discharge is necessary to meet physical or health care needs of the resident which cannot be met by the nursing facility.
2. The resident's health has improved sufficiently so that services provided by the facility are no longer needed.
3. The health or safety of individuals in the facility is endangered by the presence of the resident.
4. The resident has failed to make payment (or arrange for payment under Medicare or Medicaid) after reasonable and appropriately written notice.
5. The facility ceases to operate.

Clear and convincing evidence must be documented by the resident's physician in the resident's medical record that a transfer or discharge is necessitated by the needs of the resident rather than by an accommodation of the facility's needs.....The facility must attempt to develop alternative care plans designed

to meet the needs of the resident, and the medical record must contain documentation of the results of these alternative care plans.

The facility must immediately consult the resident's physician and provide written notification to the resident and his/her representative in a language and manner so that the resident can understand the reason for the transfer or discharge at least 30 days prior to the effective date of discharge or transfer unless the health or safety of individuals is endangered, the resident's urgent medical needs require immediate transfer or discharge, the health of the resident improves sufficiently to allow more immediate discharge or transfer, or the resident has not been within the facility for thirty (30) days or more.....

The written notice must contain a statement in not less than 12 point type that reads "You have the right to a hearing regarding the nursing home's decision to discharge or transfer you. If you think you should not have to move or leave this facility, you may file a request for a hearing within thirty (30) days after receiving this notice. The nursing home staff must help you complete the request for a hearing if you need assistance. Except in the event of an emergency, if a hearing is requested, you cannot be transferred until thirty (30) days after the date you receive the decision of the state's appointed hearing officer. If the grounds for your discharge or transfer is non-payment, you have the right to pay any amount owed prior to the date of the transfer or discharge. A form to request a hearing and a stamped addressed envelope to the Office of Inspector General is attached." The hearing request form and a postage paid envelope pre-addressed to Office of Inspector General, Board of Review, Capitol Complex, Charleston, WV 25305, must be included in the notice.....

Transfer/Discharge Planning

The nursing facility must develop a discharge plan before a resident is voluntarily or involuntarily transferred or discharged..... A facility must provide sufficient preparation and orientation to the resident to ensure a safe and orderly transfer or discharge."

2. Code of Federal Regulations, Title 42, Part 483.12 states, in part:

"Admission, transfer and discharge rights.

(a) Transfer and discharge–

(1) Definition: Transfer and discharge includes movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not.....

(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;

(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.....;

(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 the transfer or discharge is necessary under paragraph (a)(2)(iv) of this section.

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(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.

(ii) Notice may be made as soon as practicable before transfer or discharge when—

- (A) the safety of individuals in the facility would be endangered under paragraph (a)(2)(iii) of this section;
- (B) The health of individuals in the facility would be endangered, under paragraph (a)(2)(iv) of this section;
- (C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (a)(2)(ii) of this section;
- (D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (a)(2)(i) of this section; or
- (E) A resident has not resided in the facility for 30 days.

(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;
- (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

Based upon the evidence and testimony presented, it is the decision of the State Hearing Officer to reverse the proposal of ██████ Center to discharge Ms. ____ from the facility. The evidence and testimony provided in the hearing and the written arguments provided subsequent to the hearing show that SCRP did not follow Federal Regulations in the proposed transfer/discharge. The claimant's attorney, ██████ cited several reasons in her written arguments why ██████ had not complied with federal requirements in proposing the discharge of Ms. _____. ██████ cited that there was no clear and convincing evidence provided by SCRP that a discharge was necessary to meet Ms. ____'s medical needs or that the discharge was recommended by Ms. ____'s physician. Federal Regulations listed in 42 CFR Part 483.12 (a)(3)(i) state that the resident's clinical record must be documented by "the resident's physician when transfer or discharge is necessary under paragraph (a)(2)(i)" which is the section for transferring or discharging a resident due to the facility's inability to meet the resident's needs. Mr. ██████ and several of his witnesses provided testimony to show that problems existed with Ms. ____ but there was no evidence presented to show that a physician had recommended the discharge. In fact, testimony provided by Ms. ██████ indicated that the physician would not write a discharge order until such discharge was to occur, which is in clear violation of federal regulations. Since there was no documentation provided by the facility to show that Ms. ____'s physician was involved in the decision to discharge her, the discharge action would be reversed on that basis alone. However, Ms. ██████ also pointed out that the discharge notification (Exhibit #C1-1) failed to indicate a location to which Ms. ____ was being transferred, failed to provide a specific date of discharge, and was not provided directly to Ms. _____. All three (3) of these actions violate federal regulations and again would by themselves be grounds for reversal. Federal Regulations listed in 42 CFR Part 483.12

(a)(6)(iii) require that the contents of the discharge notice include "the location to which the resident is transferred or discharged" and section (a)(6) ii) require "the effective date of transfer or discharge". The representatives from [REDACTED] testified that, due to Ms. ____'s behavioral problems, the facility could not meet her needs and she was a risk to the safety of herself and other residents. While the nursing facility did show that Ms. ____ was difficult to handle and has caused problems, the facility did not provide enough substantial evidence, including documentation from a physician, that it could no longer meet Ms. ____'s needs or that she was a safety risk to herself or to others. Therefore, the State Hearing Officer finds that [REDACTED] did not follow proper procedures as required in Federal Regulations listed in 42 CFR Part 483.12 (a)(2)(i), (a)(3)(i), and (a)(6)(iii). In addition, [REDACTED] did not show by clear and convincing evidence documented by the resident's physician that a transfer/discharge was necessitated by the needs of the resident rather than by an accommodation of the facility's needs which is outlined in Program Instruction MA-94-23 dated 5-1-94. Therefore, I must reverse the proposal of [REDACTED] to discharge Ms. ____ from the facility.

XI. RIGHT OF APPEAL

See Attachment.

XII. ATTACHMENTS

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.