



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1027 N. Randolph Ave.
Elkins, WV 26241

Jim Justice
Governor

Bill J. Crouch
Cabinet Secretary

February 9, 2017



RE: [REDACTED] V. [REDACTED]
ACTION NO.: 16-BOR-3193

Dear Mr. [REDACTED]

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

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.

You will find attached an explanation of possible actions you may take if you disagree with the decision reached in this matter.

Sincerely,

Pamela L. Hinzman
State Hearing Officer
Member, State Board of Review

Encl: Resident's Recourse to Hearing Decision
Form IG-BR-29

cc: [REDACTED]

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW**

██████████,

Resident,

v.

Action Number: 16-BOR-3193

BRIGHTWOOD CENTER,

Facility.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for ██████████. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing was convened on February 2, 2017, on an appeal filed December 19, 2016.

The matter before the Hearing Officer arises from the November 21, 2016 decision by the Facility to propose involuntary discharge of the Resident.

At the hearing, the Facility appeared by ██████████, Administrator, ██████████. Appearing as witnesses for the Facility were ██████████, Director of Nursing; and ██████████, Licensed Social Worker. The Resident attended the hearing and appeared by ██████████, Ombudsman, Legal Aid of West Virginia.

All witnesses were sworn and the following documents were admitted into evidence.

Nursing Facility's Exhibits:

- NF-1 Statement written by ██████████, M.D., dated November 18, 2016
- NF-2 Office visit report by ██████████, M.D., dated November 15, 2016
- NF-3 Pre-Admission Screening dated November 28, 2016
- NF-4 Immediate Fax Reporting of Allegations-Nursing Home Program (incident date-September 20, 2016)
- NF-5 Immediate Fax Reporting of Allegations-Nursing Home Program (incident date-November 3, 2016)
- NF-6 Statement signed by ██████████, M.D., on November 23, 2016

Resident's Exhibits:

- R-1 Notice of Discharge dated November 21, 2016
- R-2 West Virginia State Code Section 64-13-1
- R-3 Code of Federal Regulations Title 42, Section 483.12
- R-4 [REDACTED] Admission Record for Appellant
- R-5 Progress Reports for Appellant
- R-6 [REDACTED] Order Summary Reports
- R-7 Pre-Admission Screening dated February 17, 2015
- R-8 Progress Notes for Appellant
- R-9 Care Plan for Appellant
- R-10 Minimum Data Set

FINDINGS OF FACT

- 1) [REDACTED], hereinafter Facility, provided written notification to the Resident of its intent to initiate involuntary transfer or discharge proceedings on November 21, 2016 (R-1). The notice advised the Resident that involuntary discharge from the facility was necessary because the safety of individuals was endangered and the Resident's health had improved sufficiently that he no longer met the criteria for nursing home care. The notice states that the Resident would be transferred to [REDACTED] or another location of his choosing.
- 2) The Facility contends the transfer is necessary because the Resident had made sexually inappropriate advances toward female patients on two occasions. Exhibit NF-4 provides a witness statement indicating that the Resident put his hand up a female patient's shirt two times, and the female patient pushed his hand away and told him to stop. Exhibit NF-5 indicates that the Resident grabbed another female patient by the arm and put her hand on his "privates."
- 3) [REDACTED], M.D., completed a psychiatric report (NF-2) on November 15, 2016, and questioned the Resident about his sexual behavior. The report states that the Resident initially denied having inappropriately touched the female patients, but then confessed to the behavior. The report states that the Resident apologized and said he would not exhibit the behaviors again; however, Dr. [REDACTED] did not believe he was being honest and felt that the Resident would repeat the behavior, especially if he believed he would not be caught.
- 4) Exhibit NF-1, a statement from [REDACTED], M.D., Medical Director at [REDACTED] dated November 18, 2016, states that the Resident is alert and oriented, and is capable of making his own medical decisions. Dr. [REDACTED] indicated that due to recent therapy notes and current activities of daily living documentation, the Resident is no longer appropriate for a nursing facility level of care. An identical statement (NF-6) was signed by [REDACTED], M.D. That statement was dated November 11, 2016, but was signed on November 23, 2016 (after the Notice of Discharge was sent).

- 5) [REDACTED], Ombudsman with Legal Aid of West Virginia, stated that the Resident has acknowledged that the sexually inappropriate behaviors occurred, and she noted that he may no longer require nursing facility care. However, Ms. [REDACTED] cited Federal and State Codes (R-1 and R-2) concerning nursing home discharge procedures, indicating that the reason for discharge must be documented in the Resident's clinical record, and that the Facility must find an appropriate place to which the Resident can be discharged. Ms. [REDACTED] stated that [REDACTED] provides no supervision of residents, and she does not believe the Resident should live in an apartment setting with no oversight due to his history of falls and inability to administer medication. Ms. [REDACTED] indicated that an apartment is not currently available because the housing complex is in the process of obtaining new management. She stated that the Resident would rather reside in [REDACTED] as he has no ties to the [REDACTED] area. The Resident contended that he becomes lightheaded when walking. Information provided in R-5, R-6, R-8, R-9 and R-10 addresses the Resident's level of functioning.
- 6) Facility representatives contended that they attempted to find various housing locations for the Resident, and that the Resident was unsatisfied with some of the options. They also indicated that the Facility contacted [REDACTED], but the center denied entrance to the Resident. Facility representatives noted that the Resident's last fall occurred in December 2015, and the fall was attributed to tripping as opposed to a physical ailment. The Resident is reportedly next on the list for the apartment at [REDACTED]. Meal delivery is available at the complex, and the location offers van service to physician's appointments. Facility representatives maintained that the Resident performs most of his activities of daily living independently.

APPLICABLE POLICY

Medicaid regulations, found in the Code of State Regulations (64 CSR 13) and the Code of Federal Regulations (42 CFR §483.12) provide that transfer and discharge of an individual includes movement of a resident to a bed outside of the Medicaid-certified portion of the facility, whether that bed is in the same physical plant. Transfer and discharge does not refer to movement of a resident to a bed within the Medicaid-certified portion of the facility.

The administrator or designee must permit each resident to remain in the facility, and not be transferred or discharged from the facility unless one of the following conditions is met:

- The transfer or discharge is necessary for the resident's welfare when the needs of the resident cannot be met in the facility; or
- The transfer or discharge is appropriate because the health of the resident has improved sufficiently that the individual no longer meets the medical criteria for nursing facility services; or

- The safety of individuals in the facility is endangered; or
- The health of individuals in the nursing facility would otherwise be endangered; or
- The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicaid) a stay at the nursing facility, including but not limited to, the amount of money determined by the financial eligibility evaluation as co-payment for the provision of nursing facility services; or
- The facility ceases to operate; or
- The resident is identified by the State and/or Federal certification agency to be in immediate and serious danger.

Documentation must be recorded in the resident's medical record by a physician of the specific reason requiring the transfer or discharge. Discharge documentation is required regardless of the reason for discharge.

Before the nursing facility transfers or discharges a resident, the administrator or designee must notify the resident and/or the responsible party verbally and in writing, in a language that is understandable to the parties, of the intent and reason for transfer or discharge. The same information must be recorded in the resident's medical record, and a copy of this written notice must be sent to the State Long-Term Care Ombudsman or his/her designee. Except in the case of immediate danger to the resident and/or others as documented, the notice of transfer or discharge must be provided at least 30 days prior to the anticipated move to ensure a safe and orderly discharge to a setting appropriate to the individual's needs.

Waiver of this 30-day requirement may be appropriate if the safety of individuals in the facility would be endangered, the immediate transfer is required by the resident's urgent medical needs, or a resident has not resided in the nursing facility for 30 days.

The written notice must include the following:

- The effective date of the transfer or discharge;
- Reason for the discharge;
- The location or person(s) to whom the resident is transferred or discharged;
- A statement that the resident has the right to appeal the action to the State;
- The name, address and telephone number of the State long-term care ombudsman;

- The mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled and mentally ill individuals.

DISCUSSION

Regulations specify that a nursing facility can involuntarily transfer/discharge an individual if the transfer or discharge is necessary when the safety of individuals in the facility is endangered and/or when the Resident no longer meets criteria for a nursing facility level of care.

The Facility's medical director certified on November 18, 2016 – prior to the November 21, 2016 Notice of Discharge - that the Resident is no longer appropriate for a nursing facility level of care. In addition, the Facility provided documentation indicating that the Resident had exhibited inappropriate sexual behaviors with two female residents. The Resident's clinical record contains comments from a psychiatrist who determined that the Resident was expected to exhibit similar sexual behaviors in the future, particularly if he believed he would not be caught. Therefore, medical documentation requirements have been satisfied.

The Facility has attempted to work with the Resident to locate acceptable housing, and the Resident has either declined several locations due to his specifications or has been denied entrance. The Facility has located housing for him at [REDACTED].

Based on information provided during the hearing, the Facility has acted in accordance with regulations in its proposal to discharge the Resident.

CONCLUSION OF LAW

The Facility has followed Federal and State regulations in its proposal to discharge the Resident.

DECISION

It is the decision of the State Hearing Officer to UPHOLD the Facility's proposal to discharge the Resident.

ENTERED this _____ Day of February 2017.

**Pamela L. Hinzman
State Hearing Officer**