



**STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL**

**Bill J. Crouch
Cabinet Secretary**

**BOARD OF REVIEW
Raleigh County District
407 Neville Street
Beckley, WV 25801**

**Jolynn Marra
Interim Inspector General**

December 6, 2018

[REDACTED]

RE: [REDACTED], A PROTECTED INDIVIDUAL v. [REDACTED]
ACTION NO.: 18-BOR-2614

Dear Ms. [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,

Kristi Logan
State Hearing Officer
Member, State Board of Review

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

cc: [REDACTED], [REDACTED]

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

█, A PROTECTED INDIVIDUAL,

Resident,

v.

Action Number: 18-BOR-2614

█,

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 November 13, 2018.

The matter before the Hearing Officer arises from the October 16, 2018 decision by the Facility to discharge the Resident from █.

At the hearing, the Facility appeared by █, Facility Administration. Appearing as a witness for the Facility was █, Social Worker. The Resident appeared by her Healthcare Surrogate, █. All witnesses were sworn and the following documents were admitted into evidence.

Facility's Exhibits:

- F-1 Medication Administration Record for September 2018
- F-2 Medication Administration Record for October 2018
- F-3 Progress Notes from September 2018 through November 2018

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the Hearing Officer sets forth the following Findings of Fact.

FINDINGS OF FACT

- 1) The Resident has resided at [REDACTED] (Facility) since 2013.
- 2) The Resident has a history of refusing prescribed medications.
- 3) The Resident tested positive for MRSA, a bacterial skin infection, in or around September 2018, stemming from a wound to her lower right leg (Exhibit F-1).
- 4) The Resident chronically refused treatment of the wound to her leg, including wound dressing and medication (Exhibit F-1, Exhibit F-2 and Exhibit F-3).
- 5) On October 16, 2018, the Facility issued a 30-Day Notice of Discharge to the Resident advising that she would be discharged on November 16, 2018, to her home because her needs could not be met in the facility.

APPLICABLE POLICY

Code of Federal Regulations 42 CFR §483.10(c)(6) states that a resident has the right to request, refuse, and or discontinue treatment.

Code of Federal Regulations 42 CFR §483.15(c)(1)(i) states 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;
- (F) The facility ceases to operate.

42 CFR §483.15(c)(2) states that 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. 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.

42 CFR §483.15(c)(3) states that 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.

42 CFR §483.15(c)(4) states that (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—

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

42 CFR §483.15(c)(5) states that 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;

DISCUSSION

Federal regulations allow for nursing facilities to involuntarily transfer or discharge a resident if such action is necessary because the resident's needs cannot be met by the facility. The resident's physician must document in the resident's medical record when a transfer or discharge is necessary under these circumstances.

Federal regulations require that before a nursing facility transfers or discharges a resident, written notice must be provided to the resident and/or representative, which must include the reason for the transfer or discharge, effective date of the transfer or discharge, and the location to which the resident will be transferred or discharged.

The Facility notified the Resident's healthcare surrogate that the Resident would be discharged to her home because her needs could not be met at the facility.

The Facility contended that although the Resident has refused prescribed medication throughout her stay at the facility, the Resident's refusal to allow treatment to her leg and MRSA causes a health risk to other residents in the facility.

The Resident's healthcare surrogate, [REDACTED], argued that the Resident does not leave her room or associate with other residents in the facility and therefore would be unable to contaminate others with MRSA. Ms. [REDACTED] testified that the Resident has not had a home for several years, and she is unable to care for the Resident in her home. It is Ms. [REDACTED] wish that the Resident remain in the Facility.

The Facility noted in the 30-Day Discharge Notice that the reason for the discharge was because the Resident's needs could not be met in the facility. However, testimony during the hearing indicated that the Resident was being discharged due to the possible health risk she posed to other residents. Federal regulations require that if a transfer or discharge is necessary because a resident's need cannot be met in their current placement, documentation of the reason must be made in the resident's medical record by the attending physician. No such documentation was provided indicating that the Resident's physician recommended a transfer or discharge because her needs could not be met the facility.

Because the Facility did not show that it followed the regulatory requirement of proper documentation of the discharge in the Resident's medical record, it's proposed transfer or discharge of the Resident cannot be affirmed.

CONCLUSIONS OF LAW

- 1) Federal regulations allow for an involuntary discharge or transfer of a resident if the resident's needs cannot be met by the facility.
- 2) Federal regulations mandate documentation by the resident's physician be made in the resident's medical record as to the reason why the resident's needs cannot be met in the facility.
- 3) The Facility failed to present documentation from the Resident's physician that her needs could not be met at the facility.
- 4) Because the Facility has not complied with the regulatory requirement of documentation in the resident's medical record by the Resident's physician, the Facility's proposed action to proceed with the involuntary transfer or discharge of the Resident cannot be affirmed.

DECISION

It is the decision of the State Hearing Officer to **reverse** the proposal of [REDACTED] to transfer or discharge the Resident.

ENTERED this 6th day of December 2018

Kristi Logan
State Hearing Officer