

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Involuntary Discharge
of [Resident 1] by [the Residence Home]
Community

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

The Minnesota Department of Health (Department) initiated this contested case proceeding by issuing a Notice of and Order for Hearing on June 13, 2014.

An evidentiary hearing was held at the [the Residence Home] Heath Care Center on Thursday, July 3, 2014. The hearing record closed, following the receipt of oral arguments at the end of the evidentiary hearings.

On July 27, 2014, the parties updated the record with notice that they continue to work jointly on obtaining retroactive coverage for [Resident 1's] nursing home stay from Minnesota's Medical Assistance program but, as of yet, have not received this determination.

Paul Mundt, Southern Minnesota Regional Legal Services, appeared on behalf of the Petitioner, [Resident 1] (Petitioner). Michelle R. Klegon, General Counsel of Welcov Healthcare, appeared on behalf of the [the Residence Home] Community ([the Residence Home]).

STATEMENT OF THE ISSUE

Whether [the Residence Home] may lawfully discharge the Petitioner, [Resident 1], for his failure to pay for the nursing care services he has received?

SUMMARY OF RECOMMENDATION

Notwithstanding [Resident 1's] failure to pay for the care that he has received, the discharge plan described by [the Residence Home] is not reasonable. The Administrative Law Judge therefore recommends that the Commissioner grant the appeal and deny the requested discharge.

Based upon the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. [Resident 1] is the victim of a debilitating stroke. As the result of his health problems, he requires significant, around-the-clock care. For example, [Resident 1] is dependent upon 24-hour nursing assistance to address respiratory, feeding, medication and self-care needs.¹

2. During the summer of 2013, these needs were being addressed by a nursing care facility outside of Chicago, Illinois. The charges for his care were defrayed by the medical assistance program in that state.²

3. Because [Resident 1's] daughter and granddaughter reside in [a municipality in] Minnesota, [Resident 1] and [the spouse of Resident 1], wished to relocate to this state.³

4. As part of that relocation, [Resident 1] was admitted to [the Residence Home] on November 26, 2013.⁴

5. [The Residence Home] is a skilled nursing "facility" within the meaning of 42 C.F.R. § 483.5(a).⁵

6. On November 26, 2013, [the spouse of Resident 1] signed an admission agreement in favor of [the Residence Home]. This agreement provides that [Resident 1 and the spouse of Resident 1] agree to pay the charges associated with [Resident 1's] care, will cooperate in the enrollment process for Medical Assistance in Minnesota and personally guarantee prompt payment of any billed charges.⁶

7. Notwithstanding the pledges made in the admissions agreement, [the Residence Home] staff knew that the that [Resident 1 and the spouse of Resident 1] did not have significant personal assets; and, as was the case in Illinois, they would require the aid of the state Medical Assistance program in order to defray the costs of [Resident 1's] care.⁷

¹ Testimony (Test.) of [S. S.-V.].

² Test. of [J.K.].

³ *Id.*

⁴ *Id.*

⁵ Test. of [S. S.-V.]; Test. of [T. L.]; 42 C.F.R. § 483.5(a).

⁶ Ex. B; Test. of [T. L.].

⁷ Test. of [S. H.]

8. Since the autumn of 2013, [Resident 1 and the spouse of Resident 1] have pursued approval of [Resident 1's] participation in Minnesota's Medical Assistance program; although his eligibility for assistance has yet to be approved. [Resident 1 and the spouse of Resident 1] have vigorously sought review of this determination through the appeals process and this effort is ongoing.⁸

9. On May 6, 2014, [the Residence Home] hand-delivered a Notice of Discharge to [Resident 1 and the spouse of Resident 1]. The Notice explained that the facility intended to discharge him to his granddaughter's home in [location redacted], Minnesota.⁹

10. The stated reason for the discharge was because the cost of [Resident 1's] care was not being paid.¹⁰

11. On June 5, 2014, [Resident 1], by and through counsel, objected to the discharge. [Resident 1] asserted that the proposed discharge was not appropriate.¹¹

12. Following the Notice of Discharge, [the Residence Home] has received from [Resident 1 and the spouse of Resident 1] two payments of approximately \$1,000 each, toward the accumulated arrearages. These sums reduced the overall balances by the same amount.¹²

13. As of the date of the evidentiary hearing, the arrearages associated with [Resident 1's] care at [the Residence Home] equal \$67,876.¹³

14. [The Residence Home] has sought out skilled nursing facilities and home care agencies in Minnesota that might be able to safely and thoroughly care for [Resident 1].¹⁴

15. As of the date of the evidentiary hearing, [the Residence Home] was not able to identify a skilled nursing facility that agreed to accept a transfer of [Resident 1].¹⁵

16. [The Residence Home] did obtain the agreement of an affiliate of the Mayo Clinic that was willing and able to provide 24-hour nursing staff to a home-bound

⁸ Test. of [T. L.]; Test. of [S. H.]; Test of [J. K.].

⁹ Ex. C; Test. of [T. L.]; Test. of [S. H.].

¹⁰ Ex. C.

¹¹ APPEAL LETTER (June 5, 2013).

¹² Test. of [T. L.]; Test. of [S. H.].

¹³ Ex. D; Test. of [T. L.]; Test. of [S. H.].

¹⁴ Ex. F; Test. of [T. D.].

¹⁵ *Id.*

stroke patient like [Resident 1]. This firm was likewise willing to provide care to [Resident 1] in [location redacted], Minnesota.¹⁶

17. When asked about the features of the [location redacted] location, [T.D.], a social worker at the facility who was participating in the discharge planning process for [Resident 1], replied: "I have no information about [location redacted]. All that I know is that is where the Granddaughter lives."¹⁷

18. Counsel for the facility acknowledged at the evidentiary hearing that [the Residence Home] would, and could, continue to care for [Resident 1] if the accrued charges were paid.¹⁸

Based upon the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. Minnesota and federal law authorize the Administrative Law Judge to: (a) conduct this proceeding; (b) make recommendations to the Commissioner as to whether [the Residence Home]'s proposed discharge meets the requirements of the law; and (c) make findings, conclusions, and orders that are related to this appeal.¹⁹

2. [The Residence Home] is a "facility" within the meaning of 42 C.F.R. § 483.5(a). It is subject to the requirements imposed by federal law relating to the discharge or transfer of any of its residents.²⁰

3. [Resident 1] is a resident of [the Residence Home] within the meaning of 42 C.F.R. § 483.12.

4. Counsel for [Resident 1] filed a timely appeal of [the Residence Home]'s Notice of Discharge.²¹

5. One basis for discharging a resident from a facility is that "the resident has failed, after reasonable and appropriate notice, to pay . . . for a stay at the facility"²²

¹⁶ Test. of [T. D.]; Test. of [S. S.-V.].

¹⁷ Test. of [T. D.].

¹⁸ DIGITAL RECORDING, OAH Docket No. 8-0900-31597 (July 3, 2014).

¹⁹ See, 42 U.S.C. §§ 1395i-3 (e) (3) and 1396r (e) (3); 42 C.F.R. §§ 483.12 and 483.204; Minn. Stat. §§ 14.50 and 144A.135.

²⁰ See *generally*, 42 C.F.R. § 483.5 (a).

²¹ See, APPEAL LETTER (June 5, 2013).

²² See, 42 C.F.R. § 483.12 (a) (2) (v).

6. Before a Medicare-certified long term care provider may involuntarily discharge a resident, the facility must notify the resident, and if known, a family member or legal representative of the resident, of the proposed discharge.²³ The facility must issue the required notices at least 30 days before the resident is scheduled to be discharged.²⁴ Further, the facility must communicate this information in a language and manner that the recipients of the notice understand.²⁵ Lastly, the notice must specify both the location to which the resident will be transferred and the resident's right to appeal the discharge decision.²⁶

7. Minnesota's "Bill of Rights" for nursing home residents provides in part:

Residents shall not be arbitrarily transferred or discharged. Residents must be notified, in writing, of the proposed discharge or transfer and its justification no later than 30 days before discharge from the facility and seven days before transfer to another room within the facility. This notice shall include the resident's right to contest the proposed action, with the address and telephone number of the area nursing home ombudsman pursuant to the Older Americans Act, section 307(a)(12). The resident, informed of this right, may choose to relocate before the notice period ends. The notice period may be shortened in situations outside the facility's control, such as a determination by utilization review, the accommodation of newly-admitted residents, a change in the resident's medical or treatment program, the resident's own or another resident's welfare, or nonpayment for stay unless prohibited by the public program or programs paying for the resident's care, as documented in the medical record²⁷

8. [The Residence Home] must prove facts that are required by law to support its discharge of [Resident 1] by a preponderance of the evidence.²⁸

9. [The Residence Home] has the burden of proof in this proceeding to establish by a preponderance of the evidence that [Resident 1] failed, after reasonable and appropriate notice, to pay for his stay at [the Residence Home].²⁹

²³ See, 42 C.F.R. § 483.12 (a) (4) (i); *In re Involuntary Discharge or Transfer of J.S. by Hall*, 512 N.W.2d 604, 610 (Minn. App. 1994).

²⁴ See, 42 C.F.R. § 483.12 (a) (5).

²⁵ See, 42 C.F.R. § 483.12 (a) (4) (i).

²⁶ See, 42 C.F.R. § 483.12 (a)(6)(iii) and (a)(6)(iv).

²⁷ See, Minn. Stat. § 144.651 (29).

²⁸ See, Minn. R. 1400.7300 (5); *In the Matter of the Involuntary Discharge or Transfer of J.S. by Ebenezer Hall*, 512 N.W.2d 604,610 (Minn. Ct. App. 1994).

²⁹ Compare, Minn. R. 1400.7300 (5).

10. [The Residence Home] has provided to [the spouse of Resident 1] appropriate notice of all monthly charges for [Resident 1's] care and of the arrearages that have resulted from the failure to pay those charges.³⁰

11. [The Residence Home] has proved by a preponderance of the evidence that [Resident 1], and those responsible for making payments for [Resident 1's] care, have failed to pay for [Resident 1's] stay at [the Residence Home]. As a result, [Resident 1] is subject to discharge from the facility.

12. The May 6, 2014 Notice of Discharge specifies a location to which [Resident 1] will be discharged, as required by 42 C.F.R. § 483.12(a)(6)(iii).

13. Under 42 C.F.R. § 483.20(l)(3), whenever a facility anticipates that it will discharge a resident, that resident:

must have a discharge summary that includes ... [a] post-discharge plan of care that is developed with the participation of the resident and his or her family, which will assist the resident to adjust to his or her new living environment.

14. Federal law also requires that prior to discharge, “[a] facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.”³¹

15. [The Residence Home] has not completed reasonable discharge planning on [Resident 1's] behalf.

16. The hearing record does not support the conclusion that [Resident 1], or [Resident 1's] caregivers, have a right to enter or remain on the [location redacted] premises.

17. [The Residence Home] is not entitled to discharge [Resident 1] from its facility.

Based upon these Conclusions of Law, the Administrative Law Judge makes the following:

³⁰ Ex. D.

³¹ See, 42 U.S.C. § 1396r(c)(2)(C); 42 C.F.R. § 483.12(a)(7).

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner:

- (1) **GRANT** the Petitioner's appeal; and
- (2) **DENY** [the Residence Home]'s request to discharge [Resident 1] following the receipt of the Commissioner's Final Order.

Dated: August 5, 2014

s/Eric L. Lipman

ERIC L. LIPMAN

Administrative Law Judge

Reported: Digitally recorded.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Dr. Edward Ehlinger, Commissioner, Department of Health, 625 Robert St. N, PO Box 64975, St. Paul, MN 55164-0975, (651) 201-5810 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

As the result of amendments to the Omnibus Budget Reconciliation Act of 1987,³² a long term care facility that has been certified as a Medicare provider may involuntarily discharge a resident only in specified situations and only after certain statutory and procedural requirements have been satisfied. As a general matter, the law permits discharge of a resident when the resident has failed, after reasonable and appropriate notice, to pay for his or his stay at the facility.³³ The issue in this contested case proceeding is whether [the Residence Home] may proceed with discharging the Petitioner following his nonpayment.

[The Residence Home] proposes to discharge [Resident 1] from its facility, and therefore bears the burden of proving by a preponderance of the evidence that it has met the legal requirements for discharge.³⁴

At the evidentiary hearing, [the Residence Home] presented uncontroverted evidence that, during his stay, [Resident 1] accrued arrearages for his care in the amount of \$67,876. [The Residence Home] also established that it promptly and contemporaneously gave to [Resident 1's spouse] monthly statements of account detailing the accumulating arrearages.

Ordinarily, the Notice of Discharge begins an iterative discussion between the facility, the patient and the patient's family members. Over the course of the transition period that follows the issuance of the Notice, the federal regulations contemplate that revisions and refinements to the discharge plan may be made so as to accomplish a safe and orderly transfer of the patient.³⁵

In this case, there are real gaps in the facility's discharge plan. First, the record does not support the conclusion that [Resident 1] (or his caregivers), would have a right to enter or remain on the [location redacted] premises. The record does not establish that [Resident 1] is a tenant or an owner of the [location redacted] premises – or holds property rights of any kind in that location. This is not a case, therefore, in which the facility proposes to discharge [Resident 1] to his own home.

Likewise, the record is silent as to whether [Resident 1's] granddaughter ever assented to becoming a caretaker, or a housemate, to her infirm grandfather. Indeed, what evidence we do have in the record, suggests that she did not assent to the transfer

³² See, 42 U.S.C. § 1396r (c)(2).

³³ See, *id.*; 42 C.F.R. § 483.12.

³⁴ See, Minn. R. 1400.7300 (5); *In the Matter of the Involuntary Discharge or Transfer of J.S. by Ebenezer Hall*, 512 N.W.2d 604, 610 (Minn. Ct. App. 1994) (“a nursing facility proposing to transfer or discharge a resident must prove the supporting facts by a preponderance of the evidence”).

³⁵ See, 42 C.F.R. § 483.12.

of her Grandfather to her home.³⁶ In the absence of a legal right to remain at the [location redacted] home, an invitation to share the premises should be a bare minimum.

The reach of the facility's claim, therefore, is quite broad. If a discharge is appropriate in this case, presumably the facility could select any of [Resident 1's] relatives of its choosing – a niece, a sister-in-law, a third cousin – upon whom it could deposit [Resident 1] and his team of nurses. Such a conclusion misapprehends the law³⁷ and the requirement for appropriate discharge planning.³⁸

The Commissioner should grant the appeal.

E. L. L.

³⁶ Ex. E. (Director of the [the Residence Home] Business Office [S.H.] “[t]alked with the Granddaughter and she stated that she would file appeal” of the denial of Medical Assistance benefits).

³⁷ Minnesota has no “filial support” statute obliging lineal descendants to pay the debts of their parents or grandparents. See generally, Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents* (Penn State Law, Scholarly Works Faculty Scholarship, 2012).

³⁸ See, *In the Matter of the Involuntary Discharge / Transfer of V.M. by Lakeside Healthcare Center of Dassel*, OAH Docket No. 8-0900-19416-2, 2008 WESTLAW 642734, slip op. at 6 (“Lakeside’s announcement that they were willing to prepare her for departure does not fulfill its obligation to ‘provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility’”) (unpublished); *In the Matter of the Involuntary Discharge / Transfer of V.M. by Roseville Good Samaritan Center*, OAH Docket No. 54-0900-17184-2, 2006 WESTLAW 1412812, slip op. at 2 (unpublished) (“The only discharge planning accomplished by Roseville with regard to Petitioner is hearing Mr. Jones’ assurance that ‘he would take care of’ Petitioner. No representative from the facility has been to Mr. Jones house. No one has conducted a home visit or made any assessment of Petitioner and the home to determine what type of assistance Petitioner would need in order live in the community generally, and in Mr. Jones’ home in particular. No plan for Petitioner’s orientation to the proposed discharge placement was in place at the time of the hearing”); *In the Matter of the Involuntary Discharge of E.H. by Augustana Health Care Center of Hastings*, OAH Docket No. 8-0900-17475-2, 2006 WESTLAW 2952715, slip op. at 3 (Discharge planning was inadequate where “E.H.’s son, Richard, does not agree to the transfer or willingly assume the responsibility of maintaining E.H.’s care” and there was “no that Augustana has conducted an orientation to ensure the safety and orderly transition of E.H. to a new residence”) (unpublished).