

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

In the Matter of the Involuntary
Discharge/Transfer of A.G., Petitioner,
by Ebenezer Care Center, Respondent

**FINDINGS OF FACT,
CONCLUSIONS
AND RECOMMENDATION**

A hearing was held on August 7, 2008, at Ebenezer Care Center, 2545 Portland Ave. S., Minneapolis, Minnesota 55404, pursuant to a Notice of and Order for Hearing issued by Julie Frokjer, Appeals Coordinator, Division of Compliance Monitoring, Minnesota Department of Health, on July 18, 2008. The record closed at the completion of the hearing.

Appearances: Sally Schoephoerster, Regional Ombudsman, Office of Ombudsman for Long-Term Care, P.O. Box 64971, St. Paul, Minnesota 55164-0971, appeared as the representative of Petitioner, A.G. Petitioner, A.G., was not present.

Susan M. Voigt, Esq., and Erin E. Venegoni, Esq., Voigt, Klegon & Rode, LLC, 2550 University Ave. W., Suite 190 S., Saint Paul, Minnesota 55114, appeared on behalf of Ebenezer Care Center, Respondent.

STATEMENT OF THE ISSUES

1. Did Respondent give proper notice of its intent to discharge A.G.?
2. Did Respondent have sufficient basis to discharge or transfer A.G. for failing to pay for her care?
3. Did Respondent adequately plan for A.G.'s discharge or transfer?

The Administrative Law Judge concludes that Respondent gave proper notice of its intent to discharge, that it had a sufficient basis to discharge A.G. for failing to pay for her care, and that it made adequate efforts to plan for her discharge. The ALJ recommends that the proposed discharge be affirmed.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. A.G. was admitted to Ebenezer Care Center on or about September 28, 2007. A.G. resided in the Ebenezer Apartments located adjacent to Ebenezer Care Center. A.G. was initially admitted for a short-term stay, for 90 days or less.¹ A.G.'s stay became long-term due to her medical issues and inability to care for her self.²

2. A.G. reviewed and signed the facility's Admission Agreement within a few days of her admission. Maria Tompkins, Admissions Coordinator, and Laurie Canavan, Respondent's office manager, reviewed the agreement with A.G. prior to her signing the agreement. The agreement was effective as of September 28, 2007.³

3. A.G. executed a financial power of attorney on her behalf in favor of her brother prior to her admission. Maria Tompkins, Admissions Coordinator, reviewed the agreement with A.G.'s brother, Michael, near the time of A.G.'s admission.⁴

4. The Admission Agreement sets forth in detail Respondent's obligations to A.G. and A.G.'s obligations to pay for Respondent's services. The Admission Agreement states that A.G. agrees to "[p]ay all charges for [her] care in advance." A.G. further agreed as indicated in the Admission Agreement on page five, Paragraph VI, sections (A), (B), and (D) the following:

A. You agree to promptly and fully pay Facility's Daily Rate for Basic Care Services for each day a space in Facility is occupied by or reserved under a bedhold for Resident. Payment is due one (1) month in advance on the first day of each month . . .

B. You agree to promptly and fully pay Facility for all Special Services and any other charges described in this Agreement, including without limitation other charges billed to Facility or by Facility as incurred by you or through order of your physician. Payment for these charges shall be due within ten (10) days of receipt of all billings for such charges . . .

D. You personally guarantee payment of all charges incurred . . .⁵

5. On April 7, 2008, Respondent personally served A.G. with a notice of discharge. The notice of discharge vacated a prior notice of discharge dated April 4, 2008, which contained a clerical error. The notice dated and served April 7, 2008 constituted the final Notice of Discharge.⁶

¹ Testimony of Michelle Schmidt.

² Test. of Laurie Canavan.

³ Ex. 3 and test. of M. Schmidt.

⁴ Test. of M. Schmidt and L. Canavan.

⁵ Ex, 3.

⁶ Ex. 2.

6. The notice of discharge informed A.G. that her account was in arrears in the amount of \$36,618.28 and was over 180 days past due. Respondent in the notice stated that Respondent is forced to discharge A.G. to her brother's home.⁷

7. A.G. requested a hearing to appeal the discharge by a letter dated May 7, 2008. The Notice of and Order for Hearing was served upon the parties on July 18, 2008.⁸

8. A.G. was informed subsequent to the service of the notice of discharge that she would be discharged to A.G.'s sister's home, and not to her brother's home.⁹ A.G. contends that her sister's home was not a viable option for her.¹⁰ Respondent does not dispute A.G.'s contention. Respondent agrees that assessment of A.G.'s brother's and sister's home was not completed to determine whether the homes were a viable option for discharge for A.G. Respondent did not establish that A.G.'s siblings consented to A.G. being discharged to their respective homes.¹¹

9. Respondent next informed A.G. on August 6, 2008, that she would be discharged to another nursing home facility, either Benedictine Health Care Center or Walker Methodist Center.¹²

10. The discharge options as to nursing home facilities may change based upon availability of beds at the specific time of the discharge. All facilities available for discharge are expected to be safe, viable, with A.G. expected to receive similar level of care. Respondent is and expects to continue to work with A.G. and the discharge facility to prepare and orient A.G., and to ensure A.G.'s safe and orderly transfer from its facility.¹³

11. A.G. has a pending action seeking payment through Medical Assistance for the outstanding arrearages owed by A.G. to Respondent. A.G. has an annuity that is not presently available for payment for her outstanding arrearages. A.G. is seeking to have the annuity balance applied towards the outstanding arrearages by changing the terms for pay out of the annuity. Respondent's counsel is representing A.G. in the pending actions involving Medical Assistance funding and the modification of the annuity terms.¹⁴

⁷ Ex. 2.

⁸ See, Notice of and Order for Hearing dated July 18, 2008. The Notice was served upon the Office of Administrative Hearings on July 18, 2008.

⁹ Test. of M. Schmidt and Sally Schoephoerster.

¹⁰ Test. of S. Schoephoerster.

¹¹ Test. of M. Schmidt.

¹² Test. of M. Schmidt.

¹³ Test. of M. Schmidt.

¹⁴ Test. of S. Schoephoerster.

12. Sally Schoephoerster on August 6, 2008 requested a continuance on A.G.'s behalf by way of telephone.¹⁵

13. A.G. withdrew her request for a continuance at the commencement of the hearing.¹⁶

14. A.G. and Respondent stipulate that this report be designated as a public document such that the document's contents can be utilized in the pending actions.

15. A.G. stipulates that adequate notice was given to her regarding her discharge.¹⁷

16. A.G. stipulates that the outstanding unpaid amount for the cost of her care owed to Ebenezer Care Center by A.G. is \$45,442.39 after credit for A.G.'s payments of \$9,833.85. The outstanding arrearages were incurred for the time period of September 28, 2007 through August 31, 2008. A.G. further stipulates that the outstanding amount, \$45,442.39, was properly incurred for her stay at Ebenezer Care Center and remains unpaid.¹⁸

17. A.G. disputes that discharge planning has occurred to her satisfaction. A.G. avers that the initial discharge planning seeking to release A.G. to her relatives' homes was inadequate since the sought released locations were not viable options. A.G. stipulates that adequate discharge planning commenced within one week prior to the hearing.

18. A.G. receives Supplemental Security Income of \$591 and a pension annuity payment of \$966.65 per month. The total income is \$1,557.65. A.G.'s monthly income of \$1,557.65 was utilized to make payments towards the costs of care for the period of February 2008 to the present.¹⁹

19. A.G.'s brother, Michael, received her monthly income for the time period of September 2007 through January 2008. A.G.'s monthly income while being received by her brother was not fully utilized in paying for her care.²⁰

20. A.G. initially was not eligible for Medical Assistance. A.G. became eligible for Medical Assistance in June 2008. Medical Assistance is currently paying A.G.'s expenses for her stay and has covered the costs since part of June 2008.

¹⁵ The request was made outside the presence of Respondent's counsel. Sally Schoephoerster was informed that the request should be made with all parties present. The continuance request was to be addressed in this hearing.

¹⁶ Test. of S. Schoephoerster.

¹⁷ Test. of S. Schoephoerster.

¹⁸ Test. of S. Schoephoerster.

¹⁹ Test. of L. Canavan.

²⁰ Test. of L. Canavan. A.G. sought to have her brother testify by way of telephone. A.G.'s brother was not available at the time of the hearing when efforts were made to contact him.

21. Medical Assistance is operated by the State of Minnesota and is jointly funded by the state and federal governments. Medical Assistance pays most health care costs for certain low-income persons, including disabled persons.²¹ The amount that Medical Assistance will pay Respondent for daily care varies and is determined in part by the level of services that the resident requires.²²

22. A.G. did not have public assistance funds available for paying the cost of her stay for the period of September 2007 through a portion of June 2008. The outstanding arrearages at issue in the amount of \$45,442.39 accrued primarily during the time period when A.G. was not eligible for public assistance.²³

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

CONCLUSIONS

1. The Department of Health and the Administrative Law Judge have jurisdiction in this matter pursuant to 42 U.S.C. §§ 1395i-3(e)(3) and 1396r(e)(3), and Minn. Stat. §§ 14.55 and 144A.135.

2. The Department gave proper notice of this hearing and has complied with all relevant procedural requirements.

3. Respondent is a “facility” within the meaning of 42 C.F.R. § 483.5 (a) and is therefore subject to the requirements imposed by federal law relating to the discharge or transfer of any of its residents.

4. A.G. is a resident of Respondent within the meaning of 42 C.F.R. § 483.12 and is therefore entitled to the rights created by federal law relating to any transfer or discharge by Respondent.

5. A.G. filed a timely appeal of Respondent’s notice of discharge.²⁴

6. Respondent has the burden of proving by a preponderance of the evidence that A.G. meets the criteria for discharge.²⁵

7. Pursuant to 42 C.F.R. § 483.12(a) (2) (v) (2007), one legal 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”

8. Respondent has proven by a preponderance of the evidence that A.G. has not paid for her care, after reasonable and appropriate notice.

²¹ See Minn. Stat. ch. 256B, specifically §§ 256B.02, 256B.04, 256B.055 and 256B.056.

²² Test. of L. Canavan.

²³ Test. of L. Canavan.

²⁴ See, Notice and Order of Hearing.

²⁵ Minn. R. 1400.7300, subp. 5.

9. Respondent must also show that it gave proper notice of its intent to discharge A.G., and made appropriate plans for placement. Minn. Stat. § 144A.135(b) requires that Respondent's notice of discharge comply with federal law.

10. Pursuant to 42 C.F.R. § 483.12(a)(6), the notice of discharge must include the reason for the transfer or discharge, the effective date of the transfer or discharge, the location to which the resident is to be transferred or discharged, the resident's right to appeal, and the information to contact the State long-term care ombudsman.

11. Pursuant to 42 C.F.R. § 483.12(a)(7), "[a] facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility."

12. Pursuant to 42 C.F.R. § 483.20(l)(3), whenever

the facility anticipates discharge, a 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.

13. Respondent has proven by a preponderance of the evidence that it gave such notice and made reasonable efforts to plan for placement.

14. The parties seek to have the document classified as a public document.

15. Any Findings of Fact more appropriately described as Conclusions are adopted as Conclusions.

16. These Conclusions are reached for the reasons set forth in the attached Memorandum, which is incorporated by reference in these Conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED THAT:

Respondent's decision to discharge A.G. be AFFIRMED.

Dated: September 3, 2008

s/Sangeeta Jain

SANGEETA JAIN
Administrative Law Judge

Reported: Digitally Recorded. No transcript prepared

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. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Sanne Magnan, Commissioner, Minnesota Department of Health, Attention: Appeals Coordinator, 85 East Seventh Place, Suite 400, P. O. Box 64882, St. Paul, MN 55164-0882, to learn the procedure for filing exceptions or presenting argument.

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. 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 the Administrative Law Judge of the date on which the record closes.

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

A.G. resided in the Ebenezer Care Center since September 2007 and in the apartment building adjacent to the Ebenezer facility prior to September 2007. A.G. strenuously objects to the discharge because she considers this facility her home and avers that the transfer to another location would constitute a significant hardship.

A.G. stipulates that she failed after reasonable and appropriate notice to pay for a stay at the facility and has accumulated outstanding arrearages \$45,442.39. A.G. agrees that she received a timely and proper notice of the notice of discharge. A.G. contends that initially Respondent did not make reasonable efforts to plan for her placement. A.G. agrees that the flaw was remedied and that the facility made reasonable efforts currently to plan for her placement.

A.G. first contends that she does not have sufficient means to pay for the outstanding arrearages. A.G. failed to establish that an inability to pay is a basis to contest her discharge. Further, A.G. failed to establish a de facto inability to pay. A.G. does not dispute that her monthly income was not fully applied towards the costs of care for the period of September 2007 through January 2008. A.G. also agrees that she has additional monies available through an annuity that could be applied towards the arrearages.

A.G. stipulates that Respondent's notice was adequate and timely. It is noted that Respondent's notice contained a discharge location that was inadequate and was subsequently changed. This subsequent change does not defeat the adequacy of the underlying notice. First, A.G. stipulates to the sufficiency of Respondent's notice. Second, it is reasonable that the discharge location changes as subsequent preparation are made to ensure the resident's safe and orderly transfer. Respondent established that its underlying notice of discharge was proper.

A.G. next contends that Respondent failed to initially adequately prepare for her discharge and thus her discharge should not occur. A.G. agrees that Respondent has now undertaken the necessary planning and orientation needed to discharge A.G. to a facility that can provide adequate, safe and continuous care for A.G.

It is uncontroverted that Respondent initially planned to discharge A.G. to her siblings' homes without ascertaining whether the siblings were willing to accept A.G. in their respective home and whether their respective homes were safe, viable options that could provide continuity of A.G.'s care. Respondent considered other nursing facilities only a few days prior to this hearing on August 4, 2008, and only after A.G. was eligible for Medical Assistance reimbursement.

Respondent's initial notice of discharge listed a discharge location that was inadequate to meet A.G.'s needs. Adequate measures to find a viable facility did not occur until a few days prior to the underlying hearing. If Respondent had not cured the defect then A.G. could not be discharged since there was insufficient preparation and orientation to ensure the safe and orderly transfer of A.G. from the facility. However, A.G. stipulates that Respondent is currently providing sufficient preparation and orientation to ensure the safe and orderly transfer of A.G. from its facility.

Respondent undertook sufficient preparation and orientation to ensure A.G.'s safe and orderly transfer from its facility. A.G. stipulated that the initial failure to adequately prepare was recently cured. A.G. failed to establish that Respondent's delayed efforts in implementing the necessary preparation constitutes a basis for denying A.G.'s discharge from the facility.

Respondent had a sufficient basis for A.G.'s discharge. Respondent provided A.G. proper notice of the discharge. Respondent sufficiently prepared for and provided orientation to ensure A.G.'s safe and orderly transfer from its facility. Respondent met its burden to establish that A.G.'s discharge is warranted.

S. J.