

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

In the Matter of the
Involuntary Discharge
Of FACT,
or Transfer of J.S.,
AND
Petitioner, by Ebenezer
RECOMMENDATION
Hall, Respondent.

FINDINGS

CONCLUSIONS

The above entitled hearing was held on for hearing before Bruce D. Campbell, Administrative Law Judge, on July 2, 1992, at Ebenezer Hall, in Minneapolis, Minnesota. The hearing was continued due to a need for a more specific statement of the grounds for proposed discharge. Ebenezer Hall subsequently served on J.S. and her attorney an Amended Notice of Discharge. A continued hearing was convened by Administrative Law Judge I P. Campbell at Ebenezer Hall on July 20, 1992.

Appearances: Mark Carlson and Florence Humphrey Batchelor. Attorneys at Law, Messerli & Kramer, 1500 Northland Plaza Building, 3800 West 80th Street, Minneapolis, Minnesota 55431-4409, appeared on behalf of the Respondent, Ebenezer Hall (Ebenezer, Facility or Respondent); and Laurie Hanson, Attorney at Law, Legal Aid Society of Minneapolis, Inc., Southside Office, 2929 Fourth Avenue South, Minneapolis, Minnesota 55408, appeared on behalf of the Petitioner, J.S. (J.S., Resident or Petitioner).

The record of this proceeding closed on August 13, 1992, with the receipt by the Administrative Law Judge of the final post hearing memorandum of counsel.

This Report is a recommendation, not a final decision. The Commissioner of the Department of Health will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. sec 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 Donna Dunkel, Minnesota Department of Health 393 North Dunlap, P.O. Box 64900, St. Paul, Minnesota 55164-0900 (612/643-2551), to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether the involuntary transfer or discharge of J. S. is necessary for her welfare because her needs cannot be met in the Facility, or whether an involuntary transfer or discharge of J.S. is appropriate because the safety of individuals in the Facility is endangered by her presence.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Ebenezer Hall (Respondent, Ebenezer or Facility) is a licensed and Medicaid-certified nursing home facility owned and operated by Ebenezer Society, a Minnesota nonprofit corporation. As a Medicaid-certified nursing home facility, Ebenezer Hall is subject to all relevant state and federal legal requirements regarding the provision of care and reimbursement, including the limitations on its right to involuntarily discharge or transfer a resident stated in 42 C.F.R. 483.12(a)(2)(i) and 483.12(a)(2)(iii) 1 9 91) .

2. The Resident, J.S., is a 74-year-old female resident of Ebenezer Hall. She was admitted to the Facility on or about February 24, 1989, when she was approximately 71 years of age. The Resident has no spouse or children. Her immediate family is limited to two elderly brothers, one of whom is physically infirm and also a nursing home resident. The Facility has attempted on several occasions to involve J.S.'s siblings in her care. They were unwilling to participate in her care or act for her wellbeing.

3. J.S. has had a history of major mental illness, documented back at least to the mid-1940s. On several occasions, she has been an inpatient in psychiatric facilities. For a number of years, J.S. was under the care of Dr. Hyatt Moe, a licensed psychiatrist. Dr. Moe began treating J.S. during 1971 and he remained responsible for her care until the spring of 1989. Since February of 1989, J.S. has received no psychological or psychiatric treatment for her major mental illness.

4. J.S. also has had a long history of alcohol abuse, She has, however, been abstaining from alcohol for at least ten years. Her past history of alcoholism is not a factor in determining the propriety of her placement at Ebenezer.

5. In January of 1989, J.S. was a resident of Angelus convalescent Center, now known as Regina Terrace Nursing Home. The home is a basic geriatric nursing facility. Angelus Home Discharged J.S. in January of 1989 because of her refusal to accept medical care and pronounced behavior problems associated with her untreated mental illness. While at Angelus Nursing Home, J.S. had discontinued psychiatric medications prescribed by Dr. Moe. On January 25, 1989, Dr. Moe admitted the Petitioner to the inpatient psychiatric unit at Metropolitan Mt. Sinai Medical Center. The purpose of the two-week inpatient stay was to evaluate her physical and mental condition and begin a program of remedication. On February 7, 1989, J.S. was discharged from Metropolitan Mt. Sinai inpatient psychiatric unit with prescriptions for a number of medications, including Xanax, a minor tranquilizer, and Haldol, an antipsychotic medication prescribed to control agitation and paranoid ideation. On February 7, 1989, J.S. entered another Ebenezer facility, an intermediate care facility, primarily for treatment of various physical ailments, including an open venous leg ulcer. J.S. was transferred from the intermediate care facility to Ebenezer Hall on February 24, 1989. At the time of her admission, she was still under the care of Dr. Moe and had received

prescriptions for the psychotropic medications Dr. Moe deemed appropriate.
There is no evidence in the record as to whether J.S. was actually taking

Haldol at the time of her admission. The social history prepared by the Social Service Department of Ebenezer at the time of admission states: "Pre-admission screening considers this a nursing home transfer at this time -- mental illness component is no consideration." Eb. Ex. 17.

6. Shortly after her transfer to Ebenezer Hall, J.S. refused to take Haldol as ordered by Dr. Moe and she also refused to have any continuing contact with him. She believes that the drug causes undesirable side effects. J.S. also has extremely paranoid thoughts about Dr. Moe. Since February of 1989, J.S. has received several psychiatric evaluations, but she has not participated in any psychiatric treatment or any program of psychotropic medication, except for taking Xanax, a minor tranquilizer, for anxiety. That medication, however, was discontinued in 1991.

7. The major mental illness from which J.S. suffers has usually been diagnosed as some species of paranoid schizophrenia. That was the diagnosis under which she was treated by Dr. Moe. Eb. Ex. 16. Other evaluations of the Petitioner have questioned whether a classic diagnosis of schizophrenia is appropriate. J.S. does not exhibit many of the components of a truly classic schizophrenic syndrome. Eb. Ex. 2. She does, however, have a general paranoid orientation toward life. She does not exhibit hallucinations or a specific delusional system. J.S. is not actively psychotic in the usual sense of the term. Eb. Ex. 2. The Petitioner does not give indications of bizarre or fragmented delusions, such as thought broadcasting, thought insertion or thought withdrawal. She does not give an indication of loosening of associations or other formal thought disorders. J.S. is not confused or disoriented and does not appear to have significant memory problems. She does, however, have vivid delusions of reference, particularly with respect to the sexual activities of other home residents. Pet. Ex. E, p. 2. J.S. is extremely paranoid about the nursing home and its relationship to any of her treating medical professionals. The Petitioner exhibits an extremely contrary or oppositional personality, Pet. Ex. L. Her oppositional personality, when coupled with her paranoid disorder, results in a highly negative reaction to the nursing home and any active intervention for her benefit. She does not form positive associations with the staff, or other residents. J.S. will discontinue using a health care professional if she believes that he or she has consulted with nursing home staff.

8. The most pronounced manifestation of J.S.'s mental illness is repeated verbal abuse of home staff members and other residents. During such episodes, she is anxious, agitated, and, sometimes, physically threatening. The level of verbal abuse appears to vary with her stress level which also appears to vary with the degree to which nursing home staff attempt to actively manage her behavior and condition. At various times in her life, including her stay at Angelus Nursing Home, she can and does lose control of

her behavior by decompensating.

9. A summary of her adverse behavior incidents is contained in Exhibit 5. The incidents are taken from nurses' daily reports from May of 1991 through June of 1992. Although the incidents reflect extreme verbal abuse and a level of physical threat, J.S. has not physically assaulted staff or other residents. Her conduct does create, however, in both staff and other residents a reasonable fear of a physical confrontation.

10. J.S.'s behavior at the Facility prior to the incidents recorded in Eb. Ex. 5 was also of a similar verbally abusive character with associated physical threats.

11. At various times since 1989, the Petitioner has neglected her personal health, including physical hygiene and nutrition and health cares on her leg ulcer. Again, at various times it would not be unusual for the Petitioner to wear the same clothing for an extended period of time, as long as several weeks. At the Facility, the Petitioner is relatively isolated. Her paranoid disorder and verbally abusive behavior prevent her from forming positive relationships with the staff or other residents. Other residents avoid J.S. because they are intimidated by her. J.S. does not participate in the programs and activities offered by the Facility. On various occasions, she has refused to allow housekeeping staff to clean her room. She also has largely sustained herself on snack foods purchased from a small store near the Facility at various times during her stay at Ebenezer.

12. The agitation experienced by J.S. will place some additional stress on her body and cardiovascular system. J.S.'s ability to maintain independently her personal hygiene and nutrition depend on her level of stress, agitation and paranoia. At some times in the past, J.S.'s psychiatric disorder has posed a threat to her personal well-being because of her refusal of medical care. J.S. is a person in need of continuing psychiatric care. Eb. Ex. 16. Her physical and mental condition has not, however, deteriorated markedly during her stay at Ebenezer. Pet. Ex. D, p. 3.

13. As a consequence of Findings 7 - 12, supra, J.S. is a person who has a major mental illness most closely approximating paranoid schizophrenia. She is in need of continuing psychiatric supervision and treatment to control her paranoia, agitation and verbally abusive behavior. At her current level of functioning, without increased agitation or decompensation, J.S. presents largely a management problem. Her behavior and ability to manage independently can, however, deteriorate as her levels of anxiety and agitation increase. Eb. Ex. 16.

14. While at the Facility, J.S. has refused to accept treatment for her major mental illness. After entering Ebenezer Hall, she did not take her major psychotropic medication and refused to see Dr. Moe. On March 13, 1989, Dr. Moe ordered two milligrams of Haldol twice a day for J.S. The Resident twice each day refused to take the medication until April 4, 1989, when the order was discontinued. Eb. Ex. 11. J.S. had become quite paranoid about Dr. Moe and refused to cooperate in any way with his professional oversight. Eb. Ex. 2. Due to her decompensating behavior at the Facility, the staff arranged for the Resident to be evaluated by Dr. Bruce Hiller, a psychiatrist with the Hennepin County Mental Health Center Nursing Home Consultation Project. The evaluation took place on December 19, 1989 at Ebenezer. At the time of the

evaluation, J.S. still refused neuroleptic medication for her symptoms. Dr. Hiller concluded:

The present schedule of medication certainly sounds appropriate in view of her touchy nature and I suspect that her proper treatment is going to be significantly impaired by her refusal to take what probably is Post indicated, one of the neuroleptic type medications. Patient is certainly on a voluntary basis at this time

and would not be a candidate for forcing medications involuntarily In spite of her symptomology. She is quite paranoid about her longstanding psychiatrist, Dr. Moe, and I suspect refused to follow any of his directions or even see him again, and she seems to have this in her mind based on some of the reactions she has had to medications prescribed. I suspect she is an extremely difficult patient to manage in terms of medications as she probably comen up with innumerable side effects and complaints about past things prescribed. Accordingly, I do not have any specific recommendation for a distinct medication change here that I think is apt to be clearly beneficial. I would favor continuation of the present schedule and try to manage as best as possible. if the management problems become intolerable, a change in facility may be the most definitive management that could be offered at this time.

Report of Bruce Hiller, M.D., December 20, 1989, Eb. Ex. 2.

15. Dr. Hiller did not undertake any mental health treatment of J.S. At the time she refused to take what he thought would be the most helpful, a neurolyptic type medication.

16. Part of J.S.'s symptomology is an oppositional personality. An oppositional personality means that the Resident will determine her own rules and limits and is extremely suspicious of authority figures. Pet. Ex. B. J.S. does not tolerate the Facility becoming involved in her medical care or treatment.

17. After the examination by Dr. Hiller, the Facility attempted to secure mental health treatment for the Petitioner through the intervention of various social service agencies. On February 25, 990, the Social Service Department of the Facility fied a report with the Adult Protection Division of Hennepin County. The County responded that they would not intervene because the situation was not life threatening. Eb. Ex. 14, ex. 1. The Minnesota Medical Decision Advocate program was also contacted in late February of 1991. The Resident refused their assistance in finding appropriate care. Eb. Ex. 14, ex. 1. Between February and Match of 1991, the Social Services Department encouraged the Resident to work with representatives of the Minnesota Alliance in obtaining appropriate care. After several meetings with Alliance representatives in which health care was discussed, the Resident did not follow through in obtaining appropriate care. Eb Ex. 14, ex. 1. In the spring of 1992, the Social Service Department again offered to facilitate appointments with Physicians of J.S.'s choosing on several occasions. She refused. Eb Ex. 14, ex. 1. Dr. Von Sternberg, the Medical Director of the Facility also offered to examine the Resident on several occasions. She refused. See, Finding 22, infra.

18. Sometime in 1991, the Medical Director of the Facility, Dr. Von Sternberg, requested that Dr. Seim provide medical services to J.S. bee, Finding 22, infra. Both physicians believed that a major psychotropic medication would be appropriate. Dr. Seim discontinued the Resident's Xanax

prescription and ordered one milligram of Haldol each day for 14 days,

beginning on December 13, 1991. J. S. was offered the medication daily for 14 days and she refused such medication. Eb. Ex, II. The Resident was not, however, informed before Haldol was ordered by Dr. Seim.

19. After the Resident's refusal to cooperate with the efforts of the staff, the Medical Director of the Facility and Dr. Seim, Ebenezer did not attempt specifically to obtain mental health care for the Resident. It was reasonable for the Facility to conclude that, because of the Resident's mental disorder including her extreme paranoia and oppositional personality, continued efforts would have been unavailing.

20. On occasions, the Resident has refused to allow the nursing staff of the Facility to perform fully the cares for some of her maladies, including her leg ulcer. Eb. Ex. 6; Pet. Ex. 1. The Resident is very particular about the cares she receives and, as previously noted, is extremely suspicious of the nursing staff. She seems to use selective denial of treatment as a way of asserting her authority and control. Despite some refusals of individual treatments, however, the leg ulcer has healed. J.S.'s selective refusals of treatment for physical problems has not resulted in any appreciable deterioration of her health. Pet. Ex. D,

21. When J.S. entered Ebenezer Hall, her attending physician, apparently, was Dr. Sandler. After a period of time, she became dissatisfied with the care she received from Dr. Sandler and saw a number of different doctors. Early in her stay at Ebenezer Hall, she began seeing Dr. Dionisio Pastones. It is not clear from the record that Dr. Pastones was ever J.S.'s attending physician of record. He did, however, consider her his patient and has expressed a willingness to act as her physician. Pet. Ex. D. An exhibit containing the contacts Dr. Pastones and his office have had with the Petitioner are contained in Pet. Ex. D. Dr. Pastones did not see the Petitioner between January 18, 1990 and June 19, 1991. Pet. Ex. D. Dr. Pastones also did not examine J.S. between July 30, 1991 and April 21, 1992, A summary of all of the Petitioner's medical contacts during her stay at Ebenezer Hall is contained in Eb. Ex. 4 and Pet. Ex. F. J.S. received absolutely no medical treatment and refused to see any physician or nurse practitioner between February 15, 1990, when she received some undefined examination at the HMC Mental Health Unit, and August 20, 1990, when she refused to see Dr. Pastones and was examined by Dr. Sandler. J.S. also refused to see any physician or nurse practitioner between the date of her visit to Dr. Sandler, August 20, 1990 and May 6, 1991, when she was seen by

Dr. Dolan. When contacted by Ebenezer staff, Dr. Pastones and Dr. Sandler refused to give orders for J.S. because they had not examined her recently.
Eb. Ex. 6; Eb. Ex. 1.

22. Despite her many contacts with Dr. Pastones, Dr. Kelly was listed on the Facility's records as the Petitioner's primary care physician. J.S. had not been seen by Dr. Kelly for almost a year when the Ebenezer Hall staff contacted him and requested direction. Dr. Kelly refused to give orders for the Petitioner, except emergency orders, unless J.S. would see him for an examination. On April 8, 1992, Dr. Kelly formally discharged J.S. from his care as her attending physician because she refused to see him. Eb. Ex. 1; Respondent's Hearing Brief, Ex. 1. On April 21, 1992, after receiving her initial discharge notice from Ebenezer Hall, J.S. contacted Dr. Pastones who later examined her. Eb. Ex. 4; Pet. Ex. D. while J.S. was not being seen by medical practitioners, as noted in Finding 21, supra, the Ebenezer staff

attempted to obtain medical care for the Petitioner. The Social Services Department attempted to contact community and governmental agencies, including the Minnesota Alliance, the Medical Decision Advocate Program, and Hennepin County Mental Health Program, to attempt to locate a physician J.S. would accept. Eb. Ex. 14. The social services department, as previously noted, attempted to contact former physicians that had provided services to J.S. Eb.

Ex. 6; Eb. Ex. 1. The Medical Director of the home, Dr. Thomas Von Sternberg, discussed J.S.'s situation with the nursing staff of the home. He was concerned because he knew that for the long periods of time previously noted, J.S. was not receiving medical care. Dr. Von Sternberg noted in J.S.'s records on February 5, 1991 that the Petitioner should begin antipsychotic drugs. Eb. Ex. 4. Dr. Von Sternberg also noted in the Petitioner's medical records on June 19, 1991 that J.S. has refused treatment despite recurring physical complaints. Dr. Von Sternberg believed that Ebenezer Hall was not able to meet J.S.'s needs. In the summer or fall of 1991, Dr. Von Sternberg persuaded Dr. Seim to treat 'he Resident. On November 8, 1991, Dr. Seim did an annual physical exam on J.S. Pet. Ex. E. During the period in which J.S. was not receiving regular medical treatment, Dr. Von Sternberg twice attempted to examine J.S. with a nurse present in her room. On both occasions, J S. refused to be seen by Dr. Von Sternberg

23. J.S.'s mental illness is a contributing factor to her periodic refusal to accept medical treatment Her oppositional personality and extreme paranoia cause her to discontinue using a physician if the Facility has any contact with the doctor or his or her nurses. The Resident does not keep the Facility advised of the medical treatment she is receiving, the dates of her scheduled visits or any other medical information that she is able to conceal.

24. On April 16, 1992, Dr. Von Sternberg, acting in the absence of any active named attending physician, documented in J.S.'s medical records that she refused to take medication and that Ebenezer Hall was unable to meet her needs. Dr. Von Sternberg recommended transferring J.S. to another facility. Pet . Ex . 4.

25. Ebenezer Hall is a general purpose nursing home facility. It does not have specialized personnel or specialized programs designed to manage or treat persons suffering from major mental illnesses who refuse to accept treatment or medication. The Social Services Department at Ebenezer does not include a psychiatric social worker and none of the Facility's nurses have psychiatric nursing training.

26. Ebenezer Hall has among its residents several individuals who suffer from mental illnesses but who are receiving regular psychiatric care, including appropriate medications. The Facility has no difficulty in caring for such individuals.

27. Ebenezer has attempted unsuccessfully to interest J.S. in activities. It has attempted to reason with J.S. to have her obtain appropriate psychiatric or psychological services. It has attempted to use available community resources to secure appropriate mental health treatment for J.S. Various members of the staff have attempted to build personal relationships with J.S. in an attempt to influence her behavior positively. On a few such occasions, after a short period of time, J.S.'s paranoia becomes ascendant and her contrary personality results in a termination of the relationship.

28 . In preparation for the hearing , J . S - was examined by Dr Seymour Z Gross, Ph.D., Director of the Pilot City Mental Health Center. While Dr. Gross questions whether the staff at Ebenezer has tried all available options in dealing with J.S., he suggests no new approach that has not been attempted by the Ebenezer staff. Dr. Gross does not discount the conclusion of other examining and treating psychiatrists that J.S. requires a major antipsychotic medication to control her paranoia and oppositional personality. Pet. Ex. E.

29 . Ebenezer does not have a duty under federal or state statutes, regulations or rules to provide mental health services to J.S. beyond those which have been attempted and refused by the Petitioner.

30. The Federal Nursing Home Reform Act, PL 10-203, contains a process termed "PASARR", Preadmission Screening and Annual Resident Review. The purpose of the PASARR process is to ensure that persons with a mental illness are not placed in a nursing home facility unless they require the level of care that the home offers and are not in need of intensive treatment known as "specialized services". The PASARR process took effect in 1990, after J.S. had been placed in Ebenezer Hall. In 1991, Level I and Level 2 screens under the PASARR process were conducted for J.S. Pet . Ex . A . The county and state personnel who conducted the PASARR evaluation determined that J.S. required the level of services provided by a nursing home but was not in need of specialized services. It was determined that J.S. required psychiatric evaluation and ongoing psychiatric care. Pet. Ex. A. At the time of the hearing in this case, no annual review had been conducted by PASARR to determine whether J.S. was in need of relocation.

31 . A finding by PASARR that a person with a mental illness requires the level of care provided by a nursing home and is not in need of specialized services does not prevent the nursing home from seeking the involuntary discharge or transfer of the resident under 42 C.F.R. 483.12 (1991).

32. Although a nursing home resident has a right to refuse treatment, consistent refusal of appropriate treatment, if properly documented, provides a basis for involuntary discharge or transfer under 42 C.F.R. 483.12 (1991),

if the effect of the refusal of treatment is to render the facility unable to meet the needs of the resident.

33. A number of alternative placements exist for J.S. which have a greater likelihood of successfully managing the Resident's mental illness and influencing her to accept appropriate psychiatric treatment. Rule 36 facilities have programs which provide supportive residential treatment to persons having a persistent and serious mental illness who require residential treatment to maintain an appropriate level of functioning.

Pet Ex. 13 contains a program summary for a Rule 36 residential treatment program offered by Sentinel House which gives preference to Hennepin County residents. See also, Pet Ex. 14. In addition to Rule 36 facilities, some skilled nursing home facilities have voluntarily developed an aggressive mental health program. Queen Care Center, for example, has an inhouse psychologist who makes weekly rounds. The nursing staff has specific training in dealing with patients having a mental health diagnosis. J.S. has previously resided successfully at Queen Care Center. Queen Care Center has indicated it will accept J.S. as soon as the appropriate admissions forms are completed. Pet. Ex. 12.

34. As noted in Finding 8, supra, J.S. is given to verbal outbursts against staff and other residents which often include threatening gestures and confrontive behavior. As indicated in Eb. Ex. 5, agitated and abusive verbal behavior by J.S., sometimes with threatening gestures, is a frequent occurrence. Sometimes the outbursts are directed to members of the Facility's staff. Other times they are directed towards other residents. Approximately 100 of the 125 residents of Ebenezer Hall are women. Most of the women are significantly older than J.S. and in more frail health. Residents who are verbally abused by J.S. are confused and frightened by her conduct. They are intimidated and afraid of her behavior. Eb. Ex. 10, p. 4.

35. Twice during the spring of 1992, J.S. entered the room of a 100-year-old legally blind man who is hard of hearing, sometime between 2:00 and 3:00 a.m., and began screaming obscenities and making threatening gestures. She accused the man of running a prostitution ring out of his room which involved some of the female nursing staff. Eb. Ex. 5. The man was required to leave his room and sleep elsewhere in the Facility on those occasions.

36. Despite her verbal threats, J.S. does at have a history of physically abusing herself or other people. Pet. Ex. B.

37. While staff could be made aware of her limiting history, other residents who are threatened by J.S. would not be aware of her diagnosis. They would likely accept her words and threatening gestures at face value, placing them in reasonable fear of bodily harm. Such fear of bodily harm, even if not consummated, could have a serious adverse impact on the physical and emotional health of residents threatened.

38. Ebenezer Hall has provided sufficient preparation and orientation to J.S. to ensure a safe and orderly transfer or discharge from the Facility within the meaning of 42 C.F.R. 483.12(a)(6) (1991). Throughout her stay at Ebenezer, J.S. has indicated her dissatisfaction with the placement. Ebenezer has contacted many other facilities and made efforts to assist J.S. in finding

an alternative placement and in preparing her for a transfer. Eb. Ex. 14. Characteristically, J.S. refused making any of the visits that are required as a condition of acceptance of a resident and did not complete any of the required forms. Ebenezer has also contacted the Services to Seniors Division of Hennepin County Community Services. An individual from that entity has been involved with J.S. in attempting to obtain a new placement,

39. Because of J.S.'s major mental illness which remains untreated and her oppositional personality, placement in a skilled nursing home facility which has a specialized program to deal with persons suffering from mental illness would be in J.S.'s best interests. An additional alternative placement which would also better serve J.S.'s needs, as long as her mental illness remains untreated, is a Rule 36 facility. See, Finding 33, supra

40. On April 13, 1992, Respondent Ebenezer Hall delivered to J.S. a written 30-day Notice of Discharge from the Facility. Due to a deficiency in the notice, the action was withdrawn.

41. On May 11, 1992, Ebenezer Hall delivered a second Notice of Discharge to J.S. On June 8, 1992, the metropolitan office of Ombudsman for

Older Minnesotans requested a hearing on behalf of J.S. to appeal the Notice of Discharge.

42. On June 16, 1992, the Commissioner of Health issued a Notice of and Order for Hearing, setting a hearing date of June 24, 1992 at Ebenezer Hall. By agreement of the parties, the date of the hearing was changed to July 2, 1992.

43. On July 2, 1992, a hearing was convened at Ebenezer Hall. As a consequence of that hearing, Ebenezer Hall provided J.S. and her counsel with a more detailed statement of the reasons for discharge. On July 6, 1992, an Amended Notice of Discharge was provided to J.S. and her counsel.

44. At the request of counsel for J.S., the hearing date was continued to July 20, 1992 to allow J.S. and her counsel to prepare evidence relating to the reasons for discharge contained in the Amended Notice of Discharge. At the hearing, counsel for J.S. stipulated that the Amended Notice of Discharge contained a sufficient statement of the proposed reasons for discharge. Counsel for J.S. also stipulated that she had been provided with a sufficient opportunity to prepare evidence on the issues raised in the Amended Notice of Discharge.

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

CONCLUSIONS

1. The Commissioner of Health has jurisdiction over the subject matter of this hearing pursuant to sections 1819(e)(3) and 1919(e)(3) of the Social Security Act, 42 U.S.C. 1395i-3(e) and 1396r(e) and Minn. Stat. 144A.135 i 990).

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.

3. A resident of a Medicare or Medicaid-certified nursing facility may only be discharged or transferred involuntarily for the reasons stated in sections 1819(c)(2) and 1919(c)(2) of the Social Security Act and 42 C.F.R. 483.12 (1991).

4. Ebenezer Hall must establish by a preponderance of the evidence that it is appropriate to involuntarily discharge or transfer J.S. from the Facility because such transfer or discharge is necessary to meet the resident's needs and the resident's welfare cannot be met in the Facility or that the safety of individuals in the Facility is endangered. In re Involuntary Discharge of Mary Elo, 1 0900-5189-2, January 29, 1991.

5. Ebenezer Hall has established by a preponderance of the evidence that transfer or discharge of J.S. is necessary to meet her welfare and that her needs cannot be met in the Facility. J.S. has a major mental illness for which she refuses treatment. Her welfare requires such treatment. Ebenezer Hall cannot meet the needs of the resident who refuses treatment for a serious mental illness with significant adverse associated behavioral manifestations.

6. Ebenezer Hall has established by a preponderance of the evidence that J. S. endangers the safety of other residents in the Facility by her verbally assaultive behavior and physical threats.

7. There are alternative placements for J.S. which would better suit her needs.

8. As a consequence of Conclusions 5 - 7, supra, the involuntary discharge or transfer of J.S. from Ebenezer Hall is appropriate.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS THE RECOMMENDATION of the Administrative Law Judge to the Commissioner of Health that the appeal of J.S. relating to her involuntary discharge or transfer from Ebenezer Hall be DENIED.

Dated this 11th day of September, 1992.

BRUCE D. CAMPBELL
Administrative Law judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency's required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Audio-Magnetic Recording; No Transcript Prepared.

MEMORANDUM

Section 1919(c)(2)(A)(i) of the amendments to the Social Security Act, contained in the Omnibus Budget Reconciliation Act of 1987, Public Law 100-203, and section 1919c(2)(A)(iii) allow an involuntary transfer or discharge of a resident from a certified nursing facility when:

The transfer or discharge is necessary to meet the resident's welfare and the resident's welfare cannot be met in the facility; or The safety of individuals in the facility is endangered.

42 C.F.R. 43.2(a)(2)(i) and (ii) (1991) contain the same standard, except reference is made to the resident's "needs" rather than the resident's welfare". Either clause (i) or clause (iii) will support an involuntary discharge or transfer. The nursing facility must prove the facts supporting

the proposed discharge by a preponderance of the evidence. In re
Involuntary
Discharge of Mary Elo, 1 0900-5189-2, January 29, 1991. The statute and

regulations require that the basis for the transfer or discharge be documented in the resident's clinical record. When discharge is proposed because the resident's welfare cannot be met in the facility, the documentation must be made by the resident's physician. When discharge is proposed because the safety of individuals in the facility is endangered, the documentation must be made by the physician in a skilled nursing home facility. The documentation need not be made by a physician under clause (iii) where only a nursing facility is involved. J.S. resides in the nursing facility portion of Ebenezer Hall.

It is beyond dispute that J.S. suffers from a major mental illness, most appropriately described as a form of schizophrenia which results in a paranoid disorder and an oppositional personality. The primary symptomology exhibited includes periods of agitation and anxiety, frequent and sometimes pronounced verbal assaults on staff and other residents and a general paranoia which causes J.S. to be extremely isolated. When the agitation and paranoia reach a certain level, J.S. will decompensate, neglecting her nutrition, personal hygiene and needed physical care. Even the licensed psychologist who examined J.S. at the request of her attorney does not dispute that she suffers from a serious mental illness which requires continuing care. Every mental health practitioner that has examined J.S. since January of 1989 agrees that she requires continuing psychiatric supervision and an antipsychotic medication to control her verbal outbursts and paranoia. Again, even Dr. Gross, who examined J.S. at the request of her attorney, does not dispute the Petitioner's need for a major psychotropic medication.

After entering Ebenezer Hall, J.S. discontinued her longstanding association with her treating psychiatrist, Dr. Moe, and refused to follow his regimen of medication. A period of deterioration followed and Ebenezer attempted to obtain psychiatric services for the Petitioner. Although J.S. allowed herself to be interviewed by Dr. Hiller, she continued to refuse antipsychotic drug therapy or psychiatric or psychological counseling. At various times in her stay at Ebenezer, the staff and Medical Director sought out community resources to attempt to find the Petitioner a psychiatrist or psychologist she would accept and from whom she could receive treatment. Set, Finding 17, supra. J.S. consistently refused all such intervention.

It is asserted by J.S. that her refusal to take the antipsychotic drug prescribed by Dr. Seim in 1991 cannot be considered a refusal of appropriate treatment, since she was not consulted by either Dr. Von Sternberg or Dr. Seim before Haldol was prescribed. 42 U.S.C. 1936r(c)(1)(D) and 42 C.F.R. 483.25(k)(2)(i) impose limitations on a physician's ability to administer antipsychotic drugs. It is argued that such drugs can only be administered as

part of a plan included in the written care plan of the patient after a comprehensive assessment of the resident and a finding that the drug therapy is necessary to treat a specific condition diagnosed and documented in the clinical record. Further, 42 C.F.R. 483.10(d)(2) (1991), gives a resident the right to be informed in advance of any change in treatment. The Administrative Law Judge, however, notes that 42 C.F.R. 483.25(k)(2)(i) only applies to residents who "have not used antipsychotic drugs". J.S., under her treatment by Dr. Moe, had received antipsychotic drugs and at least two psychiatrists had determined that such drug therapy was necessary to treat her condition which was documented in her clinical record. Dr. Seim had seen J.S. for her annual physical in the fall of 1991 before he prescribed Haidol.

Except for the assessment by Dr. Hiller in 1989, J.S. has resisted all efforts to treat her psychiatric condition since her arrival at Ebenezer Hall. The evaluation by Dr. Hiller did not result in any specific treatment of J.S.'s mental illness. Counsel for J.S., in her memoranda, does not argue that the Petitioner has sought or accepted psychiatric treatment of her major mental disorder. J.S. has a need for appropriate psychiatric treatment and her welfare would be advanced by receiving such psychiatric treatment, including appropriate medication.

It is not clear from the record what the precise physical impact on J.S. has been since early 1989 from her lack of psychiatric treatment. She is, however, frequently anxious and extremely agitated. That level of agitation may have some cumulative negative impact on her cardiovascular system. At times also she has neglected proper nutrition, personal hygiene and appropriate medical care for physical conditions. Dr. Moe states that at times her health has been at risk because of her psychiatric condition. Eb. Ex. 16. Dr. Pastones, however, states that she generally takes good care of her health. He sees no deterioration in her condition since 1989. Pet. Ex. D. The Administrative Law Judge agrees with Dr. Moe that the cumulative long-term effect of extreme agitation and anxiety will have a negative impact on the physical health of the Petitioner. The Resident has also demonstrated that her mental condition can cause her to decompensate in her behavior, placing her physical health at risk. As important as her physical health, however, is the mental health of J.S. J.S. would be most appropriately served if the symptoms of her mental illness could be controlled and she functioned without the paranoia and agitation that has characterized her recent past. That capacity for improvement in her quality of life makes treatment for her mental illness appropriate. Such treatment would certainly advance her welfare.

The Petitioner has also failed to maintain a regular attending physician and receive the periodic 60-day medical visits required by federal regulations. State regulations relating to nursing home residents also

require an attending physician. The purpose of having an attending physician is to have ongoing comprehensive medical supervision of an appropriate care plan that is in the best interests of the resident. J.S. does not have a right to self-direct her medical care while she is a resident of a nursing home. She must have an attending physician who regularly oversees her care.

It is clear from the Findings that for several protracted periods, J.S. did not see a physician as required by federal regulations, nor did she maintain consistent contact with an attending physician. In the spring of 1992, when the attending physician J.S. had listed on her Facility records refused to provide orders, and other doctors she had seen in the past did likewise, Dr. Von Sternberg acted in the absence of an attending physician. He noted in the resident's medical record that her needs could not be met at Ebenezer and that a transfer to another facility was appropriate. Eb. Ex. 4, pp. 3-4.

Counsel for J.S. argues that she was self-directing her own medical care and receiving appropriate care as required by federal and state law. To argue that a resident with a major mental illness who often believes that a nursing home resident is running a prostitution ring involving Facility nurses is consistently self-managing her own care, even though she suffers from extreme paranoia and an oppositional personality, is not credible. The failure of

J.S. to receive periodic medical care as required by federal regulations and to maintain contact with an attending physician is symptomatic of her major mental illness which goes untreated.

The major argument made by counsel for J.S. is that Ebenezer has not demonstrated that it is physically incapable of satisfying the Resident's need for psychiatric care and treatment. She argues that Ebenezer has simply chosen not to provide the required care. It is not clear in what manner Ebenezer Hal I has been deficient, even under the argument of J. S. Or numerous occasions they have attempted to obtain for J.S. the appropriate psychiatric care. J.S. has not accepted such care. Since J.S. has not been adjudicated mentally incompetent, the Facility must respect her wishes. The most sophisticated psychiatric treatment available can only be beneficial if the patient agrees to undergo treatment.

Counsel for J. S. also asserts that the Resident has a right to refuse treatment under 42 C.F.R. 483.10(b)(4) (1991). The Administrative Law Judge agrees. When the consistent refusal of treatment results in a facility not being able to meet a resident's needs, however, involuntary discharge is appropriate under 42 C.F.R. 483.12(a)(2)(i) (1991). 56 Fed. Reg. 48831, September 26, 1991. The Administrative Law Judge has found that J.S. has consistently refused treatment of her major mental illness and that Ebenezer is not capable of meeting her needs. Hence, the refusal of mental health treatment makes discharge appropriate.

Counsel for J. S. also relies on portions of federal regulations relating to the mental health services a nursing home must offer residents to conclude that the Respondent has evaded the requirements of federal law. The Administrative Law Judge does not find that the federal statutes or regulations require every nursing home to replicate in its program a treatment plan for persons with major mental illnesses who refuse treatment. A rule of reason must be applied. It would serve absolutely no purpose and would not be cost efficient to require every nursing home to maintain a comprehensive and aggressive program of treatment for major mental disorders, particularly where

mental health intervention is refused. The Administrative Law Judge does not read the word "cannot" used with reference to meeting the needs of a resident in 42 C.F.R. 483.12(a)(2)(i) (1991), as requiring the physical impossibility suggested by counsel for J.S. Virtually any program could be instituted in a given facility with the expenditure of enough human and monetary resources . To take an extreme example, it would not be physically impossible for Ebenezer Hall to replicate at its facility the most sophisticated mental health unit currently available in the Twin Cities. The Administrative Law Judge does not read 42 C.F.R. 483.12(a)(2)(i) (1991) to require a physical impossibility of providing service, as suggested by counsel for J.S. Ebenezer Hall has documented in the record that it has made every reasonable attempt to secure for J.S. the needed psychiatric and mental health care without success. Even the mental health professional selected by J.S. was unable to describe any novel approach to management of the Resident's mental illness that Ebenezer had not already found unsuccessful. See , Pet . Ex . E - The record also demonstrates that other alternative placements, including Rule 36 facilities and nursing home facilities that have voluntarily specialized in mental health care treatment of residents would provide a better alternative placement for i s

The Administrative Law Judge, therefore, finds that Ebenezer has demonstrated that it cannot within any rule of reason satisfy the mental health needs of the Resident who remains resistant to treatment. The welfare of the Resident would be served by her transfer to a different facility where those mental health needs could be better addressed.

Ebenezer has also sought to discharge J.S. because it asserts her abusive behavior poses a threat to the safety of persons at the Facility. The Administrative Law Judge has described in the Findings the type of verbal abuse and confrontive behavior that is characteristic of J.S. See, Findings 8, 34 and 35, Supra. Such behavioral incidents, covering a limited period of time are summarized in Eb. Ex. 5. The impact of some of that behavior on residents is stated in Eb. Ex. 14, ex. 1, p. 4. Some of J.S.'s verbal abuse and threats are directed toward the Facility staff. The Administrative Law Judge does not find that verbal abuse of staff provides a ground for discharge. J.S. is not likely to physically assault staff. The staff who deal with J.S. can be informed of her illness, diagnosis and likely tendencies. The staff presumably do not share the frail physical condition of the average resident. J.S. does not provide a realistic threat to the safety of the staff at the Facility.

Some of J.S.'s verbal abuse and threats, however, are directed toward residents. J.S. is physically more active and significantly younger than a number of other residents of the Facility. Many of the residents are in advanced years and in frail health. While the Administrative Law Judge agrees with Dr. Moe that J.S. does not have a history of assaultive behavior, Pet. Ex. B, other residents have no way of knowing J.S.'s mental condition or medical history. In their frail, sometimes confused condition, they have been confronted by J.S., verbally assaulted with profanities, ethnic references or other personal matters and physically threatened. Although J.S. may not carry through on her threats, a confused resident in frail health could well be endangered by such conduct. Dr. Von Sternberg, the Medical Director of the Facility who is familiar with the medical histories and current conditions of the residents, has concluded that the verbal abuse and threatening behavior of J.S. towards other residents endangers their safety, even if she does not actually carry out her threats.

In Involuntary Discharge of Mary Elo, 1-0900-5189-2, January 29, 1991, and Involuntary Discharge of Skoog, 11-0900-5998-2, the Commissioner of Health held that even physical assaults by the residents in question did not endanger

the safety of individuals in the nursing facility so as to authorize an involuntary discharge. In those cases, the Commissioner found both that alternative ameliorative options were available to the staff and that the nature and seriousness of the incidents did not justify a conclusion that the safety of other residents was endangered. Neither *Skoog, supra*, nor *Elo, supra*, govern the result in this case.

Respondent's Exhibit 5, which only covers a portion of the Resident's stay at Ebenezer, details 15 entries involving other residents. A number of the incidents deal with threatening behavior that a resident would naturally interpret as a threat to his or her safety. Counsel for J.S. minimizes the impact of verbal assault and threats of physical violence. The impact on a resident in frail health, however, could well be serious. Ebenezer Ex. 5, for example, includes the following entries:

6/15/91 - Other resident voiced her concern over her safety due to [J.S.] calling her names and foul language. The other resident was worried about what would happen if no one else was around. The resident stated, "What will she do to me?"

5/31/91 - [J.S.] pushed another resident in a wheelchair into the nurse's desk.

8/22/91 - [J.S.] came into the TV lounge as the nurse was putting another resident into a chair and turning on the regular program. [J.S.] pushed her way to the TV and changed the channel. [J.S.] started calling the other resident a "dumb bitch" and told the other resident that she wanted to watch the weather channel. [J.S.] continued to swear at the nurse when the nurse switched the channel back. The nurse told [J.S.] that she should go to the other sun porch and watch TV. [J.S.] responded, "What in the hell for? I live here, damn it, and this one's the closest to my room. You're nothing but a fucking bitch, you've been this way since you got married and it turned you into the Attorney General." The nurse stayed in the TV lounge with the other residents while [J.S.] continued yelling and swearing.

9/17/91 - Resident has been verbally abusive toward another resident. [J.S.] started yelling loudly and pointing her finger in a threatening manner accusing the other resident of talking about her. [J.S.] called that other resident "Moneybags". She said the other resident gets special attention because of her money. This other resident was afraid to go back to her room that night due to [J.S.]'s behavior. [J.S.] would sit near the phone in the hallway and would point her finger and yell at the other resident. [J.S.] tried to make the other resident admit she was talking about her. The other resident was extremely upset and shaking. Two staff personnel had to intervene and try to get [J.S.] to stop berating the other resident. [J.S.] did not respond to the staff's attempts to control her.

9/21/91 - [J.S.] has been accusing a resident across the hall of talking about her. [J.S.] came up to the nurse's station and yelled at the staff stating that the nurses better get the other resident out of the facility or "I will drag her out!" [J.S.] was throwing her hands around and she began following the staff down the hallway. The nurse wasn't able to control [J.S.] and she began to feel threatened by [J.S.]. The nurse was also afraid that [J.S.] would physically assault the other resident. The nurse stated that she had not seen [J.S.] so irate and out of control before.

11/29/91 - [J.S.] was yelling at the residents in the halls and in the bathroom. She was talking to them in a

threatening manner stating, "I'll show you what I can do!" When the nurse tried to calm her down, she started to yell at the nurse.

12/15/91 - [J.S.] came into another resident's room for the past few days and took the other resident's newspaper. The other resident says she is afraid of [J.S.] and that [J.S.] frequently walks into her room.

12127191 - Nurse noticed [J.S.] confronting another resident in the hallway stating, "What did you say about me? - Tell me, I know you said something." The other resident was trying to back away and [J.S.] continued to badger her. When the nurse tried to remedy the situation, [J.S.] stated, "You damn Jew, you stick your big nose into everything."

3/16/92 - While the nurse was assisting another resident, [J.S.] burst into the other resident's room without knocking and began to yell, "You're supposed to be passing out medications, not gossiping with the residents." [J.S.] refused to leave the room. When the nurse closed the door, [J.S.] continued to stand outside the door yelling and swearing. [J.S.] continued with her verbal outbursts throughout the nurse's shift.

4/9/92 - [J.S.] went into Mr. D's room on the third floor and threw open the door. She went into the room, pacing around the room stating, "This is where he has sex with all those nurses' aides." When asked to leave Mr. D's room, [J.S.] stated, "Go to hell." She remained in the room, berating the nurse, and then pushed the nurse to the side in the doorway and stated, "You are all running a prostitution ring and it's all happening on the third floor." [J.S.] then proceeded down the hallway looking in the toilet and the windows, wringing her hands up and down stating, "I'm not crazy you know, I know you are supplying those sex girls to him." She then went to her room and slammed the door.

5/19/92 - [J.S.] saw Resident Mr. L in the hallway. She started to yell and pointed her finger at him stating, "You've caused me a lot of trouble. Ho ho ho."

6/5/92 - [J.S.] went upstairs to Mr. D's room, walked into the room and started to yell at the resident. She again accused the staff upstairs of having sex with Mr. D on the third floor.

6/15/92 - [J.S.] went to the third floor and into another resident's room. [J.S.] then stood in the hall yelling that she was going to call 911 to report that the supervisor was a prostitute and that she was spending her whole night in the male resident's room.

6/27/92 - . . . [J.S.] later came bursting into the nursing station yelling at the nurse, talking in a rapid manner and appeared extremely angry. [J.S.] demanded that the nurse open another resident's room because she believed he took her beverage. When [J.S.] saw the other resident walking down the hall she went charging after him in a very threatening manner demanding her drink.

The affidavit of the Ebenezer social worker also contains statements by some residents regarding their interaction with J.S. as follows:

No. 4769 (6/24/92) - "We were scared of her because she (threatened that) she was going to throw hot water on both of us to disfigure our faces. I hardly knew her and she would sneak around and watch us."

No. 4812 (6/24/92) - "I'm scared of her. Really am. She makes up stuff. When she just came, she used to say, you're talking about me (now I live) a little ways from her. When she used to put her fist up to me (I would get scared). If I'm going to go to the office (and she's there), I don't say nothing'.

No. 9026 (6/24/92) - "(I was) sitting there eating and she had the ballgame on. She turned it off She called me a 'black you-know-what'. Willie said that she then said to [J.S.], don't call me that. I don't believe in that. I'll go." The staffperson kept encouraging Willie to stay and [J.S.] kept turning the television the way she wanted it. She cursed like a sailor. She's a rough (person). She thinks that little icebox belongs to her. If you put something in there, she moves it. She's bossy. Now its don't have nothing in the world to do with her. I ear a lot of talk about her and they say they are scared of her. If she's in the first one (i.e., the first bathroom), I go to the second one. If that one is full, then I come on back and wait until they are empty. She acts like the building is hers.

Eb. Ex. 14, ex. 1.

The Administrative Law Judge agrees with Dr. Von Sternberg that the Resident's verbal behavior, particularly when coupled with threatening gestures, endangers the safety of residents in frail health who come in contact with her. Unlike Skoog, supra, Dr. Von Sternberg has testified that J.S.'s loud threats and verbal abuse of frail, elderly patients with unstable medical conditions put the other residents' safety at risk. There are no ameliorative conditions that the staff can impose to protect other residents from J.S. The Petitioner's conduct is voluntary in the sense that she has refused all psychiatric intervention. Under such circumstances, the Administrative Law Judge believes that Ebenezer has established that J.S. endangers the safety of other residents in the Facility within the meaning of 42 C.F.R. 43.12(a)(2)

(iii) (1991). The involuntary discharge of J.S. and an alternative placement in either a Rule 36 facility or a skilled nursing facility that has specialized in the care of mentally ill elderly residents is most appropriate.

B.D.C.