September 25, 2024

[redacted]

RE: [redacted]
BOR Action No.: 24-BOR-3066

Dear [redacted]:

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

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Human Services. These same laws and regulations are used in all cases to ensure that all persons are treated alike.

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

Sincerely,

Eric L. Phillips
State Hearing Officer
Member, State Board of Review

Encl: Recourse to Hearing Decision
Form IG-BR-29

cc: [redacted]

WEST VIRGINIA OFFICE OF INSPECTOR GENERAL
BOARD OF REVIEW

[redacted],

Resident,

v. **Action Number: 24-BOR-3066**

[redacted]

Facility.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for [redacted] This hearing was held in accordance with the provisions found in Chapter 700 of the Office of Inspector General Common Chapters Manual. This fair hearing was convened on September 19, 2024, on appeal filed August 28, 2024.

The matter before the Hearing Officer arises from the Facility's August 14, 2024 decision to propose the discharge of the Resident from the [redacted]

At the hearing, the Facility appeared by [redacted] Executive Director-[redacted] Appearing as witnesses on behalf of the Facility were [redacted]-Director of Nursing Services and [redacted]-Social Worker. The Appellant was represented by his sister [redacted] Appearing as a witness for the Resident was [redacted] Brother-In-Law. All witnesses were sworn and the following documents were admitted into evidence.

Facility's Exhibits:

F-1 Various Progress Notes from [redacted]

Resident's Exhibits:

R-1 Notice of Discharge dated August 14, 2024
R-2 Representative Summary and Physician Information dated August 25, 2024

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

FINDINGS OF FACT

1) In October 1991, the Resident suffered a Traumatic Brain Injury (TBI) as a result of a motor vehicle accident.

2) The Resident was admitted to the [redacted] in April 2023.

3) The Resident convalesced and was discharged from the Facility.

4) The Resident was readmitted to the Facility in September 2023.

5) The Resident has a history of falling with injury to the left side of his body including fractures of the prosthetic left hip joint. (Exhibit F-1)

6) The Resident has a history of mood disorders including anxiety and adult personality and behavior disorder. (Exhibit F-1)

7) The Resident has experienced a decline in the ability to perform activities of daily living. (Exhibit F-1 and Exhibit R-2)

8) The Resident has experienced aggressive behaviors with other residents, yelling, and attempted to break objects. (Exhibit F-1)

9) The Resident has a one-on-one aide at the Facility. (Exhibit F-1)

10) The Resident requires twenty-four hour a day nursing care to address his conditions. (Exhibit R-2)

11) On August 14, 2024, the Facility issued a Notice of Discharge and Transfer (Exhibit R-1) of the Resident informing of him and his Attorney-In-Fact of a thirty-day discharge to his home effective September 16, 2024 due to his needs cannot be met in the center and the safety of individuals in the center is endangered due to the clinical or behavioral status of the Resident.

APPLICABLE POLICY

Code of Federal Regulations 42 CFR § 483.15(c)

(1) ***Facility requirements*** —

(i) The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless—

(A) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;

(B) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;

(C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;

(D) The health of individuals in the facility would otherwise be endangered;

(E) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for his or her stay. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or

(F) The facility ceases to operate.

(ii) The facility may not transfer or discharge the resident while the appeal is pending, pursuant to § 431.230 of this chapter, when a resident exercises his or her right to appeal a transfer or discharge notice from the facility pursuant to § 431.220(a)(3) of this chapter, unless the failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility. The facility must document the danger that failure to transfer or discharge would pose.

(2) ***Documentation.*** When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (c)(1)(i)(A) through (F) of this section, the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider.

(i) Documentation in the resident's medical record must include:

(A) The basis for the transfer per paragraph (c)(1)(i) of this section.

(B) In the case of paragraph (c)(1)(i)(A) of this section, the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s).

(ii) The documentation required by paragraph (c)(2)(i) of this section must be made by—

(A) The resident's physician when transfer or discharge is necessary under paragraph (c)(1)(A) or (B) of this section; and

(B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) of this section.

(iii) Information provided to the receiving provider must include a minimum of the following:

(A) Contact information of the practitioner responsible for the care of the resident

(B) Resident representative information including contact information.

(C) Advance Directive information.

(D) All special instructions or precautions for ongoing care, as appropriate.

(E) Comprehensive care plan goals,

(F) All other necessary information, including a copy of the resident's discharge summary, consistent with § 483.21(c)(2), as applicable, and any other documentation, as applicable, to ensure a safe and effective transition of care.

(3) ***Notice before transfer.*** Before a facility transfers or discharges a resident, the facility must—

(i) Notify the resident and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. The facility must send a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman.

(ii) Record the reasons for the transfer or discharge in the resident's medical record in accordance with paragraph (c)(2) of this section; and

(iii) Include in the notice the items described in paragraph (c)(5) of this section.

(4) ***Timing of the notice.***

(i) Except as specified in paragraphs (c)(4)(ii) and (8) of this section, the notice of transfer or discharge required under this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(ii) Notice must be made as soon as practicable before transfer or discharge when—

(A) The safety of individuals in the facility would be endangered under paragraph (c)(1)(i)(C) of this section;

(B) The health of individuals in the facility would be endangered, under paragraph (c)(1)(i)(D) of this section;

(C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (c)(1)(i)(B) of this section;

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (c)(1)(i)(A) of this section; or

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

(5) ***Contents of the notice.*** The written notice specified in paragraph (c)(3) of this section must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged;

(iv) A statement of the resident's appeal rights, including the name, address (mailing and email), and telephone number of the entity which receives such requests; and information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;

(v) The name, address (mailing and email) and telephone number of the Office of the State Long-Term Care Ombudsman;

(vi) For nursing facility residents with intellectual and developmental disabilities or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with developmental disabilities established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (Pub. L. 106-402, codified at 42 U.S.C. 15001 *et seq.*); and

(vii) For nursing facility residents with a mental disorder or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with a mental disorder established under the Protection and Advocacy for Mentally Ill Individuals Act.

(6) ***Changes to the notice.*** If the information in the notice changes prior to effecting the transfer or discharge, the facility must update the recipients of the notice as soon as practicable once the updated information becomes available.

(7) ***Orientation for transfer or discharge.*** A facility must provide and document sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. This orientation must be provided in a form and manner that the resident can understand.

(8) ***Notice in advance of facility closure.*** In the case of facility closure, the individual who is the administrator of the facility must provide written notification prior to the impending closure to the State Survey Agency, the Office of the State Long-Term Care Ombudsman, residents of the facility, and the resident representatives, as well as the plan for the transfer and adequate relocation of the residents, as required at § 483.70(k).

(9) ***Room changes in a composite distinct part.*** Room changes in a facility that is a composite distinct part (as defined in § 483.5) are subject to the requirements of § 483.10(e)(7) and must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another of the composite distinct part's locations.

DISCUSSION

On August 14, 2024, the Facility issued notice to the Resident informing him of a proposed involuntary discharge from the [redacted] effective September 16, 2024. The Facility cited in the notice of discharge (Exhibit R-1) the reason for the discharge was necessary for the Resident's welfare because the Resident's needs could not be met at the center and that the safety of other individuals in the center was endangered due to the clinical and behavioral status of the Resident. The Resident's representative protests the proposed discharged citing that the Resident's healthcare needs cannot be met in an in-home setting. The Facility must demonstrate by a preponderance of the evidence that Resident's healthcare needs can no longer be met at the facility and that the Resident poses an imminent danger to the health and safety to other residents at the facility.

The Resident is a 54-year-old patient at [redacted] who suffers from a Traumatic Brain Injury (TBI) due to an October 1991 motor vehicle accident. The Resident was a previous patient at the Facility but was later readmitted in September 2023 due to an injury. The Resident experiences several symptoms with his primary diagnosis of TBI, including inappropriate sexual behaviors, dementia, depression and anxiety. (Exhibit F-1).

Throughout the Resident's stay at the Facility, the Resident has had multiple occurrences of increased behavioral issues resulting in altercations with other residents, inappropriate sexual

interactions with both staff and residents, self-harm and destruction of property at the Facility. Due to the Resident's increased behavioral issues and the safety of other residents in the Facility, the Facility sought the transfer of the Resident to multiple behavioral health facilities (Exhibit F-1) but was unsuccessful with their attempts. The Facility later proposed the involuntary discharge of the Resident from the Facility to his home with his representative and sister, [redacted]

Evidence, including progress notes from [redacted] (Exhibit F-1) dated from 2023 to 2024, documents the Resident's increased behavioral issues during his residency at [redacted] which include multiple physical and sexual altercations with other residents, self-harm, inappropriate sexual altercations with staff and destruction of Facility property. During several of the instances, the Resident was redirected without further incident. The Facility representatives expounded on the Resident's increased behavioral issues regarding his altercations with other residents, sexual deviancy and the destruction of property including the flipping of a table. The Facility representatives testified to their attempts to secure a more appropriate healthcare setting to accommodate the Resident's mental health status and behavioral health issues.

[redacted] testified that due to her and her husband's own physical limitations, she would be unable to care for her brother in her home and the discharge would create and undue hardship and burden. [redacted] provided documentation from the Resident's physician (Exhibit R-2) revealing the Resident's decline with his ability to perform activities of daily living and his need for 24 hour-a-day nursing care to address his condition. The physician notes "this care could not be provided in a lower level of care given the medical complexity of this patient."

Federal regulations provide that a facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless warranted by the reasons outlined in the regulations. Reasons for discharge include but are not limited to "the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility" and "the safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident." Furthermore, federal regulations mandate the proper documentation of the proposed discharge or transfer in the resident's medical record. These regulations require that when a facility transfers or discharges a resident under any circumstances outlined in the regulations, the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider. These regulations specifically require the basis for the transfer be included in the medical record. In instances in which the healthcare needs of the resident cannot be met at the facility, the medical record documentation must include the specific resident need that cannot be met, the facility attempts to meet the resident needs and the services available at the receiving facility to meet the need. Additionally, the governing regulations mandate that the documentation be made by the resident's physician when the involuntary discharge is necessary due to unmet healthcare needs and a physician when the involuntary discharge is necessary due to the endangered safety of other individuals in the facility due to the behavioral status of the resident.

There is no dispute that the Resident experiences behavioral issues associated with his diagnosis. Evidence (Exhibit F-1) reveals the Resident presented a past medical history which included the TBI, inappropriate sexual behaviors, dementia, depression and anxiety and the medical provider

documents that the Resident's symptoms are "fully associated with his TBI". There is no doubt that the multitude of the Resident's behavioral issues present a challenge to the Facility and it is apparent that the Resident's healthcare needs would be better serviced in a treatment facility which specializes in behavioral issues. However, evidence reveals that the Resident's physician indicates that due to the Resident's healthcare need "this care could not be provided in a lower level of care given the medical complexity of this patient." The Facility documented several unsuccessful attempts to secure placement of Resident in a facility better equipped to meet his healthcare needs. However, governing regulations are specific that the facility must ensure that a medical professional documents the proposed discharge in the resident's medical record and such information is communicated to the receiving provider. Evidence documents that the Facility representatives, including [redacted] and [redacted] met with [redacted] on September 10, 2024 to discuss discharge process of the Resident to her home, but evidence failed to establish that the Resident's physicians documented the Resident's basis for the transfer, the specific unmet resident needs and the services available at the receiving facility to meet the needs of the Resident. Additionally, there was no evidence provided or documented in the Resident's medical record from a physician to document the necessity of the Resident's discharge due to the endangerment of other residents at the facility.

Because the Facility failed to document necessary information in the Resident's medical record, the Facility failed by a preponderance of the evidence to demonstrate that it correctly proposed an involuntary discharge of the Resident. Therefore, the proposed August 16, 2024 proposed involuntary discharge of the Resident cannot be affirmed.

CONCLUSIONS OF LAW

1) The Facility may involuntarily discharge a resident when the resident's needs cannot be met in the facility.

2) The reason for discharge must be documented in the resident's medical record and contain the specific resident need which cannot be met, the facility attempts to meet the resident's needs and the services available at the receiving facility to meet the need.

3) The Facility may involuntarily discharge a resident when the safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident. The reason for discharge must be documented in the resident's medical record by a physician.

4) The preponderance of evidence failed to demonstrate that the Facility documented, by a physician, the reason for discharging the Resident, the specific unmet needs, and the services available at the receiving provider to meet the Resident's need.

5) The preponderance of evidence failed to demonstrate that the Facility documented, by a physician, in the Resident's medical record the necessary discharge of the Resident due to the endangerment of the safety of other individuals at the facility.

6) Because the Facility failed to document the basis and other required information concerning the discharge in the Resident's medical record, the Facility incorrectly acted to discharge the Resident.

DECISION

It is the decision of the State Hearing Officer to **REVERSE** the Facility's decision to discharge the Resident.

ENTERED this _____ day of September 2024.

_____

Eric L. Phillips
State Hearing Officer