



State of New Jersey

DEPARTMENT OF HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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Director

**STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES**

E.A.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
v.	:	ORDER OF REMAND
	:	
COUNTRY ARCH CARE CENTER,	:	OAL DKT. NO. HMA 7795-2013
	:	
RESPONDENT.	:	

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision and the documents in evidence. Both parties filed exceptions. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is September 2, 2014, in accordance with an Order of Extension.

This matter concerns Petitioner's notice of involuntary discharge dated April 13, 2013 from Country Arch Care Center. Petitioner had previously applied for Medicaid benefits and been found eligible as of January 1, 2013 but was

subject to a transfer penalty until July 25, 2015. ID at 8. That issue was the subject of a separate fair hearing wherein the transfer penalty was affirmed. E.A. v. Hunterdon County Board of Social Services and DMAHS, OAL Dkt. No. HMA 02267-2013 (decided December 23, 2013). During the pendency of the fair hearing on the transfer penalty, Country Arch issued a notice dated stating the facility intended to discharge E.A. effective in 30 days from April 13, 2013. She would be discharged to a street address that has been identified as her daughter's home. The stated reason for the involuntary discharge was "failure to provide payment for your care." At the time of the letter, E.A. owed \$31,623.05.

The Initial Decision, in limiting its review to the validity of the notice, found that the notice was deficient and held that E.A. could not be discharged until "such time as an appropriate discharge plan is finalized and Country Arch complies with the requirement of N.J.A.C. 8:39-4.1." ID at 10. For the reasons that follow, I hereby REVERSE the Initial Decision and REMAND the matter to OAL for further findings.

As Respondent continues to argue in exceptions that there is no jurisdiction for this matter, I will first address the regulatory framework that authorizes this matter. The federal law is clear that a "nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless—. . . (iii) (I) for transfers or discharges effected on or after October 1, 1989, notice of the resident's right to appeal the transfer or discharge under the State process established under subsection (e)(3) of this section." 42 U.S.C. § 1396r. That subsection requires "a fair mechanism, meeting the guidelines established under subsection (f)(3) of this section, for

hearing appeals on transfers and discharges of residents of such facilities; but the failure of the Secretary to establish such guidelines under such subsection shall not relieve any State of its responsibility under this paragraph.” 42 U.S.C. § 1396r(e)(3).

While the courts are clear that a private nursing resident is also covered by the Medicaid fair hearing rules, E.A. is a Medicaid beneficiary. ID at 8. She is not eligible for reimbursement of her nursing home bills due to a transfer of assets that resulted in a penalty. See King v. Butler Rest Home, Inc., 365 S.W.3d 561 (Ky. Ct. App. 2011) an appeal of an involuntary discharge from a long-term care facility, even though the resident being discharged was twice denied Medicaid coverage and was not covered at the time of discharge and Auburn Med. Investors, L.P. v. Audette, 14 Mass. L. Rep. 706 (2002) (State Medicaid agency had jurisdiction over an involuntary discharge from a long-term care facility for nonpayment where the resident was denied Medicaid coverage and was a private payer at the time of appeal.) The rules specifically require that during a penalty wherein nursing facility benefits are not covered, the recipient is entitled to ancillary services. See N.J.A.C. 10:71-4.10(m) (“For the purposes of this subchapter, the penalty period shall be the period of time during which payment for long-term care level services is denied. An institutionalized individual who is ineligible for payment of long-term care services as a result of an asset transfer shall be precluded from eligibility, but shall be entitled to ancillary services if otherwise eligible.”)

The New Jersey regulation regarding nursing home discharge for a Medicaid beneficiary sets forth the procedure to include:

1. The NF shall submit to the LTCFO a written notice with documentation of its intention and reason for the involuntary transfer of a Medicaid beneficiary from the facility;

2. If the LTCFO determines that an involuntary transfer is appropriate, the beneficiary and/or the beneficiary's authorized representative shall be given 30 days prior written notice by the NF that a transfer is proposed by the NF and that such transfer will take effect upon completion of the relocation program specified in (h) below. Additionally, the NF shall forward a copy of the written notice to the LTCFO and Ombudsman. The written notice to the beneficiary and/or authorized representative shall advise of the right to a hearing and shall include the address where to send the request for a hearing. If the beneficiary requests a hearing within 30 days of the date of the written notice, the transfer is stayed pending the decision following the hearing. In those instances where the LTCFO determines that an acute situation or emergency exists, the transfer shall take place immediately. The beneficiary and/or the beneficiary's authorized representative shall be given 30 days after transfer to request a hearing;

3. DMAHS will comply with the hearing time requirements in State and Federal rules and regulations, unless an adjournment is requested by the appellant;

4. The hearing shall be conducted at a time and place convenient to the beneficiary. Notification shall be sent to all parties concerned;

5. All hearings shall be conducted in accordance with the Fair Hearing procedures adopted by the DMAHS.

N.J.A.C. 8:85-1.10(g). (Emphasis added).

It is under this authority that the matter was correctly transmitted to the OAL for a fair hearing.

However, I FIND that the hearing below did not use the correct burden of proof and standard of review regarding E.A.'s discharge notice. As mentioned above, E.A. is a Medicaid beneficiary as she is entitled to ancillary services. Country Arch is required to comply with N.J.A.C. 8:85-1.10(g). Thus, prior to the issuing the notice, Country Arch would have to notify the Long Term Care Field Office (LTCFO). It is unclear if Country Arch has complied with the notice to the LTCFO as it incorrectly considered E.A. a private pay resident. Then "[i]f the LTCFO determines that an involuntary transfer is appropriate, the beneficiary and/or the beneficiary's authorized representative shall be given 30 days prior written notice by the NF that a transfer is proposed by the NF and that such transfer will take effect upon completion of the relocation program specified in (h) below. Additionally, the NF shall forward a copy of the written notice to the LTCFO and Ombudsman. The written notice to the beneficiary and/or authorized representative shall advise of the right to a hearing and shall include the address where to send the request for a hearing." N.J.A.C. 8:85-1.10(g)2. It is clear that the rule does not require that the discharge or relocation program be done at the time of the written notice. Thus, I agree with Country Arch's argument that a discharge plan is not required to be part of the original notice of intent to discharge.

The requirement for the fair hearing require the nursing home show by a preponderance of evidence that the transfer is authorized by the rule and that relevant factors be taken into account. N.J.A.C. 8:85-1.10(f) provides that:

In any determination as to whether a transfer is authorized by this rule, the burden of proof, by a preponderance of the evidence, shall rest with the party requesting the transfer, who shall be required to appear at a hearing if one is requested and scheduled. Where a

transfer is proposed, in addition to any other relevant factors, the following factors shall be taken into account:

1. The effect of relocation trauma on the beneficiary;
2. The proximity of the proposed placement to the present facility and to the family and friends of the beneficiary; and
3. The availability of necessary medical and social services as required by Federal and State rules and regulations.

I FIND that the record before me did not apply this regulation to the determination regarding the involuntary transfer notice issued by Country Arch. As such, I hereby REVERSE the Initial Decision and REMAND the matter to OAL for further findings consistent with the above regulation. Country Arch has the burden to demonstrate that the transfer complies with and is authorized by N.J.A.C. 8:85-1.10.

THEREFORE, it is on this 28th day of AUGUST 2014

ORDERED:

That the Initial Decision is hereby REVERSED; and

That the matter is REMANDED to the Office of Administrative Law.



Valerie Harr, Director
Division of Medical Assistance
and Health Services