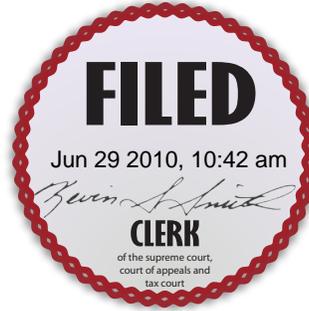


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BILLY DIX,)
)
Appellant,)
)
vs.)
)
INDIANA STATE DEPARTMENT OF)
HEALTH, and MAGNOLIA HEALTH)
SYSTEMS XVII, LLC d/b/a WILLOW)
CROSSING HEALTH AND REHABILITATION)
CENTER,)
)
Appellees.)

No. 03A01-1001-MI-13

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
Cause No. 03C01-0904-MI-894

June 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Billy Dix appeals from the trial court's order on judicial review affirming the Indiana State Department of Health's administrative determination that Dix's involuntary transfer from Magnolia Health Systems XVII, LLC, d/b/a Willow Crossing Health and Rehabilitation Center (Willow Crossing) was in compliance with Indiana's regulations. Dix presents the following consolidated and restated issues for review:

- 1) Was Dix denied due process during the informal Indiana State Department of Health (ISDH) hearing?
- 2) Did Willow Crossing prove by a preponderance of the evidence that it could not meet Dix's needs?

We affirm.¹

Dix, then age forty-seven, entered Willow Crossing in Columbus, Indiana, as a quadriplegic resident on August 23, 2007, following a period of hospitalization at St. Francis Hospital to treat a stage four pressure ulcer. Dix is mentally competent and alert and is able to speak for himself. As a result of his quadriplegia, Dix is unable to perform activities of daily living for himself and relies on the staff of the facility to meet these needs, including repositioning him every two hours. He requires nursing home level of care, which Willow Crossing is generally equipped to provide.

Dix was extremely particular about the methods and manner in which the staff at Willow Crossing attended to his most basic needs. In fact, during his stay of more than a year at the facility, the staff was rarely able to perform tasks and provide services to his satisfaction. As a result, Dix continually voiced his displeasure by badgering, berating, and

using vulgar language² toward staff members providing his daily care. Willow Crossing attempted to resolve Dix's intense discontent by providing various forms of staff training to address Dix's needs and individualized care instructions.³ The care provided, which had been evaluated and approved by the ISDH, continued to be unacceptable to Dix on a daily basis.

In July 2008, Joseph Sheehy, M.D., Dix's primary care physician (as well as the medical director of the facility), recommended that a thirty-day notice of discharge be issued to Dix. Willow Crossing, nevertheless, determined that it "wanted to continue to try other things" and "stay diligent in providing good care". *Id.* at 48. In the ensuing months, Dix remained dissatisfied with his care and continued his verbal assaults on staff. Things came to a head in October when Dix inappropriately called 911 to complain about his care (i.e., he was not being turned timely).

On October 21, 2008, Willow Crossing issued a notice of involuntary transfer/discharge to Dix. The notice provided that said transfer/discharge was necessary for Dix's welfare and his needs could not be met by the facility. The day before the notice, Dr. Sheehy documented Dix's clinical record with the following written statement:

¹ Oral argument was held in this case in Indianapolis on May 10, 2010. We commend counsel for their candor and the high quality of their arguments, both oral and written.

² Dawn Wendel, Willow Crossing's Administrator, provided the following frank illustration of Dix's verbal abuse of staff: "You stupid fucking idiot. You're so fucking stupid you can fuck up a wet dream. You are a stupid cunt. Use your brain, not your mouth. You don't have a brain. You weren't born with a brain." *Appellant's Appendix* at 40. As a result of such verbal abuse by the alert and oriented resident, Wendel testified that several CNAs had come out of Dix's room "hysterical, in tears and walk[ed] out and never come back [to work] again." *Id.* at 41.

³ Dix was also provided with social services so that his specific needs and wishes could be fully understood by the facility. Additionally, Willow Crossing offered Dix mental health services to deal with stress, but he declined such services.

The facility will be issuing resident, Billy Dix, a 30-day notice of involuntary discharge necessary for the resident's welfare; the resident's continuity of care needs cannot be met in the facility as evidenced by the continued verbalization by the alert and oriented resident himself stating there is "no one in the facility" that can on a continuous basis provide personal care to his satisfaction.

Id. at 132.

Dix timely appealed the involuntary transfer so that he could remain at Willow Crossing, which was conveniently located near his elderly parents and sister. Dix was assisted in the administrative appeal by Roger Walby, the local ombudsman. On November 4, notice of an informal hearing before ISDH Hearing Officer Joy M. Culley-Klotzsche (Hearing Officer) was sent to Dix. The notice provided in part as follows:

Your attendance and participation is welcome.... At this informal hearing, the burden of proof will be on the facility to prove, by a preponderance of the evidence that this transfer or discharge is warranted according to the terms of the Indiana Code 16.2-3.1-12 [sic] and 410-IAC 16.2. Please bring with you all witnesses who have relevant information to present to the hearing officer; also bring copies of any documents you wish to submit as evidence.

If the decision of the informal hearing officer in this case is appealed, such an appeal will not be an opportunity for either party to re-hear the case or to introduce new evidence and/or an opportunity for a completely new hearing. The importance of this is that the informal hearing officer must be made aware of all evidence in this case. Neither party should withhold evidence, or fail to attend the informal hearing, believing that they will have an opportunity to reveal such evidence at the appeal of the informal hearing officer's decision.

Appellee's Appendix at 152 (emphasis in original).

The informal hearing was held on November 12, as scheduled. As the result of

unforeseen circumstances,⁴ the hearing had to be held in Dix's private room rather than a meeting room. Dix was present at the hearing with his sister (Patricia Dix Wessel) and Walby. Willow Crossing's Administrator (Dawn Wendel) was present with the facility's nurse consultant (Kimberly Owens), social services director (Linda Schubert), and director of nursing (Paula Wright), as well as an LPN and two CNAs who had direct experience working with Dix. Following the evidentiary hearing, the Hearing Officer issued her decision on November 21, allowing the involuntary transfer. Dix timely appealed that decision to an Administrative Law Judge (ALJ). Following briefing by the parties, the ALJ issued a recommended order on December 31, affirming the Hearing Officer's decision. Once again, Dix appealed. After briefing and oral argument, the Appeals Panel of the ISDH affirmed both prior administrative decisions by order issued March 15, 2009 (the Final Agency Order).

On April 10, 2009, Dix filed the instant action for judicial review of the Final Agency Order. Dix and Willow Crossing filed briefs with the trial court.⁵ Following oral argument, the trial court affirmed the ISDH's Final Agency Order on November 19, 2009. Dix now appeals. Additional information will be provided below as needed.

“The burden of demonstrating the invalidity of agency action is on the party to the judicial review proceeding asserting invalidity.” Ind. Code Ann. § 4-21.5-5-14(a) (West,

⁴ Due to the reoccurrence of a pressure ulcer, Dix could not use his wheelchair and had to stay in bed. Just prior to the hearing, it was discovered that his bed would not fit through the doorway. Therefore, he could not be transported to a conference room for the hearing.

⁵ The ISDH did not brief the case and filed a motion to dismiss itself as a party to the proceedings, which was denied by the trial court.

Westlaw through 2009 1st Special Sess.). Our review is:

limited to determining whether the agency possessed jurisdiction over the subject matter, and whether the agency's decision was made upon substantial evidence, was not arbitrary or capricious, and was not in violation of any constitutional, statutory or legal principles. The trial court proceeding is not intended to be a trial de novo, but rather the court simply analyzes the record as a whole to determine whether the administrative findings are supported by substantial evidence. Courts that review administrative determinations, at both the trial and appellate level, are prohibited from reweighing the evidence and judging the credibility of witnesses and must accept the facts as found by the administrative body.

Bryant v. Indiana State Dep't of Health, 695 N.E.2d 975, 978 (Ind. Ct. App. 1998) (citations omitted). When determining whether the administrative body committed an error of law, however, we owe no deference to its decision, reviewing questions of law de novo. *Kinnaird v. Secretary*, 817 N.E.2d 1274 (Ind. Ct. App. 2004), *trans. denied*.

1.

Dix initially presents a question of law, arguing that he was denied due process during the informal ISDH hearing. In this regard, he asserts the following deficiencies: The Hearing Officer failed to expressly identify and rule on the admissibility of exhibits; there was no clear beginning and end to the testimony of individual witnesses; Dix was unable to see some of the witnesses as they testified; and the hearing was not conducted in an orderly manner, which resulted in him not knowing when to present his testimony and evidence.

“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *NOW Courier, Inc. v. Review Bd. of Indiana Dep't of Workforce Dev.*, 871 N.E.2d 384, 387 (Ind. Ct. App. 2007). This includes notice, an opportunity to be heard, and an opportunity to confront adverse witnesses. *Wakshlag v.*

Review Bd. Of Indiana Employment Sec. Div., 413 N.E.2d 1078 (Ind. Ct. App. 1980). Our Supreme Court has explained that due process is not “‘a technical conception with a fixed content unrelated to time, place and circumstances,’ but rather is a principle which should be flexibly applied, depending on the particular situation.” *Cliff v. Ind. Dep’t of State Revenue*, 660 N.E.2d 310, 318 (Ind. 1995) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Thus, “[w]e take cognizance of the practicalities and peculiarities of each particular case in determining whether constitutional requirements of due process have been met.” *Roberts v. County of Allen*, 773 N.E.2d 850, 853-54 (Ind. Ct. App. 2002), *trans. denied*.

In the instant case, Dix does not dispute that he received appropriate notice of the informal hearing. Said notice directed Dix to bring to the hearing all witnesses and documentary evidence he wished to present. Dix appeared at the scheduled hearing to contest the involuntary transfer, along with his sister and the local ombudsman.

While the hearing conducted by the Hearing Officer was exceedingly informal, our independent review of the hearing record reveals that Dix was provided with a meaningful opportunity to be heard. To be sure, Dix took full advantage of the opportunities to offer evidence, argue his position, and confront adverse witnesses. Dix and his representative, Walby, directly questioned a number of the facility’s witnesses during the hearing. Further, Dix, Walby, and Dix’s sister offered extensive testimony to rebut evidence presented by Willow Crossing. Dix and Walby also made concluding statements to the Hearing Officer. Despite the informal nature of the hearing and the physical limitations imposed by the

hearing space,⁶ there is no indication that Dix was unable to fully present his case and confront the evidence against him. We find no due process violation in this case.

2.

Dix contends that Willow Crossing failed to establish by a preponderance of the evidence that it could not meet his needs. Specifically, he asserts that his “use of profanity fails to establish that his needs cannot be met by Willow Crossing.” *Appellant’s Brief* at 7.

410 Ind. Admin. Code 16.2-3.1-12(a)(4) provides:

Health facilities 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 that the resident no longer needs the services provided by the facility;
- (C) the safety of individuals in the facility is endangered;
- (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; or
- (F) the facility ceases to operate.

Thus, a resident has a presumptive right to remain in a nursing home unless at least one of the six limited criteria is established by the facility. Further, the facility must convince the ISDH by a preponderance of the evidence that the involuntary transfer/discharge is authorized by subdivision (a)(4). This case involves the first exception listed above.

It is important to note first what this case is not about: retaliation. There is no

⁶ At no time during the hearing did Dix or Walby object to the style, manner, or location of the hearing. For example, Dix never indicated that he did not know who was testifying or what documentary evidence was

indication in the record, and Dix never claimed in the administrative proceedings, that Willow Crossing was transferring Dix simply because he had exercised his right to voice complaints about his care. Rather, the evidence established that Willow Crossing “in good faith made every attempt to work with [Dix]” including “an incredible amount of ongoing training, specialized training.” *Appellant’s Appendix* at 109-10. According to Owens (Willow Crossing’s nurse consultant), Dr. Sheehy told her, “[h]ow we are trained and what he wants [are] two different things; and that there [are] facilities out there that are more trained to handle [Dix’s] special needs.” *Id.* at 112.

Though a fact-finder certainly could have been persuaded otherwise, there is substantial evidence in the record to support the ISDH’s conclusion that Willow Crossing was unable to meet Dix’s needs. The record is replete with examples of Dix’s extreme dissatisfaction with the care provided and of his resulting verbal abuse of staff. This is despite the fact that Willow Crossing was generally providing adequate care to Dix and, according to Owens, “exhausting all resources” in an unsuccessful attempt to satisfy Dix. *Id.* at 92. In fact, shortly before the notice of transfer, Dix indicated during a care meeting that there was no one at Willow Crossing who could “do consistently proper care.” *Id.* at 80.

Dix’s sister testified that she gets frequent calls from Dix when he is upset with the staff. “His voice is very high. He’s very agitated. I can tell that the frustration level is very great.” *Id.* at 78. Dix testified that his behavior is generally due to frustration and the pain he experiences during care. He explained further, “I’m mad, I’m angry, I’m cussing at the

being admitted by Willow Crossing.

situation.” *Id.* at 77.

Based upon the evidence presented at the hearing, the ALJ concluded:

Mr. Dix’s continual behavior toward staff where he is constantly complaining about the services being provided to him is a very stressful environment for him. Because the services cannot be provided to his satisfaction he becomes extremely agitated and irritated. This is not in the best interests of his welfare.

Id. at 25.

In most cases, the analysis of a facility’s ability to meet a resident’s needs entails consideration of the resident’s medical needs. In the instant case, there is no doubt that Willow Crossing is generally equipped to meet the medical and daily living requirements of persons with quadriplegia. The evidence reveals, however, that Dix’s demands of care providers are particularly exacting and have on a regular basis proved unattainable by Willow Crossing staff, resulting in his extreme dissatisfaction. On appeal, Dix argues that his individual demands of how he wants care provided are wants, not needs, and his general discontent with the care provided does not reflect on the facility’s ability to provide for his needs. We cannot agree.

410 Ind. Admin. Code 16.2-3.1-3 makes clear that a resident has the right, among other things, to participate in planning his own individualized care and treatment and to receive services with reasonable accommodations of his needs and preferences. Further, a resident’s overall well-being (including medical, nursing, cognitive, and psychosocial needs) is a focus of the relevant administrative code provisions. *See, e.g.*, 410 Ind. Admin. Code 16.2-3.1-29, -33, -34, -35. “A facility must care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident’s quality of life.”

410 Ind. Admin. Code 16.2-3.1-32(a). “Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being in accordance with the comprehensive assessment and care plan.” 410 Ind. Admin. Code 16.2-3.1-37(a).

Though Willow Crossing diligently tried to provide for Dix’s overall needs, the record supports the ISDH’s conclusion that Willow Crossing was unable to meet his needs.⁷ As a result, it was within the ISDH’s discretion to determine that Dix’s quality of life was being negatively affected and he was not attaining his highest practicable physical, mental, and psychosocial well-being. The ISDH’s decision is supported by the evidence and is not arbitrary or capricious.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.

⁷ 410 Ind. Admin. Code 16.2-3.1-12(a)(5) requires the “resident’s physician” to document the resident’s clinical record when a transfer on this basis is proposed. Dix challenges the statement Dr. Sheehy placed in his clinical record regarding the need for the transfer. He argues that the doctor failed to “provide or identify medical documentation or other facts to support his statement” that the discharge was for Dix’s welfare and that Dix’s needs could not be met in the facility. *Appellant’s Brief* at 25. Dix directs us to no authority to support his assertion that the doctor’s statement requires a “medical rationale”, nor does 410 Ind. Admin. Code 16.2-3.1-12(a)(5) so require. *Id.* at 26. Further, we are not persuaded by the related argument, asserted in the Indiana State Long Term Care Ombudsman’s amicus curiae brief, that Dr. Sheehy should not have been permitted to document Dix’s record regarding the need for transfer because Sheehy also served as the medical director of the facility. Initially, we observe that Dr. Sheehy was Dix’s physician and, according to 410 Ind. Admin. Code 16.2-3.1-12(a)(5), he was the only physician who could make such documentation. Dix had the right to choose his attending physician, see 410 Ind. Admin. Code 16.2-3.1-3(n)(1), and he had chosen Dr. Sheehy. Further, there is no indication in the record that Dr. Sheehy acted in an inappropriate manner or against the best interests of his patient.