



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

September 28, 2017

CERTIFIED MAIL/RETURN RECEIPT



Danielle Holley, Esq.,
O'Connell & Aronowitz
54 State Street
Albany, New York 12207

Pascale Jean-Pierre, Director of Social Services
Waterview Nursing and Rehabilitation Center
119-15 27th Avenue
Flushing, New York 11354

Glenda Branch, Social Worker
Nassau University Medical Center
2201 Hempstead Turnpike
East Meadow, New York 11554

RE: In the Matter of [REDACTED] – Discharge Appeal

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter. This Decision is final and binding.

The party who did not prevail in this hearing may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the party wishes to appeal this decision it may seek advice from the legal resources available (e.g. their attorney, the County Bar Association, Legal Aid, etc.). Such an appeal must be commenced within four (4) months from the date of this Decision.

Sincerely,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: ISM
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

In the Matter of an Appeal pursuant to
10 NYCRR §415.3 by

[REDACTED],

Appellant,

from a determination by

Waterview Nursing and Rehabilitation Center,

Respondent,

to transfer her from a residential health care facility.

DECISION

Hearing Before: Ann H. Gayle
Administrative Law Judge

Held at: Nassau University Medical Center
2201 Hempstead Turnpike
East Meadow, New York 11554

Hearing Date: July 11, 2017
The record closed on September 15, 2017

Parties: Waterview Nursing and Rehabilitation Center
By: Danielle Holley, Esq.
O'Connell & Aronowitz

By: [REDACTED]
Resident's [REDACTED] / Representative

Nassau University Medical Center
By: Glenda Branch
Medical Social Worker

Pursuant to Public Health Law (“PHL”) §2801 and Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“10 NYCRR”) §415.2(k), a residential health care facility or nursing home such as Waterview Nursing and Rehabilitation Center (“Respondent” or “Facility”) is a residential facility providing nursing care to sick, invalid, infirm, disabled, or convalescent persons who need regular nursing services or other professional services but who do not need the services of a general hospital.

Transfer and discharge rights of nursing home residents are set forth at 10 NYCRR §415.3. Respondent transferred █ (“Appellant” or “Resident”) from care and treatment in its nursing home to █ Hospital (“█ for a █ evaluation. Subsequently, █ determined that Appellant was ready to be discharged to the Facility, but Respondent refused to readmit Appellant. While Appellant awaited readmission to the Facility, she was “temporarily admitted” to █”). The next day, █ transferred Appellant to Nassau University Medical Center (“NUMC” or “Hospital”). In █ 2017, NUMC determined that Appellant was ready for discharge to the Facility, and Respondent refused to readmit Appellant. Appellant’s █ and the New York State Ombudsman’s office (“Ombudsman”) appealed the discharge determination, on behalf of Appellant, to the New York State Department of Health (“NYSDOH”).

The hearing on that appeal was held in accordance with 10 NYCRR §415.3(h). Pursuant to §415.3(h)(2)(iii)(b) the Facility has the burden of proving that the transfer was necessary and the discharge plan is appropriate.

A transcript (pages 1-176) of this hearing was made by a court reporting service. Appellant’s █ represented Appellant¹ and testified for Appellant. The following Facility representatives testified for Respondent: Pascale Jean-Pierre—Director of Social Services, Geetha

¹ Appellant’s █ representative waived Appellant’s right to be present at the hearing (T 13-15, 18).

Mohanan, RN–Director of Nursing, Alison Lustbader–Director of Admissions, and Michael Berger–Administrator. Jose O. Mejia, MD–NUMC’s Director of Hospitalist Services, Paris Pacheco, MD–Primary Team Resident Physician, Glenda Branch–Social Worker, and Lisa McLaughlin–Director of Social Work testified for the Hospital.

The following documents were accepted into evidence by the Administrative Law Judge (“ALJ”) as ALJ, Facility, and Hospital Exhibits:

ALJ:

- I: Notice of Hearing with “Notice of Transfer with Anticipated Return to Facility” attached
- II: Bureau of Adjudication letter dated █, 2017
- III: Proof of Mailing to Ombudsman’s Office

Facility:

- 1: Nursing Note of █, 2016 at 8:34:34 p.m.
- 2: Nursing Note of █, 2016 at 2:32 p.m.
- 3: Nursing Note of █, 2016 at 4:41 a.m.
- 4: Nursing Note of █, 2016 at 5:03 a.m.
- 5: Nursing Note of █, 2016 at 5:27 a.m.
- 6: Nursing Note of █, 2016 at 10:51 a.m.
- 7: Allscripts document dated █, 2017
- 8: Census

Hospital:

- A: PASRR of █/2017 evaluation
- B: █ assessment dated █, 2017
- C: Nursing flow sheets dated █, 2017
- D: PASRR of █/2017 evaluation²

Appellant was given the opportunity but did not offer any documents into evidence.

STATEMENT OF ISSUES

Respondent transferred Appellant to █ for a █ evaluation on █ █ 2016. When █ deemed Appellant ready for discharge to the Facility, Respondent refused to readmit her. Appellant was temporarily placed in █ while she waited for

² This document was received by the ALJ on September 15, 2017. Pursuant to the agreement of the parties given on a September 14, 2017 conference call, the ALJ marked this into evidence when it was received on September 15, 2017.

Respondent to readmit her. However, the day after Appellant arrived at █ █ transferred Appellant to NUMC. In █ 2017, NUMC deemed Appellant ready for discharge, and Respondent refused to readmit Appellant to its Facility. The initial issue to be determined in this proceeding is whether Appellant was transferred/discharged in accord with her rights pursuant to 10 NYCRR §415.3. If Appellant was denied her legal rights as delineated in this regulation, there is no reason to address the questions of whether the transfer/discharge was warranted and whether the discharge plan was appropriate.

FINDINGS OF FACT

Citations in parentheses refer to exhibits (“Ex”) and testimony of witnesses in the transcript (“T”) found persuasive in arriving at a particular finding.

1. Respondent, Waterview Nursing and Rehabilitation Center, is a residential health care facility located in Flushing, New York. (Ex I)
2. Appellant, age █ was admitted to the Facility from █ on █ 2015. During the course of Appellant’s █ stay at the Facility, she was placed on various units/wings, and she was transferred to █ and readmitted to the Facility █ times. The last readmission from █ was on █, 2016. Appellant spent the █ holiday at her █ home (█ 2016), and on █ 2016, just a few days after her return to the Facility, Appellant was transferred to █ for a █ evaluation. (Ex 8; T 20, 77-82)
3. Respondent’s chart for Appellant documents agitation and Appellant’s alleged behavior of █ the █ in her room, █ down her █, and trying to █ herself with a █ as the underlying reason for the █, 2016 transfer to █ for a █ evaluation. (Ex 6; T 63-64)

4. In an undated Notice of Transfer with Anticipated Return to Facility, Respondent determined to transfer Appellant to █ effective █, 2016. The stated grounds for transfer were that Appellant was in need of a psychiatric evaluation because her alleged behavior of █ agitation was a threat to the safety and health of Appellant and Respondent's staff. (Ex I)

5. Respondent called Appellant's █ on █, 2016, to inform her that Appellant was being transferred to the hospital, but Appellant's █ was not given a copy of the undated Notice of Transfer with Anticipated Return to Facility. Appellant's █ understanding of the reason for the transfer was that it was due to Appellant's agitation stemming from her refusal to receive █ medication. (Ex I; T 17-18, 19-22, 29-31, 65-67, 151)

6. Respondent was notified, beginning in █ 2017, that Appellant's condition was stable and she was ready for discharge back to the Facility from █ Respondent refused to readmit Appellant on the grounds that a bed in the west wing, the unit for residents with █ diagnoses and █ with █, was not available. Appellant's █ then agreed to have Appellant placed temporarily in █ solely because it was her understanding and belief that in a very short time Appellant would be transferred back to the Facility. (Ex 7; T 89-93, 148-150)

7. On █, 2017, the day after Appellant arrived at █ █ transferred Appellant to another hospital, NUMC, for a █ health assessment due to █ NUMC determined that Appellant was stable and ready for discharge, medically on █ 31, 2017, and █ on █, 2017. Both Parkview and Respondent refused to admit Appellant. When Appellant's █ repeated attempts to have Appellant discharged from NUMC to the

Facility failed, she contacted the Ombudsman's office for assistance. In █ 2017, Appellant's █ and the Ombudsman's office contacted NYSDOH to request an appeal of Appellant's transfer/discharge from the Facility and Respondent's subsequent refusals to readmit Appellant to the Facility. (Ex B; T 27, 92, 122, 131-134, 155-157)

8. Appellant has remained at NUMC pending the outcome of this proceeding.

DISCUSSION AND CONCLUSION

10 NYCRR §415.3(h)(1)(iii)(a) provides that, before it transfers or discharges a resident, the facility shall notify the resident and designated representative of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. Subsections (iii) & (iv) of §415.3(h)(1) both require that all nursing home residents be provided with the notice outlined in §415.3(h) before transfer/discharge. The notice must include, *inter alia*, a statement that the resident has the right to appeal the action to the NYSDOH. 10 NYCRR §415.3(h)(1)(iii)(c) and §415.3(h)(1)(v). Respondent was required to provide Appellant and her representative with such Notice prior to the discharge date. An undated Notice of Transfer with Anticipated Return to Facility that was not given to Appellant's █/representative before, on the day of, or after, transfer does not satisfy the written notice requirements of §415.3(h).

A hearing was held on July 11, 2017. Appellant's █ testified that she was never given a copy of the "Notice of Transfer with Anticipated Return to Facility" ("Transfer Notice"), and she had no idea that the Facility would not readmit Appellant into the Facility (T 17-18, 151). Respondent claims that Appellant was provided with a copy of the Transfer Notice on the day of Appellant's transfer, and that a copy of the Transfer Notice was mailed to Appellant's █/representative the day after the transfer (T 30-31). The Transfer Notice is undated and Appellant's █ name is not written or mentioned anywhere on the document. Respondent

did not provide documentary evidence/proof that the Transfer Notice was mailed to Appellant's █

Toward the end of the hearing day, it was revealed that Appellant was evaluated on █ 2017 for a PASRR (Pre-Admission Screen Resident Review), and the results were received by NUMC a few business days before the hearing. The PASRR determined that "Inpatient care is appropriate and desired but the nursing facility is not the appropriate setting for the individual's needs" (emphasis added) (Exhibit A, page 4 of 6). Appellant's █ testified that she would appeal the PASRR determination ("PASRR appeal"), and NUMC conceded that Appellant must remain in the hospital until the PASRR appeal was resolved. The ALJ determined that the record in the instant appeal would remain open until the PASRR appeal was resolved. On █ 2017, NUMC contacted the ALJ's office to report that the PASRR appeal was resolved. The ALJ held a conference call with all parties later that same day.

The parties reported on the conference call that Appellant was evaluated on █ 2017 for another PASRR, and it was determined that "Inpatient care is appropriate and desired, and the nursing facility is an appropriate setting for meeting the individual's needs" (emphasis added) (Exhibit D, page 2 of 6). Respondent refused to voluntarily readmit Appellant into its Facility. Respondent reiterated the position it took at the hearing; it would be willing to readmit Appellant to the Facility only if a bed in the west wing is available, but no such bed is currently available. Neither the █, 2017 PASRR determination nor the NUMC and █ discharge determinations required that Appellant be placed in a "specialty bed" in the Facility's "west wing."

Having found that Appellant was denied her legal rights pursuant to §415.3(h), the questions of whether the transfer/discharge was warranted and whether the discharge plan was

█/Waterview

appropriate will not be addressed. Nor will Respondent's arguments that Appellant's discharge to Parkview obviated Respondent's obligation to readmit Appellant or that the request for an appeal was not timely. Appellant is currently stable and ready for discharge to any available bed in the Facility.

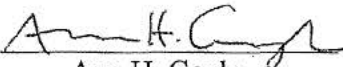
DECISION

The appeal by Appellant is GRANTED.

Respondent must readmit Appellant to its Facility before it admits any other resident; Respondent **shall not** delay readmission of Appellant until a bed is available on the west wing.

This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

Dated: New York, New York
September 28, 2017


Ann H. Gayle
Administrative Law Judge

TO:

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