



**Department
of Health**

ANDREW M. CUOMO
Governor

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

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

December 29, 2017

CERTIFIED MAIL/RETURN RECEIPT



Rean Enriquez, Administrator
Evergreen Commons Rehabilitation
and Nursing Center
1070 Luther Road
East Greenbush, New York 12061

Laura Kline, Social Worker
Samaritan Hospital
2215 Burdette Avenue
Troy, New York 12180

Marc A. Antonucci, Esq.
Rivkin Radler Attorneys at Law
9 Thurlow Terrace
Albany, New York 12203-1005

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: nm
Enclosure

STATE OF NEW YORK: DEPARTMENT OF HEALTH

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

██████████, Appellant,

from a determination by

Evergreen Commons Rehabilitation & Nursing Center, Respondent,

to discharge him from a residential health care facility.

COPY

**DECISION
AND
ORDER**

A Notice of Transfer/Discharge, dated ██████████ 2017, was issued to ██████████ Appellant (“resident”) by Evergreen Commons Rehabilitation & Nursing Center (“facility”). The resident’s ██████████ (“resident’s ██████████ or “appellant”) appealed the facility’s proposed transfer/discharge on the resident’s behalf. The pre-transfer hearing was held on December 26, 2017, at Samaritan Hospital, Troy, New York, before Kimberly A. O’Brien, Esq., Administrative Law Judge (“ALJ”).

The hearing was held in accordance with the Public Health Law of the State of New York; Part 415 of Volume 10 of the New York Code of Rules and Regulations (“NYCRR”); the United States Code of Federal Regulations (“CFR”) 42 CFR Subpart E (§§431.200 - 431.246) and 42 CFR Part 483; the New York State Administrative Procedure Act; and 10 NYCRR Part 51.

Evidence was received, witnesses were sworn or affirmed and examined. A transcript of the proceeding was made. Appellant, Toni Naughton, appeared by phone. The following individuals from Samaritan Hospital were present at the hearing: Yelena Zack MD, Psychiatrist; Karen Julian, Social Work & Care Coordinator; Laura Kline, LMSW, Resident's Social Worker; and Marc Antonucci, Esq. The following individuals from the facility were present at the hearing: Brenda Burton, RN, Nurse Manager; Bernie Rostocki, ANP; Amy Jackson, RN, Director of Nursing Services; and Rean Enriquez, Administrator.

At the conclusion of the hearing, the ALJ made her findings on the record and ordered the facility to immediately accept the resident back into its [REDACTED]. The ALJ stated on the record that she would issue a writing of her findings and order upon receipt of the transcript, there was no objection. However, on December 26th, shortly after the hearing was concluded, the facility's administrator called the ALJ's office requesting written confirmation of the ALJ's order. In response, the ALJ sent a December 26, 2017 email to the parties confirming her oral order. On December 27th, at 9:07 am, the hospital's attorney sent an email to the ALJ indicating that the facility refused to comply with the order and accept the resident back into the facility; but at 10:12 am, the hospital's attorney sent another email to the ALJ indicating that the facility agreed to comply with the order. Based on the foregoing, the ALJ is issuing this written decision and order in advance of receiving the transcript¹.

STATEMENT OF THE CASE

The issues to be determined in this proceeding are whether the Facility's discharge of the

¹ A transcript of the proceeding was made; however, it is not available at this time. Accordingly, herein the ALJ cited exhibits admitted into the record and the name(s) of the individual(s) that provided testimony to support each finding of fact.

Resident was necessary and the discharge plan was appropriate. The Facility has the burden of proof and must prove its case by substantial evidence. (10 NYCRR § 415.3[h][2][iii], SAPA § 306[1]). The facility Notice of Transfer/Discharge indicates that the resident's needs cannot be met by the facility "after reasonable attempts at accommodation" and the health and safety of the resident and individuals in the facility would otherwise be endangered by his continued residency [ALJ Ex. 1A – Notice of Hearing and Notice of Transfer/Discharge]. The facility made a determination to discharge the resident from the facility effective [REDACTED] 2017, [REDACTED] days prior to the date of the discharge notice. The facility did not propose a discharge location [ALJ Ex. 1A – Notice of Hearing and Notice of Transfer/Discharge]. The appellant is aware of the facility's assertions and appealed the discharge.

FINDINGS OF FACT

The following findings of fact were made after a review of the entire record in this matter. Citations in parentheses refer to exhibits ("Ex.") or testimony ("Testimony"). These citations represent evidence found persuasive in arriving at a finding of fact. Conflicting evidence was considered and rejected in favor of the cited evidence.

1. The resident is a [REDACTED]-year-old male, and his diagnoses include [REDACTED] and [REDACTED] [ALJ Ex. 1].
2. On or about [REDACTED], 2017, the resident was admitted to the facility's [REDACTED] [Testimony of Mr. Enriquez]. The resident [REDACTED] the [REDACTED] unit and [REDACTED] from the facility on two occasions. The resident also made numerous attempts to [REDACTED] from the unit and to barricade the door [Testimony of Mr. Enriquez; Ms. Burton].
3. The facility does not have a psychiatrist on staff or a consulting agreement

with a psychiatrist. The facility nursing staff “adjusted” the resident’s medications during his stay [Testimony of Mr. Enriquez & Ms. Burton].

4. On [REDACTED] 2017, the facility called the police after the resident became [REDACTED] toward a facility staff member. When the police arrived at the facility, the resident became [REDACTED] toward the police and the police handcuffed the resident. The facility sent the resident, via ambulance, with a police escort, to Samaritan Hospital’s [REDACTED] [Testimony of Mr. Enriquez & Ms. Burton; Facility Ex. 1 – 12/15/17 Police “Incident Report”).

5. The resident was seen at Samaritan “[REDACTED],” but the resident was admitted to the Samaritan Hospital’s [REDACTED] floor, and he has remained there [ALJ Ex. 1-3, Hospital Record 12-16-2017 thru 12-26-2017; Testimony of Dr. Zack & Ms. Kline].

6. The [REDACTED] floor is not [REDACTED] the hospital nurses provide 1 to 1 supervision of the resident “on an as needed basis” to keep the resident in his room, and when he is ambulating about the [REDACTED] floor to keep him from wandering. There is no physician’s order for 1 to 1 supervision [Testimony of Dr. Zack].

7. Since the resident’s admission to the hospital on [REDACTED], 2017, his physicians changed and increased dosages of his medications (which are all administered orally) to address his [REDACTED] and [REDACTED]. The resident agrees to take his medications; he has not attempted to [REDACTED] from the facility; and he has not exhibited signs of severe [REDACTED] and [REDACTED] or [REDACTED] toward hospital staff [Testimony of Dr. Zack & Ms. Kline; ALJ Ex. 1-3, Hospital Record 12-16-2017 thru 12-26-17].

8. Upon discharge from the hospital, Dr. Zack will write discharge instructions indicating that the resident's current medication regimen/ dosages are effective/appropriate to treat the resident [Testimony of Dr. Zack].
9. At this time, the resident is stable and he is not attempting to [REDACTED] from the hospital or exhibiting signs of [REDACTED] and [REDACTED] or [REDACTED]. Presently, the facility's [REDACTED] is an appropriate placement for the resident [Testimony of Dr. Zack & Ms. Kline; ALJ Ex. 1-3, Hospital Record 12-16 -2017 thru 12-26-17].

DISCUSSION

On December 21 and December 22, 2017, the ALJ held two lengthy conference calls with the appellant, the facility, and hospital staff. During these calls, there was extensive discussion about the resident's condition and needs. The ALJ repeatedly advised the facility that neither the hospital nor the Appellant's home was an appropriate discharge location for the resident. The facility administrator expressed his concern and sincere belief that on [REDACTED], 2017, after the resident was [REDACTED] toward a staff member and police, the resident could not return to the facility as it would jeopardize the health and safety of its residents and staff. In advance of the call on the 22nd, at the direction of the ALJ, the hospital forwarded its [REDACTED] notes, nursing notes, and medication record for the resident ("hospital record"). Dr. Zack opined that the resident is stable and he can return to the facility. The hospital record shows that since his admission to the hospital the resident has not [REDACTED] from the hospital, the resident has not required [REDACTED] during his stay, the resident has not been [REDACTED] toward hospital staff, the resident takes his oral medications, and the resident's oral medication regimen has alleviated his [REDACTED] and [REDACTED] behavior. It is undisputed that the appellant, the hospital, and the facility

are working to identify an alternative placement for the resident; and it is possible that a facility in [REDACTED] may better suit the resident's needs. During the call on the 22nd, the hospital proposed that the facility readmit the resident to its [REDACTED] until an alternative placement can be secured, but the facility refused.

The ALJ advised the parties that there would be a hearing at the hospital on December 26th. The ALJ explained to the parties that the facility has the burden of proof and is required to show that pursuant to its discharge notice the resident is presently a danger to himself and others and the facility cannot meet the resident's needs. Pursuant to 10 NYCRR §§ 415.3(h) (2) (iii), the facility must propose a discharge plan that is available and appropriate to meet the resident's needs.

Based on the testimony and documentary evidence presented at the hearing, the ALJ determined that the resident's [REDACTED] and [REDACTED] behavior is well managed with the oral medication regimen established by the hospital [REDACTED] during his [REDACTED] day hospital stay the resident has not attempted to [REDACTED] from the hospital; the resident has not required [REDACTED] the resident has not been [REDACTED] toward hospital staff; and the resident is not presently a danger to himself, other residents, or facility staff. The hospital is not an appropriate discharge location because it does not provide a long-term plan for Appellant's care. The resident requires the skilled nursing services provided by the facility's [REDACTED]. It is understandable that under these circumstances it would be preferable for the resident to be placed at another facility, but no available placement has been identified. Accordingly, the hospital may immediately transfer/ discharge the resident to the facility.

ORDER

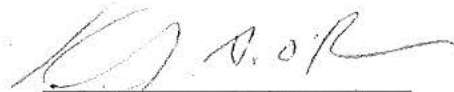
1. The appeal of the resident [REDACTED] transfer/discharge is granted; and
2. The hospital may **immediately** transfer/discharge the resident back to Evergreen

Commons Rehabilitation & Nursing Center, East Greenbush, New York, in accordance with this Decision and Order; and

3. This Order may be appealed to a court of competent jurisdiction pursuant to the New York Civil Practice Law and Rules; and

4. This Order shall be effective on service on the parties.

DATED: Albany, New York
December 27, 2017



KIMBERLY A. O'BRIEN
Administrative Law Judge

To: [REDACTED]
[REDACTED]
[REDACTED]

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