



Department of Health

ANDREW M. CUOMO
Governor

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

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

October 4, 2018

CERTIFIED MAIL/RETURN RECEIPT

Lina Feygin, DSW
Bensonhurst Center for Rehab Healthcare
1740 84th Street
Brooklyn, New York 11214

Anthony Sgarlato, Advocate
Brooklyn Street, AEH Inc.
9201 4th Avenue, 5th Floor
Brooklyn, New York 11214

[REDACTED]
c/o Bensonhurst Center for Rehab Healthcare
1740 84th Street
Brooklyn, New York 11214

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: cmg
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH

In the Matter of

██████████ Bensonhurst Center for
Rehabilitation

Appeal from a Nursing Home Resident Involuntary Discharge pursuant to
Title 10 (Health) of the Official Codes, Rules and Regulations of the
State of New York (NYCRR) §415.3(h)

Administrative Law Judge's Decision

COPY

A "Transfer and Discharge Notice" ("Discharge Notice"), date ██████████ 2018, was issued to ██████████ "appellant" or "resident") by Bensonhurst Center for Rehabilitation ("facility" or "respondent"). The resident appealed the facility's proposed transfer/discharge. The pre-transfer hearing was held on August 28, 2018, at the facility, 1740 84th Street Brooklyn, New York, before Kimberly A. O'Brien, Esq., Administrative Law Judge ("ALJ").

The facility appeared by Lina Feygin, DSW. The resident appeared in person and spoke on his own behalf. 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.

The following individuals were present at the hearing: Lina Feygin, DSW; Danielle Sinclair, SW; Nadia Puglia, DON; Lea Shimunov, Assistant DON; Waheed Bashir, Director of Rehabilitation; Efraim Acker, Administrator; Eli Goldstein, Assistant Administrator; and ██████████

██████████ Evidence was received, witnesses were sworn or affirmed and examined. An audio recording of the hearing was made.

STATEMENT OF THE CASE

The resident's "health has improved sufficiently" so that he "no longer needs services provided by this facility." The facility proposes to discharge the resident from the facility to his apartment in ██████████ [ALJ Ex. 1]. The resident is aware of the facility's assertions and appealed his discharge.

FINDINGS OF FACT

The following findings of fact were made after a review of the entire record in this matter. Citations in brackets refer to exhibits [Ex.] Conflicting evidence was considered and rejected in favor of the cited evidence.

1. The resident, a [REDACTED] year-old male, was admitted from [REDACTED] to the facility in [REDACTED] 2018 [Ex. 1].
2. The resident is articulate, alert, oriented and he can make his needs known [Ex 1; ALJ Ex. 2].
3. The facility's [REDACTED] 2018 discharge notice stated that the resident's health has improved and proposed to discharge the Resident to his home [ALJ Ex. 1].

DISCUSSION

The facility proposes to involuntarily discharge the resident to a lower level of care because the resident's condition has improved sufficiently so that he no longer requires care in a nursing home. The facility alleges that the resident's discharge is permissible pursuant to 10 NYCRR § 415(h)(1)(i)(a)(2), which states:

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.

Under the hearing procedures at §415.3(h)(2)(ii), the facility bears the burden to prove a discharge necessary and the discharge plan is appropriate. Under SAPA § 306(1), a decision in an administrative proceeding must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or fact; less than preponderant evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision, Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 (3rd Dept. 1984), appeal dismissed 63 N.Y.2d 649.

A hearing was scheduled on July 12, 2018, and the resident requested an adjournment to obtain counsel; Jean Carney, Administrative Law Judge, granted the request. The matter was reassigned to Kimberly A. O'Brien, Administrative Law Judge (ALJ) and hearing date was set, August 28, 2018. The resident and the resident's [REDACTED] Anthony Sgarlotto [REDACTED] or "Mr. Sgarlotto"), called the ALJ's office requesting an indefinite adjournment of the August 28 hearing "until further notice" because the resident is [REDACTED] and needs the care. The request was denied.¹

At the August 28 hearing, held at the facility, the resident appeared on his own, indicating that his [REDACTED] was not available. The facility appeared by Ms. Feygin. After extensive pre-hearing discussion the facility asked to proceed with the hearing and it was held. The facility had the burden of proof to show that the resident no longer needs the care it provides and that the discharge location is appropriate to meet the resident's needs. The facility did not present the facility physician, Donald Martinelli, MD, and did not present an up to date assessment of the resident's condition. The facility staff reported that the resident has exhibited difficult behaviors including that the resident had called the police on multiple occasions because he did not receive pain medications in a timely manner.

The resident is very articulate and able to discuss in detail his history, medical condition, physicians, tests, medications, and needs. The resident sees physicians in the community and he explained that his condition has only gotten worse since arriving at the facility and he has no diagnosis. He said he [REDACTED] at the facility and in the [REDACTED] of his apartment building, where he was found [REDACTED]. Eventually, he wants to go to assisted living because the thought of returning to the apartment causes him [REDACTED]. The resident said he [REDACTED] seeking a diagnosis, and needs to have his medications adjusted including those for pain and [REDACTED]. He does not wish to see the facility [REDACTED] and has an appointment with [REDACTED] in the community on or about [REDACTED] 2018; the facility acknowledged this to be true. The resident became overwrought perseverating on his physicians' and his family's deep concern for his state of health, and his

¹ The resident and Mr. Sgarlotto were told by a representative of the ALJs office that the resident's health and proposed discharge plan will be discussed at the hearing [ALJ Ex. 2].

assisted living placement which his [REDACTED] and a volunteer caseworker from "NYU Langone," [REDACTED]

"who has been out [REDACTED]" were both working on.

After the hearing, it became clear to the ALJ that the facility did not have an up to date assessment of the resident's condition and needs. The ALJ held the record open, and the parties agreed that the facility physician, Dr. Martinelli, would examine the resident and make an updated assessment after he spoke with the resident's primary care physician, Dr. Husney, in the community. The ALJ scheduled an agreed conference call, September 6, 2018, to discuss the updated assessment ("call"). The resident indicated that his

[REDACTED] and [REDACTED] would be with him and participate on the call. The ALJ encouraged their participation and advised the resident that they did not need to be present with him at the facility to participate on the call, any or all of them could be connected by phone at the time of the call.

On the morning of the September 6 call, the ALJ's office reached out to Mr. Sgarlotto to participate on the call and he said he was not available. The resident again appeared on his own without any support. Dr. Martinelli did not participate on the call, but issued an "updated assessment" stating that the resident does not need the care provided by the facility, "he knows how to manipulate the system" and he [REDACTED]

[REDACTED] ALJ Ex.3]. The resident was crying and perseverating on details about his medications and conditions, and repeating how worried his family and his physicians', including Dr. Martinelli, were about him. At the conclusion of the call, the resident and the facility agreed that the facility would reach out to Mr. Sgarlotto to discuss any efforts he was making on the resident's behalf to explore assisted living options.

On or about September 20, the facility contacted the ALJ's office requesting a decision, and the ALJ asked the facility to provide a written update, via email, on the progress of discussions between the facility and Mr. Sgarlotto, with a copy to the resident. Ms. Feygin, DSW, indicated that "social work" had "tried" but had not reached Mr. Sgarlotto [ALJ Ex. 4]. On or about September 20-21, 2018, the facility contacted the ALJ's office on multiple occasions indicating that the resident was [REDACTED]

[REDACTED] and it requested that the ALJ direct that the resident be discharged from the facility [ALJ Ex. 5].

On September 28, 2018, the resident contacted the ALJ's office and encouraged the ALJ to contact him and "his [REDACTED] Anthony (Sgarlotto)" "legal advocate," 718-855-5929 and cell [REDACTED]. It is unclear what Mr. Sgarlotto's role is at this point, while he has appeared on the sidelines, he has not meaningfully engaged in the hearing process. It appears that the resident would like his help, but the ALJ cannot require that he do so. The ALJ believes that if Mr. Sgarlotto is unwilling or unavailable to advocate for the resident, the facility should encourage the resident to engage Ms. Rodriguez and or an Ombudsperson to provide support and advocacy.

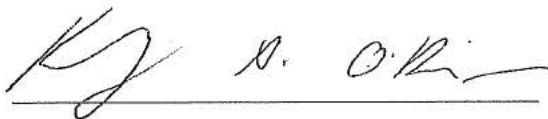
It is the facility that reported to the ALJ's office that the resident was engaging in [REDACTED]. The facility had the burden of proof to show the resident no longer requires the care it provides, not that it cannot meet his needs. The facility has failed to prove the Resident no longer requires the services it provides. The ALJ did not reach a determination about whether the Facility proposed an appropriate discharge plan as the Facility failed to prove that grounds exist for discharge under 10 NYCRR Part 415.

ORDER

NOW; after considering the request for hearing, the testimony and the documents in evidence, the ALJ issues the following Order:

1. The ALJ upholds [REDACTED] appeal from the [REDACTED] 2018 Discharge Notice.
2. The ALJ dismisses the [REDACTED] 2018 Discharge Notice.

Dated: Menands, New York
October 2, 2018



Kimberly A. O'Brien
Administrative Law Judge

To: [REDACTED] Resident
c/o Bensonhurst Center for Rehabilitation
1740 84th Street
Brooklyn, NY 11214

Lina Feygin, DSW
Bensonhurst Center for rehabilitation
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