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## Department of Health

ANDREW M. CUOMO  
Governor

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

LISA J. PINO, M.A., J.D.  
Executive Deputy Commissioner

September 10, 2020

### CERTIFIED MAIL/RETURN RECEIPT

[REDACTED]  
c/o The Homestead at Soldiers and Sailors  
Memorial Hospital  
418 N. Main Street  
Penn Yan, New York 14527

Robert Burlingham, LHNA  
The Homestead at Soldiers and Sailors  
Memorial Hospital  
418 N. Main Street  
Penn Yan, New York 14527

[REDACTED]

Stephany Hess, MSRN-BC  
Upstate Medical University Hospital  
750 East Adams Street  
Syracuse, New York 13210

Edward Townsend, Esq.  
Harter Secrest & Emery LLP  
1600 Baush & Lomb Place  
Rochester, New York 14604

**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

[REDACTED]

Appellant,

from a determination by

**The Homestead at Soldiers &  
Sailors Memorial Hospital**

Respondent,

to discharge him from a residential  
health care facility.

COPY

DECISION  
AND  
ORDER

Hearing Before:

Natalie J. Bordeaux  
Administrative Law Judge

Held via:

Cisco WebEx videoconference

Hearing Date:

September 3, 2020

Parties:

The Homestead at Soldiers & Sailors Memorial Hospital  
418 N. Main Street  
Penn Yan, New York 14527  
By: Edward H. Townsend, Esq.  
Harter Secrest & Emery LLP  
1600 Bausch & Lomb Place  
Rochester, New York 14604-2711

By: [REDACTED]

## JURISDICTION

The Homestead at Soldiers & Sailors Memorial Hospital (the Facility), a residential health care facility subject to Article 28 of the New York Public Health Law, determined to discharge Gavin Godlewski (the Appellant). The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 NYCRR § 415.3(i).

## HEARING RECORD

Facility witnesses: Robert Burlingham, Administrator  
Valerie Robson, Director of Long-Term Care Admissions  
Dr. Karen Mead, Neurology Consultant, neuro-behavioral unit

Facility exhibits: 1-9

Appellant witnesses: [REDACTED], Appellant's [REDACTED]  
Stephany Hess, Clinical Case Manager, Upstate Medical  
University Hospital (Upstate Medical)

Appellant exhibits: A-C

The hearing notice and accompanying cover letter were marked as ALJ Exhibit I. A transcript of the hearing was made.

## ISSUES

Has The Homestead at Soldiers & Sailors Memorial Hospital established that its determination to discharge the Appellant was correct and that its discharge plan was appropriate?

## FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old male who was admitted to the Facility on [REDACTED], 2020 from [REDACTED] Hospital. (Exhibit 4.)
2. The Appellant is diagnosed with [REDACTED], [REDACTED], [REDACTED] and [REDACTED] He is at risk of elopement. (Exhibits 4, A-C.)

3. On [REDACTED], 2020, Facility nursing staff found the Appellant [REDACTED] on the [REDACTED] in his room, with part [REDACTED]. He was helped back to the inside of his room and escorted to the emergency department of Soldiers & Sailors Memorial Hospital (Soldiers & Sailors) for a [REDACTED] evaluation. (Exhibits 2, 3, 5, 9.)
4. On [REDACTED], 2020, a Facility social worker handed the Appellant a discharge notice dated [REDACTED], 2020 in Soldiers & Sailors' emergency department. The notice advised that "[a]n immediate transfer or discharge is required because the health or safety of yourself would be endangered by your continual stay" and that the Facility "lacks the resources or capability to deal with [Appellant's] [REDACTED] issues and they pose an imminent danger to the health and safety" of Facility staff, residents, and other visitors. The notice identified the emergency department at Soldiers & Sailors as the discharge location. (Exhibits 1, 5.)
5. On [REDACTED], 2020, medical staff in Soldiers & Sailors' emergency department determined that the Appellant required [REDACTED] care and arranged for the Appellant's transfer to Upstate Medical that same day. (Exhibit B.)
6. Upon his arrival at Upstate Medical on [REDACTED], the Appellant was admitted to a medical-surgical floor and placed under quarantine for three days based upon pandemic-related protocols before his anticipated transfer to an [REDACTED] floor. He was continually evaluated during the three-day quarantine, during which medical staff determined that he had no need for an [REDACTED] admission. (Exhibit B.)
7. On [REDACTED] 2020, Upstate Medical contacted the Facility to effectuate the Appellant's safe return to the Facility. (Exhibit B.)
8. The Facility has refused to allow the Appellant to return. (Exhibit 9.)

9. On [REDACTED], 2020, Upstate Medical's Clinical Case Manager, Stephany Hess, requested this hearing on the Appellant's behalf to contest the Facility's continued refusal to readmit the Appellant.
10. The Appellant has neither a medical nor [REDACTED] need for continued hospitalization. He has continuously stayed on a medical-surgical floor at Upstate Medical as an [REDACTED] [REDACTED] patient. (Exhibits B-C.)
11. A hearing was held on September 3, 2020, during which the Facility was verbally directed to readmit the Appellant to the next available semi-private bed. This written decision is the final administrative determination regarding the discharge appeal.

#### APPLICABLE LAW

A residential health care facility (also referred to in the regulations as a nursing home) is a facility which provides regular nursing, medical, rehabilitative, and professional services to residents who do not require hospitalization. PHL §§ 2801(2)-(3); 10 NYCRR § 415.2(k).

Department regulations at 10 NYCRR § 415.3(i)(1)(i) describe the permissible bases upon which a residential health care facility may transfer or discharge a resident. When a residential health care facility determines that discharging a resident is necessary due to the endangerment of the health of other individuals in the facility, it must ensure that the resident's clinical record contains complete documentation made by the resident's physician and, as appropriate, the interdisciplinary care team. 10 NYCRR § 415.3(i)(1)(ii). When the stated basis for the residential health care facility's determination is that discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility, the facility must ensure that the resident's medical record includes documentation made by a physician describing the "specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the



service available at the receiving facility to meet the need(s).” 42 CFR § 483.15(c)(2); *see also* Department “Dear Administrator” Letter dated August 20, 2019 (DAL-NH 19-07) entitled “Notice of Transfer or Discharge and Permitting Residents to Return”.

The residential health care facility must notify the resident and a designated representative, if any, of the transfer or discharge and the reasons for the move in writing. Such notice must be provided no later than the date on which a determination was made to transfer or discharge the resident. 10 NYCRR §§ 415.3(i)(1)(iii)-(iv).

The residential health care facility must prove by substantial evidence that the discharge was necessary, and that the discharge plan was appropriate. 10 NYCRR § 415.3(i)(2)(iii); State Administrative Procedure Act § 306(1).

DISCUSSION

The Appellant was transferred to the Facility on ██████████ 2020 from ██████████ Hospital with diagnoses of ██████████, ██████████, ██████████ ██████████ ██████████, ██████████ and ██████████.

(Exhibit 4.) The Facility initially placed the Appellant in a ██████████ care unit based upon the hospital reports of exit-seeking incidents. However, upon his return from an emergency room visit triggered by an attempt to leave the premises that required security intervention, the Appellant was transferred to its 20-bed ██████████ unit, a locked unit for ██████████ residents with ██████████ problems. (Exhibit 5; T Burlingham.)

On the evening of ██████████, 2020, the Appellant was escorted to the emergency department at Soldiers & Sailors (within the same physical address as the Facility) for a ██████████ evaluation after an attempted escape ██████████ room, which staff believed was a ██████████. (Exhibits 2-3.) A Facility social worker presented him with the

[REDACTED] 2020 discharge notice on [REDACTED] while he remained in the emergency department. A copy of the notice was mailed to the Appellant's [REDACTED] and designated representative. (Exhibits 1, 5.) Neither the Appellant nor his [REDACTED] received the notice on the date of the determination, as required by 10 NYCRR § 415.3(i)(1)(iv).

The [REDACTED] notice informed the Respondent that he was being discharged because his continued stay would jeopardize the health or safety of himself or others and that the Facility was unable to meet his needs. However, the Facility offered no documentation from a physician describing the Appellant's needs which could not be met, the efforts made to meet those needs, and the specific services the discharge location will provide to meet the needs which the Facility is unable to meet. 42 CFR § 483.15(c)(2).

Since his transfer to Upstate Medical on [REDACTED], 2020, medical staff have consistently determined that the Appellant, despite some [REDACTED] challenges and [REDACTED] diagnoses, is not [REDACTED] and does not require hospitalization for medical or [REDACTED] reasons. At the hospital, he is an [REDACTED] patient, signifying that he has no need for hospital treatment even though he is occupying an acute care bed. Ms. Hess explained that the Appellant is best suited for placement in a [REDACTED] unit, such as the unit he resided in at the Facility. However, the Facility is unwilling to accept the Appellant's return. Ms. Hess has sent referrals out to other residential health care facilities with [REDACTED] units but the Appellant has not been accepted for placement. (Exhibits A-B.)

Dr. Karen Mead, the Facility's [REDACTED] consultant for its [REDACTED] unit, opined that the Appellant's active [REDACTED] diagnoses render him unsuitable for treatment in any unit at the Facility, including the [REDACTED] unit. However, she acknowledged that her opinion



was confined to review of the Appellant's medical records because she had no firsthand knowledge regarding his case.

As justification for its determination, the Facility has asserted that it was unable to properly assess its ability to offer appropriate care to the Appellant before accepting him from ██████████ Hospital because that hospital failed to provide complete documentation regarding his conditions until after he was already transferred. The Department has already addressed such a claim in DAL-NH 19-07:

Facilities are required to determine their capacity and capability to care for the residents they admit, so in the absence of atypical changes in residents' conditions, it should be rare that facilities who properly assess their capacity and capability of caring for a resident then discharge that resident based on the inability to meet their needs. Therefore, facilities should not admit residents whose needs they cannot meet based on the facility assessment.

Valerie Robson, the Facility's Director of Long-Term Care Admissions, acknowledged that the Facility had not conducted its own Preadmission Screen Resident Review (PASRR) for the Appellant on admission and relied instead upon the information transmitted by ██████████ Hospital. If the Appellant's ██████████ diagnoses or their purported severity were unknown to the Facility at the time of his admission but discovered after his acceptance, the Facility was required to conduct its own screening to evaluate the suitability of continued placement in a skilled nursing facility in lieu of an alternative setting, which it now contends is more appropriate for the Appellant. *See* 42 CFR Part 483, Subpart C. Assigning blame to the transferring hospital, even if warranted, does not absolve the Facility of its own obligations. The Facility was clearly aware of this as it made no attempt to "return" the Appellant to that hospital. Instead, it sought to discharge the Appellant to a different one. A claim that ██████████ at a hospital is a more suitable setting for the Appellant's care in no way alters the

characterization of such a discharge location as one providing only acute care as opposed to a long-term solution. (T Hess.)


Contrary to assertions made at the hearing, the Facility had determined to refuse the Appellant's return less than twelve hours after he was brought to Soldiers & Sailors, as hospital staff were informed on the morning of ██████████ that the Facility would not accept him back. (Exhibit 9.) The Facility has failed to establish that the Appellant's discharge to Soldiers & Sailors, an acute care hospital and the discharge location indicated on the ██████████ 2020 notice, was appropriate. Nor is it appropriate for him to remain at Upstate Medical, another acute care hospital. This is not a policy change. In a "Dear Administrator" Letter dated September 23, 2015 (DAL-NH 15-06), the Department reminded residential health care facilities that hospitals are not considered final discharge locations for residents with episodes of acting out behavior who are sent to hospitals for treatment. The Appellant has been occupying an Upstate Medical hospital bed for no medical reason. The Facility's determination fails to comport with regulatory requirements and is not sustained.

**DECISION AND ORDER**

The Homestead at Soldiers & Sailors Memorial Hospital has not established that its determination to discharge the Appellant was correct and that the discharge plan was appropriate.

The Homestead at Soldiers & Sailors Memorial Hospital is directed to readmit the Appellant to the first available semi-private bed prior to admitting any other person to the facility, pursuant to 10 NYCRR § 415.3(i)(2)(i)(d).

Dated: September 4, 2020  
Menands, New York




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Natalie J. Bordeaux  
Administrative Law Judge