cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan
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December 16, 2021

CERTIFIED MAIL/RETURN RECEIPT

[redacted]
c/o Saints Joachim and Anne Nursing
and Rehabilitation Center
2740 Surf Avenue
Brooklyn, New York 11224

Aaron Schwartz, Administrator
Saints Joachim and Anne Nursing
and Rehabilitation Center
2740 Surf Avenue
Brooklyn, New York 11224

Eve Koopersmith, Esq.
Garfunkel Wild, P.C.
11 Great Neck Road
Great Neck, New York 11021

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,

Dawn MacKillop-Soller

Dawn MacKillop-Soller
Acting Chief Administrative Law Judge
Bureau of Adjudication

DXM: cmg
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

COPY

In the Matter of an Appeal, pursuant to 10 NYCRR 415.3, by [redacted] Appellant, from a determination by **Saints Joachim and Anne Nursing and Rehabilitation Center,** Respondent, to discharge Appellant from a residential health care facility.	**DECISION**

Before: Rayanne L. Babich
Administrative Law Judge

Dates: July 7, 23, 27, 30, 2021
August 4, 9, 11, 24, 2021
Record closed November 3, 2021

Held at: Webex videoconference

Parties: [redacted] Appellant
c/o Saints Joachim and Anne Nursing and Rehabilitation Center
2720 Surf Avenue
Brooklyn, New York 11224
Pro Se

Aaron Schwartz, Administrator
Saints Joachim and Anne Nursing and Rehabilitation Center
2720 Surf Avenue
Brooklyn, New York 11224
By: Eve Koopersmith, Esq.

JURISDICTION

An Amended Notice of Transfer/Discharge dated [redacted] 2021, and a Second Amended Notice of Transfer/Discharge dated [redacted], 2021, were served on [redacted] (Appellant) by Saints Joachim and Anne Nursing and Rehabilitation Center (Facility). 10 NYCRR 415.3(i)(1)(iii)(a). The Appellant appealed the proposed discharge. 10 NYCRR 415.3(i)(2). A record of the hearing was made through a stenographic transcript. (T. 1 – 690; T-a. 1 – 85.) The Appellant appeared and represented himself at the hearing with the use of an electronic voice operated by the Appellant through a computer. The Facility was represented by Eve Koopersmith, Esq.

RECORD

ALJ Exhibits:	I.	Notice of Discharge, [redacted] 2021; Facility letter informing of discontinuation of [redacted] care services, [redacted] 2021
	II.	Amended Notice of Transfer/Discharge, [redacted], 2021
	II-a.	Second Amended Notice of Transfer/Discharge, [redacted], 2021
	III.	Appellant's opening statement submitted electronically, July 7, 2021
	IV.	Appellant's witness list, exhibits, and objections to Facility exhibits submitted electronically, July 22, 2021
	V.	ALJ email correspondence, July 9, 2021
	VI.	Appellant's direct examination submitted electronically, August 9, 2021
	VII.	Appellant's closing statement submitted electronically, August 24, 2021
	VIII.	Letter with report from Appellant's external appeal of [redacted] care services, September 23, 2021
	IX.	Email correspondence, October 27 to November 3, 2021
Facility Exhibits:	1.	Letter from [redacted] 2021
	2.	[redacted] therapy and Nursing progress notes, [redacted] – [redacted] 2021
	3.	Medical progress notes, [redacted], 2021
	4.	Social work progress notes, [redacted] 2020 – [redacted], 2021
	5.	Facility letter to its residents, [redacted] 2021; Letter from [redacted] 2021

	6.	Social Work progress notes, [redacted] – [redacted], 2021
	7.	Physical therapy progress note, [redacted], 2021
	8.	Resident face sheet; [redacted] progress note, [redacted] 2021; Letter from [redacted], 2021; Nursing progress notes, [redacted] 2021; Letter from [redacted] 2021; Housing expense form, [redacted] 2021
	9.	[redacted] authorization and Plan of Care, [redacted] 2021
	10.	Letter to Con Edison power company, [redacted] 2021
	11.	[redacted] Assessment, [redacted] 2021
	12.	Appellant and [redacted] email correspondence, [redacted] –[redacted] 2021
	13.	Appellant home assessment, [redacted], 2021
	14.	Appellant and Facility administrator email correspondence [redacted] 2021
Appellant Exhibits:	A.	Appellant medication records and nursing care plan, [redacted], 2021 –[redacted] 2021
	B.	[redacted] /medical progress notes [redacted] and [redacted], 2020; Medical progress note, [redacted], 2020; Nursing progress note, [redacted], 2020
	D.	Letter from [redacted], 2021
	F.	Appellant's clinical record from Facility, [redacted] 2020 – [redacted] 2021

Facility Witnesses:
Aaron Schwartz, Facility Administrator
Ineka Wedderburn, Director of Social Work
Sergey Genkin, Attending Physician
Kochurani Angadiyil, Registered Nurse
Natan Mlenarsky, Respiratory Therapist

Appellant Witnesses:
[redacted]
Sergey Genkin, Attending Physician
Kochurani Angadiyil, Registered Nurse
Natan Mlenarsky, [redacted] Therapist
[redacted] (via [redacted] translator)
[redacted] (via [redacted] translator)

FINDINGS OF FACT

1. Saints Joachim and Anne Nursing and Rehabilitation Center is a residential health care facility. [Ex I, II.]

2. The Appellant, age [redacted] was admitted to the Facility on [redacted], 2020 for long-term care following a hospitalization. He is diagnosed with [redacted]), a [redacted]. He is [redacted] and requires a [redacted]. The Appellant [redacted]. He [redacted]. [Ex VI, VIII, 3, 8; T. 114-115, 222, 298.]

3. The Appellant is dependent on caregivers 24 hours per day to meet his care needs. [Ex 8; T. 136, 222, 290-291.]

4. As of [redacted] 2020, the Facility discontinued operation of its specialized [redacted] services to [redacted] residents with approval from the New York State Department of Health (Department). [Ex I, II, 5.]

5. The Facility is seeking to discharge the Appellant because "the resident's needs cannot be safely met after reasonable attempts or accommodation within the [Facility]" and the Appellant "requires specialized [redacted] services to sustain [his] health and well-being." [Ex I, II, 5.]

6. The Facility's discharge plan is to transfer the Appellant to his home located at [redacted] with the following services in place:

   a. [redacted] a Medicaid Long Term Care (MLTC) agency will provide Licensed Practical Nurse (LPN) services for a total of twenty-one (21) hours per day via split shift. Service will include all skilled needs and personal care. This is contingent upon resident's consent for the services.

   b. [redacted] have agreed to provide the remaining three (3) hours of support a day. They have been trained and were able to provide proper return demonstration of all the following skilled tasks: Hoyer lift use, [redacted] and medication administration [redacted]

c. Certified Home Health Care Agency Services (ie: physical therapy, speech therapy, and home health aide) will be provided. This is contingent upon resident's consent for the services.
d. Mr. [redacted] primary physician: Board certified family practice [redacted] M.D., D.O., has agreed to oversee Mr. [redacted] care at home, this includes overseeing Mr. [redacted] care and skilled services after Mr. [redacted] discharge from Saints Joachim and Anne Nursing and Rehabilitation Center.
e. Equipment needed, will be order[ed] prior to Mr. [redacted]s discharge. The following needed equipment includes Hoyer lift, [redacted] and supplies ([redacted] medication crusher, Geri-chair, [redacted] and supplies for [redacted] hospital bed (resident already owns), incontinence supplies, and oxygen concentrator machine and supplies for the concentrator.
f. Con Edison will be notified that Mr. [redacted] is on a [redacted] [Ex I, II, 6.]

7. The Appellant's medical care team at the Facility, including his treating physicians, have agreed and documented in the Appellant's clinical record that he can be safely discharged home with 24 hours of home care and the proper equipment in place. [Ex 3, 4, 6, F; T. 100-101, 156, 429-431.]

8. The Appellant remains at the Facility pending the outcome of this appeal. [Ex II.]

ISSUES

Has the Facility met its burden of proving that the discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in the Facility? Has the Facility met its burden of proving that its discharge plan is appropriate?

APPLICABLE LAW

1. Transfer and discharge rights of nursing home residents are set forth in 10 NYCRR 415.3(i), which provides, in pertinent part:

> (1) With regard to the transfer or discharge of residents, the facility shall:
>
> (i) permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless such transfer or discharge is made in recognition of the resident's rights to receive considerate and respectful care, to receive necessary care and services, and to participate in the development of the comprehensive care plan and in recognition of the rights of other residents in the facility. (a) The resident may be transferred only when the interdisciplinary care team, in consultation with the resident or the resident's designated representative, determines that:
>
> (1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in the facility; *See also* PHL §2803-z.

2. In planning for discharge, a facility must:

> (vi) provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility, in the form of a discharge plan which addresses the medical needs of the resident and how these will be met after discharge, and provide a discharge summary pursuant to section 415.11(d) of this Title; and
> (vii) permit the resident, their legal representative or health care agent the opportunity to participate in deciding where the resident will reside after discharge from the facility.
> 10 NYCRR 415.3(i)(1)(vi)-(vii).

Federal regulations at 42 CFR 483.15 contain substantially identical provisions.

3. The Facility has the burden of proving that the "discharge or transfer is/was necessary and the discharge plan appropriate." 10 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

Grounds for Transfer/Discharge

The Facility has established that based on its termination of [redacted] and [redacted] services, discharge is necessary. 10 NYCRR 415.3(i)(1)(i)(a)(1). The Appellant is diagnosed with [redacted] and requires around the clock care to complete his activities of daily living and to meet his daily medical care needs. [Ex 3, D, F; T. 114.] The Appellant's attending physician at the Facility, Sergey Genkin, M.D., testified the Appellant requires a [redacted] services to sustain his life. [Ex 3, F; T. 222, 226, 421-422.] On [redacted] 2021, the Facility informed the Appellant of its intent to discontinue care provided to [redacted] residents and therefore, the Facility can no longer meet his comprehensive care needs. [Ex 5; T. 93.]

The Appellant does not object to the grounds for discharge or discontinuation of the services he requires but has refused the Facility's effort to arrange a transfer to another facility that can provide these services. Facility Administrator, Aaron Schwartz, testified that the Facility ensured a safe and smooth transition for all its [redacted] residents by collaborating and following a plan that was approved by the Department. [Ex I; T. 92-94.] Prior to issuing its Notice of Discharge, residents were alerted to the change in services and offered assistance to transfer to an equivalent skilled nursing facility; however, the Appellant expressed his desire to return to his home with services in place and he refused the Facility's attempts to transfer him to another nursing home. [Ex 4-6, 14, F; T. 95, 117.] The termination of [redacted] care and [redacted] services at the Facility results in the inability for the Appellant's medical needs to be met at the Facility and discharge is necessary. 10 NYCRR 415.3(i)(1)(i)(a)(2) and 415.3(i)(2)(iii)(b); PHL 2803-z(d).

Discharge Plan

When preparing a discharge from any facility, the plan must "[address] the medical needs of the resident and how these will be met after discharge," as well as allow the resident an "opportunity to participate in deciding where [he] will reside after discharge from the facility." 10 NYCRR 415.3(i)(1)(vi)-(vii). There is no dispute that the Appellant's complex medical condition and care needs require a coordinated and detailed discharge plan to ensure his safety and well-being. One of the physicians treating the Appellant, Steven Badin, M.D., documented in the clinical record, and the interdisciplinary care team agrees, that the Appellant is stable to be discharge to his home in the community with continuous care provided 24 hours per day. [Ex II, 3, 5, 8-11; T. 226-228.]

The discharge plan begins with a Medicaid long term care agency (MLTC), [redacted], who created a care plan that will provide an LPN for 21 hours per day. [Ex 9; T. 121.] These 21 hours will be divided into two separate shifts per day and the LPN during each shift will provide all necessary skilled care as well as personal care services to the Appellant. [Ex T. 135, 142.] The remaining three hours of care per day will be provided by a family member, [redacted] and a friend, [redacted] (Caregivers). [Ex 9; T. 136.] Both Caregivers, who are certified home health aides and chosen by the Appellant, signed a "Letter of Responsibility" with the MLTC indicating their agreement to provide care to the Appellant during the three hours an LPN is not present, which included Hoyer lift, transfer, [redacted] care, [redacted] and [redacted] [Ex 8, 9; T. 122-123, 568, 575.] Additionally, the Facility provided training sessions over several months prior to discharge to both Caregivers on how to complete these care tasks that were outlined in the Letter of Responsibility. [Ex 2, 4, F; T. 547.] Dr. Genkin and Natan Mlenarsky, [redacted] Therapist, explained further that the Caregivers can safely provide care to the Appellant if they receive instructions on how to attend to the Appellant's care needs, specifically including cleaning and grooming; basic care for his [redacted] how to provide nutrition, hydration, and medication [redacted]. [T. 226-228, 322-324, 418.]

The Appellant raised concerns regarding the adequacy of the training the Caregivers received by claiming the Caregivers did not receive all of the training that was recorded in his clinical record. He presented no evidence to support this claim. [Ex F.] Through testimony and the Appellant's clinical record, the evidence showed that [redacted] therapists provided training sessions to both Caregivers on how to perform [redacted] care, including changing of a [redacted] changing a sponge and [redacted] understanding alarm bells on the [redacted] and providing [redacted] through an [redacted] during an emergency. [Ex 2, 6, F; T. 123. 136-137, 142, 300.] The evidence also showed that registered nurses from the Facility provided training sessions to both Caregivers to care for the Appellant's [redacted], including nutrition, medication administration and [redacted]; and performing personal care including transfer via Hoyer lift. [Ex 2, 6, 8; T. 289-292.] Both caregivers demonstrated to the [redacted] therapists and registered nurses their ability to complete these tasks which match the recommendation from Dr. Genkin and Mr. Mlenarsky. [Ex 2, 6, 8; T. 294.]

[redacted] testified that she believes she requires additional training for these care tasks before she can feel comfortable providing care to the Appellant. [T. 566.] While the training provided to the Caregivers addressed all of the required care tasks as outlined by the medical team and MLTC, and both Caregivers testified they are currently employed as a certified home health aide, it is in the Appellant's best interest for the Facility to ensure the Caregivers are able to demonstrate competency for all of these tasks prior to the Appellant's discharge. [Ex 2; T. 568.]

Dr. Genkin and Mr. Mlenarsky agreed the Caregivers should also complete a course in Cardiopulmonary Resuscitation (CPR) before providing care to the Appellant. [T. 308, 322-324, 433-434.] [redacted] testified that she has never completed CPR training but is willing to do so through a course offered in the community. [T. 308, 418, 547, 594.]

The Appellant argued that the discharge plan does not provide a sufficient number of persons to complete his daily care. Kochuri Angadiyil, Registered Nurse, testified that two persons may be required to perform bathing for the Appellant. [T. 290.] The discharge plan recognizes this need by including a referral to [redacted], a Certified Home Health Agency (CHHA), for services to supplement the care from the LPN or Caregiver which will allow for a two-person assist when bathing. [Ex I-III; T. 132-134.] The range of services provided by the CHHA include assessment and treatment of physical, occupational, and speech therapy along with skilled nursing services and non-skilled home health aides to perform personal care and would be provided simultaneously with the services offered through the MLTC and the Caregivers. [T. 133.]

Upon completion of the CHHA referral by Ms. Wedderburn, the Appellant refused to participate in the evaluation offered by the CHHA to begin services. [T. 133, 500.] Ms. Wedderburn testified that the Appellant advised the CHHA that he would complete the evaluation when it was "closer to discharge," but the evaluation has not yet been completed. [T. 497-498, 502.] While the Appellant's points to a hypothetical unavailability of services through the CHHA, he is unable to offer into evidence of the frequency, duration, and nature of these services because he did not complete the evaluation. The Facility has completed the necessary referrals. [Ex 4, F.] Prior to discharge, the Appellant must submit to an evaluation by [redacted] services or other equivalent service provider.

Despite these efforts made by the Facility to secure appropriate services for discharge, the Appellant presents an alternative argument that the discharge plan is not adequate because it lacks access 24 hours per day to registered nurses, [redacted] therapists, and personal care attendants. This type of care described by the Appellant is available in a skilled nursing facility, an option that was presented to him, but he refused to consider.

Upon discharge, the Appellant's previous primary care provider, [redacted]., will resume care. Dr. [redacted] signed written statements on February 8 and June 16, 2021 affirming he "will oversee [the Appellant's] case and skilled services of [Appellant's] care." [Ex 5, 8; T. 140, 164.] All necessary durable medical equipment (DME) for home use, including a Hoyer lift, [redacted] and supplies, medication crusher, Geri-chair, [redacted] machine and its supplies, incontinence supplies, and an oxygen concentrator machine and coordinating supplies, will be ordered by the Facility and provided to the Appellant to be available and ready upon discharge. [T. 145-147, 152.] As per his request, the Facility has committed to arrange for the Appellant's hospital bed to be transported with him to his home when discharged. [Ex 11; T. 171.]

To honor the Appellant's desire to return home and given his refusal of transfer to another nursing home, the Facility has created a plan that will meet his medical needs. 10 NYCRR 415.3(i)(1)(vi). The Appellant will receive care 24 hours per day through the services of the Caregivers and [redacted] the only MLTC that offered this level of care, and further services for skilled care and personal care have been made available once the Appellant submits to an evaluation with the CHHA. [T. 128-129; 132-133.] Once discharged, the Appellant can resume care with his previous primary care physician who has agreed to not only provide the Appellant's medical care but oversee these community services.

I find discharge to the Appellant's residence with services is appropriate because the Facility has developed a discharge plan that will meet the Appellant's medical needs.

ORDER

The Facility is authorized to discharge the Appellant to the location identified as the Appellant's home address in the Amended Notice of Discharge dated [redacted], 2021 and Second Amended Notice of Discharge dated [redacted], 2021, and in accordance with its discharge plan providing that:

1. The Caregivers, [redacted], shall complete a course in Cardiopulmonary Resuscitation (CPR) prior to discharge;
2. The Caregivers, [redacted], shall demonstrate to the Facility, prior to discharge, the ability to complete necessary care tasks related to:
    a. [redacted] care
    b. [redacted]
    c. [redacted] ([redacted]); and
3. The Appellant shall complete an evaluation with [redacted] or other equivalent Certified Home Health Agency (CHHA).

Dated: December 15, 2021
Albany, New York

Rayanne L. Babich
Administrative Law Judge

TO:

[redacted] Appellant
c/o Saints Joachim and Anne Nursing and Rehabilitation Center
2720 Surf Avenue
Brooklyn, New York 11224

Aaron Schwartz, Administrator
Saints Joachim and Anne Nursing and Rehabilitation Center
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