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**Department
of Health**

KATHY HOCHUL
Governor

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

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

November 16, 2021

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o Delmar Center for Rehab & Nursing
125 Rockefeller Road
Delmar, New York 12054

Steven D. Weiner, Esq.
Kaufman, Borgeest & Ryan LLP
200 Summit Lake Drive
Valhalla, New York 10595

Michael Schaeffer, LMSW
St. Peter's Hospital
315 S. Manning Boulevard
Albany, New York 12208

Rafi Lehmann, Administrator
Delmar Center for Rehab & Nursing
125 Rockefeller Road
Delmar, New York 12054

RE: In the Matter of ██████████ – 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
Acting Chief Administrative Law Judge
Bureau of Adjudication

DXM: cmg
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

Delmar Center for Rehabilitation
and Nursing

Respondent,

to discharge him from a residential health
facility.

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DECISION

-----X
On ██████████ 2021, Delmar Center for Rehabilitation and
Nursing (Facility) transferred resident ██████████ ██████████
(Appellant) to ██████████ ██████████ ██████████ ██████████ ██████████ ██████████.
From there he was transferred to St. Peter's Hospital (the
Hospital), also located in Albany, due to the Facility's
determination to refuse to readmit him as a resident. The
Appellant requested a hearing to contest the Facility's
determination. On November 12, 2021, a hearing was held via
videoconference before Dawn MacKillop-Soller, Administrative
Law Judge. (Recording 1-2:42.)

The Appellant appeared at the hearing and represented
himself. The Hospital appeared at the hearing in support of
the Appellant's appeal represented by Director of Social Work
Michael Schaeffer, LMSW, who also testified on the

Appellant's behalf. The Facility was represented by Steven D. Weiner, Esq. and presented as a witness Director of Nursing Scott Broderick, R.N. Administrator Rafi Lehmann also appeared at the hearing. Evidence was received (ALJ I, facility Exhibits A-K, hospital Exhibit 1). The hearing was recorded. (Recording @ 1-2:42.)

Summary of Facts

1. Delmar Center for Rehabilitation & Nursing, formerly Good Samaritan Lutheran Health Care Center, is a nursing home located in Delmar, New York. (Exhibit A.)

2. Appellant [REDACTED] [REDACTED] age [REDACTED] was admitted to the Facility on [REDACTED] [REDACTED] 2016. His medical conditions include [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

(Exhibits A, C, 1; Recording @ 1:07-1:12; 2:05-2:07.)

3. Currently the Appellant's medications include [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] and
[REDACTED]. He is independent with personal care and activities of daily living except that he requires assistance with his medications and ambulation. He uses a "handheld assist" or a wheelchair or rollator to safely ambulate. (Exhibits A, C, 1; Recording @ 2:08-2:11, 2:27.)

4. On [REDACTED] [REDACTED] 2021, the Facility transferred the Appellant to [REDACTED] due to concerns that his [REDACTED] behaviors rendered him unsafe to remain at the Facility. These behaviors included "[REDACTED] at staff" and [REDACTED] to "[REDACTED] [REDACTED] [REDACTED]" and "[REDACTED] [REDACTED] [REDACTED]."

He also has a history of smoking cigarettes onsite, attempting to "[REDACTED] [REDACTED] [REDACTED] [REDACTED] staff, and other [REDACTED] behaviors. (Exhibits 1, B4-B7.)

5. By progress note dated [REDACTED] 2021, the Facility's physician, Jonathan Waldman, M.D., determined that the Appellant requires "emergent crisis intervention" and "EMS will be called for transfer as the risk to the staff and residents (*sic*) are too great for him to remain in the facility." (Exhibit B6.)

6. At this hearing, the Facility produced a "Notice of Transfer/Discharge" dated [REDACTED] [REDACTED] 2021, which identifies the reason for discharge as "(t)he continued safety of individuals in the facility would otherwise be endangered by your continued residence" and the discharge location as "[REDACTED] [REDACTED]."

The Facility did not give written notice of the discharge to the Appellant or his representative until it produced this notice at the hearing. Prior to the hearing, the Appellant had not received this notice nor was

it contained in his hospital record. (Exhibit K; Recording @ 26:32, 30:23, 59:10.)

7. [REDACTED] [REDACTED] [REDACTED] evaluated the Appellant and cleared him for discharge back to the Facility, but the Facility refused to readmit him. This resulted in his transfer on [REDACTED] 2021 to St. Peter's Hospital, where he was admitted for social work to explore discharge placement options. St. Peter's Hospital also deemed him medically stable for discharge, yet the Facility refused to accept him back as a resident without proposing a discharge plan. (Exhibits 1, B6, B7; Recording @ 33:24, 36:02.)

8. The Appellant remained at the Hospital until the conclusion of the hearing, at which point the Facility was directed to readmit him to the first available bed.

Issues

Has the Facility established that the Appellant's transfer is necessary and that the 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:

...

- (2) the safety of individuals in the facility is endangered;

...

- (ii) ensure complete documentation in the resident's clinical record when the facility transfers or discharges a resident under any of the circumstances specified in subparagraph (i) of this paragraph. The documentation shall be made by: (b) a physician when transfer or discharge is necessary due to the endangerment of the health of other individuals in the facility under subclause (3) of clause (a) of subparagraph (i) of this paragraph;

...

- (iii) before it transfers or discharges a resident:
- (a) notify the resident and designated representative, if any, and, if known, family member of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner the resident and/or family member understand;

- (iv) provide the notice of transfer or discharge ... as soon as practicable before transfer or discharge, but no later than the date on which a determination was made to transfer or discharge the resident, under the following circumstances:
 (a) the safety of individuals in the facility would be endangered;
- (v) 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

2. The nursing home has the burden of proof that the discharge was necessary, and the discharge plan is appropriate. 10 NYCRR 415.3(i)(2)(iii)(b).

Discussion

The Appellant was admitted to the Facility on [REDACTED] 2016 and placed in long-term care. His [REDACTED] behaviors that resulted in his transfer to [REDACTED] [REDACTED] included threats to "[REDACTED]" and "[REDACTED] a [REDACTED] [REDACTED] [REDACTED] [REDACTED]." (Exhibit B6.) He also exhibited [REDACTED] in the weeks preceding the transfer that included "[REDACTED] at staff over food and drink options, attempting to "[REDACTED] staff, and insisting on smoking cigarettes onsite. (Exhibits B4-B7.) Based on this pattern of [REDACTED] behaviors, the Facility's physician, Jonathan Waldman, M.D., determined that transfer of the Appellant to [REDACTED] [REDACTED] [REDACTED] was necessary for

"emergent crisis intervention." (Exhibits B1, B4-B6; Recording @ 1:05-1:10, 1:15-1:16, 1:19, 1:21-1:22.)

A nursing home seeking discharge of a resident who is hospitalized requires permissible grounds for discharge, which the Facility has not established, and appropriate written notice. The Facility did not provide the required written notice explaining the reasons for the transfer "no later than the date on which a determination was made to transfer." 10 NYCRR 415.3(i)(1)(iii)(a) and (iv); 42 CFR 483.12(a)(4). (Recording @ 1:01-1:02.)

The purpose of the notice requirement is to inform the Appellant of the details of the discharge process. 42 CFR 483.12(a)(6). The Facility pointed out that the transfer was emergent, but this is no excuse for not meeting the notice requirement. (Recording @ 32:21-32:35.) The mandatory notice provision under the regulations must be complied with "as soon as practicable" but no later than the date of transfer. 10 NYCRR 415.3(i)(1)(iv); 42 CFR 483.12(a)(4) and (5). Providing the Appellant with this notice at the hearing hardly meets this requirement.

Nursing homes are required to provide "adequate and appropriate medical care" to residents, which includes treatment and drug plans that meet their needs. 10 NYCRR 415.3(f)(1)(i). While the Appellant's behaviors are

concerning and understandably challenging, the Facility failed to establish that it took the steps expected of nursing homes to manage them, such as by increasing the Appellant's supervision, placing him closer to the nurse's station, and performing assessments that include adjustments to his medications. (Exhibit B5; Recording @ 1:27-1:35, 1:44-1:45.)

St. Peter's Hospital Director of Social Work Michael Schaeffer relied on his 25 years of social work experience primarily in a hospital setting to discuss how abnormal behaviors can be directly attributable to improper management of conditions like [REDACTED] and [REDACTED]. (Recording 2:05-2:06.) He explained the changes hospital staff made to the Appellant's medications for his [REDACTED] [REDACTED] include administering him [REDACTED] [REDACTED] [REDACTED], and testified that he has not exhibited any [REDACTED] behaviors during either hospital stay. (Exhibit 1; Recording @ 2:02.) St. Peter's Hospital hospitalist Erica Fish-Merrill, D.O. confirmed this professional opinion in her discharge summary by emphasizing the importance of close follow-up for these conditions. (Exhibits 1, C.)

The Facility's failures also include not maintaining proper documentation in the Appellant's clinical record showing the basis for the transfer. The Facility is required

to "ensure complete documentation" by a physician made at or near the time of the transfer. 10 NYCRR 415.3(i)(1)(ii)(b). While there is a clinical note from Dr. Waldman's telecommunication stating the history of events, there is no discussion of appropriate placement options that considers his medical status and needs. (Exhibit B6.)

Even if the Facility had met its burden of proof to establish grounds for discharge, which it did not accomplish, it never provided an appropriate discharge plan, as required. 10 NYCRR 415.3(i)(2)(ii)(b). The Facility has not produced any evidence or argument to show the Appellant's placement in a hospital - an acute care facility - meets his long-term needs and is an appropriate discharge plan. The [REDACTED] and medical teams at both hospitals confirmed the Appellant's stabilization and that he was safe for discharge. (Exhibits 1, C; Recording @ 2:06, 2:08.) The Facility failed to rebut this evidence, such as by performing an evaluation of the Appellant at either hospital, and nonetheless refuses to readmit the Appellant, claiming he remains a threat to patients and staff. (Recording @ 33:24, 36:02.)

The Facility's claim that discharge planning is the duty of the Hospital is a failed attempt to shift the burden of this responsibility to the Hospital. (Recording @ 2:14-2:42, 2:17, 2:19, 2:24-2:25.) The Facility remained responsible for

the Appellant's residential care after the hospital evaluations confirmed his stability. The Appellant requires return to the Facility to receive the nursing home care he requires - the same level of care he has received for the past five years. (Recording @ 2:06, 2:08.)

The Facility's concern that staff will resign should the Appellant return fails to justify not readmitting him. (Recording @ 1:08-1:09.) Hospitalization of a nursing home patient requires a facility to establish and follow a written policy that includes "readmission" if the resident requires nursing home care. 10 NYCRR 415.3(i)(3)(i) and (ii); 42 CFR 483.12(b)(3). In such cases, the notice must include a statement "that the resident may return to the first available bed if he or she prevails at the hearing on appeal." 10 NYCRR 415.3(i)(1)(i)(c)(v)(e)(5). Consistent with these rules is Department policy that specifically prohibits nursing homes from using hospitals as "final discharge locations" and requires them to "readmit the resident and/or develop an appropriate discharge plan" when transfers to hospitals are due to "episodes of acting out behavior." Transfer & Discharge Requirements for Nursing Homes, DAL NH 15-06, September 23, 2015. The Facility followed none of these rules.

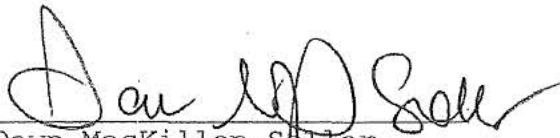
The discharge appeal is granted. The Facility is ordered to readmit the Appellant consistent with the verbal directive at the conclusion of the hearing. (Recording @ 2:37.)

Order

1. The Facility has failed to establish that its discharge was necessary or that the discharge plan is appropriate. The Facility was not authorized to discharge the Appellant; and

2. Pursuant to 10 NYCRR 415.3(i)(2)(i)(d), the Facility is directed to readmit the Appellant prior to admitting any other person.

Dated: Albany, New York
November 16, 2021


Dawn MacKillop-Soller
Administrative Law Judge

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