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Department of Health

KATHY HOCHUL
Governor

MARY T. BASSETT, M.D., M.P.H.
Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

March 15, 2022

CERTIFIED MAIL/RETURN RECEIPT

██████████ ██████████
c/o St. John's Episcopal Hospital
327 Beach 19th Street
Far Rockaway, New York 11691

Sharon Bryan, SW
St. John's Episcopal Hospital
327 Beach 19th Street
Far Rockaway, New York 11691

Barbara Phair, Esq.
3 Dakota Drive
Suite 300
Lake Success, New York 11042

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

**Beach Gardens Rehabilitation
and Nursing Center**

Respondent,

to discharge him from a residential
health care facility.

COPY

DECISION
AND
ORDER

Hearing Before: Natalie J. Bordeaux
Administrative Law Judge

Held via: WebEx videoconference

Hearing Dates: February 11 and March 7, 2022
The record closed March 14, 2022

Parties: Beach Gardens Rehabilitation and Nursing Center
17-11 Brookhaven Avenue
Far Rockaway, New York 11691
By: Barbara Phair, Esq.
Abrams Fensterman, LLP
3 Dakota Drive, Suite 300
Lake Success, New York 11042

████████████████████
Pro Se

JURISDICTION

Beach Gardens Rehabilitation and Nursing Center (the Facility), a residential health care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] (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: Gina Solomita, Administrator
Maria Pitogo, Director of Nursing Services
Shari Greenberg, Corporate Social Worker
Farah Anglade, Social Worker
Rana Hassan, M.D.

Facility exhibits: 1-7

Appellant witnesses: [REDACTED] Appellant
Sharon Bryan, LCSW, Senior Social Worker, St. John’s Episcopal Hospital (SJEH)
Venkata Lokireddy, MD, Resident in [REDACTED] SJEH (February 11, 2022 only)
Margaret Mooney, MD, Resident in [REDACTED] SJEH (March 7, 2022 only)
Kamilendra Sen, MD, Attending [REDACTED] SJEH (March 7, 2022 only)

Appellant exhibits: A-I

ALJ exhibits: I-VI

Digital recordings of the hearing on both February 11 and March 7 were made.

ISSUES

Has Beach Gardens Rehabilitation and Nursing Center 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] 2021 from SJEH. (Exhibit 1.)
2. The Appellant is diagnosed with [REDACTED]. (Exhibit 1.)
3. On [REDACTED] 2021, the Appellant was sent to SJEH's emergency department for an evaluation after he [REDACTED] Facility staff and a resident. (Exhibit 3.)
4. On [REDACTED] 2021, the Appellant was cleared by SJEH's emergency department as [REDACTED] stable and returned to the Facility. (Exhibit 3.)
5. Shortly after his return that same day, Facility nursing staff informed Dr. Rana Hassan, the Appellant's physician at the Facility, that the Appellant's behavior was more [REDACTED] and that despite "one to one" monitoring, his assigned aide was afraid for her safety. Dr. Hassan ordered the Appellant to be sent back to SJEH's emergency department for another [REDACTED] evaluation. (Exhibit 3.)
6. When emergency medical personnel arrived, Facility nursing staff inserted a discharge notice dated [REDACTED] 2021 in the Appellant's nursing progress notes, which advised that the Appellant was being discharged because his "needs cannot currently be met by the services available at the facility". The notice identified "St. John" as the discharge location. (Exhibit 5.)
7. The Appellant was transported to SJEH on [REDACTED] 2021. (Exhibits 3 and E.)
8. On [REDACTED] 2021, the Appellant was admitted to SJEH's [REDACTED] unit. (Exhibit E.)

9. On or about [REDACTED] 2021, SJEH attending [REDACTED] Dr. Kamalendra Sen determined that the Appellant was [REDACTED] and medically stable and could safely be discharged to the Facility. (ALJ Exhibit I; February 11 Recording @ 47:41.)
10. On [REDACTED] 2021, the Appellant underwent a Preadmission Screening and Resident Review (PASRR) at SJEH to determine an appropriate discharge location. (Exhibit E.)
11. On [REDACTED], 2021, the PASRR evaluator concluded that the Appellant's needs can be appropriately met in a nursing facility setting. (Exhibit E.)
12. On or about [REDACTED] 2021, SJEH Senior Social Worker Sharon Bryan advised the Facility that the Appellant was cleared for discharge. The Facility informed her that it would not allow the Appellant to return. (ALJ Exhibit I.)
13. Ms. Bryan sent referrals to more than ten other nursing homes to procure an alternative discharge location. The Appellant was not accepted by any of those facilities. (Exhibit 4; February 11 Recording @ 53:28.)
14. On January 25, 2022, Ms. Bryan requested this hearing on the Appellant's behalf to contest the Facility's refusal to re-admit him. (ALJ Exhibit I.)
15. The Appellant has neither a psychiatric nor medical need for continued hospitalization. He has continuously stayed at SJEH's [REDACTED] unit as an Alternate Level of Care (ALC) patient since late [REDACTED] 2021. (Exhibit A.)

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 for the resident's welfare because the resident's needs cannot be met after reasonable attempts at accommodation 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

At the hearing, the Facility presented a nursing progress note which appears to be a cut and pasted version of a discharge notice. (Exhibit 5.) Administrator Gina Solomita testified that the discharge notice was handed to the Appellant before emergency medical personnel arrived at the Facility on [REDACTED] 2021 or while emergency medical personnel were on the premises and before the Appellant's physical removal. (March 7 Recording @ 6:30.) The progress note fails to document that a copy of the discharge notice was ever given to the Appellant, and the Facility offered no firsthand account to corroborate Ms. Solomita's suggestion. (Exhibit 5.) The Facility was required to provide the Appellant with the discharge notice on the date of the determination. 10 NYCRR § 415.3(i)(1)(iv).

The reason for discharge cited in the [REDACTED] 2021 notice is not a permissible basis identified in 10 NYCRR § 415.3(i)(1)(i). The basis for discharge described on the notice merely states that the Appellant's "needs cannot currently be met by the services available at the facility." (Exhibit 5.) A permissible basis for discharge most closely resembling that statement requires that a resident's needs cannot be met after reasonable attempts at accommodation in the facility. 10 NYCRR § 415.3(i)(1)(i)(a)(1). That basis for discharge requires 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). The Facility offered no such documentation.

Despite the Facility's awareness that SJEH is an acute care hospital, it maintains the position that the Appellant's needs are best met in SJEH's [REDACTED] unit or an [REDACTED] [REDACTED] facility, indefinitely. As facilities were advised in a "Dear Administrator" Letter

dated September 23, 2015 (DAL-NH 15-06), residential health care facilities may not resort to hospitals as final discharge locations for residents with episodes of acting out behavior who are sent to the hospital for treatment. The Facility's discharge decision contravenes all applicable regulations and further guidance and is inconsistent with the medical evidence.

On or about [REDACTED], 2021, Dr. Sen, the Appellant's attending [REDACTED] at SJEH, determined that the Appellant was [REDACTED] stable for return to the Facility. However, when Ms. Bryan attempted to arrange the return, she was advised that the Facility would not allow it. SJEH arranged for a PASRR evaluation, issued on [REDACTED] 2021, which confirmed that the Appellant's needs could be met by a nursing home. (Exhibit E.) Before resorting to this hearing request, Ms. Bryan contacted multiple nursing homes in an effort to procure an alternate nursing home placement for the Appellant.

The Appellant remains [REDACTED] and medically stable for return to the Facility. During his [REDACTED] stay of over three months, he has had no behavioral [REDACTED] (February 11 Recording @ 51:33, 57:39; March 7 Recording @ 24:26.) He has stayed in SJEH's [REDACTED] unit as a patient with an ALC designation since late [REDACTED] 2021, meaning that he has occupied an acute care hospital bed he does not need and can be cared for elsewhere, for nearly three months.

On the first day of this hearing, Dr. Hassan expressed concerns over the medications that SJEH administered to the Appellant. (February 11 Recording @ 18:30; Exhibit F.) He explained that Benadryl, which the Appellant received at SJEH for [REDACTED] should not be given to [REDACTED] patients and that he would not allow the Appellant to continue to receive the medication for off-label use. (February 11 Recording @ 19:18, 20:00.) Dr. Hassan also asked that SJEH taper off both [REDACTED] and [REDACTED] [REDACTED] medications which he contended

would constitute [REDACTED] if administered in a nursing home setting. (February 11 Recording @ 19:00.) Dr. Hassan sought information concerning the Appellant's behavior once those medications were removed from the Appellant's regimen. Dr. Lokireddy, the medical resident assigned to the Appellant's [REDACTED] unit in [REDACTED] 2022, agreed to work with Dr. Hassan to address the Facility's concerns. (February 11 Recording @ 58:09, 1:00:15, 1:08:16.)

At the Administrative Law Judge's request (February 11 Recording @ 1:21:08), SJEH provided the Facility with two weeks of information subsequent to the February 11 hearing date regarding the Appellant's care, including medication changes, and [REDACTED] reports. (Exhibits G-I.) The parties reconvened on March 7, at which time Dr. Hassan expressed concerns regarding SJEH's continued administration of [REDACTED] to the Appellant, albeit at a low dosage, for a diagnosis with which he testified the Facility would not be able to continue administering. (March 7 Recording @ 15:04, 24:03.) Dr. Sen, the Appellant's attending [REDACTED] at SJEH throughout his [REDACTED] hospital stay, committed to tapering off that medication immediately, beginning with the nighttime administration of medication on [REDACTED] (March 7 Recording @ 26:03, 31:06.)

Dr. Hassan asserted that he would need SJEH to observe the Appellant's behavior for an additional two weeks after the medication was no longer administered to verify that the Appellant remained [REDACTED] stable. (March 7 Recording @ 27:04, 28:40.) However, the Administrative Law Judge did not accept that request, given the fact that the Appellant has stayed at the hospital for over [REDACTED] months without a medical need. To verify that the Appellant no longer requested [REDACTED] and could then be returned to the Facility in a condition that would enable a nursing home to provide him with the care that he needs, the Administrative Law

Judge requested [REDACTED] notes, updated medication administration records, and nursing notes from March 7 until the morning of Monday, March 14. (March 7 Recording @ 28:10, 34:36.)

Updated information was received on March 14, reflecting that SJEH's [REDACTED] unit immediately commenced tapering off the Appellant's [REDACTED] as of the evening of [REDACTED] and that as of [REDACTED] the Appellant was no longer receiving [REDACTED] (Exhibit V.)

Hospital staff had also stopped administering "PRN" or "as needed" medications, including Benadryl. (Exhibit IV.) Despite the change in the Appellant's medication regimen, the record establishes that the Appellant's behavior has remained stable. (Exhibits II and V.)

During the hearing, Facility witnesses expressed an unwillingness to re-admit the Appellant unless and until they were certain that the Appellant will not engage in dangerous behavioral [REDACTED] given the spontaneity of his prior [REDACTED] episodes. (February 11 Recording @ 20:50, 23:30, 29:50, 43:15.) This decision is not a guarantee of the Appellant's future behavior but serves merely to enforce existing regulations that require nursing homes to maintain responsibility and ultimate custody of individuals that they admit if and until those individuals can be safely discharged to another suitable location. As already stated, an acute care hospital is not such a location.

SJEH has abided by all requests made of it to cooperate in and secure the Appellant's return to the Facility. As the Appellant is has been and remains [REDACTED] and medically stable, the Facility must now re-admit him.

This order in no way prevents the Facility from transporting the Appellant for evaluation by a hospital's emergency department if he has future outbursts or exhibits other troubling behaviors. However, as occurred in the present matter, the Appellant must be accepted back to the nursing home once he is [REDACTED] and/or medically cleared to return. If the Facility is

unable or unwilling to continue to provide care for this resident, it has the obligation to develop an appropriate discharge plan and issue a new discharge notice stating permissible grounds for discharge.

DECISION AND ORDER

Beach Gardens Rehabilitation and Nursing Center has not established that its determination to discharge the Appellant was correct and that the discharge plan was appropriate.

Beach Gardens Rehabilitation and Nursing Center 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: March 15, 2022
Menands, New York



Natalie J. Bordeaux
Administrative Law Judge