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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 18, 2022

CERTIFIED MAIL/RETURN RECEIPT

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

Gina Solomita, NHA
Beach Gardens Rehab and Nursing Ctr
17-11 Brookhaven Avenue
Far Rockaway, New York 11691

Jennel Bagnall, SW
St. John's Episcopal Hospital
327 Beach 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
facility.

COPY

DECISION

On ██████████, 2022, Beach Gardens Rehabilitation and
Nursing (Facility), transferred resident ██████████ ██████████
(Appellant) to St. John's Episcopal Hospital in Far Rockaway,
New York (Hospital). On ██████████ 2022, the Appellant requested
a hearing to contest the Facility's determination not to
readmit him as a resident. The hearing was held by
videoconference by Dawn MacKillop-Soller on March 14, 2022.

The Appellant appeared at the hearing and represented
himself. Barbara Stegun Phair, Esq. appeared on behalf of
the Facility. The Facility presented as witnesses
Administrator Gina Solomita, Director of Nursing Maria
Pitgogo, Rana Hassan, MD, and Savetry Deodharry, LPN. The
Hospital appeared on the Appellant's behalf and was
represented by Director of Social Work Jacqueline

Lutchmidat, who also testified as a witness. Piotr Slowik, MD also testified on behalf of the Hospital and in support of its position that the Appellant return to the Facility.

Evidence was received (ALJ I, Facility Exhibit 1, Hospital Exhibits A-B.) The hearing was recorded. (Recording @ 1-2:08:32.)

Summary of Facts

1. Beach Gardens Rehabilitation and Nursing Center is a nursing home located in Far Rockaway, New York. (Exhibit 1.)

2. Appellant [REDACTED] [REDACTED] age [REDACTED] was admitted to the Facility on [REDACTED] [REDACTED] 2021, for short-term rehabilitation following a hospitalization for a [REDACTED] [REDACTED]. His diagnoses include [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. The Hospital also documented a diagnosis of [REDACTED] [REDACTED]. Currently the Appellant's medications include [REDACTED] 450mg and [REDACTED] daily to manage his [REDACTED] and [REDACTED] use disorders. (Exhibits ALJ I, A; Recording 1:39:11-1:39:16, 1:43:19-1:43:26, 1:58:12.)

3. The Appellant's medical history also includes a 2007 [REDACTED] surgery, which resulted in an [REDACTED] [REDACTED] that periodically requires [REDACTED] and [REDACTED] (Exhibit A; Recording 2:00:05-2:03:28.)

4. On [REDACTED], 2022, at the request of the Facility, the Appellant was transported by ambulance to the Hospital's emergency room for a [REDACTED] evaluation. The FDNY ambulance report states "staff at nursing home want him to go to Hospital to speak to a doctor for a [REDACTED] eval" due to refusing to take his medication "for 2 days." The FDNY also noted that the patient "was not [REDACTED]" (Exhibit 1; Recording 32:44-39:05.)

5. The Appellant has a history of [REDACTED] and [REDACTED] behaviors, including [REDACTED] [REDACTED] staff and residents and [REDACTED] on a resident and [REDACTED]. The Appellant's non-compliance includes refusing care and not permitting staff to enter his room. (Exhibit A; Recording 47:05-49:30, 1:17:09-1:17:26, 1:29:27.)

6. Hospital [REDACTED] assessments dated [REDACTED] [REDACTED] confirm the Appellant is [REDACTED] stable and does not require continued inpatient hospital care. He is also medically stable for discharge following the [REDACTED] care he received at the Hospital. The Hospital advised the Facility on [REDACTED] that he was ready for return to the nursing home. The Facility, however, refuses to accept his return, and has proposed no other discharge plan. (Exhibit A; Recording 10:35, 16:47.)

7. A Preadmission Screening and Resident Review (PASRR) completed on [REDACTED] [REDACTED] 2022, and arranged by the Hospital, determined nursing home care is appropriate for the Appellant. The PASSR also states the Appellant is not a danger to himself or others and does not need [REDACTED] [REDACTED] hospitalization. (Exhibit A.)

8. The Hospital Patient Review Instrument (PRI) completed the same date states the Appellant has "predictable [REDACTED] during specific care routines or as a reaction to normal stimuli, (for example, [REDACTED] [REDACTED]), regardless of frequency. [REDACTED]." (Exhibit B.)

9. The Facility failed to prepare or provide to the Appellant or his representative written Notice of Transfer/Discharge identifying the reason for the discharge and the discharge location, as required under 10 NYCRR 415.3(i). (Recording 16:47-17:52.)

10. The Appellant remains at the Hospital pending the outcome of this decision.

Issues

Has the Facility established that the Appellant's transfer is necessary and that the discharge plan is appropriate?

Applicable Law

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 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;

(3) the safety of individuals in the facility is endangered; or

(4) the health 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: (a) the resident's physician and, as appropriate, interdisciplinary care team

when transfer or discharge is necessary under subclause (1) or (2) of clause (a) of subparagraph (i) of this paragraph; ... and (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:
 - (b) the health of individuals in the facility would be endangered.
 - (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.

Federal regulations at 42 CFR 483.15 contain substantially identical provisions.

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

Discussion

The Facility argues the Appellant is not entitled to an appeal because his discharge was voluntary based on the police taking him into custody, yet it produced no evidence, such as a police report, to substantiate this claim. The testimony of the Appellant and the Hospital's Director of Social Work Jacqueline Lutchmidat and the FDNY and hospital records confirm the Appellant's involuntarily discharge by his [REDACTED] transport directly from the Facility to the Hospital by ambulance for a [REDACTED] evaluation and the Facility's refusal to accept him back. (Exhibits A, 1; Recording 11:55-39:36.)

Equally unpersuasive is the Facility's claim that the discharge was voluntary because the Appellant "broke the chain of custody" when he eloped from the Hospital after the transport was completed. (Recording 16:22.) The Hospital records and the testimony of Ms. Lutchmidat established that at no point following his [REDACTED] admission did the Appellant leave the Hospital, the same location where he has resided for the past 25 days. (Recording 11:55-16:22, 26:45, 39:05-44:06.)

The Facility claims discharge was necessary because the Appellant no longer needs the services provided at the nursing home and is a danger to others. Nursing homes involuntarily

discharging nursing home residents must establish permissible grounds for discharge and must provide the resident and his representative with written notice of the grounds for discharge. 10 NYCRR 415.3(i). The Appellant never received any notice prior to his transport to the Hospital or at any point during his hospital stay. (Recording 16:30-17:50.)

The Facility claims it is unable to manage the Appellant's [REDACTED] behaviors. Hospital [REDACTED] Piotr Slowik, MD emphasized, however, that the Appellant's predictable [REDACTED] is manageable by basic de-escalation techniques, such as staff redirection and by staff engaging him in thoughtful discussions. Dr. Slowik confirmed the Appellant has not exhibited any aggression at the Hospital — even when staff searched his room to locate an iPod. While this incident resulted in staff administering the Appellant 10 mg. of oral [REDACTED] Dr. Slowik explained that this was a one-time prescription for his [REDACTED] but not to address [REDACTED]. Dr. Slowik also discussed that given the Appellant's stability, a PRN prescription for this drug is not needed upon his discharge from the Hospital. (Exhibit B; Recording 1:29:27-1:30:02, 1:31:48-1:31:57, 1:44:58-1:59:29.)

Nursing homes are also required to ensure complete documentation by a physician in the resident's clinical

record explaining the necessity of the discharge when the grounds alleged are nursing home services are no longer needed and that the resident is a danger. 10 NYCRR 415.3(i)(1)(ii). The Facility did not submit documentation from the Appellant's clinical record by any physician to explain the need and reasons for the discharge. The testimony of the Facility's physician, Rana Hassan, MD, discussing the Appellant's independence and suitability for placement in the community is not a substitute for, and fails to meet, the requirement that the necessity for discharge be properly documented by a physician in the resident's clinical record. (Recording 1:03:27-1:04:24.)

In addition to failing to provide any notice of discharge, and failing to establish appropriate grounds for discharge, the Facility also failed to produce any discharge plan. Department of Health policy specifically prohibits nursing homes from using hospitals as "final discharge locations." Nursing homes are required to "readmit a 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.

Once the Hospital deemed the Appellant stable, the Facility remained responsible for readmitting him back into

its care or devising another appropriate discharge plan. The Appellant has been evaluated by the Hospital's [REDACTED] and medical care teams, all of whom agree the Appellant does not meet the criteria for [REDACTED] care and is safe for discharge back to the Facility. The Facility has not presented any evidence, such as medical testimony by a physician or an evaluation performed at the Hospital, to dispute these professional opinions. (Exhibits A, B; Recording 1:47:38-1:47:49, 1:57:50.)

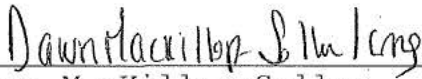
The Facility failed to meet its burden of proving its discharge was necessary and that it had an appropriate discharge plan. The discharge appeal is granted. The Facility is ordered to readmit the Appellant prior to admitting any other person.



Order

1. The Facility has failed to establish that its discharge was necessary and that the discharge plan was appropriate; 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
March 18, 2022


Dawn MacKillop-Soller
Administrative Law Judge

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

Jennel Bagnall
St. John's Episcopal Hospital
327 Beach 19th Street
Far Rockaway, New York 11691

Barbara Stegun Phair
Abrams Fensterman, LLP
3 Dakota Drive Suite 300
Lake Success, New York 11042

Gina Solomita, Administrator
Beach Gardens Rehabilitation and Nursing Center
1711 Brookhaven Avenue
Far Rockaway, New York 11691