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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

June 28, 2022

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o Flushing Hospital
4500 Parsons Blvd.
Flushing, New York 11355

Ellen Davis, SW
Flushing Hospital
4500 Parsons Blvd.
Flushing, New York 11355

Jerry Enella, NHA
Flushing Nursing and Rehabilitation
35 15 Parsons Blvd.
Flushing, New York 11354

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

**Sapphire Center for Rehabilitation
and Nursing,**

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: June 24, 2022

Parties: Sapphire Center for Rehabilitation and Nursing
35-15 Parsons Boulevard
Flushing, New York 11354
By: Jerry Enella, Administrator

██████████
Pro Se

JURISDICTION

Sapphire Center for Rehabilitation and Nursing (the Facility), a residential health care facility subject to Article 28 of the New York Public Health Law, determined to discharge ██████████ (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: Jerry Enella, Administrator
Ben Tolentino, Assistant Director of Nursing
Suzette Batan, Nurse Manager
Kristian Dine, Director of Social Services

Facility exhibits: 1-5

Appellant witnesses: ██████████ Appellant
Ellen Davis, Social Worker, Flushing Hospital Medical Center (FHMC)
██████████ MD, Medical Resident, FHMC
Barbara Ponieman, MD, ██████████ FHMC

ALJ Exhibits: I-III¹

A digital recording of the hearing was made (1:27:47 in duration.)

ISSUES

Has Sapphire Center for Rehabilitation and Nursing 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 ██████-year-old male who was admitted to the Facility on ██████ 2022 from FHMC as a short-term rehabilitation patient to treat an ██████ (Exhibit 5; Recording @ 23:12, 31:55.)

¹ Exhibit III was submitted in electronic format only.

2. The Appellant is diagnosed with ██████████
██████████
██████████
██████████. (Exhibits 1, 2, 5.)

3. On ██████████ 2022, the Facility transferred the Appellant to FHMC to address his complaints of ██████████ and ██████████. He was admitted as a medical inpatient for treatment of ██████████ likely caused by a ██████████. (Exhibit 1; Recording @ 9:00.)

4. On or immediately following his ██████████ transfer to FHMC, the Facility’s Director of Social Service inserted a note in the Appellant’s file entitled, “Notice of Transfer or Discharge (Revision),” which records that the Facility determined to discharge the Appellant to the hospital because the discharge is necessary for the Appellant’s welfare and his needs cannot be met in the facility. The notice also states that the Appellant was discharged “because the safety of [sic] health of individuals in the facility would otherwise be endangered.” (Exhibit 4.)

5. On ██████████, 2022, the Appellant’s attending physician at FHMC determined that the Appellant’s medical condition was stable and cleared him for discharge and return to the Facility. (Exhibit II.)

6. The Facility has refused to allow the Appellant to return. (Exhibits 4, 5; Recording @ 17:35.)

7. On June 15, 2022, FHMC Social Worker Ellen Davis requested this hearing on the Appellant’s behalf to contest the Facility’s continued refusal to readmit the Appellant. (Exhibit II.)

8. The Appellant has neither a medical nor ██████████ need for continued hospitalization. (Recording @ 9:10, 16:36, 1:22:52.)

9. A hearing was held on June 24, 2022, during which the Facility was verbally directed to readmit the Appellant to the next available semi-private bed. (Recording @ 1:17:00.) 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, entitled "Notice of Transfer or Discharge and Permitting Residents to Return," dated August 20, 2019 (DAL-NH 19-07).

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 has the burden of proving 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

When it sent the Appellant to FHMC on [REDACTED] 2022, the Respondent placed a notice of discharge in the Appellant's medical records which stated that the Appellant would be discharged to "Flushing Hospital" that day because his needs cannot be met at the facility, and that he was endangering the health and safety of others. (Exhibit 4.) 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). Nor has the Facility offered documentation from a physician to explain how the Appellant's presence endangers the health of others. 10 NYCRR § 415.3(i)(1)(ii). The Facility also failed to establish that this notice or any other written notice was provided to the Appellant in accordance with the requirements of 10 NYCRR §§ 415.3(i)(1)(iii)-(iv).

Facility witnesses testified that the Appellant's behavior has been a difficulty since the date of his admission, as he has had altercations with other residents and refused medically necessary treatment. (Recording @ 32:22.) Ben Tolentino, the Facility's Assistant Director of Nursing, testified that the Appellant's [REDACTED] because he refuses to abstain from [REDACTED]. In turn, he has been unable to receive necessary surgery for [REDACTED].

Mr. Tolentino also expressed concern regarding the Appellant's and on Facility grounds. (Recording @ 36:13.)

The Department has explicitly advised 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. "Dear Administrator" Letter entitled, "Transfer and Discharge Requirements for Nursing Homes," dated September 23, 2015 (DAL-NH 15-06). For over two weeks, FHMC attending physicians have determined that the Appellant no longer requires hospitalization for medical or reasons. At the hospital, the Appellant is receiving a of antibiotics through a to combat an. However, this treatment can be administered in a nursing home setting. (Recording @ 9:40, 11:20, 12:51.) The Facility has failed to meet its burden of proving it cannot.

While the Appellant has had some inappropriate behavioral outbursts, FHMC attending Dr. Barbara Ponieman explained that he can be redirected. She prescribed a medication for, on and an additional medication, on. Dr. Ponieman conceded that the Appellant is not always willing to accept medication, but also confirmed that the medication is not vital to managing his behavior. (Recording @ 13:20, 1:22:02.) The Facility has also failed to meet its burden of proving that it is.

As requested at the hearing, FHMC submitted progress notes, a medication list, and evaluations regarding the Appellant's inpatient stay. (Exhibit III.) That documentation confirms the testimony of the Appellant's witnesses. It is inappropriate for the Appellant to remain at FHMC, an acute care hospital, when he has no medical need for hospital

treatment. The Facility's determination fails to comport with regulatory requirements and is not sustained.

DECISION AND ORDER

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

Sapphire Center for Rehabilitation and Nursing 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: June 27, 2022
Menands, New York



Natalie J. Bordeaux
Administrative Law Judge