

cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan
SAPA File
BOA by scan



Department of Health

KATHY HOCHUL
Governor

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

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

November 3, 2022

CERTIFIED MAIL/RETURN RECEIPT

[REDACTED]
c/o Flushing Hospital
4500 Parsons Blvd.
Flushing, New York 11355

Rachel Gajadhar, SW
Flushing Hospital
4500 Parsons Blvd.
Flushing, New York 1135

Jessica Oliva, Esq.
Kaufman Borgeest & Ryan LLP
200 Summit Lake Drive
Valhalla, New York 10595

[REDACTED]

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,

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: nm
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

COPY

In the Matter of an Appeal, pursuant to
10 NYCRR 415.3, by

[REDACTED]

DECISION

Appellant,

from a determination by

DRY HARBOR NURSING AND REHABILITATION CENTER

to discharge him from a residential health care facility.

Before: Tina M. Champion
Administrative Law Judge

Held at: Videoconference via WebEx

Date: October 25, 2022

Parties: [REDACTED]
c/o Flushing Hospital
4500 Parsons Blvd.
Flushing, New York 11355

Dry Harbor Nursing and Rehabilitation Center
By: Jessica Oliva, Esq.
Kaufman, Borgeest & Ryan LLP
200 Summit Lake Drive
Valhalla, New York 10595

Interested Parties: Flushing Hospital
By: Rachel Gajadhar, SW
4500 Parsons Blvd.
Flushing, New York 11355

[REDACTED]

JURISDICTION

By notice dated [REDACTED] 2022, Dry Harbor Nursing and Rehabilitation Center (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [REDACTED] (the Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) 415.3(i).

The hearing was held in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulations (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR.

Evidence was received and witnesses were examined. A digital recording of the proceeding was made.

HEARING RECORD

The Appellant was present during the hearing. He was resistant to answering questions posed by the Administrative Law Judge. It is uncertain whether he understood the purpose of the hearing or what transpired during the hearing due to his [REDACTED] with [REDACTED] cognition.

Facility Witnesses: [REDACTED], LPN¹
Eliana Lewis, LCSW
Joneb Alday, DON
Mitchell Wechter, NHA

Facility Exhibits: 1 – 13

Hospital Witnesses: Sergio Magana, MD
Sandra Rodriguez, LCSW
Desiree Garib, RN

Hospital Exhibits: none

Other Witnesses: [REDACTED]

ALJ Exhibits: 1 – Letter with Notice of Hearing

¹ Ms. [REDACTED] appeared by telephone from [REDACTED] and provided an unsworn statement.

² Mr. [REDACTED] appeared by telephone from [REDACTED] and provided an unsworn statement.

FINDINGS OF FACT

1. The Appellant is an [REDACTED]-year-old male with diagnoses including [REDACTED] [REDACTED] (Facility Ex. 4.)
2. The Appellant was admitted to the Facility in [REDACTED] 2022 for rehabilitation to increase his level of ambulation and independence with activities of daily living (ADLs). He received restorative physical therapy and occupational therapy during his stay. (Facility Exs. 3 & 4.)
3. On [REDACTED], 2022, the Appellant's roommate at the Facility was found in bed [REDACTED]. The roommate stated that he was [REDACTED] in the [REDACTED]. The Appellant stated that he [REDACTED] his roommate, citing the roommate going through the Appellant's belongings as the reason. (Facility Exs. 1 & 2.)
4. The roommate was sent to the hospital on [REDACTED], 2022 for treatment of his injuries. He had a [REDACTED] as well as [REDACTED] to [REDACTED]. He passed away three days later. (Facility Ex. 11.)
5. The Appellant was sent to Flushing on [REDACTED], 2022 for a [REDACTED] evaluation. (Facility Ex. 7.)
6. The Appellant was initially placed on 1:1 constant observation at Flushing because of the incident with his roommate. He exhibited no issues and Flushing discontinued the 1:1. The Appellant was subsequently placed on 1:1 constant supervision again and given a wander guard as a safety precaution because he expressed a desire to go "home" and Flushing was concerned that he was at risk for elopement. (Facility Exs. 7 & 12.)
7. The Appellant was prescribed [REDACTED] at Flushing for [REDACTED]. Flushing subsequently switched the Appellant's medication to [REDACTED]. The Appellant has been on [REDACTED] for several weeks and is tolerating it well. (Facility Exs. 7 & 12.)

8. The Appellant was [REDACTED] and medically cleared for discharge from Flushing shortly after his admission. (Facility Exs. 7 & 12.)

9. The Appellant had not exhibited any [REDACTED] or [REDACTED] behavior at the Facility prior to [REDACTED], 2022, and has not exhibited any [REDACTED] or [REDACTED] behavior at Flushing. (Facility Exs. 3, 4, 7, 9, 12; T. [REDACTED] Alday, Magana, Rodriguez, Garib.)

10. The parties have been advised that the district attorney will not be pressing criminal charges against the Appellant because of his mental status. (T. Rodriguez, [REDACTED])

11. The Facility issued a "Notice of Discharge Letter" dated [REDACTED], 2022, which stated it was discharging the Appellant to an address in [REDACTED] New York. The address was identified at the hearing as the Appellant's home in the community. The reason cited is that the safety or health of residents in the facility would be endangered. The notice included the death of the Appellant's roommate as a fact supporting the determination despite the fact that the roommate did not die until three days after the purported date of the notice. (Facility Ex. 13.)

12. The Facility subsequently issued a "Transfer/Discharge Notice" dated [REDACTED], 2022, which stated it was discharging the Appellant to [REDACTED], an assisted living facility in [REDACTED] New York. The reasons cited are that the transfer/discharge is appropriate because the resident's health has improved sufficiently so that he no longer needs the services provided by the Facility and because the health and/or safety of individuals in the facility would otherwise be endangered. (Facility Ex. 6.)

13. [REDACTED] approved the Appellant's admission to its facility and was ready to accept him on [REDACTED], 2022. (Facility Ex. 5.)

14. The Appellant's [REDACTED] maintains that the family does not agree with either discharge plan proposed by the Facility. (T. [REDACTED])

15. The Facility has refused to allow the Appellant to return.

16. Flushing has made referrals to three skilled nursing facilities in [REDACTED] New York, all of whom have denied admission. (Facility Ex. 7.) At the conclusion of the hearing, Flushing also sent a referral to a fourth skilled nursing facility, located in [REDACTED] New York, which was identified by the Appellant's [REDACTED]. That facility also denied admission to the Appellant.

17. On [REDACTED], 2022, the Facility requested time to explore whether four specifically identified nursing homes in [REDACTED] would accept the Appellant. The Appellant's [REDACTED] who resides in [REDACTED] stated that he is not in agreement with the Appellant being relocated to [REDACTED].

18. The Appellant timely appealed the Facility's discharge determination and proposed discharge location in the notice dated [REDACTED], 2022.

19. The Appellant has remained at Flushing during the pendency of the appeal.

ISSUES

Has the Facility established that its determination to discharge the Appellant is correct and that its discharge plan is appropriate?

APPLICABLE LAW

A residential health care facility, also referred to in the Department of Health Rules and 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].)

A resident may only be discharged pursuant to specific provisions of the Department of Health Rules and Regulations. (10 NYCRR 415.3[j][1].) Excluding reasons of nonpayment and facility closure, a resident may be transferred only when:

- (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;

- (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;

(10 NYCRR 415.3[i][1][i][a].)

A Facility must ensure complete documentation in the resident's clinical record when a resident is discharged. When discharge is necessary due to the endangerment of the health of other individuals in the facility, documentation shall be made by a physician. (10 NYCRR 415.3[i][1][ii][b].)

Under the hearing procedures at 10 NYCRR 415.3(i)(2)(iii)(b), the Facility bears the burden to prove a discharge is necessary and appropriate. Under SAPA § 306(1), a decision in an administrative proceeding must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact. It is less than a preponderance of evidence but more than mere surmise, conjecture or speculation, and it constitutes a rational basis for a decision. (Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3d Dept. 1984], appeal dismissed 63 N.Y.2d 649.)

DISCUSSION

Reason for Discharge

This appeal was initiated based on the Facility seeking to discharge the Appellant on the grounds that the health and/or safety of individuals in the facility would otherwise be endangered. (Facility Ex. 13.) The Facility argues, in sum and substance, that the Appellant has demonstrated that he is capable of unpredictable and unprovoked behavior that endangers the health and safety of others at the Facility. The Facility issued a subsequent transfer/discharge notice adding as a

basis for discharge that the Appellant's health has improved sufficiently such that he no longer needs the services provided by the facility.

There are no known witnesses to the incident that occurred at the Facility on [REDACTED] 2022. Facility LPN [REDACTED] took statements from both the Appellant and the Appellant's roommate that were consistent in reports of the source of the roommate's injuries being from the Appellant [REDACTED] him. The Appellant has impaired cognition. The Appellant's roommate also suffered from impaired cognition, evidenced from his medications and their indications. (Facility Ex. 11.) Neither the Appellant nor his roommate may have been an accurate reporter of the events that transpired. However, it is assumed for this proceeding that the Appellant did in fact [REDACTED] his roommate and that such [REDACTED] led to the roommate's death three days later.

The Appellant stated that he [REDACTED] his roommate because the roommate was going through the Appellant's belongings. The Appellant also reported to Flushing that his roommate had been bothering him for a few days and that nothing had been done about it despite his alerting staff to the problem. (Facility Ex. 7.) Facility witnesses testified that the Appellant has not acted aggressively in the past, and as a result concluded that the Appellant's behavior was unpredictable and unprovoked. At least one of the Facility witnesses, DON Joneb Alday, based this conclusion in part on the Appellant's roommate also not previously exhibiting aggressive or aggravating behaviors. It is unclear from the testimony why Mr. Alday has concluded that the Appellant was capable of acting out the norm yet the Appellant's roommate was not. The Facility has failed to show that the Appellant's behavior was unpredictable or unprovoked. However, the Appellant's behavior coupled with the extreme consequence of death to another resident resulting from the behavior demonstrates that the Appellant is a danger to the health and/or safety of others in the Facility. It is foreseeable that the Appellant, with his cognitive impairment and physical ability, may pose a danger to other residents with cognitive impairment and potentially aggravating

behaviors in a nursing home setting. The Facility has met its burden to prove discharge is necessary on this basis.

The Appellant was admitted to the Facility in [REDACTED] 2022 for rehabilitation to increase his level of ambulation and independence with activities of daily living (ADLs). He received restorative physical therapy and occupational therapy during his stay. Eliana Lewis, Director of Social Services at the Facility, credibly testified that the Appellant did not require restorative therapy as of [REDACTED], 2022, his last date in the Facility. The Facility's Careplan Reports (Facility Exs. 3 & 4) support this testimony. It is noted as far back as [REDACTED] 2022 that the Appellant was to be discharged from restorative physical therapy due to reaching his maximum functional potential. Flushing's Medical Doctor Sergio Magana and Registered Nurse Desiree Garib both testified that they believe the Appellant should reside in a skilled nursing facility. However, both Dr. Magana and Ms. Garib acknowledged that the Appellant does not have any skilled nursing needs. They elaborated that their recommendation for a skilled nursing facility is based on the need for the Appellant to have supervision, including supervision by someone who is able to promptly identify and respond to changes in the Appellant's condition. The Appellant's [REDACTED], [REDACTED] [REDACTED] also stated that he believes the Appellant needs to be in a skilled nursing facility. Notably, Mr. [REDACTED] who lives in [REDACTED] and allegedly has a Power of Attorney for his [REDACTED], stated that he did not know his [REDACTED] was residing in a nursing home until a couple months after he was admitted, the last time he spoke with his [REDACTED] by telephone was approximately six months ago, and the last time he saw his [REDACTED] in person was in 2019 at his [REDACTED] funeral. Facility documentation reflects that Mr. [REDACTED] has been largely unresponsive to and unengaged with the Facility in discharge planning. For example, Facility notes in the Appellant's Careplan for [REDACTED] [REDACTED] 2022 state, "...Attending Homecare called writer, he was unable to reach POA [REDACTED] [REDACTED].....SW provided...#2POA and [REDACTED] [REDACTED] ([REDACTED]) phone number. SW tried contacting #1 POA, [REDACTED] [REDACTED] as well and

VM is full. #2 POA...and [REDACTED] [REDACTED] were also called and unable to reach. [REDACTED] – no response from the family. VM is full [REDACTED] – No response from the family, VM is full”. (Facility Ex. 3.) Despite the opinion of Flushing and Mr. [REDACTED] that the Appellant should reside in a skilled nursing home, the Appellant currently has no skilled nursing needs. It is expected that the Appellant will need skilled nursing in the future as his medical conditions will inevitably lead to further decline in his abilities and overall health. However, the Facility has met its burden to prove discharge is necessary at the present time on the basis that the Appellant's health has improved sufficiently such that he no longer needs the services provided by the facility.

Discharge Location

It is the responsibility of the Facility to find an appropriate discharge location and develop an appropriate discharge plan for the Appellant if it is necessary to discharge him as provided for by the applicable regulations. The Appellant has expressed a desire to go home on several occasions. He expressed that he wanted to go home while he was a resident at the Facility and has expressed the same while at Flushing, although it is uncertain what the Appellant considers to be his home. Several witnesses credibly testified that to the extent the Appellant has been agitated at Flushing, the agitation stems from the Appellant not wanting to be in the hospital. The Appellant owns a two-family residence in [REDACTED] New York. According to Mr. [REDACTED] one unit is occupied by tenants and the other unit – the Appellant's unit – is “empty.” The Facility initially proposed discharge to home with 24-hour home care services as part of the Nursing Home Transition & Diversion Waiver program (NHTD). The Appellant had an ongoing application with NHTD since at least [REDACTED] 2022. Given the Appellant's lack of need for skilled nursing care but need for supervision, and his ownership of a home in the community, discharge to his home with 24-hour care by a licensed home health care agency is an appropriate discharge plan.

The Facility also proposed discharge to [REDACTED], an assisted living facility in [REDACTED] New York. [REDACTED] was prepared to accept the Appellant at its facility

on [REDACTED], 2022. Flushing has opined that the Appellant currently needs supervision. This is corroborated by the Facility's [REDACTED], 2022 discharge notice that proposed discharge to home with 24-hour care. Ms. Lewis testified that an assisted living facility would be appropriate for the Appellant. However, the Facility did not provide any details as to how the Appellant would be supervised at [REDACTED]. Notably absent from the testimony was information on the number of hours in a day the Appellant would be supervised and who would be supervising him. Ms. Lewis also testified that an assisted living facility is a better setting for the Appellant than a nursing home because of the population of residents. This argument is unconvincing. Ms. Lewis acknowledged that it is not possible to know the cognitive status of others at a skilled nursing facility. Since [REDACTED] accepted the Appellant, it is reasonable to assume they have or will accept other residents with cognitive impairment. There is no way to ensure that the Appellant will not interact with residents differently in the group setting of an assisted living facility than he would in a skilled nursing facility, which the Facility argued and proved poses a danger to others. The Facility has failed to demonstrate that [REDACTED] is an appropriate discharge plan for the Appellant.

While discharge to home with 24-hour care is an appropriate discharge plan for the Appellant, Flushing Social Worker Sandra Rodriguez testified that the involvement of family locally may be required for the Appellant to qualify for home care and that the Appellant's family declined this arrangement previously. If the Facility is unable to effectuate its discharge plan with 24-hour home care, the Facility cannot unilaterally place the responsibility on Flushing to continue to care for the Appellant since he has been medically and [REDACTED] cleared for discharge. The Facility should be prepared to accept the Appellant back. A hospital is an acute care facility and is not an appropriate discharge location for a resident. Ms. Lewis adamantly testified that nursing homes do not provide 1:1 care for residents. However, absent an appropriate and available discharge plan, the Facility must take steps to employ strategies and provide the level of

supervision required for the Appellant, even if that is 1:1 supervision, while it works to formulate an appropriate and available discharge plan.


DECISION

Dry Harbor Nursing and Rehabilitation Center has established that its determination to discharge the Appellant was correct, and that its discharge location identified in the [REDACTED]


[REDACTED] 2022 discharge notice is appropriate.

1. Dry Harbor Nursing and Rehabilitation Center is authorized to discharge the Appellant to home with 24-hour care in accordance with its discharge plan dated [REDACTED], 2022.
2. If Dry Harbor Nursing and Rehabilitation Center is unable to arrange for 24-hour care for the Appellant at home by a licensed home health care agency on or before [REDACTED], 2022, then it must 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).
3. This decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules.

DATED: Albany, New York
November 3, 2022


Tina M. Champion
Administrative Law Judge

TO:


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

Jessica Oliva, Esq.
Kaufman, Borgeest & Ryan LLP
200 Summit Lake Drive
Valhalla, New York 10595

Rachel Gajadhar, SW
Flushing Hospital
4500 Parsons Blvd.
Flushing, New York 11355

