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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

November 30, 2022

CERTIFIED MAIL/RETURN RECEIPT

■■■■ ■■■■
c/o Bellevue Hospital
462 First Avenue
New York, New York 10016

Dina Goldemberg, DSW
Bellevue Hospital
462 First Avenue
New York, New York 10016

Shmuel Freedman, Administrator
Cliffside Rehabilitation and Residential
Healthcare Center
119-19 Graham Court
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,

Natalie J. Bordeaux /cy

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB:
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

COPY

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

██████ ██████

DECISION

Appellant,

from a determination by

CLIFFSIDE REHABILITATION & RESIDENTIAL
HEALTH CARE CENTER

to discharge her from a residential health care facility.

Before: Tina M. Champion
Administrative Law Judge

Held at: Videoconference via WebEx

Date: November 15, 2022

Parties: ██████ ██████
c/o Bellevue Hospital
462 First Avenue
New York, New York 10016

Cliffside Rehabilitation & Residential Health Care Center
119-19 Graham Court
Flushing, New York 11354
By: Shmuel Freedman, NHA
sf@cliffsiderehab.com

Interested Party: Bellevue Hospital
462 First Avenue
New York, New York 10016
By: Dina Goldemberg, DSW
Dina.Goldemberg@nychhc.org

JURISDICTION

By notice dated [REDACTED] 2022, Cliffside Rehabilitation & Residential Health Care Center (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [REDACTED] [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 not present during the hearing.

Facility Witnesses: Cheryl Phoenix-Rivera, DON
Marvin Teich, Medical Director
Shmuel Freedman, NHA

Facility Exhibits: 1 – 16

Hospital Witnesses: Dina Goldemberg, DSW
Alexa Parker, SW
Sandra Rodriguez, LCSW
Desiree Garib, RN

Hospital Exhibits: A – D

ALJ Exhibits: I – Transfer/Discharge Notice
II – Letter with Notice of Hearing

FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old female with a diagnosis of [REDACTED] (Facility Ex. 1.)
2. The Appellant was initially admitted to the Facility in [REDACTED] 2017. She has had multiple hospital admissions to treat [REDACTED] issues. (Facility Exs. 2-4, 7, 9, 12, 15, 16.)
3. The Appellant was transferred to Bellevue Hospital on [REDACTED] 2022, following an incident where she [REDACTED] and [REDACTED] at Facility staff and the Facility deemed her to be [REDACTED] and [REDACTED] with [REDACTED] behavior. (Facility Ex. 15.)
4. On [REDACTED] 2022, the Facility issued a Transfer/Discharge Notice discharging the Appellant to "NYC Health + Hospitals / Bellevue" on the grounds that the health of individuals at the Facility would be endangered. (ALJ I.)
5. The Appellant timely appealed the Facility's discharge determination and proposed discharge location in the notice dated [REDACTED] 2022.
6. The Appellant has been psychiatrically and medically cleared for discharge from Bellevue Hospital. (Hosp. Exs. A-D.)
7. The Facility has refused to allow the Appellant to return, and the Appellant has remained at Bellevue Hospital since [REDACTED] 2022. (Hosp. Ex. A.)
8. Bellevue Hospital sent numerous referrals to other skilled nursing facilities within the five boroughs prior to the hearing, none of which accepted the Appellant. (T. Goldemberg.)
9. The Appellant has remained at Bellevue Hospital 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[i][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][i][b].)

Facilities are required to provide written notice of transfer or discharge that includes the following:

- (a) The reason for transfer or discharge;
- (b) The specific regulations that support, or the change in Federal or State law that requires, the action;
- (c) The effective date of transfer or discharge;
- (d) The location to which the resident will be transferred or discharged;
- (e) a statement that the resident has the right to appeal the action to the State Department of Health, which includes:

- (1) an explanation of the individual's right to request an evidentiary hearing appealing the decision;
- (2) the method by which an appeal may be obtained;
- (3) in cases of an action based on a change in law, an explanation of the circumstances under which an appeal will be granted;
- (4) an explanation that the resident may remain in the facility (except in cases of imminent danger) pending the appeal decision if the request for an appeal is made within 15 days of the date the resident received the notice of transfer/discharge;
- (5) in cases of residents discharged/transferred due to imminent danger, a statement that the resident may return to the first available bed if he or she prevails at the hearing on appeal; and
- (6) a statement that the resident may represent him or herself or use legal counsel, a relative, a friend, or other spokesman;

(f) the name, address and telephone number of the State long term care ombudsman;

(g) for nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act;

(h) for nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

(10 NYCRR 415.3(i)(1)(v).)

Facilities are also required to "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."

(10 NYCRR 415.3(i)(1)(vi).)

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

The Facility seeks to discharge the Appellant on the grounds that the health of individuals in the facility would otherwise be endangered. (ALJ Ex. I.) The Facility offered uncontroverted testimony and documentary evidence that the Appellant is a difficult individual to care for and to have residing in its nursing home. In the months prior to the Appellant being sent to the hospital on [REDACTED] 2022, the Appellant had been refusing medications and foods at times. She was also often [REDACTED] and [REDACTED] and she [REDACTED] at the Facility. The Facility's Medical Director, Dr. Teich, testified that the Appellant's behaviors and [REDACTED] needs make discharge necessary. He also testified that the Facility does not have a [REDACTED] and that the Appellant wanders around but refuses to wear a Wander Guard, which would put her own safety at risk if she were to elope. Dr. Teich, who has never met the Appellant in person, opined that a skilled nursing facility with a secure unit is an appropriate setting for the Appellant. However, the Facility did not present sufficient evidence supporting that the Appellant requires a [REDACTED] or that it has exhausted all possible efforts to manage the Appellant's behaviors, such as various behavioral management strategies or one-to-one care.

Subsequent to the hearing in this matter, Bellevue Hospital sent out a second round of referrals to other skilled nursing facilities, including four facilities identified by the Facility. A telephone conference was held on [REDACTED], 2022, to discuss the status of those referrals. Only one facility, located on [REDACTED], accepted the Appellant. No information was provided on whether the [REDACTED] facility has a secure unit. The Appellant's [REDACTED] who lives in [REDACTED] is the only family member who maintains a relationship with the Appellant. He visits

the Appellant frequently and transferring the Appellant to Long Island would create a hardship and prevent his frequent visitation.

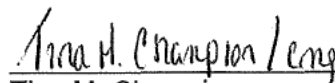
The Facility has not met its burden to prove that discharge is necessary. It also failed to develop an appropriate discharge plan for the Appellant. The Facility listed "NYC Health + Hospitals / Bellevue" as the discharge location on its [REDACTED], 2022, discharge notice. Discharge to a hospital, an acute care facility, is not an appropriate discharge plan, nor does it address how Appellant's medical needs will be met after discharge from the hospital. While the Facility was authorized to, and understandably did, send the Appellant to the hospital for evaluation following her behavior on [REDACTED] 2022, the Facility has no authority to refuse to re-admit the Appellant after she was evaluated and cleared by the hospital to return to the facility.

DECISION

Cliffside Rehabilitation & Residential Health Care Center has not established that the Appellant's discharge was necessary and that the discharge plan was appropriate.

1. Cliffside Rehabilitation & Residential Health Care 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).
2. 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 29, 2022



Tina M. Champion
Administrative Law Judge

TO:

■■■■ ■■■■
c/o Bellevue Hospital
462 First Avenue
New York, New York 10016

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