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NEW YORK STATE OF OPPORTUNITY. Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, M.D., M.P.H.
Acting Commissioner

MEGAN E. BALDWIN
Acting Executive Deputy Commissioner

April 7, 2023

CERTIFIED MAIL/RETURN RECEIPT

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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 /cmg

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: cmg
Enclosure

STATE OF NEW YORK: DEPARTMENT OF HEALTH

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

COPY

New York Foundation Community Guardian o/b/o [redacted]

Appellant,

DECISION

from a determination by Mosholu Parkway Nursing & Rehabilitation Center

Respondent,

to discharge him from a residential health care facility

Hearing Before: Jean T. Carney
Administrative Law Judge (ALJ)

Held via: Cisco WebEx videoconference

Hearing Date: March 30, 2023, and April 5, 2023

Parties: Mosholu Parkway Nursing & Rehabilitation Center, Respondent
By: Lourdes Martinez, Esq.
lmartinez@sheppardmullin.com

New York Foundation Community Guardian
o/b/o [redacted] Appellant
By: Anna Hock, Esq.
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North Central Bronx Hospital, Interested Party
By: Anna Hock, Esq.
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JURISDICTION

Without notice, Mosholu Parkway Nursing & Rehabilitation Center (Mosholu or Facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge [redacted] (Resident) from the Facility after transferring him to a hospital for a [redacted] evaluation on [redacted] 2022. The Facility refused to re-admit the Resident after he was medically cleared to be discharged, and the New York Foundation Guardian (Guardian) appealed the determination to the New York State Department of Health (Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) § 415.3(i).

HEARING RECORD

In support of its determination, the Facility presented documents (Exhibits 2, 3, and 7) and the testimony of Dr. Venkata Chintaluri, Medical Director; Eli Skaist, Administrator; and Anika Hunter, Director of Nursing (DON). The Appellant and Interested Party were joined in interest and represented by Ms. Hock, presenting documents (Exhibits A-F) and the testimony of Richard Ellison, MD. The Appellant appeared by Jhenifer Estevez, Case Manager. The Resident's appearance was excused. The Notice of Hearing was admitted as ALJ Exhibit I; the ALJ took official notice of Dear Administrator Letter (DAL) 19-07, and the hearing was digitally recorded.

ISSUES

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

FINDINGS OF FACT

Citations in parentheses refers to the testimony of the witness ("T") at the hearing and exhibits ("Exh") found persuasive in arriving at a particular finding. Any conflicting evidence was considered and rejected in favor of the cited evidence. An opportunity to

be heard having been afforded the parties, and evidence having been duly considered, it is hereby found:

1. The Resident is a [redacted]-year-old male who was admitted to the Facility for long term care on [redacted], 2022 from [redacted] Hospital with relevant diagnoses of [redacted] and [redacted] (Exhs A and 7).

2. On [redacted] 2023, the Resident was transferred to North Central Bronx Hospital (Hospital) for evaluation after he was found [redacted] his roommate with a [redacted]. At the time of the transfer, the Resident had a Guardian. Neither the Resident nor the Guardian were advised of the transfer. (Exh 7; T Mr. Skaist).

3. The Hospital deemed the Resident lacked capacity to make decisions regarding his treatment, and obtained an Order granting treatment over objection. The Hospital has not had to enforce the Order because the Resident voluntarily complied with taking his medication after the proceeding. (T Dr. Ellison).

4. On or about [redacted] 2023, the Hospital notified the facility that the Resident was medically and [redacted] cleared for discharge back to the Facility; but the Facility refused to re-admit the Resident, based on his behavior that precipitated his transfer to the hospital. (Exhs A, C, and D; T Mr. Skaist).

5. The Facility admitted to violating Department of Health regulations by failing to issue either a discharge notice, or a notice of transfer, to the Resident and/or his Guardian. (T Mr. Skaist).

6. The Resident does not require any specialized care. He has been medically and [redacted] cleared for discharge with a primary diagnosis of [redacted] with [redacted]. The Resident's attending [redacted] finds that he is stable, and requires the care of a skilled nursing facility. (Exhs A, B, and C; T Dr. Ellison).

APPLICABLE LAW

A residential health care facility, also referred to as a nursing home, is a facility which provides regular nursing, medical, rehabilitative, and professional services to residents who do not require hospitalization. (Public Health Law §§ 2801[2] and [3]; 10 NYCRR § 415.2[k]).

Pursuant to 10 NYCRR § 415.3(i)(1)(i)(a), a resident may only be discharged when the interdisciplinary care team determines that:

> (1) the transfer of 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.

Additionally, 10 NYCRR § 415(i)(1)(ii) requires that the facility ensures complete documentation in the resident's clinical record when transferring or discharging a resident under the above circumstances. 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.

Before it transfers or discharges a resident, the facility must notify the resident of the transfer or discharge, and record the reasons in the clinical record. (10 NYCRR §

415.3[i][1][iii]). The written notice must include the reason for the transfer or discharge, the specific regulations that support the action, the effective date of the transfer and the location to which the resident will be discharged. (10 NYCRR § 415.3[i][1][v]).

The burden is on the Facility to prove by substantial evidence that the discharge is necessary, and the plan is appropriate. (10 NYCRR § 415.3(i)(2)(ii); New York State Administrative Procedure Act [SAPA] § 306[1]). Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact; less than preponderance of evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision. (*Stoker v. Tarantino*, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3rd Dept. 1984], *appeal dismissed* 63 N.Y.2d 649[1984]).

DISCUSSION

The Facility failed to meet its burden of showing that the discharge is necessary, and the plan is appropriate. The Facility's failure to issue a discharge notice alleging grounds and an appropriate discharge location constitutes a violation that cannot be excused. The Facility had ample time to provide such notice, yet took the position that it was not required to engage in discharge planning because the Resident had already been transferred, and dismissed this violation as a mistake that should not have any bearing on this proceeding. (T Dr. Chintaluri and Mr. Skaist).

It is well settled that a facility cannot discharge a resident to a hospital. (DAL 19-07). The Facility claims that it is unable to care for this Resident, and therefore cannot re-admit him. These assertions are based on the Resident's behavior that prompted his transfer to the hospital for evaluation. There is no dispute that the resident engaged in behavior that warranted being transferred to the hospital for evaluation. However, once the Resident's medication was adjusted, and he was stabilized, then the Facility was obligated to re-admit him.

The Facility argued that it was unaware of the Resident's diagnosis of [redacted] when it initially admitted the Resident, and therefore should not be required to re-admit him. However, Dr. Ellison credibly testified that the Resident's primary diagnosis is [redacted] with [redacted], which is being managed with his current medications. (T Dr. Ellison). The evidence shows that the Facility has many other residents with the same or similar diagnoses and medication regime as this Resident. (T Dr. Chintaluri). Finally, the Facility argued that during his stay in the hospital, the Resident has been [redacted] and will [redacted] at staff. [redacted] does not rise to the level of being a danger to himself or others. The fact that this Resident is not as [redacted] as other residents does not constitute a sufficient reason for the Facility's refusal to re-admit.

Facilities must adequately screen individuals before admitting them, and "in the absence of atypical changes in residents' conditions, it should be rare that facilities that properly assess their capacity and capability to care for a resident then discharge that resident based on an inability to meet that resident's needs." The Facility's argument that it is unable to meet the Resident's needs are not supported by the evidence. The Facility claims that its employees are not trained to care for individuals with the Resident's diagnoses. That argument holds no weight because most of the current residents have [redacted] and therefore the employees should have sufficient training to care for those patients. The Facility also argued that the majority of its rooms have three or four beds, and the resident would not be able to have a private room. That argument holds little weight because the Resident has not been in a private room while in the hospital. The Facility argued that the Resident is not completely compliant with treatment. Dr. Ellison credibly testified that most patients with [redacted] have some level of non-compliance, because they believe that they are fine, and do not need treatment. The Facility failed to show how the Resident's non-compliance was an atypical change in his condition.

A discharge plan must "[address] the medical needs of the resident and how these will be met after discharge." (10 NYCRR § 415.3[i][1][vi]). The Facility presented no evidence of an appropriate discharge location, or of any attempt to engage in discharge planning with either the hospital, or the Resident's guardian.

ORDER

Mosholu Parkway has failed to establish that the Appellant's discharge is necessary, and its discharge plan is appropriate.

1. Pursuant to 10 NYCRR § 415.3(i)(2)(i)(d), the Facility is Ordered to re-admit the Resident to the first available bed, and shall not accept any new admissions before re-admitting the Resident.
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
April 7, 2022

JEAN T. CARNEY
Administrative Law Judge

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