

Enclosure

cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan
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Department of Health

KATHY HOCHUL
Governor

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

MEGAN E. BALDWIN
Acting Executive Deputy Commissioner

June 12, 2023

CERTIFIED MAIL/RETURN RECEIPT

Frank Mazzagatti, Esq.
Weiss, Zarett, Sonnenklar & Levy P.C.
3333 New Hyde Park Road, Suite 211
New Hyde Park, New York 11042

Adam D. Kahn, Esq.
Lasalle, LaSalle & Dwyer, P.C.
309 Sea Cliff Avenue
Sea Cliff, New York 11579

Kristen H. Kraemer, Esq.
Office of General Counsel
Long Island Jewish Hospital Valley Stream
900 Franklin Avenue
Valley Stream, New York 11580

New York Guardianship Services, Inc.
1204 Avenue U, Suite 2001
Brooklyn, New York 11229

RE: In the Matter of [REDACTED] [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: cmg

STATE OF NEW YORK: DEPARTMENT OF HEALTH

COPY

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

██████████ ██████████ :

DECISION
CASE#6019

Appellant, :
from a determination by :
BEACH GARDENS REHABILITATION :
AND NURSING CENTER :
to discharge him from a residential health :
care facility. :

Hearing Before: Sean D. O'Brien
Administrative Law Judge

Held via WEB EX video conference

Hearing Date: June 7, 2023

Parties: Beach Gardens Rehabilitation and Nursing
17-11 Beach Avenue
Far Rockaway, New York 11691
By: Frank A. Mazzagatti, Esq.
Weiss, Zarett, Sonnenklar & Levy P.C.
3333 New Hyde Park Road/Suite 211
New Hyde Park, New York 11042

New York Guardianship Services, Inc.,
as Guardian of ██████████ ██████████
By: Adam D. Kahn, Esq.
Lasalle, LaSalle & Dwyer P.C.
309 Sea Cliff Avenue
Sea Cliff, New York 11579

Appearance: Long Island Jewish Hospital
900 Franklin Avenue
Valley Stream, New York 11580
By: Kristen H. Kraemer, Esq.
Legal Affairs

JURISDICTION

On [REDACTED] [REDACTED], 2023, Beach Gardens Rehabilitation and Nursing Center (the Facility), a residential health care facility subject to Article 28 of the New York Public Health Law, determined to discharge/transfer [REDACTED] [REDACTED] (the Appellant) from the Facility to Long Island Jewish Hospital Valley Stream (LIJH). The Appellant's Guardian, New York Guardianship Services, Inc., (Guardian) filed an appeal of Facility's determination with the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) Section 415.3(i).

HEARING RECORD

Facility Exhibits: A-D

Facility Witnesses:

Sacha Clery, RN, Director of Nursing
Seth Kurtz, MD, Medical Director
Shari Greenberg, Corp. Dir. Of Social Work

Appellant's Exhibits: 1-2

Appellant's Witnesses:

[REDACTED] MD, [REDACTED], LIJH
[REDACTED], Social Worker, LIJH

Administrative Law Judge Exhibit I: Notice of Hearing

A digital recording of the hearing was made part of the hearing record via WEB EX. The appearance of the Appellant at the Hearing was waived by the attorney representing the Appellant's Guardian.

ISSUE

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

FINDINGS OF FACT

Citations in parentheses refer to testimony (T) of witnesses and exhibits (Exhibit) found persuasive in arriving at a particular finding.

1. The Appellant is a [REDACTED]-year-old male who was admitted to the Facility for long term care on [REDACTED] [REDACTED] 2023, from Long Island Jewish Hospital Valley Stream (LIJH). (Exhibits A, B, C, 2.)

2. The Appellant is [REDACTED] cognitively impaired and a Guardian over the person and property of the Appellant was Court ordered on [REDACTED], 2023, and as amended, on [REDACTED] 2023, by New York State Supreme Court Justice Gary F. Knobel. (Exhibit 1.) Approximately 25 percent of the Facility's residents are cognitively impaired. (T. Solomita.)

3. On [REDACTED] [REDACTED] 2023, the Facility determined to discharge/transfer the Appellant because he was a threat to others after being in a [REDACTED] with his roommate. (Exhibits D, T; T. Clery, T. Solomita)

4. The Appellant was discharged/transferred from the Facility on [REDACTED] 2023, to the LIJH, emergency room. LIJH cleared the Appellant on [REDACTED] 2023, for discharge back to the Facility, but the Facility refused to accept the Appellant. (Exhibits D, E" T. Clery, T. Solomita, T. [REDACTED])

5. The Facility did not involve the Appellant or his Guardian, in the discharge planning process and in particular the determination to unilaterally discharge/transfer the Appellant to LIJH. (T. Clery, T. Solomita.)

6. The Appellant remains at LIJH pending the outcome of the appeal

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. Public Health Law Sections 2801(2)(3); 10 NYCRR Section 415.2(k).

A resident may only be discharged/transferred pursuant to specific provisions of the Department of Health Rules and Regulations (10 NYCRR Section 415.3[i][1]). The Facility alleges the Appellant's discharge is permissible pursuant to 10 NYCRR Section 415.3(I)(1)(i)(a)(2)(3)(4), which states in relevant parts

"...the resident's needs cannot be met after reasonable attempts at accommodation...

...the safety of individuals in the facility is endangered..."

Under the hearing procedures at 10 NYCRR Section §415.3(i)(2)(ii), the Facility bears the burden to prove a discharge necessary and the discharge plan is appropriate. Under the New York State Administrative Procedures Act (SAPA) Section 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; 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.

DISCUSSION

The Appellant was admitted to the Facility for long term placement on [REDACTED] 2023, from LIJH, after a long hospitalization. His diagnosis includes [REDACTED] and [REDACTED]. The Appellant is [REDACTED] cogitatively impaired, and a Guardian of the Appellant's person and property was Court ordered while he was a patient at LIJH. (Exhibits A, B, C, 1; T. Clery, T. Solomita, T. [REDACTED].)

The Facility asserts it did not receive the Appellant's current guardianship papers as part of the Appellant's referral package from LIJH. (T. Solomita.) In addition, the Facility argues that it was not given the full medical record of the Appellant to make a proper initial admission determination. (T. Clery.)

However, the LIJH social worker testified that over several months starting in [REDACTED] 2022 the Facility was given the Appellant's updated information through the on-going Patient Review Instrument (PRI). On a monthly basis LIJH sent out referrals on behalf of the Appellant for discharge locations. The PRI

document along with the Appellant's physical and medical notes, lab work and prescriptions were updated for each referral sent to the Facility via the electronic All Scripts system. Each referral for the Appellant contained the previously provided information. (T. [REDACTED].) The complete reading of the referrals provided the Facility with the necessary information regarding the Appellant. Therefore, when the Facility admitted the Appellant in [REDACTED] 2023 it had access to the Appellant's cumulative PRI referrals and related information to make an informed decision regarding Appellant's conditions. (Exhibits B, C, 2.) DAL-NH 19-07 at page 2.

Notwithstanding the Facility's post-admission arguments, that it was not given complete records from LIJH, the Appellant was admitted to the Facility on [REDACTED] [REDACTED] 2023. Soon after his admission he displayed an uncooperative attitude by refusing his medications and a routine COVID swab. (T. Clery.) On [REDACTED] [REDACTED] 2023, the Appellant was involved in a [REDACTED] [REDACTED] with his roommate. As a result of this incident, the Facility determined to discharge/transfer the Appellant immediately to the LIJH emergency room. No discharge plan was developed with input from

either the Guardian or the Appellant. (Exhibit D; T. Clery, T. Solomita.)

LIJH admitted the Appellant on [REDACTED], 2023. Several days later [REDACTED], 2023, LIJH staff determined the Appellant medically and psychiatrically ready for return to the Facility. (T. Toth.) LIJH attempted to return the Appellant back to the Facility, but the Facility refused. (T. Solomita.) On [REDACTED] [REDACTED], 2023, the Guardian filed a discharge/transfer appeal with the Department on behalf of the Appellant.

There is a regulatory framework for residential health care facilities to follow prior to the discharge/transfer of a resident. The Facility is required to "...provide sufficient preparation and orientation to residents to ensure safe and orderly...discharge from the facility...." 10 NYCRR 415.3(i)(1)(vi). The regulations also require a post discharge plan "**...that shall be developed with the participation of the resident and his family,** which will assist the resident to adjust to his new living environment...." (emphasis added) 10 NYCRR 415.11(d)(3). These regulatory requirements were not met by the Facility

In addition, per a "Dear Nursing Home Administrator" letter dated August 20, 2019, and re-issued in October 2022, (DAL-NH 19-

07) the Department placed all residential health care facilities on notice that discharges to hospitals are not appropriate discharge locations if a resident's clinical or behavioral status endangers the health and/or safety of others at the Facility. The letter in paragraph 8 in the "Frequently Asked Questions" section goes on to state, "[a] facility's determination not to permit a resident to return must not be based on the **resident's condition** when originally sent to the Hospital." (emphasis added).

In the present case, the Facility never commenced the discharge planning process to another skilled nursing facility or treatment facility which would address the Appellant's conditions and it did not make any attempt to accommodate the Appellant's needs. Rather, the Facility took a short-term response of discharging/transferring Appellant to a hospital in reaction to the Appellant's [REDACTED] with his roommate.

The Facility also failed to provide the discharge/transfer notice to the Appellant's Guardian, as required by regulations and issued guidance. 10 NYCRR 415.3(i), DAL 19-07. In addition, the Facility's purported basis for the Appellant's discharge/transfer was that the safety of individuals was at risk due to the Appellant's behavior. In discharge/transfer cases where the

safety of other residents is at risk a physician's review and approval of the discharge and discharge plan is necessary. 10 NYCRR 415.3 (i) (1) (ii) (b).

In the present case, the sign off by the Facility's physician does not indicate a thorough review of the Appellant's discharge/transfer or for any discharge plan. (Exhibit D.) The Facility's medical director was not personally aware of the Appellant's situation and only signed off on the discharge/transfer after the Appellant was already at LIJH. (T. Kurtz.)

The regulations allow for the discharge/transfer of residents who are a threat to the health and safety of others, but the Facility failed to follow the regulatory requirements for a proper discharge. The Facility admitted the Appellant and as such it is responsible to follow the applicable regulations for proper discharge/transfer. The Appellant is cleared by LIJH medical and psychiatric staff to return to the Facility and per DOH regulations and Guidance the Facility must allow for his return.

CONCLUSION

The Facility failed follow regulations in 10 NYCRR 415.3 setting the forth the requirements of discharging a resident.

DECISION

The appeal by Appellant is Affirmed.

The Facility is not authorized to discharge/transfer the Appellant. The Facility must readmit the Appellant to the first available semi-private bed before it admits any other person to the Facility. 10 NYCRR 415.3(i)(2)(i)(d).

This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

DATED: Albany, New York
June 12, 2023



Sean D. O'Brien
Administrative Law Judge

To: Frank A. Mazzagatti, Esq.
Weiss, Zarett, Sonnenklar & Levy, P.C.
3333 New Hyde Park Road/Suite 211
New Hyde Park, New York 11042

Kristen H. Kraemaer, Esq,
Office of General Counsel
Long Island Jewish Hospital Valley Stream
900 Franklin Avenue
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Adam D. Khan, Esq.
LaSalle, LaSalle & Dwyer, P.C.
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1204 Avenue U/Suite 2001
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