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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

February 23, 2022

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o Erie County Medical Center
462 Grider Street
Buffalo, New York 14215

Regina A. DeVecchio, Esq.
Erie County Medical Center
462 Grider Street
Buffalo, New York 14215

James Lockwood, Director of Nursing
Buffalo Center for Rehabilitation and Nursing
1014 Delaware Avenue
Buffalo, New York 14209

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

[REDACTED]

Appellant,

from a determination by

Buffalo Center for Rehabilitation
and Nursing

Respondent,

to discharge him from a residential health
facility.

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DECISION

On [REDACTED], 2022, Buffalo Center for Rehabilitation and Nursing (Facility), transferred resident [REDACTED] [REDACTED] (Appellant) to Erie County Medical Center in Buffalo, New York (Hospital). On [REDACTED] 2022, the Appellant's [REDACTED] requested a hearing on behalf of the Appellant to contest the Facility's determination not to readmit him as a resident. On February 11, 2022, a hearing was held via videoconference before Dawn MacKillop-Soller, Administrative Law Judge.

The Appellant did not appear at the hearing due to his inability to meaningfully participate. The Appellant's [REDACTED] [REDACTED] [REDACTED] [REDACTED], appeared on behalf of the Appellant. Long-term care ombudsperson Susan Fenster also appeared on the Appellant's behalf. Regina A. DelVecchio, Esq. appeared on behalf of the Hospital. The Hospital

presented as a witness Chief of [REDACTED] Yogesh Bakhai, M.D. in support of the Hospital's position that the Appellant return to the Facility. The Facility was represented by Director of Nursing James Lockwood, who also testified as a witness. The Facility also presented as a witness Administrator Emelyne Cherenfant.

Evidence was received (ALJ I, Facility Exhibits A-I, Hospital Exhibits 1-10). The hearing was recorded. (Recording @ 1-2:17:58.)

Summary of Facts

1. Buffalo Center for Rehabilitation and Nursing is a nursing home with a specialized [REDACTED] care unit located in Buffalo, New York. (Exhibit A; Recording 55:05-55:13, 1:28:04.)

2. Appellant [REDACTED], age [REDACTED] was admitted to the Facility on [REDACTED], 2020, and placed in the [REDACTED] unit. His diagnoses include [REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] Currently the Appellant's medications include [REDACTED] 50mg, one time per day, and [REDACTED] 50mg, at bedtime. (Exhibits A, B; Recording 48:51,1:27:55-1:28:08.)

3. The Appellant has a BIMS score of [REDACTED] and requires around the clock 1:1 supervision to safely complete his personal

care and activities of daily living due to his [REDACTED]
(Exhibits 1, A, B; Recording 48:54.)

4. On [REDACTED], 2022, the Facility transferred the Appellant to the emergency room at Erie County Medical Center for a [REDACTED] evaluation because he [REDACTED] another resident by [REDACTED] him in the [REDACTED] causing a [REDACTED] [REDACTED] EMS deemed the injury "non-urgent," but also transported that resident to the emergency room for evaluation. That resident returned to the Facility in stable condition. (Exhibits 2, C, H; Recording 33:48-33:52, 53:44-55:46, 59:19-1:00:48.)

5. In a handwritten note that accompanied the Appellant to the emergency room at the Hospital, the nursing supervisor wrote: "DON (Director of Nursing) requests that resident does not return to this Facility for any reason." (Exhibit 3.)

6. The Facility reports the Appellant has a history of [REDACTED] behaviors, including several incidents involving [REDACTED] abuse and [REDACTED] behaviors toward staff and other residents. On [REDACTED], he [REDACTED] a different patient, causing a [REDACTED] [REDACTED] that required [REDACTED] Following this incident, the Appellant was evaluated at the emergency room, deemed not appropriate for [REDACTED] care, and returned to the Facility. (Exhibit B; Recording 49:06-49:17, 53:44-57:47, 58:25.)

7. Hospital [REDACTED] and medical assessments confirm the Appellant is medically stable and does not require inpatient hospital care. The Hospital advised the Facility that he was ready for return to the nursing home. The Facility, however, refuses to accept his return, and has proposed no other discharge plan. (Exhibits A, ALJ I; Recording 49:25-49:31; 1:13:52-1:20:08, 1:20:19, 1:46:33-1:47:03.)

8. A written Notice of Transfer/Discharge dated [REDACTED], 2022 identified the discharge location as the Hospital and the reasons for discharge as "(t)he health of other (sic) resident in this facility would otherwise be endangered by your continued residency," "(t)he resident's welfare and his/her needs cannot be met in the facility," and "(a)n immediate transfer or discharge was required due to the resident's urgent medical need." The notice states: "We are unable to continue to care for resident." It was completed by a nurse but was not provided to the Appellant or his representative nor was it contained in the medical record at the Hospital. (Exhibit I; Recording 34:16-36:42.)

9. The Appellant remained at the Hospital until the conclusion of the hearing, at which point the Facility was directed to readmit him to the first available bed. (Recording 1:00:39.)

Issues

Has the Facility established that the Appellant's transfer is necessary and that the discharge plan is appropriate?

Applicable Law

Transfer and discharge rights of nursing home residents are set forth in 10 NYCRR 415.3(i), which provides, in pertinent part:

(1) With regard to the transfer or discharge of residents, the facility shall:

(i) permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless such transfer or discharge is made in recognition of the resident's rights to receive considerate and respectful care, to receive necessary care and services, and to participate in the development of the comprehensive care plan and in recognition of the rights of other residents in the facility.

(a) The resident may be transferred only when the interdisciplinary care team, in consultation with the resident or the resident's designated representative, determines that:

...

(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;

(4) the health of individuals in the facility is endangered.

...

(ii) ensure complete documentation in the resident's clinical record when the facility

transfers or discharges a resident under any of the circumstances specified in subparagraph (i) of this paragraph. 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 (i)(a)(1) ... 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.

- ...
- (iii) before it transfers or discharges a resident:
 - (a) notify the resident and designated representative, if any, and, if known, family member of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner the resident and/or family member understand.
 - (iv) provide the notice of transfer or discharge ... as soon as practicable before transfer or discharge, but no later than the date on which a determination was made to transfer or discharge the resident, under the following circumstances:
 - (b) the health of individuals in the facility would be endangered.
 - (vi) 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, and provide a discharge summary pursuant to section 415.11(d) of this Title.

Federal regulations at 42 CFR 483.15 contain substantially identical provisions.

The nursing home has the burden of proving that the discharge was necessary, and the discharge plan was appropriate. 10 NYCRR 415.3(i)(2)(iii)(b).

DiscussionDischarge grounds

The Facility involuntarily discharged the Appellant without establishing permissible discharge grounds. The Facility claims discharge of the Appellant was necessary because his needs cannot be met, yet it did not provide the Appellant and his representative with 30 days' written notice of that ground nor did it provide them with written notice of the endangerment of health ground "as soon as practicable." 10 NYCRR 415.3(i).

The Facility admits it did not provide its notice to the Appellant or his representative but claims the requirements were met when the notice was sent with EMS and to the Department of Health and discussed with the Appellant's [REDACTED] by telephone. The notice dated [REDACTED] [REDACTED] the same day as the discharge, however, was not provided to the Hospital or the Appellant and his representative. (Recording 33:48-36:42, 43:33-45:56, 46:57-47:27.)

Nursing homes involuntarily discharging residents on the ground of needs cannot be met are also required to ensure complete documentation by a physician in the resident's clinical record explaining the necessity of the discharge. 10 NYCRR 415.3(i). Social worker and nursing notes document the Appellant was discharged to the Hospital for [REDACTED]

evaluation, but the Facility presented no documentation by a physician to explain the need and reasons for the discharge. (10 NYCRR 415.3(i); Exhibits A, B, D-F; Recording 15:00-1:15:47, 1:28:57.)

The Facility claims it exhausted all options to handle the Appellant's challenging behaviors in connection with his [REDACTED] including 1:1 supervision, before discharging him to the Hospital. The evidence established, however, other strategies for the Facility to pursue, such as enhanced 1:1 supervision and reduced [REDACTED] drug dosages. While the Facility had 1:1 supervision 24 hours per day in place for the Appellant, the level was "visual observation" and not "arm's length," its most extensive oversight. Hospital Chief of [REDACTED] Yogesh Bakhai, M.D. explained the importance of assigning the proper level of 1:1 supervision as part of a patient's treatment plan and to manage [REDACTED] Administrator Emelyne Cherenfant confirmed staff are trained in de-escalation, which suggests their suitability to anticipate the overstimulation in [REDACTED] patients that Dr. Bakhai explained can lead to [REDACTED] and [REDACTED] behaviors. (Exhibits 2, B; Recording 1:11:30-1:13:18, 1:50:47-1:53:45.)

Equally important for dementia patients, according to Dr. Bakhai, is not overprescribing [REDACTED] drugs because they can [REDACTED] [REDACTED] and [REDACTED] in [REDACTED]

patients. The Hospital drastically reduced the Facility's dosages of [REDACTED] and [REDACTED] at 200mg each once per day and [REDACTED] at 1mg twice per day to [REDACTED] and [REDACTED] at 50mg once per day. Since the dosage changes, the Appellant has been calm and cooperative, without exhibiting any [REDACTED] or [REDACTED]. Dr. Bakhai made clear that [REDACTED] and [REDACTED] behaviors in [REDACTED] patients like the Appellant are handled not by [REDACTED] drug dosages but by staff working hard at behavioral and environmental modifications. (Recording 1:01:43-1:04:05, 1:47:33-1:52:27, 1:56:01-1:58:07, 2:00:25-2:01:25.)

Discharge plan

The Facility has not produced any evidence to show the Appellant's placement in an acute care hospital setting meets his long-term needs and is an appropriate discharge plan. The Appellant has been evaluated by the Hospital's [REDACTED] and medical care teams, all of whom agree the Appellant does not meet the criteria for [REDACTED] care and is safe for discharge back to the Facility where he can receive the [REDACTED] care he requires. Dr. Bakhai emphasized the importance of returning the Appellant to his home at the Facility to restore his dignity given he has remained in the [REDACTED] emergency room for the duration of his hospital stay. The Facility has not presented any evidence, such as medical

testimony by a physician or an evaluation performed at the Hospital, to dispute these professional opinions. (Recording 1:54:07-1:54:31.)

Once the Hospital deemed the Appellant stable, the Facility remained responsible for readmitting him back into its care or devising another appropriate long-term care plan. The Hospital correctly points to Department policy specifically prohibiting nursing homes from using hospitals as "final discharge locations" and requires them to "readmit the resident and/or develop an appropriate discharge plan" when transfers to hospitals are due to "episodes of acting out behavior." Transfer & Discharge Requirements for Nursing Homes, DAL NH 15-06, September 23, 2015. (Exhibit 1; Recording 1:18:08-1:18:42.)

The Facility failed to meet its burden of proving its discharge was necessary and that it had an appropriate discharge plan. The discharge appeal is granted. The Facility is ordered to readmit the Appellant consistent with the verbal directive at the conclusion of the hearing. (Recording 2:16:58.)

Order

1. The Facility has failed to establish that its discharge was necessary and that the discharge plan was appropriate; and

2. Pursuant to 10 NYCRR 415.3(i)(1), the Facility is directed to readmit the Appellant prior to admitting any other person.

Dated: Albany, New York
February 22, 2021


Dawn MacKillop-Soller
Administrative Law Judge

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