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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 4, 2022

CERTIFIED MAIL/RETURN RECEIPT

[REDACTED]
c/o Samaritan Hospital
2215 Burdett Avenue
Troy, New York 12180

Social Work Services
Samaritan Hospital
2215 Burdett Avenue
Troy, New York 12180

Barbara Phair, Esq.
Abrams Fensterman LLP
3 Dakota Drive, Suite 300
Lake Success, New York 11042

Michael Hotz, NHA
The Grand at Barnwell
3230 Church Street
Valatie, New York 12184

[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

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

██████████

Appellant,

from a determination by

The Grand Rehabilitation and Nursing at Barnwell,

Respondent,

to discharge Appellant from a residential health care facility.

COPY

**DECISION
AFTER
HEARING**

Before: Rayanne L. Babich
Administrative Law Judge

Dates: October 28, 2022

Held at: New York State Department of Health
Webex videoconference

Parties: ██████████ Appellant
c/o Samaritan Hospital
2215 Burdett Avenue
Troy, New York 12180

Michael Hotz, Administrator
The Grand Rehabilitation and Nursing at Barnwell
3230 Church Street
Valatie, New York 12184
By: Barbara Phair, Esq.

JURISDICTION

By notice dated ██████████ 2022, The Grand Rehabilitation and Nursing at Barnwell (Facility), determined to discharge ██████████ (Appellant) from care in its Facility pursuant to Title 10 of the Official Compilation of the New York Code Rules and Regulations (NYCRR) Part

415.3(i)(1)(iii)(a). The Appellant's representative appealed the proposed discharge on behalf of the Appellant. 10 NYCRR 415.3(i)(2).

RECORD

ALJ Exhibits: I – Notice of Discharge, [REDACTED] 2022
II – Notice of Hearing, [REDACTED] 2022
III – Facility Admission Record

Facility Exhibits: 1 – Facility progress notes, [REDACTED] to [REDACTED], 2022
2 – Hospital progress notes, [REDACTED] to [REDACTED], 2022

Appellant Exhibits: None

Facility Witnesses: Timothy Turbett, M.D., Medical Director for the Facility
Jaime McGivney, Acting Director of Nursing for the Facility
Lauren Sinopoli, Director of Social Work for the Facility
Michael Hotz, Facility Administrator

Appellant Witnesses: None

The hearing was digitally recorded. [R. 1:00:55.]

FINDINGS OF FACT

1. The Grand Rehabilitation and Nursing at Barnwell is a residential health care facility (nursing home). [Ex I-III.]
2. The Appellant, age [REDACTED] was admitted to the Facility on [REDACTED] 2021 for long term care. The Appellant's [REDACTED] [REDACTED] serves as his designated representative. [Ex III.]
3. The Appellant's current primary medical diagnoses include [REDACTED]
[REDACTED]
[REDACTED]. [Ex III; R. 29:17.]
4. On [REDACTED] 2022, the Appellant [REDACTED] with his [REDACTED] and threatened to [REDACTED] while [REDACTED]. The Facility called emergency

services, and the Appellant was transported to Samaritan Hospital (hospital) and admitted to a medical floor. [Ex 2; R. 16:24, 55:18.]

5. The Facility determined that it cannot meet the needs of the Appellant and issued a Notice for Discharge on [REDACTED] 2022. The Facility's discharge plan is to transfer the Appellant to the hospital. [Ex I.]
6. Timothy Turbett, M.D., the Appellant's physician and Medical Director at the Facility, determined the Appellant's needs cannot be met at the Facility because the Facility does not have the professional staff, nursing staff, or resources to care for his on-going [REDACTED] condition. Dr. Turbett and the medical team at the Facility documented in the medical record on [REDACTED] and [REDACTED], 2022 that the Appellant is unsafe to return to the Facility because he is unable to control his [REDACTED], that services offered by the Facility have thus far been unsuccessful, and that [REDACTED] [REDACTED] were found in his room while the Appellant continues to make statements that he is [REDACTED]. [Ex 1; T. 18-19.]
7. Hospital nursing assessment records from [REDACTED] and [REDACTED], 2022 documented that the Appellant wanted to [REDACTED], including using a "[REDACTED] [REDACTED]". The [REDACTED] record stated that a physician was "updated" and that the Appellant "[REDACTED]". It also documented orders that were issued for 1:1 (staff to patient ration) status and for the Appellant to be checked every 15 minutes. [Ex 2.]

ISSUE

Has the Facility met its burden of proving that the Appellant's need cannot be met at the Facility after reasonable attempts at accommodation and that its discharge plan is appropriate?

APPLICABLE LAW

1. 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. *See also* PHL 2803-z.

2. For the discharge of residents, the facility shall:

(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; and
(vii) permit the resident, their legal representative or health care agent the opportunity to participate in deciding where the resident will reside after discharge from the facility.

10 NYCRR 415.3(i)(1).

3. The Facility has the burden of proving that the "discharge or transfer is/was necessary and the discharge plan appropriate." 10 NYCRR 415.3(i)(2)(iii)(b).

4. When a nursing home sends a resident to the hospital for treatment of acting out behavior, the nursing home is responsible to readmit the resident and/or develop an appropriate discharge plan. A hospital is not considered to be the final discharge plan. DOH *DAL NH-15-06: Transfer & Discharge Requirements for Nursing Homes* (September 23, 2015).

5. A hospital is not an appropriate discharge location. DOH *DAL NH-19-07: Notice of Transfer or Discharge and Permitting Residents to Return* (August 20, 2019, Redistributed October 11, 2022).
6. Federal regulations at 42 CFR 483.15 contain substantially identical provisions to the forgoing provisions of 10 NYCRR 415.3(i).

DISCUSSION

The Facility has proven that the discharge is necessary because the Facility cannot meet the Appellant's needs. 10 NYCRR 415.3(i). The Facility has not proven the discharge location is appropriate. At the hearing, there was no evidence presented that the Appellant has been cleared for discharge from the hospital.

Grounds for Transfer

The Appellant was admitted to the Facility on [REDACTED], 2021, for long term care and his [REDACTED] has served as his representative. [Ex III; R. 29:29.] The Facility is seeking to discharge the Appellant on the grounds that it is necessary for the Appellant's welfare and his needs cannot be met after reasonable attempts at accommodation. 10 NYCRR 415.3(i)(1)(i)(a)(1). [Ex I, 1, 2.] The Appellant's representative has requested the Appellant return to the Facility.

There is no dispute that the Appellant requires the services of a nursing home to attend to his daily physical and medical needs. [Ex 2; R. 28:59.] The Facility's decision to discharge the Appellant is due to his [REDACTED] needs. Timothy Turbett, M.D., the Appellant's physician and Medical Director at the Facility testified that the Appellant has established a [REDACTED] [REDACTED] that has led to at least two occasions on which the Appellant has [REDACTED] [REDACTED] [R. 14:18, 25:32.] On a prior occasion, the Appellant [REDACTED] in his

[REDACTED]. [R. 54:59.] As Michael Hotz, the Facility Administrator, testified, the incident that precipitated the Appellant's current hospital admission is accurately described as the Appellant having "[REDACTED]" and [REDACTED]

[REDACTED]. [R. 54:59.]

Dr. Turbett testified that the Appellant's primary diagnoses are due to his [REDACTED], and he requires a facility that provides [REDACTED] care and constant supervision, as well as daily care for his physical needs. [R. 23:24, 37:33.] The Facility has attempted to meet the Appellant's needs by providing a [REDACTED] who meets with the Appellant regularly and a [REDACTED] nurse practitioner to manage [REDACTED] medications. [R. 16:00, 26:57.] Despite these efforts, the Appellant's behavior remains [REDACTED] and [REDACTED] in a manner of which the Facility cannot reasonably accommodate. Mr. Hotz testified that the interventions the Facility has available are not sufficient to meet the needs related to the Appellant's on-going pattern of behaviors and [REDACTED]. [R. 54:17.]

Dr. Turbett explained that the hospital medical record demonstrates that even if the Appellant is cleared for discharge, the plan of care currently in use at the hospital contains "1:1" care, in which a staff member is always present, or checks by staff every 15 minutes and video monitoring. [R. 21:41, 22:31, 26:10.] As recent as the day before hearing, [REDACTED] medications are being administered through an [REDACTED]. [R. 52:46.] Dr. Turbett determined that the type of supervisory and [REDACTED] care the Appellant needs, which enables him to be "stable," is not available at the Facility because the staffing cannot support this monitoring and a [REDACTED] and emergency medication is not available at all times. [R. 19:28.] The Facility has made reasonable accommodations to care for the Appellant but cannot meet his [REDACTED] needs and ensure his welfare with the resources available. 10 NYCRR 415.3(i)(1)(i)(a)(1).

Discharge Plan

Although grounds for discharge have been established, the Notice of Discharge identified the hospital as the discharge plan. [Ex I.] It is well established that a hospital is not an appropriate discharge location. DOH *DAL NH-19-07: Notice of Transfer or Discharge and Permitting Residents to Return* (August 20, 2019, Redistributed October 11, 2022); 10 NYCRR 415.3(i)(2)(iii)(b). Without an appropriate discharge plan, the Facility would be required to readmit the Appellant. DOH *DAL NH-15-06: Transfer & Discharge Requirements for Nursing Homes* (September 23, 2015). There was no evidence that the Facility has worked with the Appellant's representative in developing a discharge plan. 10 NYCRR 415.3(i)(1)(vi)-(vii).

However, the evidence failed to show that the Appellant has been determined appropriate for discharge from hospital. No evidence was received that demonstrated the hospital has currently ordered the Appellant be discharged or that he does not require further hospitalization. The hospital records showed that as recent as [REDACTED] 2022, the Appellant continued to make statements that indicate his [REDACTED], and he may still require further evaluation and hospitalization. [Ex 2.]

CONCLUSION

The credible and persuasive testimony from Dr. Turbett established that the Appellant's needs cannot be met at the Facility even with reasonable accommodations. 10 NYCRR 415.3(i)(1)(i)(a)(1). The hospital has remained silent as to the Appellant's current condition. Neither the Appellant nor the hospital produced evidence of any kind to demonstrate that the Appellant should return to the Facility. Despite the opportunity, the hospital chose not to participate in the proceedings in any manner whatsoever; therefore, it is deemed the Appellant is

not suitable for discharge from the hospital and remains hospitalized. Due to the lack of proof that the Appellant has been cleared for hospital discharge, the Facility is not required to readmit the Appellant at this time.

Dated: November 4, 2022
Albany, New York

A handwritten signature in cursive script that reads "Rayanne L. Babich". The signature is written in black ink and is positioned above a horizontal line.

Rayanne L. Babich
Administrative Law Judge

TO:

██████████ Appellant
c/o Samaritan Hospital
2215 Burdett Avenue
Troy, New York 12180

██████████ Appellant Representative
████████████████████
████████████████████

Barbara Phair, Esq., for the Facility
Abrams Fensterman, LLP
3 Dakota Drive, Suite 300
Lake Success, New York 11042

Michael Hotz, Administrator
The Grand Rehabilitation and Nursing at Barnwell
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