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NEW YORK STATE OF OPPORTUNITY. Department of Health

KATHY HOCHUL
Governor

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

JOHANNE E. MORNE, M.S.
Acting Executive Deputy Commissioner

September 18, 2023

CERTIFIED MAIL/RETURN RECEIPT

Lourdes Martinez, Esq.
Shepperd Mullin
30 Rockefeller Plaza
New York, New York 10112

[redacted]
c/o Nassau University Hospital
2201 Hempstead Turnpike
East Meadow, New York 11554

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

[redacted]

Appellant,

DECISION

from a determination by Promenade Rehabilitation & Health Care 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: August 21, 2023

Parties: Promenade Rehabilitation & Health Care Center, Respondent
By: Lourdes Martinez, Esq.
lmartinez@sheppardmullin.com

[redacted], *Pro se*, Appellant

Nassau University Hospital, Interested Party
By: Jeremy Debari, SW
jdebari@numc.edu

JURISDICTION

Without notice, Promenade Rehabilitation & Health Care Center (Promenade or facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge [redacted] (Appellant or resident) from the facility after transferring him to a hospital for a [redacted] evaluation. The facility refused to re-admit the resident after he was medically cleared to be discharged, and the resident 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 A, B1-7, C, D1-2, E and F); the testimony of Daniel Buff, MD; Sam Samet, Administrator; and Liza Dowd, Director of Nursing (DON). The Appellant testified in his own behalf and presented no documentary evidence. The Notice of Hearing was admitted as ALJ Exhibit I; the hearing was digitally recorded and made part of the record.

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 short term rehabilitation on [redacted], 2022 from [redacted] Hospital with relevant diagnoses of [redacted]. The resident was discharged from rehabilitation due to his refusal to participate. (Exhs B1 and B2; T Ms. Dowd).

2. On [redacted] 2023, the resident was transferred to Nassau University Hospital (Hospital) for a [redacted] evaluation secondary to [redacted] as exhibited by [redacted], after the resident [redacted] his roommate. (Exh B6; T Mr. Samet).

3. The Hospital cleared the resident to return to the facility; but the facility refused to readmit him, stating that the resident poses a danger to the safety of others in the facility. (Exh B7).

4. On [redacted] 2023, the resident [redacted] a staff member with his wheelchair, while attempting to prevent the resident from bringing a [redacted] up to his room. The resident's [redacted] had brought the [redacted] to the facility, and struggled to control the [redacted] during the altercation. (Exh C).

5. On [redacted] 2022, the resident had arranged for transportation to a medical appointment outside of the facility. The ambulette was not sufficient to accommodate the resident's wheelchair, so he [redacted] on the ambulette with a [redacted] (Exhs D1 and D2; T Mr. Samet).

6. The facility has made numerous referrals to other nursing homes; but none have accepted the resident. The resident has resisted the facility's attempts to include him in discharge planning. (T Mr. Samet and Dr. Buff).

7. The resident goes out on pass frequently, sometimes staying overnight. He is competent and capable of arranging medical appointments, and medication management. The resident can perform many of his activities of daily living (ADLs); but would need some assistance in grooming if he were discharged to the community. The resident has an apartment in [redacted] through [redacted], and he could be approved for housing appropriate for his wheelchair. (T Dr. Buff).

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

While the facility presented sufficient evidence to show that the discharge is necessary, it failed to present an appropriate discharge plan. The facility admitted that it failed to issue a discharge notice because an appropriate discharge location had not been found. (T Mr. Samet).

The facility presented a video in support of its determination to refuse to readmit the resident once he was cleared to return to the facility. (Exh C). The video clearly showed the resident using his wheelchair to [redacted] a staff member. The video also shows an individual identified as the resident's [redacted] attempting to enter an elevator with a [redacted] When the resident became [redacted] the [redacted] started [redacted] on the [redacted] and the resident's [redacted]. The resident claimed that the [redacted] is a [redacted]; but he failed to present any documentation to support this claim. (T [redacted], T Dr. Buff, T Mr. Samet). The resident also claimed that the staff person in the video [redacted] before he [redacted] her; but the video does not support this claim. (T [redacted]).

The facility presented photographs depicting an ambulette with damage to the window and door panels on the driver's side. (Exh D2). Mr. Samet credibly testified that he was called outside and found the resident, [redacted], holding a [redacted] Mr. Samet also saw that the ambulette [redacted] had been [redacted] He calmed the resident down, and learned that the resident had called the ambulette to transport him to an appointment; but the ambulette was not large enough to fit his wheelchair. The resident became [redacted] and [redacted] the ambulette with the [redacted]

Mr. Samet further testified that the facility had called the police at least ten times pertaining to incidents where the resident became [redacted] including an incident where the resident [redacted] his roommate with a "[redacted] The resident admitted to [redacted] his roommate because he felt the roommate was being disrespectful, so the resident "did what he had to do" for his rights. (T [redacted]). Ms. Dowd testified credibly to the resident's flagrant disregard of the facility's rules against smoking. The resident has

asserted that he has the right to smoke, and will continue to do so. (T Ms. Dowd, T [redacted]. Dr. Buff credibly testified that the resident has made [redacted] comments to female staff, and has [redacted] or tried to [redacted] some female staff. (T Dr. Buff). In response, the resident denied [redacted] anyone; he testified that the female staff are [redacted] and that explains why they do not want to assist him. (T [redacted]

The resident's assertions in response to the evidence presented by the facility hold little weight. He takes no responsibility for his actions, attempting to rationalize his inappropriate behavior, and his inability to control his anger. The credible evidence supports the facility's allegations that the safety of others in the facility would be at risk if the resident was returned.

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 proposed discharging the resident to the community. Mr. Samet testified that the resident has an apartment in [redacted] subsidized by [redacted] Based on the resident's need for a wheelchair, he could request an ADA compliant apartment. Dr. Buff testified that the resident could be safely discharged to an ADA compliant apartment with home care assistance. Dr. Buff also testified that certain shelters would be appropriate to meet the resident's needs; but generally, discharge to a shelter is a plan of last resort. The resident has resisted efforts to find appropriate housing because his [redacted] currently resides in his apartment, so he would prefer to remain in the facility until he can find another apartment. However, the resident is not entitled to remain in a nursing home if he does not require skilled nursing care.

The discharge plan is appropriate in that it would meet the resident's needs. However, a discharge plan is appropriate only if it can be implemented. As of the date of the hearing, the proposed discharge could not be implemented because the resident has not cooperated with requesting an ADA compliant apartment from [redacted] The facility must readmit the resident until an appropriate discharge plan may be implemented.

ORDER

Promenade Rehabilitation & Health Care Center has established that the Appellant's discharge is necessary, but failed to establish an appropriate discharge plan.

1. Pursuant to 10 NYCRR § 415.3(i)(2)(i)(d), the facility is Ordered to re-admit the Resident until an appropriate discharge plan may be implemented.
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
September 18, 2023

JEAN T. CARNEY
Administrative Law Judge

TO: Lourdes Martinez, Esq.
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New York, New York 10112

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