



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

June 10, 2020

CERTIFIED MAIL/RETURN RECEIPT

Isola Williams, SW
Brooklyn Gardens Nursing & Rehabilitation
835 Herkimer Street
Brooklyn, New York 11233

[REDACTED]
c/o Brooklyn Gardens Nursing
& Rehabilitation
835 Herkimer Street
Brooklyn, New York 11233

Jota Borgmann, Esq.
Mobilization for Justice
100 William Street, 6th Floor
New York, New York 10038

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

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,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication


JFH: cmg
Enclosure

cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan
SAPA File
BOA by scan

STATE OF NEW YORK

DEPARTMENT OF HEALTH

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


Appellant, :

from a determination by
BROOKLYN GARDENS NURSING AND REHABILITATION CENTER :
Respondent, :

to discharge him from a residential health care facility.
-----X

ORIGINAL

Hearing Before:

Sean D. O'Brien
Administrative Law Judge

Held at:


Brooklyn Gardens Nursing & Rehab Ctr
835 Herkimer Street
Brooklyn, New York 11233

Hearing Dates:

April 21, 2020
May 14, 2020
May 21, 2020

Parties:

Brooklyn Gardens Nursing and
Rehabilitation Center,
835 Herkimer Street
Brooklyn, New York 11233
By: Barbara S. Phair, Esq
3 Dakota Drive, Suite 300
Lake Success, New York 11042


By: Jota Borgmann, Esq.
Mobilization For Justice, Inc.
100 William Street, 6th Floor
New York, New York 10038

JURISDICTION

By notice dated [REDACTED] 2020, Brooklyn Gardens Nursing and Rehabilitation Center (the Facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge/transfer [REDACTED] (the Appellant) from the Facility. The Appellant appealed the determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) Section 415.3(i).

The Appellant on [REDACTED], 2020, was afforded the opportunity to obtain legal counsel and he did so on [REDACTED], 2020, when his attorney from the Mobilization For Justice Legal Services Center appeared and requested an adjournment of the April 30, 2020, hearing date. A Hearing on this appeal was conducted via WEB EX on May 14, 2020, and May 21, 2020, with both the Facility and Appellant represented by legal counsel.

HEARING RECORD

Facility Exhibits: 1-10

Facility Witnesses: Isola Williams, Social Worker
Dr. Hanan Miller, Attending Physician
Mohamed Aly, Physical Therapy Team Leader
Leah Holland, LPN, Charge Nurse

Appellant's Exhibits: A-R

Appellant's Witness: [REDACTED]
Aimee Castoire, Medicaid Coordinator

Administrative Law Judge (ALJ) Exhibit I: Notice of Hearing with Discharge Notice.
ALJ Exhibit II: Notice of the continuation of the Hearing.

A digital recording of the hearing was made part of the hearing record via WEB EX.

ISSUE

Has the Facility established that the determination to transfer/discharge the Appellant is correct and that its discharge plan 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. Conflicting evidence, if any, was considered and rejected in favor of cited evidence.

1. The Appellant is a [REDACTED] year-old male who was admitted to the Facility on [REDACTED] 2019, after his hospitalization at [REDACTED] Hospital with a diagnosis of [REDACTED] due to [REDACTED] of the [REDACTED]). (Exhibits 2, M).

2. The Appellant's medical conditions include: [REDACTED] and [REDACTED] (Exhibits 2, M).

3. By notice dated [REDACTED] 2020, the Facility determined to discharge the Appellant on [REDACTED] 2020, because his "...health has improved sufficiently..." so that he no longer needs the services of a skilled nursing facility. (Exhibits 1, 3, 5, 7, 9, 10; T. Miller 12:22, T. Aly 35:09).

4. The Facility determined to discharge the Appellant to an assisted living setting. In particular, [REDACTED] (Exhibits 1, 3, 5; T. Williams 2h:06).

5. At the time of his admission to the Facility, the Appellant needed assistance in all of his Activities of Daily Living (ADLs) including ambulating, transferring and personal hygiene. (Exhibits 3, 5, 7, 9, 10; T. Aly 31:46).

6. The Appellant has completed his rehabilitation to the point where he no longer needs skilled nursing care nor does he need assistance with his ADLs. (Exhibits 3, 5, 7, 8, 9, 10, H; T. Miller 12:22, T. Aly 35:18, T. Holland 46:43).

7. The Appellant, until the recent COVID-19 pandemic shutdown, regularly went into the community on pass without aides from the Facility. (Exhibits 3, 5, 7, 9, 10, E, F, G, N, O; T. Holland, 46:20, 55:39).

8. The Appellant can ambulate with a roller walker up to [REDACTED] feet and rest as needed. (Exhibits 3, 5, 9; T. Aly 43:57 T. Holland 46:20).

9. The Appellant was accepted at the assisted living facility, [REDACTED]. (Exhibits 3, 5, 6, Q; T. Williams 2h:06).

10. The assisted living services by [REDACTED] will include social services, medical supervision and recreation services while providing the Appellant with more independence. (T. Williams 2h:07).

11. It is the professional opinion of the Appellant's caregivers at the Facility, including the Appellant's Attending Physician, Social Worker, and his rehabilitation and occupational team supervisor that Appellant's discharge to an assisted living setting, in particular, [REDACTED] is appropriate. (Exhibits 3, 5, 7, 8, 9; T. Miller 12:22, T. Aly 35:09, T. Holland 56:31 T. Williams 2h:08).

12. The Nursing Home did not involve the Appellant nor his family in the discharge planning process and in particular the referral and determination to discharge Appellant to [REDACTED] as required by 10 NYCRR 415.11(d). (Exhibits 10, E, G, M, N, O, Q; T. Williams 1h:57, 2h:30, 2h:46 T. [REDACTED] 28:32, 45:50, 51:30).

13. The Appellant remains at the Facility 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 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 Sections 415(i)(1)(i)(a)(1) and (2), which state in relevant part

(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 at 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....

Under the hearing procedures at 10 NYCRR Section §415.3(i)(2)(iii), the Facility bears the burden to prove a discharge is 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 on [REDACTED] 2019, for rehabilitation after suffering a [REDACTED]. His medical conditions include: [REDACTED]. At the time of his admission to the Facility, the Appellant required assistance with the ADLs of ambulating, transferring and personal hygiene. (Exhibits 2, 3, 5; T. Miller, 11:42 T. Aly 31:46).

By [REDACTED], 2020, the Appellant made sufficient improvements in all ADL areas to the point where the Appellant needs no further rehabilitation and skilled nursing care at the Facility. The Appellant can ambulate with a roller walker for distances of up to [REDACTED] feet before needing a rest. (Exhibits 3, 5, 7, 8, 9, 10; T. Miller 12:04, T. Aly 43:57, T. Holland 56:31).

Mr. [REDACTED] the team leader of rehabilitation and occupational services for the Appellant, testified the Appellant successfully completed rehabilitation. Mr. [REDACTED] also testified Appellant does not require skilled nursing care and is no longer a candidate for residential rehabilitation therapy. (Exhibits 3, 8, 9; T. Aly 34:30).

The Appellant's Social Worker, Ms. Isola Williams, testified the Appellant was denied placement at a number of assisted living centers due to his age and income level before being accepted at [REDACTED]. Ms. Williams further testified the goal for the Appellant was for him to leave the skilled nursing facility and transition to an assisted living setting with a lower level care and more independence for the Appellant. (Exhibits 3, 6, 8, 10, E, G, O, Q; T. Williams 2h:07).

The Facility coordinated in obtaining an assisted living arrangement for the Appellant. The services of [REDACTED] include social services, recreation services and medical supervision to assist the Appellant in the monitoring of his medical conditions. (Exhibits 6, 8, 10, G, Q; T. Williams 2h:08).

Importantly, Dr. Elliot Schwartz, the Medical Director of the Facility, wrote in a statement "...the resident [Appellant] is no longer appropriate for Skilled Nursing Care." Dr. Schwartz further stated, "[i]t is my determination that [the Appellant's] needs can be met at [REDACTED] [REDACTED]..." (Exhibit 5). This statement was supported by the Appellant's attending physician, Dr. Hanan Miller, who stated the Appellant is medically stable to be discharged to an assisted living location. (Exhibit 7; T. Miller 12:22).

The Appellant testified on his own behalf and made it known he does want to be discharged because he feels uncomfortable in going to [REDACTED] without physically visiting it. (T. [REDACTED] 55:20, 1h:07). In addition, the Facility failed to work with the Appellant in obtaining his preferences on where he wishes to be discharged. (T. [REDACTED] 45:40, 51:35).

While the offered on-line "virtual tour" of [REDACTED] is an acceptable option during the COVID-19 shutdown, such a tour is not the same as actually visiting a location as evidenced by the Appellant's visit on [REDACTED], 2020, to a different assisted living location where the Appellant

saw that location's unsuitable conditions. (T. [REDACTED] 34:00-37:30. In addition, the Appellant made it known to his social worker he wished to stay in [REDACTED] where his family is located. (T. [REDACTED] 45:50, 57:30).

The discharge plan to [REDACTED] is not appropriate for the Appellant because the Facility failed to work with the Appellant and his family to find an appropriate discharge location as required by 10 NYCRR 415.11(d)(3). The regulation requires a Facility to prepare 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)).

In the present case, the documentary evidence and testimony of the witnesses are clear that Appellant's family, in particular, the Appellant's [REDACTED] was not invited to any of the Facility's discharge discussions held intermittently for the Appellant from [REDACTED] 2019 to [REDACTED] 2020. (Exhibits 10, E, G, M, N, O, P, Q; T. Williams 2h:30, T. [REDACTED] 45:55). Even more significant is the Appellant himself was not consulted as to the Facility's specific plan to discharge Appellant to [REDACTED] until the day the Discharge Notice was served on the Appellant. (T. [REDACTED] 29:27, 51:35). In [REDACTED] and [REDACTED] 2020 referrals to discharge Appellant to assisted living locations were made by Facility social workers, but with no input or notice to the Appellant. (Exhibits 10, G, Q).

While the Appellant no longer needs skilled nursing care, the Facility must at least attempt to work with the resident on a regular basis to determine what his needs and preferences are for an appropriate and safe discharge. In this case the social workers at the Facility failed to regularly engage the Appellant and his family in proper and informed discharge planning even though the Facility's medical and physical therapy staffs successfully prepared Appellant for discharge.

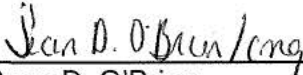
CONCLUSION

Brooklyn Gardens Nursing and Rehabilitation Center has proven that Appellant no longer needs the skilled nursing care of a nursing home. However, Brooklyn Gardens Nursing and Rehabilitation's proposed discharge plan for Appellant is not appropriate.

DECISION


1. The appeal by Appellant is therefore AFFIRMED.
2. The Facility is not authorized to discharge Appellant in accordance with the [REDACTED] 2020, Discharge Notice.
3. 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 10, 2020



Sean D. O'Brien
Administrative Law Judge

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