



Department
of Health

KATHY HOCHUL
Governor

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

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

November 24, 2021

CERTIFIED MAIL/RETURN RECEIPT

██████████ ██████████
c/o Queens Hospital Center
82-68 164th Street
Queens, New York 11432

Mary Richardson, LCSW
Queens Hospital Center
82-68 164th Street
Queens, New York 11432

Daniel Kret, Administrator
Highland Care Center
91-31 175 Street
Queens, New York 11432

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

Dawn MacKillop-Soller
Acting Chief Administrative Law Judge
Bureau of Adjudication

DXM: nm
Enclosure

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

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

DECISION

Highland Nursing Care and Rehabilitation
Center, Inc. a/k/a Highland Care Center
Respondent,

to discharge him from a residential health
facility.

On ██████████ ██████████, 2021, Highland Nursing Care and Rehabilitation Center, Inc., also known as Highland Care Center (Facility), transferred resident ██████████ ██████████ (Appellant) to Queens Hospital in Queens, New York (Hospital). On November 12, 2021, the Hospital requested a hearing on behalf of the Appellant to contest the Facility's determination not to readmit him as a resident. On November 18, 2021, a hearing was held via videoconference before Dawn MacKillop-Soller, Administrative Law Judge.

The Appellant appeared at the hearing. The Hospital appeared at the hearing on the Appellant's behalf.

██████████ Hagop Gorgissian, M.D. and clinical
██████████ Miryam Sorkin, PSY.D. testified in support of

3. Currently the Appellant's medications include [REDACTED] [REDACTED] [REDACTED]. He is not independent with personal care and activities of daily living and requires assistance with dressing, toileting, bathing, and taking his medications. He walks and eats independently but requires some assistance and supervision with these tasks. (Exhibits 1, A; Recording @ 10:41-15:20, 1:15:36.)

4. On [REDACTED] [REDACTED] 2021, the Facility transferred the Appellant to Queens Hospital for [REDACTED] evaluation due to concerns that his [REDACTED] and [REDACTED] [REDACTED] were unsafe for him to remain at the Facility. These behaviors included cursing and standing on a bed while "[REDACTED] [REDACTED]" and "[REDACTED] [REDACTED] [REDACTED] staff," appearing "[REDACTED] [REDACTED]," attempting "to [REDACTED] residents and staff, and wandering "from room to (sic) rooms." (Exhibit 2.)

5. Hospital [REDACTED] and medical assessments confirm the Appellant is medically stable and does not require continued inpatient care. The Hospital advised the Facility on [REDACTED], 2021 that the Appellant was ready to return to the Facility. The Facility, however, refuses to accept his return, and has proposed no other discharge plan. (Exhibit A, ALJ I; Recording @ 13:31, 13:48-14:06, 1:12:41.)

6. A Preadmission Screening and Resident Review (PASRR) completed at the request of the Hospital on [REDACTED] 2021 by Ascend Management Innovations determined that nursing home level care is appropriate and inpatient psychiatric care is not required. (Exhibit A, ALJ I.)

7. A written Notice of Transfer/Discharge identifying the reason for the discharge and the discharge location was not prepared or provided to the Appellant or his representative. (Recording @ 09:49-11:01, 1:12:21.)

8. 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 @ 3:12.)

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:

...

- (3) the safety of individuals in the facility is endangered; or
 (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: (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:
 - (a) the safety of individuals in the facility would be endangered;
 - (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 is appropriate. 10 NYCRR 415.3(i)(2)(iii)(b).

Discussion

Hospital nursing notes document that on [REDACTED] [REDACTED] 2021, the Appellant was transferred to the Hospital for [REDACTED] evaluation due to his [REDACTED] and [REDACTED] [REDACTED] behaviors. (Exhibit 2.) He was admitted to a medical unit at the Hospital with a focus in [REDACTED] care. (Recording @ 30:57-31:34, 48:05-42:24.) In the months preceding the transfer, the Appellant's [REDACTED] behaviors included attempting to [REDACTED] staff and [REDACTED] at

them, [REDACTED] in the hallway, taking residents' belongings, and [REDACTED] an [REDACTED] (Exhibit 2.)

Nursing homes seeking involuntary discharge of residents under any circumstances are required to give appropriate written notice and to establish permissible grounds for discharge, both of which are missing in this case. Nursing homes are required to provide written notice "as soon as practicable" but "no later than the date on which a determination was made to transfer," yet the Facility never provided the Appellant or his representative with this important notice. 10 NYCRR 415.3(i); 42 CFR 483.15(c).

The purpose of the notice, among other things, is to disclose details of the discharge process and, in cases such as this, provide contact information for "the agency responsible for the protection and advocacy of mentally ill individuals." 10 NYCRR 415.3(v); 42 CFR 483.15(c). The Facility's claim that it had no time to prepare or provide the notice because the transfer was emergent is no excuse for its failure to meet these mandatory notice requirements. (9:49-10:40, 1:12:21.) The Facility had ample time to complete this process after the Appellant's transfer was completed or, at the very least, upon his

admission to the Hospital almost two months ago. (Exhibit A.)

Also missing from the Appellant's clinical record is proper documentation by a Facility physician explaining why the Appellant's discharge from this nursing home for reasons of health or safety was necessary, as required. 10 NYCRR 415.3(i); 42 CFR 483.15(c). The Facility is required to "ensure complete documentation" by a physician made at or near the time of the transfer. 10 NYCRR 415.3(i). A progress note recorded on the date of the transfer by Facility Medical Director Dr. Younesi stating the Appellant's diagnoses hardly meets this requirement. (Exhibit 2.)

The Facility also failed in its obligation to make "reasonable attempts at accommodation" prior to transferring the Appellant. 10 NYCRR 415.3(i). The Facility claims it has limited staff to handle the Appellant's challenging behaviors. (Recording @ 46:37.) In accepting the Appellant as a resident under its care, however, the Facility was required to explore all viable options to address such behaviors, such as increased supervision and assessments that include medical evaluations and drug changes to meet his needs. (Recording @ 1:00:12-1:03:05.) Hospital [REDACTED] Miriam Sorkin, PSY.D. also described

other measures that have benefitted the Appellant at the Hospital include ensuring he has access to walks, various books, and his favorite snacks. (Exhibit 2; Recording @ 1:04:37-1:04:47.)

Nursing homes are required to provide "adequate and appropriate medical care" to residents, which includes necessary adjustments to treatment and drug plans. 10 NYCRR 415.3(f)(1)(i), 415.3(e)(1)(i). The evidence established that upon his admission at the Hospital, the Appellant required treatment for [REDACTED] [REDACTED] affecting [REDACTED] [REDACTED] and drug adjustments to address his [REDACTED] [REDACTED], specifically changes to the timing of the administration of drugs and the dosage amounts. Hospital [REDACTED] Hagop Gorgissian, M.D. explained these changes as [REDACTED] 250mg in the morning and 1500 mg at bedtime, [REDACTED] 500mg at lunchtime and 15mg at bedtime, and [REDACTED] 50mg at bedtime. (Recording @ 10:41-15:20.) While the Facility was giving the Appellant these same drugs, Dr. Gorgissian explained that it was not administering them timely or in the proper dosage amount to effectively treat his conditions. (Recording @ 1:28:26-1:30:25.)

Dr. Gorgissian also emphasized the importance of the timely and proper administration of these drugs, all of which are available at the Facility. (Recording @ 24:11-

24:22, 36:12-40:10, 1:26:43-1:27:19.) While the Facility raised concerns about its inability to administer the Appellant [REDACTED] - a drug the Hospital ordered pro re nata (PRN) or on an as needed basis - Dr. Sorkin explained that the Appellant no longer requires that drug and hasn't received it since [REDACTED] [REDACTED] (Recording @ 25:24-26:39, 32:31-32:42, 33:41, 35:40-36:12, 39:39.)

The Facility also failed to meet its burden of proving an appropriate discharge plan. 10 NYCRR 415.3(i). 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. To the contrary, the [REDACTED] and medical teams at the Hospital and the PSSR findings confirm the Appellant's stabilization and that he is safe for discharge back to the Facility where he can receive the level of care he requires. (Exhibit A; Recording @ 1:16:36-1:25:25.) Dr. Sorkin confirmed that the Appellant does not meet the criteria for an in-patient [REDACTED] unit because he is not a danger to himself or others. (Exhibit A; Recording @ 31:53-32:03.) The Facility produced no evidence, such as an evaluation performed at the Hospital, to dispute these professional opinions.

The Facility's refusal to readmit the Appellant on the ground that it lacks the staffing to provide the care and oversight he requires is contrary to its duties under the regulation to provide such care or to instead locate an appropriate discharge location that will provide it. 10 NYCRR 415.3(i)(1)(i), 415.3(f)(1)(i), and 415.3(c)(5). (Recording @ 48:24-48:42.) The medical evidence establishes that the level of care the Appellant requires includes assistance and with personal care, completing activities of daily living, and taking his medications – tasks suitable for nursing homes to provide. (Exhibit A; Recording @ 46:37.)

Once the Hospital evaluations confirmed the Appellant's stabilization and that he was safe for discharge, the Facility remained responsible for readmitting him back into its care. Department policy specifically prohibits 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.


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 @ 3:10.)



Order

1. The Facility has failed to establish that its discharge was necessary or that the discharge plan is appropriate. The Facility was not authorized to discharge the Appellant; 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
November 24, 2021


Dawn MacKillop-Soller
Administrative Law Judge

To:  
c/o Queens Hospital Center
82-68 164th Street
Queens, New York 11432

Mary Richardson, LCSW
Queens Hospital Center
82-68 164th Street
Queens, New York 11432

Daniel Kret, Administrator
Highland Care Center
91-31 175 Street
Queens, New York 11432