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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 15, 2022

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o Safire Rehabilitation of the Northtowns
2799 Sheridan Drive
Tonawanda, New York 14150

Rachel Barbaro, Assistant NHA
Safire Rehabilitation of the Northtowns
2799 Sheridan Drive
Tonawanda, New York 14150

Bria Lewis, Esq.
Center for Elder Law and Justice
438 Main Street, Suite 1200
Buffalo, New York 14202

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

██████████

Appellant,

from a determination by

Safire Rehabilitation of the Northtowns

Respondent,

to discharge him from a residential
health care facility.

COPY

DECISION
AND
ORDER

Hearing Before: Natalie J. Bordeaux
Administrative Law Judge

Held via: WebEx Videoconference

Hearing Date: February 7, 2022
The record closed February 11, 2022

Parties: Safire Rehabilitation of the Northtowns
2799 Sheridan Drive
Tonawanda, NY 14150
By: Rachel Barbaro, Assistant Administrator

██████████

By: Bria Lewis, Esq.
Center for Law and Justice
438 Main Street, Suite 1200
Buffalo, NY 14202

JURISDICTION

By notice dated [REDACTED], 2022, Safire Rehabilitation of the Northtowns (Facility), a residential health care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] (Appellant). The Appellant appealed the discharge determination to the New York State Department of Health (Department) pursuant to 10 NYCRR § 415.3(i).

HEARING RECORD

- Facility witnesses: Rachel Barbaro, Assistant Administrator
Alisa Mazurkiewicz, Director of Social Services
Stephen Kociszewski, Physical Therapist
- Facility exhibits: 1-11
- Appellant witnesses: [REDACTED] Appellant
- Appellant exhibits: 2-3
- ALJ exhibits: I-II

A digital recording of the hearing was made (1:20:19 in duration).

ISSUES

Has Safire Rehabilitation of the Northtowns established that its determination to discharge the Appellant was correct and that its discharge plan was appropriate?

FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old male who was transferred from [REDACTED] to the Facility on [REDACTED] 2020 for short-term rehabilitation to aid his recovery after an [REDACTED]. The accident had caused [REDACTED] and [REDACTED]

[REDACTED]

[REDACTED] (Facility Exhibit 11.)

2. The Appellant's [REDACTED] necessitated the [REDACTED], for which he requires [REDACTED]. He has been trained, and is able to perform, required daily maintenance. (Facility Exhibit 10.)
3. The Appellant ambulates with a wheelchair unassisted. He is independent with all activities of daily living (ADLs) other than walking, for which he requires the assistance of two people. (Facility Exhibit 7; Recording @ 21:40.)
4. By notice dated [REDACTED] 2022, the Facility determined to discharge the Appellant, effective [REDACTED] 2022, because his health has improved sufficiently that he no longer requires the services provided by the facility. The notice advised the Appellant that he would be discharged to [REDACTED] shelter, located at 1 [REDACTED] [REDACTED] (Facility Exhibit 2.)
5. The Appellant's clinical record contains documentation from his physician that his condition has improved such that he no longer requires the services of a nursing home, and that discharge to the community is appropriate. (Facility Exhibit 1.)
6. On January 12, 2022, the Appellant requested this hearing to contest the Facility's discharge determination. He remains at the Facility pending the hearing's outcome.

APPLICABLE LAW

A residential health care facility (also referred to in the 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 §§ 2801(2)-(3); 10 NYCRR § 415.2(k).

Department regulations at 10 NYCRR § 415.3(i) describe the transfer and discharge rights of residential health care facility residents. They state, 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:

(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;

When the facility transfers or discharges a resident because the resident's health has improved sufficiently that the resident no longer needs the services provided by the facility, the facility shall ensure that the resident's clinical record contains complete documentation made by the resident's physician and, as appropriate, the resident's interdisciplinary care team. 10 NYCRR § 415.3(i)(1)(ii)(a). The residential health care facility must prove by substantial evidence that the discharge was necessary and the discharge plan appropriate. 10 NYCRR § 415.3(i)(2)(iii)(b); State Administrative Procedure Act § 306(1).

DISCUSSION

The Appellant was admitted to the Facility on [REDACTED] 2020 for short-term rehabilitation, post-hospitalization. (Facility Exhibit 11.) Although he is still wheelchair-bound, he is now independently capable of performing all ADLs. (Facility Exhibit 7; Recording @ 21:40.) He is also able to [REDACTED] without assistance. (Facility Exhibit 10.)

The Appellant was discharged from occupational and physical therapy in [REDACTED] 2021 after refusing continued rehabilitation. (Facility Exhibit 5.) Since then, however, his physical condition has deteriorated, likely due to lack of activity, which has caused him to again require

those therapies. (Facility Exhibits 7-9; Recording @ 36:35, 1:14:00.) He is already obtaining required [REDACTED] and [REDACTED] care as an outpatient and would, similarly, be able to receive physical therapy in the community. (Facility Exhibit 10.) His decline while he remains in the nursing home supports the Facility's conclusion that a continued nursing home stay is not in his best interest.

Although the Appellant insisted that he requires nursing home care until he is able to walk properly, a process impeded by an [REDACTED] (Recording @ 32:52), he also expressed a desire to remain in nursing home care until his [REDACTED] (Recording @ 1:08:03.) He presented no medical evidence to support his claims that these or any other conditions require continued nursing home care. The Facility has established that the Appellant's health has improved sufficiently that he no longer requires the services provided by the facility.

At the hearing, the Appellant stated that he sought a transfer to another nursing home in the [REDACTED] area. (Recording 1:07:35.) Alisa Mazurkiewicz, Director of Social Services, met with the Appellant repeatedly to accommodate the Appellant's expressed discharge preferences and avert discharge to a shelter. She sent referrals to several nursing homes in the [REDACTED] area, but none were willing to accept the Appellant because he has no documented need for nursing home care. (Facility Exhibit 3.) Ms. Mazurkiewicz also attempted placement for the Appellant in assisted living facilities. However, he was rejected due to his age. (Recording @ 47:50.)

Ms. Mazurkiewicz sent a referral on the Appellant's behalf to [REDACTED] [REDACTED] to provide community-based housing assistance. She also provided several income-based housing applications to the Appellant and provided additional phone numbers to contact for housing applications. (Facility Exhibits 3 and 6.) He completed a

housing application for a [REDACTED]-based housing project but did not call other phone numbers provided for more housing prospects. (Recording @ 59:00, 1:06:50.)

The Facility appears to have made extensive efforts to develop a discharge plan. However, the issue remains whether discharge to the [REDACTED] is appropriate for the Appellant, given his physical limitations and medical needs. A shelter for adults cannot legally admit anyone who requires services beyond those that the shelter is authorized to provide by law and regulation, and by its operational plan, and/or who is incapable of ambulation on stairs without personal assistance, unless such a person can be assigned a room on a floor with ground level egress or the shelter is equipped with an elevator. 18 NYCRR 491.9(c)(1)&(5).

Before issuing the discharge notice, the Facility failed to ascertain whether the [REDACTED] was able to accommodate the Appellant's needs, including wheelchair-accessibility with ground floor accommodations or a working elevator, and a private restroom for safe and [REDACTED]. Since the Appellant's counsel requested additional time to obtain a letter of support from the Appellant's physician, the Facility was afforded the same amount of time within which to obtain additional information from the [REDACTED].

The Appellant's attorney did not subsequently submit any professional medical opinion contrary to the documented opinion of the Facility's medical team that the Appellant is no longer in need of nursing home care. Nor, however, did the Facility provide any additional information about the shelter. The Appellant's attorney did contact the [REDACTED] and was informed that it cannot accept individuals with [REDACTED] (ALJ Exhibit II.) The Facility has failed to establish that its discharge plan was appropriate. As such, its discharge plan cannot be sustained.

The Facility's goal in rendering care to the Appellant (a sub-acute rehabilitation patient) is to help him safely return to a lower level of care and a less restrictive setting. That goal has already been met. The Facility is required to continue to devise other discharge options for the Appellant.

The Appellant articulated no realistic objectives at the hearing, instead repeating his preference for nursing home care despite consistent rejections of his referrals by other nursing homes. He is advised and encouraged to work with Facility staff in its continued efforts to find an alternate discharge location. Future proposed discharge plans will again be assessed as to their appropriateness rather than whether they are perceived by the Appellant as ideal. However, the Facility is not authorized to discharge the Appellant based upon its currently proposed discharge plan.

DECISION AND ORDER

Safire Rehabilitation of the Northtowns has established that its determination to discharge the Appellant was correct.

Safire Rehabilitation of the Northtowns has failed to establish that its discharge plan for the Appellant was appropriate.

Safire Rehabilitation of the Northtowns is precluded from discharging the Appellant based upon the [REDACTED] 2022 discharge notice.

Dated: February 15, 2022
Menands, New York



Natalie J. Bordeaux
Administrative Law Judge