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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

December 14, 2022

CERTIFIED MAIL/RETURN RECEIPT

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Forest Hills Care Center
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Felicia Johnson, DSW
Brookhaven Rehabilitation and Health
Care Center
250 Beach 17th Street
Far Rockaway, New York 11691



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
Chief Administrative Law Judge
Bureau of Adjudication

NJB: cmg
Enclosure

JURISDICTION

By notice dated [REDACTED] 2022, Forest Hills Care Center (Forest Hills or Facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] [REDACTED] (Appellant or Resident) from the Facility on the grounds that (1) the Appellant's needs cannot be met by the Facility; and (2) the health and/or safety of individuals would otherwise be endangered. The Appellant was discharged on [REDACTED], 2022 to Brookhaven Rehabilitation and Health Care Center (Brookhaven). Ms. [REDACTED] the Appellant's [REDACTED] and health care proxy, appealed the discharge 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 Progress Notes (Exhibit 1) and the testimony of Daniel Culliford, M.D., Consultant Psychiatrist; Evangeline Bustalinio, Director of Nursing (DON); and Claire Agajan, Director of Social Services. The Appellant's appearance was excused on consent of the parties; and Ms. [REDACTED] testified on his behalf. In addition, testimony was taken from Felicia Johnson, Director of Social Services at Brookhaven. ALJ Exhibits I (Notice of Hearing with Discharge Notice) and II (Resident's face sheet) were admitted; and the hearing was digitally recorded.

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 Appellant is an [REDACTED]-year-old male who was admitted to the Facility on [REDACTED] 2022 from [REDACTED] for short term rehabilitation, with relevant diagnoses of [REDACTED]. (Exhs II and 1; T Ms. Bustalinio).

2. The Appellant improved physically, but his [REDACTED] worsened. The Appellant would get up in the middle of the night, would wander into other residents' rooms, and would try to [REDACTED]. (T Ms. Bustalinio and Ms. Agajan).

3. The Facility would redirect the Appellant, put him on one-to-one supervision, and used a wander guard for his safety. The Facility determined that the Appellant would benefit from placement in a facility with a [REDACTED]. (T Dr. Culliford and Ms. Bustalinio).

4. The Appellant's [REDACTED] opposed transferring her [REDACTED] to Brookhaven. Ms. [REDACTED] would visit her [REDACTED] daily, sometimes multiple times a day, while he was in Forest Hills. Since his transfer to Brookhaven, Ms. [REDACTED] can only make the trip once a week. (T Ms. Agajan and Ms. [REDACTED]).

5. The Appellant is in the [REDACTED]. As the disease has progressed, he has been losing the ability to [REDACTED], and primarily [REDACTED]. His treatment team at Brookhaven does not [REDACTED]. (Exh 1; T Dr. Culliford and Ms. [REDACTED]).

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 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;
- (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

The Facility failed to provide adequate notice of discharge to the Appellant. The discharge notice admitted into evidence is dated [REDACTED] 2022; eighteen days after the Appellant was discharged to Brookhaven. The facility claimed that a discharge notice was given to the Appellant on the day he was discharged; but failed to provide that notice at the hearing, despite being given an opportunity to do so. In addition, Ms. [REDACTED] credibly testified to not being notified of her [REDACTED] discharge until after he was already at Brookhaven. The facility failed to comply with 10 NYCRR § 415.3(i)(1)(iii) when it did not give the Appellant and Ms. [REDACTED] advance notice of the discharge.


The facility failed to show that the discharge is necessary. The discharge notice alleges that the Appellant's needs cannot be met by the facility. In support of these allegations, the facility submitted progress notes documenting staff concerns that the Appellant wanders and has poor safety awareness. These are well known behaviors in

ORDER

Forest Hills has failed to establish that the Appellant's discharge is necessary, and its discharge plan is appropriate.

1. The Appellant must be re-admitted to Forest Hills to the first available bed.
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
December 13, 2022**


JEAN T. CARNEY
Administrative Law Judge

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[REDACTED]
[REDACTED]
[REDACTED]
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