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Department of Health

KATHY HOCHUL
Governor

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

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

November 8, 2023

CERTIFIED MAIL/RETURN RECEIPT

██████████ ██████████
Rockaway Care Center
353 Beach 48th Street
Far Rockaway, New York 11691

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

Alyssa Braunstein, DSW
Rockaway Care Center
353 Beach 48th Street
Far Rockaway, New York 11691

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,

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: nxm
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

Rockaway Care Center,

Respondent,

to discharge him from a residential
health care facility.

COPY

DECISION
AFTER HEARING

#DA23-6179

Hearing Before: Kendra Vergason
Administrative Law Judge

Held at: New York State Department of Health
by videoconference
October 31, 2023

Parties: Rockaway Care Center
353 Beach 48th Street
Far Rockaway, New York 11691
ABraunstein@rockawaycc.com
By: Barbara Phair, Esq.
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3 Dakota Drive, Suite 300
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██████████
Rockaway Care Center
Pro Se

JURISDICTION

Rockaway Care Center (Respondent), a residential health care facility (RHCF) subject to Article 28 of the Public Health Law, determined to discharge [REDACTED] (Appellant) from care and treatment in its nursing home to the [REDACTED] a shelter. The Appellant appealed the discharge determination to the New York State Department of Health pursuant to 10 NYCRR 415.3(i).

Evidence was received and witnesses were examined. A digital recording was made of the proceeding (51:27 in duration).

HEARING RECORD

Respondent Witnesses: Tovia Lent, MD
Alyssa Braunstein, Director of Social Work
Jeane McMahan, RN, Nursing Supervisor
Ward Tucker, Director of Rehab

Respondent Exhibits: 1 – 8

Appellant Witnesses: [REDACTED] Appellant

Appellant Exhibits: None

ALJ Exhibit: I

SUMMARY OF FACTS

1. Respondent Rockaway Care Center is a residential health care facility, specifically a nursing home within the meaning of PHL 2801.2, located in Far Rockaway, New York.

2. Appellant [REDACTED] age [REDACTED] was admitted as a resident on [REDACTED], 2023, for short term rehabilitation after hospitalization for [REDACTED], with diagnoses that

include [REDACTED]. (Exhibits 1, 4.)

3. By notice dated [REDACTED] 2023, the Respondent advised the Appellant of its determination to discharge him on [REDACTED] 2023, on the grounds that his health has improved sufficiently that he no longer needs the services provided by the facility. (Exhibit ALJ I.)

4. During his stay at the facility, the Appellant received physical and occupational therapy services to address difficulty with walking, toileting, dressing and grooming. (Recording @15:15.) He was discharged from physical therapy (PT) on [REDACTED], 2023, and from occupational therapy (OT) on [REDACTED], 2023, because he was independent with ambulation, stairs and ADLs. (Exhibit 2; Recording @15:21.)

5. The Appellant's treating physician at the facility has determined and documented in his medical record that he is "medically cleared to go to the shelter." (Exhibit 1)

6. The Appellant is independent with all care needs and activities of daily living and receives no treatments or services at the facility other than medications and coordination of his medical appointments in the community. (Exhibits 1-4; Recording @18:49.)

7. The discharge notice advised the Appellant he would be discharged to the [REDACTED], which is a men's shelter that can assist with housing and social service needs. (Exhibit ALJ I; Recording @38:35.) The discharge plan includes medication supply, medical appointment referrals and transportation to the shelter as requested and needed by the Appellant. (Exhibit 4.)

8. Alternative placement or residential options for the Appellant other than [REDACTED] DHS shelter are severely limited due to Appellant's lack of income. (Exhibits 5, 6; Recording @26:53.) In early [REDACTED] 2023, the Respondent made referrals to two [REDACTED] facilities as appropriate placement options for discharge. (Exhibit 5; Testimony, Braunstein.) The Appellant participated in an interview with one of the facilities but declined placement at a [REDACTED] facility. (Exhibit 5.)
9. The Appellant remains at Rockaway Care Center pending the outcome of this hearing.

ISSUES

Has Rockaway Care Center established that its determination to discharge the Appellant is authorized and that its discharge plan is appropriate?

APPLICABLE LAW

A residential health care facility (RHCF), or nursing home, is a residential facility providing nursing care to sick, invalid, infirm disabled or convalescent persons who need regular nursing services or other professional services but who do not need the services of a general hospital. PHL § 2801; 10 NYCRR 415.2(k).

Transfer and discharge rights of nursing home residents have been codified in Public Health Law § 2803-z and set forth at 10 NYCRR 415.3(i) which provides, in pertinent part, that the facility shall:

- (1) (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 for no longer needing facility services, the facility shall ensure that the resident's clinical record contains complete documentation made by the resident's physician. 10 NYCRR 415.3(i)(1)(ii)(a); 42 CFR 483.15(c)(2)(ii)(A).

The Respondent has the burden of proving that discharge of the resident and the discharge plan are appropriate. 18 NYCRR 415.3(h)(2)(iii)(b).

DISCUSSION

The Appellant was admitted to the Facility on [REDACTED], 2023, for short-term rehabilitation after a recent hospitalization for a [REDACTED] for which he received [REDACTED] (Exhibit 1; Recording@10:27.) His admission was for sub-acute rehabilitation services, with the goal of restoring his abilities prior to his [REDACTED] 2023 hospitalization. (Recording@14:54.)

At the Facility, the Appellant received physical and occupational therapy. He was discharged from all therapies in [REDACTED] after attaining his maximum functional level. (Exhibits 1-3; Recording@15:21.) The Appellant is independent with all activities of daily living (ADLs) and is fully ambulatory throughout the facility and does not require any assistive devices. (Exhibits 1-4; Recording@10:37; 15:21.)

The Appellant asserted that he experiences [REDACTED] and has pain and [REDACTED]. (Recording @44:36.) He does not feel he is

ready to be discharged because he will not be able to work due to not being able to [REDACTED]. (Recording @45:35.) However, the Appellant acknowledged that the pain and [REDACTED] has been going on for over two years. (Recording @47:57.) He was admitted to the facility after hospitalization to treat a [REDACTED], and his functional abilities have been fully restored to his prior level of function before he was hospitalized.

The Appellant presented no medical evidence or opinion to controvert the Respondent care team's professional opinion that he is not in need of nursing home care and that his needs can be managed as an outpatient. He already has frequent medical appointments in the community with his [REDACTED] and his [REDACTED], and he has recurring [REDACTED] appointments at a [REDACTED] clinic. (Recording @18:49.) His care needs following discharge are to continue with these same services. (Exhibit 6; Recording @19:17.) The Respondent has established that the Appellant's health has improved sufficiently that he no longer requires the services provided by the Facility. (Exhibits 1-6.)

With respect to the proposed discharge plan, the Respondent, with the Appellant's involvement, began discharge planning in [REDACTED] in anticipation of the Appellant completing restorative therapy services. (Exhibit 5.) Appellant was homeless before coming to the facility and does not have any income. (Recording @27:06.) Before resorting to shelter placement, the Respondent worked with the Appellant and made referrals to two "[REDACTED]" residential facilities for [REDACTED]; [REDACTED]. (Exhibits 5, 6; Recording @26:12.) The Appellant participated in the referral process, but during an interview with [REDACTED] he

declined such a placement and indicated he would prefer to go to a shelter than to the [REDACTED] organization. (Exhibit 5; Recording @26:20.) The Respondent presented a "Patient Agreement to DHS Shelter Discharge" form signed by him on [REDACTED]/23. (Exhibit 7.) At the hearing the Appellant said he did not recall signing the form and that it might not be his signature. (Recording @30:33.) The shelter has, in any event, accepted him for placement. (Exhibit 8.)

The Respondent's social worker testified that other placement options are not available because the Appellant has no income, which is required for residential arrangements such as an adult home or assisted living. (Exhibit 6; Recording @26:53.) Respondent has complied with PHL § 2803-z in using its best efforts, including compliance with applicable federal and state regulations, to secure appropriate placement or an appropriate residential arrangement for the Appellant, other than temporary housing assistance (shelter placement). PHL § 2803-z(1)(b).

The Respondent's obligation is to provide a discharge plan that meets the Appellant's needs, not necessarily the discharge plan of the Appellant's choice. The Appellant is not entitled to remain in nursing home care when he no longer needs the services provided by the facility. Before discharging the Appellant, the Respondent will provide the Appellant with a supply of his medications and necessary outpatient referrals, if any. (Exhibit 5; Recording@25:27.) The proposed discharge plan addresses the Appellant's needs and how those needs will be met after discharge. 10 NYCRR 415.3(i)(1)(vi). The Respondent has established that its proposed discharge plan to the DHS shelter is appropriate.

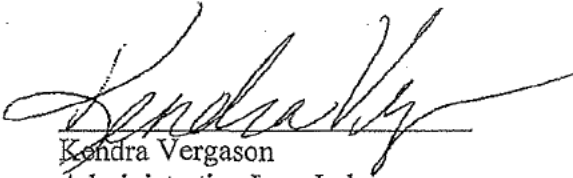
Lastly, facilities are required to give written notice of the discharge to the resident “at least thirty days prior to the facility-initiated transfer or discharge.” PHL § 2803-z(1)(c); 10 NYCRR 483.15(i)(1)(iv). The regulations at 10 NYCRR 415.3(i)(1)(iv)(c) provide an exception to the 30-day notice requirement when “the resident’s health improves sufficiently to allow a more immediate discharge.” However, Public Health Law Section 2803-z, which was enacted in 2021, eliminated this exception to the required 30-day notice. PHL §2803-z(1)(e). The notice of discharge dated [REDACTED] 2023, with a discharge date of [REDACTED] 2023, does not fall within the permissible exceptions under PHL § 2803-z. The Respondent failed to provide the Appellant notice of discharge at least 30-days before the stated date of discharge and is therefore, prohibited from discharging the resident prior to [REDACTED] 2023.

DECISION:

Respondent Rockaway Care Center has established valid grounds for the discharge of Appellant [REDACTED] and has established that its discharge plan is appropriate. The Respondent is authorized to discharge the Appellant after [REDACTED] 2023 in accordance with the [REDACTED] 2023 discharge notice.

This decision is made by Kendra Vergason, Bureau of Adjudication, who has been designated to make such decisions.

Dated: Rochester, New York
November 7, 2023


Kendra Vergason
Administrative Law Judge
Bureau of Adjudication