

cc: DOH.sm.DCAppeals@health.ny.gov by scan
SAPA File
BOA by scan



Department of Health

KATHY HOCHUL
Governor

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

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

March 22, 2024

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o Northshore University Hospital
300 Community Drive
Manhassat, New York 11030

Kristen Kraemer, Esq.
Northshore University Hospital
300 Community Drive
Manhassat, New York 11030

Adam Kahn, Esq.
309 Sea Cliff Avenue
Sea Cliff, New York 11579

Shva Sauer, NHA
Fulton Commons Care Center
60 Merrick Avenue
East Meadow, New York 11554

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

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,

A handwritten signature in blue ink that reads "Natalie J. Bordeaux". The signature is written in a cursive style.

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: cmg
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

COPY

In the Matter of an Appeal, pursuant to
10 NYCRR 415.3, by

[REDACTED]

Appellant,

from a determination by

Fulton Commons Care Center,

Respondent,

to discharge her from a residential
health care facility.

DECISION
AFTER
HEARING

Hearing before: Kathleen Dix
Administrative Law Judge
March 13, 2024
By WebEx Videoconference

Parties: Fulton Commons Care Center
60 Merrick Avenue
East Meadow, NY 11554
By: Barbara Phair, Esq.

[REDACTED]
c/o Northshore University Hospital
300 Community Drive
Manhassat, New York 11030
By: Adam D. Kahn, Esq.

Interested Party: Northshore University Hospital
300 Community Drive
Manhassat, New York 11030
By: Kristen Kraemer, Esq.

JURISDICTION

On [REDACTED] 2024, Fulton Commons Care Center, (Facility), a residential health care facility subject to Article 28 of the Public Health Law (PHL), determined to discharge [REDACTED] (Appellant) from care and treatment in its Facility to Northshore University Hospital.

The hearing was held on March 13, 2024, in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulations (CFR); and the New York State Administrative Procedure Act (SAPA); via Webex videoconference. (2h. 42.29 m.) Testimonial evidence was received, and witnesses were examined. A digital recording of the hearing was made.

HEARING RECORD

ALJ Exhibits:

1. Notice of Hearing and Notice of Discharge/Transfer.

Facility's Exhibits:

None.

Appellant's Exhibits:

None.

Facility's Witnesses:

1. Shva Saur, Administrator
2. Zvi Batash, M.D., Chief Medical Officer of The Grand¹
3. Marcia Roberson, Director of Nursing
4. Tracy Davis, Director of Social Services

Appellant's Witnesses:

1. [REDACTED] M.D.
2. [REDACTED], M.D.
3. [REDACTED] Appellant
4. [REDACTED]

¹ On the Facility's website it lists "The Grand Rehabilitation & Nursing" under its "corporatewebsite" tab.

ISSUES

Has the Facility established that its determination to discharge the Appellant is correct and that its discharge plan is appropriate?

FINDINGS OF FACTS

1. Respondent is a residential health care facility, specifically a nursing home, within the meaning of PHL § 2801.2 and 10 NYCRR 415.2(k), located in East Meadow, New York.

2. The Appellant is a [REDACTED] year-old female who was admitted to the Facility on or about [REDACTED] 2023, with a primary diagnosis of [REDACTED], for the purpose of rehabilitation. (T. Appellant, 2:18, 2:21)

3. By notice dated [REDACTED] 2024, the Respondent advised the Appellant of its determination to discharge her on [REDACTED] 2024, on the grounds that the Facility "is not licensed to provide the level of care required for medical condition". (ALJ Exhibit I.)

4. The discharge notice advised the Appellant she would be discharged to the [REDACTED] [REDACTED] [REDACTED]. (ALJ Exhibit I.)

5. On [REDACTED], 2024, the Appellant was transferred to the Northshore University Hospital (Hospital) for an evaluation following [REDACTED] tests. (T. Roberson 1:43, 1:51.)

6. On [REDACTED], 2024, after examining the Appellant in the emergency department, the Hospital advised the Facility that the Appellant was cleared to return to the Facility, but the Facility refused to accept her back. (T. [REDACTED], T. Roberson 1:50.)

7. The Appellant remains at the Hospital pending the outcome of this hearing.

APPLICABLE LAW

A residential health care facility, 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 PHL § 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:

(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;

. . .

(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, . . .

When alleging that a transfer or discharge is appropriate because it is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in the facility, the necessity of the transfer or discharge must be documented in the resident's medical record by the resident's physician. 10 NYCRR 415.3(i)(1)(ii)(a) and (iii)(b); 42 C.F.R. § 483.15(c)(2)(ii)(B).

The Respondent has the burden of proving that the discharge is necessary and that the discharge plan is appropriate. 18 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

Grounds for Discharge

The Appellant, a [REDACTED]-year-old woman, was admitted to the Facility on or about [REDACTED] 2023, with a primary diagnosis of [REDACTED] for rehabilitation following a [REDACTED]. The Appellant has not yet completed the prescribed therapy. (T. Appellant.) On or about [REDACTED] 2024, the Appellant became aware that she might be [REDACTED] and so advised the Facility. The Facility conducted two separate [REDACTED] tests to confirm the [REDACTED]. The Appellant's [REDACTED] was confirmed by both [REDACTED] tests. The [REDACTED] tests revealed a [REDACTED] of the [REDACTED] that was in conflict with the Appellant's calculation of the same. The Appellant was referred to two separate [REDACTED] who treated women with "[REDACTED]", though both declined to accept her as a patient.² The Facility's Director of Nursing, Marcia Roberson, was concerned about the liability involved in having a [REDACTED] resident and advised the Appellant that the Facility could not retain her as a resident due to her [REDACTED]. (T. Roberson.)

By notice dated [REDACTED] 2024, the Respondent advised the Appellant of its determination to discharge her on [REDACTED] 2024, on the grounds that her needs cannot be met after "reasonable attempts at accommodation in the facility as evidenced by: [the Facility is] not licensed to provide the level of care required for medical condition". The discharge notice advised the Appellant she would be discharged to [REDACTED] [REDACTED]" (ALJ Exhibit I.) The Appellant and the Facility's social worker, Tracy Davis, had discussions regarding the Appellant's discharge planning. (T. Davis 1:56.)

Thereafter, on [REDACTED], 2024, the Appellant was transported to the Hospital "while [the Facility] worked on the [the Appellant's] discharge planning", ostensibly for a medical evaluation because she needed further evaluation due to the discrepancy in the [REDACTED] of the [REDACTED] was "[REDACTED]", and two physicians had declined to take the Appellant on as a patient. (T. Davis 2:01, T. App 2:19, T. Roberson 1:46.) After

² Ultimately, the Appellant did obtain an [REDACTED] who will treat her for this [REDACTED] (T. Dr. [REDACTED])

examining the Appellant in the emergency department, the Hospital doctors determined that the Appellant did not require acute medical care, and on that same date cleared the Appellant for return back to the Facility. (T. Dr. [REDACTED] 2:09, T. Roberson 1:50.) The Facility refused to allow the Appellant to return. (T. Roberson 1:50.)

There is a regulatory framework for a residential health care facility to follow prior to the discharge of a resident. Before the Facility seeks to discharge the Appellant, the Facility must notify her and her designated representative of the discharge and the reasons for the discharge. 10 NYCRR § 415.3(i)(1)(iii)(a). The documentation showing the Facility's inability to meet the resident's needs **must** be made by the resident's physician and **must** include the specific resident needs the facility could not meet, the facility's efforts to meet those needs, and the specific services the receiving facility will provide to meet the needs of the resident that cannot be met at the current facility. (*Emphasis added.*) 10 NYCRR 415.3(i)(1)(ii)(a) and (iii)(b); 42 C.F.R. § 483.15(c)(2)(ii)(B). Further, in a "Dear Nursing Home Administrator" letter (DAL) dated August 20, 2019, and re-issued in October 2022, (DAL-NH 19-07), the Department explained that to demonstrate that any of the circumstances permissible for a facility to initiate transfer or discharge **the medical record must show documentation of the basis for the transfer or discharge.** (*Emphasis added.*)

The Facility offered no documentary evidence, in the form of a medical record or otherwise, regarding its determination to not accept the Appellant back after her [REDACTED], 2024, examination at the Hospital.

Dr. [REDACTED] who is the Appellant's primary medical attending physician at the Hospital, testified that he has examined the Appellant, reviewed her medical records, and said that the Appellant has not had any acute care needs since she arrived at the Hospital. Dr. [REDACTED] stated that the Appellant was admitted to the Hospital only because the Facility would not accept her back. Dr. [REDACTED] further testified that the Appellant does not have any medical needs that could not be managed in a skilled nursing home setting, that as an internal medicine physician it is not uncommon to see a patient who is [REDACTED], and that he coordinates patient's care with specialists. (T. Dr. [REDACTED] 2:08 - 2:11.)

Dr. [REDACTED], a board-certified [REDACTED] and a [REDACTED] fellow, testified that she has examined the Appellant and reviewed her medical records,

that the Appellant does not have any acute care needs that require hospitalization at this time, that the Appellant's [REDACTED] related needs can be managed on an outpatient basis, and that the Appellant is connected with the Hospital's [REDACTED] clinic for [REDACTED] care. Dr. [REDACTED] further testified that she has discussed with the Appellant the risks of [REDACTED] and pain medication with her [REDACTED] that she has treated many [REDACTED] patients who have [REDACTED] who reside in the community and are not hospitalized unless a complication arises, and that a patient who can successfully be cared for in the community could also be successfully cared for in a skilled nursing facility. (T. Dr. [REDACTED] 2:14 - 2:17.)

While the regulations do allow for the discharge of residents where the resident's needs cannot be met after reasonable attempts at accommodation in the facility, the Facility must follow the regulatory requirements for a proper discharge. In the present case, the Facility has failed to meet its regulatory obligations. The Facility offered no medical evidence from the Appellant's physician, nor did it offer a copy of the Appellant's medical records where the Appellant's physician documented the proffered reasons for the Appellant's discharge, the Facility's inability to meet the her needs, the specific needs the facility could not meet, the facility's efforts to meet those needs, and the specific services the receiving facility will provide to meet the needs of the resident that cannot be met at the current facility, as is required by 10 NYCRR 415.3(i)(1)(ii)(a) and (iii)(b); 42 C.F.R. § 483.15(c)(2)(ii)(B).

The Facility has failed to meet its burden to prove that the discharge of the Appellant was necessary. See, 18 NYCRR 415.3(i)(2)(iii)(b).

Discharge Plan

Applicable law requires that the Facility provide sufficient preparation and orientation to residents to ensure a safe and orderly 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. (10 NYCRR 415.3(i)(1)(vi)). In this case, the discharge notice advised the Appellant she would be discharged to a family shelter, which could accommodate the Appellant's request to stay local to [REDACTED] (ALJ Exhibit I, T. Davis 1:57 – 1:58.) This Notice of Discharge gave the Appellant notice of the Facility's

intent to discharge her 30 days hence. The Facility's social worker Tracy Davis testified that she had discussion(s) with the Appellant regarding her discharge from the Facility to the shelter. (T. Davis 1:56 – 1:58.)

Despite the Facility serving the Notice of Discharge to the Appellant on [REDACTED] 2024, and after the Appellant was making plans for the same, the Facility, four days later, brought the Appellant to the Hospital, and after it was determined that the Appellant did not need acute care, the Facility refused to allow the Appellant to return. The Facility justified its actions by relying on 10 NYCRR 415.26(i)(1)(viii)(b), which states:

(i) *Admission policies and practices.*

(1) The nursing home shall:

...
(viii) apply the following restrictions to the admission and retention of residents:

...
(b) prenatal, intrapartum or postpartum, and maternity patients shall not be admitted; ...

and argues that if it "readmits" the Appellant it will violate this regulation. However, this argument fails. The transfer of the Appellant to the hospital for medical care was not a discharge³ and therefore the Facility's argument that the regulations do not allow it to "readmit" the Appellant is misguided. By this, the Facility is seeking to invoke the "protection" of a regulation which, but for its own inappropriate conduct in refusing to allow the Appellant to return, would not have any basis to argue applies. The Facility had commenced the discharge process for the Appellant, but that process has not yet been completed. The Appellant continues to be a resident of the Facility; her return to the Facility from the Hospital is not an "admission" barred by 10 NYCRR 415.26(i)(1)(viii)(b). Additionally, as a hospital is not an appropriate "discharge" location, the Facility's refusal to allow the Appellant to return after the medical examination that it sought for the Appellant, is improper and this action violates both State and Federal law, *i.e.*, the Appellant's rights under PHL § 2803-z, 10 NYCRR 415.3(i) and 42 C.F.R. § 483.15(c)(2)(ii)(B).

³ In the same DAL noted above, the Department placed all residential health care facilities on notice that "discharges" to hospitals are not appropriate discharge locations (frequently asked questions, question number 8).

The Facility has an obligation to abide by its own discharge notice. Instead of doing so, the Facility shuttled the Appellant to the Hospital, thereby precluding the Appellant from finishing her prescribed therapy and taking away her right to have 30 days for "sufficient preparation and orientation . . . to ensure a safe and orderly discharge transition from the Facility" to her discharge location. (10 NYCRR 415.3(i)(1)(vi)). The Appellant was deprived of 30 days in which to prepare for her shelter discharge because the Facility opted to "dump" the Appellant in the Hospital without forewarning.

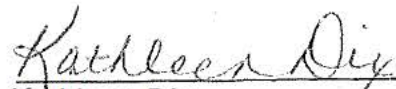
The Hospital was not an appropriate discharge location for the Appellant. In the event that the Facility determines that the Appellant should again be discharged, it must issue a new discharge notice.

DECISION and ORDER

The Facility failed to establish that its determination to discharge the Appellant is correct and that its discharge plan is appropriate.

1. Fulton Commons Care Center is not authorized to discharge the Appellant based upon its [REDACTED] 2024, discharge notice.
2. Fulton Commons Care Center is directed to receive the Appellant back from the Hospital before it admits any other person to the Facility. 10 NYCRR 415.3(i)(2)(i)(d) and (i)(3)(iv).
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.

Dated: Menands, New York
March 22, 2024



Kathleen Dix
Administrative Law Judge

To:

Shva Sauer, Administrator
Fulton Commons Care Center
60 Merrick Avenue
East Meadow, NY 11554

Barbara Stegun Phair, Esq.
Abrams Fensterman, LLP
3 Dakota drive
Lake Success, New York 11042

██████████
c/o Northshore University Hospital
300 Community Drive
Manhassat, NY 11030

Adam D. Kahn, Esq.
309 Sea Cliff Avenue
Sea Cliff, New York 11579

Kristen Kraemer, Esq.
Northshore University Hospital
300 Community Drive
Manhassat, NY 11030