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**Department
of Health**

KATHY HOCHUL
Governor

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

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

May 16, 2024

CERTIFIED MAIL/RETURN RECEIPT

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Mary Clare Campion, Coordinator
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377 Oak Street, 5th Floor
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Joseph Benden, Administrator
Five Towns Premier Rehabilitation & Nursing
1050 Central Avenue
Woodmere, NY 11598



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: nm
Enclosure

STATE OF NEW YORK: DEPARTMENT OF HEALTH

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

[REDACTED]

Appellant,

COPY

DECISION

from a determination by
THE FIVE TOWNS PREMIER
REHABILITATION & NURSING CENTER
Respondent,

to discharge him from a residential health care facility

Hearing Before: Jean T. Carney
Administrative Law Judge (ALJ)

Held via: Cisco WebEx videoconference

Hearing Date: May 14, 2024

Parties: The Five Towns Premier
Rehabilitation & Nursing Center, Respondent

By: Barbara Phair, Esq.
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[REDACTED], Appellant

By: [REDACTED], Complainant

[REDACTED]
[REDACTED]
[REDACTED]

JURISDICTION

By notice dated [REDACTED] 2024, The Five Towns Premier Rehabilitation & Nursing Center (Premier or Facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] (Appellant) from the Facility on the grounds that the Appellant's needs cannot be met by the Facility. The proposed discharge location is to [REDACTED]. The Appellant's [REDACTED] (Complainant) 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 a document (Exhibit 1); the testimonies of Joseph Benden, Administrator; Yuridia Velez-Seaman, Manager of the dialysis unit; and Michelle Miller, Social Worker. The Complainant testified on behalf of her [REDACTED] the Appellant. Kim Accardi, from the Ombudsman Program was also present. ALJ Exhibit I was admitted; and the hearing was digitally recorded.

ISSUE

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 refer 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 a [REDACTED]-year-old male who was admitted to the Facility in 2022. He is [REDACTED] and requires [REDACTED] (Exh 1; T Complainant and Mr. Benden).

2. The Facility has a [REDACTED] unit with 14 stations, two of which are dedicated for [REDACTED] residents. (T Mr. Benden).

3. The Facility Administration determined that due to staffing issues, it would no longer provide [REDACTED] to [REDACTED] residents. The [REDACTED] unit will continue to serve other residents of the Facility, and the Facility will still have [REDACTED] residents. (T Mr. Benden and Ms. Velez-Seaman).

4. On or about [REDACTED] 2024, the Complainant was informed of this new policy, and told that the Appellant would be transferred sometime in the next several months. The Complainant was not informed of her right to appeal the determination. (T Complainant and Miller).

5. On [REDACTED], 2024, the Complainant was informed that the Appellant was accepted at [REDACTED], and would be transferred there the following day. (T Complainant and Mr. Benden).

6. On [REDACTED] 2024, the Facility discharged the Appellant and issued a discharge notice alleging that the discharge was necessary because the Appellant's needs cannot be met in the Facility. (ALJ I; T Miller).

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 of 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 meet its burden of showing that the discharge is necessary. Initially, it must be noted that the Facility failed to give the Appellant and his representatives sufficient and appropriate notice of the proposed discharge. Facilities must provide the notice of discharge at least 30 days before the resident is discharged. (10 NYCRR § 415.3[i][4][iv]; Dear Administrator Letter[DAL] 19-07). Here, the Facility prepared the discharge notice on the same day that the Appellant was discharged. The Facility argues that the Complainant did not object to the transfer prior to [REDACTED] but that is not relevant. Even if consideration is given to the Facility for giving the Complainant oral notice on [REDACTED] of its intent to transfer the Appellant, that is still less than the 30 day notice required by regulation. The notice fails to comply with regulatory requirements and the discharge must be denied.

The Facility alleges that the discharge is necessary because the Appellant's needs cannot be met at the Facility. This determination is based on the Facility's decision to stop providing [REDACTED] services to residents who are on [REDACTED]. Pursuant to 10 NYCRR 401.3, proposed changes in the extent and kind of services provided shall not be made until approved by the Department of Health (Department). (10 NYCRR 401.3[a]). The evidence presented at the hearing indicates that the Facility has not advised the Department of this change in the services provided, contending that because [REDACTED] services will still be provided to other residents, the Department need not be notified. However, the regulation requires notification of any change, not just cessation of services. The Facility also attempted to paint the [REDACTED] unit as a distinct and separate entity, not operating under the authority of the Facility. This assertion is disingenuous at best. The testimony revealed that the [REDACTED] unit's manager reports to Mr. Benden, the Facility's

Administrator. The decision to stop [REDACTED] services to [REDACTED] residents was made by Mr. Benden, in consultation with the [REDACTED] unit manager, but without consulting the Department. The Facility failed to show that it had the authority to change [REDACTED] services, therefore the discharge grounds are denied.

Further, in order to meet the regulatory requirements for discharging a resident on the grounds that their needs cannot be met, the resident's physician "must document information about the basis for transfer or discharge." (DAL 19-07). The Facility's only evidence from the Appellant's physician was a brief progress note written on [REDACTED] 2024, documenting a request to follow up on [REDACTED] "obtained as a pre-request to transfer to a new [REDACTED]" and was conducted on [REDACTED] 2024. (Exh 1). This note does not satisfy the regulatory requirement to provide complete documentation by a physician in the Appellant's clinical record, necessitating denial of the discharge. Finally, the Facility is required to properly assess its capabilities when admitting residents. Absent an atypical change in the resident's condition, discharge based on the inability of the Facility to meet the resident's needs should be rare. (DAL 19-07). Here, there is no evidence showing that the appellant's needs have changed

In light of the foregoing, there is no need to address whether the discharge plan is appropriate. The Facility shall re-admit the Appellant and provide [REDACTED] services until the Department determines either that this service may be changed, or confirms that prior written approval of this change is not required.


ORDER

Five Towns Premier Rehabilitation and nursing Center has failed to establish that the Appellant's discharge is necessary.

1. The Appellant may not be discharged pursuant to the notice dated [REDACTED] [REDACTED] 2024.

2. The Facility must re-admit the Appellant to the first available bed, before admitting any other residents.
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: Albany, New York
May 16, 2024


JEAN T. CARNEY
Administrative Law Judge

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[REDACTED]
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