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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

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

Bensonhurst Center for Rehabilitation & Healthcare,
Respondent,

to discharge him from a residential
health care facility.

COPY

DECISION
AFTER
HEARING

Hearing before: Kathleen Dix
Administrative Law Judge
July 25, 2024
By WebEx Videoconference

Parties: Lena Feygin, Director of Social Work
Bensonhurst Center for Rehabilitation & Healthcare
1740 84th Street
Brooklyn, New York 11214
By: Jamie I. Cash, Esq.

██████████ ██████████
c/o Bensonhurst Center for Rehabilitation & Healthcare
1740 84th Street
Brooklyn, New York 11214
By: Alfred Polizzotto, Esq.

JURISDICTION

By notice dated [REDACTED] 2024, Bensonhurst Center for Rehabilitation & Healthcare (Respondent), a residential health care facility subject to Article 28 of the PHL, determined to discharge / transfer [REDACTED] [REDACTED] (Appellant) from care and treatment in its facility. The Appellant appealed the determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes, Rules, and Regulations (NYCRR) Section 415.3(i). The hearing was held by videoconference on July 25, 2024.

HEARING RECORD

ALJ Exhibits:

- I. Notice of Hearing and Notice of Discharge or Transfer
- II. Rescheduling Letter

Respondent's Exhibits:

1. Admission Face Sheet [REDACTED]/24) with Progress Notes and PRI (23 pages)
2. Physician Progress Notes (9 pages)
3. Physical Therapy and Occupational Therapy Progress Notes (9 pages)
5. Director of Social Work Letter Regarding Discharge with attachments (9 pages)
6. [REDACTED] Acceptance Letter (1 page)
8. Nursing Progress Note dated [REDACTED]/24
9. Video 2024-[REDACTED]

Appellant's Exhibits:

- A. Patient Review Instrument (PRI) dated [REDACTED]/2023 (6 pages)
- B. [REDACTED] Email dated [REDACTED] 2024 with PRI attached (8 pages)
- G. Video IMG_8057
- H. Video IMG_8058
- I. Video IMG_8059
- J. Video IMG_8065
- K. Video IMG_8066

Respondent's Witnesses:

1. Katrina Lati, Director of Rehabilitation
2. Danielle Sinclair, Social Worker
3. Nadiya Puglia, Director of Nursing
4. Antonia Darmetta, Italian Translator

Appellant's Witnesses:

1. [REDACTED] Appellant's [REDACTED]

A digital recording of the hearing was made. (2h 33m.)

ISSUES

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

FINDINGS OF FACTS

1. Respondent Bensonhurst Center for Rehabilitation & Healthcare 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 Brooklyn, New York.

2. The Appellant is a [REDACTED]-year-old male who was admitted to the Respondent's facility on [REDACTED] 2023 for [REDACTED] and because he was unable to be cared for at home. The Appellant's additional diagnoses include [REDACTED]. His [REDACTED] is designated as the Appellant's primary family contact. (Exhibit 1.)

3. By notice dated [REDACTED] 2024, the Respondent advised the Appellant of its determination to discharge him on [REDACTED] 2024, on the grounds that his health has improved sufficiently such that he no longer needs the services provided by the facility as evidenced by "completed rehab and cleared for discharge." (ALJ Exhibit I and Exhibit 5).

4. The notice advised the Appellant he would be discharged to "[REDACTED]" which is the address of [REDACTED] an assisted living facility. (ALJ Exhibit I and Exhibit 5).

5. A Patient Review Instrument (PRI) was completed on [REDACTED] 2023 by the hospital from which the Appellant was discharged the day prior to his [REDACTED] 2023 admission to the Respondent's facility. The PRI indicated that the Appellant needed a skilled nursing facility level of care and listed his primary diagnosis as "hx [history] of falls and [REDACTED]." Also noted in the PRI is that the Appellant has had multiple admissions for mechanical falls with the most recent fall in [REDACTED] 2023. (Exhibits A and 1).

6. At the time of his [REDACTED] 2023 admission to the Respondent's facility, the Appellant's activities of daily living (ADL) required either constant or intermittent supervision. (Exhibits A and 1.)

7. The Appellant is [REDACTED]. (Exhibits A and 1.)

8. In a doctor's progress note dated [REDACTED] 2024, Dr. Isabella Peluso, the Appellant's treating physician at the Respondent's facility, opined that the Appellant was doing well and would be stable for discharge to an adult home since he is able to ambulate independently. (Exhibit 2.)

9. In a nurse's progress note dated [REDACTED], 2024 it was noted:
Resident was seen by Dr. Peluso on [REDACTED] 24
As per MD recommendations, resident is stable to be discharged to Assisted Living facility.

(Exhibit 8.)

10. In a letter dated [REDACTED], 2024, Danielle SinClair, the Respondent's social worker, stated that the Appellant is ambulatory and will complete rehabilitation on [REDACTED] 2024. (Exhibit 5.)

11. In a letter dated [REDACTED], 2024, [REDACTED] acknowledged that they had received referrals for placement of the Appellant on both [REDACTED], 2023 and [REDACTED] 2024, and each time the Appellant was accepted but discharge was postponed. (Exhibit 6.)

12. The Appellant timely appealed the Respondent's discharge determination and proposed discharge location.

13. The Appellant remains at the Respondent's facility pending the outcome of this hearing.

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(1); 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) and federal regulations at 42 C.F.R. § 483.15. 10 NYCRR 415.3(i) 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.

...

(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, and provide a discharge summary pursuant to section 415.11(d) of this Title.

When alleging that a transfer or discharge is appropriate because the resident's health has improved sufficiently so that the resident no longer needs the services provided by 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)(l)(ii)(a) and (iii)(b); 42 C.F.R. § 483.15(c)(2)(ii)(A).

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

DISCUSSION

Grounds for Discharge

The Respondent asserts that the Appellant's health has improved and that he no longer requires nursing home care as evidenced by his completion of rehabilitation and clearance for discharge. (ALJ Exhibit I and Respondent Exhibit 5). The Appellant, a [REDACTED]-year-old man, was first admitted to the Respondent's facility on [REDACTED] 2019. After returning home for a period of time, he was readmitted on [REDACTED] 2023 following an [REDACTED], 2023 hospitalization at [REDACTED] for

with [REDACTED] and [REDACTED]. Ms. Puglia stated that [REDACTED] is a condition that "[REDACTED]"; that [REDACTED] is one of the diseases that unfortunately is untreatable. Ms. Puglia opined that the Appellant's dementia has stayed the same since his admission. Ms. Puglia explained that the Respondent received the Appellant's PRI completed by the hospital and based its plan of care for the Appellant on the PRI. Based upon the Appellant's history of falls, the Respondent put safety precautions in place for him. Ms. Puglia testified that the Appellant's ADLs with regard to eating and transferring have improved while at the Respondent's facility. Ms. Puglia also acknowledged that subsequent to the Notice of Discharge being issued, the Appellant had fallen at the facility, in [REDACTED] 2024, when he was observed on the floor of his room next to his bed. (Recording @ 37:02, 37:37, 39:22, 40:35, 50:52, 53:15, 53:52; 54:44; 55:19.)

When a nursing home seeks to discharge a resident, 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)(l)(ii)(a) and (iii)(b); 42 C.F.R. § 483.15(c)(2)(ii)(A). In a progress note dated [REDACTED], 2024, Dr. Peluso opined that the Appellant was doing well and would be stable for discharge to an adult home since he is able to ambulate independently. (Exhibit 2.) While at the Respondent's facility, the Appellant was given physical and occupational therapies, and the Respondent asserts that the Appellant's ambulation and ADL functional statuses have improved "tremendously", his rehabilitation is complete, and he is at a functional status which has allowed him to be admitted to an assisted living facility with a [REDACTED] unit. (Recording at @ 5:21; 5:45; 7:31.)

In response, the Appellant contends that he has not markedly improved as the Respondent asserts. The Appellant notes that the only conditions that the Respondent asserted have improved are his ability to ambulate and transfer; none of his other conditions have improved as evidenced by the fall he had after being served with the Notice of Discharge. As such, he still needs the services of the Respondent. (Recording @ 25:16; 26:24-27:11.)

Benny [REDACTED] the Appellant's [REDACTED] testified that he visits his [REDACTED] on a bi-weekly basis and that his [REDACTED] does not walk, but "[REDACTED] and holds onto

something. Mr. ██████ stated that over the last few months he advised the nurses that the Appellant complains of pain in his ██████ asked that the Appellant be put in wheelchair, and expressed his concern that the Appellant is going to fall and get hurt. Mr. ██████ also stated that though he believes that the Respondent did not advise him of all the Appellant's falls, it has advised him approximately three times that his ██████ has fallen, the most recent time being on ██████, 2024. Mr. ██████ explained that some of the Appellant's falls have been falls out of bed and he has asked the Respondent to keep the Appellant's bed low so that if he does fall, any injuries will be mitigated. Mr. ██████ indicated that the Appellant has on occasion been injured when he has fallen. Mr. ██████ acknowledged his ██████ hospitalization in ██████ 2024, and testified that his ██████ is getting worse. He stated that his ██████ and ██████ such as having to ██████ or that he is ██████ for Mr. ██████ ██████ Mr. ██████ stated that he does not correct his ██████ when he ██████ to ██████ to him. (Recording @ 28:00, 28:52, 29:55 – 30:56, 31:38, 32:01; 33:06, 33:28.)

Both the Appellant and the Respondent offered videos of the Appellant into evidence which were viewed at the hearing. The comments made on the videos, which were in ██████ were translated by Antonia Darnetta, an employee of the Respondent. The videos offered by the Appellant show him transferring to and from a wheelchair and ambulating to his room and down a hall a short distance. The metadata from each of these videos shows they were created on ██████, 2024. (Exhibits G – K.) The Respondent's video is of the Appellant in a ██████ ██████. It appears from the video that the Appellant took a few steps forward while doing so. This video is labeled with a date of July 23, 2024; however, the metadata shows the video was created on July 24, 2024. (Exhibit 9.)

The medical evidence in the record, made by the Appellant's treating physician, which was supported by the testimonies of both the Respondent's nursing and rehabilitative services staff, shows that the Appellant is ambulatory and is independent in his transfers, and though he does need assistance with other activities of daily living, has improved such that he no longer needs the services of a nursing home and is appropriate for a lower level of care. The record contains no contrary medical evidence.

Thus, the Respondent has established that the Appellant's discharge was necessary in accordance with 10 NYCRR 415(i)(1)(i)(a)(2).

Discharge Location:

The Respondent asserts that [REDACTED] is an appropriate facility for the Appellant. Danielle SinClair, Respondent's Social Worker, testified that the Appellant was "originally admitted on [REDACTED] [2023] for "a short term rehab." Ms. SinClair stated that she had meetings with the Appellant's family regarding discharge planning and assisted living placements, and that the Appellant was accepted in an assisted living facility in [REDACTED] [2023] but that his family did not wish to proceed in that regard. The Appellant was hospitalized [REDACTED] 2024 due to [REDACTED], was readmitted on [REDACTED], 2024, and was placed back on rehabilitation. The Appellant was thereafter again accepted to an assisted living facility, but the Appellant's family again declined the transfer, "even though as per Ms. Lati, [the Appellant] is ambulating independently without any assistive devices." (Recording @ 13:16 – 14:20.)

Ms. SinClair described [REDACTED] as an assisted living facility which provides care, supervision if needed, and has a [REDACTED]. Ms. SinClair explained that the Appellant's primary language is [REDACTED] and the [REDACTED] is able to accommodate his language. The Appellant's placement would be to a [REDACTED] [REDACTED] a unit that treats [REDACTED] patients who need supervision due to their [REDACTED] issue, where he would also receive prompting and assistance with activities of daily living as needed. Ms. SinClair testified that there is nothing that the Appellant needs that a [REDACTED] unit cannot provide for him. (Recording @ 14:37, 14:56, 15:14-16:08.) [REDACTED] has accepted the Appellant for care. (Exhibit 6.)

Mr. [REDACTED] denies having meetings with any of the Respondent's personnel in person and stated that he has only spoken with Ms. SinClair over the phone. (Recording @ 29:19.)

The Facility has shown that the proposed discharge location, [REDACTED] is available to the Appellant and is an appropriate placement given the Appellant's lack of skilled nursing needs, independence with ambulation and transfers, and medical stability. While [REDACTED] is an appropriate discharge location, the Appellant can choose to go

elsewhere if he prefers to not be in an assisted living facility. However, the Appellant cannot stay in the Respondent's facility as he no longer needs the services of a nursing home.

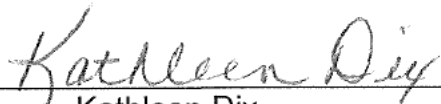
DECISION

Bensonhurst Center for Rehabilitation & Healthcare has established that the discharge of the Appellant was necessary, and the discharge location is appropriate.

1. Bensonhurst Center for Rehabilitation & Healthcare is authorized to discharge the Appellant in accordance with its Notice of Discharge dated [REDACTED] 2024.

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: Menands, New York
September 13, 2024



Kathleen Dix
Administrative Law Judge

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