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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

June 25, 2024

CERTIFIED MAIL/RETURN RECEIPT

Barry Klinger, Administrator
Carthage Center for Rehab and Nursing
1045 West Street
Carthage, New York 13619



██████████
c/o Carthage Center for Rehab and Nursing
1045 West Street
Carthage, New York 13619

Anthony Marrone, Esq.
506 East Washington Street
Syracuse, New York 13202

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: cmg
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

COPY

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

██████████

DECISION

Appellant,

from a determination by

CARTHAGE CENTER FOR
REHABILITATION AND NURSING,

Respondent,

to discharge him from a residential health care facility.

Before: Tina M. Champion
Administrative Law Judge

Held at: Videoconference via WebEx

Date: June 17, 2024

Record closed: June 18, 2024

Parties: ██████████
c/o Carthage Center for Rehabilitation and Nursing
1045 West Street
Carthage, New York 13619

By: ██████████ Appellant's ██████████

Carthage Center for Rehabilitation and Nursing
1045 West Street
Carthage, New York 13619
By: Barry Klinger, Administrator

Anthony Marrone, Esq.
506 East Washington Street
Syracuse, New York 13202

JURISDICTION

By notice dated [REDACTED] 2024, Carthage Center for Rehabilitation and Nursing (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [REDACTED] [REDACTED] (the Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes, Rules, and Regulations (NYCRR) 415.3(i).

The hearing was held in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulations (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR.

Evidence was received and witnesses were examined. A digital recording was made of the proceeding.

HEARING RECORD

ALJ Exhibits: I – Letter with Notice of Hearing and 30-Day Discharge Notice [REDACTED]/24)
II – Temporary Guardianship
III – Email thread with attachments

Facility Exhibits: 1 – Admission Record
2 – Summary of Efforts/Events
3 – BIMS
4 – IDT Meeting/Evaluation note
5 – Pull Call Bell photo
6 – Plug-in Call Bell photo
7 – Tap Call Bell photo

Appellant Exhibits: None

Facility Witnesses: Barry Klinger, Administrator

Appellant Witnesses: [REDACTED] [REDACTED] Appellant's [REDACTED]

*Anthony Marrone, Esq., as Temporary Guardian over the person and property of the Appellant also testified.

FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old male who was admitted to the Facility on [REDACTED] 2024. (Exhibit [Ex.] 1; Testimony [T.] Klinger.)
2. The Appellant was admitted directly from [REDACTED] after spending [REDACTED] days in the hospital. (T. Klinger, Marrone.)
3. The Appellant's diagnoses include [REDACTED], leaving him [REDACTED]. (Facility Ex. 1; T. Klinger, [REDACTED])
4. The Appellant's inability to use his [REDACTED] existed prior to his admission to the Facility on [REDACTED], 2024, and has remained unchanged since that date. (T. Klinger, [REDACTED])
5. The Appellant is cognitively aware and able to verbally call for assistance if needed. (Facility Exs. 2, 3; T. Klinger, [REDACTED])
6. Decisions to offer admission into the Facility to a prospective resident are made at a "corporate level" by Centers Health Care. Centers Health Care oversees multiple (approximately 40) residential health care facilities across New York State, including this Facility. (T. Klinger.)
7. The Facility maintains that Centers Health Care admitted the resident to the Facility on the mistaken assumption that the Facility had an updated call bell system similar to that in most or all of its other facilities. However, the only call bell system within the Facility is a pull system that requires the [REDACTED]. (Facility Ex. 5; T. Klinger.)
8. Upon the Facility becoming aware that the Appellant was unable to activate the call bell system, the Facility assigned a 1:1 aide to monitor the Appellant. (T. Klinger.)
9. On [REDACTED], 2024, the Facility issued a 30-Day Discharge Notice to the Appellant which proposed discharge to a [REDACTED] facility, [REDACTED]. (ALJ Ex. I.)

10. The Discharge/Transfer Notice states that the Appellant will be transferred because his needs cannot be met at the Facility. (ALJ Ex. I.)

11. The Appellant timely appealed the Facility's discharge determination and proposed discharge location.

12. The Appellant has remained at the Facility during the pendency of the appeal.

ISSUES

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

APPLICABLE LAW

A residential health care facility, also referred to in the Department of Health Rules and Regulations as a nursing home, is a facility which provides regular nursing, medical, rehabilitative, and professional services to residents who do not require hospitalization. (PHL § 2801[2][3]; 10 NYCRR 415.2[k].)

A resident may only be discharged pursuant to specific provisions of the Department of Health Rules and Regulations. (10 NYCRR 415.3[i][1].)

The Facility alleged that the Appellant's discharge is permissible pursuant to 10 NYCRR 415.3(i)(1)(i)(a)(1), which states:

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.

A Facility must ensure complete documentation in the resident's clinical record when a resident is discharged. (10 NYCRR 415.3[i][1][ii].)

Facilities are required to provide written notice of transfer or discharge that includes the following:

- (a) The reason for transfer or discharge;
- (b) The specific regulations that support, or the change in Federal or State law that requires, the action;
- (c) The effective date of transfer or discharge;
- (d) The location to which the resident will be transferred or discharged;
- (e) A statement that the resident has the right to appeal the action to the State Department of Health, which includes:
 - (1) an explanation of the individual's right to request an evidentiary hearing appealing the decision;
 - (2) the method by which an appeal may be obtained;
 - (3) in cases of an action based on a change in law, an explanation of the circumstances under which an appeal will be granted;
 - (4) an explanation that the resident may remain in the facility (except in cases of imminent danger) pending the appeal decision if the request for an appeal is made within 15 days of the date the resident received the notice of transfer/discharge;
 - (5) in cases of residents discharged/transferred due to imminent danger, a statement that the resident may return to the first available bed if he or she prevails at the hearing on appeal; and
 - (6) a statement that the resident may represent him or herself or use legal counsel, a relative, a friend, or other spokesman;
- (f) the name, address and telephone number of the State long term care ombudsman;
- (g) for nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act;
- (h) for nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

(10 NYCRR 415.3[i][1][v].)

Facilities are also required to "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.”
(10 NYCRR 415.3[i][1][vi].)

Under the hearing procedures at 10 NYCRR 415.3(i)(2)(iii), the Facility bears the burden to prove a discharge is necessary and appropriate.

DISCUSSION

The Appellant is a [REDACTED]-year-old male who was admitted to the Facility on [REDACTED], 2024. Immediately prior to admission he had been hospitalized at [REDACTED] for almost two years. The Appellant has diagnoses of [REDACTED], leaving him [REDACTED]. While at [REDACTED], the Appellant did not use a call bell for assistance. Instead, he was placed in a room near the nurse’s station and called out for help if needed, as his cognitive function is intact and he is fully able to verbalize his needs.

The call bell system at the Facility operates on a pull system and is not updated. The Facility maintains that it cannot meet the needs of the Appellant because it does not have a call bell system, such as one activated by a [REDACTED] [REDACTED], that the Appellant is able to utilize. The Facility maintains that keeping the Appellant at its Facility places it in jeopardy of being found by the Department of Health to be in violation of state regulations and subjecting it to imposition of a civil penalty. The Facility, upon discovery that the Appellant is [REDACTED], assigned him a 1:1 aide to monitor him and address any needs he may have.

The Appellant’s [REDACTED] Ms. [REDACTED] testified that she is very happy with the care the Appellant has received at the Facility. She feels that the Appellant’s needs can be adequately met at the Facility despite the Appellant’s inability to use the call bell system. Ms. [REDACTED] elaborated that the Appellant’s needs are largely met on a schedule or by means not requiring him to utilize a call bell. Specifically, he receives his medication and meals on a schedule every day and does not

need to ask for food. His [REDACTED] needs are met using a [REDACTED] [REDACTED] resulting in no need to be [REDACTED] or to be taken to the [REDACTED]. As the Appellant does not have [REDACTED], Ms. [REDACTED] testified that there is no risk of him falling from the bed. She explained that his only real "needs" may be a [REDACTED] on occasions or wanting the channel changed on the television.

Ms. [REDACTED] has offered multiple solutions to the Facility to address its expressed concern for Appellant to have a call bell system that he can utilize in addition to him verbally calling out for help. One of those solutions includes a video baby monitor directed at the Appellant's bed with the receiver at the nurse's station, presumably next to the call bell notification system. Ms. [REDACTED] has offered to pay for this device. Ms. [REDACTED] has voiced strong disagreement with the Appellant being transferred to another location after the Facility accepted the Appellant in the same condition as he is now based on its own corporate mistaken belief about the type of call bell system at the Facility.

Ms. [REDACTED] also testified at length as to the importance of keeping the Appellant in the same geographic area of the Facility. She testified that she visits her [REDACTED] at least every other day, and sometimes every day. She can maintain this frequency of visitation as she lives only [REDACTED] minutes away and works only [REDACTED] minutes away from the Facility. Ms. [REDACTED] testified that the Appellant's [REDACTED] who is in her [REDACTED], visits the Appellant three or four times a week and can only do so because she lives [REDACTED] minutes away. The proposed facility, [REDACTED], is approximately [REDACTED] and would prevent most visitation and involvement by the Appellant's family, especially in inclement weather.

While the Appellant has nonetheless agreed to a discharge to another local facility, Mr. Klinger testified that all of the other facilities within a 50-mile radius, of which there are only three, have denied admission to the Appellant.

At the conclusion of the hearing, the record was held open for the Facility to submit authoritative documentation to support its position that discharge is necessary based on the type of call bell system currently in place at its Facility. The Facility submitted an email citing to the following as "some examples of the potential citations and the regulations that [the Facility has] to uphold, and the liabilities and consequences if [it is] not up to the standard that the Department of Health deems [it] should be," and also included the following explanation:

1. From NYS gov website. Section 713-1.3 Nursing Units. (b) Call bell requirement
2. List of all the F Tags that a facility can be cited for by the Department of Health. These are all part of the State Operations Manual for Long Term Care facilities. The detailed list is 863 pages.
3. F919 - Resident Call System - The requirement to have one. Additionally, on our last survey on 03/16/2023, we got a deficiency for our call bell system, and we most likely would receive another deficiency for this instance as well.
4. F689 - Free of Accidents. On bottom of page 333 and top of page 334 (Resident Vulnerabilities). Verbal or signed consent does not eliminate a facility's responsibility to protect a resident from an avoidable accident. The regulations hold the facility ultimately accountable for the resident's care and safety.
5. F600 - Freedom from Abuse, Neglect, and Exploitation. Page 70 definition of Neglect, states "the failure of the facility to provide a good or service that is necessary to a resident" Page 91 last bullet point on page. This is an example of a level 4 neglect which results in Immediate Jeopardy and the example illustrates a call bell/light that the resident was not able to use.
6. F558 - Receive Services with Reasonable Accommodations. That we were not able to accommodate the resident being able to achieve independent functioning by not having a call bell system that the resident can use.

(ALJ Ex. III.)

Ms. [REDACTED] responded to the email submission, raising the following questions and points summarized as follows: the Facility was fined in 2023 and it has not updated the system since then, baby monitors could be used as electronic devices, the Facility is to make the necessary requirements to aid in patient care – such as baby monitors, the Appellant and his family should not suffer because of the Facility's mistake in accepting the Appellant when the Facility knew of his medical condition, and there are other patients at the Facility who also cannot use the pull cord call bell system or even understand the purpose of the cord. (ALJ Ex. III.)

Mr. Marrone, as Temporary Guardian of the Person and Property of the Appellant, also responded to the supplemental email submission by the Facility. Mr. Marrone argued that the Facility has not met its burden to demonstrate the discharge is necessary on the cited grounds that the Appellant's welfare and needs cannot be met in the facility. Mr. Marrone's response to the Facility includes the following arguments:

- using the regulations and the facility's admitted inability to meet those regulations is [not] a sufficient reason for discharging Mr. [REDACTED]. If anything, perhaps the facility should consider coming into compliance with regulations that govern all skilled nursing facilities in this State.
- 10 NYCRR 713-1.3(b) [does not require that] each resident has to have the ability to use the bell, just that a bell system needs to exist at each resident's bedside, which also registers a visual signal at various locations outside the resident's room. I believe [REDACTED] [REDACTED] has offered numerous alternatives that would achieve this goal.
- the example cited in F600 is inapposite to the case here. In that example the facility specifically removed the call bell system because the resident was using it too frequently.
- With regard to the F558, my position would be that Ms. [REDACTED] has offered reasonable accommodations and even offered to pay for those accommodations.

(ALJ Ex. III.)

While the Facility may have chosen not to accept the Appellant as a resident had the Appellant's admission been handled at the local level rather than at the corporate level, there is insufficient evidence that it cannot meet the needs of the Appellant. In fact, the Facility has met the needs of the Appellant for approximately a month already since the Appellant's admission on [REDACTED] 2024, with no incidents being cited. The Appellant and his [REDACTED] are happy with the care the Appellant receives. The Facility is to be commended for implementing a 1:1 aide to address its concerns in the short-term. However, the Facility's ultimate solution to addressing the pull call bell system issue by seeking to discharge the Appellant rather than focusing on updating its system or adopting one of the very reasonable solutions that Ms. [REDACTED] has suggested and offered to pay for is misplaced. The Facility has not met its burden to show that the discharge of the Appellant is necessary pursuant to 10 NYCRR 415.3(i)(1)(i)(a)(1).


It is not necessary to reach a determination on the appropriateness of the discharge location, however, the Appellant has made a compelling case to support his position that discharge to a facility located approximately [REDACTED] away from his [REDACTED] and [REDACTED] is not appropriate given the totality of circumstances.


DECISION

Carthage Center for Rehabilitation and Nursing has not established that its determination to discharge the Appellant was correct. It is not necessary to reach a determination on the appropriateness of the proposed discharge location.

1. The Appellant may not be discharged in accordance with the [REDACTED] 2024, 30-Day Discharge Notice.
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
June 25, 2024


Tina M. Champion
Administrative Law Judge

TO: 
c/o Carthage Center for Rehabilitation and Nursing
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