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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

August 27, 2024

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o St. John's Episcopal
327 Beach 19th Street
Far Rockaway, New York 11691

Michael Bass, Esq.
Abrams Fensterman, LLP
54 State Street, Suite 803
Albany, New York 12207

Jacqueline Lutchmidat, DSW
St. John's Episcopal
327 Beach 19th 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: cmg
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

In the Matter of an Appeal, pursuant to :
10 NYCRR 415.3, by :
 :
 :
 [REDACTED] :
 [REDACTED] :
 Appellant, :
 from a determination by :
 :
 Haven Manor Health Care Center :
 Respondent, :
 to discharge him from a residential :
 health care facility. :
 :

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DECISION
#DA24-6419

Hearing before: Kendra Vergason
Administrative Law Judge

Hearing date: August 13, 2024
By videoconference

Parties: Haven Manor Health Care Center, Respondent
1441 Gateway Blvd.
Far Rockaway, New York 11691
By: Michael Bass, Esq.
Abrams Fensterman, LLP
54 State Street, Suite 803
Albany, New York 12207
mbass@abramslaw.com

[REDACTED] Appellant
c/o St. John's Episcopal Hospital
327 Beach 19th Street
Far Rockaway, New York 11691
By: Jacqueline Lutchmidat, Director of Social Work, St.
John's Episcopal Hospital
jlutchmi@ehs.org

2. Appellant is independent in bed mobility, transfers, ambulation, dressing and eating. He requires supervision and set-up assistance with personal hygiene and bathing, and physical assistance with toileting. (Exhibit 1.)

3. Appellant's score on the Brief Interview for Mental Status (BIMS) is █ out of 15. (Exhibits 1, 4.) Appellant's █ █ is his designated representative and Public Health Law Surrogate. (Exhibits 1, 3.)

4. Between █ and █, 2024, the Respondent sent the Appellant to hospital emergency departments for █ evaluation seven times for exhibiting █ and/or █; three of these transfers were due to Appellant █ at the facility and resulted in admission to the hospital for acute care with diagnosis of █. (Exhibit 1.)

5. On █ 2024, Respondent transferred the Appellant to SJEH emergency department after he intentionally █. Appellant returned to Respondent facility the following morning, █ 2024, and was immediately placed on 1:1 monitoring for transfer to █ Hospital for further evaluation and management due to his displaying irr █ and █ upon entering the facility. (Exhibit 1.) After refusing to remain in the lobby, Appellant was taken to his room while remaining on 1:1 monitoring by security.

6. On █, 2024, at approximately 5:50 PM, Appellant repeatedly and intentionally █ causing his █. Respondent called 911 and Appellant was emergently transported, in █ to SJEH for acute care of his injuries and █ evaluation. Appellant was thereafter admitted to SJEH █ for stabilization. (Exhibit 1.)

7. A Transfer/Discharge Notice prepared by Respondent and dated [REDACTED], 2024, states grounds for discharge as “residents needs cannot be met after reasonable attempts at accommodation in the facility as evidenced by: [REDACTED].” (Exhibit 5.)
8. No written transfer/discharge notice was ever given to the Appellant or his designated representative. (Exhibit 5; T Pierre, [REDACTED] [REDACTED])
9. On [REDACTED], 2024, Appellant was admitted to SJEH [REDACTED] with diagnosis of [REDACTED]. (Exhibits 1, C; T Qureshi.)
10. On [REDACTED], 2024, SJEH notified Respondent that Appellant is medically and [REDACTED] stable and cleared for discharge from the hospital and return to Respondent facility. Hospital [REDACTED] and medical assessments provided to Respondent, including the Preadmission Screening and Resident Review (PASRR) Level II evaluation, confirm Appellant’s needs can be appropriately met in a nursing facility setting and that he requires no specialized services. (Exhibit B; T Qureshi, Pierre, Lutchmidat.)
11. The Respondent refuses to readmit the Appellant and has proposed no other discharge plan. (T Pierre, Lutchmidat.)
12. The Appellant has neither a medical nor [REDACTED] need for continued hospitalization. (Exhibit B; T Qureshi.)
13. The Appellant remains at SJEH pending the outcome of this hearing.

ISSUES

Has the Respondent complied with the requirements for discharge of the Appellant, and established that discharge was necessary and the discharge plan is appropriate?

APPLICABLE LAW

A residential health care facility (RHCF), or nursing home, is a residential facility that

provides 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).

Department regulations at 10 NYCRR § 415.3(h)(l)(i) describe the permissible bases upon which a residential health care facility may transfer or discharge a resident. When a resident is sent emergently to an acute care setting, such as a hospital, it is considered a facility-initiated transfer, not discharge, and the resident must be permitted to return to the facility. 10 NYCRR 415.3(i)(3); 42 CFR 483.15(e)(1); DAL-NH 19-07, August 20, 2019. Not permitting a resident to return following hospitalization constitutes a facility-initiated discharge and the facility must have evidence that the resident's status at the time the resident seeks to return to the facility (not at the time the resident was transferred for acute care) meets one of the permissible bases for discharge. DAL-NH 19-07, August 20, 2019; *see also*, CMS State Operations Manual, 100-07, Appendix PP.

Before a facility discharges or transfers a resident, it must notify the resident and his or her designated representative, in writing, of the discharge, including notification of appeal rights. 10 NYCRR 415.3(i)(1)(iii); 42 CFR 483.15(c)(3) and (5)(iv). Such written notice must be provided no later than the date on which a determination was made to transfer or discharge the resident. 10 NYCRR §§ 415.3(h)(l)(iii)-(iv).

The facility has the burden of proving that the discharge is necessary and the discharge plan is appropriate. 10 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

On [REDACTED], 2024, Appellant was emergently transferred to SJEH for acute care due to an act of [REDACTED] (Exhibits 1, 5.) He was thereafter admitted to SJEH [REDACTED] unit for

stabilization. (Exhibit 1.) On [REDACTED], 2024, SJEH determined that Appellant was medically and [REDACTED] stable, no longer required inpatient hospitalization and was cleared for return to Respondent's facility. The Respondent, however, refuses to allow the Appellant to return.

The Respondent has failed to comply with the requirements for the transfer or discharge of a resident from a nursing home, has failed to establish that the discharge was necessary, and has failed to establish the discharge plan is appropriate.

The Respondent was required to give written notice to Appellant and his designated representative before discharging him, which it failed to do. Despite knowing that Appellant's [REDACTED] [REDACTED] is his designated representative (also referred to by Respondent in clinical record as his Public Health Law Surrogate), Respondent did not allege, nor present evidence to show that written notice was ever provided to Ms. [REDACTED] or Appellant. Instead, the Respondent relied on a nurse progress note and the discharge notice it prepared but did not serve, both dated [REDACTED] 2024, that describe an unsuccessful attempt to contact Ms. [REDACTED] by phone. Telephone calls to the [REDACTED] do not constitute written notice at the time of discharge and are not what the regulation requires.

Respondent inappropriately seeks to discharge Appellant to a hospital contrary to federal and state regulations and Department official guidance which clearly proscribes such action. In a Dear Administrator Letter dated August 20, 2019 (DAL NH 19-07), the Department explicitly confirmed to residential health care facilities that hospitals are not considered final discharge locations for residents.

Q: If a resident is sent to the hospital due to the resident's clinical or behavioral status that endangers the health and/or safety of other individuals in the facility, do I need to issue a Discharge/Transfer Notice?

A: A hospital is not an appropriate discharge location. Admission assessments are key to ensuring the facility can care for the residents admitted.

If there is evidence a facility cannot meet the resident's needs, or the resident poses a danger to the health and safety of his/herself or others, the facility must follow all the requirements as they apply to discharge including the basis for discharge, provide notice to the resident, his/her representative and the LTCOP, reason for discharge, discharge location and appeal rights information. A facility's determination not to permit a resident to return must not be based on the resident's condition when originally sent to the hospital.

DAL-NH 19-07, August 20, 2019.

While the transfer of Appellant to the hospital on [REDACTED] may have been appropriate, Respondent's attempt to discharge the Appellant to SJEH was not. The uncontroverted medical evidence establishes that the Appellant currently requires care in a nursing home but not inpatient care in a general hospital. The Respondent failed to provide the required written notice of discharge, failed to establish permissible grounds for discharge and failed to develop an appropriate discharge plan for the Appellant. The Respondent's determination fails to comply with regulatory requirements and is not sustained.

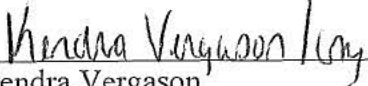
SJEH, which has been forced to retain this resident in a hospital bed he does not need, has made referrals to other nursing homes, so far without success. (T Lutchmidat.) It is the responsibility of the Respondent, not the hospital, to arrange for Appellant's care elsewhere if Respondent is not willing to undertake it. In the meantime, the discharge appeal is granted.

DECISION AND ORDER

Respondent Haven Manor Health Care Center has not established that its determination to discharge the Appellant was correct or that the discharge plan was appropriate.

Respondent is directed to readmit the Appellant to the first available semi-private bed prior to admitting any other person to the facility. 10 NYCRR 415.3(i)(2)(i)(d).

Dated: Rochester, New York
August 26, 2024


Kendra Vergason
Administrative Law Judge