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**Department
of Health**

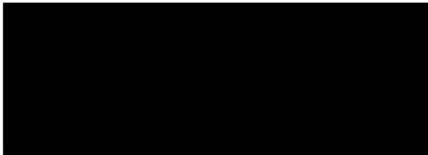
KATHY HOCHUL
Governor

JAMES V. McDONALD, MD, MPH
Commissioner

JOHANNE E. MORNE, MS
Executive Deputy Commissioner

January 22, 2025

CERTIFIED MAIL/RETURN RECEIPT



Efraim Acker, NHA
Bensonhurst Center for Rehabilitation
and Healthcare
1740 84th Street
Brooklyn, New York 11214

Jamie Cash, Esq.
499-521 Pine Brook Road
Lincoln Park, New Jersey 07035

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: cmg
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

[REDACTED]

Appellant,

from a determination by

**Bensonhurst Center for Rehabilitation
and Healthcare,**

Respondent,

to discharge her from a residential
health care facility.

COPY

DECISION
AFTER
HEARING

Hearing before: Kathleen Dix
Administrative Law Judge
January 8, 2025
By WebEx Videoconference

Parties: Bensonhurst Center for Rehabilitation
and Healthcare
1740 84th Street
Brooklyn, New York 11214
By: Jamie I. Cash, Esq.
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Lincoln Park, NJ 07035
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[REDACTED] Appellant
c/o [REDACTED]
[REDACTED]

JURISDICTION

By notice dated [REDACTED] 2024, Bensonhurst Center for Rehabilitation and Healthcare, (Respondent), a residential health care facility subject to Article 28 of the Public Health Law (PHL), determined to discharge / transfer [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 on January 8, 2025, 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. Evidence was received and witnesses were examined. A digital recording of the hearing was made. (1h 11m.) The Appellant made one post hearing written submission. The record closed on January 10, 2025.

HEARING RECORD

ALJ Exhibits:

- I. Notice of Hearing

Respondent's Exhibits:

1. Physician Progress Notes
2. Social Work Progress Notes
3. Discharge Summary

Appellant's Exhibit:

None

Respondent's Witnesses:

Lena Feygin, Director of Social Work
Nadiya Puglia, Director of Nursing
Katrina Lati, Director of Rehabilitation

Appellant's Witnesses:

[REDACTED] Appellant

ISSUES

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

FINDINGS OF FACT

1. Respondent, Bensonhurst Center for Rehabilitation and 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 female who was admitted to the Facility on [REDACTED], 2023 from [REDACTED] for short term rehabilitation. (Exhibit 1).

3. By notice dated [REDACTED] 2024, the Respondent advised the Appellant of its determination to discharge her on [REDACTED] 2024, on the grounds that her health has been improved sufficiently so that she no longer needs the services of the facility. (ALJ Exhibit I).

4. The discharge notice advised the Appellant she would be discharged to [REDACTED] *i.e.*, [REDACTED], where the Appellant had previously resided. (ALJ Exhibit I).

5. A physician's progress note from Donald Martinelli, M.D., dated [REDACTED] 2024 states that the Appellant was seen on [REDACTED] 2024, that she showed no distress, uses oxygen as needed, and ambulates with a rolling walker [REDACTED] feet. Dr. Martinelli opined that the Appellant was clinically stable and medically cleared for transfer to assisted living. (Exhibit 1, Page 14).

6. The Appellant was transferred to [REDACTED] on [REDACTED], 2024.

(Exhibit 2, Page 17; Exhibit 3.)

7. On [REDACTED] 2024, the Appellant appealed the Facility's discharge determination and proposed discharge location.

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:

...

(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 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)(1)(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 sufficiently so that she no longer needs the services of the facility. (ALJ Exhibit I). The Appellant was admitted to the Respondent's facility following a hospitalization on [REDACTED] 2023 for short term rehabilitation with a primary diagnosis of [REDACTED]

[REDACTED] The Appellant was evaluated by [REDACTED], MD, a physician employed by the Respondent, on [REDACTED] 2023 and found to have [REDACTED],

[REDACTED] The Appellant had been wheelchair bound for the previous two years and it was determined that she would benefit from skilled rehabilitation services. During her stay, the Appellant received physical and occupational therapies, from which she benefitted, and her abilities improved. (Exhibit 1.)

Nadiya Puglia, Director of Nursing, testified that Donald. Martinelli, MD, the Appellant's treating physician while at the facility, had cleared the Appellant for discharge to an assisted living facility. (Recording @ 26:46, 28:06.) In a progress noted dated [REDACTED] 2024, Dr. Martinelli stated that the Appellant was seen on [REDACTED] 2024, showed no distress, is able to use oxygen as needed, and can ambulate with a rolling walker up to [REDACTED] feet. Dr. Martinelli opined that the Appellant was clinically stable and medically cleared for transfer to assisted living. (Exhibit 1, Page 14).

The Appellant testified that she does not object to her discharge to [REDACTED] itself. The Appellant testified that she was admitted to the Facility for rehabilitation and received the same. The Appellant did not deny that her doctor had medically cleared her for discharge on [REDACTED] 2024, and admitted that she had no medical evidence contradictory to Dr. Martinelli's clearance for discharge. The Appellant testified that she was not ready to go to [REDACTED] on [REDACTED] 2024. The Appellant believes she needs more time at the Respondent's facility and that she wanted to wait until "everything was in place and equipment [was] ready for [her], to make [her] transition smooth." (Recording @ 29:34, 46:03, 47:48, 48:01; Appellant's post hearing submission.)

The medical evidence in the record by the Appellant's treating physician, which is supported by the testimony of the Respondent's Director of Nursing, Ms. Puglia, shows that the Appellant is ambulatory, that she ambulates with a rolling walker [REDACTED] feet, that she is clinically stable, and is medically cleared for transfer to assisted living. The record contains no contrary medical evidence. Thus, the Respondent has established that the Appellant's discharge was necessary in accordance with 10 NYCRR § 415.3(i)(1)(i)(a)(2). Dr. Martinelli's progress note complies with the regulatory requirement that documentation of the necessity of the Appellant's discharge be contained in her medical record. 10 NYCRR § 415.3(i)(1)(ii)(a) and (iii)(b); 42 C.F.R. § 483.15(c)(2)(ii)(A).

Discharge Plan

The Notice of Discharge advised the Appellant that she would be discharged to [REDACTED] *i.e.*, [REDACTED], where the Appellant had previously resided, and sought to return. (ALJ Exhibit I.) Lena Feygin,

Director of Social Work, testified that the Appellant advised her that she wished to be discharged to [REDACTED], and though offered other facilities where she was accepted, the Appellant declined those facilities over [REDACTED]. Ms. Feygin testified that the Appellant knew on [REDACTED] 2024 that she was being discharged to [REDACTED] the following day, that she had expressed dissatisfaction with the Facility, and stated that she wanted to go to [REDACTED]. The Appellant asked to be transported via an ambulette rather than an ambulance, which was accommodated. Social Work progress notes indicated that the Appellant refused to get dressed despite encouragement from the Respondent and that the Appellant expressed a preference to remain in her gown during transportation. Following the transfer, [REDACTED] acknowledged that the Appellant had arrived safely and was then currently in her room. (Recording @ 21:39, 24:50 25:18; Exhibits 2, 3.)

The Appellant contends that she was verbally advised of her discharge the morning of [REDACTED] 2024 at which time she was not dressed because she was not planning on going anywhere, that when advised of her discharge she told Ms. Feygin that she did not feel ready to leave the Facility, *i.e.*, that “she was not going”, that she was trying to reach the Department to file an appeal to the discharge and was awaiting a return call. The Appellant stated that she had not agreed to leave on [REDACTED], 2024, despite being threatened with the police, and that she was pushed in her wheelchair out of the door to waiting transportation which had been arranged by the Facility. The Appellant testified that she was handed a copy of the Notice of Discharge as she was being wheeled out of the Facility. The Appellant also asserts that she was not provided with equipment that she requested, *e.g.*, a bed wedge, portable oxygen, and [REDACTED] and the Appellant wanted to test the wheelchair “weeks in advance” to

see if she were comfortable in it, but that was not done. (Recording @ 33:23 *et. seq.*, Exhibit 3.)

The record shows that the Appellant wanted to be discharged to [REDACTED]. Discharge to [REDACTED] may have been appropriate given the Appellant's lack of skilled nursing needs and the increase in her functional abilities because the Appellant was residing there for several years prior to her hospitalization and it is currently available to the Appellant, and because it would address the Appellant's long-term care and medical needs and how they will be met after discharge, as required by 10 NYCRR § 415.3(i)(1)(vi). However, despite the Appellant's admitted agreement to be discharged to [REDACTED], the record does not contain a signed and dated written statement by the Appellant or her designated representative evidencing such agreement. At the time of the discharge the Appellant refused to sign the discharge documents (Exhibit 3), and did not cooperate with, and actively resisted, the discharge, evidencing that she was not then agreeing to a discharge. As such, absent written consent as noted above, the Respondent was required to provide written notice of transfer or discharge to the Appellant at least 30 days before she was transferred. 10 NYCRR §§ 415.3(i), (iii) and (iv). The Respondent did not do so. The Notice of Discharge was dated [REDACTED] 2024, the day before the Appellant was transferred to [REDACTED]. The Respondent failed to properly and timely notify the Appellant of her transfer or discharge and failed to provide the Appellant with sufficient preparation and orientation to ensure safe and orderly discharge from its' facility as required by 10 NYCRR §§ 415.3(i), (iii) and (iv).

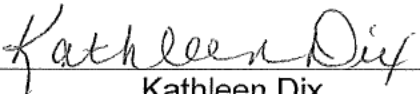
DECISION and ORDER

Bensonhurst Center for Rehabilitation and Healthcare has established that its determination to discharge the Appellant was necessary but failed to establish that the

discharge plan was appropriate.

1. Bensonhurst Center for Rehabilitation and Healthcare is directed to readmit the Appellant to the first semi-private bed available prior to admitting any other person to the facility; and to provide the Appellant with 30-days of time to leave the Facility. 10 NYCRR 415.3(i)(2)(i)(d) and (i)(3)(iv).
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
January 22, 2025


Kathleen Dix
Administrative Law Judge

To: Efraim Acker, Nursing Home Administrator
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and Healthcare
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[REDACTED]
[REDACTED]
c/o
[REDACTED]