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NEW YORK STATE | Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, MD, MPH
Commissioner

JOHANNE E. MORNE, MS
Executive Deputy Commissioner

March 18, 2025

CERTIFIED MAIL/RETURN RECEIPT

[redacted]
c/o Elmhurst Hospital
79-01 Broadway
Elmhurst, New York 11373

Nicole Reichmann, NHA
Ocean Gardens Care Center
64-11 Beach Channel Drive
Arverne, New York 11692

Anna Hock, Esq.
Barker Patterson Nichols, LLP
300 Garden City Plaza, Suite 100
Garden City, New York 11530

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

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB:
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

Ocean Gardens Care Center,

Respondent,

to discharge him from a residential health care facility.

COPY

ORDER

#DA25-6521

Hearing before: Jeanne T. Arnold
Administrative Law Judge
February 6, 2025 (pre-hearing)
February 20, 2025
March 14, 2025
By videoconference

Parties: Ocean Gardens Care Center
64-11 Beach Channel Drive
Arverne, New York 11692
By: Nicole Reichmann, Administrator

[redacted]
c/o Elmhurst Hospital
By: Anna I. Hock, Esq.
Barker Patterson Nichols, LLP
300 Garden City Plaza
Suite 100
Garden City, New York 11530

Also appearing: Elmhurst Hospital
79-01Broadway
Elmhurst, New York 11373

JURISDICTION

On [redacted] 2024, Ocean Gardens Care Center (Facility), a residential health care facility subject to Article 28 of the Public Health Law (PHL), contacted local police to remove [redacted] (Appellant), a resident, from its nursing home after he [redacted] another resident (Resident A). The police transported the Appellant to [redacted] County Criminal Court, where a judge issued orders of protection for Resident A and the certified nurse aide (CNA) who intervened and escorted the Appellant out of Resident A's room. The Appellant was then transported by police to Elmhurst Hospital, where he remains. The Appellant has appealed the Facility's decision not to readmit him to the New York State Department of Health (Department) pursuant to 10 NYCRR 415.3(i).

HEARING RECORD

Facility witnesses:	Nicole Reichmann, Administrator Mary Ellen Finneran, Assistant Director of Nursing Anne Marie Coombs, Director of Nursing Alicia Lemon, Director of Social Services Nenad Grlic, Medical Director
Facility exhibits:	1-8
Appellant witnesses:	Tushara Edupghanti, Physician, Elmhurst Hospital Laura Eraso, Esq., Legal Aid Joseph Iannotto, Social Work Supervisor, Elmhurst Hospital [redacted], Appellant's [redacted]
Appellant exhibits:	A-B
ALJ exhibits:	I – Hearing notice with notice of discharge dated [redacted] 2024 II – Notice of discharge dated [redacted], 2025 III – Decision dated [redacted], 2024

A recording of the proceeding was made (Recording 1, 0h:2m in duration; Recording 2, 1h:42m; Recording 3, 2h:6m). Testimony is indicated by "T".

SUMMARY OF FACTS

1. The Facility 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 Arverne, New York.

2. On [redacted], 2023, the Appellant, age [redacted] was transferred to the Facility from [redacted] Hospital with diagnoses of, among other things, [redacted]. (Exhibit 1.)

3. On [redacted], 2024, a Facility CNA heard a scream, entered Resident A's room, and found the Appellant [redacted] Resident A's [redacted] The CNA removed the Appellant from the room. Facility staff then contacted law enforcement who removed the Appellant from the premises. (ALJ III, Summary of Facts #2, 3; T Finneran.)

4. On [redacted] 2024, [redacted] County Criminal Court Judge [redacted] issued temporary orders of protection on behalf of Resident A and the CNA requiring the Appellant, among other things, to stay away from the home of Resident A and the place of employment of the CNA and to "not go within [redacted]" of both Resident A and the CNA. However, the orders also note they are "subject to incidental contact" at the Facility. (Exhibits 5, 6.) At the arraignment, the judge noted that the Appellant could return to the Facility but, if he did, he may not approach or speak with Resident A and/or the CNA and instead would have to "turn and walk away." (Exhibit 8, p 5.)

5. On [redacted], 2024, police transported the Appellant to Elmhurst Hospital, a general hospital within the meaning of PHL § 2801(10), after he was ordered there for an

assessment "and medical treatment if he needs it" before returning to a skilled nursing facility. (Exhibit 8, p 3.)

6. After the Appellant was cleared from [redacted] emergency, he requested to return to the Facility and, when the Facility would not readmit him, he appealed. A hearing ensued on [redacted] 2024, and an Administrative Law Judge (ALJ) issued a decision finding, among other things, that the Facility had not discharged the Appellant but that when Elmhurst Hospital determines the Appellant is ready for discharge, the Facility has an obligation to evaluate him. "If the Facility then determines that it is unable to care for the Appellant, it must issue a discharge notice and devise an appropriate plan." ALJ III, p 5, citing *Notice of Transfer or Discharge and Permitting Residents to Return*, DAL-NH 19-07 (reissued October 11, 2022); *Transfer and Discharge Requirements for Nursing Homes*, DAL-NH 15-06.

7. By notice dated [redacted], 2024, the same day as that hearing, the Facility retroactively determined to discharge/transfer the Appellant on [redacted], 2024 because the health and/or safety of individuals in the facility were endangered. The notice was sent by certified mail to the Appellant's representative and detailed that the discharge location was Elmhurst Hospital, where the Appellant had been escorted to by police officers and where he was admitted. (Exhibit 3.) The notice was not served on the Appellant.

8. The Appellant has remained at Elmhurst Hospital despite being cleared both medically and [redacted] to return to the Facility as early as [redacted] 2024. Nonetheless, the Appellant was admitted to the hospital for safe discharge planning

because the Facility refused transfer back. (Exhibits A, B; T Edupghanti, Iannotto.) The Facility continue to refuse to accept the Appellant back. (T Reichmann, Coombs.)

9. On [redacted], 2025, the Appellant requested this hearing to challenge the Facility's continued refusal to accept the Appellant back.

10. On [redacted] 2025, the parties appeared and agreed to an adjournment to February 20 for the Facility to review lengthy medical records provided by Elmhurst Hospital. One day prior to the adjourned hearing, the Facility issued a new notice dated [redacted] 2025, which determined to discharge the Appellant to [redacted] an Assisted Living Facility (ALF), again indicating the grounds for the discharge that the health and/or safety of individuals in the facility were endangered. (Exhibit ALJ II.) The notice did not specify a date for discharge. At the adjourned hearing, the parties agreed for both the [redacted]; 2024 notice and the [redacted] 2025 notice to be addressed.

11. After close of the Facility's case on [redacted] 2025, the Appellant and his family requested an adjournment to visit the proposed ALF, the discharge plan in the Facility's notice dated [redacted], to determine whether it is an appropriate placement for the Appellant.

12. The Appellant's family determined that the ALF is not an appropriate placement for the Appellant and the Appellant wished to proceed with the current appeal. The Appellant remains at Elmhurst Hospital pending the outcome of this appeal.

ISSUES

Has the Facility established that the Appellant's discharge is authorized and that its proposed discharge plan pursuant to its notice dated [redacted] 2024 is appropriate?

Has the Facility established that the Appellant's discharge is authorized and that its proposed discharge plan pursuant to its notice dated [redacted], 2025 is appropriate?

APPLICABLE LAW

A residential health care facility, or nursing home, is a facility that provides regular nursing services, medical, rehabilitative, and professional services to residents who do not require hospitalization. PHL § 2801(2)(3); 10 NYCRR 415.2(k).

Transfer and discharge rights of nursing home residents are set forth in PHL § 2803-z, Department regulations at 10 NYCRR §415.3(i) and federal regulations at 42 CFR 483.15(c). A nursing facility may discharge a resident when the interdisciplinary care team, in consultation with the resident, determines that the health and safety of individuals in the facility are endangered. 10 NYCRR 415.3(i)(1)(i)(a)(3)(4). When discharge is for this reason, the facility must ensure complete documentation in the medical record, made by a physician, that includes the basis for the discharge. 10 NYCRR 415.3(i)(1)(ii)(b).

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 (reissued October 11, 2022). 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).

The Facility must 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 those needs will be met after discharge. 10 NYCRR 415.3(i)(1)(vi). The Facility must also permit residents and their representatives the opportunity to participate in deciding where the resident will reside after discharge. 10 NYCRR 415.3(i)(1)(vii).

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 or around [redacted], 2024, an incident occurred at the Facility and the Appellant was brought to Elmhurst Hospital, an acute care hospital, by police for observation and/or treatment. The Facility refused to readmit him. The Appellant appealed the Facility's refusal to readmit to the New York State Department of Health pursuant to 10 NYCRR 415.3(i). A hearing ensued on [redacted] 2024 in which the ALJ determined both that the Facility had not yet discharged the Appellant, and that the Hospital had not yet cleared the Appellant for readmission to the Facility. (Exhibit ALJ III.)

[redacted], 2024 notice:

Before it transfers or discharges a resident, a nursing home must notify the resident and designated representative, if any, of the transfer or discharge and the grounds for it in writing. PHL § 2803-z(1)(c); 10 NYCRR 415.3(i)(1)(iii),(iv)&(v); 42 CFR 483.15(c)(3)&(5). On October 1, the very day of the first hearing, and prior to requesting or receiving any further information from the hospital, the Facility issued a discharge/transfer notice and served it on the Appellant's family by certified mail. The stated discharge location was Elmhurst Hospital. The date of the proposed discharge, [redacted] 2024, had already passed, the Appellant already was transferred to the hospital and the notice was not served on the Appellant himself. (Exhibit ALJ I.)

Department regulations specify that a notice of discharge must be provided "no later than the date on which a determination was made to transfer or discharge." 10 NYCRR 415.3(i)(1)(iv). An October 1 notice stating that a determination to discharge on [redacted] is, on its face, invalid.

Furthermore, the [redacted] notice stated the discharge location as Elmhurst Hospital. "A hospital is not an appropriate discharge location." *Notice of Transfer or Discharge and Permitting Residents to Return*, DAL-NH 19-07 (reissued October 11, 2022); *Transfer and Discharge Requirements for Nursing Homes*, DAL-NH 15-06. When a resident is hospitalized, the nursing home is required to readmit him if he requires nursing home care. 10 NYCRR 415.3(i)(3); 42 CFR 483.15(e). If the resident is not appropriate for return to the nursing home, the nursing home is required to provide notice and sufficient preparation and orientation to ensure safe and orderly transfer or discharge in the form of a discharge plan which addresses his medical needs and how these will be

met after discharge. 10 NYCRR 415.3(i)(1)(vi). As the Facility's Notice dated [redacted] 2024 was not timely, proposed to discharge the Appellant to an inappropriate discharge location and because the Facility did not consider the hospital's medical records prior to issuing such notice, the Facility failed to establish that the Appellant's discharge was authorized or that its proposed discharge plan pursuant to its notice dated [redacted] 2024 was appropriate.

[redacted], 2025 notice:

On February 20, 2025, the adjourned date concerning the appeal of the notice dated [redacted], the Facility presented a second notice dated [redacted] which alleges the same grounds for discharge as the first, that the health and safety of individuals in the Facility are endangered. 10 NYCRR 415.3(i)(1)(i)(a)(3)(4). When discharge is for this reason, the Facility must ensure complete documentation in the medical record, made by a physician, that includes the basis for the discharge. 10 NYCRR 415.3(i)(1)(ii)(b).

The Facility presented the temporary orders of protection dated [redacted], 2024, which required the Appellant, among other things, to stay away from the home of Resident A and the place of employment of the CNA and to "not go within [redacted]" of both Resident A and the CNA. However, the orders also note they are "subject to incidental contact" at the Facility. (Exhibits 5, 6.) At the criminal arraignment, the judge specifically noted that the Appellant could return to the Facility on the conditions that if he did, he could not approach or speak with Resident A and/or the CNA and instead would have to "turn and walk away." (Exhibit 8, p 5.) On the second day of this hearing, on [redacted] 2025, the Appellant's criminal attorney testified that the orders of protection have now

been completely vacated effective [redacted] based upon dismissal of the charges themselves. (T Eraso.)

The Facility's medical director testified that the Appellant's past verbal outbursts included an unspecified incident in [redacted] 2023 in which 911 was called and an unidentified-dated incident wherein the Appellant [redacted], as well as the incident that resulted in the orders of protection at issue. The medical director claimed that this establishes the Appellant's behavior is unpredictable and, therefore, that readmission to the Facility would endanger the safety of the Facility's residents. However, the medical director admitted that he did not document these or any other such behaviors in the Appellant's file as required by the regulations (10 NYCRR 415.3[i][1][ii][b]). He also could not explain why a discharge to an ALF would be any safer for the Appellant and/or its residents than continued residence at the Facility. Additionally, the medical director testified that the last time he saw the Appellant was on [redacted] 2024, prior to the Appellant's admission to Elmhurst Hospital and even prior to the incident of [redacted] 2024 which resulted in the orders of protection at issue. 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.

The Facility's assistant director and director of nursing also both testified that they believed that other residents' safety would be endangered if the Appellant returned to the Facility because the Appellant is able to walk about the Facility and they do not provide 1:1 supervision. Yet both also admitted that the Facility, with five floors of resident units, could implement a plan of care to keep the Appellant away from Resident A and the CNA. They stated that a plan of care that limited the Appellant's unsupervised contact with

residents or staff would limit the Appellant's own freedoms. (T Finneran, Coombs.) The issue is appropriate supervision, not limiting freedom. A nursing home must provide appropriate supervision of its residents.

Director of nursing Coombs testified that she reviewed the hospital's records and visited with the Appellant only once since he was transferred out of the Facility. That approximate-five-minute visit occurred on [redacted] after commencement of this hearing and five months after the Appellant's admission to the hospital. (T Coombs, Iannotto.) Although Coombs claimed that it would not be safe for the Facility's residents if the Appellant returns, she relies on behaviors pre-dating the Appellant's hospital admission. She admitted that according to the hospital records the Appellant has had no concerning behaviors since he was admitted to the hospital.

The hospital admitted the Appellant's medical record since his admission there. (Exhibit A.) The hospital's physician, Dr. Edupghanti, who has contributed to the Appellant's care on a rotating schedule since his admission, also testified. The Appellant was seen for a [redacted] evaluation and was cleared [redacted] as early as [redacted] to return to the Facility. The Appellant was then admitted to the hospital for safe dispositional planning because the Facility refused to accept him back.

The Appellant has been diagnosed with [redacted]. He has, however, been calm and cooperative throughout his stay, has not demonstrated any [redacted] behaviors and has been compliant with his medications. (Exhibit A.) It is safe for the Appellant to return to the Facility, and he does not require hospital care. (Exhibit A; T Edupghanti.) The Facility has not demonstrated that the health or safety of its residents would be endangered if the Appellant is returned to the Facility.

The Facility's notice dated [redacted], 2025, proposes discharge to [redacted] an ALF which is a lower level of care than the Facility itself. The Facility has not explained how, if it cannot safely care for the Appellant, an ALF providing a lower level of care can. The Facility's medical director testified that the [redacted] ALF is a safe plan for the Appellant because it is a Level [redacted] facility, yet he also admitted that he was not specifically familiar with [redacted] and that he had not seen the Appellant since [redacted] 2024. (T Grlic.) Dr. Edupghanti, of Elmhurst Hospital who has seen and treated the Appellant far more recently, testified that upon current examination of the Appellant, he is oriented only [redacted] and that in her professional opinion a safe discharge for the Appellant would dictate that he be sent back to the same level of care from which he came. She testified that he needs direction to complete his Activities of Daily Living (ADLs). The Appellant can walk independently and can [redacted], but he does require prompting and needs assistance [redacted]. (T Edupghanti.)

The hospital's social worker, Mr. Iannotto, testified that he is the Alternative Level of Care (ALC) Supervisor, and he has been working with the Appellant since his admission to the hospital on locating a safe discharge location. Despite at least 12 different referrals to nursing homes all over the state, the Appellant has not been accepted.

Mr. Iannotto testified in no uncertain terms that the only safe discharge plan for the Appellant would be to a nursing home as the Appellant is only oriented to self. He admitted that the PRIs prepared by the hospital indicate that the Appellant's level of care is for a Health Related Facility (HRF) and not a skilled Nursing Facility (SNF) but explained that nurses prepare the PRI based only upon chart review of ADLs. Mr. Iannotto pointed out that a hospital must also consider factors such as the underlying medical diagnoses. Here,

the Appellant's diagnosis of [redacted] necessarily means that his condition will continue to [redacted] While a Level [redacted] ALF, such as [redacted] has staff that can assist with ADLs, it could not handle the Appellant's continued [redacted]. (T Iannotto.)

Mr. Iannotto testified that currently the Appellant mostly [redacted], he greets people [redacted]. Mr. Iannotto noted that the Facility representative visited the Appellant only once in the hospital for a visit that lasted between two and five minutes and they neither performed a cognitive assessment nor reviewed any records. The latest PRI, dated [redacted] 2025, details that the Appellant is only [redacted]. (Exhibit A.)

Mr. Iannotto has communicated extensively with the Appellant's family regarding discharge plans. In contrast, the Facility has shown little evidence of any attempt to communicate with the Appellant's family, which was not even aware of the Facility's proposed discharge plan to [redacted] until the adjourned hearing date. (T Iannotto.) The family was nevertheless willing to entertain discharge to the proposed ALF and agreed to research and visit it. Having done so, the family has concerns because the ALF has all new staff, does not have enough staff to supervise its residents, and is undergoing extensive construction. (T Iannotto; Statement of [redacted].) It is further noted that [redacted] admitted the Appellant without ever reviewing his medical record. (T Iannotto.) The acceptance was based on his condition prior to his admission to the hospital.

The Facility must 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 those needs will be met after discharge. 10 NYCRR 415.3(i)(1)(vi). The Facility must also permit residents and

their representatives the opportunity to participate in deciding where the resident will reside after discharge. 10 NYCRR 415.3(i)(1)(vii). The Facility did not meet its burden to prove that it complied with these requirements.

The Facility has failed to comply with the notice 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 Facility's determination, as detailed in its notice dated [redacted], 2025, fails to comply with regulatory requirements and is not sustained.

Elmhurst Hospital has been forced to retain the Appellant in a bed he does not need, has worked with the Appellant and his family and has made numerous referrals to other nursing homes, so far without success. (T Iannotto.) It is the responsibility of the Facility -- not the hospital --to arrange for Appellant's care elsewhere if the Facility is not willing to undertake it. In the meantime, the discharge appeal is granted.

DECISION: The Facility has failed to establish that the discharge of Appellant was necessary and that its discharge plan is appropriate. The Facility is directed, pursuant to 10 NYCRR 415.3(i)(2)(i)(d), to readmit the Appellant prior to admitting any other person.

Dated: Rochester, New York
March 17, 2025

Jeanne T. Arnold
Administrative Law Judge
Bureau of Adjudication

To: Nicole Reichmann, Administrator
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