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Department of Health

KATHY HOCHUL
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Executive Deputy Commissioner

March 24, 2025

CERTIFIED MAIL/RETURN RECEIPT

Erica Schwartz, DSW
Beth Abraham Center for Rehabilitation
612 Allerton Avenue
Bronx, New York 10467

[REDACTED]
C/O Beth Abraham Center for Rehabilitation
612 Allerton Avenue
Bronx, New York 10467

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: nm
Enclosure

STATE OF NEW YORK: DEPARTMENT OF HEALTH

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

[REDACTED]

Appellant,

COPY

from a determination by

DECISION

Beth Abraham Center for Rehabilitation
Respondent,

to discharge him from a residential health care facility.

Hearing Before: Jean T. Carney
Administrative Law Judge

Held via: Cisco WebEx videoconference

Hearing Date: March 13, 2025

Parties: [REDACTED] Appellant, *pro se*
C/O Beth Abraham Center for Rehabilitation
612 Allerton Avenue
Bronx, New York 10467

Beth Abraham Center for Rehabilitation, Respondent
612 Allerton Avenue
Bronx, New York 10467

By: Erica Schwartz, Director of Social Services
eschwartz@bethabrahamcenter.net

JURISDICTION

By notice dated [REDACTED], 2025, Beth Abraham Center for Rehabilitation (Facility or Respondent), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] (Appellant or Resident) from the Facility on the grounds that the safety of individuals in the facility was endangered. The proposed discharge location is to the [REDACTED] Homeless Services ([REDACTED]), New York. The Appellant appealed the discharge determination to the New York State Department of Health (Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) § 415.3(i).

HEARING RECORD

In support of its determination, the Facility presented documents (Exhibits 1-8); and the testimony of Robin Tucker-Brandon, LCSW; Arash Arvin, MD, Medical Director; Evan Stein, Assistant Director of Rehabilitation Services; and Erica Schwartz, Director of Social Services. The Appellant testified in his own behalf. The Notice of Hearing with Discharge Notice was admitted into evidence (ALJ I). The hearing was digitally recorded and made part of the record.

ISSUE

Has the Facility established that the Appellant's discharge is necessary and the discharge plan is appropriate?

FINDINGS OF FACTS

Citations in parentheses refers to the testimony of the witness ("T") at the hearing and exhibits ("Exh") found persuasive in arriving at a particular finding. An opportunity to be heard having been afforded the parties, and evidence having been duly considered, it is hereby found:

1. The Appellant is a [REDACTED]-year-old male who was admitted to the Facility on [REDACTED] 2021, for short term rehabilitation [REDACTED]. The Appellant is alert and capable of making decisions regarding his care. (Exhs 1, 7 and 8; T Dr. Arvin, Ms. Brandon-Tucker and Appellant).

2. On [REDACTED] 2022, the Appellant signed the Facility's Resident Smoking Safety Agreement/Contract (Contract), and Smoking Rules and Safety Agreement (Rules). The Rules sets forth in detail the Facility's smoking policy include restrictions based on weather, infection control, designated smoking areas and times. The Rules also state that smoking will be supervised, all smoking materials will be stored in a locked area by staff, and made available only during designated smoking times. The Contract sets forth in detail the consequences for violating the Rules, culminating in withdrawing smoking privileges and issuing a 30-day discharge notice after four violations. (Exh 2).

3. Between [REDACTED] 2024 and [REDACTED] 2025, the Appellant was found in violation of the Rules on five occasions. He was found smoking in a non-designated area or at a non-designated time four times, and found with smoking materials all five times. (Exh 3).

4. The Appellant is independent in his activities of daily living (ADLs). He uses a rolling walker while ambulating; his [REDACTED] medical and [REDACTED] conditions are stable; and his treatment team has determined that he may safely be discharged to the community. (Exhs 1, 4, 5 and 6; T Dr. Arvin, Mr. Stein and Appellant).

5. The Facility has worked with the Appellant on discharge planning for over a year. He was accepted to the [REDACTED] program and can continue working with his case manager after being discharged. The Appellant has no family or other supports in the community. The Facility referred him for placement in several Assisted Living Facilities (ALFs); but he was not accepted due to his lack of income. (T Ms. Tucker-Brandon and Appellant).

6. The Facility will ensure that the Appellant will be discharged with a supply of his current medications, follow up appointments with his providers, and a new rolling walker. (T Ms. Schwartz).

APPLICABLE LAW

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

Pursuant to 10 NYCRR § 415.3(i)(1)(i)(a), a resident may only be discharged when the interdisciplinary care team determines that:

- (1) the transfer of discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in the facility;
- (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;
- (3) the safety of individuals in the facility is endangered; or
- (4) the health of individuals in the facility is endangered.

Additionally, 10 NYCRR § 415(i)(1)(ii) requires that the facility ensures complete documentation in the resident's clinical record when transferring or discharging a resident under the above circumstances. The documentation shall be made by:

- (a) the resident's physician and, as appropriate, interdisciplinary care team, when transfer or discharge is necessary under subclause (1) or (2) of clause (a) of subparagraph (i) of this paragraph; and

(b) a physician when transfer or discharge is necessary due to the endangerment of the health of other individuals in the facility under subclause (3) of clause (a) of subparagraph (i) of this paragraph.

The burden is on the Facility to prove by substantial evidence that the discharge is necessary, and the plan is appropriate. (10 NYCRR § 415.3(i)(2)(ii); New York State Administrative Procedure Act [SAPA] § 306[1]). Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact; less than preponderance of evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision. (*Stoker v. Tarantino*, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3rd Dept. 1984], *appeal dismissed* 63 N.Y.2d 649[1984]).

DISCUSSION

The Facility has met its burden of showing that the discharge is necessary, and the discharge plan is appropriate. A discharge plan must “[address] the medical needs of the resident and how these will be met after discharge.” (10 NYCRR § 415.3[i][1][vi]). The evidence establishes that the Appellant’s medical needs can be met in the community, and he no longer needs the services provided in the Facility. The Appellant’s medical record establishes that he is independent in his ADLs and can manage his needs in the community.

The Facility contends that the Appellant’s repeated violations of the smoking Rules and Contract endangers the safety of himself and others. The Facility has a responsibility to ensure that all residents are safe. Both the Contract and the Rules ensure the safety of the residents, while accommodating those residents who smoke. The Contract gives violators incremental consequences for violating the smoking Rules, including increased limitations to smoking privileges. At all stages, the violator is provided with counseling and referrals for substance abuse treatment. The Contract clearly states that after four violations, a 30-day discharge notice would be issued, and

smoking privileges will be rescinded. The consequences set forth in the Contract are reasonably related to the violations. After the fourth violation, the Facility gave the Appellant another opportunity to comply with the Rules; but he committed a fifth violation before the Facility determined to discharge him.

While the Appellant did not remember signing the Contract and Rules, he did not deny that his signature was on both documents. Ms. Tucker-Brandon testified that when she counseled the Appellant after each violation, he responded that it was cold outside, and he was more comfortable smoking in his room. Dr. Arvin testified that some residents have medical conditions that could be aggravated by cigarette smoke, and some have portable oxygen tanks. The risk of a resident accidentally starting a fire if they smoke in their room is significant. The Appellant testified that he could control his smoking, and if he was allowed to remain in the facility, he would promise to comply with the smoking Rules. The Facility has been more than accommodating to the Resident; but his continued violations and failure to comply with this policy, creates a significant safety risk. The Appellant has been given multiple opportunities to with the Contract and Rules and has not done so.

Although the Facility did not allege in the Discharge Notice that the Appellant's health has improved such that he no longer needs skilled nursing services, the plan is to discharge the Appellant to the [REDACTED], New York. The testimony and documentary evidence from the Medical Director and Director of Rehabilitation Services supports the Facility's assertion that the discharge plan is appropriate because the Appellant no longer requires skilled nursing services. The Appellant is independent in all his activities of daily living, he can ambulate with a rolling walker, he is familiar with and able to administer his own medications, and he can manage his medical appointments. (T Dr. Arvin and Appellant). The Appellant is doing well in a physical therapy program designed to assist residents who are ready to be

discharged navigate obstacles. (T Mr. Stein and Appellant). The Facility has shown that the Appellant may safely be discharged to the community.

The Appellant requests more time to work with [REDACTED] and find permanent housing. He argues that his health has not improved enough to be discharged to the community because he needs [REDACTED] therapy, and a referral to an [REDACTED] surgeon. However, he can receive those services in the community. The evidence establishes that the discharge plan addresses the Appellant's medical needs and how they will be met after discharge. The evidence also establishes that the Facility has worked with the Appellant to explore other discharge locations; but discharge to the shelter system is the only available option.

ORDER

Beth Abraham Nursing and Rehabilitation has established that its determination to discharge the Appellant is necessary, and that the discharge location is appropriate.

1. The Facility is authorized to discharge the Appellant pursuant to the notice of Discharge dated [REDACTED] 2025.
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: March 21, 2025
Albany, New York


JEAN T. CARNEY
Administrative Law Judge

TO: Erica Schwartz, DSW
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eschwartz@bethabrahamcenter.net



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