



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

June 21, 2017

CERTIFIED MAIL/RETURN RECEIPT

Allison Bellin, DSW
Beth Abraham Health Services
612 Allerton Avenue
Bronx, NY 10467

[REDACTED], Resident
c/o Beth Abraham Health Services
612 Allerton Avenue
Bronx, NY 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,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: nm
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

Beth Abraham Health Services,

Respondent,

to discharge him from a residential health care facility.

COPY

DECISION

Hearing Before:

Ann H. Gayle
Administrative Law Judge

Held at:

Beth Abraham Health Services
612 Allerton Avenue
Bronx, New York 10467

Hearing Dates:

May 25, 2017
June 13, 2017

Parties:

Beth Abraham Health Services
By: Allison Bellin
Director of Social Work

[REDACTED]
Pro Se

Pursuant to Public Health Law (“PHL”) §2801 and Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“10 NYCRR”) §415.2(k), a residential health care facility or nursing home such as Beth Abraham Health Services (“Respondent” or “Facility”) 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.

Transfer and discharge rights of nursing home residents are set forth at 10 NYCRR §415.3(h). Respondent determined to discharge ████████ (“Appellant” or “Resident”) from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(h)(1)(i)(a)(3) and (4) which provides, in pertinent part:

- (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: ...
 - (3) the safety of individuals in the facility is endangered; or
 - (4) the health of individuals in the facility is endangered.

10 NYCRR §415.3(h)(1)(ii)(b) provides, in pertinent part, that the facility shall: ...

- (ii) ensure complete documentation in the resident’s clinical record when the facility transfers or discharges a resident under any of the circumstances specified in subparagraph (i) of this paragraph. The documentation shall be made by: ...
 - (b) a physician when transfer or discharge is necessary due to the endangerment of the health of other individuals in the facility...

Appellant appealed the discharge determination to the New York State Department of Health.

The hearing on that appeal was held in accordance with 10 NYCRR §415. Pursuant to 10 NYCRR §415.3(h)(2)(iii)(b), the Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate.

This hearing was digitally recorded and transferred to a compact disc (“CD”); the CD has become part of the record. Appellant testified for Appellant. The following individuals testified for Respondent: Allison Bellin–Director of Social Work, Ramon Santos–Social Worker, Chandel Stallworth–Director of Recreational Services, and Paulette McCullough–Nurse Manager.

The following documents were accepted into evidence by the Administrative Law Judge (“ALJ”) as ALJ and Facility Exhibits:

ALJ:

- I: Notice of Hearing with the Facility’s Discharge Notice attached
- II: May 30, 2017 letter

Facility:

- 1: Progress Notes

Appellant was given the opportunity but did not offer any documents into evidence.

ISSUE

Has Beth Abraham Health Services established that the transfer is necessary and the discharge plan is appropriate?

FINDINGS OF FACT

Citations in parentheses refer to testimony (“T”) of witnesses and exhibits (“Ex”) found persuasive in arriving at a particular finding.

1. Respondent, Beth Abraham Health Services, is a residential health care facility located in Bronx, New York. (Ex I)
2. Appellant, █ age █ was admitted to the Facility on █ 2017. (T Bellin, Appellant)
3. By notice dated █ 2017, Respondent advised Appellant that it had determined to transfer/discharge him on the grounds that the health or safety of individuals in the facility is endangered by Appellant’s alleged smoking in bathrooms and unsupervised. (Ex I)

█ / Beth Abraham

4. Respondent proposes to discharge Appellant to the █ Shelter ("Shelter"), █. (Ex I; T Bellin)

5. It is the professional opinion of the Facility's Social Services and Nursing disciplines that transfer to the Shelter is appropriate, but an opinion of the Facility's Medical Director or any other physician was not provided at the hearing. (Ex 1; T Bellin, McCullough)

6. Appellant has remained at Beth Abraham Health Services pending the outcome of this proceeding.

DISCUSSION

Respondent's proposal to discharge Appellant pursuant to 10 NYCRR §415.3(h)(1)(i)(a)(3) and (4) is based on Appellant's alleged smoking in bathrooms, in Appellant's room, and in other non-designated smoking areas (Appellant denies this), as well as smoking in designated areas but at non-designated times and when Appellant's smoking privileges were restricted and/or suspended (Appellant admits this).

Appellant was admitted to the Facility on █ 2017; two days later, a nurse, a certified nurse assistant, and a social worker smelled cigarette smoke in Appellant's room at a time when Appellant's non-smoking roommates were not in the room, and Appellant was the only person in his room. Although a room search by Security on that day (█) did not find cigarettes or smoking paraphernalia, and Appellant both denied he was a smoker and refused to sign a smoking policy, Appellant allegedly signed a smoking policy six days later (█). Appellant is a smoker, and he admits to smoking at non-designated smoking times and when his smoking privileges were restricted or suspended. Appellant denied smoking in non-designated smoking areas such as his room or a bathroom and no cigarettes or smoking paraphernalia were ever found by Security, but Facility employees smelled and observed cigarette smoke in such

locations at times when Appellant was there or just leaving those areas. Appellant claims that he agreed to accepting disciplinary actions such as limitations on, and ultimately suspension of, his smoking privileges for the sole reason that he was new to the Facility and did not want to make waves so early on in his stay. Appellant testified that he knows how dangerous it is to smoke in non-designated areas due to oxygen in use throughout the Facility, and he will not smoke in non-designated areas for that reason.

Respondent was given the opportunity to produce documentation (in addition to the progress notes already in evidence) at the hearing, but Respondent did not produce the smoking policy that Appellant allegedly signed, and Respondent did not produce evidence that a physician approved or supported the proposed discharge. Even if there was sufficient evidence to conclude that Appellant signed a smoking policy, the failure to produce evidence that a Facility physician approved or supported the proposed discharge, as required by 10 NYCRR §415.3(h)(1)(ii)(b), is sufficient to deny Respondent's proposal to discharge Appellant at this time.

The hearing for this matter was originally scheduled for May 25, 2017; when the ALJ arrived at the Facility on that date prepared to hold the hearing, the Parties reported that they had not received the Notice of Hearing (Ex I) informing them of the May 25 hearing date. Although the Parties indicated that they might wish to settle the matter, no settlement was reached, and the hearing was adjourned to June 13, 2017. During a conference call on June 8, 2017, the Facility indicated that it wished to amend its Notice of Discharge to add the grounds of health improved sufficiently so that the Resident no longer required skilled care. The ALJ was prepared to grant Appellant's request, over Respondent's objection, for two additional weeks to prepare for hearing on the additional grounds, however, Respondent determined that it would not amend the discharge notice, preferring to proceed on June 13, 2017. At the June 13 hearing, when Appellant

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proposed an agreement to be discharged on █ 2017, the record was kept open and a conference call was scheduled for June 19, 2017. On the June 19 conference call, Respondent reported that it would not agree to Appellant's request to remain at the Facility until █

Having found that discharge cannot occur at this time due to Respondent's failure to produce evidence that a physician approved its proposed discharge, I will not address whether the safety or health of residents in the Facility would be endangered if Appellant is permitted to remain at the Facility, or if the Shelter is an appropriate discharge location.

If the Parties cannot reach a mutually agreeable discharge plan, the Facility may serve the Resident with a new Notice of Discharge on any grounds it deems exist, and Appellant would have the right to request another hearing to appeal that proposed discharge, but Respondent is not authorized to discharge Appellant pursuant to its May 10, 2017 Discharge Notice.

DECISION

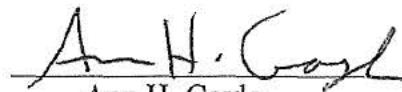
I find that the facility has not produced sufficient evidence to prove that the transfer is necessary and the discharge plan is appropriate.

The appeal by Appellant, █, is therefore GRANTED.

Respondent, Beth Abraham Health Services, is not authorized to discharge Appellant in accordance with the █, 2017 discharge notice.

This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

Dated: New York, New York
June 21, 2017


Ann H. Gayle
Administrative Law Judge

██████ / Beth Abraham

TO: ██████████
c/o Beth Abraham Health Services
612 Allerton Avenue
Bronx, New York 10467

Allison Bellin
Director of Social Work
Beth Abraham Health Services
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