



**Department
of Health**

ANDREW M. CUOMO
Governor

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

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

March 19, 2018

CERTIFIED MAIL/RETURN RECEIPT

Joanne Eisen, Director of Social Work
Beach Gardens Rehab & Nursing Center
17-11 Brookhaven Avenue
Far Rockaway, New York 11691

[REDACTED]
c/o Beach Garden Rehab & Nursing Center
17-11 Brookhaven Avenue
Far Rockaway, New York 11691

Barbara Phair, Esq.
Abrams, Fensterman
3 Dakota Drive, Suite 300
Lake Success, New York 11042

[REDACTED]

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 /CAC
James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: cac
Enclosure

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

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



Appellant,

from a determination by

Beach Gardens Rehab & Nursing Center,

Respondent,

to discharge him from a residential health care facility.

COPY

DECISION

Hearing Before:

Ann H. Gayle
Administrative Law Judge

Held at:

Beach Gardens Rehab & Nursing Center
17-11 Brookhaven Avenue
Far Rockaway, New York 11691

Hearing Date:

March 14, 2018

Parties:

Beach Gardens Rehab & Nursing Center
By: Barbara Phair, Esq.
Abrams, Fensterman, *et al.*



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 Beach Gardens Rehab & Nursing Center (“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 [REDACTED] (“Appellant” or “Resident”) from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(h)(1)(i)(a)(1) and (3) 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: ...
 - (1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in the facility; or
 - ...
 - (3) the safety of individuals in the facility is endangered.

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 and Appellant [REDACTED] testified for Appellant. The following individuals testified for Respondent: Brocha Kagen—Physician Assistant, Alicia Kelly, R.N.—Wound Care Director and Educator, Manuel Acosta—Director of Plant Operations, and Joanne Eisen—Director of Social Work.

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

Facility:

- 1: Physician Assistant note dated [REDACTED] 8
- 2: Progress Notes
- 3: Summary of services provided at Brookside
- 4: Face Sheet
- 5: Statement of [REDACTED]

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

ISSUE

Has Beach Gardens Rehab & Nursing Center 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, Beach Gardens Rehab & Nursing Center, is a residential health care facility located in Far Rockaway, New York. (Ex I)
2. Appellant [REDACTED], age [REDACTED] was admitted to the Facility from [REDACTED] Hospital, for rehabilitation, on [REDACTED], 2016. (Ex 4; T Kelly, Appellant)
3. By notice dated [REDACTED] 2018, Respondent advised Appellant that it had determined to transfer/discharge him on the grounds that the safety of individuals in the facility is endangered by Appellant’s pattern of behavior such as [REDACTED] [REDACTED] throughout the facility, and that such behavior is beyond the scope of Respondent’s ability to care for Appellant. (Ex I)

Beach Gardens

4. Respondent proposes to discharge Appellant to [REDACTED] Nursing Center [REDACTED] (Ex I)

5. It is the professional opinion of the Facility's caregivers at the Facility, including the Facility's physician assistant on behalf of the medical director, that discharge to [REDACTED] is appropriate. (Ex 1; Ex 2; Ex 3; T Kagen, Kelly, Eisen)

6. Appellant has remained at Beach Gardens Rehab & Nursing Center pending the outcome of this proceeding.

DISCUSSION

Respondent determined to discharge Appellant pursuant to 10 NYCRR §415.3(h)(1)(i)(a)(1) and (3) based on Appellant's pattern of behavior of [REDACTED] throughout the Facility and [REDACTED] in his room. Appellant's challenge to these grounds for discharge is more akin to a challenge of Respondent's definitions or ideas of what "[REDACTED]" mean than to a denial of that pattern of behavior. Appellant's testimony and his questions to Respondent's witnesses revealed that his behavior did include [REDACTED] in various places throughout the Facility and [REDACTED] in his room.

Appellant seems to believe that Respondent, to meet its burden, would have to demonstrate that the items he [REDACTED] except for a [REDACTED] in the room. Respondent has proven that [REDACTED] is present when numerous items, especially those that should be [REDACTED]

[REDACTED]

[REDACTED]

Appellant seems to believe that [REDACTED] means that the item can no longer be used and must be fully replaced, but Respondent has proven that [REDACTED] exists when an item cannot be used after its [REDACTED] of whether that item must be discarded or can be repaired. Finally, Appellant seems to believe that “throughout the Facility” means the entire Facility (every floor of the Facility from end to end) whereas Respondent has proven that “throughout the Facility” means various rooms or areas within the Facility.

Respondent’s witnesses testified that beginning shortly after Appellant’s admission to the Facility and continuing to date, Appellant has been [REDACTED] items in his room, he has been counseled to no avail about the danger such behavior creates, and that every several weeks staff from housekeeping, social services, and/or nursing must [REDACTED] Appellant’s [REDACTED] in his room and closet. Those items have included but are not limited to [REDACTED]

[REDACTED] s, Appellant’s and other residents [REDACTED]

Respondent’s witnesses also testified that Appellant has been observed by staff and on video surveillance equipment [REDACTED] Additionally, when several [REDACTED] and could not be found for several weeks, a [REDACTED] was subsequently found in Appellant’s room when Respondent was cleaning his room and discarding what it determined to be [REDACTED] items as described above.

Ms. Kagen, Ms. Kelly, and Ms. Eisen testified that efforts to redirect Appellant from the above-described behavior and to educate him about the danger and risk of harm that such behavior causes and creates have been met with resistance and belligerence from Appellant. They further testified that this Facility does not have the specialized services and units that they, in their professional opinion, believe Appellant requires. Respondent identified [REDACTED] another skilled facility which has a [REDACTED] unit and staff specifically trained to monitor and treat Appellant's needs, as a transfer/discharge plan for Appellant.

Appellant, who makes his own decisions, represented himself at the hearing with the assistance of his [REDACTED] testified that Appellant, who is "very smart and aware of many topics," likes to help people, especially "underdogs," and that Appellant feels a connection with the people at the Facility [REDACTED] expressed her disagreement with the plan to transfer Appellant to [REDACTED] in part, because she read some unfavorable reviews about [REDACTED]

Appellant appears to be in denial of his [REDACTED] tendencies/behavior, and he does not believe that his behavior causes a risk to others. Appellant testified that he knows how things work, and he likes to fix things and show others how to do so. He acknowledged some of the behavior described by Respondent's witnesses, such as [REDACTED]

[REDACTED] but he seems to believe that such behavior was okay and not dangerous because he sees it as removing, not [REDACTED] He also acknowledged [REDACTED]

[REDACTED] but he doesn't think it's [REDACTED] because he finds those items to be [REDACTED]

[REDACTED]

[REDACTED]

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Appellant does not wish to be transferred to [REDACTED]. He testified that he has made friends at the Facility, and he would be [REDACTED] to separate from them. Appellant further testified that he is extremely well-liked and depended upon by the other residents at the Facility, and that it would be a disservice to these residents, especially his roommate, if he were transferred.

CONCLUSION

Respondent has proven that Appellant's behavior of [REDACTED] that could attract [REDACTED] and/or cause [REDACTED]. Respondent has also proven that Appellant's needs cannot be met at this Facility, and that [REDACTED] is an appropriate placement for addressing Appellant's needs.

DECISION

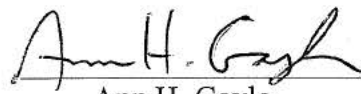
I find that the transfer is necessary and the discharge plan is appropriate.

The appeal by Appellant, [REDACTED] is therefore DENIED.

Respondent, Beach Gardens Rehab & Nursing Center, is authorized to discharge Appellant [REDACTED] in accordance with its [REDACTED] 2018 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: Menands, New York
March 16, 2018


Ann H. Gayle
Administrative Law Judge

[REDACTED] Beach Gardens

TO:

[REDACTED]
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Far Rockaway, New York 11691

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