



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 18, 2019

CERTIFIED MAIL/RETURN RECEIPT

Paul Bibuld, Esq.
221-12 Hartland Avenue
Queens Village, New York 11427

William B. O'Hara, Esq., CFO
Chapin Home for the Aging
165-01 Chapin Parkway
Jamaica, New York 11432

Raul Tabora, Esq.
Bond Schoeneck & King
600 Third Avenue, 22nd Floor
New York, New York 10016

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: 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

Chapin Home for the Aging,

Respondent,

to transfer him from a residential health care facility.

COPY

DECISION

Hearing Before:

Ann H. Gayle
Administrative Law Judge

Held at:

Chapin Home for the Aging
165-01 Chapin Parkway
Jamaica, New York 11432

Hearing Date:

April 18, 2019
The record closed on May 30, 2019

Parties:

Chapin Home for the Aging
By: Raul Tabora, Esq.
Bond Schoeneck & King

By: [REDACTED]

Resident's [REDACTED] Representative

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 Chapin Home for the Aging (“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.

Respondent determined to discharge Appellant from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(h). §415.3(h)(1)(i)(a)(3), (vi) and (vii) read in pertinent part:

(h) Transfer and discharge rights.

- ...
- (1) With regard to the transfer or discharge of residents, the facility shall:
 - (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:
 - ...
 - (3) the safety of individuals in the facility is endangered.
 - ...
- (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, subdivision (d) of this Title; and

- (vii) permit the resident, their legal representative or health care agent the opportunity to participate in deciding where the resident will reside after discharge from the facility.

Appellant's █ on behalf of Appellant, appealed the discharge determination to the New York State Department of Health. Pursuant to §415.3(h)(2)(iii)(b) the Facility has the burden of proving that the transfer was necessary and the discharge plan is appropriate.

A transcript (pages 1-357) of this hearing was made by a court reporting service.

Appellant's █ represented Appellant¹ and testified for Appellant. The following Facility representatives testified for Respondent: Certified Nurse Assistant ("CNA") Arlene Thorpe, Director of Nursing Vernita Ford, R.N., and Medical Director Nodar Janas, M.D. Respondent's Chief Financial Officer William B. O'Hara, Esq., Board Member Janet Unger, and Administrator Jennifer McManaman were present at the hearing.

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

ALJ:

- I: Notice of Hearing with Notice of Transfer/Discharge attached

Facility:

- 1: Discharge summary
- 2: Statement of Arlene Thorpe
- 3: Two photographs
- 4: Court document
- 5: Thumb drive/video surveillance
- 6: █ consult

Resident:

- A: Hospital transfer form
- B: Hospital visit form (morning visit)
- C: Hospital visit form (afternoon visit)
- D: Face sheet
- E: Physician order report
- F: Continuity of care document
- H: Transfer/Discharge Notice and copy of envelope

¹ Appellant's █/representative waived Appellant's right to be present at the hearing (T 7).

- Q: Diagram of Resident's room
- R: Investigation summary and witness statements

Facility Exhibit 7 and Resident Exhibits G and I through P were marked for identification but not accepted into evidence by the ALJ; these documents remained with Respondent and Appellant, respectively.

STATEMENT OF ISSUES

In the early hours of █ 2019, Respondent transferred █ (“Appellant” or “Resident”) to █ Hospital (“█ for a █ evaluation (Exhibit B). Later that morning, █ discharged Appellant to police custody for transfer to the █ Precinct wherein Appellant was subsequently released to his █ (“Appellant’s █ who brought Appellant back to the Facility. The Facility refused to readmit Appellant so Appellant’s █ brought Appellant back to █ for another evaluation (Exhibit C). Upon discharge from █ on the evening of █ 2019, Appellant’s █ brought Appellant to Appellant’s █ home. The initial issue to be determined in this proceeding is whether Appellant was transferred/discharged in accord with his rights pursuant to 10 NYCRR §415.3. If Appellant was denied his legal rights as delineated in this regulation, there is no reason to address the questions of whether the transfer/discharge was warranted and whether the discharge plan was appropriate.

FINDINGS OF FACT

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

1. Respondent, Chapin Home for the Aging, is a residential health care facility located in █ New York. (Ex I)
2. Appellant, age █ was admitted to the Facility from █

Medical Center, █ on █ 2019, for short term rehabilitation services. Prior to his hospitalization, Appellant lived in █ in his own home independently with supportive services. (Ex 1; Ex D; T 279-280)

3. At approximately 12:45 a.m. on █ 2019, CNA Thorpe found Appellant at the bedside of Appellant's roommate ("Mr. █). Mr. █ was █ his bedsheets were █ and Appellant was holding a █ from a wheelchair █"). When Ms. Thorpe yelled words to the effect of what are you doing, Appellant who was holding the █ in a █ in █ of him began charging toward her. Ms. Thorpe backed out of the room screaming for help. Other CNAs, nurses, and a security guard responded and attempted to calm Appellant and retrieve the █ from him. 911 was called, and emergency medical technicians ("EMT") and police officers responded. Mr. █ was brought to █ Appellant gave the █ to the police officers who, together with EMT, brought Appellant to █ for a █ evaluation. Appellant, upon being cleared medically and █ for discharge from █ was released to police custody. (Ex 2; Ex 3; Ex 5; Ex B; Ex R; T 75-76, 78-80, 91, 117-118, 121-123, 127-128, 133-134, 146-147, 168, 182-183, 221-224, 226-227, 299-301)

4. Police officers brought Appellant directly from █ to the █ precinct where he was charged with misdemeanors and a violation, given a desk appearance date of █ 2019, and released to Appellant's █ who brought Appellant to the Facility. The Facility arranged for its medical director, Dr. Janas, to speak with Appellant's █ by telephone. Dr. Janas informed Appellant's █ that Respondent would not accept Appellant back into the Facility due to Appellant's █ act toward Mr. █. Dr. Janas gave Appellant's █ three options: bring Appellant back to the police precinct to ask them what can be done in this situation; bring Appellant back to Appellant's home where he could resume living independently with services;

(§415.3(h)(1)(vi)); and permit the resident, their legal representative or health care agent the opportunity to participate in deciding where the resident will reside after discharge from the facility (§415.3(h)(1)(vii)). The March 20, 2019 notation by Dr. Janas in the “Discharge Summary Medical” note that “Discharge planning was ongoing” (Ex 1) does not satisfy the requirements of the aforesaid regulation, particularly since there was no testimony from a Facility social worker to support this claim, and Appellant’s █ testified that not only was there no discharge plan or planning, but that prior to the events of █ 2019, he and Respondent had actually discussed the possibility of Appellant remaining at the Facility for long term care. Nor does the █ 2019 telephone conversation wherein Dr. Janas gave Appellant’s █ “three options” for Appellant following Respondent’s refusal to readmit Appellant when he was discharged and released from █ and police custody. See Finding of Fact #4.

CONCLUSION

I find that Appellant was denied his legal rights pursuant to §415.3(h); as such, the questions of whether the transfer/discharge was warranted and whether the discharge plan was appropriate will not be addressed. Respondent must readmit Appellant to the first available semi-private bed before it admits any other resident (§415.3(h)(2)(i)(d)). Appellant, however, is not required to accept such readmission particularly if Appellant’s █ believes that Appellant is currently residing in a setting in which he is adapting and benefitting from the services provided, or for any other reason.

DECISION

The appeal by Appellant is GRANTED.

