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**Department
of Health**

KATHY HOCHUL
Governor

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

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

October 7, 2021

CERTIFIED MAIL/RETURN RECEIPT

██████████ ██████████
c/o Silvercrest Nursing
& Rehabilitation Center
144-45 87th Street
Jamaica, New York 11435

Maureen Peters
Silvercrest Nursing
& Rehabilitation Center
144-45 87th Street
Jamaica, New York 11435

Andria Adigwe, Esq.
Hinman Howard & Kattell LLP
707 Westchester Avenue, Suite 407
White Plains, New York 10604

RE: In the Matter of ██████████ ██████████ – 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

██████████ ██████████

Appellant,

from a determination by

Silvercrest Nursing and Rehabilitation and Center

Respondent,

to discharge Appellant from a residential health care facility.

COPY

DECISION

Before: Rayanne L. Babich
Administrative Law Judge (ALJ)

Dates: September 7th, 17th, 20th and 21st, 2021

Held at: Webex videoconference

Parties: ██████████ ██████████ Appellant
c/o Silvercrest Nursing and Rehabilitation Center
144-45 87th Street
Jamaica, New York 11435

Silvercrest Nursing and Rehabilitation Center
144-45 87th Street
Jamaica, New York 11435
By: Andria Adigwe, Esq.

JURISDICTION

By notice dated ██████████ 2021, Silvercrest Nursing and Rehabilitation Center (Facility) determined to discharge ██████████ ██████████ (Appellant) from care in its Facility. 10 NYCRR 415.3(i)(1)(iii)(a). The Appellant appealed the proposed discharge. 10 NYCRR 415.3(i)(2). The hearing was digitally recorded. (R1 3:53:32; R2 7:28; R3 9:32; R4 59:57.) The Appellant

appeared at the hearing and represented himself. The Facility was represented by Andria Adigwe, Esq.

RECORD

ALJ Exhibits: I – Letter with Notice of Hearing
II – Notice of Discharge, [REDACTED] 2021
III – Email correspondence, [REDACTED] 2021

Facility Exhibits: 1 – Occupation and Physical Therapy Discharge Summaries, [REDACTED] 2021 to [REDACTED] 2021
2 – Nursing Admission Assessment, [REDACTED] 2021
3 – Care Plan Activity Report, [REDACTED], 2021
4 – Nursing, Medical and Social Services Progress Notes, [REDACTED] to [REDACTED] 2021
5 – Resident Face Sheet and Brief Interview for Mental Status Assessment. [REDACTED], 2021
6 – Nursing Progress Notes, [REDACTED] to [REDACTED] 2021
7 – Nursing and Social Services Progress Notes, [REDACTED] 2021
8 – Nursing and Physical Therapy Progress Notes, [REDACTED] 2021

Appellant Exhibits: None

Facility Witnesses: Maureen Peters, Director of Social Work
Renata Kalita, Registered Nurse
Michelle Alexis-Leach, Registered Nurse
Mohammed Syed, Director of Rehabilitation Services
Stanley Ramah, Assistant Director of Nursing
Ryan Spencer, Social Worker

Appellant Witness: [REDACTED] [REDACTED]

FINDINGS OF FACT

1. Silvercrest Nursing and Rehabilitation Center is a residential health care facility. [Ex I, II.]
2. Following an acute hospitalization, the Appellant was admitted to the Facility on [REDACTED] 2021 for wound care and short-term occupational therapy. [Ex 1, 2, 5; T. Syed.]

3. The Appellant's primary medical diagnoses include [REDACTED] [REDACTED] [REDACTED]. His medications include [REDACTED]. [Ex 4, 5; T. Syed; T. Appellant.]
4. The Appellant receives daily dressing care from a registered nurse for a wound on the [REDACTED]. The wound must be inspected, treated with medication, and dressed every day to prevent exacerbation and promote healing. The wound interferes with the Appellant's ability to walk independently, so he requires a wheelchair for ambulation. [Ex 1 – 4; T. Syed; T. Kalita; T. Alexis-Leach; T. Appellant.]
5. On [REDACTED], 2021, the Appellant underwent [REDACTED] on his [REDACTED] and occupational therapy was expected to resume following a two-week recovery. [T. Peters; T. Syed; T. Appellant.]
6. The Facility cited as grounds for discharge as the "safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident; Resident is posing an imminent threat to self, patients and staff." The Facility has a non-smoking policy prohibiting smoking on the Facility property, including all indoor and outdoor areas, to prevent contact between oxygen sources and a flame, and to protect other residents from exposure to smoke. The Facility has also enacted COVID-19 safety protocols that must be followed, which require residents to isolate and wear masks when returning from trips outside the Facility without a Facility escort. The Appellant has repeatedly refused to follow these rules. [Ex II, 4, 6; T. Peters; T. Syed; T. Ramah; T. Appellant.]
7. The Facility's discharge plan is a transfer to a men's shelter located at [REDACTED] [REDACTED] [REDACTED], [REDACTED] [REDACTED] [REDACTED] [REDACTED]. [Ex II.]

8. The Appellant opposed the discharge plan because he requires on-going nursing services for wound care and the use of a wheelchair for ambulation, both of which have been confirmed by the Facility's care team and Appellant's medical record. [T. Appellant; T. Syed; T. Kalita.]
9. The Appellant's medical record submitted in evidence by the Facility failed to show complete documentation by the Appellant's physician regarding the appropriateness of the Appellant's discharge and discharge plan despite this requirement pursuant to 10 NYCRR 415.3(i)(1)(ii)-(iii). [Ex 1 – 8.]

ISSUES

Has the Facility met its burden of proving that the safety of individuals in the Facility is endangered if the Appellant remains in the Facility and that the discharge plan is appropriate?

APPLICABLE LAW

1. Transfer and discharge rights of nursing home residents are set forth in 10 NYCRR 415.3(i), which provides, in pertinent part:
 - (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.

2. In preparation for discharge, a facility must develop a plan that “addresses the medical needs of the resident and how these needs will be met after discharge.” 10 NYCRR 415.3(i)(1)(vi).
3. When the discharge or transfer is necessary under 10 NYCRR 415.3(i)(1)(i), the resident’s physician must “ensure complete documentation in the resident’s clinical record” and “record the reasons in the resident’s clinical record.” 10 NYCRR 415.3(i)(1)(ii)(b) and (iii)(b).
4. The Facility has the burden of proving that the “discharge or transfer is/was necessary and the discharge plan appropriate.” 10 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

The Facility has failed to meet its burden of proof to establish the grounds for discharge and that its discharge plan is appropriate according to 10 NYCRR 415.3(i).

Grounds for Transfer

The Appellant was admitted to the Facility for wound care and short-term rehabilitation services. [Ex 2, 4, 5; T. Peters; T. Syed.] The Facility is seeking to discharge the Appellant because the Facility has determined that the Appellant endangers the safety of other individuals by using a lighter to smoke [REDACTED] and by refusing to follow its COVID-19 procedures that require him to travel outside the Facility with an escort, or if unescorted, isolate and wear a mask upon returning from off-site travels. [Ex II.]

The Appellant admitted to smoking in his room and offered no reason for his refusal to cease smoking or to follow quarantine rules after returning to the Facility. [T. Appellant.] Testimony from Stanley Ramah, Assistant Director of Nursing and Maureen Peters, Director of

Social Work, established that despite repeated warnings and education from the staff, the Appellant continues to smoke cigarettes both inside and outside the Facility. [Ex 4, 6; T. Ramah; T. Peters.] Renata Kalita, Registered Nurse, testified that the Appellant has refused to allow an escort from the Facility to accompany him or to isolate upon returning from outside trips. [T. Kalita.] On at least two occasions, Ms. Peters and other Facility staff have confiscated lighters from the Appellant. [Ex 4, 6; T. Peters.]

While the evidence established that these violations raise safety concerns, the Facility has made no effort to mitigate risks associated with the Appellant's actions other than confiscate lighters from the Appellant. [T. Peters.] Measures that could have been explored, such as changing the location of the Appellant's room closer to staff, placing the Appellant on a one-to-one observation, or other behavioral strategies, were not in place. Instead, the only recourse has been to discharge the Appellant who still requires daily nursing care. [Ex II; T. Peters.]

Notwithstanding these concerns, the Facility has also failed to submit documentation by a physician in the Appellant's medical record stating that "discharge is necessary" due to endangerment of other individuals, as required. 10 NYCRR 415.3(i)(1)(ii)(b) and (iii)(b). Although documentation from other members of the Appellant's interdisciplinary care team may accompany physician records, this documentation alone is insufficient for the Facility to meet its burden to demonstrate the appropriateness of the Appellant's discharge. [Ex 2, 6 – 8.] Furthermore, as the Appellant testified and the medical evidence clearly supports, the Appellant continues to require nursing care to properly attend to his wound daily by cleaning it and applying medication and dressings because he cannot complete these tasks himself. [Ex 4; T. Appellant; T. Kalita.] Despite the Appellant's behavior, the Facility has a regulatory obligation to ensure the

documentation in the medical record is complete and that the Appellant's physician documents the reasons for discharge, and it failed to do so.

I find the Facility has not met its burden to establish grounds to discharge the Appellant due to the endangerment of the safety of other individuals. 10 NYCRR 415.3(i)(1)(i)(3).

Discharge Plan

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 discharge plan offered to the Appellant is transfer to a men's shelter located at [REDACTED]. [Ex II.] The Facility argued the Appellant is independent and can meet his own needs at the shelter. The Appellant objected to the discharge location because he does not wish to enter the shelter and he still requires wound care at the Facility. [T. Appellant.]

The evidence showed the Appellant requires daily nursing services to examine, medicate, and dress a wound located on the [REDACTED]. [Ex 4, 8; T. Kalita, T. Alexis-Reach.] Also, although rehabilitation staff determined occupational therapy services should be paused due to the Appellant's pain and recovery from recent [REDACTED], there is a plan for the Appellant to restart these services. [Ex 1, 4, 8; T. Syed.] Despite these care needs, the Facility provided no plan and made no preparations for how the Appellant's wound care and occupational therapy needs will be met at the shelter. [T. Peters; T. Syed; T. Kalita.]

The Facility has also failed to show that the shelter is able to accept the Appellant with his current wheelchair use. Although the Appellant was tentatively accepted for admission to an assisted living facility, pending further paperwork, he has declined this referral offered by the Facility. [Ex 7; T. Spencer; Ex III.] Absent a plan for how the wound care, and possible

occupational therapy services will be provided, the discharge plan to the shelter is not appropriate.
10 NYCRR 415.3(i)(1)(vi).

I find the discharge to a men's shelter not appropriate because the Facility has failed to show how the discharge location will meet his medical needs.

ORDER

The Facility is not authorized to discharge the Appellant to the location identified in the Notice of Discharge dated [REDACTED] 2021 or in accordance with its discharge plan.

Dated: October 6, 2021
Albany, New York



Rayanne L. Babich
Administrative Law Judge

TO:

■■■■ Appellant
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Jamaica, New York 11435

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