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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

November 29, 2021

CERTIFIED MAIL/RETURN RECEIPT

■■■■ ■■■■
c/o Hudson Point at Riverdale
3220 Henry Hudson Parkway
Bronx, New York 10463

Emmanuel Lichtik
Hudson Point at Riverdale
3220 Henry Hudson Parkway
Bronx, New York 10463

Scott Frycek, Esq.
Lewis Johs Avallone Aviles, LLP
1377 Motor Parkway, Suite 400
Islandia, New York 11749

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,

Dawn MacKillop-Soller

Dawn MacKillop-Soller
Acting Chief Administrative Law Judge
Bureau of Adjudication

DXM: nm
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

COPY

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

■■■■ ■■■■

DECISION

Appellant,

from a determination by

HUDSON POINT AT RIVERDALE

to discharge him from a residential health care facility.

Before: Tina M. Champion
Administrative Law Judge

Held at: Videoconference via WebEx

Date: November 10, 2021

Parties: ■■■■ ■■■■
Hudson Point at Riverdale
3220 Henry Hudson Parkway
Bronx, New York 10463
By: pro se

Hudson Point at Riverdale
3220 Henry Hudson Parkway
Bronx, New York 10463
By: Scott Frycek, Esq.
Lewis Johs Avallone Aviles, LLP
1377 Motor Parkway, Suite 400
Islandia, New York 11749

JURISDICTION

By notice dated [REDACTED], 2021, Hudson Pointe at Riverdale (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [REDACTED] [REDACTED] (the Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) 415.3(i).

The hearing was held in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulations (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR.

Evidence was received and witnesses were examined. A digital recording was made of the proceeding.

HEARING RECORD

ALJ Exhibits: 1 – Letter with Notice of Hearing and Transfer/Discharge Notice ([REDACTED]/21)

Facility Exhibits: 1 – Admission Packet
2 – Invoice
3 – Progress Notes (Nursing/Medical)
4 – Medication Administration Record
5 – Progress Notes (Consultant)
6 – Progress Notes (Social Services)
7 – Progress Notes (Medical)

Appellant Exhibits: None

Facility Witnesses: Emanuel Lichtik, Administrator
Maureen Sammon, Medical Coordinator
Pevelyn Rojas, Nurse Manager
Yaneika Olivo, Director of Social Services

Appellant Witnesses: [REDACTED] [REDACTED] Appellant

FINDINGS OF FACT

1. The Appellant has been a resident at the Facility off and on since 2015, with his last readmission on [REDACTED] 2018. (Testimony [T.] Lichtik.)
2. The Appellant resides in a private room at the Facility. (T. Lichtik.)
3. The Appellant has [REDACTED] on his [REDACTED] and requires wound care. He insists on performing his own wound care and consistently refuses to allow Facility staff to assist in any manner other than to provide him with medical supplies. (T. Rojas.)
4. The Appellant began receiving Medicaid coverage in [REDACTED] 2019. He is eligible to receive social security benefits but has placed his benefits on hold. (T. Sammon.)
5. The Appellant is currently responsible for paying a net allowable monthly income (NAMI) of [REDACTED] to the Facility. (T. Sammon.)
6. The Appellant has never paid his NAMI to the Facility and owed \$ [REDACTED] to the Facility as of [REDACTED] 2021. (T. Sammon.)
7. On [REDACTED], 2021, the Facility issued a Transfer/Discharge Notice to the Appellant which proposed discharge to [REDACTED] Motel in [REDACTED] (ALJ Ex. I.)
8. The Transfer/Discharge Notice states that the Appellant will be transferred because the Appellant's welfare and needs cannot be met in the Facility and because the Appellant has failed to pay for his stay at the Facility. (ALJ I.)
9. The Appellant timely appealed the Facility's discharge determination.
10. The Appellant has remained at the Facility during the pendency of the appeal.

ISSUES

Has the Facility established that its determination to discharge the Appellant is correct and that its discharge plan is appropriate?

APPLICABLE LAW

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

A resident may only be discharged pursuant to specific provisions of the Department of Health Rules and Regulations. (10 NYCRR 415.3[i][1].)

The Facility alleged that the Appellant's discharge is permissible pursuant to 10 NYCRR 415.3(i)(1)(i)(a)(1), which states that a resident may be transferred 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.

It also alleged that the Appellant's discharge is permissible pursuant to 10 NYCRR 415.3(i)(1)(i)(b), which states:

Transfer and discharge shall also be permissible when the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare, Medicaid or third party insurance) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid. Such transfer or discharge shall be permissible only if a charge is not in dispute, no appeal of a denial of benefits is pending, or funds for payment are actually available and the resident refuses to cooperate with the facility in obtaining the funds.

Under the hearing procedures at 10 NYCRR 415.3(i)(2)(iii), the Facility bears the burden to prove a discharge is necessary and appropriate. Under SAPA § 306(1), a decision in an administrative proceeding must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact. It is less than a preponderance of evidence but more than mere surmise, conjecture or speculation, and it constitutes a rational basis for a decision. (Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3d Dept. 1984], appeal dismissed 63 N.Y.2d 649.)

DISCUSSION

Reason for Discharge

It is undisputed that the Appellant has wounds requiring care. The Appellant testified that he performs his own care because it takes him two hours each time due to the amount of pain he feels. Pevelyn Rojas, RN, nurse manager at the Facility, testified that the Facility supplies the Appellant with the items he both requires and requests in order for him to do his own care. She credibly testified that the Facility consistently attempts to provide required care to the Appellant but that he refuses the treatment. Ms. Rojas also credibly testified that the Appellant refuses to accept the medications that are prescribed to him. The Appellant testified that he does not need or want various prescribed medications. The Appellant vehemently testified that he has been denied an appropriate comprehensive care plan.¹ His assertion is based in large part on his desire for alternative medicine as he prefers an integrative approach to his health care, and he believes that the Facility “only deals in pharmaceuticals.” For example, the Appellant testified that

¹ In support of his appeal the Appellant made other allegations including negligence and abuse relating to other residents, denying the Appellant a lock to his bureau, and not providing the Appellant with transportation to the motel where he previously resided to obtain certain possessions. These allegations are irrelevant a determination on the issues at hand and are not addressed herein.

the Facility will not give him [REDACTED] a day so that he receives enough "[REDACTED] to deal with pain," enough [REDACTED] to [REDACTED], and [REDACTED] instead of [REDACTED]

[REDACTED] The Facility has shown that it consistently and appropriately attempted to provide the Appellant with skilled nursing services. While the Appellant's preferences to manage his health are to be respected, the evidence overwhelmingly demonstrates that the Appellant requires medical care that he will not allow the Facility to render. Therefore, the Appellant has created a situation where the Facility is unable to meet his needs and discharge is appropriate.

It is also undisputed that the Appellant has never paid his NAMI to the Facility and that he was on notice that he was required to pay. The Appellant froze his social security payments, has refused to sign an authorization for the Facility to directly receive his NAMI from Social Security, and has refused to endorse an existing check made out to him for \$ [REDACTED] (T. Sammon, Olivo.) All of these actions/refusals were admittedly for the purpose of avoiding obtaining income and/or denying payment to the Facility. (T. Appellant.) The Appellant testified that the Facility does not deserve payment because they will not provide him with a comprehensive care plan. The Facility has provided the Appellant with a private room and meals for years, as well as consistently and appropriately attempted to provide him with skilled nursing services. The Facility has shown that they have provided reasonable and appropriate notice to the Appellant that his NAMI is due and owing, and the Appellant has failed to pay for his stay. Therefore, discharge is appropriate for nonpayment.

Discharge Location

The Facility has proposed discharge to [REDACTED] Motel in [REDACTED]. While the Appellant disputes that he should be discharged, he testified that he is happy with the discharge location. Yaneika Olivo, Director of Social Services, testified that upon discharge the Facility will refer the Appellant to a home health care agency to determine eligibility for physical


therapy and skilled nursing care, will set up transportation with Medicaid, will provide 30-days' worth of necessary medications to the Appellant, and will arrange for primary care in the community if needed. (T. Olivo; see also Facility Ex. 6 at p. 5.) Given Appellant's testimony and the arrangements that the Facility has committed to make upon discharge, I find that the discharge location is appropriate for the Appellant.

DECISION

Hudson Pointe at Riverdale has established that its determination to discharge the Appellant was correct, and that its transfer location is appropriate.

1. Hudson Pointe at Riverdale is authorized to discharge the Appellant in accordance with its discharge plan on or after [REDACTED] 2021.
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: Albany, New York
November 29, 2021



Tina M. Champion
Administrative Law Judge

TO:

██████████
Hudson Point at Riverdale
3220 Henry Hudson Parkway
Bronx, New York 10463

Scott Frycek, Esq.
Lewis Johs Avallone Aviles, LLP
1377 Motor Parkway, Suite 400
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