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Department of Health

KATHY HOCHUL
Governor

MARY T. BASSETT, M.D., M.P.H.
Acting Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

December 23, 2021

CERTIFIED MAIL/RETURN RECEIPT

Kelly Barrett Sarama, Esq.
Center for Elder Law & Justice
438 Main Street, Suite 1200
Buffalo, New York 14202

Sean Mackenzie, Esq.
Magavern Magavern Grimm
810 Main Street
Niagara Falls, New York 14301

RE: In the Matter of [REDACTED] [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,

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

DXM: cmg
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH

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

COPY

██████████
Appellant,

DECISION
&
ORDER

from a determination by

Newfane Rehabilitation & Health Care
Respondent,

to discharge him from a residential health
facility.

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On ██████████ 2021, Newfane Rehabilitation & Health Care (Respondent or facility), issued a discharge notice and proposed to discharge resident ██████████ (Appellant or resident) to ██████████.

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

On December 21, 2021, a hearing was held via videoconference before Kimberly A. O'Brien, Administrative Law Judge (ALJ). Respondent was represented by Sean Mackenzie, Esq., Magavern, Magavern, Grimm, and Nicole Cornell, Director of Social Work, appeared and provided testimony. The Appellant was represented by Kelly Barrett Sarama, Esq., Center for Elder Law & Justice, and the Appellant and his ██████████

██████████ Power of Attorney (POA) and ██████████ (resident's ██████████ also appeared and provided testimony. Evidence was received including Respondent exhibits 1-7 and Appellant exhibit (Ex.) A. The hearing was recorded, 4 hours and 53 minutes.

Summary of Facts

1. Respondent operates a nursing home located in New Fane, New York [Ex. 1].
2. The resident, age ██████████ was admitted to the facility in ██████████ 2019 from ██████████ (hospital). While the resident has been diagnosed with ██████████, a Preadmission Screening and Resident Review (PASRR) completed by the hospital determined that nursing home level care was appropriate [Ex. 1, 2, 3].
3. In or about ██████████ 2020 the resident began to engage in disruptive behaviors and ██████████ that has continued to escalate [Ex. 1, 3, 4, 5, 6].
4. On ██████████, 2021, the facility issued a transfer/discharge notice stating that the resident is a danger to himself and others and that they can no longer meet his needs [Ex. 7].

Issues

Has the Facility established that the Appellant's transfer is necessary and that the 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].) Transfer and discharge rights of nursing home residents are set forth in 10 NYCRR 415.3(i).

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

Ms. Dillon testified that since [REDACTED] 2020 the resident has exhibited escalating [REDACTED] behaviors. In the months preceding the issuance of the discharge notice the resident made [REDACTED] comments to staff, pursued female residents to [REDACTED] himself. The resident has also been [REDACTED] [REDACTED] other residents' belongings including [REDACTED] and he becomes [REDACTED] when staff attempt to retrieve the items from the resident.

The facility has made many attempts at accommodation including ordering [REDACTED] consultations, placing the resident in a private room, and providing increased supervision and one to one care. Ms. Dillon testified that the facility does not have a locked unit or an all-male unit, and it does not have full-time [REDACTED] care providers on staff. The resident has only had [REDACTED] consultations, which Ms Dillon stated is

not optimal. The resident's behaviors require that he be restricted from freely moving about the facility and engaging with the other residents and he is isolated.

Ms Dillon testified that she and her staff have reached out to many facilities in the area, but the resident has been denied placement and he is on a "do not readmit list" at several area facilities. Ms. Dillon testified that the resident regularly communicates with his family by phone, but the facility visitation log/records show that even before Covid the family rarely visited the resident at the facility. While [REDACTED] is located in [REDACTED], it has services that the facility cannot provide to the resident including onsite [REDACTED] care providers to provide in person care to the resident. [REDACTED] also has an all-male unit and a locked unit where the resident would be free to engage with others on the unit and participate in group activities. Ms. Dillon testified that the facility has a good relationship with [REDACTED] and other residents have been transferred there and have reported that they are happy with the placement.

The resident's [REDACTED] testified that the resident's family, including his [REDACTED]-yearold [REDACTED] live in [REDACTED]. Their main objection to the transfer/discharge is that [REDACTED] is approximately a [REDACTED]-hour drive, and the family does not have the time or resources to visit the resident in [REDACTED]. The resident testified that he does not like that the facility has a lot of sick and old people, but he does not want to go to [REDACTED] because it is too far from his family.

The facility has met its burden to show that the discharge is necessary and that it can no longer meet the resident's needs. The facility has also shown that it made reasonable and appropriate efforts to identify a facility that could meet the resident's needs, and that [REDACTED] is available and an appropriate discharge location.

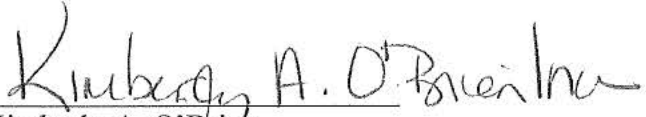
ORDER

Respondent has established that its determination to discharge the Appellant was correct.

1. Respondent may discharge Appellant on or after [REDACTED], 2021 pursuant to its [REDACTED] 2021 discharge notice.

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
December 22, 2021


Kimberly A. O'Brien
Administrative Law Judge

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