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**Department
of Health**

KATHY HOCHUL
Governor

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

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

October 7, 2022

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o North Central Bronx Hospital
3424 Kossuth Avenue
Bronx, New York 10467

Anna Hock, Esq.
300 Garden City Plaza
Suite 100
Garden City, New York 11530

Akia Blandon, VP Nursing
The Plaza Rehab & Nursing Center
100 West Kingsbridge Road
Bronx, New York 10468

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,

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: 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

The Plaza Rehab and Nursing Center,

Respondent,

to discharge Appellant from a residential health care facility.

COPY

**DECISION
AFTER
HEARING**

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

Date: September 20 and September 30, 2022

Held at: Webex videoconference

Parties: ██████████
c/o The Plaza Rehab and Nursing Center
100 West Kingsbridge Road
Bronx, New York 10468

The Plaza Rehab and Nursing Center
100 West Kingsbridge Road
Bronx, New York 10468
By: Scott Frycek, Esq.

Interested Party: North Central Bronx Hospital
3424 Kossuth Avenue
Bronx, New York 10467
By: Anna Hock, Esq.

JURISDICTION

By notice dated ██████████, 2022, The Plaza Rehab and Nursing 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 pursuant to 10 NYCRR 415.3(i)(2).

RECORD

The Appellant appeared at the hearing but requested the hospital speak on his behalf and was excused from the hearing to return to his hospital room. [R1 21:38; R2 5:11.] The hearing was digitally recorded. [R1 2:49:01; R2 2:17:07.]

Facility Exhibits: 1 – Incident Report, undated
 2 – Notice of Discharge, ██████████ 2022
 3 – Facility medical records
 4 – State Operations Manual – Guidance to Surveyors for Long Term Care Facilities, Appendix PP, excerpt
 5 – State Operations Manual – Guidance to Surveyors for Long Term Care Facilities, Appendix PP, excerpt
 6 – Physician’s Desk Reference for ██████████

Hospital Exhibits: A – Facility face sheet
 B – Hospital medical records
 C – AllScript communication
 D – Patient Review Instrument, ██████████ 2022
 E – Patient Review Instrument, ██████████ 2022
 F – Preadmission Screening and Resident Review, ██████████ 2022
 G – Department of Health complaint, ██████████ 2022
 H – Department of Health correspondence, ██████████ 2022
 I – Department of Health correspondence, ██████████ 2022
 J – Care Port PRI report, ██████████ 2022

Facility Witness: Akia Blandon, DNP, Vice President of Clinical Services

Hospital Witnesses: Anshu Taneja, M.D., Attending Physician
 Julie Gilgore, LCSW, Social Work Supervisor

FINDINGS OF FACT

1. The Plaza Rehab and Nursing Center is a nursing home. [Ex 2, A.]
2. The Appellant, age ██████████ was admitted to the Facility on ██████████, 2022, following a six-year admission at a prior nursing home. The reason for the admission provided to the Facility was that the prior nursing home changed its smoking policy and therefore could no longer accommodate the Appellant. [Ex 3; R1 39:42, 2:09:27.]

3. The Appellant's diagnoses include [REDACTED], difficulty walking, and need for assistance with personal care. [Ex 3, B, C; R1 42:15.]
4. The Appellant is unable to walk and dependent on a wheelchair, and he requires the assistance of another person with bathing, dressing, toileting, feeding, and transferring. He requires 24-hour nursing supervision for medication management and monitoring of vital signs and food intake. [Ex 3; R2 45:09.]
5. On [REDACTED], 2022, the Facility contacted 9-1-1 because it determined the Appellant required transfer to a hospital "because he was [REDACTED]. [REDACTED] Emergency services transported the Appellant to North Central Bronx Hospital. The Appellant was admitted on the same date to a medical unit and remains in the hospital at the time of the hearing. [Ex A, B, 1, 2, 3; R2 30:01.]
6. The Facility issued a Notice of Discharge on [REDACTED], 2022 and cited as its grounds for discharge that "this transfer/discharge notice is being issued because the health and/or safety of individuals in the facility is endangered due to the continuing [REDACTED] behavior of the Resident." [Ex 2.] The Facility's discharge plan was to transfer the Appellant to the hospital.
7. The Appellant was medically and [REDACTED] cleared for discharge from the hospital and return to nursing home care on [REDACTED] 2022. The Facility has refused to accept the Appellant and this appeal followed. [Ex 1, B, G, H; R2 34:06, 42:02.]

ISSUES

Has the Facility met its burden of proving that the discharge was necessary and that the discharge plan is appropriate?

APPLICABLE LAW

1. Residents of a nursing home have the right to "adequate and appropriate medical care, and to be fully informed by a physician in a language or in a form that the resident can understand." 10 NYCRR 415.3(f)(1)(i).
2. 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; or
 - (4) the health of individuals in the facility is endangered.
3. When it transfers a resident on grounds that safety of individuals in the facility is endangered, the facility must ensure complete documentation, made by a physician, in the resident's clinical record. 10 NYCRR 415.3(i)(1)(ii)9b).

4. 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).
5. 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).
6. Federal regulations at 42 CFR 483.15 contain substantially identical provisions to the forgoing provisions of 10 NYCRR 415.3(i).

DISCUSSION

The Facility has failed to meet its burden of proving either that grounds for discharge is necessary or that its discharge plan is appropriate.

Grounds for Discharge

The Appellant was accepted for admission by the Facility after a six year stay at a prior nursing home due to a change in the prior home’s smoking policy. [R1 39:42.] In addition to requiring nursing home care for his daily needs, the Appellant was diagnosed with [REDACTED] [REDACTED] prior to his arrival at the Facility. [Ex 2.] Akia Blandon, Nurse Practitioner and Vice President of Clinical Services, testified that the Appellant was accepted into the Facility with a primary diagnosis of [REDACTED] and the belief that the [REDACTED] diagnosis was only secondary as a “historical diagnosis” along with others listed. [R1 2:05:52.] She claimed that the Facility cannot meet the Appellant’s needs because he poses a danger to the health and safety of others. [Ex 1; R1 29:09, 1:05:34.]

The Facility’s only witness at this hearing, NP Blandon, has never met the Appellant. [R1 43:31.] She testified that on the day he was sent to the hospital, the Appellant was ‘ [REDACTED]

[REDACTED] [R1 48:00.] She also claimed that he was "[REDACTED]" but was unable to identify that staff who were [REDACTED] [R1 54:54.] The Facility had previously noted that the Appellant was [REDACTED] [REDACTED]. [Ex 3; R1 46:40.] NP Blandon also stated that she had no knowledge of threats made to any residents. [R1 55:23.] Her report of the incidents was based solely on her review of records and reports she received from her assistant as she did not speak with the Appellant, staff, or the attending physician at the Facility. [R1 57:43.]

Having accepted the Appellant as a resident, the Facility had an obligation to provide adequate and appropriate medical care through a physician in a language he can understand. 10 NYCRR 415.3(f)(1)(i). However, the Facility failed to provide reasonable measures to meet the needs of the Appellant. The evidence showed that although the Appellant, who is confined to a wheelchair, refused medication, [REDACTED]

[REDACTED], but also that he was cooperative with clinical staff. [Ex 2; R1 46:40; R2 45:09.] The evidence failed to establish the Facility took reasonable measures to address his behaviors other than a [REDACTED] consult. Notably, that consult obtained by the Facility itself only recommended continued monitoring for [REDACTED] issues. [Ex 3.] The records do not document attempts to [REDACTED] [REDACTED] from the Appellant's reach or possession or employ any other measures to provide appropriate interventions to meet his needs. [Ex 3.]

In addition, the Appellant's [REDACTED], which was left unaddressed by the Facility, may have contributed to his [REDACTED]. The Appellant's primary language is [REDACTED] and he also suffers from [REDACTED]. [Ex 3, B.] As explained by the Appellant's attending physician in the hospital, Anshu Taneja, M.D., his inability to [REDACTED] along with limited or

no access to [REDACTED] speaking staff may have contributed to his [REDACTED] [R2 31:41.] NP Blandon, who unlike Dr. Taneja has never met the Appellant, testified that on the day 9-1-1 was contacted, she could not state whether any [REDACTED]-speaking staff were present. [R1 1:15:01.] The Facility made no attempts to determine whether the Appellant should have a [REDACTED] or refer him to a medical provider who can address his [REDACTED] difficulties. [Ex 3; R1 53:09, 2:12:21.] The Appellant's hospital record documents that he "could not hear the questions sufficiently to be able to answer them." [Ex B, p. 27.]

At the time of the hearing, the Appellant had been in the hospital for 53 days, despite being cleared for discharge ten days after he was admitted. [Ex B; R2 33:59.] He has no medical or [REDACTED] reasons to remain in the hospital and a discharge location is the only impediment. [R2 42:02.] Dr. Taneja testified that the Appellant was stabilized on medication, cleared by [REDACTED] and has been calm and cooperative during his stay and is appropriate to return to the Facility. [R2 33:59, 38:09, 39:35, 53:18.] Documentation from the Appellant's medical record showed that a Facility physician referred him the hospital for a [REDACTED] evaluation, but the Facility failed to otherwise meet its burden of proof. [Ex 3.]

Discharge Plan

It is an explicit and well-established policy of the Department of Health that a transfer to a hospital followed by a refusal to accept the resident once cleared for discharge is not an appropriate discharge plan. DOH DAL NH 15-06: *Transfer & Discharge Requirements for Nursing Homes*, (September 2015). The Facility's own discharge notice stated that the discharge was being made to the hospital, and it was issued at the same time the Facility had emergency services transport him there. [Ex 2; R1 2:22:16.] The hospital social worker, Julie Gilgore, LCSW, testified that the

Facility refused to accept the Appellant's return or engage in any form of discharge planning. [R2 1:30:21, 1:41:00.]

The Facility first argued that the Appellant's return to care is not appropriate because he is now prescribed [REDACTED] a conventional [REDACTED] medication that the Facility claims it is prohibited from administering to residents under federal regulations. The Facility failed to establish the existence of such a prohibition. It claims to rely on the Centers for Medicare and Medicaid Services Operations Manual. 42 CFR §483. [Ex 4, 5.] These regulations address in general terms the manner in which medical providers of any facility must manage a resident prescribed this medication. The Facility failed, however, to identify any specific regulation that prohibits the administration of [REDACTED] to a nursing home resident. If necessary, the Facility may be required to engage its interdisciplinary team to oversee the Appellant's care, which is the specific purpose of a nursing home. 10 NYCRR 415.1(a)(5).

The Facility alternatively argued that it cannot accept the Appellant because his [REDACTED] behaviors posed a risk for others; however, the evidence showed the Facility did not attempt to implement reasonable measures short of discharge, that could have been utilized to provide appropriate care for the Appellant's [REDACTED] [Ex 3.] The Facility's own failure to make reasonable attempts to address the Appellant's needs cannot be relied on as a justification for refusing the Appellant's return to the Facility. NP Blandon's claims that the Facility cannot meet the Appellant's needs provided little explanation why not, no account of efforts to meet them short of discharge, and they are not supported by the medical evidence of the physicians who have treated the Appellant during his hospital stay. [Ex B.] She testified that "our [REDACTED] are very leery of managing patients with [REDACTED] [that] have [a] [REDACTED]," but no one from the Facility has communicated with the hospital medical team to discuss his care, despite the

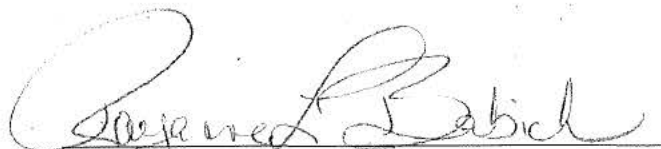
43 days available before hearing. [R1 1:18:15; R2 1:45:05.] A transfer to the hospital does not discharge the duty a facility owes to its residents and the Facility's decision to send the Appellant to a hospital as a final location is not an appropriate plan.

The Plaza Rehab and Nursing Center has not established that its determination to discharge the Appellant to the hospital is necessary or that the discharge plan is appropriate.

ORDER

1. The Appellant's appeal is GRANTED.
2. The Facility is ordered to accept the Appellant to the next available semi-private bed prior to admitting any other person to the Facility, pursuant to 10 NYCRR 415.3(i)(2)(i)(d).
3. This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Laws and Rules.

Dated: October 7, 2022
Albany, New York



Rayanne L. Babich
Administrative Law Judge

TO:

■■■■ ■■■■
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Bronx, New York 10468

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