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Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, M.D., M.P.H.
Acting Commissioner

MEGAN E. BALDWIN
Acting Executive Deputy Commissioner

April 21, 2023

CERTIFIED MAIL/RETURN RECEIPT

██████████ ██████████
c/o Brooklyn Gardens Nursing & Rehabilitation
835 Herkimer Street
Brooklyn, New York 11233

Barbara Phair, Esq
Abrams Fensterman, LLP
3 Dakota Drive, Suite 300
Lake Success, New York 11042

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 lcy

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

**Brooklyn Gardens Nursing and
Rehab Center,**

Respondent,

to discharge him from a residential
health care facility.

COPY

**DECISION
AFTER HEARING**

#DA23-5980

Hearing before:

John Harris Terepka
Administrative Law Judge

Held at:

New York State Department of Health
by videoconference
April 21, 2023

Parties:

Brooklyn Gardens Nursing and Rehab Center
835 Herkimer Street
Brooklyn, New York 10802
adahan@brooklyngardens.com

By: Barbara Stegun Phair, Esq.
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██████████
Brooklyn Gardens Nursing and Rehab Center
██████████

JURISDICTION

Brooklyn Gardens Nursing and Rehab Center (the Respondent), a residential health care facility (RHCF) subject to Article 28 of the Public Health Law, determined to discharge ██████████ ██████████ (the Appellant) from care and treatment in its nursing home. The Appellant appealed the discharge determination to the New York State Department of Health pursuant to 10 NYCRR 415.3(i).

SUMMARY OF FACTS

1. Respondent Brooklyn Gardens Nursing and Rehab Center is a residential health care facility, specifically a nursing home within the meaning of PHL 2801.2, located in Brooklyn, New York.
2. Appellant William ██████████ age ██████████ was admitted in ██████████ 2022 for short term rehabilitation after hospitalization. His current diagnoses include ██████████ disease and he receives ██████████ three times weekly. (Exhibit 1.)
3. By notice dated ██████████, 2023, the Respondent advised the Appellant that it had determined to discharge him on ██████████ 2023, on the grounds that his health has improved sufficiently that he no longer needs the services provided by the facility. (Exhibit ALJ I.)
4. The Appellant is not in need of nursing home care. He is medically stable, ambulates with a cane, is independent with all activities of daily living, and receives no rehabilitation therapy services from the Respondent. His medical needs can be met on an outpatient basis. (Exhibits 1, 2, 3, 4.)

5. The Appellant's treating physician at the facility has determined and documented in his medical record that he is not in need of nursing home care and that discharge to a shelter in the community is medically appropriate. (Exhibit 1.)
6. Before his admission to Brooklyn Gardens in ██████████ 2022, the Appellant had resided at the ██████████ Shelter, in ██████████ (Exhibit 5.)
7. The discharge notice advised the Appellant he would be discharged back to the ██████████ Shelter, at ██████████, which has accepted him for placement and can provide assistance with housing and social services. The discharge plan includes appropriate arrangements for transportation to the shelter, and medication and medical care referrals including arrangements for his three times weekly ██████████ treatments. (Exhibits 2, 5.)
8. The Appellant remains at Brooklyn Gardens pending the outcome of this hearing.

ISSUES

Has the Respondent established that the Appellant's discharge is authorized and that the discharge plan is appropriate?

APPLICABLE LAW

A residential health care facility (RHCF), or nursing home, 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. PHL 2801; 10 NYCRR 415.2(k). Transfer and discharge rights of nursing home residents have been codified in Public Health Law 2803-z and set forth at 10 NYCRR 415.3(i) which provides, in pertinent part, that the facility shall:

- (1) (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:

...
(2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility.

...
(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(d) of this Title.

The Respondent has the burden of proving that the discharge or transfer is necessary and that the discharge plan is appropriate. 18 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

The Respondent presented documents (Exhibits 1-5) and testimony of:

Virender Hak, MD, treating physician
Theresa Bertrand, director of nursing
Pamela Diehl, director of rehabilitation services
Connie Swain, social worker

The Appellant testified. The ██████████ 2023 notice of hearing and ██████████, 2023 discharge notice are in evidence as ALJ Exhibit I. A digital recording of the hearing was made. (1h4m.)

The Respondent has established that the Appellant is no longer in need of nursing home care. He ambulates independently with a cane and is independent with activities of daily living (ADL). (Exhibit 2.) He was discharged from facility occupational therapy on ██████████ and from physical therapy on ██████████, 2023. (Exhibit 3.) His treating physician at the facility, Virender Hak, MD, has evaluated him and documented in the

facility record that he is cleared for discharge and can return to the shelter. (Exhibit 1.) While the Appellant claims to still need nursing home care because of mobility limitations and because he receives ██████████ he presented no medical opinion to controvert the Respondent's evidence that he does not require nursing home placement for these issues. Appropriate grounds for discharge have been established.

A nursing home must permit residents and their representatives the opportunity to participate in deciding where the resident will reside after discharge. 10 NYCRR 415.3(i)(1)(vii). The Respondent has complied with this regulation by making efforts to include the Appellant in discharge planning. Assisted living facility placement was discussed with him but is not an option because the Appellant has no income. (Exhibit 5.) The Appellant has applied for social security disability benefits, which might improve his housing options, but presented no evidence to indicate when that application will be resolved. He is currently receiving assistance with the application process from the social worker at his ██████████ center and will have further access to housing and social services at the shelter. The Appellant has not identified any other options for the Respondent to explore, nor has he demonstrated other efforts of his own to develop a plan for discharge.

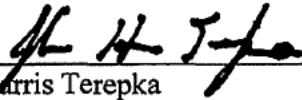
The Appellant objects to the Respondent's discharge plan to return him to the ██████████ Shelter. He resided in that shelter until his hospitalization and admission to Brooklyn Gardens for short term rehabilitation. A physician has determined that return to the shelter is medically appropriate, and the Appellant has offered no evidence to the contrary. In the absence of any realistic alternative options, referral back to the shelter where he had last resided is an appropriate discharge plan.

The Respondent's obligation is to provide an appropriate discharge plan that addresses the Appellant's medical needs. While the Appellant wants to remain at Brooklyn Gardens until ██████████ because he claims his current medical insurance authorization extends until then, he is not entitled to remain in nursing home care he does not need simply because he may have medical insurance. He is also not entitled to remain in nursing home care he does not need until he secures the resources to find living arrangements that he wants. The discharge plan includes arrangements for him to continue to receive his three times weekly ██████████ treatments, and housing assistance and other social services resources will be available to him at the shelter. Under these circumstances the Respondent's discharge plan is appropriate and the Respondent is entitled to proceed with it.

DECISION: Respondent Brooklyn Gardens Nursing and Rehab Center has established valid grounds for the discharge of Appellant ██████████ ██████████ and has established that its discharge plan is appropriate. The Respondent is authorized to discharge the Appellant in accordance with the ██████████ 2023 discharge notice.

This decision is made by John Harris Terepka, Bureau of Adjudication, who has been designated to make such decisions.

Dated: Rochester, New York
April 21, 2023



John Harris Terepka
Administrative Law Judge
Bureau of Adjudication