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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

June 12, 2023

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o Fulton Center for Rehabilitation
and Healthcare
847 County Highway 122
Gloversville, New York 12078

Eli Tucker, NHA
Fulton Center for Rehabilitation
and Healthcare
847 County Highway 122
Gloversville, New York 12078

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 Long

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: cmg
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

COPY

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

██████████ ██████████

Appellant,

DECISION

DA23-6044

from a determination by

FULTON CENTER FOR
REHABILITATION AND HEALTHCARE

to discharge him from a residential health care facility.

Before: Tina M. Champion
Administrative Law Judge

Held at: Videoconference via WebEx

Date: June 8, 2023

Parties: ██████████ ██████████
c/o Fulton Center for Rehabilitation and Healthcare
847 County Highway 122
Gloversville, New York 12078
By: pro se

Fulton Center for Rehabilitation and Healthcare
847 County Highway 122
Gloversville, New York 12078
By: Eli Tucker, Administrator

JURISDICTION

By notice dated [REDACTED] 2023, Fulton Center for Rehabilitation and Healthcare (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

Facility Exhibits: 1 – Smoking Timeline and Clinical Record Documentation
2 – Discharge Planning Timeline

Appellant Exhibits: None

Facility Witnesses: Gabby Staley, Social Worker
Eli Tucker, Administrator

Appellant Witnesses: Appellant

FINDINGS OF FACT

1. The Appellant is a [REDACTED] year-old male who was admitted to the Facility on [REDACTED], 2020. (Facility Exhibit [Ex.] 1; Testimony [T.] Staley.)
2. Upon admission to the Facility, the Appellant signed a "no smoking safety agreement." (Facility Ex. 1; T. Staley.)
3. The Appellant has been caught smoking in the Facility on numerous occasions, against the Facility's no smoking policy. The Appellant's clinical record is replete with documentation of instances in which the Appellant was caught smoking, notations of education and reeducation on the Facility's policy, and reference of the danger to others in the Facility due to oxygen use at the Facility. (Facility Ex. 1; T. Staley.)
4. The Appellant acknowledged that he as smoked at the Facility and states that the last time he smoked was the last date he got caught smoking, which was on [REDACTED] 2023. (Facility Ex. 1; T. Appellant.)
5. The Appellant currently has [REDACTED] wounds that require skilled nursing care. He is unable to perform his own wound care. (T. Staley, Appellant.)
6. On [REDACTED] 2023, the Facility issued a Transfer/Discharge Notice to the Appellant with proposed discharge to [REDACTED], New York. (ALJ Ex. I.)
7. The Transfer/Discharge Notice states that the Appellant will be transferred because the safety of individuals in the Facility would otherwise be endangered, as evidenced by the Appellant continuing to smoke in a non-smoking facility. (ALJ Ex. I.)
8. The Appellant timely appealed the Facility's discharge determination.
9. 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)(3), which states that a resident may be transferred only when the interdisciplinary care team, in consultation with the resident or the resident's designated representative, determines that the safety of individuals in the facility is endangered.

A Facility must ensure complete documentation in the resident's clinical record when a resident is discharged. (10 NYCRR 415.3[i][1][ii].)

Facilities are required to provide written notice of transfer or discharge that includes the following:

- (a) The reason for transfer or discharge;
- (b) The specific regulations that support, or the change in Federal or State law that requires, the action;
- (c) The effective date of transfer or discharge;
- (d) The location to which the resident will be transferred or discharged;
- (e) A statement that the resident has the right to appeal the action to the State Department of Health, which includes:

- (1) an explanation of the individual's right to request an evidentiary hearing appealing the decision;
- (2) the method by which an appeal may be obtained;
- (3) in cases of an action based on a change in law, an explanation of the circumstances under which an appeal will be granted;
- (4) an explanation that the resident may remain in the facility (except in cases of imminent danger) pending the appeal decision if the request for an appeal is made within 15 days of the date the resident received the notice of transfer/discharge;
- (5) in cases of residents discharged/transferred due to imminent danger, a statement that the resident may return to the first available bed if he or she prevails at the hearing on appeal; and
- (6) a statement that the resident may represent him or herself or use legal counsel, a relative, a friend, or other spokesman;

(f) the name, address and telephone number of the State long term care ombudsman;

(g) for nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act;

(h) for nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

(10 NYCRR 415.3[i][1][v].)

Facilities are also required to "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."

(10 NYCRR 415.3[i][1][vi].)

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.

DISCUSSION

Reason for Discharge

The Appellant's clinical record contains documentation of numerous instances in which the Appellant has violated the Facility's policy of no smoking. It also documents numerous efforts by the Facility to educate the Appellant on the Facility's no smoking policy and the danger of smoking in the Facility. Specifically, the Appellant's clinical record reflects that the Appellant has been educated on the danger of smoking given the presence of oxygen in the Facility. The Appellant does not dispute that he has smoked at the Facility despite his knowledge that smoking is prohibited. He stated that he has been taking an inhaled form of nicotine, which has quashed his cravings, and that he has not smoked since the last time he was caught on [REDACTED] 2023. This is insufficient to address the valid concern for the safety of the other residents at the Facility. There is no guarantee that the Appellant will not repeat his long pattern of smoking at the Facility despite it being prohibited. The Facility has met its burden to prove that discharge is necessary.

Discharge Location

The Facility has proposed discharge to [REDACTED], New York. [REDACTED] is a skilled nursing facility and, as such, provides the same level of care as Fulton Center for Rehabilitation and Healthcare. [REDACTED] is approximately an [REDACTED] away from Fulton Center for Rehabilitation and Healthcare when traveling by car.¹ Smoking is permitted at [REDACTED].

The Appellant does not want to go to [REDACTED] because he feels it is too far from where his [REDACTED] lives in [REDACTED] New York. The Appellant testified, and the record supports, that

¹

[REDACTED]

the Appellant's [REDACTED] is involved in the Appellant's care. (T. Appellant; Facility Ex. 1.) The Facility canvassed multiple facilities in an attempt to find one closer to the Appellant's [REDACTED] (Facility Ex. 2; T. Staley.) Most facilities declined the Appellant, some agreed to put him on an extensive waiting list (longer than 1 year), and some did not respond.

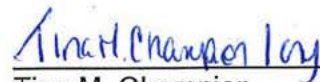
[REDACTED] is the only skilled nursing facility where smoking is allowed that has accepted the Appellant at the current time. The Appellant has been working with [REDACTED] to obtain an apartment in the community where he can have home nursing services to meet his medical needs. However, it is unknown when an apartment will be located for the Appellant and when arrangements can be made for a safe discharge. The Facility has met its burden to show that the discharge location is appropriate for the Appellant.

DECISION

Fulton Center for Rehabilitation and Healthcare has established that its determination to discharge the Appellant was correct, and that its transfer location is appropriate.

1. Fulton Center for Rehabilitation and Healthcare is authorized to immediately discharge the Appellant in accordance with its discharge plan.
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
June 12, 2023



Tina M. Champion
Administrative Law Judge

TO:

██████████
c/o Fulton Center for Rehabilitation and Healthcare
847 County Highway 122
Gloversville, New York 12078
████████████████████

Eli Tucker, Nursing Home Administrator
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