

cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan
SAPA File
BOA by scan



Department of Health

KATHY HOCHUL
Governor

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

JOHANNE E. MORNE, M.S.
Acting Executive Deputy Commissioner

October 11, 2023

CERTIFIED MAIL/RETURN RECEIPT

Christopher Otterbein, NHA
Heritage Village Rehab & Nursing
4570 Route 60
Gerry, New York 14740

[REDACTED]
c/o UPMC Chautauqua
207 Foote Avenue
Jamestown, New York 14701

[REDACTED]
Torja Triscari, Case Manager
UPMC Chautauqua
207 Foote Avenue
Jamestown, New York 14701

RE: In the Matter of [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,

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: nm
Enclosure

STATE OF NEW YORK: DEPARTMENT OF HEALTH

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

██████████ ██████████

Appellant,

COPY

DECISION

from a determination by
Heritage Village Rehab & Nursing

Respondent,

to discharge her from a residential health care facility

Hearing Before: Jean T. Carney
Administrative Law Judge (ALJ)

Held via: Cisco WebEx videoconference

Hearing Date: September 21, 2023

Parties: Heritage Village Rehab & Nursing, Respondent
By: Christopher Otterbein, Administrator
cotterbein@heritage1886.org

██████████ ██████████ Appellant
By: ██████████ ██████████ Health Care Proxy
████████████████████████████████████████

University of Pittsburgh Medical Center, Chautauqua,
Interested Party

By: Toria Triscari, Case Manager
triscarit@upmc.edu

JURISDICTION

By notice dated [REDACTED] 2023, Heritage Village Rehab & Nursing (Heritage or Facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] [REDACTED] (Appellant) from the Facility after returning her to the University of Pittsburgh Medical Center, Chautauqua (UPMC), for a [REDACTED] evaluation. The Facility refused to re-admit the Appellant and the Appellant's [REDACTED] and health care proxy appealed the determination to the New York State Department of Health (Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) § 415.3(i).

HEARING RECORD

In support of its determination, the Facility presented documents (Exhibits 1-8); the testimony of Rachel Johnson, Director of Nursing (DON); and Christopher Otterbein, Administrator. The Appellant presented documents (Exhibits A and B); and the testimony of her [REDACTED] and healthcare proxy, [REDACTED] [REDACTED] and Toria Triscari, Clinical Care Coordinator and Discharge Planner at UPMC. The Notice of Hearing was admitted as ALJ Exhibit I; the hearing was digitally recorded and made part of the record.

ISSUES

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

FINDINGS OF FACT

Citations in parentheses refers to the testimony of the witness ("T") at the hearing and exhibits ("Exh") found persuasive in arriving at a particular finding. Any conflicting evidence was considered and rejected in favor of the cited evidence. An opportunity to

be heard having been afforded the parties, and evidence having been duly considered, it is hereby found:

1. The Appellant is a [REDACTED]-year-old female who was admitted to the facility for long term care on [REDACTED], 2023 from UPMC with relevant diagnoses of [REDACTED] and Nothing by Mouth (NPO). The Appellant had been in UPMC approximately four years before being admitted to the Facility. (Exhs 1 and 5; T Ms. [REDACTED])

2. Upon her arrival at the Facility for admission on [REDACTED] 2023, the Appellant asked for some water from a front desk staff person. The Appellant knew that she was NPO due to her [REDACTED]. The Appellant was able to take some sips of water before the DON arrived and intervened. (Exhs 1 and 6; T Ms. Johnson).

3. The Facility initiated an investigation and devised a plan to educate staff on the Appellant's NPO order. (Exhs 5 and 6).

4. At approximately 4:00 pm on [REDACTED] 2023, the Appellant [REDACTED]. The Appellant scored [REDACTED] out of 27 on a Mood Interview (PhQ9), indicating the [REDACTED]. The Appellant was also given a Brief Interview for Mental Status (BIMS), scoring [REDACTED] out of 15. (Exhs 1, 2 and 3; T Ms. Johnson).

5. After the Appellant reported her [REDACTED], the Facility contacted UPMC and learned that prior to being discharged to the Facility, the Appellant was placed on 1:1 supervision, and recently [REDACTED]. This information was not given to the Facility prior to the Appellant's admission. (T Ms. Johnson).

6. At approximately 5:00 pm on July 14, 2023, The Facility determined to send the Appellant back to UPMC for a [REDACTED] evaluation. The Appellant has remained at UPMC since then. (Exhs 1, A and B; T Ms. Johnson and Ms. Triscari).

7. On [REDACTED] 2023, the Appellant was [REDACTED] due to her attempts to [REDACTED]. Since the Appellant's return to UPMC, referrals have been made to numerous skilled nursing facilities; but none have accepted her. On [REDACTED] 2023, the Appellant's discharge plan noted that the Appellant needs skilled nursing level of care with [REDACTED] health history, and referenced two facilities suggested by a [REDACTED] center. (Exh A).

APPLICABLE LAW

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

Pursuant to 10 NYCRR § 415.3(i)(1)(i), the facility shall not transfer or discharge the resident unless such transfer or discharge is made in recognition of the resident's rights...to receive necessary care and services...(a), a resident may only be discharged when the interdisciplinary care team 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;
- (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;
- (3) the safety of individuals in the facility is endangered; or
- (4) the health of individuals in the facility is endangered.

Additionally, 10 NYCRR § 415(i)(1)(ii) requires that the facility ensures complete documentation in the resident's clinical record when transferring or discharging a resident under the above circumstances. The documentation shall be made by:

(a) the resident's physician and, as appropriate, interdisciplinary care team, when transfer or discharge is necessary under subclause (1) or (2) of clause (a) of subparagraph (i) of this paragraph; and

(b) a physician when transfer or discharge is necessary due to the endangerment of the health of other individuals in the facility under subclause (3) of clause (a) of subparagraph (i) of this paragraph.

Before it transfers or discharges a resident, the facility must notify the resident of the transfer or discharge, and record the reasons in the clinical record. (10 NYCRR § 415.3[i][1][iii]). The written notice must include the reason for the transfer or discharge, the specific regulations that support the action, the effective date of the transfer and the location to which the resident will be discharged. (10 NYCRR § 415.3[i][1][v]).

The burden is on the facility to prove by substantial evidence that the discharge is necessary, and the plan is appropriate. (10 NYCRR § 415.3(i)(2)(ii); New York State Administrative Procedure Act [SAPA] § 306[1]). Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact; less than preponderance of evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision. (*Stoker v. Tarantino*, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3rd Dept. 1984], *appeal dismissed* 63 N.Y.2d 649[1984]).

DISCUSSION

According to the Dear Administrator Letter 19-07 (DAL), re-issued on October 11, 2022, "[f]acilities are required to determine their capacity and capability to care for the residents they admit, so in the absence of atypical changes in residents' conditions, it

should be rare that facilities that properly assess their capacity and capability to care for a resident then discharge that resident based on the inability to meet the resident's needs." This is one such rare situation.

In order to properly assess its capability to care for the Appellant, the Facility relied on the information it received from UPMC. The unrefuted evidence indicates that UPMC failed to accurately disclose the Appellant's [REDACTED] health issues to the Facility. DON Johnson credibly testified that UPMC assured her that the Appellant's [REDACTED] health issues had been resolved. However, considering the fact that the Appellant attempted to [REDACTED] herself within minutes of arriving at the Facility from UPMC, and a few hours later [REDACTED], leads to the opposite conclusion.

The evidence further indicates that UPMC failed to disclose pertinent information to the Facility. Namely, two months before being discharged to the Facility, the Appellant [REDACTED], and was placed on 1:1 supervision until [REDACTED] [REDACTED]. (Exh 8). Finally, approximately 10 days before the hearing in this matter, UPMC had to place [REDACTED] on the Appellant to prevent her from [REDACTED]. (Exh A). As a result of UPMC's withholding information during the referral process, the Facility was not able to properly assess its capability to care for the Appellant.


The Facility contends that if they had been given this information, they would not have admitted the Appellant because they cannot meet her needs. The Facility does not have the staff or training to adequately care for this level of [REDACTED] health issues. (T Ms. Johnson). In response, the representative from UPMC testified that because some nursing home residents have [REDACTED], this Facility should be able to meet the Appellant's needs, including the use of [REDACTED] (T Ms. Triscari). This testimony is not credited due to the witness's lack of actual knowledge and qualifications to make such assertions.

There was no evidence showing that the Appellant has been cleared for discharge from the hospital, and no evidence to refute the Facility's contentions that information regarding the Appellant's mental health needs were either minimized or not provided in the referral packet.

ORDER

1. The Facility has shown that the Appellant's discharge is necessary.
2. The Facility may discharge the Appellant pursuant to the discharge notice dated [REDACTED] 2023.
3. This Decision may be appealed to a court in the appropriate jurisdiction.
4. This Decision shall become effective upon service to the parties.

**DATED: Albany, New York
October 11, 2023**


JEAN T. CARNEY
Administrative Law Judge

TO: Christopher Otterbein, NHA
Heritage Village Rehab & Nursing
4570 Route 60
Gerry, New York 14740

[REDACTED]
c/o UPMC Chautauqua
207 Foote Avenue
Jamestown, New York 14701

[REDACTED]
[REDACTED]
[REDACTED]

Toria Triscari, Case Manager
UPMC Chautauqua
207 Foote Avenue
Jamestown, New York 14701