



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

March 6, 2018

CERTIFIED MAIL/RETURN RECEIPT

Tzvi Barax, NHA
Dumont Center for Rehabilitation
676 Pelham Road
New Rochelle, New York 10805

[REDACTED]
c/o Dumont Center for Rehabilitation
676 Pelham Road
New Rochelle, New York 10805

[REDACTED]

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,

James F. Horan / CAE
James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: cac
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

[REDACTED]

Appellant,

from a determination by

Dumont Center for Rehabilitation,

Respondent,

to discharge her from a residential
health care facility.

COPY

**DECISION
AND
ORDER**

Hearing Before:

Natalie J. Bordeaux
Administrative Law Judge

Held at:

Dumont Center for Rehabilitation
676 Pelham Road
New Rochelle, New York 10805
February 16, 2018

Parties:

Dumont Center for Rehabilitation
By: Tzvi Barax, Administrator

[REDACTED]

Pro Se

JURISDICTION

By notice dated [REDACTED], 2018, Dumont Center for Rehabilitation (the Respondent), a residential health care facility subject to Article 28 of the New York Public Health Law, determined to discharge [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 NYCRR § 415.3(h).

HEARING RECORD

Respondent witnesses: Tzvi Barax, Administrator
Danielle Livecchi, Speech-Language Pathologist
Esther Zellermaier, Physician Assistant
Lilibeth Salvador, R.N., Nurse Manager
Quirina Naron, R.N., Director of Nursing Services
Tamika Greaves, Director of Social Services

Respondent exhibits: 1 [REDACTED] 2018 [REDACTED] (diagnostic evaluation)
2 (progress notes between [REDACTED] 2018 and [REDACTED] 2018)
3 (physical therapy discharge summary)
4 (progress notes as of [REDACTED] 2017)
5 [REDACTED] 2018 letter from Dr. Ronald Gross)
6 [REDACTED] 2018 letter from Tamika Greaves)
7 (face sheet – admission discharge record)

Appellant witnesses: [REDACTED]
Marsha Friedman, Ombudsman, New York State Long-Term Care Ombudsman Program

Appellant exhibits: 1 (executed New York State health care proxy form)
2 (documents regarding Riverdale Manor Home for Adults)

The notice of hearing and discharge notice were marked as ALJ Exhibit I. A digital recording of the hearing was made.

ISSUES

Has Dumont Center for Rehabilitation established that its determination to discharge the Appellant and to transfer the Appellant to an assisted living facility was correct?

FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old female who was admitted to Dumont Center for Rehabilitation (the Facility) on [REDACTED] 2016 after living with her [REDACTED], the Appellant's primary caretaker for most of her life. (Facility Exhibit 2; Recording @ 5:23; 49:01.)
2. The Appellant's admitting diagnoses were: [REDACTED]
[REDACTED] (Facility Exhibit 4.)
3. By notice date [REDACTED] 2018, the Facility determined to discharge the Appellant on [REDACTED] 2018 because her health has improved sufficiently so that she no longer requires skilled nursing care. The notice proposes to discharge the Appellant to Riverdale Manor, an assisted living facility located at 6355 Broadway, Bronx, NY 10471. (ALJ Exhibit I.)
4. On [REDACTED] 2018, after the date of the Facility's discharge determination, the Facility conducted a diagnostic evaluation of the Appellant's cognitive abilities and determined that the Appellant's cognition is [REDACTED] impaired. (Facility Exhibit 1.)
5. The Appellant remains at Dumont Center for Rehabilitation pending the outcome of this appeal.

APPLICABLE LAW

A residential health care facility (also referred to in the regulations as a nursing home) is a facility which provides regular nursing, medical, rehabilitative, and professional services to residents who do not require hospitalization. 10 NYCRR § 415.2(k); 10 NYCRR § 415.13; and 10 NYCRR § 415.16. Within 14 days after a resident's admission, the facility must conduct a comprehensive and accurate assessment of the resident's functional abilities, and identify any impairments to such abilities. The facility must also conduct comprehensive assessments of the resident's abilities and impairments periodically, and at least once every 12 months. 10 NYCRR

§ 415.11(a)(1). The assessments must include the resident's medically defined conditions and prior medical history; physical and mental functional status; discharge potential; ability to perform activities of daily living; mental and psychosocial status; rehabilitation potential; and cognitive status, 10 NYCRR § 415.11(a)(2).

Regulations at 10 NYCRR § 415.3(h) describe the transfer and discharge rights of residential health care facility residents. They state, 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:

(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;

When a residential health care facility determines to discharge a resident because the resident's health has improved such that the resident no longer requires the facility's services, the facility must ensure that the resident's clinical record contains complete documentation made by the resident's physician and, as appropriate, by the resident's interdisciplinary care team. 10 NYCRR § 415.3(h)(1)(ii). The residential health care facility must prove by substantial evidence that the discharge was necessary, and that the discharge plan was appropriate. 10 NYCRR § 415.3(h)(2)(iii); State Administrative Procedure Act § 306(1).

DISCUSSION

The Appellant was admitted to the Facility on [REDACTED] 2016 for [REDACTED] care [REDACTED] [REDACTED] while he [REDACTED] was [REDACTED] because the Appellant was considered incapable of providing for her own basic needs and had never lived alone. During the Appellant's initial [REDACTED] week residence at the Facility, the Appellant's [REDACTED] became [REDACTED] and asked the Facility to continue to care for the Appellant. (Recording @ 27:09; 50:00.)

The Appellant's [REDACTED] is unable to continue to care for the Appellant. (Facility Exhibit 4; Recording @ 5:49; 26:22; 50:42.) When the Appellant lived with her [REDACTED], the Appellant received continued assistance with activities of daily living (including meal preparation, cutting the Appellant's food, inserting and removing the Appellant's partial dentures, and reminding the Appellant to take her prescriptions) from hired aides and from the Appellant's [REDACTED]. (Recording @ 49:07.)

On the date of admission, the Appellant's listed diagnoses were: [REDACTED]

[REDACTED] (Facility Exhibit 4.)

However, the Facility soon became aware of the Appellant's [REDACTED] state. On [REDACTED] 2016, a Facility social worker observed that the Appellant was [REDACTED] (Facility Exhibit 4.) Subsequently, on [REDACTED] 2016, a Facility physical therapist noted that the Appellant is [REDACTED] at times and requires both verbal and tactile cues for safe transfers. (Facility Exhibit 3.) On [REDACTED] 2016, a social worker noted that the Appellant has [REDACTED] related to [REDACTED] and sought to maintain the Appellant's highest possible level of cognitive functioning and ability. (Facility Exhibit 4.) Despite this information in the Appellant's file, the Facility conducted no assessment of the Appellant's

cognitive abilities until [REDACTED] 2018, after the discharge determination had already been made. This assessment determined the Appellant to have a [REDACTED] cognitive impairment.

(Facility Exhibit 1.)

The Facility failed to establish that the [REDACTED] 2018 determination was made by or in consultation with the Appellant's interdisciplinary care team and the Appellant's physician as required by 10 NYCRR §§ 415.3(h)(1)(i)(a) and 415.3(h)(1)(ii). Director of Social Services Greaves testified that she assessed the Appellant and determined that the Appellant was "too high function" for a skilled nursing facility, as she requires "limited" skilled nursing care.

(Facility Exhibit 4; Recording @ 7:11; 33:16.) Although Ms. Greaves presented a [REDACTED] 2018 letter from Medical Director Dr. Gross supporting the [REDACTED] 2018 determination, this letter does not establish appropriate participation by Dr. Gross, or any other physician, in the decision to discharge the Appellant. (Facility Exhibit 5.) The letter was written before an appropriate assessment of the Appellant's cognitive abilities was even performed.

Information provided by the Facility does not establish that the Appellant's medical conditions have improved. Dr. Gross' letter suggests that the Appellant does not require care in a skilled nursing setting because she is clinically stable. (Facility Exhibit 5.) With respect to the Appellant's medical services needs, however, Ms. Zellermaier testified that they were "episodic" and infrequent. This means that the Appellant still has such needs. (Recording @ 17:22.) Regarding the Appellant's functional abilities, although Ms. Levecchi stated that the Appellant had completed several assigned therapies, she confirmed that the Appellant should still be supervised. (Recording @ 11:45.) The Appellant's completion of assigned therapy does not establish a lack of need for services provided by a skilled nursing facility.

The Appellant has been [REDACTED] for most of her life. He [REDACTED] described the Appellant as being [REDACTED]. She also testified that the Appellant has [REDACTED] (Recording @ 30:15; 30:46; 32:27; 33:48.) She emphasized that the Appellant is cognitively [REDACTED] and requires supervision. The Appellant's [REDACTED] asserted that she informed the Facility's social workers of the Appellant's cognitive impairments. She recalled advising the social workers to read all documents to the Appellant, and explain what they were reading, even though the Appellant might not understand what was being said to her. (Recording @ 22:07.)

The Appellant's [REDACTED] described the Appellant's cognition as [REDACTED], and stated that the Appellant becomes [REDACTED] when she must act independently. The Appellant's [REDACTED] also asserted that the Appellant cannot [REDACTED] by herself, and recalled that the Appellant was once [REDACTED] because she did not understand that the [REDACTED]

[REDACTED] For these reasons, the family believes that an assisted living facility would not offer adequate supervision and guidance to the Appellant. (Recording @ 31:27.)

Ms. Friedman, the Ombudsman, reported that the Appellant has difficulty transferring from chairs to a standing position. She explained that the Appellant moves very slowly and hesitantly when walking with her rollator, and described the Appellant as having a mental need for a trained routine when performing activities of daily living. Ms. Friedman asserted that the Appellant lacks a "comprehensive understanding" of her own basic needs, citing as an example, Appellant's lack of awareness that her [REDACTED] (Recording @ 34:54.) When asked to testify, the Appellant was unable to respond to questions asked without prompting from her [REDACTED] (Recording @ 48:12). The Appellant's

cognitive impairment is an aspect of her health which was not properly considered by the Facility, and which shows no improvement.

CONCLUSION

The Facility's determination to discharge the Appellant was not made by an appropriate interdisciplinary care team, but was instead the decision of a social worker at the Facility. The Appellant's cognitive abilities were not assessed when she was admitted, and were not evaluated at all until after the Facility's determination. The ██████████ 2018 evaluation confirms that the Appellant has a ██████████ cognitive impairment which has not improved.

An assisted living facility is prohibited from accepting or retaining a person who is cognitively impaired to a degree which endangers the person's safety. 18 NYCRR § 494.4(d). The Appellant is unable to understand or express her needs independently, comprehend information that she is given, or comprehend basic safety concepts without cueing and prompting. As such, plans to discharge the Appellant to an assisted living facility would not comport with 18 NYCRR § 494.4(d).

Due to the Appellant's impaired cognition, she requires continued supervision, a very carefully controlled environment, and constant physical and psycho-social support with activities of daily living. The Appellant cannot be left safely alone, nor can she act without cueing and prompting. The Facility has failed to establish that the Appellant's health has improved sufficiently that she no longer requires the care provided by a nursing home, or that transfer to an assisted living facility is an appropriate discharge plan.

DECISION AND ORDER

Dumont Center for Rehabilitation has not established that its determination to discharge the Appellant and transfer the Appellant to an assisted living facility was correct.

1. Dumont Center for Rehabilitation is not authorized to discharge the Appellant based upon ██████████ 2018 determination.

Dated: March 5, 2018
New York, New York

Natalie Bordeaux

Natalie J. Bordeaux
Administrative Law Judge