



Department of Health

ANDREW M. CUOMO
Governor

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

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

December 3, 2018

CERTIFIED MAIL/RETURN RECEIPT

[REDACTED] resident
c/o John McKay, Director of Social Work
Bay Park Rehabilitation and Nursing Center
801 Co-op City Boulevard
Bronx, New York 10475

John McKay, Director of Social Work
Bay Park Rehabilitation and Nursing Center
801 Co-op City Boulevard
Bronx, New York 10475

Barbara Phair, Esq.
Adams Law, LLP
3 Dakota Drive – Suite 300
Lake Success, New York 11042

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
Chief Administrative Law Judge
Bureau of Adjudication

JFH: cmg
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
BAYPARK CENTER FOR NURSING AND REHABILITATION,
Respondent,
to discharge her from a residential health care facility.

COPY

DECISION
AND
ORDER

A Notice of Transfer/Discharge, dated [REDACTED] 2018, was issued to [REDACTED] (“Appellant” or “Resident”) by Bay Park Center for Nursing and Rehabilitation (“Respondent” or “Facility”). The Resident appealed the Facility’s proposed transfer/discharge. The pre-transfer hearing was held on October 4, 2018, at the Facility, 801 Co-Op City Boulevard, Bronx, New York, before Kimberly A. O’Brien, Esq., Administrative Law Judge (“ALJ”).

The Facility was represented by Barbara Phair, Esq. The Resident appeared in person and testified in her own behalf. The hearing was held in accordance with the Public Health Law of the State of New York; Part 415 of Volume 10 of the New York Code of Rules and Regulations (“NYCRR”); the United States Code of Federal Regulations (“CFR”) 42 CFR Subpart E (§§431.200 - 431.246) and 42 CFR Part 483; the New York State Administrative Procedure Act; and 10 NYCRR Part 51.

Evidence was received, witnesses were sworn or affirmed and examined. A digital recording (“Rec.”) of the proceeding was made [Rec. 0:01- 34:51]. The following individuals

were present: Barbara Phair, Esq. (*Phillip Hammanberg, Esq. Observing*); Sanjay Sood, M.D.; Unica Bishop, Occupational Therapist; and John McKay, Director of Social Work (“DSW”).

STATEMENT OF THE CASE

The [REDACTED] 2018 Notice of Transfer/Discharge indicates that the health of the Resident has improved sufficiently so that she no longer needs the services provided by the Facility. [10 NYCRR§415.3 (h)(1)(i)(a)(2)]. The Facility proposes to discharge the Resident to [REDACTED] Shelter, [REDACTED] (“shelter”) [Ex. 2]. The Appellant is aware of the Facility’s assertions and appealed her discharge.

FINDINGS OF FACT

The following findings of fact were made after a review of the entire record in this matter. Citations in parentheses refer to exhibits or testimony. These citations represent evidence found persuasive in arriving at a particular finding. Conflicting evidence was considered and rejected in favor of the cited evidence.

1. The Resident, [REDACTED]-year-old female, was admitted to the Facility, on [REDACTED] 2018, from the hospital, for [REDACTED] term rehabilitation [REDACTED] wound on [REDACTED] [Ex. 1].
2. The Resident is alert, oriented and able to make her needs known. The Resident is independent with all her activities of daily living (“ADL’s”), and she schedules her own medical appointments in the community. The Resident is eligible to be admitted to the shelter [Ex. 1, Ex. 2, ALJ Ex. 2].

DISCUSSION

The Facility has determined that the health of the Resident has improved sufficiently so that she no longer requires the services provided by the Facility. The Facility shall have the

burden of proof and must show that the transfer is necessary and the discharge plan is appropriate 10 NYCRR §415.3(h)(2)(ii).

The Resident requested and was granted an adjournment of the September hearing, which was adjourned to October 4, 2018 [ALJ Ex. 1]. On October 4, 2018, the ALJ appeared at the Facility for the hearing. Initially, the Resident refused to appear, and the ALJ asked the DSW to encourage the Resident to appear, because the ALJ wanted to hear from her. Approximately one hour after the hearing was scheduled to commence, the Resident arrived at the hearing, and upon entering the room she let the ALJ know that she was recording with her phone. The Resident objected to having specific facility staff members in the room and requested that they be directed to leave the room. The ALJ granted the request and asked the staff members to leave the room, and told them that they would be called back in if necessary. The ALJ began the hearing and explained the proceeding. The Resident kept interrupting and talking about her needs. The ALJ repeatedly asked the Resident not to interrupt, but she continued to talk. The ALJ then heard from the Resident, and allowed her to talk without interruption for quite some time.

The Resident said that she has a [REDACTED] wound and she has a right to stay at the Facility. She is seeing medical providers in the community, and she has [REDACTED] 2018 appointment with her community physician to assess her wound and medical condition (assessment). She said that the shelter is a dangerous place and she will not go there; and that she has not had long term housing for many years because of gentrification. She has been working with [REDACTED] [REDACTED] on long term housing, and she has a [REDACTED] [REDACTED] which will allow her to stay at a hotel. She said the social work staff has not helped her with using the [REDACTED] and finding long placements in the community.

Dr. Sood, Facility Physician, testified that he is new to taking care of the Resident and he

has attempted to establish a physician / patient relationship, but the Resident has repeatedly refused care and has refused to allow him to examine her. While he has not been able to examine the Resident, he has carefully reviewed the Resident's medical record, including nursing notes and physical & occupational therapy notes, and he has also had discussions with Facility staff about the Resident's condition. Dr. Sood believes that the Resident does not require the services provided by the Facility and can be appropriately discharged to the community, shelter, with follow up care/ appointments in the community. Mr. McKay, DSW, who is new to the Facility has not worked with the Resident, and agreed to help the Resident use her [REDACTED] and identify other housing in the community.

While the ALJ found Dr. Sood to be credible, he admitted that he had not provided care to and did not examine the Resident. It is undisputed that the Resident had an appointment with her community physician on [REDACTED] for an assessment. On or about [REDACTED], the Resident contacted the ALJ's office and said she did not go to the appointment because the Facility did not provide transportation. The ALJ then requested an updated assessment from the Facility, with a copy to the Resident. On or about [REDACTED] 2018, the Facility provided the requested assessment. Dr. Amit Saxena, Facility Medical Director, and Mr. McKay, DSW, affirmed that the Resident does not require the care provided by the Facility; the Resident's medical needs can be met in the community on an out-patient basis; and the shelter is an appropriate placement for the Resident. Accordingly, the Facility has met its burden to show that the Resident no longer requires the services it provides and the discharge is necessary.

ORDER


1. The Appeal of the Resident, [REDACTED], is not sustained; and
2. The Facility may discharge the Resident on or after [REDACTED] 2018, in

accordance with this Decision and Order; and

3. This Order may be appealed to a court of competent jurisdiction pursuant to the New York Civil Practice Law and Rules; and

4. This Order shall be effective on service on the parties.

DATED: Albany, New York
November 30, 2018


KIMBERLY A. O'BRIEN
Administrative Law Judge

To [REDACTED] Resident
C/o: John McKay, Director of Social Work
Bay Park Rehabilitation and Nursing Center
801 Co-op City Boulevard
Bronx, New York 10475

John McKay, Director of Social Work
Bay Park Rehabilitation and Nursing Center
801 Co-op City Boulevard
Bronx, New York 10475

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