



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 12, 2019

CERTIFIED MAIL/RETURN RECEIPT

Sheila Mathew, DSW
Fairview Nursing Care Center
69-70 Grand Central Parkway
Forest Hills, New York 11375

██████████
c/o Fairview Nursing Care Center
69-70 Grand Central Parkway
Forest Hills, New York 11375

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,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: nm
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

FAIRVIEW NURSING CARE CENTER

Respondent,

to discharge her from a residential health
facility.

ORIGINAL

DECISION

By notice dated [REDACTED] 2019, Fairview Nursing Care Center (the Facility) determined to discharge [REDACTED] [REDACTED] (the Appellant) from care in its nursing home. The Appellant appealed the proposed discharge. On [REDACTED], 2019, the Facility amended the notice to state the discharge location as the [REDACTED] Shelter. A hearing was held at the Facility on March 6, 2019, before **Dawn MacKillop-Soller, Administrative Law Judge**. The Appellant was present at the hearing and represented herself. The Facility was represented by Sheila Mathew, Director of Social Work.

The [REDACTED] 2019 Discharge Notice was marked ALJ Exhibit I and the amended notice was marked Facility Exhibit 8. Case manager Kahett Alfarez, physical therapy assistant Kolleen Jagolina, director of nursing Sommer Espino, director of rehabilitation Marcet Jairna, and Ms. Mathew testified for the Facility and presented Exhibits 1-

8. The Appellant testified on her own behalf and presented Exhibit A.

The Facility determined to discharge the Appellant because her health has improved sufficiently so she no longer needs the services provided by a nursing home. The [REDACTED] 2019 discharge plan proposed to discharge the Appellant to [REDACTED], an assisted living facility. After the Appellant refused to agree to transfer to an assisted living facility, the Facility amended the discharge notice to propose discharge to the [REDACTED] Shelter. The Appellant opposes any discharge, claiming she requires skilled nursing services to complete her activities of daily living.

ISSUES

Has the Facility met its burden of proving that the Appellant's health has improved sufficiently so she no longer needs nursing home care, and established that its discharge plan is appropriate?

FINDINGS OF FACT

1. The Appellant, age [REDACTED] was admitted to the Facility on [REDACTED] 2018, for short-term rehabilitation following her hospitalization for [REDACTED] pain and [REDACTED]. Her medical conditions include [REDACTED]. She has a prior medical history of [REDACTED] from a [REDACTED]. The Appellant does not have any cognitive limitations and manages her own medications,

including daily pills for [REDACTED]. (Exhibit 6; Recording @ 13:52, 17:52, 36:20, 54:10, 55:19-56:24.)

2. The Appellant prefers to use a wheelchair for ambulation but is without medical restrictions for weight bearing. She is capable of freely ambulating with an assistive device, such as a rolling walker or wheelchair. She is also capable of walking independently for short distances. She is independent in activities of daily living and self-care. (Exhibit 4, 5, 6; Recording @ 9:47, 33:34-34:25, 36:58.)

3. The Facility's interdisciplinary care team has determined that the Appellant has reached her maximum rehabilitation potential, but recommends she continue to receive physical therapy services to maintain her physical therapy progress. (Recording @ 32:50.)

4. The Facility initially arranged for the Appellant to transfer to [REDACTED], an assisted living facility, located at [REDACTED] [REDACTED] [REDACTED]. Upon the Appellant's refusal to transfer, the Facility determined discharge to the [REDACTED] Shelter, located at [REDACTED] [REDACTED] [REDACTED], was appropriate. The Appellant opposes the discharge based on her inability to walk and her physical therapy needs. (ALJ I, Exhibit 8; Recording @ 11:38, 48:39.)

5. The Appellant's care team at the Facility and the Facility's physician, Sharad Soni, M.D., conclude that the

Respondent's discharge is appropriate. This determination is based on personal observations of the Appellant, discussions with Facility staff, notes in the Appellant's record and a physician assessment. (Exhibit 4, 7; Recording @ 33:34, 44:11, 52:43, 1:15.)

APPLICABLE LAW

1. The hearing was held in accordance with Article 28 of the Public Health Law (PHL) of the State of New York; Part 415 in Volume 10 of the Official Compilation of Codes, Rules and Regulations (NYCRR); Part 483 of the United States Code of Federal Regulations (CFR); and the New York State Administrative Procedure Act (SAPA). The Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate. 10 NYCRR 415.3(h)(2)(iii).

2. Pursuant to 10 NYCRR 415.3(h)(2), a resident has the right to challenge a nursing home's transfer or discharge plan.

3. Transfer and discharge rights of nursing home residents are set forth in 10 NYCRR 415.3(h). It provides, in pertinent part:

(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;

4. "Assisted living residence" is defined at PHL § 4651.1. Regulations applicable to assisted living facilities are found at 18 NYCRR Part 494. 18 NYCRR 494.4 provides:

(d) An assisted living program may care only for a person who: (5) voluntarily chooses to participate in an assisted living program after being provided with sufficient information to make an informed choice.

ANALYSIS AND CONCLUSIONS

The Facility proved by substantial evidence that the Appellant's health has improved sufficiently so she no longer needs nursing home care and that its discharge plan to transfer the Appellant to the ██████████ ██████████ Shelter is appropriate. The Facility's evidence established that in addition to managing her own medications and her independence in activities of daily living, the Appellant has reached her maximum level of improvement. The Facility's physician and interdisciplinary care team agree that she no longer requires skilled nursing care. (Exhibit 7; Recording @ 34:04, 44:11, 1:15.)

The Appellant opposes the discharge and argues that she requires the Facility's skilled nursing services because she cannot walk due to a ██████████ ██████████ ██████████. This claim is unpersuasive because it is contrary to the evidence, which confirmed that the Appellant's prior trauma to her ██████████ is healed and she is capable of freely and safely ambulating independently using a rolling walker and wheelchair. It is also inconsistent with the personal observations made by Facility staff of the Appellant walking independently without

assistance. (Exhibit A; Recording @ 28:31, 36:58, 44:11, 52:43, 58:36, 1:10.)

The purpose of nursing home care is to attend to the "sick, invalid, infirm, disabled or convalescent persons," none of which describe the Appellant. PHL § 2801. Director of rehabilitation, Ms. Jairna, and physical therapy assistant, Ms. Jagolina, credibly testified that the Appellant is independent with medication management, self-care and activities of daily living, including toileting, bathing and bed transfers. The Appellant's steady refusal to make efforts to improve on her walking is without any medical basis. She is medically cleared for weight bearing and staff routinely encourage her to walk. (Recording @ 21:39, 22:11, 27:45, 30:07-30:43, 33:34, 36:58, 1:07.)

While the Facility's medical and therapy team agree that the Appellant no longer requires skilled nursing care, they initially determined that she would benefit from a lower level of care at Madison York, an assisted living facility. Under 18 NYCRR 494.4(d)(5), however, a resident's transfer to an assisted living facility must be voluntary. Mr. Alvarez explained the benefits of this placement for the Appellant, which include on-site physical therapy by a home health care therapist, a "home-like" option not available at the ██████████ Shelter. 10 NYCRR 1001.2(a). An assisted living facility would provide the Appellant with the opportunity to further her rehabilitation goals, which is consistent

with her desire to improve her quality of life. (Exhibit 7; Recording @ 44:34, 46:24, 52:05, 52:43, 1:49, 1:04, 1:19, 1:23.)

The Appellant, who is without a home or caretaker in the community, failed to provide justifiable reasons for her rejection of this arrangement, other than to falsely claim she cannot walk and physical therapy services would abruptly end. Because the Appellant refused to transfer to an assisted living environment, the Facility determined to discharge her to the [REDACTED] Shelter, a location that would permit her to access physical therapy services on an outpatient basis. (Recording @ 9:19, 20:38, 44:40, 46:58, 48:39, 51:52, 1:16, 1:22.)


I find the Facility's determination to discharge the Appellant to the [REDACTED] Shelter appropriate because the Facility has proven by substantial evidence that the Appellant's condition has improved sufficiently so that she no longer needs skilled nursing services. I also find that because the Appellant has rejected the option of an assisted living facility, the discharge plan to transfer her to the [REDACTED] Shelter is an appropriate alternative. The Appellant may consent to her discharge to an alternate location, such as [REDACTED], or a different assisted living facility, within the next 30 days; however, should she fail to do so, the Facility is authorized to transfer the Appellant to the [REDACTED] Shelter in accordance with its discharge plan on or after [REDACTED] 2019.

DECISION AND ORDER

1. The Facility is authorized to discharge the Appellant to the [REDACTED] Shelter in accordance with its discharge plan on or after [REDACTED] 2019.

2. This decision shall be effective upon service on the parties by personal service or service by certified or registered mail as required under PHL § 12-a(4).

**Dated: Albany, New York
March 12, 2019**


**DAWN MacKILLOP-SOLLER
Administrative Law Judge**

To: Ms. Bonnie Spanjol
Fairview Nursing Care Center
69-70 Grand Central Parkway
Forest Hills, New York 11375

Sheila Mathew, Director of Social Work
Fairview Nursing Care Center
69-70 Grand Central Parkway
Forest Hills, New York 11375