



**Department
of Health**

ANDREW M. CUOMO
Governor

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

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

May 28, 2019

CERTIFIED MAIL/RETURN RECEIPT

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

[REDACTED]
c/o Fairview Nursing Care Center
69 70 Grand Central Parkway
Forest Hills, New York 11375

[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
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

██████████

Appellant,

from a determination by

Fairview Nursing Care Center

Respondent,

to discharge her from a residential
health care facility.

COPY

DECISION

Hearing Before: Natalie J. Bordeaux
Administrative Law Judge

Held at: Fairview Nursing Care Center
69-70 Grand Central Parkway
Forest Hills, New York 11375

Hearing Date: May 1, 2019
The record closed May 22, 2019

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

██████████
Pro Se

JURISDICTION

By notice dated █ 2019, Fairview Nursing Care Center (the Facility), a residential health care facility subject to Article 28 of the New York Public Health Law, determined to discharge █ (the Appellant). 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

Facility witnesses: Khett Alferez, Case Manager
Merced Jarina, Director of Rehabilitation
Aura Panganiban-Dinglasan, Social Work Coordinator
Sommer Espino, Director of Nursing

Facility exhibits: 1-4

Appellant witnesses: █, Appellant

ALJ Exhibits: I-II

A digital recording of the hearing was made.

ISSUES

Has Fairview Nursing Care Center established that its determination to discharge the Appellant was correct and that its discharge plan is appropriate?

FINDINGS OF FACT

1. The Appellant is a █-year-old female who was transferred from █ Hospital to the Facility on █ 2019 for short-term rehabilitation after sustaining █ injuries, including █ on her █, and █ (Exhibit 4.)

2. By notice dated █ 2019, the Facility determined to discharge the Appellant on █ 2019 because her health has improved sufficiently that she no longer requires the

services provided by the facility. The notice proposes to discharge the Appellant to the [REDACTED] Shelter, located at [REDACTED] (Exhibit 1.)

3. The Appellant does not require skilled nursing care and is independently able to perform activities of daily living with use of assistive devices for ambulation, toileting, and bathing.

(Recording @ 5:04, 11:21, 24:32, 1:14:14.)

4. Before her hospitalization and admission to the Facility, the Appellant resided in a studio apartment, which she owns but is currently unable to occupy because of [REDACTED] that requires repair. (Recording @ 28.20.)

5. The Appellant's clinical record contains documentation from the Appellant's physician and interdisciplinary care team that the Appellant can be safely discharged to the shelter.

(Exhibit 2.)

6. The Appellant remains at the Facility 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. Public Health Law §§ 2801(2)-(3); 10 NYCRR § 415.2(k).

Department 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;

The residential health care facility must prove by substantial evidence that the discharge was necessary and the discharge plan appropriate. 10 NYCRR § 415.3(h)(2)(iii); State Administrative Procedure Act § 306(1).

DISCUSSION

The Appellant was admitted to the Facility on [REDACTED] 2019 for short-term rehabilitation to aid her recovery from [REDACTED] injuries, including [REDACTED] on her [REDACTED] and [REDACTED]. (Recording @ 5:04.) She is also diagnosed with [REDACTED] and [REDACTED]. (Exhibit 4.)

Upon her admission, the Facility's rehabilitation staff devised a plan of care entailing physical and occupational therapies with an expected duration of between 8 and 12 weeks. The therapeutic goals were intended to restore or, at minimum, improve the Appellant's functional abilities and enable her to regain her physical independence, specifically with respect to bed mobility, transfers and ambulation. The Appellant received a total of 12 weeks of therapy. Although staff determined that the Appellant had attained her maximum rehabilitative potential after 8 weeks, the Appellant received an additional four weeks of rehabilitative services to ensure that she was able to maintain her functional abilities. On [REDACTED] 2019, the Appellant was discharged from all therapies with the approval of Facility physician Dr. Bagdig Baghdassarian. (Exhibit 4; Recording @ 11:21.)

The Appellant is independently able to perform all activities of daily living, including bed mobility, transfers, ambulation, personal hygiene, and dressing. Although she requires the use of an assistive device for bathing, toileting, and ambulation, she does not require physical assistance from another person to complete these tasks. (Exhibit 4.) The Appellant's medical conditions are stable and can be treated in a community setting. She does not receive skilled care from Facility staff in any discipline. (Recording @ 21:01.)

At the hearing, the Appellant contended that her body is not as strong as it was before her injuries, and she cannot perform tasks without assistance. She stated that she requires a shower chair for bathing. The Appellant also explained that she uses a rollator to assist with toileting and bathing, although she generally requires a wheelchair for moving around. (Recording @ 14:48, 24:27.) She recounted falling on several recent occasions while ambulating with a rollator. (Recording @ 1:38:33.) The Appellant's use of any assistive device, including a wheelchair, does not diminish the Facility's characterization of her abilities as "independent" because she completes activities of daily living without the help of another person.

The Appellant asserted that she receives medication from the Facility around the clock for undiagnosed [REDACTED], and that she requires skilled care for the pain. (Recording @ 14:26.) Sommer Espino, the Facility's Director of Nursing, confirmed her awareness of the Appellant's pain. She explained that the Appellant did not require skilled nursing care to administer pain medication and would be able to obtain the same medications in the community. (Recording @ 20:27.) The Appellant also stated that she requires help with [REDACTED] and [REDACTED]bs when she experiences [REDACTED]. Although she stated that a Certified Nurse Aide (CNA) assists her with [REDACTED] and [REDACTED] the Appellant insisted that she requires additional therapy in the form of [REDACTED] from Facility rehabilitation staff. The Appellant

provided no explanation or evidence to justify her claim that she required [REDACTED] from a physical therapist, but merely recalled that a previous physical therapist had [REDACTED] her [REDACTED] (Recording @ 19:18, 1:23:06.) [REDACTED] and [REDACTED] do not constitute skilled nursing care or assistance uniquely available in nursing homes which cannot be accessed in the community. (Recording @ 1:14:14.)

Ms. Espino noted that the Appellant has refused wound-care visits for several consecutive weeks. In response, the Appellant explained that she has rejected treatment because wound-care staff wake her up at night and in the morning during the 7 o'clock hour, thereby depriving her of much-needed sleep. The Appellant's refusal of help with wounds evinces her ability to address her own needs. (Recording @ 1:16:49.) The Facility has established that the Appellant's conditions have improved so that she no longer requires the services of a skilled nursing facility.

The Facility proposes to discharge the Appellant to [REDACTED] Shelter, a shelter located in [REDACTED]. (Exhibit 1.) The Appellant has a home in the community, a [REDACTED] where she resided before her stay at the Facility. However, the apartment was [REDACTED] which resulted in the [REDACTED] of the Appellant's [REDACTED] and the Appellant's own injuries. At the hearing, the Appellant explained that her apartment is presently uninhabitable, as she has only begun to arrange [REDACTED] [REDACTED]. Although she accepted some responsibility for the delayed renovation (she was [REDACTED] and tending to her [REDACTED] the Appellant contended that most, if not all, necessary work would have already commenced if the Facility had not "restricted" her out-on-pass privileges by requiring a person to accompany her when she leaves the premises. She is unwilling to give repairmen or anyone else the keys to her

apartment (which precludes any work being performed in her absence) because she believes that someone has already stolen her jewelry. While the Appellant also insisted that work in her apartment would be completed by late June if she could leave Facility grounds unescorted, she provided no documentation to support her statements and subsequently stated that she was unable to offer an expected date of repair completion. As she was so advised at the hearing, the Facility's out-on-pass rules are not relevant to this review of the Facility's discharge determination. (Recording @ 28:20, 1:04:00.)

The Appellant stated that she was unwilling to be discharged to a location in the [REDACTED] because she needs to be close to her home in order to oversee repairs. Her dissatisfaction with discharge to a different [REDACTED], particularly when she is ambulatory and receives transportation from a service for people with disabilities, is unreasonable. The Appellant also emphasized that shelter placement is completely unsafe and inappropriate. However, Mr. Alferez correctly explained that the [REDACTED] Shelter serves as an intake location where staff would arrange for her shelter placement. (Recording @ 54:54.)

Before determining to discharge the Appellant to [REDACTED] Shelter, Facility staff attempted other discharge locations in the community, none of which proved viable. Case Manager Khett Alferez confirmed that the Appellant's [REDACTED] is unwilling to accommodate the Appellant at her home. Mr. Alferez also contacted the Appellant's former partner regarding the possibility of discharging the Appellant to his residence. However, the Appellant's former partner did not respond. (Exhibit 2; Recording @ 6:46.) The Appellant confirmed that her former partner is unable to house her, even temporarily. (Recording @ 1:00:51.)

When Mr. Alferez attempted placement for the Appellant at an assisted living facility, he was informed that the Appellant was ineligible for admission because she is under the age of [REDACTED]

Mr. Alferez contacted several assisted living facilities to inquire whether they would be willing to waive their age-related eligibility criteria. Each time, he was advised that the Appellant would not qualify for admission. (Recording @ 8:38, 45:19.)

Mr. Alferez reviewed other possible temporary housing options, including housing available to individuals who [REDACTED]. However, he learned that the [REDACTED] only offers lodging to vict [REDACTED]. The [REDACTED] The Appellant was therefore ineligible for temporary assistance from the Red Cross. Mr. Alferez explained that his research into possible discharge locations directed him to the [REDACTED] Department of Homeless Services (DHS). Although the Appellant contended that several neighbors in her apartment building received private accommodations from DHS at the local [REDACTED] Mr. Alferez explained that private accommodations at the [REDACTED] are provided by DHS only for those with a [REDACTED], neither of which applies to the Appellant. (Recording @ 50:16.)

The Appellant stated that she had made numerous attempts on her own to procure temporary accommodations from the [REDACTED] to avoid being discharged to a shelter. She insisted that [REDACTED] would listen to Facility staff more carefully and be willing to work with the Facility more readily than with her. Mr. Alferez agreed to contact the individuals that the Appellant identified as [REDACTED] supervisory staff to discuss temporary housing. (Recording @ 47:46.) The parties were advised that the hearing record would remain open until May 22 (three weeks after the hearing date) to ascertain the outcome of the Facility's outreach to the [REDACTED] leads identified by the Appellant. (Recording @ 1:28:53, 1:43:03.)

In an email dated May 16, 2019, Mr. Alferez confirmed that he contacted the two █ employees who the Appellant believed were capable of effectuating housing arrangements. One named █ employee referred Mr. Alferez to DHS, and the other named employee never returned his phone calls. Mr. Alferez also contacted the █ to ascertain whether the Appellant was eligible for █. He was advised that the █ program stopped accepting new applications in █ 2009. (Exhibit II.)

The Facility cannot serve as the Appellant's housing when she does not require skilled nursing care. Its significant efforts to identify alternative housing options for the Appellant were to no avail. The Appellant meets the medical appropriateness criteria for shelter placement delineated by DHS. It is the role of DHS to provide temporary housing for individuals in the community who have no place to stay.

The Appellant has been aware of the Facility's discharge planning since at least █ 2019. She has had ample time within which to █ for her home and avoid shelter placement. Yet, she has not offered any information regarding the status of work in her apartment.

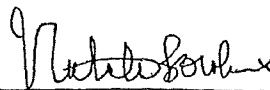
The Facility has established that its discharge plan is appropriate.

DECISION

Fairview Nursing Care Center has established that its determination to discharge the Appellant was correct, and that its discharge plan is appropriate.

1. Fairview Nursing Care Center is authorized to discharge the Appellant in accordance with its █ 2019 discharge notice.

Dated: May 24, 2019
New York, New York



Natalie J. Bordeaux
Administrative Law Judge