



**Department
of Health**

ANDREW M. CUOMO
Governor

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

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

September 20, 2019

CERTIFIED MAIL/RETURN RECEIPT

Anne Weisbrod, Director of Social Services
Hebrew Home for the Aged at Riverdale
5901 Palisade Avenue
Bronx, New York 10471

██████████
c/o Hebrew Home for the Aged
at Riverdale
5901 Palisade Avenue
Bronx, New York 10471

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: cmg
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

Hebrew Home for the Aged at Riverdale,

Respondent,

to discharge her from a residential health care facility.

ORIGINAL

DECISION

Hearing Before:

Ann H. Gayle
Administrative Law Judge

Held at:

Hebrew Home for the Aged at Riverdale
5901 Palisade Avenue
Bronx, New York 10471

Hearing Date:

July 29, 2019
The record closed August 27, 2019

Parties:

Hebrew Home for the Aged at Riverdale
By: Anne Weisbrod, Director of Social Work



Pro Se

Pursuant to Public Health Law (“PHL”) §2801 and Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“10 NYCRR”) §415.2(k), a residential health care facility or nursing home such as Hebrew Home for the Aged at Riverdale (“Respondent” or “Facility”) is a residential facility providing nursing care to sick, invalid, infirm, disabled, or convalescent persons who need regular nursing services or other professional services but who do not need the services of a general hospital.

Transfer and discharge rights of nursing home residents are set forth at 10 NYCRR §415.3(h). Respondent determined to discharge ██████████ (“Appellant” or “Resident”) from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(h)(1)(i)(a)(2) which 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.

Appellant appealed the discharge determination to the New York State Department of Health, and a hearing on that appeal was held. Pursuant to 10 NYCRR §415.3(h)(2)(iii)(b), the Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate. SAPA § 306(1) provides that the standard of proof shall be by substantial evidence. “Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact; it is less than a preponderance of the evidence but more than mere surmise, conjecture or speculation. ...Put differently, there must be a rational basis for the decision. (Citations omitted)” (*Stoker v. Tarentino*, 101 A.D.2d 651, 652, 475 N.Y.S.2d 562, 564 [App. Div. 3d Dept. 1984], mod. 64 N.Y.2d 994, 489 N.Y.S.2d 43.

A digital recording of the hearing was made part of the record. Appellant appeared and testified on her own behalf, and Zachary Palace, M.D., was called as witnesses for Appellant. Barry Schechter, Supervisor-Long Term Care Ombudsman Office, assisted Appellant at the hearing and testified. Anne Weisbrod, Director of Social Services, Molly Little, Social Worker, Sharon Praigrod, R.N., Clinical Manager, and Glenna Steinke, D.O., testified for Respondent.

The following documents were accepted into evidence by the Administrative Law Judge

(“ALJ”) as ALJ, Facility, and Resident Exhibits:

ALJ:

- I: Notice of Hearing with the Facility’s Discharge Notice attached
- II: June 18, 2019 letter
- III: July 10, 2019 letter.

Facility:

- 1: Case review
- 2: Chart notes
- 3: ADLs summary report and destination log

Resident:

- A: ██████████ 2019 report from Dr. ██████████
- B: ██████████, 2019 blood work
- C: ██████████ 2019 report from Dr. ██████████

ISSUE

Has Hebrew Home for the Aged at Riverdale established that the transfer is necessary and the discharge plan is appropriate?

FINDINGS OF FACT

Citations in parentheses refer to testimony (“T”) of witnesses and exhibits (“Ex”).

1. Respondent, Hebrew Home for the Aged at Riverdale, is a residential health care facility located in Bronx, New York. (Ex I)

¹ This document was received and marked into evidence post hearing (August 28, 2019).

but none of them have accepted Appellant. ██████████ Shelter system residence) in ██████████, where Appellant lived prior to her admission to the Facility, is no longer an option for Appellant. Ms. Little, Ms. Weisbrod, Ms. Praigrod, and Dr. Steinke all believe the Shelter is appropriate for Appellant, but Appellant does not want to return to the Shelter.

Appellant testified that one “can’t live as a ██████ in the Shelter.” The Facility’s medical director, Dr. Palace, testified that he is familiar with nursing home skilled needs’ requirements, and Appellant’s needs do not meet the criteria for remaining in a skilled facility. Dr. Palace testified that the Shelter would be challenging and difficult but not impossible for an ██████ ██████ woman such as Appellant. Dr. Palace believes that keeping a ██████ diet and having time and space to ██████ would be difficult but doable in the Shelter especially with a support system, which Appellant has. However, when further questioned by Appellant, Dr. Palace did acknowledge that in his “heart of hearts” he does not believe that discharging Appellant to the Shelter is in her best interest.

The request of Supervising Long Term Care Ombudsman, Barry Schechter, to keep the record open following the conclusion of the July 29 hearing was granted. A conference call was scheduled for August 20, 2019. The parties were to provide reports (if available) from Appellant’s surgeon, ██████████, M.D., her ██████████ Dr. ██████████ and her ██████████ Dr. ██████████. The parties would also provide updates of their efforts to locate an assisted living facility for Appellant.

Appellant provided a redacted version of Dr. ██████████ ██████████ report, and the parties reported on the August 20 conference call that Dr. ██████████ and Dr. ██████████ would not provide reports. The parties also reported that another assisted living facility with a ██████████ menu, ██████████ ██████████ was identified, but Appellant had not yet visited it. Another conference call was

scheduled for August 27, 2019. The parties reported on the August 27 conference call that Appellant had not yet been accepted into any assisted living facility, and they would continue to explore options. The following day, Appellant provided an unredacted version of Dr. ██████████ report (Exhibit C). Dr. ██████████ Assessment (page 3) included “Would not recommend discharge to a shelter as this environment might pose a limitation to optimal recovery after surgical intervention.” Dr. ██████████ added at page 4 of his report that Appellant “is a patient of mine who underwent a ██████████. At this point, she should not go into a shelter, I believe, as that environment would be contraindicated due to her recent surgery.” Dr. ██████████ unsworn statements would not, standing alone, be grounds for finding that the Shelter is not appropriate for Appellant. However, when combined with Dr. Palace’s testimony that the Shelter is not in Appellant’s best interest, I find that Respondent has not met its burden of proving that Appellant should be discharged to the Shelter at this time.

During the hearing, Appellant expressed her strong desire to be discharged to a setting which offers a ██████████ menu, but she did commit to considering and exploring non-██████████ settings. The parties are encouraged to continue to work diligently, together and independently, to find a suitable discharge location for Appellant who no longer requires skilled care.

CONCLUSION

Respondent has proven that Appellant’s health has improved sufficiently so that she no longer needs the services provided by the Facility. Respondent has not proven that discharge to the Shelter is appropriate for Appellant at this time.

DECISION

I find that the discharge plan is not appropriate for Appellant at this time.

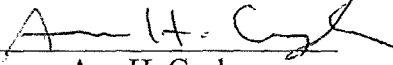
The appeal by Appellant is therefore GRANTED.

██████/Hebrew Home

Respondent–Hebrew Home for the Aged at Riverdale is NOT authorized to discharge Appellant in accordance with its ██████ 2019 discharge notice.

This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

Dated: New York, New York
September 20, 2019


Ann H. Gayle
Administrative Law Judge

TO: ██████
c/o Hebrew Home for the Aged at Riverdale
5901 Palisade Avenue
Bronx, New York 10471

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