



**Department
of Health**

ANDREW M. CUOMO
Governor

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

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

July 2, 2020

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o Livingston Hills Nursing
and Rehabilitation Center
2781 Route 9, P.O. Box 95
Livingston, New York 12542

Diane Seider, Ombudsman
Hudson Valley Long Term Care
Ombudsman Program
7 Woods Road, Suite 3C
Hyde Park, New York 12538

Stephanie Tolle, Director of Social Work
Livingston Hills Nursing and Rehabilitation Center
2781 Route 9, P.O. Box 95
Livingston, New York 12542

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

cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan
SAPA File
BOA by scan

STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

ORIGINAL

DECISION

██████████ ██████████

Appellant,

from a determination by

LIVINGSTON HILLS NURSING
AND REHABILITATION CENTER

to discharge her from a residential health care facility.

Before: Tina M. Champion
Administrative Law Judge

Held at: Videoconference via WebEx

Date: June 18, 2020

Parties: ██████████ ██████████
Livingston Hills Nursing and Rehabilitation Center
2781 Route 9, P.O. Box 95
Livingston, New York 12542
By: Pro Se
Assisted by Diane Seider, Ombudsman

Livingston Hills Nursing and Rehabilitation Center
By: Stephanie Tolle, Director of Social Work
Livingston Hills Nursing and Rehabilitation Center
2781 Route 9, P.O. Box 95
Livingston, New York 12542

JURISDICTION

By notice dated May 1, 2020, Livingston Hills Nursing and Rehabilitation Center (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), 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 New York Codes Rules, and Regulations (NYCRR) 415.3(i).

The hearing was held in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulations (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR.

Evidence was received and witnesses were examined. A stenographic reporter prepared a transcript of the proceeding.

HEARING RECORD

ALJ Exhibits: I – Letter with Notice of Hearing and Transfer/Discharge Notice
II – [REDACTED] 2020 email to ALJ from Stephanie Tolle

Facility Exhibits: 1 – Home Visit Form
2 – PT – Therapist Progress & Discharge Summary, [REDACTED]/20
3 – Progress Notes – LPN, [REDACTED]/20
4 – Progress Notes – OT, [REDACTED]/20
5 – Progress Notes – LPN, [REDACTED]/20
6 – Progress Notes – MD, [REDACTED]/20
7 – Progress Notes – SW, [REDACTED] 20
8 – ADL Tracker Form
9 – Care Plan
10 – Notice of Transfer and/or Discharge
11 – Admission Record Face Sheet
12 – Progress Notes – OT, [REDACTED]/20
13 – Progress Notes – PT, [REDACTED]/20

Appellant Exhibits: None

Facility Witnesses: Ulka Patel, Physical Therapist and Director of Rehabilitation
Cynthia Silvestris, LPN and Discharge Planner

Appellant Witnesses: Appellant testified on her own behalf

FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old female who was admitted to the Facility on [REDACTED] 2019 from an acute care hospital with a primary diagnosis of [REDACTED]. (Facility Ex. 11.)
2. The Appellant has received physical therapy (PT) and occupational therapy (OT) services from the Facility. (Facility Exs. 2, 4, 12-13.)
3. The Appellant maintains that her receipt of PT services while at the Facility has been intermittent, occurring for four days at a time. (Testimony [T.] [REDACTED] Ulka Patel, a physical therapist and the Director of Rehabilitation, testified that the Appellant has had both PT and OT "on and off" when she was in pain or needed a "boost." (T. Patel.)
4. The Appellant's last PT treatment plan commenced on [REDACTED], 2020. It included short-term goals for activity tolerance, gait training, decreased pain, and increased balance. It also included a long-term goal for ambulation. The Appellant was discharged from PT on [REDACTED] [REDACTED] 2020. (Facility Ex. 2.)
5. The stated reason for discharge from PT is "Long term goal met." The long-term goal for ambulation is that the Appellant "will improve gait ability with Rollator Walker [REDACTED] feet on even surfaces to modified independence (assistive device or extra time needed) in order to negotiate daily environment safely and independently." Next to the goal on the discharge summary it was stated that on [REDACTED] 2020 "goal not met" and "explanation: goal partially met – needs intermittent rest to make [REDACTED] (Facility Ex. 2.)

6. The short-term goals for activity tolerance and increased balance on the discharge summary were noted as "goal met;" however, the short-term goals for gait training and decreased pain were noted as "goal not met." (Facility Ex. 2.)

7. The Facility maintains that the Appellant can ambulate short distances of [REDACTED] to [REDACTED] feet without any assistive device and that she can ambulate [REDACTED] feet with a rolling walker. (T. Patel; see also Facility Exs. 4, 12.) The Appellant denies that she can ambulate without an assistive device, and the Appellant spends most of the day in bed. (T. Patel, [REDACTED])

8. The Appellant has participated in restorative OT on multiple occasions to address [REDACTED] pain from long history of [REDACTED] impairments. The OT has had intermittent effectiveness but has not provided consistent long-term pain management. (Facility Exs. 4, 12.)

9. Despite [REDACTED] pain, the Appellant can perform bed mobility, transfers, toileting, dressing, bathing, and grooming tasks with modified independence of extra time and sitting during the activity. (Facility Exs. 4, 12.)

10. Facility documentation and witness testimony consistently indicates that the Appellant manages her activities of daily living (ADLs) on her own and has been observed doing such, although the Appellant denies being able to care for herself. (Facility Exs. 3, 5-9.)

11. On [REDACTED] 2020, the Facility physician noted that the Appellant is "well managed on the current regimen stable for safe discharge home, for outpatient management." (Facility Ex. 6.)

12. The Appellant has a [REDACTED] home in [REDACTED] New York, where her [REDACTED] also resides. The Facility has provided the Appellant with information on obtaining a ramp for the front of the home for access with a wheelchair as that is her preferred method of mobility. (Facility Exs. 3, 5.)

13. On [REDACTED] 2020, the Facility issued a Notice of Transfer/Discharge to the Appellant which proposed discharge to "home" on [REDACTED] 2020. (Facility Ex. 10.)

14. The Transfer/Discharge Notice states that the Appellant will be transferred because the Appellant's health has improved sufficiently, and the Appellant no longer requires the services of the facility. (Facility Ex. 10.)

15. The Appellant timely appealed the Facility's discharge determination and proposed discharge location.

16. On [REDACTED] 2020, subsequent to a [REDACTED] 2020 telephone conference with all concerned parties and the Administrative Law Judge (ALJ), a physical therapist with the Facility visited the Appellant's home to conduct an assessment. The therapist found the front steps to be in poor condition needing repair and recommended that the back steps be made sturdier and the bilateral railings be reinforced until the front steps/deck are repaired and a ramp is added. She noted that clutter should be removed. The therapist otherwise found the home to be a safe and appropriate discharge location for the Appellant. (Facility Ex. 1.)

17. The Appellant's ability to negotiate stairs was assessed by PT on [REDACTED] 2020. The Appellant was able to ascend/descend four steps with one rail and "with contact guard assist." (Facility Ex. 13; T. Patel.)

18. The Appellant has remained at the Facility during the pendency of the appeal.

ISSUES

Has the Facility established that its discharge plan for the Appellant is appropriate?

APPLICABLE LAW

A residential health care facility, also referred to in the Department of Health Rules and Regulations as a nursing home, is a facility which provides regular nursing, medical, rehabilitative, and professional services to residents who do not require hospitalization. (PHL § 2801[2][3]; 10 NYCRR 415.2[k].)

A resident may only be discharged pursuant to specific provisions of the Department of Health Rules and Regulations. (10 NYCRR 415.3[i][1].)

The Facility alleged that the Appellant's discharge is permissible pursuant to 10 NYCRR 415(i)(1)(i)(a)(2), which states:

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.

Under the hearing procedures at 10 NYCRR 415.3(i)(2)(iii), the Facility bears the burden to prove a discharge is necessary and appropriate. Under SAPA § 306(1), a decision in an administrative proceeding must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact. It is less than a preponderance of evidence but more than mere surmise, conjecture or speculation, and it constitutes a rational basis for a decision. (Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3d Dept. 1984], appeal dismissed 63 N.Y.2d 649.)

DISCUSSION

The Facility has determined that the Appellant's health has improved sufficiently and the Appellant no longer requires the services of a skilled nursing facility. Specifically, it has determined that the Appellant is medically stable, has reached her maximum potential in therapy, and is independent in her ADLs with modifications of a seated position and extra time to complete

tasks. The Facility has provided the Appellant, who prefers to utilize a wheelchair for locomotion over other ambulation assistive devices, with information on having a ramp installed at her front entrance multiple times prior to [REDACTED] 2020. During a home visit, the Facility assessed the Appellant's [REDACTED] home and found it to be a safe and appropriate discharge location. Ms. Patel unwaveringly testified that the Appellant can enter and exit the home using the back steps. The Facility recommends that the back steps be made sturdier and the bilateral railings be reinforced for the Appellant, who is [REDACTED]. Inside the home, the only item of concern noted is the existence of clutter that should be removed for safe mobility.

Cynthia Silvestris, LPN and Discharge Planner, testified that the Appellant is on a manageable medication regime and that she can secure at least a two-week supply of medications for the Appellant upon discharge. Ms. Silvestris also testified that she will have all necessary supports in place for the Appellant upon discharge, namely, a home health aide and medical appointment transportation. Ms. Silvestris also indicated that she will assist the Appellant in locating another doctor in the community who accepts the Appellant's insurance and anything else that the Appellant needs.

The Appellant testified on her own behalf. She denied that she can care for herself or ambulate as claimed by the Facility and expressed that she does not feel ready for discharge. Despite her denials as to ambulation, she acquiesced that she navigated the stairs during an assessment on [REDACTED] 2020, albeit in pain. The Appellant appeared fearful of returning to the community, repeatedly asserting that she felt safe at the Facility, and stated that to discharge her would be to give her a COVID-19 death sentence.

The evidence supports that the Facility's plan to discharge the Appellant to her home in the community is appropriate. The Appellant has no skilled nursing needs. Although therapy at the Facility has not been consistent, the Appellant has reached her maximum potential for

improvement. She can manage her ADLs with modified independence and will receive assistance from a home health aide with more challenging tasks and while attending medical appointments. The Appellant's overwhelming fear of becoming infected with COVID-19 is insufficient to preclude her discharge to home. The installation of a ramp on the front entrance of the Appellant's home prior to discharge is desirable; however, the Appellant has taken no steps to utilize the information provided by the Facility and to work with the Facility as it attempted to assist her in getting set up at home. The evidence supports that while it is more difficult and reinforcements should be put in place, the back steps are usable by the Appellant to attend medical appointments and enter/exit in an emergency until she has the front entrance repaired and a ramp installed.

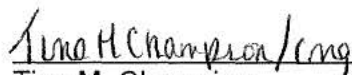
During the hearing the Facility indicated that the Appellant may be eligible to be discharged to an assisted living facility relatively near her home. The Appellant stated that she would consider discharge there if the assisted living facility would accept her. Immediately after the hearing the Facility contacted the assisted living facility and then reported to the ALJ that the assisted living facility did not have an age restriction and would work with the Appellant regarding finances. According to the Facility, the Appellant declined to see the assisted living facility as she first wanted to receive a decision on this discharge appeal. (ALJ II.) The Appellant is encouraged to visit and consider the identified assisted living facility as an alternative to discharge to her home. The Appellant is also encouraged to seek emotional support in the community to help her cope with this transition.

DECISION

Livingston Hills Nursing and Rehabilitation Center has established that its discharge location for the Appellant is appropriate.

1. Livingston Hills Nursing and Rehabilitation Center is authorized to discharge the Appellant in accordance with its discharge plan on or after [REDACTED] 2020.
2. This decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules.

DATED: Menands, New York
July 2, 2020


Tina M. Champion
Administrative Law Judge

TO:

[REDACTED]
Livingston Hills Nursing and Rehabilitation Center
2781 Route 9, P.O. Box 95
Livingston, New York 12542

Diane Seider, Ombudsman
Hudson Valley Long Term Care Ombudsman Program
7 Woods Road, Suite 3C
Hyde Park, New York 12538

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