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# Department of Health

**ANDREW M. CUOMO**  
Governor

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

**LISA J. PINO, M.A., J.D.**  
Executive Deputy Commissioner

December 8, 2020

**CERTIFIED MAIL/RETURN RECEIPT**

[REDACTED]  
c/o Mount Sinai Morningside Hospital  
1111 Amsterdam Avenue  
New York, New York 10025

Ms. Bibi Nzam, RN  
St. Mary's Center Inc.  
516 West 126<sup>th</sup> Street  
New York, New York 10027

[REDACTED]  
Ms. Kathryn Grabowy, SW  
Mount Sinai Morningside Hospital  
1111 Amsterdam Avenue  
New York, New York 10025

**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

St. Mary's Center, Inc.

Respondent,

to discharge her from a residential health  
care facility.

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DECISION

On [REDACTED] [REDACTED] 2020, St. Mary's Center, Inc.  
(Facility), discharged resident [REDACTED] (Appellant)

to Mount Sinai Morningside (the hospital) in New York City.

On [REDACTED], 2020, the Appellant's [REDACTED] [REDACTED]  
appealed the discharge on the Appellant's behalf. 10 NYCRR  
415.3(i)(2)(i)(a). On December 4, 2020, a hearing was held by  
videoconference before Dawn MacKillop-Soller, Administrative  
Law Judge. Evidence was received (ALJ I; Appellant 1-3; and  
Facility A-C). A transcript of the hearing was made.

The Appellant's [REDACTED] appeared and testified on the  
Appellant's behalf. The Facility was represented by Bibi  
Nzam, Director of Nursing. Ms. Nzam, Eng Tan, MD, Esther  
Chijioke, MD, and Roberta Adams, Assistant Director of  
Nursing, testified on behalf of the Facility. Kathryn



3. The Facility specializes in providing skilled nursing care to patients diagnosed with [REDACTED] and [REDACTED] [Testimony, Esther Chijioke, MD.]

4. In [REDACTED] of 2020, the Appellant was placed on 1:1 supervision for safety due to [REDACTED], wandering, and [REDACTED] [REDACTED] behaviors. Her behaviors also included [REDACTED] [REDACTED] with staff, and attempted elopement. [Exhibit 2.]

5. On [REDACTED] [REDACTED], 2020, the Appellant's [REDACTED] [REDACTED] to include [REDACTED] a staff member. The Facility transferred the Appellant the same day to Mt. Sinai Morningside, a hospital in Manhattan, for [REDACTED] evaluation. [Exhibit 3.]

6. The Facility did not serve any Notice of Transfer/Discharge on the Appellant or a family member as required by 10 NYCRR 415.3(i). [Testimony, Bibi Nizam.]

7. The hospital admitted the Appellant for [REDACTED] and medical evaluations. Upon admission, her [REDACTED] was [REDACTED] - more than [REDACTED] times above normal - at [REDACTED]. Her medications included [REDACTED] a drug used to counteract [REDACTED] drugs, and [REDACTED] at 88mcg for [REDACTED]. These factors and an [REDACTED] [REDACTED] [REDACTED] contributed to her [REDACTED] [REDACTED],

██████████ and ██████████ behaviors. [Exhibits A-C; Testimony, Hart Kopple-Perry, DO, Fernando Carnivale, MD.]

8. Hospital ██████████ and medical assessments confirm the Appellant is medically and ██████████ stable and does not require continued ██████████ hospital care. The hospital medical care team has cleared the Appellant for return to the Facility. The Facility, however, refuses to accept her return, and proposes no other discharge plan. [Exhibits B-C; Testimony, Bibi Nizam.]

9. The Appellant remains at the hospital pending the outcome of this hearing.

#### Applicable Law

1. Transfer and discharge rights of nursing home residents are set forth in 10 NYCRR 415.3(i), which provides, 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:

- (1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in the facility;
- (ii) ensure complete documentation in the resident's clinical record when the facility transfers or discharges a resident under any of the circumstances specified in subparagraph (i) of this paragraph. The documentation shall be made by:
  - (a) the resident's physician and, as appropriate, interdisciplinary care team, when transfer or discharge is necessary under subclause (1) or (2) of clause (a) of subparagraph (i) of this paragraph; and
- (iii) before it transfers or discharges a resident:
  - (a) notify the resident and designated representative, if any, and, if known, family member of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner the resident and/or family member understand;
  - (b) record the reasons in the resident's clinical record; and

2. The Facility has the burden of proving that the "discharge or transfer is/was necessary and the discharge plan appropriate." 10 NYCRR 415.3(i)(2)(iii)(b).

#### Discussion

The Facility claims that the Appellant's behaviors [REDACTED] following her admission, and that due to the [REDACTED] of these behaviors, it can no longer meet her



needs and discharge is necessary. [Exhibits 2-3; Testimony, Hart Kopple-Perry, DO, Esther Chijioke, MD, Bibi Nizam.] Prior to determining to transfer the Appellant to the hospital, however, the Facility had a duty to provide the Appellant with "adequate and appropriate medical care" by ruling out medical causes for her behaviors, a process the medical evidence established it failed to complete. 10 NYCRR 415.3(f)(1)(i).

The Appellant's [REDACTED] was [REDACTED] upon arrival at the hospital. This was recorded within hours of her [REDACTED] on the Facility staff member. Hart Kopple-Perry, DO, [REDACTED] for the hospital, explained that this [REDACTED] [REDACTED] [REDACTED] [REDACTED] her [REDACTED] [REDACTED] and [REDACTED] considering her [REDACTED] [REDACTED]. Indeed, the Facility's medical records confirm that since the date of her admission more than 11 months ago, the Appellant's [REDACTED] readings have yielded consistently [REDACTED] readings, between [REDACTED] and [REDACTED]. [Exhibits 2-3.] Dr. Kopple-Perry explained that [REDACTED] and behavioral changes can also be attributable to an [REDACTED] [REDACTED], which the Facility confirmed the Appellant had when the transfer occurred. [Exhibit 2; Testimony, Esther Chijioke, MD.]

Fernando Carnavali, MD, attending physician at the hospital, agreed that these conditions and the Facility's



prescriptions for [REDACTED] at 400 mg, [REDACTED] at 88 mcg instead of 100 mcg, and [REDACTED] (an unnecessary drug because its purpose is to counteract side effects of [REDACTED] drugs that were not being administered to the Appellant) contributed to her [REDACTED] [REDACTED] [REDACTED] and [REDACTED] behaviors. [Testimony, Hart Kopple-Perry, DO, Fernando Carnavali, MD.] The hospital medical records state that upon arrival, the Appellant had "[REDACTED] associated with [REDACTED] [REDACTED] [REDACTED] [REDACTED] and [REDACTED] [Facility Exhibit 2.]

The hospital staff stabilized the Appellant's [REDACTED] behaviors by changing her medications to include [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED], [REDACTED] [REDACTED] and [REDACTED] and [REDACTED] as needed. Dr. Kopple-Perry also described other adjustments made by hospital staff, including short walks on the medical floor, consistent staff redirection for tasks, and video or telephone calls with family. Since these modifications - all of which are available at the Facility - the Appellant has not experienced [REDACTED] wandered, attempted elopement, or required around the clock supervision. [Testimony Kathryn Grabowy, Hart Kopple-Perry, DO.] Based on the hospital's resolution of her [REDACTED] behaviors, the Facility is required to readmit the Appellant.

10 NYCRR 415.3(i)(1)(i).

The Facility transferred the Appellant to Mount Sinai Morningside without issuing her or her [REDACTED] proper notice. The Facility was required to provide the Appellant and her [REDACTED] with written notice of the transfer. 10 NYCRR 415.3(i)(1)(iii)(a). The required notice was never provided. Written notice was, among other things, critical for informing the Appellant and her [REDACTED] of the long term care ombudsman and agencies responsible for advocating for individuals with [REDACTED] [REDACTED] [REDACTED]. 10 NYCRR 415.3(i)(1)(v)(f), (g), and (h). The Appellant's clinical record was also devoid of a physician's note explaining the necessity for the discharge, which is required when the discharge is because the Appellant's needs cannot be met. 10 NYCRR 415.3(i)(1)(ii)(a).

In addition to failing to issue a notice of discharge, the Facility has failed to establish any appropriate discharge plan. Bibi Nizam, Director of Nursing, offered no authority for her claim that this process is the responsibility of the hospital. [Testimony, Bibi Nazam.] Department regulations clearly place the burden of discharge planning on the long term residential care facility - not the hospital. The Facility has the burden of developing and proving the appropriateness of the discharge plan. 10 NYCRR 415.3(i)(1)(vi). Department policy disseminated to nursing

home administrators by a "Dear Administrator Letter" and found on the Department of Health website emphasizes this obligation. It states:

State and Federal regulations require that nursing home residents who are temporarily hospitalized be allowed to return to the facility following hospitalization ... Hospitals are not acceptable final discharge locations. When sending residents with episodes of acting out behavior to hospitals for treatment, the nursing home is responsible to readmit the resident and/or develop an appropriate discharge plan. In these cases, the hospital is not considered to be the final discharge location. DAL NH 15-06, Transfer & Discharge Requirements for Nursing Homes, September 23, 2015.

The Facility has articulated no argument that the Appellant's placement in a hospital setting meets her long term medical needs and is an appropriate discharge plan. The hospital confirmed the Appellant is stable and there is no [REDACTED] or medical need for her continued placement. The Appellant is clinically ready for discharge from the hospital to the Facility, where she can continue to receive the specialized and skilled nursing services she requires. The Facility and the hospital agree this level of care is necessary to effectively manage the Appellant's underlying conditions. [Testimony, Hart Kopple-Perry, DO, Esther Chijioke, MD, Bibi Nazam.]

If the Facility believes another placement is appropriate for the Appellant, it is obligated to identify

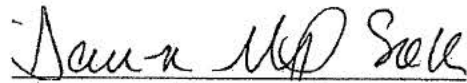
that placement, develop an appropriate discharge plan, and issue the required written notice of discharge. Meanwhile, the Facility having failed to issue proper notice of the discharge and establish discharge was necessary and the existence of an appropriate discharge plan, the discharge appeal is granted. Consistent with the verbal directive at the conclusion of the hearing, the Facility is ordered to readmit the Appellant to the first available bed.

Order

1. The Facility is not authorized to discharge the Appellant without proper notice and an appropriate discharge plan.


2. Pursuant to 10 NYCRR 415.3(i)(2)(i)(d), the Facility is directed to readmit the Appellant prior to admitting any other person.

Dated: Albany, New York  
December 7, 2020



Dawn MacKillop Soller  
Administrative Law Judge

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