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**Department
of Health**

KATHY HOCHUL
Governor

MARY T. BASSETT, M.D., M.P.H.
Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

January 24, 2022

CERTIFIED MAIL/RETURN RECEIPT

██████████ ██████████
c/o Ellicott Center for Rehab and Nursing
200 Seventh Street
Buffalo, New York 14201

David Wettenstein, Administrator
Ellicott Center for Rehab and Nursing
200 Seventh Street
Buffalo, New York 14201

Bria Lewis, Esq.
Center for Elder Law & Justice
438 Main Street, Suite 1200
Buffalo, New York 14202

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,

Dawn MacKillop-Soller
Acting Chief Administrative Law Judge
Bureau of Adjudication

DXM: cmg
Enclosure

JURISDICTION

Ellicott Center for Rehabilitation and Nursing (the Respondent), a residential health care facility (RHCF) subject to Article 28 of the Public Health Law, determined to discharge [REDACTED] [REDACTED] (the Appellant) from care and treatment in its nursing home. The Appellant appealed the discharge determination to the New York State Department of Health pursuant to 10 NYCRR 415.3(i).

SUMMARY OF FACTS

1. Respondent Ellicott Center for Rehabilitation and Nursing is a residential health care facility, specifically a nursing home within the meaning of PHL 2801.2, in Buffalo, New York. Appellant [REDACTED] [REDACTED] age [REDACTED] was admitted as a resident in [REDACTED] 2021 after hospitalization for an infection related to a [REDACTED]. (Exhibit 1.)
2. By notice dated [REDACTED] 2021, the Respondent advised the Appellant that it had determined to discharge her on [REDACTED] 2022, on the grounds that her health has improved sufficiently that she no longer needs the services provided by the facility. (Exhibit ALJ I.)
3. The Appellant is independent with all ADLs, transfers and ambulation. Her care team at Ellicott Center, including her treating physician, have concluded that she no longer needs the services provided by a nursing home and that an assisted living facility can provide an appropriate level of care. (Exhibits 2-4; Testimony.) The discharge plan set forth in the facility's notice is discharge to [REDACTED] Assisted Living, in [REDACTED].
4. The Appellant remains at Ellicott Center pending the outcome of this hearing.

ISSUES

Has the Respondent established that the Appellant's discharge from Ellicott Center is necessary and that the discharge plan is appropriate?

APPLICABLE LAW

A residential health care facility (RHCF), or nursing home, 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. PHL 2801; 10 NYCRR 415.2(k). Transfer and discharge rights of RHCF residents are set forth in PHL 2803-Z and Department regulations at 10 NYCRR 415.3(i). The regulation 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:
 - ...
 - (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.
 - ...
 - (vi) provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility, in the form of a discharge plan which addresses the medical needs of the resident and how these will be met after discharge, and provide a discharge summary pursuant to section 415.11(d) of this Title.
 - (vii) permit the resident, their legal representative or health care agent the opportunity to participate in deciding where the resident will reside after discharge from the facility. 10 NYCRR 415.3(i)(1)

The Respondent has the burden of proving that the discharge or transfer is or was necessary and that the discharge plan is appropriate. 18 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

This hearing was originally noticed for January 20, 2022. At a videoconference on January 20, the Appellant requested a 48-hour postponement in order to secure and present documentation in support of her case. The Respondent agreed to reschedule the hearing to January 24. On January 24, the notice of hearing with attached notice of discharge was marked as ALJ Exhibit I. The Respondent's documents were marked as Exhibits 1-4. Christine Boyles, social worker; and Ian Kennedy, director of rehabilitation, testified for the Respondent. The Appellant testified but presented no documents. The hearing was held, and recorded, by videoconference. (0h56m.)

The Respondent has concluded that the Appellant is no longer in need of nursing home care. The Appellant at times appeared to agree that she does not want or need to be in a nursing home and would like to be in an apartment or at an assisted living facility. To the extent she claims still to require nursing home care, her claim is not supported by any persuasive evidence or professional opinion and is contradicted by the professional opinion of the Respondent's care team, including her treating physician at the facility. Grounds for discharge have been established.

A nursing home must permit residents and their representatives the opportunity to participate in deciding where the resident will reside after discharge. 10 NYCRR 415.3(i)(1)(vii). The Respondent has complied with this regulation by making efforts to develop, with the Appellant's participation, a discharge plan. The Appellant's claims at the hearing that the Respondent has done nothing to involve or assist her in exploring discharge options was not credible and is not consistent with the evidence. The Appellant has been aware since at least [REDACTED] 2021 of the Respondent's

determination that she is not in need of nursing home care and of its attempts to establish a discharge plan. The Respondent has explored all discharge options requested by the Appellant, including her interest in a transfer to an assisted living facility in [REDACTED] and has attempted referrals to other facilities without success.

An assisted living residence is an adult care facility that provides or arranges for housing, on-site monitoring, and personal care services and/or home care services in a home-like setting. An assisted living residence provides daily food service, twenty-four hour on-site monitoring, case management services and the development of an individualized service plan for each resident. PHL 4651.1. Conditions of eligibility for admission to an assisted living residence include submission of a written report from a physician, physician assistant or nurse practitioner that states the resident is not in need of long-term care which would require placement in a residential health care facility and is not otherwise medically or mentally unsuitable for care in the facility. PHL 4657.3. Assisted Living at [REDACTED] has accepted the Appellant as eligible for admission.

Because an assisted living residence provides a less restrictive level of care than a nursing home, the proposed transfer is consistent with the Respondent's obligation to "provide each resident with considerate and respectful care designed to promote the resident's independence and dignity in the least restrictive environment commensurate with the resident's preference and physical and mental status." 10 NYCRR 415.4.

The discharge plan includes transportation to the assisted living facility along with appropriate prescriptions for medication and equipment, and medical appointment referrals. The Appellant objects to making the several hour trip, but the Respondent's discharge plan will include suitable medical transportation as needed.


The Respondent's obligation is to provide a discharge plan that meets the Appellant's medical needs, not the discharge plan of her choice. The Appellant is not entitled to remain in nursing home care she does not need until she finds living arrangements that she wants. The Respondent's plan to discharge her to an assisted living facility, which is able to meet her care needs, is an appropriate discharge plan. The Respondent has met its burden of proving that the discharge is authorized and the discharge plan is appropriate.

DECISION: Respondent Ellicott Center has established valid grounds for the discharge of Appellant [REDACTED] [REDACTED] and that its discharge plan is appropriate.

The Respondent is authorized to discharge the Appellant in accordance with the [REDACTED], 2021 discharge notice.

This decision is made by John Harris Terepka, Bureau of Adjudication, who has been designated to make such decisions.

Dated: Rochester, New York
January 24, 2022



John Harris Terepka
Administrative Law Judge
Bureau of Adjudication