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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

May 2, 2022

CERTIFIED MAIL/RETURN RECEIPT

■■■■■
c/o Dr. Susan Smith McKinney
Rehabilitation Center
594 Albany Avenue
Brooklyn, New York 11203

Sara Freizer, DSW
Dr. Susan Smith McKinney
Rehabilitation Center
594 Albany Avenue
Brooklyn, New York 11203

Barry Schechter, Ombudsman
Center for Independence of the Disabled
841 Broadway
New York, New York 10003

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

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

DR. SUSAN SMITH MCKINNEY
REHABILITATION CENTER AND NURSING HOME

Respondent,

to discharge him from a residential health
care facility.

COPY

DECISION
BOA#5798

Hearing Before:

Sean D. O'Brien
Administrative Law Judge

Held via WEB EX

Hearing Date:

April 26, 2022

Parties:

Dr. Susan Smith McKinney
Rehabilitation Center/Nursing Home
594 Albany Avenue
Brooklyn, New York 11203
By: Sara Freizer,
Director of Social Work

██████████

Pro Se

Appearance by:
Barry Schechter, Ombudsman
Center for Independence
For the Disabled
841 Broadway
New York, New York 10003

JURISDICTION

By notice dated [REDACTED] [REDACTED] 2022, Dr. Susan Smith McKinney Rehabilitation Center and Nursing Home, (the Facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge/transfer [REDACTED] [REDACTED] (the Appellant) from the Facility. The Appellant appealed the determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) Section 415.3(i).

HEARING RECORD

Facility Exhibits: 1-5

Facility Witnesses: Sara Freizer, Director of Social Work
Dr. Robert Holland, Medical Director
Dr. Inna Sosina, treating physician
Patricia Reseau, R.N., Asst. Nursing Director
Karen Williams, Social Worker

Appellant's Witness: [REDACTED] [REDACTED]

Appellant's Exhibit: A

Administrative Law Judge Exhibit 1: Notice of Hearing with Discharge Notice

A digital recording of the hearing was made part of the hearing record via WEB EX.

ISSUE

Has the Facility established that the determination to transfer/discharge is correct and the discharge plan for the Appellant is appropriate?

FINDINGS OF FACT

Citations in parentheses refer to testimony (T.) of witnesses and exhibits (Exhibit) found persuasive in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of cited evidence.

1. The Appellant is a [REDACTED]-year-old male who was admitted to the Facility on [REDACTED] 2020, for short-term rehabilitation. (Exhibits 2, 4; T. Freizer 20:46).

2. By notice dated [REDACTED] 2022, the Facility determined to discharge the Appellant because his "...health has improved sufficiently..." so that he no longer needs the services of a skilled nursing facility. (Exhibit 1).

3. The Facility determined to discharge the Appellant to the [REDACTED] shelter [REDACTED] at the [REDACTED] Shelter, [REDACTED] [REDACTED] [REDACTED], where he

has been accepted. (Exhibits 1, 3, 4; T. Freizer 19:47, 25:45, T. Williams 58:41).

4. At the time of his admission to the Facility, the Appellant needed assistance in all of his Activities of Daily Living (ADLs) including ambulating, transferring, and bathing. The goal of Appellant's short-term admission was to return the Appellant to the community. (Exhibit 4; T. Freizer 21:08).

5. The Appellant has completed his short-term rehabilitation to the point where he no longer needs skilled nursing care, nor does he need assistance with his ADLs. (Exhibit 4; T. Freizer 21:22, T. Reseau 29:50, 30:30, 34:30, T. Sosina 43:39).

6. The Appellant can take his own medications, self-direct and is capable of making his own medical appointments. He also goes on day passes from the Facility. (Exhibit 4; T. Reseau 31:04, 32:11, 39:00, T. Sosina 44:08, 47:28).

7. The Appellant can ambulate independently using a roller walker. (Exhibits T. Reseau 29:56, 35:30, 36:40, T. 42:13).

8. The Appellant was referred to the [REDACTED] Shelter

[REDACTED] The Appellant does not have any income and is not

eligible for an adult home stay or an assisted living location. The [REDACTED] program was referenced, but it is not available to the Appellant. (Exhibits 1, 4; T. Freizer 19:47, T. Williams 51:58).

9. It is the professional opinion of the Appellant's caregivers at the Facility, including the Appellant's treating physician, social worker, and the Director of Social Work that discharge to the [REDACTED] Shelter [REDACTED] is appropriate. (Exhibits 3, 4; T. Freizer 20:01, 22:11, 31:04, T. Sosina 43:48, 45:00, 48:40, T. Williams 53:00).

10. Appellant remains at the Facility pending the outcome of this Appeal.

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. Public Health Law Sections 2801(2)(3); 10 NYCRR Section 415.2(k).

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

The Facility alleges the Appellant's discharge is permissible pursuant to 10 NYCRR Section 415(i)(1)(i)(a)(2), which states in relevant part:

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 Section §415.3(i)(2)(ii), the Facility bears the burden to prove a discharge necessary and the discharge plan is appropriate. Under the New York State Administrative Procedures Act (SAPA) Section 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; less than preponderance of evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision, Stoker v. Tarantino,

101 A.D.2d 651, 475 N.Y.S.2d 562 (3rd Dept. 1984), appeal dismissed 63 N.Y.2d 649.

DISCUSSION

The Appellant was admitted to the Facility on [REDACTED] 2021, for short-term rehabilitation. His medical conditions include [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. At the time of his admission to the Facility, the Appellant required assistance with the ADLs of ambulating, transferring, and bathing. (Exhibits 2, 4; T. Sosina 41:22, 47:04).

By [REDACTED] [REDACTED] 2022, the Appellant had made sufficient improvements in all ADL areas and had no need for continued skilled nursing care at the facility. The Facility's Assistant Director of Nursing, Patricia Reseau, R.N., testified that the Appellant has hit all the benchmarks for his physical and occupational therapy. Director Reseau further testified the Appellant ambulates independently using a roller walker. (Exhibits 1, 3, 4; T. Reseau 30:30, 31:30, 34:40, 35:30 36:40).

Dr. Inna Sosina, the Appellant's primary physician, testified the Appellant does not require nursing home placement and can be discharged to the [REDACTED] [REDACTED] shelter [REDACTED] (Exhibit 4; T.

Sosina 48:40). The Appellant testified on his own behalf and made it known that he does not want to be discharged because he claims that he is not ready. He did not, however, provide any medical justification to support his position that he must remain in the Facility. Therefore, the Facility has met its burden of establishing valid grounds that the discharge of the Appellant is necessary because the Appellant no longer needs the services of a residential care facility. 10 NYCRR Section 415.3(i)(1)(i)(b).

The discharge plan to the community and to the [REDACTED] shelter [REDACTED] in particular, is appropriate. The Appellant does not have any family or friends as a housing resource. In addition, the Appellant does not have any income and is not eligible for discharge to an assisted living location or an adult home due to his lack of income and age. The [REDACTED] program does not have readily available housing. (T. Freizer 22:30, 22:47, 26:10, T. Williams 54:50, 55:44, 56:20, 1:02).

The Appellant, however, is able to make medical appointments outside of the Facility and is alert, oriented and can ambulate independently. (Exhibits 1, 4). Also, the Appellant's apartment where he resided prior to the Facility is no longer available. (T. Williams 1:00).

The discharge plan addresses the medical needs and personal care needs of the Appellant post discharge. The Appellant has been formally accepted by the discharge location. 10 NYCRR Section 415.3(i)(1)(vi). (Exhibit 3).

At the [REDACTED] shelter a social worker will be assigned to the Appellant to assist him regarding housing, meals, and medications. The Appellant has a roller walker as durable medical equipment. In addition, the Appellant's scripts and necessary medical referrals will be made. The health care the Appellant may still need can be provided on an outpatient basis and does not require the services of a residential care facility. (Exhibits 1, 3, 4; T. Freizer 26:35, T. Williams 53:23, 58:41).

The Facility has adequately planned for the Appellant's discharge. The Facility's actions sufficiently address the medical needs of the Appellant post discharge. 10 NYCRR Section 415.3(i)(1)(vi).

CONCLUSION

The Dr. Susan Smith McKinney Rehabilitation Center and Nursing Home has proven that its determination to discharge the Appellant is correct and the discharge plan is appropriate.

DECISION

The appeal by Appellant is therefore DENIED.

The Facility is authorized to discharge the Appellant in accordance with the Facility's [REDACTED] 2022, 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: Albany, New York
May 2, 2022


Sean D. O'Brien
Administrative Law Judge

To:

██████████
c/o Dr, Susan Smith McKinney Rehabilitation Center
594 Albany Avenue
Brooklyn, New York 11203

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