



# 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 14, 2018

Christina Catalano, LMSW  
Upper East Side  
211 East 79<sup>th</sup> Street  
New York, New York 10075

[REDACTED]  
c/o Upper East Side  
211 East 79<sup>th</sup> Street  
New York, New York 10075

Angela Bellizzi, Esq.  
225 Crossways Park Drive  
Woodbury, New York 11797

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

COPY

In the Matter of an Appeal, pursuant to 10 NYCRR §415.3, by  
[REDACTED] Appellant,  
from a determination by  
UPPER EAST SIDE REHABILITATION AND NURSING CENTER,  
Respondent,  
to discharge her from a residential health care facility.

DECISION  
AND  
ORDER

A Notice of Transfer/Discharge, dated [REDACTED] 2018, was issued to [REDACTED] (“Appellant” or “Resident”) by Upper East Side Rehabilitation and Nursing Center (“Respondent” or “Facility”). The Resident appealed the Facility’s proposed transfer/discharge. The pre-transfer hearing was held on August 27, 2018, at the Facility, 211 East 79<sup>th</sup> Street, New York, New York, before Kimberly A. O’Brien, Esq., Administrative Law Judge (“ALJ”).

The Facility was represented by Angela Bellizzi, Esq. The Resident appeared in person and testified in her own behalf. The hearing was held in accordance with the Public Health Law of the State of New York; Part 415 of Volume 10 of the New York Code of Rules and Regulations (“NYCRR”); the United States Code of Federal Regulations (“CFR”) 42 CFR Subpart E (§§431.200 - 431.246) and 42 CFR Part 483; the New York State Administrative Procedure Act; and 10 NYCRR Part 51.

Evidence was received, witnesses were sworn or affirmed and examined. A digital

recording (“Rec.”) of the proceeding was made [Rec. 0:01- 34:51]. The following individuals were present: Christina Catalano, Director of Social Work (“DSW”); Angela Bellizi, Esq.; Veronica Wallis, Nurse Practitioner (“NP”); Marie Lamour, Director of Nursing; Sushant Abrol, Director of Rehabilitation; [REDACTED] Resident; Petronella Thomas, Ombudsman; [REDACTED] Resident’s [REDACTED] Resident’s [REDACTED]

### STATEMENT OF THE CASE

The July 13, 2018 Notice of Transfer/Discharge indicates that the health of the Resident has improved sufficiently so that she no longer needs the services provided by the Facility. [10 NYCRR§415.3 (h)(1)(i)(a)(2)]. The Facility proposes to discharge the Resident to a “NYS DHS Shelter” (“shelter”) [Ex. 2]. The Appellant is aware of the Facility’s assertions and appealed her discharge.

### FINDINGS OF FACT

The following findings of fact were made after a review of the entire record in this matter. Citations in parentheses refer to exhibits or testimony. These citations represent evidence found persuasive in arriving at a particular finding. Conflicting evidence was considered and rejected in favor of the cited evidence.

1. The Resident, a [REDACTED] year-old female, was admitted to the Facility on [REDACTED] 2018, for [REDACTED] term rehabilitation, after she was hospitalized due to a [REDACTED] [Ex. 3 at p. 7].

2. The hospital [REDACTED] team” identified the presence of [REDACTED] in the Resident’s home and these conditions exacerbate her [REDACTED] and are “unlikely to be addressed soon since ongoing [REDACTED] (“unsafe conditions”) [Ex. 3 at p. 7].

3. The Resident is alert, oriented and able to make her needs known. She is

independent with ambulation and all her activities of daily living (“ADL’s”), and she schedules her own medical appointments in the community [Ex. 3].

4. Because of the unsafe conditions in the Resident’s home, the Resident may be eligible for Medicaid non – chronic custodial coverage, and if the Resident’s application is accepted, Medicaid would likely cover in full her continued stay at the Facility (“Medicaid custodial coverage”) [Ex.3].

#### History

The Hearing was originally scheduled to commence on August 6, 2018 [ALJ Ex. 1]. The ALJ appeared at the facility for the hearing, but instead she conducted a lengthy prehearing discussion with the parties. It is undisputed that since the Resident’s [REDACTED] 2018 admission to the Facility, she has seen and is being followed by a number of physicians in the community. It is also undisputed that after the [REDACTED] Discharge Notice was issued the Resident went to the hospital emergency room (“ER”) on a few occasions with complaints of difficulty [REDACTED] she was not admitted to the hospital. The Resident discussed the unsafe conditions in her home and ongoing [REDACTED]; her poor health; and her [REDACTED] recent [REDACTED] diagnosis and his upcoming [REDACTED] schedule. Unfortunately, the Resident and her family are going through a very difficult time.

The Resident said that she cannot have any bill for her stay because all her income goes to support her [REDACTED] and her [REDACTED] who live in her home. While the Resident acknowledged that Medicare discontinued coverage of her stay at the Facility (“stay”) and denied her appeals, she believes that it is a mistake and she has a right to continuing Medicare coverage for her stay. The Facility explained that the Resident does not have any more Medicare coverage available for this stay. Medicare would likely pay for a future stay if the Resident was hospitalized again and a

stay at a skilled nursing facility was ordered.<sup>1</sup> Ms. Catalano, DSW (“DSW”), offered to explore assisted living placements with the Resident, but the Resident ultimately declined. The Resident said she declined because Medicare will not cover her stay in an assisted living facility (“AL”), and to stay at an AL she would be required to convert her community Medicaid coverage and pay net available monthly income (“NAMI”) to the AL. The ALJ encouraged the Resident to reach out to an Ombudsman, and the parties were encouraged to work on resolving their differences and reaching an agreement.

The agreed August 13, 2018 conference call was held with the parties, little progress was made, and the ALJ again encouraged the Resident to reach out to an Ombudsman. The agreed August 17, 2018 conference call was held, and while the Resident was going to meet with an Ombudsman later that day it was clear that the parties were not going to reach an agreement, and a hearing was scheduled for August 27, 2018.

#### Discussion

The Facility has determined that the health of the Resident has improved sufficiently so that she no longer requires the services provided by the Facility. The Facility shall have the burden of proof and must show that the transfer is necessary and the discharge plan is appropriate 10 NYCRR §415.3(h)(2)(ii).

On August 27, 2018, the ALJ appeared at the Facility and after extensive prehearing discussion with the parties, a hearing was held. The Resident said that she continues to believe that Medicare should cover her stay because she recently went to the ER with difficulty

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<sup>1</sup> [REDACTED] of 2018, the Resident requested a transfer to another skilled nursing facility, with a specific request that her medical record (“PRI”) be sent to a few facilities she named. The DSW sent the Resident’s medical record to the named facilities and others. She was not accepted at any of the facilities, either no reason was given or the DSW was told that the facility found the Resident has no skilled needs at this time [Ex. 1].



██████████ and she is now ██████████ dependent. Veronica Wallis, Nurse Practitioner (“Nurse Practitioner”), does not believe that the Resident is ██████████ dependent. The DSW conceded that if the Resident requires ██████████, she is not a shelter candidate. Ms. Thomas, Ombudsman, inquired about the Medicaid custodial coverage, and the Facility confirmed that once the Resident provides the necessary documentation, the Facility will submit the application on her behalf, and if approved, it is not likely that the Resident will be required to pay her NAMI to the Facility. The ALJ encouraged the Resident to complete the application.

The ALJ asked to speak with Dr. Klein, the Resident’s physician at the Facility. The Facility reached Dr. Klein by phone, and he addressed all attending the hearing by speaker phone. Because Dr. Klein was offsite and did not have access to the Resident’s file, he could not speak to whether there was a significant change in her condition or whether the Resident required ██████████. Dr. Klein agreed that upon his return to the Facility he would see the Resident, review her medical record and assess her current condition and needs, and issue an updated assessment. The Resident asked that her community medical information be included in her medical record and available for Dr. Klein’s review. The Resident and Resident’s ██████████ agreed to meet with the DSW the following day so that the DSW could copy the community medical information (“information”) [Ex. 3]. The Facility agreed that Dr. Klein would see the Resident and review the information along with the rest of her medical record, which included the Resident’s recent visits to the ER. The record was left open pending Dr. Klein’s updated assessment.

On September 5, 2018, an agreed conference call was held with the parties to discuss Dr. Klein’s updated assessment wherein Dr. Klein confirmed that there was no significant change in the Resident’s condition and that she could be discharged to the community/shelter [Ex. 3]. The

Facility forwarded a copy of the updated assessment to the ALJ, and a copy was provided to the Resident. The Resident said that she has a number of serious medical conditions and needs surgery. She believes that if Dr. Klein talked with her community physicians, he would agree that she needs the services provided by the Facility and order inpatient physical therapy, which she believes would be covered by Medicare. The ALJ inquired about whether the Resident applied for the Medicaid custodial coverage. The Resident said that she would not apply without a written guarantee that she will not have to pay a NAMI. The DSW said that Medicaid would not provide such a guarantee.

On September 6, 2018, upon notice to the Facility, the Resident requested and the ALJ agreed to consider additional information about her past medical history and her [REDACTED] medical condition (“additional information”), much of which has already been discussed [Ex. 4]. On September 10, 2018, Ms. Bellizzi, Esq., forwarded to the ALJ, with a copy to the Resident, a letter (“letter”) from the DSW and Nurse Practitioner, wherein it states that the Resident went to the ER on [REDACTED] 2018 complaining of [REDACTED] and upon her return to the Facility Dr. Klein prescribed the recommended [REDACTED] medication” (“medication”) [Ex. 5]. The letter also states that the medication “can be administered by Mrs. Gomez independently, and there is no significant change in her status or level of care required at this time” [Ex. 5].

#### Conclusions

Dr. Klein, examined and assessed the Resident, and reviewed and considered her medical record, including the record of the Resident’s [REDACTED] 2018 visit to the ER, and he continues to believe that the Resident’s needs can be met in the community and discharge to the shelter is appropriate [Ex 3, Ex. 4, Ex. 5]. Accordingly, the Facility has met its burden to show

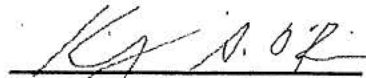
that the Resident no longer requires the services it provides and the discharge is necessary.

The Resident has chosen not to pursue an assisted living placement and she has also chosen not to apply for Medicaid custodial care coverage. The proposed discharge to the shelter is clearly the discharge of last resort. The Resident does not require [REDACTED] and is independent with all her ADLs, and the Facility has verified that the shelter will accept the Resident. Accordingly, the Facility has met its burden to show that the shelter placement is available and appropriate to meet the Resident's needs.

ORDER

1. The Appeal of Resident [REDACTED] is not sustained; and
2. The Facility may discharge the Resident on or after [REDACTED] 2018 in accordance with this Decision and Order; and
3. This Order may be appealed to a court of competent jurisdiction pursuant to the New York Civil Practice Law and Rules; and
4. This Order shall be effective on service on the parties.

DATED: Albany, New York  
September 14, 2018

  
KIMBERLY A. O'BRIEN  
Administrative Law Judge



To [REDACTED] Resident

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