



**Department
of Health**

ANDREW M. CUOMO
Governor

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

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

January 22, 2019

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o Sea Crest Nursing & Rehabilitation Center
3035 West 24th Street
Brooklyn, New York 11224

Kwang Lee, Administrator
Sea Crest Nursing & Rehabilitation Center
3035 West 24th Street
Brooklyn, New York 11224

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

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

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

Seacrest Nursing and Rehabilitation Center,

Respondent,

to discharge her from a residential health care facility.

DECISION

Hearing Before:

Ann H. Gayle
Administrative Law Judge

Held at:

Sea Crest Nursing and Rehabilitation Center
3035 West 24th Street
Brooklyn, New York 11224

Hearing Dates:

November 9, 2018 and November 28, 2018
Record closed January 9, 2019

Parties:

Sea Crest Nursing and Rehabilitation Center
By: Angela Bellizzi, Esq.

██████████
Pro Se, with assistance from ██████████

JURISDICTION AND BACKGROUND

Pursuant to Public Health Law (“PHL”) §2801 and Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“10 NYCRR”) §415.2(k), a residential health care facility or nursing home such as Sea Crest Nursing and Rehabilitation Center (“Respondent” or “Facility”) 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.

Transfer and discharge rights of nursing home residents are set forth at 10 NYCRR §415.3(h). Respondent determined to discharge █ (“Appellant” or “Resident”) from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(h)(1)(i)(a)(1), which provides, in pertinent part:

(h) Transfer and discharge rights.

...

- (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.

Appellant appealed the discharge determination to the New York State Department of Health (“NYSDOH”), and a hearing on that appeal was held. Pursuant to 10 NYCRR §415.3(h)(2)(iii)(b), the Facility has the burden of proving that the transfer is necessary and the

discharge plan is appropriate; pursuant to the State Administrative Procedure Act, the standard of proof is substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact; it is less than a preponderance of the evidence but more than mere surmise, conjecture or speculation. . . . Put differently, there must be a rational basis for the decision. Stoker v. Tarentino, 101 A.D.2d 651, 652, 475 N.Y.S.2d 562, 564 [App. Div. 3d Dept. 1984], mod. 64 N.Y.2d 994, 489 N.Y.S.2d 43.

A digital recording of the November 9, 2018 hearing date and a transcript (pages 1-178) of the November 28, 2018 hearing date were made part of the record. Appellant, █ and █, PhD, testified for Appellant. William Kelly–Social Work Director, Biljana Cvijic–Social Worker, Olga Itskovich–Nurse Supervisor, Mariya Gold–Nurse Practitioner, and Youssef Endraws –Director of Rehabilitation, testified for Respondent. Kwang Lee–Administrator attended the hearing but did not testify.

The following documents were accepted into evidence by the Administrative Law Judge (“ALJ”) as ALJ, Facility, and Appellant Exhibits:

ALJ

- I: Notice of Hearing with attached Notice of Discharge/Transfer
- II: November 13, 2018 letter re November 16, 2018 hearing date
- III: November 13, 2018 letter re adjournment request
- IV: November 15, 2018 letter re November 28, 2018 hearing date

Facility:

- 1: █/2018 email from Facility to NYS DOH
- 2: Social work progress notes
- 3: Weights and vitals summary
- 4: PT discharge summary for █ 2018–█/2018
- 5: PT discharge summary for █/2018–█/2018
- 6: PT/OT screening form

Appellant:

- A: Copy of map route from Resident’s home to █ Rehabilitation

ISSUE

Has Sea Crest Nursing and Rehabilitation Center established that the discharge is necessary and the discharge plan is appropriate?

FINDINGS OF FACT

Citations in parentheses refer to transcript (“T”) pages and exhibits (“Ex”) found persuasive in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. Respondent, Sea Crest Nursing and Rehabilitation Center, is a residential health care facility located in Brooklyn, New York. (Ex I)
2. Appellant, █, age █ was admitted to the Facility on █ 2016, for short-term therapy; the anticipated discharge plan was for Appellant to return to her home with services. Appellant’s medical conditions include █
█
█
█
█
█. (Ex 2; T 26-29, 88-89, 146)

3. By notice dated █ 2018 (“discharge notice”), Respondent advised Appellant that it had determined to discharge her on the grounds that the discharge was for Appellant’s welfare as her needs cannot currently be met by the services available at the Facility. The discharge location is █ Rehabilitation (“█” in █) (Ex I)

4. Appellant has remained at the Facility pending the outcome of this proceeding.

DISCUSSION

Respondent is seeking to discharge Appellant on the grounds that the discharge is necessary for Appellant's welfare and that her needs cannot be met after reasonable attempts at accommodation at the Facility. Respondent's witnesses testified: that Appellant, whose weight can fluctuate by almost █ lbs. in as little as a ten-day period¹, needs to be weighed regularly because knowing Appellant's weight is crucial to determining the types as well as proper dosage and administration of medications; that one such medication, █ is necessary for Appellant's medical conditions, particularly her █; and that Appellant regularly refuses medication such as █ and to be weighed. They further testified that Appellant requires five or more CNAs² (Certified Nurse Assistants) several times each day to administer her care and that her size has █. Respondent has identified Woodcrest, with its specialized █ care program, staff, structure, and equipment, as a safe and appropriate discharge location for Appellant. (Record as a whole)

Nurse Practitioner Mariya Gold testified that she believes a █ facility is necessary to meet Appellant's needs due to Appellant's █ size and weight which currently are determined based on observation due to Appellant's refusal to be weighed. Ms. Gold further testified that Appellant's refusal of █ "is going to █. She's going to go into █ and that will compromise her █ leading to either possibly █" (T88-89). Appellant refuses to take █ because it causes her to █ and she is █ and █. Ms. Gold believes that the █ center which has specialized staff and specialized beds and equipment, can more readily and

¹ Appellant weighed █ lbs. on █/18 and █ lbs. on █/18 (Ex 3).

² at least two on each side of the bed to steady, reposition, and turn Appellant, while another CNA administers the care

appropriately tend to Appellant's needs including cleaning Appellant following her █
█ Ms. Gold believes these circumstances could enable Appellant to agree to take her
much-needed █ as directed. (T 87-92; 162-163)

Rehabilitation Director Youssef Endraws testified that: Appellant, who is currently non-ambulatory, has been placed on rehabilitation services ("rehab") and received physical and occupational therapy several times during the course of her stay at the Facility, and that rehab was discontinued each time when she achieved her maximum rehab potential; Appellant █
█ in her room due to her █
█) which requires a wheelchair at least █; and due to Appellant's
█ and █ her range of motion ("ROM") in her █ is impaired actively and passively. Functional ROM for the █ is █ degrees; Appellant's is █ degrees. As such, Appellant cannot be placed in a █
█ (T 127-128). Dr. Endraws testified that all of the above cause safety concerns for Appellant, and that a skilled facility with a █ unit, which includes █ to accommodate █ wheelchairs, is the appropriate setting to meet Appellant's needs. (Ex 4; Ex 5; Ex 6; T 105-108, 111-112, 118-129, 132)

Dr. Endraws' testimony was reinforced by Nursing Supervisor Olga Itskovich's testimony that Appellant's weight "definitely" presents a safety concern at the Facility in part because Appellant's █ that on one occasion when emergency medical services was called to transport Appellant to the hospital, Appellant had to be "put on a gurney and she was strapped in, but they had to basically █
█ (T 78-80). Ms. Itskovich further testified that Appellant's refusals to be transferred to the hospital, to take all of her medications and to be weighed, and that Appellant's weight and size

██████/Sea Crest

██████ and to become ██████ and ██████ when her regular/familiar routine is disrupted. Dr. Kleyman has been addressing this by redirecting Appellant to “identify possible positive aspects” and to understand and “appreciate that everything doesn’t always have to turn out badly” (T 150), and Appellant works on this by seeking help; she “picks up the phone and she starts calling anybody who would talk to her” (T 151). Dr. Kleyman also acknowledged that ██████ will be available to treat and work with Appellant at ██████

Dr. Kleyman testified that the proposed discharge has caused Appellant to be ██████ ██████ and ██████ that her most significant relationship (*i.e.*, with her ██████) will be destroyed because he would not be able to visit her at ██████ but Dr. Kleyman was not aware that Appellant had refused to allow Respondent to file an application for Access-A-Ride for him (T 153). Dr. Kleyman stated, “I can’t speak to will her physical health improve in a ██████ facility. Maybe it will... I can’t say” (T 152). (T 62, 142-157).

Finally, it should be noted that Appellant took issue with Respondent’s timing of holding a care plan meeting regarding discharge to a ██████ center at the same time the notice of transfer/discharge to ██████ was given to Appellant. The more than three months Appellant has remained at the Facility since learning of the proposed discharge to ██████ has given Appellant the opportunity to participate in the comprehensive care plan regarding discharge to ██████ and to work on her ██████ and fears about such discharge with Dr. Kleyman. (T 73-74)

CONCLUSION

Respondent demonstrated that the discharge is necessary for Appellant's welfare and that her needs cannot be met after reasonable attempts at accommodation at the Facility because her size, immobility, and refusal of medications and to be weighed regularly create a safety issue for

█/Sea Crest

Appellant. Respondent has further demonstrated that █ with its █ care program, structure, staff, and equipment, is a safe and appropriate discharge location for Appellant.

DECISION

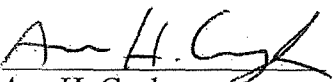
I find that the transfer is necessary and the discharge plan is appropriate.

The appeal by Appellant is therefore DENIED.

Respondent, Sea Crest Nursing and Rehabilitation Center, is authorized to discharge Appellant, █, in accordance with the █, 2018 discharge notice. The discharge shall occur no sooner than █, 2019, in order to give Appellant an opportunity to further adjust to this proposed change. Appellant may be discharged to █ sooner than █ 2019, if she chooses to do so.

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: New York, New York
January 18, 2019


Ann H. Gayle
Administrative Law Judge

TO: █
c/o Sea Crest Nursing and Rehabilitation Center
3035 West 24th Street
Brooklyn, New York 11224

Kwang Lee, Administrator
Sea Crest Nursing and Rehabilitation Center
3035 West 24th Street
Brooklyn, New York 11224

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