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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

March 30, 2021

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o Apex Rehabilitation & Care Center
78 Birchwood Drive
Huntington Station, New York 11746

Anabelle Mazzochi, DON
Apex Rehabilitation & Care Center
78 Birchwood Drive
Huntington Station, New York 11746

Leah Knightner, LMSW
Apex Rehabilitation & Care Center
78 Birchwood Drive
Huntington Station, New York 11746

Yvette Boisnier, Ombudsman
Family Service League
55 Horizon Drive
Huntington, New York 11743

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

[REDACTED]

Appellant,

from a determination by

APEX REHABILITATION
AND CARE CENTER

Respondent,

to discharge him from a residential health
care facility.

COPY

DECISION

Hearing Before:

Matthew C. Hall
Administrative Law Judge

Held at:

Hearing held remotely at
Apex Rehabilitation
And Care Center
78 Birchwood Drive
Huntington Station, New York 11746

Hearing Date:

July 1, 2020

Parties:

Apex Rehabilitation
and Care Center
By: Anabelle Mazzochi, DON

[REDACTED]
By: Yvette Boisnier, Ombudsman

JURISDICTION

By notice dated [REDACTED] [REDACTED] 2020, Apex Rehabilitation and Care Center (the Facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] [REDACTED] (the Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) § 415.3(h).

HEARING RECORD

- ALJ Exhibits: 1 - Notice of Hearing and attached Facility Discharge Notice
- Facility Exhibits: 1 - Smoking Contract
2 - Progress Notes [REDACTED] /20)
3 - Progress Notes [REDACTED] /20)
4 - Progress Notes [REDACTED] /20)
5 - Progress Notes [REDACTED] /20)
6 - Progress Notes ([REDACTED] /20)
7 - Progress Notes [REDACTED] /20)
8 - Physical Therapy Discharge Summary
9 - Prescription forms
10 - Video clip
11 - Second Discharge Notice
- Appellant's Exhibits: A - Statement from [REDACTED]
B - Statement from [REDACTED]
- Facility Witnesses: Anabelle Mazzochi, DON
Samantha Persoff, LMSW
- Appellant's Witness: Yvette Boisner, Ombudsman

4. By notice dated [REDACTED] [REDACTED], 2020, the Facility issued a second discharge notice to the resident because his health and safety had improved that he no longer needed the services of a skilled nursing facility. (Ex. 11.)

5. The Facility determined to discharge the Appellant to the [REDACTED] [REDACTED] [REDACTED], located at [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (Ex. 11.)

6. Upon admission to the Facility, the Appellant required rehabilitation to recover from a fall. At the time of his admission, the Appellant could stand alone for less than [REDACTED] [REDACTED]. He could walk with a rollator for less than [REDACTED] feet. He also needed assistance in all Activities of Daily Living (ADLs). (Ex. 8; T. Mazzochi.)

7. On [REDACTED] 2020, the Appellant was discharged from sub-acute rehabilitation as he had achieved his rehabilitation goals. He could stand unsupported for [REDACTED]. He could walk up to [REDACTED] feet with a rollator. He was also now independent in all ADL's. (Ex. 8.)

8. While the Facility intends to discharge the Appellant to a [REDACTED] the Facility has made efforts to help the Appellant find a discharge location more to his preference, including local rooms to rent. The Appellant has been uncooperative and has

refused to apply to any of the options discovered by the Facility's social workers. The Facility has agreed to continue to help the Appellant in his search for a more suitable living situation. (Ex. 6; Persoff.)

9. The Facility is a "smoking" facility, but only allows smoking as allowed by the Facility smoking policy. Each smoking resident of the Facility is required to sign a "Smoking Contract." The Appellant signed the contract and was aware of the requirements of the contract. (Ex. 1.)

10. The Appellant, however, consistently violated the terms of the contract, including smoking in his own room as well as his " [REDACTED] room." (Ex. 3.)

11. The Appellant was also observed by video recording smoking outdoors in a "non-smoking" area at a time when he had lost his smoking privileges due to prior violations of the contract. (Ex. 11.)

12. It is the professional opinion of Appellant's caregivers at the Facility, including the Facility's Attending Physician, Administrator, Director of Social Work, and Director of Rehabilitation, that the Appellant no longer requires placement in a skilled nursing facility and that his continued presence in the

Facility, would place other residents at risk of harm. (T. Mazzochi, Persoff.)

13. It is also the professional opinion of Appellant's caregivers at the Facility, that discharge to the community, including to a [REDACTED], is appropriate. (T. Mazzochi, Persoff.)

14. After this hearing was held, the Appellant was discharged from the Facility pursuant to Governor Cuomo's March 12, 2020 Executive Order 202.

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 §§ 2801(2)(3); 10 NYCRR § 415.2(k).

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

The Facility alleged that the Resident's discharge is permissible pursuant to 10 NYCRR § 415(i)(1)(i)(a)(2), which states:

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.

The Facility further alleged that the Resident's discharge is permissible pursuant to 10 NYCRR § 415(i)(1)(i)(a)(3), which states:

The transfer or discharge is appropriate because the safety of individuals in the facility is endangered.

Under the hearing procedures at Title 10 NYCRR §415.3(i)(2)(ii), the Facility bears the burden to prove a discharge necessary and appropriate. Under the New York State Administrative Procedures Act (SAPA) § 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.

Regarding whether the transfer or discharge is appropriate because the safety of individuals in the facility is endangered:

The Appellant has blatantly ignored the smoking safety rules instilled by the Facility. He signed a "Smoking Contract," acknowledging that he was aware of the content of the contract. (Ex. 1.) Despite a requirement in the contract to not smoke outside of designated smoking times and areas, the Appellant was seen smoking outside during non-smoking hours in a non-smoking area. (Ex. 1, Ex. 3.) Also, even though the contract prohibits the possession of smoking paraphernalia, the Appellant was seen carrying a lighter. (Ex. 1, Ex. 3.) Further, during a non-smoking time at the Facility, the Appellant was video-recorded smoking outside the Facility in a non-smoking area. (Ex.1, Ex.10.) By his actions, the Appellant has placed himself and others at risk of harm:

Accordingly, the Facility has proven that its determination to discharge the Appellant is correct.

Discharge Location

As discussed above, while the Facility intends to discharge the Appellant to a [REDACTED], the Facility has made efforts to help the Appellant find a discharge location more to his

preference, including local rooms to rent. The Appellant, however, has been uncooperative and has refused to apply to any of the options discovered by the Facility's social workers. The Facility has agreed to continue to help the Appellant in his search for a more suitable living situation. At present, however, there are no other options due to the Appellant's lack of cooperation. For these reasons, the Facility's decision to discharge the Appellant to a [REDACTED] is appropriate.

DECISION

Apex Rehabilitation and Care Center has established that its determination to discharge the Appellant was correct, and that transfer to a [REDACTED] is appropriate.

1. Apex Rehabilitation and Care Center is authorized to discharge the Appellant in accordance with its discharge plan upon receipt of this decision.
2. This decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules.

DATED: Albany, New York
March 30, 2021

Matthew C. Hall / cmg
MATTHEW C. HALL
Administrative Law Judge