



**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

June 8, 2021

CERTIFIED MAIL/RETURN RECEIPT

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██████████ ██████████
c/o Delmar Center
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Mary Keniry, LMSW, J.D.
Long Term Care Ombudsman Program Director
Catholic Charities Senior and Caregiver Support Services
1462 Erie Boulevard, 2nd Floor
Schenectady, New York 12305

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,

COPY

from a determination by

DECISION

**DELMAR CENTER for
REHABILITATION and NURSING
Respondent,**

to discharge him from a residential health care facility.

Hearing Before:

Jean T. Carney
Administrative Law Judge

Held via:

Cisco WebEx videoconference

Hearing Date:

May 25, 2021

Parties:

██████████ Appellant, pro se

Delmar Center, Respondent

By: Kara McGuinness-Hickey
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JURISDICTION

By notice dated [REDACTED], 2021, Delmar Center for Rehabilitation and Nursing (Facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] [REDACTED] (Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) § 415.3(i).

HEARING RECORD

- Facility Exhibits:
- 1 – Discharge Notice dated [REDACTED]/21
 - 2 – Face Sheet
 - 3 – Physical Therapy Progress Report
 - 4 – BIM Report
 - 6 – Facility Notes
 - 7 – SW Progress Notes
- Facility Witnesses:
- Rafi Lehman, Administrator
 - Brian Reese, Director of Rehabilitation
 - Sierra Conklin, RN Unit Manager
 - Suzanne Meyer, Director of Social Work
- Appellant Exhibits: None
- Appellant Witness: [REDACTED] [REDACTED] Appellant

Mary Keniry appeared as Appellant's ombudsman, but did not testify. A transcript of the proceeding was made part of the record.

ISSUES

Has the Facility established that the Appellant's discharge is necessary and discharge plan is appropriate?

FINDINGS OF FACT

An opportunity to be heard having been afforded the parties, and evidence having been duly considered, it is hereby found:

1. The Appellant is a [REDACTED]-year-old male who was admitted to the Facility on [REDACTED], 2016 from [REDACTED] Hospital after [REDACTED] (Exhibit 2).
2. On [REDACTED], 2021, the Facility served a Transfer/Discharge Notice on the Appellant, asserting that the Appellant's "health has improved sufficiently so that you no longer need the services provided by the facility." (Exhibit 1).
3. The facility has 80 custodial care beds, and 40 sub-acute beds. The Appellant currently resides in a custodial care unit. On or about June 2, 2020, Centers Healthcare took ownership of the facility, and determined that beds were needed for sub-acute care. (Testimony of Ms. Meyer and Mr. Lehman).
4. The Appellant's relevant diagnoses include [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]. He currently needs assistance with medication due to his [REDACTED] and suffers from [REDACTED] that have recently required hospitalization. (Exhibits 2 and 3, Appellant's testimony).
5. The facility identified the [REDACTED]
[REDACTED] as an appropriate discharge plan because it is appropriate for the Appellant in that he would be able to come and go as he pleases, and he would have access to the same services that the facility currently provides. (Testimony of Ms. Meyer and Mr. Lehman).

APPLICABLE LAW

A residential health care facility, also referred to 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] and [3]; 10 NYCRR § 415.2[k]).

Pursuant to 10 NYCRR § 415.3(i)(1)(i)(a), a resident may only be discharged when the interdisciplinary care team 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;
- (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;
- (3) the safety of individuals in the facility is endangered; or
- (4) the health of individuals in the facility is endangered.

Additionally, 10 NYCRR § 415(i)(1)(ii) requires that the facility ensures complete documentation in the resident's clinical record when transferring or discharging a resident under the above circumstances. The documentation shall be made by:

- (a) the resident's physician and, as appropriate, interdisciplinary care team, when transfer or discharge is

necessary under subclause (1) or (2) of clause (a) of subparagraph (i) of this paragraph; and

(b) a physician when transfer or discharge is necessary due to the endangerment of the health of other individuals in the facility under subclause (3) of clause (a) of subparagraph (i) of this paragraph.

The burden is on the Facility to prove by substantial evidence that the discharge is necessary, and the plan is appropriate. (10 NYCRR § 415.3(i)(2)(ii); New York State Administrative Procedure Act [SAPA] § 306[1]). 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[1984]).

DISCUSSION

The Facility alleges that the Appellant's health has improved sufficiently so that he no longer requires skilled nursing care, thereby requiring that the Appellant be discharged to the [REDACTED]. The Facility failed to present sufficient evidence that the Appellant's discharge is necessary, and the discharge plan is appropriate.

When asked why it was necessary to discharge the Appellant, the facility's witnesses uniformly stated that it was appropriate, and because the Appellant would have greater freedom if he was discharged to the [REDACTED]. There was no evidence from the Appellant's physician detailing how the Appellant's health had improved, or

changed in any way, in the months leading to the discharge notice. Rather, the testimony was consistent that the Appellant's condition had not changed since the new owners started operating the facility in [REDACTED] of 2020.

The facility argues that it wants to free the Appellant's bed for a sub-acute care resident because the reimbursement rate is greater. That rationale is not relevant to this proceeding. The standard here is whether the discharge is necessary because the resident's health has improved sufficiently so that he no longer requires the services provided by the facility. The evidence shows that while the Appellant is partially independent in his activities of daily living, his [REDACTED] prevents him from self-administering his daily medication. The facility did not know if the [REDACTED] provides that service, or whether the Appellant's wheelchair could be accommodated, or how his mental health needs would be met.

The Appellant contends that he still needs the services provided by the facility, particularly in administering his medication, controlling his [REDACTED] and monitoring the progression of his [REDACTED]. Absent credible evidence from the Appellant's treating physician addressing these concerns, the facility cannot meet its burden showing that the Appellant's discharge is necessary.


Additionally, the facility did not involve the Appellant in his discharge planning, or ask him what his discharge goals were, merely assuming that the Appellant would want the additional freedom afforded by the [REDACTED], and making conclusory statements that the discharge plan is appropriate because it is appropriate. The facility's witnesses contradicted each other regarding whether the [REDACTED] was an assisted living facility, or an independent living facility. Yet they agreed that it was an appropriate discharge for the Appellant, despite not having a clear idea of what the [REDACTED]

provides, or having seen the accommodations. Therefore, their testimony on that material fact is not credited. The facility has failed to show that the discharge plan is appropriate.

ORDER

The Appellant's appeal from the Discharge Notice dated [REDACTED] 2021 is upheld; and the Discharge Notice is dismissed.

DATED: June 7, 2021
Albany, New York


JEAN T. CARNEY
Administrative Law Judge

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cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan
SAPA File
BOA by scan