cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan
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Department of Health

KATHY HOCHUL
Governor

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

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

September 27, 2021

CERTIFIED MAIL/RETURN RECEIPT

[redacted]
c/o Midway Nursing Home
69-95 Queens Midtown Expressway
Maspeth, New York 11378

Katherine Ajiwokewu, DSW
Midway Nursing Home
69-95 Queens Midtown Expressway
Maspeth, New York 11378

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

In the Matter of an Appeal, pursuant to 10 NYCRR 415.3, by

[redacted] Appellant,

from a determination by

Midway Nursing Home

Respondent,

to discharge Appellant from a residential health care facility.

COPY

DECISION

Before: Rayanne L. Babich
Administrative Law Judge (ALJ)

Dates: July 26, 2021; August 31, 2021; September 10, 2021; and September 16, 2021

Held at: Webex videoconference

Parties: [redacted] Appellant
c/o Midway Nursing Home
69-95 Queens Midtown Expressway
Maspeth, New York 11378

Katherine Ajiwokewu, Director of Social Work
Midway Nursing Home
69-95 Queens Midtown Expressway
Maspeth, New York 11378

JURISDICTION

An Amended Notice of Transfer/Discharge dated [redacted] 2021, was served on [redacted] (Appellant) by Midway Nursing Home (Facility). 10 NYCRR 415.3(i)(1)(iii)(a). The Appellant appealed the proposed discharge. 10 NYCRR 415.3(i)(2). The hearing was digitally recorded.

(R1@1:27:13; R2@1:05:01; R3@52:57; R4@17:15.) The Appellant appeared and represented himself at the hearing. The Facility was represented by Katherine Ajiwokewu, Social Worker.

RECORD

ALJ Exhibits:
I – Amended Notice of Discharge dated 2021
II – Letter with Notice of Hearing
III – Email correspondence from Facility dated 2021
IV – Notice of Discharge dated 2021

Facility Exhibits:
1 – Admission Face Sheet
2 – Nurse Practitioner Progress Note dated 2021
3 – Nurse Practitioner Progress Note dated 2021

Appellant Exhibits:
A – Appellant's medical records from Facility and
B – Discharge Summary from dated 2021
C – Nursing Progress Notes dated 2021

Facility Witnesses:
Katherine Ajiwokewu, Social Worker
, Physical Therapist
Paulina Czerkas, Rehabilitation Director
Rey Romero, Assistant Director of Nursing

Appellant Witnesses:
, Physical Therapist Assistant

FINDINGS OF FACT

1. Midway Nursing Home is a residential health care facility. [Ex I, II.]
2. Following surgery, the Appellant was transferred from another nursing home to the Facility on 2021, for short term rehabilitation to improve strength in his range of motion, standing balance, and ambulation. [Ex 1, 3, A; R1@48:26.]
3. The Appellant's primary medical diagnoses include history of for history of , pain, and [Ex 2, 3.]

4. The Appellant's medications include [redacted]. [Ex 3, A.]

5. The Appellant continues to receive daily physical therapy at the Facility to improve his ambulation and mobility. [Ex 2, 3; R1@40:47; R3@41:26.]

6. The Appellant ambulates with either a manual wheelchair or under supervision with a walker and is independent is his activities of daily living. [Ex 2, 3; R1@27:47, 41:01; R2@12:12; R3@40:42.]

7. The Facility issued an Amended Notice of Discharge to the Appellant on [redacted] 2021 citing the reason for discharge as the "resident's health improves sufficiently so the resident no longer needs the services of the facility as evidenced by: Resident met his maximum functional level in therapy at this time." [Ex I.]

8. The Facility's discharge plan is a transfer to the private residence of a non-relative located at [redacted][1] [Ex I.]

ISSUE

Has the Facility met its burden of proving that the Appellant's health has improved sufficiently so he no longer needs the services it provides and that its discharge plan is appropriate?

APPLICABLE LAW

1. Transfer and discharge rights of nursing home residents are set forth in 10 NYCRR 415.3(i), which provides, in pertinent part:

   (1) With regard to the transfer or discharge of residents, the facility shall:

[1] The Facility's request at the close of the hearing to amend the Notice of Discharge and substitute the discharge location with a placement at a men's shelter was denied.

(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:

> 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;

2. When the discharge or transfer is necessary under subclause 1 of 10 NYCRR 415.3(i)(1)(i)(a), "the resident's physician and, as appropriate, interdisciplinary care team" must document the reasons for discharge in the clinical record. 10 NYCRR 415.3(i)(1)(ii) and (iii).
3. A discharge plan must "[address] the medical needs of the resident and how these will be met after discharge." 10 NYCRR 415.3(i)(1)(vi)-(vii).
4. Pursuant to Public Health Law (PHL) 2803-z(b), "no residential health care facility shall initiate a transfer or discharge of a resident to the home of another individual without the written consent of the resident and the other individual and the other individual has received and acknowledged the comprehensive discharge plan to address the resident's needs."
5. The Facility has the burden of proving that the "discharge or transfer is/was necessary and the discharge plan appropriate." 10 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

The Facility failed to prove that the discharge is necessary because the Appellant's health has improved sufficiently so he no longer requires the services provided by the Facility and has failed to prove that its discharge plan to the home of a non-relative is appropriate, pursuant to PHL 2803-z and 10 NYCRR 415.3(i).

Grounds for Transfer

The Appellant was admitted to the Facility following a transfer from another nursing home after [redacted] surgery. [Ex 1 – 3.] The Appellant required rehabilitation services to restore strength in his [redacted], gain an increase in range of motion, and improve balance and mobility. [Ex 1, 3, A.] The Facility is seeking to discharge the Appellant because the Facility has determined the Appellant no longer requires the type of services the Facility provides. [Ex I.] The Appellant objected to the discharge because he believes physical therapy is still necessary.

The Facility has asserted that the Appellant no longer requires skilled services, however, the Facility continues to provide daily physical therapy sessions to the Appellant. [Ex I, 2, 3; R3@41:26.] Members of the rehabilitation service, including [redacted], Physical Therapist; [redacted], Physical Therapy Assistant and Rehabilitation Director; and [redacted], Physical Therapy Assistant, testified that the Appellant, while still using a manual wheelchair, requires supervision when using a walker and is still practicing stair use with an assistive device (cane) during therapy sessions. [R1@40:47; R2@24:48; R3@40:31, 43:43.] Although Ms. [redacted] testified that the Appellant has met his therapy goals and can continue physical therapy through outpatient services, the only goal for treatment upon admission, and as documented in the Appellant's medical record, was for the Appellant to return to his prior level of functioning and to be able to safely navigate the stairs to return to his prior housing in the community. [Ex A;

R1@42:14.] Ms. ■■■ who has been treating the Appellant throughout his admission to the Facility, testified the Appellant requires supervision when navigating stairs with a cane. [R3@44:09.] Ms. ■■■ described the Appellant's current functional status as a "stand-by assist" which requires the Appellant to have another person available and ready to provide hands-on assistance only if needed. [R3@43:43, 46:44.] As the Appellant has yet to reach his therapy goal of reaching his prior level of functioning and independently navigating the stairs at the home in the community, even with an assistive device, and the Facility continues to provide physical therapy daily, the Appellant is certainly still in need of these skilled services provided by the Facility.

Additionally, the Facility has failed to present evidence of "complete documentation in the resident's clinical record when the facility transfers or discharges a resident" by "the resident's physician." 10 NYCRR 415.3(i)(1)(i)-(ii). Despite two requests for such documentation, the Facility has submitted into evidence only two progress note entries, authored each by nurse practitioners, from the Appellant's medical record. [Ex 2, 3.] Although documentation from other members of the resident's interdisciplinary care team may accompany the physician's records, these records alone are insufficient to demonstrate the Facility has ensured complete documentation by the physician regarding the Appellant's discharge. 10 NYCRR 415.3(i)(1)(ii)(a).

Discharge Plan

The Facility has proposed a plan to discharge the Appellant to the home of a non-relative where he has previously resided. [Ex I; R1@30:14.] When discharging to the home of another individual, the Facility must obtain the "written consent of the resident and the other individual" and the other individual must have "received and acknowledged the discharge plan." PHL 2803-

z(b). Furthermore, a discharge plan must "[address] the medical needs of the resident and how these will be met after discharge." 10 NYCRR 415.3(i)(1)(vi). The Facility contended that the discharge location is the Appellant's prior residence and the plan for his return to that residence was developed upon admission. [R1@25:28.] The Appellant objected to the discharge location because the only point of entry and exit from the residence contains ███ stairs which he is currently unable to safely negotiate on his own. [R1@56:25.]

Katherine Ajiwokeu, Social Worker, testified that she had neither obtained written consent from the non-relative for the Appellant to return to her home, nor had the Facility contacted the non-relative as part of the discharge planning process until these proceedings commenced. [R1@30:41; R2@1:00:37.] Further testimony from Ms. Ajiwokeu revealed that the non-relative is not agreeable to the Appellant's discharge to her home because she believes the Appellant cannot safely navigate the stairs independently. [Ex III; R3@1:00:31.] Without the consent of the individual whose home was identified as the discharge location, the discharge plan is not appropriate.

There is no dispute how many stairs are present at the discharge location and that there are no other points of access to the home. Although home care services have been requested to commence upon discharge, there is no plan in place for how the Appellant will enter and exit the home. [R1@34:23.] Despite Ms. ███ testimony that the Appellant still requires a "stand-by" assistance, combined with Ms. ███ testimony that outpatient physical therapy services are recommended, the Facility has failed to show a plan for how the Appellant will traverse these stairs to attend these medical appointments. [R1@42:36; R3@43:43, 46:44.]

The Facility also argued that in lieu of discharge to the non-relative's home, placement can be offered at a men's shelter. [Ex III.] As an untimely offered alternate discharge plan, the Facility

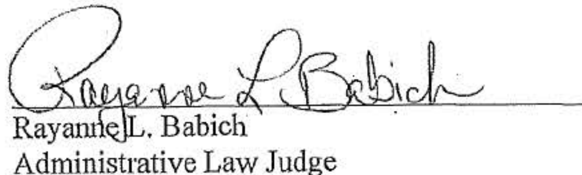
has neither provided sufficient notice to the Appellant, nor has the Appellant been referred and accepted. Although placement at a men's shelter is not under consideration in this matter, there are noteworthy concerns whether the Appellant's medical needs could be met in such a setting.

The Facility's determination to discharge the Appellant is not appropriate because the Facility has not proven that the Appellant's condition has improved sufficiently so that he no longer requires the services provided by the Facility. I find discharge to the private residence of a non-relative not appropriate because the Facility has failed to secure written consent from the non-relative and has not demonstrated how the Appellant will be able to access medical care if he cannot use the stairs. The Facility is not authorized to transfer the Appellant in accordance with its discharge plan.

ORDER

The Appellant's appeal is GRANTED. The Facility is not authorized to discharge the Appellant in accordance with its Notice of Discharge dated [redacted], 2021.

Dated: September 24, 2021
Albany, New York



Rayanne L. Babich
Administrative Law Judge

TO:

[redacted] Appellant
c/o Midway Nursing Home
69-95 Queens Midtown Expressway
Maspeth, New York 11378

Katherine Ajiwokewu, Director of Social Work
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