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Department of Health

KATHY HOCHUL
Governor

MARY T. BASSETT, M.D., M.P.H.
Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

December 23, 2022

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o The Phoenix Rehabilitation & Nursing
140 St. Edwards Street
Brooklyn, New York 11201

Tatyana Polyak, DSW
The Phoenix Rehabilitation & Nursing
140 St. Edwards Street
Brooklyn, New York 11201

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,

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: 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

**The Phoenix Rehabilitation
and Nursing Care Center,**

Respondent,

to discharge her from a residential
health care facility.

COPY

DECISION

#DA22-5909

Hearing Before: John Harris Terepka
Administrative Law Judge

Hearing Date: December 8, 12, 20, 2022
By videoconference

Parties: The Phoenix Rehabilitation and Nursing Care Center
140 St. Edwards Street
Brooklyn, New York 11201
tpolyak@thephoenixrehab.com
By: Tatyana Polyak, DSW

██████████ ██████████
The Phoenix Rehabilitation and Nursing Care Center
████████████████████

JURISDICTION

The Phoenix Rehabilitation and Nursing Care Center (the Respondent), a residential health care facility subject to Article 28 of the Public Health Law, determined to discharge [REDACTED] [REDACTED] (the Appellant) from care and treatment in its nursing home. Pursuant to 10 NYCRR 415.3, the Appellant appealed the discharge determination to the New York State Department of Health.

The Respondent presented documents (Exhibits 1-10) and testimony from Tatyana Polyak, director of social work, and Griffin Chumas, director of rehabilitation. The Appellant presented documents (Exhibits A-D) and testified. The notice of hearing and [REDACTED] 2022 discharge notice are in evidence as ALJ Exhibit I. The hearing was held and recorded by videoconference. (I 0h38m; II 1h33m; III 4h26m.)

SUMMARY OF FACTS

1. Respondent The Phoenix Rehabilitation and Nursing Care Center is a residential health care-facility (RHCF), or nursing home, located in Brooklyn, New York. Appellant [REDACTED] [REDACTED] age [REDACTED] was admitted to the facility on [REDACTED] 2022 for short term rehabilitation after hospitalization. Her diagnoses include [REDACTED] and [REDACTED] (Exhibit 1.)
2. By notice dated [REDACTED] 2022, the Respondent advised the Appellant that it had determined to discharge her on [REDACTED] 2022, on the grounds that her health has improved sufficiently that she no longer needs the services provided by the facility. (Exhibit ALJ I; Exhibit 2.) The Appellant requested this hearing on [REDACTED], 2022.
3. The Appellant has completed and has been discharged from rehabilitation therapy. (Exhibits 9, 10.) She has limited mobility with the use of a walker but is

otherwise independent with her care needs with limited support. Her medical needs can be met on an outpatient basis with referrals for medical care, physical therapy and home care services. (Exhibits 3-6.)

4. The Appellant's treating physician and interdisciplinary care team at the facility have documented in the resident record that she is not in need of nursing home care and that she can be discharged to home or to a homeless shelter. (Exhibit 5.)

5. The discharge notice advised the Appellant she would be discharged to the [REDACTED] shelter system, specifically the [REDACTED] Shelter at [REDACTED], New York. (Exhibit ALJ I.) She had been accepted and was placed in the [REDACTED] shelter system immediately before she was hospitalized and then transferred to The Phoenix for rehabilitation. (Exhibit 3, page 11.)

6. The Respondent's discharge plan includes appropriate referrals for medical care, physical therapy, home care services and ongoing housing assistance. Housing and social services assistance will be available through the [REDACTED] of Social Services, which will also review her requests for reasonable accommodation in the shelter system. (Exhibit 4.)

7. Efforts by the Respondent to develop alternative discharge plans have included attempts to place the Appellant at an assisted living facility or with family. The Appellant has been permitted to participate in but has turned down or failed to pursue such placement options and has not cooperated or participated in reasonable efforts by the Respondent to develop an alternative discharge plan. (Exhibits 3, 4, 8.)

8. The Appellant remains at The Phoenix pending the outcome of this proceeding.

ISSUES

Has the Respondent established that the transfer is necessary and the discharge plan appropriate?

APPLICABLE LAW

A residential health care facility (RHCF), or nursing home, 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. PHL 2801; 10 NYCRR 415.2(k).

Transfer and discharge rights of RHCF residents are set forth in Department regulations. A resident may be transferred 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. 10 NYCRR 415.3(i)(1)(i)(a)(2).

The facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility, in the form of a discharge plan which addresses the medical needs of the resident and how these will be met after discharge. The facility must permit the resident, their legal representative or health care agent the opportunity to participate in deciding where the resident will reside after discharge from the facility. 10 NYCRR 415.3(i)(1)(vi-vii)

The facility has the burden of proving that the discharge or transfer is necessary and the discharge plan appropriate. 10 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

The Appellant objected that the [REDACTED] discharge notice originally served on her was missing a page containing information advising her of her hearing right and how to exercise it. She nevertheless did request this hearing by contacting the Department on [REDACTED], 2022. The December 8 hearing was held and adjourned to December 12 for service of another complete copy of the discharge notice (Exhibit 2) and for the parties to exchange and review exhibits. On December 12 the hearing was held and further adjourned to December 20 for the Appellant to review her complete facility record, which the Respondent did allow her to do. The Appellant was repeatedly advised that she could present any evidence she wanted to be considered and was instructed and offered assistance in submitting it. After being afforded two adjournments and the opportunity to submit evidence, she did present emails (Exhibits A, B) and approximately 90 pages of progress notes and therapy reports from her facility record, extensively annotated by her. (Exhibits C, D.)

The Appellant's treating physician and care team at the facility have documented in her patient record that she is no longer in need of nursing home care. The Appellant has presented no persuasive evidence to challenge this conclusion. She claimed that Respondent's progress notes, therapy and medical records, completed by numerous facility staff over many months, are replete with misinformation, omissions and falsifications and record many events that "never happened." (Exhibits C, D.) These claims are not consistent with the evidence, were refuted by the testimony of the Respondent's director of social work and director of rehabilitation, and are not credited.

In any event, the Appellant herself acknowledged at this hearing that regardless of what appears in her facility record, she does not need to remain in a nursing home. She wants to live in the community on her own in an hotel or apartment. While she complains that she is still in need of physical therapy, that can be provided on an outpatient basis along with any home care services she may require and does not require nursing home placement. This conclusion is consistent with her own expressed desire to live on her own. The Respondent has met its burden of establishing valid grounds for discharge pursuant to 10 NYCRR 415.3(i)(1)(i)(a)(2).

The Appellant's objection to the discharge is not that she claims to still require nursing home care. Her objection is to the Respondent's discharge plan to return her to the shelter system. A nursing home must permit residents and their representatives the opportunity to participate in deciding where the resident will reside after discharge. 10 NYCRR 415.3(i)(1)(vii). Respondent records and the testimony of its director of social work establish that the Appellant has been afforded that opportunity to participate since at least early [REDACTED] 2022. (Exhibit 2; Exhibit 3, page 8; Exhibit 8.)

The Respondent has attempted to explore transfer to an assisted living facility, and initiated efforts with several such facility groups, including at least one specific facility the Appellant indicated a preference for. The Appellant failed to cooperate in those efforts and blames the Respondent for failing to secure placement at a facility she wants and at a cost she is willing to pay. After this hearing was commenced, the Respondent continued its efforts to make referrals to assisted living facilities. Appointments were made for the Appellant to explore her options and be evaluated, but the application process cannot move forward without her cooperation and cannot be

expected to provide a solution if the Appellant is unwilling to participate in that process and contribute to her charges if accepted.

The Respondent has made reasonable attempts to assist and work with the Appellant to develop an alternative discharge plan, without success. Progress notes in the Appellant's record document extensive attempts to work with her about discharge planning, and repeated instances of her failure to cooperate with those efforts. (Exhibit 3.) The Appellant agrees she can live independently and wants to find housing in an hotel or apartment, but apparently believes that although she has an income, she is entitled to have the cost paid for her. The Respondent's discharge planning efforts, which began several months ago, have also included contacting family members who might be willing and able to take her in. One [REDACTED] recently advised the Respondent's discharge planner that he has offered her financial support for an apartment. He also was willing to take her in to live with him, but she says she is unable to accept that option because it is on a second floor with only stairs for access. (Exhibit 3, page 8; Exhibit 8.)

The evidence suggests that the Appellant simply does not have a realistic understanding of the options available to her. She demands a room or apartment with a kitchen and bath of her own. She acknowledges she does have an income, the amount of which she did not specify, but she also asserts she is unable to pay for such accommodations, claiming that the Respondent knows how to secure some unspecified "government" benefit for her but is refusing to do so.

Immediately before she was hospitalized and then transferred to The Phoenix for rehabilitation in [REDACTED] 2022, the Appellant had been homeless. She had briefly resided in an hotel, then entered the shelter system and had been placed in the [REDACTED]

Shelter. Eventual return to the shelter system was contemplated from the time discharge planning began in 2022. (Exhibit 3, page 8.) A facility physician who treated her has documented an opinion that she can now be safely discharged back to the shelter system. (Exhibit 5; Exhibit D.)

The Appellant has, since at least 2022, been in communication with the Department of Social Services shelter system in connection with a request for reasonable accommodation upon her return that includes a first-floor single room, kitchen and private bath. The first-floor single room was approved but the kitchen and private bath requests were denied. She was advised of her appeal rights on those issues and stated at the hearing that she is appealing the denials. It has been explained to her that a specific room will not be assigned to her until she checks into the shelter. (Exhibits A, B.) Her assertions at this hearing that the Respondent has failed to submit accurate information to the DSS or to otherwise cooperate with the request for reasonable accommodation are not substantiated by the credible evidence. (Exhibit 3.)

The Respondent's discharge plan includes transportation and other logistical assistance in order to effectuate a safe transfer, and referrals for any necessary physical therapy and home care services she may require. The shelter system will assume responsibility for further long-term housing assistance. The proposed discharge, which was resorted to only after other options were explored, fulfills the Respondent's obligation to ensure a safe and orderly transfer from the facility with a discharge plan which addresses the medical needs of the resident and how these will be met after discharge.

The Appellant is not in need of nursing home care. While she clearly faces challenges in finding long-term living arrangements, she has received the appropriate referrals for assistance. She has rejected an offer by her [REDACTED] to take her in or help with housing costs, and has either rejected or failed to cooperate with the process of applying and agreeing to pay charges for which she may be responsible at assisted living facilities. She has not come forward with any other realistic options that the Respondent can assist her in exploring. Under these circumstances, the Respondent's plan is an appropriate discharge plan and the Respondent is entitled to proceed with it.


The Appellant questions whether the proposed shelter will accept her because of her physical limitations, which are the basis for her request for reasonable accommodation from the shelter system. She has been advised by the Respondent and the [REDACTED] Human Resources Administration (HRA) that the request is under review. If the [REDACTED] Department of Social Services shelter system is unwilling or unable to safely and appropriately admit and place her in accordance with its policies and procedures, the Respondent is not authorized to implement a different discharge plan.

DECISION: Respondent The Phoenix Rehabilitation and Nursing Care Center has established valid grounds for the discharge of Appellant [REDACTED] [REDACTED] and has established that the discharge plan is appropriate.

The Respondent is authorized to discharge the Appellant in accordance with the [REDACTED] 2022 discharge notice.

This decision is made by John Harris Terepka, Bureau of Adjudication, who has been designated to make such decisions.

Dated: Rochester, New York
December 22, 2022



John Harris Terepka
Administrative Law Judge
Bureau of Adjudication