



**Department
of Health**

ANDREW M. CUOMO
Governor

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

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

July 5, 2018

CERTIFIED MAIL/RETURN RECEIPT

Thomas J. Cone, Esq.
708 Third Avenue, 5th Floor
New York, New York 10017
Counsel for Briarcliff Manor Center
for Rehabilitation and Nursing Care

[REDACTED]
C/o Briarcliff Manor Center for
Rehabilitation and Nursing Center
620 Sleepy Hollow Road
Briarcliff, New York 10510

Asher Fried, Ombudsman
C/o Gabriel Felix
Office of the State Long Term Care Ombudsman
10 County Center Road, Suite 203
White Plains, New York 10607

RE: In the Matter of [REDACTED] Discharge Appeal

Dear Parties:

Enclosed please find the Interim 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 / etc
James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: cac
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

BRIARCLIFF MANOR CENTER FOR
REHABILITATION AND NURSING CARE

to discharge him from a residential health care facility.

COPY

DECISION

Before: Tina M. Champion
Administrative Law Judge

Held at: Briarcliff Manor Center for Rehabilitation and Nursing Care
620 Sleepy Hollow Road
Briarcliff Manor, New York 10510

Date: June 20, 2018

Parties: Briarcliff Manor Center for Rehabilitation and Nursing Care
By: Thomas J. Cone, Esq.
708 Third Avenue, 5th Floor
New York, New York 10017

[REDACTED]

620 Sleepy Hollow Road
Briarcliff Manor, New York 10510
By: Asher Fried, Ombudsman
c/o Gabriel Felix
Office of the State Long Term Care Ombudsman
10 County Center Road, Suite 203
White Plains, New York 10607

JURISDICTION

By notice date [REDACTED] 2018, Briarcliff Manor Center for Rehabilitation and Nursing Care (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [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).

The hearing was held in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulations (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR.

Evidence was received and witnesses were examined. An audio recording of the proceeding was made.

HEARING RECORD

- ALJ Exhibits: I – Notice of Hearing and attached Transfer/Discharge Notice ([REDACTED] 18)
- Facility Exhibits:
 - 1 – Progress Notes – Medical ([REDACTED] 18)
 - 2 – Physician’s Order ([REDACTED] 18)
 - 3 – OT Evaluation and Plan of Treatment ([REDACTED] /18)
 - 4 – PT Evaluation and Plan of Treatment ([REDACTED] /18)
 - 5 – OT Discharge Summary ([REDACTED] 18)
 - 6 – PT Discharge Summary ([REDACTED] 18)
 - 7 – Progress Notes – Social Services ([REDACTED] 18)
 - 8 – Letter by Sukdeb Datta, M.D. ([REDACTED] 18)
 - 9 – Letter by Victoriya Bardenshteyn, MSW ([REDACTED] 8)
 - 10 – Progress Notes – Social Services ([REDACTED] 18)
- Appellant Exhibits:
 - A – Medical report by Aditya Patel, M.D. (undated)
 - B – Medical report by Sukdeb Datta, M.D. ([REDACTED] 18)

Facility Witnesses: Mary Courtney, Director of Nursing
Shadia Adeyemi, Director of Rehabilitation
Victoriya Bardenshteyn, Director of Social Services
Eugene Rajaratnam, M.D., Medical Director (unsworn, by telephone)

Appellant Witnesses: Appellant testified on his own behalf

FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old male who was admitted to the Facility on [REDACTED] 2018. (Facility Ex. 2.)
2. The Appellant was admitted to the Facility for [REDACTED]-term rehabilitation due to [REDACTED] pain [REDACTED] and other symptoms presenting subsequent to a [REDACTED] and [REDACTED] surgery. (Testimony [T.] Rajaratnam, Courtney.)
3. The Appellant received physical therapy (PT) and occupational therapy (OT) services from the Facility. He was discharged from OT on [REDACTED] 2018, and from PT on [REDACTED] 2018. (Facility Exs. 2-6, 9.)
4. On [REDACTED] 2018, the Facility issued a discharge notice to the Appellant which proposed discharge to "the community" at [REDACTED] (ALJ Ex. I.)
5. The proposed discharge address is the offices of a Housing Resource Center operated by Orange County Department of Social Services. (ALJ Ex. I.)
6. The Transfer/Discharge Notice states that the Appellant's interdisciplinary team, in conjunction with the Appellant's primary physician, had determined that the Appellant would be discharged because the Appellant's health has improved sufficiently and the Appellant no longer requires the services of a skilled nursing facility. (ALJ Ex. I.)
7. The Appellant timely appealed the Facility's discharge determination and proposed discharge location.

8. The Appellant has remained at the Facility during the pendency of the appeal and has only been receiving custodial care since being discharged from OT and PT. (T. Courtney.)

ISSUES

Has the Facility established that its determination to discharge the Appellant is correct and that its discharge plan is appropriate?

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. (PHL § 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[h][1].)

The Facility alleged that the Appellant's discharge is permissible pursuant to 10 NYCRR 415(h)(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.

Under the hearing procedures at 10 NYCRR 415.3(h)(2)(iii), the Facility bears the burden to prove a discharge is necessary and appropriate. Under 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. It is less than a preponderance of evidence but more than mere surmise, conjecture or

speculation, and it constitutes a rational basis for a decision. (Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3d Dept. 1984], appeal dismissed 63 N.Y.2d 649.)

DISCUSSION

Reason for Discharge

The Facility has determined that the Appellant's health has improved sufficiently and the Appellant no longer requires the services of a skilled nursing facility. (ALJ Ex. I.)

The Appellant was admitted to the Facility on [REDACTED] 2018, for [REDACTED] term rehabilitation. He began receiving OT on [REDACTED] 2018, and PT on [REDACTED] 2018. He was discharged from OT on [REDACTED] 2018, and from PT on [REDACTED] 2018. The Director of Rehabilitation, Ms. Adeyemi, testified extensively as to Appellant's short-term and long-term goals in OT and PT. She stated that Appellant was discharged from the therapies due to his meeting the goals of therapy and his ability to function independently or with modified independence. She further stated that the Appellant's self-reported pain level was not impeding his function and that his needs could be met with outpatient therapy two to three times a week.

Appellant ambulates with [REDACTED] and he testified he is unable to walk without it. This assertion was contradicted by Ms. Adeyemi and Ms. Courtney, the Director of Nursing, who both stated they have observed the Appellant ambulate without assistance. Despite Appellant's repeated statement that any aide or nurse in the Facility could corroborate his alleged inability to ambulate independently, the Appellant did not call any witnesses to support this or contradict the testimony of Ms. Adeyemi and Ms. Courtney.

In support of his position that his health has not improved enough to be discharged, the Appellant presented part of an undated medical note from Aditya Patel, M.D. (Resident Ex. A.) The Appellant acknowledged that this document was created prior to Appellant's admission to the

Facility and, consequently, the course of OT and PT he received at the Facility. (T. [REDACTED])

This document is not probative of the Appellant's current health.

The Appellant also presented a "Follow Up Patient Evaluation" by Sukdeb Datta, M.D., from a consultation on [REDACTED] 2018. (Resident Ex. B.) The report recites the Appellant's complaint of ongoing pain and indicates, among other things, measured ranges of motion below normal ranges of motion for his [REDACTED] (Resident Ex. A.) It also recites that the "patient states that he ambulates with the help of a [REDACTED] and that the "patient is able to get up out of the chair without assistance." (Resident Ex. B at p. 2.) In a letter dated [REDACTED], 2018, Dr. Datta states that he reviewed the Appellant's PT discharge summary and spoke with Ms. Adeyemi, and that PT "can be continued on an outpatient basis as per evaluation by the inpatient physical therapy team." (Facility Ex. 8.)

Ms. Courtney testified that since being discharged from PT on [REDACTED] 2018, the Appellant has been receiving only custodial care at the Facility. This custodial care consists of room and board, cleaning, and medicine. The Appellant is able to perform his activities of daily living independently or with modified independence, does not need assistance with any of his medications, and can receive OT and/or PT on an outpatient basis. (T. Courtney, Adeyemi.)

The evidence supports that Appellant's health has improved sufficiently such that he no longer needs the services of a skilled nursing facility.

Discharge Location

The Facility has proposed discharging the Appellant to "the community" [REDACTED] [REDACTED] (ALJ Ex. I), which is a Housing Resource Center operated by Orange County Department of Social Services. The Appellant's attending physician at the Facility, Dr. Rajaratnam, opined that the Appellant was stable for discharge to a homeless shelter with

orthopedic follow-up. (Facility Ex. 1.) Ms. Courtney testified that the Appellant's needs can be met at a homeless shelter as he has no current skilled nursing needs and has only been receiving custodial care at the Facility since [REDACTED] 2018. Ms. Adeyemi testified that the Appellant's needs can be met outside the Facility by receiving outpatient PT two to three times per week.

The Director of Social Services, Ms. Bardenshetyn, testified that she explored multiple potential discharge locations for the Appellant, including staying with a family member or friend, assisted living, an adult home, a nursing home transitional waiver program, and, at the request of the Appellant, another rehabilitation facility. None of those locations were viable options for various reasons including age of the Appellant, income level of the Appellant, and level of care required by the Appellant. The Appellant has been involved in his care plan meetings at the Facility during which discharge location was discussed. (Facility Exs. 7, 9.) During one care plan meeting, the Appellant told the Facility he would be going to a shelter upon discharge. (Facility Ex. 9.)

The Appellant does not need the services of a skilled nursing facility. The Facility has explored several options for discharge location and has proven that its plan to discharge the Appellant to a shelter is appropriate.

DECISION

Briarcliff Manor Center for Rehabilitation and Nursing Care has established that its determination to discharge the Appellant was correct, and that its transfer location is appropriate.


1. Briarcliff Manor Center for Rehabilitation and Nursing Care is authorized to discharge the Appellant in accordance with its discharge plan on or after [REDACTED] 2018.

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
July 3, 2018


Tina M. Champion
Administrative Law Judge

TO:


c/o Briarcliff Manor Center for Rehabilitation and Nursing Care
620 Sleepy Hollow Road
Briarcliff Manor, New York 10510

Asher Fried, Ombudsman
c/o Gabriel Felix
Office of the State Long Term Care Ombudsman
10 County Center Road, Suite 203
White Plains, New York 10607

Thomas J. Cone, Esq.
708 Third Avenue, 5th Floor
New York, New York 10017