



Department of Health

ANDREW M. CUOMO
Governor

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

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

October 17, 2019

CERTIFIED MAIL/RETURN RECEIPT

Sheila Mathew, DSW
Fairview Nursing Care Center
69-70 Grand Central Parkway
Forest Hills, New York 11375



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



Appellant,

from a determination by

Fairview Nursing Care Center

Respondent,

to discharge her from a residential
health care facility.

ORIGINAL

DECISION

Hearing Before:

Natalie J. Bordeaux
Administrative Law Judge

Held at:


Fairview Nursing Care Center
69-70 Grand Central Parkway
Forest Hills, New York 11375

Hearing Date:

October 7, 2019
The record closed on October 11, 2019

Parties:

Fairview Nursing Care Center
69-70 Grand Central Parkway
Forest Hills, New York 11375
By: Sheila Mathew, Director of Social Work


Pro Se

JURISDICTION

By notice dated ██████████, 2019, Fairview Nursing Care Center (the Facility), a residential health care facility subject to Article 28 of the New York Public Health Law, determined to discharge ██████████ (the Appellant). The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 NYCRR § 415.3(h).

HEARING RECORD

Facility witnesses: Khett Alferrez, Case Manager
Trixia Belle Go, Nurse
Geruel Moises, Physical Therapist

Facility exhibits: 1-3

Appellant witnesses: ██████████, Appellant
██████████, Appellant's friend

Appellant exhibits: A

The notice of hearing, discharge notice, and the accompanying cover letter were marked as ALJ Exhibit I.¹ A digital recording of the hearing was made (1:52:31 in duration).

ISSUES

Has Fairview Nursing Care Center established that its determination to discharge the Appellant was correct and that its discharge plan is appropriate?

FINDINGS OF FACT

1. The Appellant is a ██████-year-old female who was transferred from ██████████ ██████████ to the Facility on ██████████ 2019 for short-term rehabilitation for a ██████████ to the ██████████ ██████████ in her ██████████ (Exhibit 2.)

¹ This hearing was originally scheduled for Friday, September 6. However, the Appellant did not receive the notice. After the rescheduled date was confirmed verbally with the Appellant, a new hearing notice was issued. (Recording @ 1:34.)

2. By notice dated ██████████ 2019, the Facility determined to discharge the Appellant on ██████████ 2019 because her health has improved sufficiently that she no longer requires the services provided by the facility. The notice originally proposed to discharge the Appellant to the ██████████ Shelter, located at ██████████. However, on ██████████ 2019, the discharge location was amended at the Appellant's request to ██████████, a shelter located at ██████████. (Exhibit 1; Recording @ 5:42.)

3. On ██████████, 2019, the Appellant was discharged and transferred to the ██████████ ██████████ in accordance with the Appellant's instructions. (Exhibit 2.)

4. On ██████████ 2019, the Appellant requested this hearing to contest the Facility's discharge determination.

5. The Appellant does not require skilled nursing care and is independently able to perform activities of daily living with use of an assistive device for ambulation. (Recording @ 8:30.)

6. The Appellant's clinical record contains documentation from the Appellant's physician and interdisciplinary care team that the Appellant's condition has improved such that she no longer requires the services of a skilled nursing facility and that her discharge to the shelter was appropriate. (Exhibit 2.)

APPLICABLE LAW

A residential health care facility (also referred to in the 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).

Department regulations at 10 NYCRR § 415.3(h) describe the transfer and discharge rights of residential health care facility residents. They state, in pertinent part:

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

(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:

(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;

The residential health care facility must prove by substantial evidence that the discharge was necessary and the discharge plan appropriate. 10 NYCRR § 415.3(h)(2)(iii); State Administrative Procedure Act § 306(1).

DISCUSSION

By notice dated [REDACTED] 2019, the Facility determined to discharge the Appellant on [REDACTED] 2019 because her health has improved sufficiently that she no longer requires the services provided by the facility. (Exhibit 1.) The Appellant requested this hearing after she was discharged to contest the stated reason for her discharge and the discharge plan. (Recording @ 18:45.)

The Appellant was admitted to the Facility on [REDACTED] 2019 for short-term rehabilitation to restore her functional mobility and aid her recovery from injuries sustained after falling in the [REDACTED]. (Exhibits 2 and 3.) The Appellant received physical and occupational therapy at the Facility six days each week. (Recording @ 28:43.) For the first twelve days of treatment,

the Appellant's physician limited her ability to [REDACTED], which restricted aspects of her rehabilitative therapies. On [REDACTED] 2019, the Appellant's [REDACTED] removed this restriction. The Appellant began to receive more intensive occupational and physical therapy and made steady progress. (Recording @ 11:10.)

From the date of admission, Facility staff communicated regularly with the Appellant for discharge planning purposes. During initial discussions, the Appellant advised Case Manager Khett Alferez that she would be living with friends in [REDACTED] [REDACTED] in a residence with multiple steps and was worried about her ability to climb several steps. In response to the Appellant's concerns, Mr. Alferez directed Facility rehabilitation staff to provide therapy that would enable the Appellant to navigate multiple steps independently. (Recording @ 8:30.)

The Appellant completed all prescribed therapies before the Facility's issuance of this discharge determination. She was, and remains, independently able to perform all activities of daily living, including transfers, bed mobility, and ambulation with the use of an assistive device. (Recording @ 13:50.) The Appellant was discharged with a cane, and on the date of discharge, she was able to climb [REDACTED] steps without assistance. (Exhibit 3; Recording @ 10:56.) The Appellant's medical conditions were stable on the date of the discharge determination and remained stable through the date of discharge. She neither received, nor required, skilled nursing assistance and was able to access any needed medical care as an outpatient. (Exhibit 2.)

The Appellant now contends that she was discharged prematurely and that she would have benefited from several additional weeks of therapy. (Recording @ 26:40.) As support for her claim, she stated that her initial rehabilitation goal was to climb [REDACTED] steps unassisted, yet she was discharged with an ability to climb only six [REDACTED] unassisted. (Recording @ 23:40, 33:09.) The Facility initially set the Appellant's therapy goals upon her admission. However, as

staff monitored the Appellant's progress, those goals were revised to more accurately reflect her abilities and change in proposed discharge location. (Recording @ 12:00, 1:31:30.)

Since her discharge, the Appellant's community Medicaid coverage has authorized occupational therapy twice each week, which the Appellant stated is insufficient in comparison to the duration and frequency of therapy received during her short-term rehabilitation stay. (Recording @ 26:48.) The fact that the Appellant's community Medicaid coverage has not yet authorized physical therapy at all and has authorized occupational therapy in a substantially lower frequency than that which she received at the Facility supports the Facility's determination that she does not now need these therapies to the extent that she was receiving them at the Facility.

Even though she now claims that she wants to return to the Facility, the Appellant also expressed dissatisfaction with the quality of physical therapy received by a Facility staff member and presented an undated complaint that she submitted to a Facility director during her stay. (Recording @ 32:08.) In the complaint, the Appellant expressed dissatisfaction with massage for her pain. Most pertinent to the present matter and contrary to the Appellant's assertions at the hearing, the Appellant's written complaint also noted that she did not experience pain relief from an increase in exercise but from herself "discerning what my body needed with the exercise and me listening to my instincts that I found relief. It was only after I likewise rested an entire weekend, that the following week, the pain was less." (Exhibit A.)

The Appellant asserted that she suffers from other conditions, including ██████████ and ██████████, which have not improved because the Facility ignored her complaints. (Recording @ 37:57.) She has had ██████████ for several years and was not admitted to the Facility for treatment of this condition. (Recording @ 1:29:26.) Facility Nurse Trixia Go confirmed that

the Appellant's [REDACTED] can be properly treated in the community. (Recording @ 59:47.) The Appellant's physician at the Facility confirmed that the Appellant's conditions were stable on the date of discharge. (Exhibit 2.) She has in no way refuted this finding.

In the three months that have elapsed since the Appellant's discharge, she has successfully managed to coordinate her own care in the community and obtain needed care. (Recording @ 58:20.) She does not require medical, nursing or other skilled care in a custodial setting. The Facility has established that the Appellant's condition improved sufficiently that she no longer requires the services of a skilled nursing facility.

The [REDACTED] 2019 discharge determination initially proposed to discharge the Appellant to [REDACTED] Shelter in the [REDACTED]. However, at the Appellant's request, the Facility discharged her to the [REDACTED], a shelter located in [REDACTED] on [REDACTED] 2019. (Exhibit 1; Recording @ 5:42, 19:54.) Before her hospitalization and subsequent admission to the Facility, the Appellant resided in an apartment in [REDACTED] which she shared with roommates. (Recording @ 34:57.) During her stay at the Facility, the Appellant's roommates left the apartment and relocated to [REDACTED]. Although they offered the Appellant space in their new home, and the Appellant initially advised Mr. Alferez that she expected to be discharged to her friends' new home, the Appellant subsequently declined her roommates' offer. As a result, she has no available home in the community. (Recording @ 8:56, 35:24, 1:07:46.)

The Appellant explained that she declined to relocate to [REDACTED] because her doctors and friends are all located in [REDACTED] (Recording @ 1:16:24.) She asked to be discharged to the [REDACTED] instead of [REDACTED] Shelter because the former offered greater safety measures. (Recording @ 34:33, 1:01:18.) However, she explained that after several weeks at the [REDACTED], she concluded that she ambulated too slowly to

comply with shelter rules. She recalled experiencing a [REDACTED] at the shelter after noticing water on the floor because it reminded her of the fall she sustained in her [REDACTED]. These [REDACTED] are not limited to the shelter setting, as the Appellant also confirmed feeling similar [REDACTED] while staying at the Facility. (Recording @ 1:00:05.) Although the Appellant claimed that shelter staff threatened to “write her up” for using handle bars in a bathroom stall when changing her clothes, she offered no evidence to support her claim. (Recording @ 30:55, 35:54.)

The Appellant also stated that the shelter environment imposes many rules to which she must adhere, including returning each day between 3:45 and 4:00 pm, which render it difficult for her to make housing arrangements. While she has “looked into” applying for low-cost housing, applicants are placed on waiting lists, which renders this option unlikely in the immediate future. She expressed a clear preference for returning to the Facility (also located in Queens) because of the support readily available on-site for additional therapy and in the event of a fall. (Recording @ 1:14:00.) Although a short-term rehabilitation stay might offer added convenience for the Appellant, ease of access to care does not justify a continued stay at a skilled nursing facility.

The Appellant opined that she is entitled to at least eight or twelve weeks of occupational and physical therapy, while simultaneously insisting that she would likely need more services because three months have elapsed since her discharge. (Recording @ 41:00, 1:11:13.) The Appellant also stated that she expected the Facility to attempt to procure long-term care placement for her at another nursing home. (Recording @ 22:45, 1:05:16.) During her short-term stay, the Appellant’s medical conditions remained stable and her physical abilities improved. She did not meet the criteria for long-term placement in a nursing home. (Recording @ 12:00, 1:05:52.)

Although the Appellant had nearly three months from the date of discharge and two months from the date of her hearing request to prepare for this hearing, she was afforded an additional four days (a time-frame requested by her friend at the hearing) in which to submit additional documentation to support her claims that she continues to require nursing home care and that discharge to the shelter was not appropriate. (Recording @ 1:42:32.) She did not submit additional information.

The Facility made continuous and earnest attempts to procure another discharge plan for the Appellant before resorting to shelter placement, but the Appellant elected to place her preference for housing in [REDACTED] over realistic housing options. (Recording @ 1:16:26.) She rejected a safe, stable, and permanent housing opportunity with friends while anticipating an impractical and medically inappropriate outcome from this discharge appeal.

The Facility fulfilled its responsibilities toward the Appellant, a short-term rehabilitation patient. As a skilled nursing facility, it was required to assist the Appellant with attaining her physical independence to effectuate a safe return to the community. The Facility was also required to devise an appropriate discharge plan that addresses the Appellant's medical needs and how those will be met after discharge. 10 NYCRR § 415.3(h)(1)(vi). While shelter placement is only a temporary solution to the Appellant's housing difficulties, it was and remains the only available and suitable discharge location. The Appellant meets the medical appropriateness criteria for shelter placement set forth in 18 NYCRR § 491.4. It is the role of the New York City Department of Homeless Services, not the Facility, to provide temporary housing for homeless individuals in the five boroughs.

The Facility has established that its discharge plan is appropriate.

DECISION

Fairview Nursing Care Center has established that its determination to discharge the Appellant was correct, and that its discharge plan is appropriate.

Dated: October 17, 2019
Menands, New York



Natalie J. Bordeaux
Administrative Law Judge