



# Department of Health

ANDREW M. CUOMO  
Governor

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

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

September 27, 2019

## CERTIFIED MAIL/RETURN RECEIPT

Maureen Peters, DSW  
The Silvercrest Center for Nursing and  
Rehabilitation  
144-45 87<sup>th</sup> Street  
Briarwood, New York 11435

██████████  
c/o The Silvercrest Center for Nursing  
and Rehabilitation  
144-45 87<sup>th</sup> Street  
Briarwood, New York 11435

**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: nm  
Enclosure

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

-----X  
In the Matter of an Appeal, pursuant to :  
10 NYCRR § 415.3, by :  
 :  
 :  
 [REDACTED] :  
 :  
 Appellant, :  
 :  
 :  
 from a determination by :  
 :  
 :  
 Silvercrest Center for Nursing :  
 and Rehabilitation :  
 Respondent, :  
 :  
 :  
 to discharge him from a residential health :  
 care facility :  
 :  
-----X

ORIGINAL

DECISION

A Notice of Transfer/Discharge, dated [REDACTED] [REDACTED] 2019, was issued to [REDACTED] [REDACTED] (Appellant), by Silvercrest Center for Nursing and Rehabilitation (Facility). The Appellant appealed the Facility's proposed discharge. On August 29, 2019, a hearing on the appeal was held before Dawn MacKillop-Soller, Administrative Law Judge, at Silvercrest Center for Nursing and Rehabilitation, located at 144-45 87<sup>th</sup> Street, Briarwood, New York. Evidence was received (ALJ I and Facility 1-3). An audio recording of the proceeding was made.

The Appellant was present at the hearing and represented himself. The Facility was represented by Maureen Peters, Director of Social Work. Stanley Ramah, Assistant Director of Nursing, Sharon Cauilan, Acting Director of Rehabilitation, Gerald Duman,

social worker, and Ms. Peters testified on behalf of the Facility. The Appellant testified on his own behalf. The record remained open until September 5, 2019 for the Facility to confirm the status of its Section Q referral to the New York Association on Independent Living (NYAIL) for discharge of the Appellant to transitional housing in the community.

#### ISSUES

Has the Facility proven by substantial evidence that the Appellant's health has improved sufficiently so that he no longer needs skilled nursing care services and that its discharge plan is appropriate?

#### FINDINGS OF FACT

1. The Appellant, age [REDACTED] was transferred to the Facility from [REDACTED] Hospital on [REDACTED] 2018 for short-term rehabilitation treatment of a [REDACTED], which resolved after a course of antibiotics. On [REDACTED] 2018, he was discharged from rehabilitative services. His medical conditions include [REDACTED] [REDACTED] [REDACTED] [REDACTED]. His daily medications include [REDACTED] and [REDACTED] [Exhibit 3; Recording @ 22:29, 25:58, 54:50.]

2. The Appellant does not require skilled nursing care from medical staff. [Recording @ 8:04, 9:20-35; 12:15, 12:51.]

3. The Facility's proposed discharge plan is to the [REDACTED] [REDACTED] Shelter, located at [REDACTED] [REDACTED] [REDACTED] a homeless center for men. The Appellant opposes the discharge on the ground that he requires assistance

with completing his activities of daily living (ADL's), including changing his [REDACTED] transferring to a shower chair, bathing and dressing. [ALJ I; Recording @ 12:51; 39:08-39:51.]

4. The Appellant's clinical record reflects that his interdisciplinary care team and Facility physician, Ashwin Trivedi, M.D., agree that discharge to the [REDACTED] Shelter, located at [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED], New York, is safe and appropriate. The physician's opinion is based on the Appellant's ability to verbally make his needs known and independently maneuver his wheelchair outside the Facility to visit family and friends. [Exhibit 1.]

#### APPLICABLE LAW

1. The hearing was held in accordance with Article 28 of the Public Health Law of the State of New York; Part 415 in Volume 10 of the Official Compilation of Codes, Rules and Regulations (NYCRR); Part 483 of the United States Code of Federal Regulations (CFR); the New York State Administrative Procedure Act (SAPA); and 10 NYCRR Parts 51 and 415. The Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate. 10 NYCRR 415.3(h)(2)(iii).

2. Pursuant to 10 NYCRR 415.3(h)(2), a resident has the right to challenge a nursing home's transfer or discharge plan.

3. Transfer and discharge rights of residential health care facility residents are set forth in Department regulations

at 10 NYCRR 415.3(h). This regulation provides, 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:

(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;

...  
(ii) ensure complete documentation in the resident's clinical record when the facility transfers or discharges a resident under any of the circumstances specified in subparagraph (i) of this paragraph. 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

(iii) before it transfers or discharges a resident:

(a) notify the resident and designated representative, if any, and, if known, family member of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner the resident and/or family member understand;

...

(vi) 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, and provide a discharge summary pursuant to section 415.11(d) of this Title; and

(vii) 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.

...

(2) The department shall grant an opportunity for a hearing to any resident who requests it because he or she believes the facility has erroneously determined that he or she must be transferred or discharged in accordance with the following:

...

(iii) (b) the nursing home shall have the burden of proof that the discharge or transfer is/was necessary and the discharge plan appropriate.

4. Admission standards for adult placement in New York State homeless shelters are stated in 18 NYCRR 491.4. They include:

- (a) The operator shall retain and care for only those individuals who do not require services beyond those permitted by law and regulation.
- (b) The operator shall not accept, except on an emergency basis, nor retain any person who:
  - (1) causes danger to himself or others or interferes with the care and comfort of other residents;
  - (2) is in need of a social, religious, cultural or dietary regimen that cannot or will not be met by the facility;
  - (3) is in need of a level of medical, mental health, or nursing care that cannot be rendered safely and effectively by approved community resources;

- (4) is incapable of ambulation on stairs without personal assistance unless such a person can be assigned a room on a floor with ground level egress; or
- (5) is under 18 years of age.

#### DISCUSSION

The Appellant, who is a [REDACTED] and wheelchair dependent, was admitted to the Facility for short term rehabilitation on [REDACTED] 2018 for treatment of a [REDACTED] that resolved with antibiotics within days of his admission. He was discharged from rehabilitative services with a plan for him to return to his [REDACTED] house located in [REDACTED], an option that is no longer available. The Appellant opposes the discharge, claiming he requires assistance with [REDACTED] changes, dressing, bathing and transfers to a shower chair. The evidence showed, however, that the Appellant requires no rehabilitation therapy services, ongoing medical care or medication management. Although the Facility's evidence established that the Appellant no longer needs placement in a skilled nursing facility, it was insufficient to support the appropriateness of the discharge plan. [Exhibit 1; Recording @ 8:04, 9:20-35; 12:15, 12:51.]

The Facility has the burden of proof to establish the appropriateness of its discharge plan. 10 NYCRR 415.3(h)(1)(a)(2). The Facility's discharge plan to transfer the Appellant to the [REDACTED] [REDACTED] Shelter (shelter) is inappropriate because it fails to address his medical or nursing care needs and how they

will be met after discharge, a discharge planning requirement. 10 NYCRR 415.3(h)(1)(vi). It also fails to comply with shelter placement standards and procedures. 18 NYCRR 491.4(b); Department of Homeless Services (DHS) procedures, September 2018, p. 22, 25.

Shelter placement is prohibited if the resident requires a level of medical or nursing care "that cannot be rendered safely and effectively by approved community resources." 18 NYCRR 491.4(b)(3). It is also inappropriate if it is not established that the resident "can be assigned a room on a floor with ground level egress" based on an inability to ambulate on stairs. 18 NYCRR 491.4(b)(4). Facilities seeking transfer within the [REDACTED] shelter system are also required to complete referral form DHS-14c for prior approval of a resident's medical appropriateness. The evidence failed to show that the Facility satisfied these mandatory criteria prior to resorting to a proposed transfer of the Appellant to a shelter. 18 NYCRR 491.4(b); DHS procedures, p. 25.

Even if the Facility had adhered to proper procedures for approval of such a transfer, the Appellant's ongoing need for assistance to perform his ADL's renders him unsuitable for a shelter setting. 18 NYCRR 491.4(3). The Appellant credibly testified that he requires staff assistance with changing his [REDACTED] showering, transferring from his wheelchair and putting on his [REDACTED] and [REDACTED]. In support of its alleged claim that the



Appellant is independent in performing these basic tasks, the Facility produced witnesses who had never personally observed the Appellant perform any of them. These witnesses also relied exclusively on hearsay by nursing staff not present at the hearing to attempt to claim the Appellant can independently perform such activities, which was unconvincing. [Recording @ 15:08-43, 17:51, 29:43-30:17, 39:08-39:51, 1:36:15.]

The Appellant's clinical record was also devoid of a physician's note explaining the appropriateness of the discharge plan in connection with the Appellant's ADL limitations, documentation contemplated as "complete" under the regulation when the ground for discharge is that a resident's health has sufficiently improved to no longer require skilled nursing care. 10 NYCRR 415.3(h)(1)(ii)(a). Ashwin Trivedi, M.D., the Facility's physician, authorizes shelter placement without stating any medical basis for his opinion, such as examination findings that address the Appellant's [REDACTED] extremity deficiencies and the medical appropriateness of a shelter environment. [Exhibit 1.]

Facility witnesses Maureen Peters, Director of Social Work, and Sharon Cauilan, Acting Director of Rehabilitation, acknowledged the Appellant's showering and dressing challenges but claimed they can be mitigated using a [REDACTED] [REDACTED] [REDACTED] it and specialized shower chair. While these devices sound promising to assist the Appellant, the Facility has neither

secured them nor confirmed their effectiveness for his use or appropriateness in a shelter environment. Stanley Ramah, Assistant Director of Nursing, also described training opportunities for the Appellant to learn dressing and toileting skills, but these teachings, which seem useful, were never completed. [Recording @ 50:22, 1:04, 1:09:24, 1:15:41, 1:16:01, 1:24:40, 1:26:19.]

The Facility having failed to establish an appropriate discharge plan, the discharge appeal is granted. The Facility is not authorized to discharge the Appellant to the shelter in accordance with its discharge plan. Consistent with the discussion during the September 5, 2019 telephone conference call, the Facility is encouraged to continue the process for a Section Q referral, a placement option that the Appellant agrees would further his ability to live independently in the community and provide vocational counseling for employment opportunities. [1:31:20, 1:33:38, 1:35:15.]

ORDER

1. The Facility has failed to establish that its discharge plan was appropriate; and

2. The Facility is not authorized to discharge the Appellant to the [REDACTED] Shelter pursuant to its discharge plan.

Dated: Albany, New York  
September 27, 2019

  
DAWN MacKILLOP-SOLLER  
Administrative Law Judge

To: [REDACTED]  
Silvercrest Center for Nursing and Rehabilitation  
144-45 87<sup>th</sup> Avenue  
Briarwood, New York 11435

Ms. Maureen Peters, Director of Social Work  
Silvercrest Center for Nursing and Rehabilitation  
144-45 87<sup>th</sup> Avenue  
Briarwood, New York 11435