



Department of Health

ANDREW M. CUOMO
Governor

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

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

November 12, 2019

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o DeMay Living Center
100 Sunset Drive
Newark, New York 14513

Emily D. Crowley, Esq.
Harris Beach PLLC
99 Garnsey Road
Pittsford, New York 14534

Christine Stalker, Administrator
DeMay Living Center
100 Sunset Drive
Newark, New York 14513

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: cmg
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

ORIGINAL

DECISION

[REDACTED],

Appellant,

from a determination by

DEMAY LIVING CENTER

to discharge him from a residential health care facility.

Before: Tina M. Champion
Administrative Law Judge

Held at: DeMay Living Center
100 Sunset Drive
Newark, New York 14513

Date: October 9, 2019

Parties: [REDACTED]
DeMay Living Center
100 Sunset Drive
Newark, New York 14513
By: Pro Se

DeMay Living Center
By: Emily D. Crowley, Esq.
Harris Beach PLLC
99 Garnsey Road
Pittsford, New York 14534

JURISDICTION

By notice dated [REDACTED] 2019, DeMay Living Center (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [REDACTED] [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 – Letter with Notice of Hearing and Transfer/Discharge Notice
Facility Exhibits: 1 – Resident Notes
Appellant Exhibits: None
Facility Witnesses: Jennifer Levy, Nurse Manager
Michelle Ikewood Furfaro, Social Worker
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 for short-term rehabilitation of an [REDACTED] (Testimony [T.] Levy.)

2. The Appellant received physical therapy (PT) and occupational therapy (OT) services from the Facility and has been discharged from both therapies. (Facility Ex. 1; T. Levy.)

3. On [REDACTED] 2019, the Facility issued a Notice of Transfer/Discharge to the Appellant which proposed discharge to "[REDACTED]", to provide homeless shelter placement. (ALJ Ex. I.)

4. The Transfer/Discharge Notice states that the Appellant will be transferred because the Appellant's health has improved sufficiently, and the Appellant no longer requires the services of the facility. (ALJ Ex. I.)

5. The Appellant timely appealed the Facility's discharge determination and proposed discharge location.

6. At the hearing, the Appellant stated that he does not dispute the reason for his discharge or his readiness for discharge from a skilled nursing facility. However, he disagrees with the discharge location as he does not feel that it is appropriate for him. (Recording [R.] @ 5:25.)

7. The Appellant has remained at the Facility during the pendency of the appeal.

ISSUES

Has the Facility established that its discharge plan for the Appellant 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

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. Specifically, the Facility has determined that the Appellant "is independent in all ADL's (sic) there are no cognitive deficits. [The Appellant] does not have any mental health or developmental disabilities. [The Appellant] has no skilled or custodial needs." (ALJ Ex. I.) The Appellant does not dispute the reason for discharge or his readiness for discharge from a skilled nursing facility. However, he disagrees with the discharge location and does not feel that a shelter would be appropriate for him. (R. @ 5:25.)

Jennifer Levy, the nurse manager of the unit at the Facility where the Appellant resides, testified that the Appellant has no underlying or significant health issues. She testified that he was discharged from PT on [REDACTED], 2018 and then underwent two additional courses of PT from which he has been discharged, one for [REDACTED] pain and one for assessment of independence in preparation for discharge from the facility. Ms. Levy testified that the Appellant was discharged from OT on [REDACTED] 2019, which he received in order to assess his need for therapy prior to discharge, and that he is independent in all aspects. Ms. Levy testified that the Appellant is independent with all activities of daily living and that he has crutches available to him in case of a [REDACTED] pain, but that she has not seen him use the crutches recently. She testified that the Appellant leaves the facility a few times a week and travels off-site in a car, is gone for a few hours at a time, and ambulates independently when he leaves.

Ms. Levy testified that the Appellant is not receiving any skilled medical services from the Facility and has never received any skilled services from the Facility beyond PT and OT. She also testified that the Appellant has a primary care physician in the community and that the Facility will schedule an appointment for the Appellant upon discharge because the Appellant is on three daily medications that will need to be refilled and require follow-up. Ms. Levy testified that the Appellant does not need skilled nursing for intake or administration of those medications and that there is no indication that he needs any skilled nursing services.

Ms. Levy testified that the Appellant was unemployed prior to his admission to the Facility and was living with a friend as he does not own or rent a home in the community.

Michelle Ikewood Furfaro, a social worker at the Facility, testified that the Appellant has a BIMS score of [REDACTED]/15 and that she personally delivered a copy of the Transfer/Discharge Notice to the Appellant. Ms. Furfaro testified that the Transfer/Discharge Notice at issue in this matter is actually the Facility's third attempt to discharge the Appellant and that the first two attempts were

unsuccessful because the Notices were determined to be insufficient, but that the Appellant has been appropriate for discharge since the end of [REDACTED] 2019 after he was evaluated by the therapy programs at the Facility. (T. Furfaro.)

Ms. Furfaro testified that she was involved in identifying a safe discharge plan for the Appellant and that she had several conversations with the Appellant, including a conversation with him upon admission, about where he would be discharged after his rehabilitation was complete. Ms. Furfaro testified that the Appellant indicated that he was homeless and had no family members or friends with whom he could stay. She testified that she explored alternative options including [REDACTED] which she described as a program that helps individuals wanting to return to the community who do not have housing, but all her attempts to identify housing or a program that could assist with housing were unsuccessful because of the Appellant's unemployment and lack of funds.

Ms. Furfaro testified that [REDACTED] provides emergency shelter housing where individuals can stay between the hours of 4:00 p.m. and 8:00 a.m. and provides a dinner meal each night. She further testified that she spoke with someone at [REDACTED] [REDACTED] who assured her that they would have a bed for the Appellant. Ms. Furfaro testified that the Appellant has Medicaid and that transportation to medical appointments will not be a problem for him, and that the Appellant is in the process of applying for Social Security Benefits. She further testified that the Facility is willing to give the Appellant \$ [REDACTED] for any necessary transportation or meals for a few days. Ms. Furfaro testified that she is not aware of any other housing options available to the Appellant appropriate for an individual not needing skilled nursing who is homeless and has no other funds or resources.

The Appellant testified that he does not feel it is "mentally or physically safe" for him to be discharged to a homeless shelter. With respect to his physical health, the Appellant testified that

his [REDACTED] due to years of [REDACTED] although physically therapy has helped a bit. He also testified that being on the street and walking around for eight hours a day between the hours of 8:00 a.m. and 4:00 p.m. when he is not allowed to be at the homeless shelter would not be good for him. With respect to his mental health, the Appellant testified that he has had [REDACTED] moments both prior to admission to the Facility and while at the Facility, and that he fears he will "[REDACTED]" if discharged to a homeless shelter. The Appellant testified that he has been medicated for [REDACTED] "off and on" in the past but is not currently medicated, that he declined an offer by the Facility to refer him to a care provider for [REDACTED] when he first arrived at the Facility, and that his primary care physician in the community can refer him to an appropriate care provider for depression if it becomes necessary. The Appellant also testified that he is aware of his options for services or treatment in the community if [REDACTED] or [REDACTED] occurs and that he has Medicaid benefits he can utilize to obtain services or treatment. The Appellant testified that he has no friends or other contacts with whom he can live upon discharge. He also testified that he would like to become employed but is unsure if he will be able to because of his [REDACTED]


The evidence supports that the Facility's plan to discharge the Appellant to the [REDACTED] [REDACTED] is appropriate. The Appellant has no skilled nursing needs. The possibility or fear of discharge to a shelter taking a physical or mental toll on the Appellant is insufficient to preclude his discharge to that location, particularly given that the Facility has appropriately explored all other known options for a discharge location for this Appellant. The Appellant can ambulate independently and engage independently in all activities of daily living. He is encouraged to seek out employment or other meaningful activities during the hours between 8:00 a.m. and 4:00 p.m. when he cannot be at the shelter. The Appellant is also encouraged to seek help from his primary care physician in the community with any elevated levels of [REDACTED] and/or [REDACTED] should they arise post discharge.

DECISION

DeMay Living Center has established that its discharge location for the Appellant is appropriate.

1. DeMay Living Center is authorized to discharge the Appellant in accordance with its discharge plan on or after [REDACTED], 2019.
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
November 6, 2019


Tina M. Champion
Administrative Law Judge

TO: [REDACTED]
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