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Department of Health

ANDREW M. CUOMO
Governor

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

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

February 5, 2020

CERTIFIED MAIL/RETURN RECEIPT

Nicole Crawford, SW
Pinnacle Multicare Nursing
and Rehabilitation Center
801 Co-op City Blvd.
Bronx, New York 10475

██████████
c/o Pinnacle Multicare Nursing
and Rehabilitation Center
801 Co-op City Blvd.
Bronx, New York 10475

Barbara Phair, Esq.
Abrams, Fensterman, Fensterman, Eisman,
Formato, Ferrara, Wolf & Carrone, LLP
3 Dakota Drive, Suite 300
Lake Success, New York 11042

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**

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

██████████, Appellant

COPY

from a determination by

Pinnacle Multicare Nursing and Rehabilitation Center

to discharge from a residential health care facility.

Before: Rayanne L. Babich
Administrative Law Judge (ALJ)

Held at: Pinnacle Multicare Nursing and Rehabilitation Center
801 Co-op City Boulevard
Bronx, New York 10475

Parties: ██████████, Appellant
c/o Pinnacle Multicare Nursing and Rehabilitation Center
801 Co-op City Boulevard
Bronx, New York 10475

Pinnacle Multicare Nursing and Rehabilitation Center
801 Co-op City Boulevard
Bronx, New York 10475

By: Barbara Phair, Esq.
Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara,
Wolf & Carrone, LLP
3 Dakota Drive, Suite 300
Lake Success, New York 11042

Through notice dated ██████████, 2019, Pinnacle Multicare Nursing and Rehabilitation Center (Facility), a residential health care facility subject to Article 28 of New York Public Health Law (PHL), sought to discharge ██████████ (Appellant) from the Facility. The Appellant requested an appeal with the New York State Department of Health pursuant to Title

10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York. (NYCRR Part 415.3(i).

The hearing was held on January 13, 2020 and in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulation (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR. An audio recording was made of the hearing.

RECORD

- ALJ Exhibits: I – Letter with Notice of Hearing
II – Notice of Discharge dated [REDACTED] 2019
- Facility Exhibits: 1 – Medical Progress Note dated [REDACTED] 2019
2 – Discharge Planning Instructions dated [REDACTED] 2020
3 – Physical Therapy Discharge Summary dated [REDACTED] 2019
- Appellant Exhibits: A – [REDACTED]
[REDACTED]
B – Medicaid Notice of Decision on Medical Assistance dated [REDACTED] 2018
C – Electronic mail from Dr. [REDACTED] dated November 27, 2019¹
- Facility Witnesses: Nicole Crawford, Social Worker
Erica Schwartz, Director of Social Work
Jeffrey Vergara, Nurse Manager
Asad Nasr, Rehabilitation Director
Charles Sillerberg, MD, Physician (by telephone)
- Appellant Witnesses: Appellant testified on his own behalf

¹ During the hearing, Appellant asserted that his private provider wrote a letter showing that a shelter was not appropriate for him. The record was left open through January 17, 2020 to provide Appellant time to obtain a copy of the letter.

FINDINGS OF FACT

The Findings of Fact were made after considering all testimony, statements, and documents admitted into evidence. The items that appear in parentheses following the findings indicate exhibits (Ex), statements (S), or testimony (T) in evidence. In instances where any evidence contradicted other evidence, it was considered by the ALJ and rejected.

1. Appellant has been a resident at the Facility for several years. (T Appellant)
2. Appellant was discharged from skilled services (physical therapy) on [REDACTED], 2019 and no longer requires skilled services. (T Appellant; T Nasr; S Sillerberg)
3. Appellant is independent in his activities of daily living and can meet all his care needs without assistance. (T Vergara; S Sillerberg; T Nasr)
4. Appellant has been working with community agencies and assigned housing coordinator to secure independent housing. (T Appellant; T Crawford)
5. The Facility has assisted Appellant with the application process for independent housing when requested by Appellant. (T Crawford)
6. An apartment was offered to Appellant in [REDACTED] 2019 located in [REDACTED] New York which Appellant declined because it was a studio design and he is seeking a one-bedroom design. (T Appellant; T Crawford)
7. The Facility issued a Notice of Discharge to Appellant on [REDACTED], 2019 on the ground that the Appellant's health has improved sufficiently so that he no longer requires the services provided by the Facility. (ALJ II)
8. The proposed discharge location is to a [REDACTED] shelter which has social work and housing services available. (ALJ II; T Crawford; Ex A)

9. The Appellant can leave the Facility on his own independent pass without assistance and is able to navigate in the community. (T Appellant; T Sillerberg; T Vergara)
10. Appellant's goal is to leave the Facility and obtain his own residence in the community. (T Appellant)

ISSUE

Whether the facility has met its burden to show that its determination to discharge Appellant was proper and whether the discharge plan is safe and appropriate?

APPLICABLE LAW

A residential health care facility, or 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). Under 10 NYCRR 415.3(i)(1)(i)(a)(2), a resident may be discharged "because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility." Furthermore, the Facility has the burden to prove that the discharge plan and location is safe and appropriate. 10 NYCRR 415.3(i)(2)(iii)(b). The standard of proof is substantial evidence. (SAPA § 306(1).

DISCUSSION

Grounds for Transfer

The Facility has met its burden to show its determination to transfer Appellant was proper under 10 NYCRR 415.3(i). Through its Notice of Discharge, the Facility alleges the discharge is proper under 10 NYCRR 415.3(i)(1)(i)(a)(2) because the Appellant no longer requires skilled

care. (ALJ II) Along with the physician statements and medical records, and testimony of the social work, rehab and nursing staff, the Appellant acknowledges that he does not require any skilled services provided by the Facility. (Ex 1; T Appellant; S Sillerberg; T Crawford; T Nasr; T Vergara) Appellant was discharged from physical therapy on [REDACTED] 2019 and has not required any further services for a skilled need. (T Nasr) Appellant is independent in all activities of daily living and independently enters the community to meet his own needs. (T Appellant; T Vergara; T Nasr; T Crawford) Appellant offers that he has been making efforts to engage in activities in the community of which he will be required to do on his own when he leaves the Facility. (T Appellant) Dr. Charles Sillerberg, Appellant's physician of record at the Facility, stated Appellant is medically stable, able to manage his chronic medical diagnoses, and does not require long term care services. (S Sillerberg)

Appellant asserts that his private provider, "Dr. [REDACTED] had written a letter on his behalf which he recalls providing to the Facility, but neither has it available nor presents this provider as a witness. After being provided with an opportunity before the record closed on January 17, 2020, Appellant submitted a copy of an electronic mail sent by Dr. [REDACTED]. The November 27, 2019 electronic mail states, in part, that the provider "agree[s] that [Appellant] does not need skilled nursing that requires NH stay." (Ex C) This opinion offered by the Appellant taken in combination with the testimony and evidence presented shows the Facility has met its burden to prove that the Appellant no longer requires the services offered by the Facility and its determination to discharge Appellant was proper under 10 NYCRR 4 415.3(i)(1)(i)(a)(2).

Discharge Plan

The Facility has also met its burden to show that the discharge plan and location is safe and appropriate. The proposed discharge location is the ██████████'s Shelter located at ██████████ ██████████, New York. (ALJ II) The Appellant testifies on his own behalf that he is able and ready to leave the Facility to live independently in the community. (T Appellant) The Facility has been assisting Appellant with discharge planning for several years with a focus on independent living services through a local agency called ██████████. (T Crawford) Facility social worker, Nicole Crawford, testifies that social work staff has been assisting Appellant with completing applications for housing communities but that as recently as ██████████ 2019, Appellant declined an apartment offered. (T Crawford) Ms. Crawford also testifies that it was her understanding that Appellant declined the apartment because it contained a studio design and he was seeking a one bedroom design. (T Crawford) Appellant confirms this sentiment in his testimony stating that he expects to be paying rent and other bills and is seeking an apartment he finds suitable for his needs. (T Appellant) Upon discharge to the shelter, Appellant will be provided with his prescription medication as well as any medical equipment deemed necessary. (T Crawford) At the time of hearing, only a rollator was identified as his current durable medical equipment needs. (T Crawford) In addition, the shelter will have staff who will assist Appellant with coordination of his medical care, housing and other social work needs. (Ex A; T Crawford)

The Appellant offers evidence in the form of a brochure from the housing agency currently assisting him which shows that services can be provided to those residing in a shelter. (Ex A) Appellant plans to continue his efforts to obtain housing but states that he believes he should be able to remain in the Facility until he finds a community and apartment that is suitable for him. (T Appellant) Appellant testifies he completed an application for housing

approximately two months ago, however, the deadline submission had only just passed in the beginning of [REDACTED] 2020. (T Appellant) As a result, it appears the last two months are spent simply waiting for responses and follow up with housing. The difficulty with this process is the length of time each step requires, but that does not justify the resulting extended stay for Appellant in a Facility that is not appropriate for his level of care.


The physician of record, Dr. Sillerberg, states that shelter placement for Appellant is safe “as long as he has his meds.” (S Sillerberg) The Nurse Manager, Jeffrey Vergara, testifies Appellant knows his medications extremely well and social work has assured Appellant will receive medications and prescriptions upon discharge. (T Vergara; T Crawford) The Director of Rehabilitation, Asad Nasr, testifies that Appellant is independent with a rollator and can manage outside and negotiate outdoor surfaces independently and safely. (T Nasr) Appellant also acknowledges his independence and states he “asks for passes so [he] can be outside and learn to practice how to be independent and navigate on my own on the street.” (T Appellant) Through Appellant’s own report and the testimony and statements of Facility witnesses, Appellant’s needs can be safely met at a shelter where he will have access to support staff.

In support of his belief that he should remain at the Facility while looking for an apartment, Appellant offers the electronic mail from Dr. [REDACTED] however, this documentation provides that Dr. [REDACTED] “believes that the [REDACTED] Shelter is not suitable for him.” There is no additional evidence to support why the shelter would not be suitable, or to support the shelter would not be safe or appropriate for Appellant. While the Appellant is independent in his own care and will have access to housing services in the community if discharged to the shelter, it would be inappropriate for him to linger in a facility for services he does not need.

ORDER

For the reasons stated above, Pinnacle Multicare Nursing and Rehabilitation Center has established that its determination for discharge is proper and that its discharge plan is appropriate under 10 NYCRR 415.3(i), and the Appellant's appeal is DENIED.

1. The Facility is authorized to transfer the Appellant in accordance with the plan on the Notice of Discharge dated [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.


Rayanne L. Babich
Administrative Law Judge

Dated: February 4, 2020
Albany, New York