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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 26, 2020

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

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

Christine Stalker, NHA
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

██████████,

Appellant,

from a determination by

DeMay Living Center,

Respondent,

to discharge her from a residential
health care facility.

COPY

DECISION

Hearing Before:

John Harris Terepka
Administrative Law Judge

Held at:

DeMay Living Center
100 Sunset Drive
Newark, New York 14513
February 24, 2020

Parties:

DeMay Living Center
100 Sunset Drive
Newark, New York 14513
By: Emily D. Crowley, Esq.
Harris Beach PLLC
99 Garnsey Road
Pittsford, New York 14534

██████████
DeMay Living Center

By: ██████████ ██████████

JURISDICTION

DeMay Living Center (the Respondent), a residential health care facility (RHCF) subject to Article 28 of the Public Health Law, determined to discharge [REDACTED] (the Appellant) from care and treatment in its nursing home. The Appellant appealed the discharge determination to the New York State Department of Health pursuant to 10 NYCRR 415.3(i).

SUMMARY OF FACTS

1. Appellant [REDACTED], age [REDACTED] was admitted as a resident at DeMay Living Center in [REDACTED] 2019 for short term rehabilitative care after hospitalization.
2. By notice dated [REDACTED], 2020, the Respondent advised the Appellant that it had determined to discharge her on [REDACTED] 2020, on the grounds that her health has improved sufficiently that she no longer needs the services provided by the facility. (Exhibit ALJ I.)
3. The Appellant is no longer in need of nursing home care. She is medically stable, independent with care needs, has been discharged from physical and occupational therapies, and receives no services from the Respondent other than meals and medication. The Appellant's medical needs can be met on an outpatient basis. (Exhibits 5, 6; testimony.)
4. The Appellant's care team at DeMay Living Center has determined she is no longer in need of nursing home care and that discharge to a shelter in the community is appropriate. (Exhibits 5, 6; testimony.)
5. The [REDACTED] discharge notice advised the Appellant she would be discharged to [REDACTED] a shelter for the homeless in [REDACTED] New York. The discharge

plan includes transportation to ██████████, medication and medical appointment referrals, a two-wheel walker and a manual wheelchair. She also has a power chair for mobility. (Testimony.)

6. The Appellant remains at DeMay Living Center pending the outcome of this hearing.

ISSUES

Has the Respondent established that the Appellant's discharge from DeMay Living Center is authorized and that the discharge plan is appropriate?

APPLICABLE LAW

A residential health care facility (RHCF), or nursing home, is a residential facility providing nursing care to sick, invalid, infirm disabled or convalescent persons who need regular nursing services or other professional services but who do not need the services of a general hospital. PHL 2801; 10 NYCRR 415.2(k).

Transfer and discharge rights of RHCF residents are set forth in Department regulations at 10 NYCRR 415.3(i). 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:
 - ...
 - (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.
 - ...

(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.

(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. 10 NYCRR 415.3(i)(1)

The Respondent has the burden of proving that the discharge or transfer is or was necessary and that the discharge plan is appropriate. 18 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

The notice of hearing with attached notice of discharge was marked as ALJ Exhibit I. Respondent presented Exhibits 1-6. Jennifer Smith, RN, [REDACTED] PT, and [REDACTED] SW, testified for the Respondent. The Appellant and her [REDACTED] testified for the Appellant and presented Exhibit A. A digital recording of the hearing was made. (1h56m.)

The Appellant came to DeMay Living Center in [REDACTED] 2019 for short term rehabilitation after hospitalization for [REDACTED]. In [REDACTED] 2019 occupational and physical therapy assessments found her dependent in a number of areas. (Exhibit 5, pages 23, 26.) By the end of 2019 she was independent with self-care, bed mobility and transfers, and she is independent in the use of the power wheelchair with which she has been provided. She was discharged from occupational therapy on [REDACTED] 2019 and from physical therapy on [REDACTED], 2020. (Exhibit 5, pages 89-94, 161-64.) A January 17, 2020 physical examination and review of systems documents no concerns, noting "She appears well-developed, well-nourished and well-groomed. She is cooperative... Judgment and insight normal. She is conversant. She does not appear ill. No distress." (Exhibit 1.)

The Appellant is no longer in need of nursing home care. Her claim she still requires nursing home care because she requires assistance with some activities of daily living is not supported by persuasive evidence and is contradicted by the professional opinion of the Respondent's care team. It is also inconsistent with her stated wish to live independently if she can find a place to live. She has [REDACTED] problems and a [REDACTED] that is being followed by her [REDACTED] and she has a treating physician outside the nursing home. The health care that she may still require can be provided on an outpatient basis and does not require nursing home placement. Grounds for discharge have been established.

The Appellant objects to the discharge plan on the grounds that she feels a shelter is not safe for her. Although she is ambulatory and able to perform all transfers, she is largely wheelchair bound and is concerned her care needs may not be met.

A nursing home must permit residents and their representatives the opportunity to participate in deciding where the resident will reside after discharge. 10 NYCRR 415.3(i)(1)(vii). The Appellant is an [REDACTED], which severely complicates her situation and limits her options. Her [REDACTED] who appeared with her at the hearing, lives in [REDACTED] but is unable to take her in. Some social service resources are unavailable to her because of her [REDACTED] status. Other assistance is unavailable so long as she remains a nursing home resident. It was only after efforts to find other options failed that resort was had to a shelter. The discharge plan includes transportation to the shelter, transportation and meal money, a 30-day supply of medication, necessary equipment including wheelchair, and medical appointment referrals with her treating physician and

█ (Exhibit 6, page 286) who will provide ongoing medical care. She has recently been provided with a power scooter for added mobility.

The Appellant is not entitled to remain in nursing home care for which there is no medical need. She has been referred to █ █ County, the █ █, and the █ ombudsman program in █ for assistance in identifying available services. Representatives from all three of these organizations were present at this hearing. Neither the Appellant nor any of these representatives offered evidence of any alternative discharge plan that might be developed while the Appellant remains indefinitely in nursing home care for which she has no medical need. Under these circumstances, the Respondent's plan is presumptively an appropriate discharge plan.

The discharge plan is only appropriate, however, if it can actually be implemented. The █ is an emergency shelter, provides two meals per day and a bed, and expects residents to be outside from 8am to 4pm daily. The Respondent described arrangements for the transfer that involve little or no actual preadmission screening of residents, consisting of little more than transporting the Appellant to the shelter during intake hours.

According to the Respondent, the █ has been contacted, has reviewed the Appellant's care needs, and has indicated that it will accept her. This purported acceptance all took place on the basis of a telephone call from the Respondent's social worker who represented the Appellant to be completely independent for her care needs. The Appellant's █ also contacted the shelter, however, and obtained an email from a case manager stating that it would not be able to accept her because of

her medical conditions. (Exhibit A.) It appears that the shelter's ability and willingness to accept this resident depends upon who is describing her condition and needs.

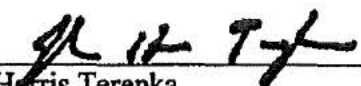
It is not clear that [REDACTED] will, in fact, be able to accept the Appellant if she is transported there. Should the shelter be unable to admit her, the Respondent will not have complied with the discharge plan, is not authorized to discharge the Appellant, and will be obligated to readmit her and develop a new and appropriate discharge plan.

DECISION: Respondent DeMay Living Center has established valid grounds for the discharge of Appellant [REDACTED].

The Respondent is authorized to discharge the Appellant to the [REDACTED], provided, the [REDACTED] determines she is eligible for admission to its shelter. Should the [REDACTED] turn her away, the Respondent is not authorized to involuntarily discharge her elsewhere.

This decision is made by John Harris Terepka, Bureau of Adjudication, who has been designated to make such decisions.

Dated: Rochester, New York
February 25, 2020



John Harris Terepka
Administrative Law Judge
Bureau of Adjudication