



Department of Health

ANDREW M. CUOMO
Governor

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

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

March 16, 2020

BY EMAIL

██████████
c/o Northwell Long Island Jewish Hospital
270-05 76th Avenue
New York, New York 11001

Irene Lynch, SW Supervisor
Northwell Long Island Jewish Hospital
270-05 76th Avenue
New York, New York 11001

██████████
The Silvercrest Center for Nursing & Rehab.
144-45 87th Avenue
Briarwood, New York 11435

Barton P. Levine, Esq.
Law Offices of Barton P. Levine
260 Madison Avenue, 17th Floor
New York, New York 10016

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

cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan
SAPA File
BOA by scan

**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

The Silvercrest Center for Nursing and Rehabilitation

to discharge from a residential health care facility.

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

Held at: Long Island Jewish Medical Center
270-05 76th Avenue
New Hyde Park, New York 11040

Parties: ██████████, Appellant
c/o Long Island Jewish Medical Center
270-05 76th Avenue
New Hyde Park, New York 11040
By: Barton Levine, Esq.

The Silvercrest Center for Nursing and Rehab
144-45 87th Avenue
Briarwood, New York 11435
By: Andria Adigwe, Esq.

Interested Persons: Long Island Jewish Medical Center
270-05 76th Avenue
New Hyde Park, New York 11040
By: Adam Kahn, Esq.

Through notice dated ██████████ 2020, The Silvercrest Center for Nursing and Rehabilitation (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 (DOH) 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 March 6, 2020 and in accordance with the PHL; Part 415 of 10 NYCRR; Title 42, 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 in two parts which appear in the record on one compact disc. [R 1@01:19:41; 2@55:54] Attorney for the Facility appeared by telephone. Appellant was not present at the hearing but was represented by counsel and his [REDACTED]

PROCEDURAL HISTORY

The [REDACTED] 2020 Notice of Discharge indicated a discharge date of [REDACTED] 2020. Appellant was not discharged at that time but was later hospitalized due to an acute medical need on [REDACTED] 2020. After the request for a discharge appeal, a hearing date was originally set for February 25, 2020. An adjournment request by the Appellant was granted due to his counsel's unavailability and the hearing was reset to March 6, 2020.

RECORD

ALJ Exhibits: I – Notice of Discharge, [REDACTED] 2020
II – Letter with Notice of Hearing
III – DAL NH 15-06: Transfer & Discharge Requirements for Nursing Homes, dated September 23, 2015 (NYS DOH)

Facility Exhibits: 1 – Facility Social Services Progress Notes, [REDACTED] 2020 – [REDACTED] 2020
2 – Notice of Medicare Non-Coverage, [REDACTED] 2020
3 – Facility ADL Instructions, [REDACTED] /2020 – [REDACTED] 1/2020
4 – Patient Review Instrument, [REDACTED] /2019
5 – Patient Review Instrument [REDACTED] 2020
6 – Facility Medical Records
7 – Hospital Medical Records
8 – Medicare Coverage Denial, [REDACTED] /2020 – [REDACTED] /2020

Appellant Exhibits: None

Facility Witnesses: Opal Fisher, Nurse Manager
Kim Cheek, Medicaid Coordinator
Natasha Elie, Facility Administrator

Appellant Witnesses: [REDACTED] Appellant's [REDACTED]
[REDACTED] Social Worker at Hospital
[REDACTED] Nurse Practitioner at Hospital

FINDINGS OF FACT

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

1. The Silvercrest Center for Nursing and Rehabilitation is a skilled nursing facility as defined under PHL §2801 (2)-(3).
2. Upon discharge from [REDACTED] (Hospital) on [REDACTED], 2020, Appellant, and [REDACTED] year-old male, was admitted to the Facility with several diagnoses including: [REDACTED]
[REDACTED] requiring care. [Ex 4]
3. At the time of admission to the Facility, Appellant required assistance with activities of daily living, transferring, care for multiple pressure sore wounds and physical therapy. [Ex 6; R1@13:45, 14:20]
4. As of [REDACTED] 2020, Medicare discontinued coverage for skilled care services. [Ex 2; R2@1:10:26 – 1:11:59]
5. On [REDACTED] 2020, the Facility issued a Notice of Discharge to Appellant with a planned discharge date of [REDACTED] 2020 and a discharge location to his home. [ALJ I]

6. On [REDACTED], 2020, Appellant was admitted to Hospital after being transferred by ambulance from the Facility due to [REDACTED].
[Ex 7; R1@29:55]
7. Appellant was treated at the Hospital for a [REDACTED] and [REDACTED] along with provisions of custodial care and physical therapy. [R2@4:00]
8. Appellant has been determined medically stable and cleared for discharge. [R2@6:58 – 7:30]
9. The Facility has declined to accept Appellant post hospital discharge and this appeal followed.

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 transferred or discharged if “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.” In addition, pursuant to 415.3(i)(1)(ii), the facility shall:

(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

(b) a physician when transfer or discharge is necessary due to the endangerment of the health of other individuals in the facility under subclause (3) of clause (a) of subparagraph (i) of this paragraph;
(emphasis added)

Beyond developing the grounds for discharge, under 10 NYCRR 415.3(i)(1)(vii)-(viii), the

Facility must:

- (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.

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). Title 10 NYCRR 415.3(i)(1)(v)(e)(4) directs that a Notice of Discharge must include a statement of the resident's right to appeal which includes "an explanation that the resident may remain in the facility...pending the appeal decision if the request for an appeal is made within 15 days of the date the resident received the notice of transfer/discharge...." The standard of proof in this appeal is substantial evidence. (SAPA § 306(1)).

DISCUSSION

Right to Appeal

Under his appeal, 10 NYCRR 415.3(i)(2)(iii)(b) gives Appellant the right to remain in the facility if the appeal is entered within 15 days. Through assistance from his providers, Appellant's appeal of the Notice of Discharge was timely as the record shows it was entered on

or before [REDACTED] 2020, only nine (9) days from the date it was issued. Despite his acute medical need which has been resolved, the Facility's refusal to accept him back from the Hospital limited Appellant's rights and violated the plain reading of the "Dear Administrator" letter, DOH *DAL NH 15-06: Transfer & Discharge Requirements for Nursing Homes*, (September 2015). [Ex III] This "Dear Administrator" letter addresses resident hospitalizations noting that "[s]tate and [f]ederal regulations require that nursing home residents who are temporarily hospitalized be allowed to return to the facility following hospitalization, without regard to payment source, and with or without bed hold. In the absence of bed hold or in the case of expired bed hold, the resident must be admitted to the next available semi-private bed. Hospitals are not acceptable final discharge locations." [Ex III] The dictated course of action was for the Facility to accept the Appellant back from the Hospital and continue with his discharge process as necessary, but it failed to do so.

Grounds for Transfer

The Facility has not 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 transfer is proper under 10 NYCRR 415.3(i)(1)(i)(a)(3) because he has completed his course of rehabilitation with physical therapy and was ready to be discharged. [R1@ 25:52 – 29:08] There is a dispute as to whether Appellant has improved to where he no longer requires the type of skilled care services provided by the Facility. Testimony presented by Opal Fisher, Nurse Manager for the Facility, showed that Appellant was admitted to the Facility because he was unable to transfer, had multiple wounds, and staff has to provide most of the care for him regarding toileting/bathing, dressing, and meal preparation. [R1@13:45 – 14:40] Ms. Fisher reported that Appellant's condition improved over time where he was reduced to a one-person

assist, began to do things for himself and advocate for his needs. Appellant was also reportedly actively engaged in physical therapy and was working toward his goals. [R1@15:18 – 15:55] During his stay, the Appellant attended rehabilitation sessions twice a day and his main concern was to gain enough strength and ability to walk when discharged home. [R1@15:59; 17:08 – 17:31]

In contrast, [REDACTED] Nurse Practitioner for the Hospital, testified that although medically cleared for discharge from the Hospital, Appellant still requires wound care, two-person assistance with activities of daily care, and if living in the community, nursing or home health aide care 24 hours per day. [2@1:50 – 3:13] After being treated for a [REDACTED] [REDACTED] and [REDACTED] Appellant would benefit from further physical therapy as he is currently not ambulating on his own. [R2@5:01 – 5:45]

While consideration can be given to circumstances in which Appellant did in fact improve to the extent the Facility alleges, the testimony of the Hospital staff was found to be more credible as they are actively caring for Appellant. In addition, the Facility has offered no testimony or records from its medical providers or rehabilitation staff to show Appellant had reached his treatment goals and should be discharged, as required under 10 NYCRR 415.3(i)(1)(ii). Also, the Facility has not had the opportunity to evaluate Appellant since his acute episode because the Facility has refused to accept him from the Hospital. The Facility remained responsible for determining the Appellant's appropriate level of care and has not met its burden to show that he no longer requires the services offered. As Ms. [REDACTED] described, the Appellant was "[REDACTED]" when he arrived to the Hospital, [R2@3:26 – 3:43], and the possibility of [REDACTED] is a reasonable conclusion. Regardless of the Appellant's prior condition, his current status shows a continued need for wound care and physical therapy.

The Facility asserted an argument that its decision to discharge Appellant was based on the [REDACTED] 2020 denial of Medicare coverage for skilled services. [Ex 2; R1@33:58 – 35:49] At that time, Medicare determined that Appellant’s need for skilled services “does not need medical necessity.” It further states, in part, Appellant “now need[s] ongoing care” and his “records show that [Appellant is] not getting better in spite of therapy.’ [Ex 2] Although it may have been appropriate to discharge Appellant at that time, he remained at the Facility. Upon his acute medical event resulting in hospitalization, the Facility maintained its responsibility to accept Appellant back to the Facility and proceed with his post-discharge condition.

It was also noted that during his Hospital stay, attempts were made to extend Appellant’s rehabilitative services through Medicare, which were denied. [Ex 8; 1@55:33] The denial letter shows that during its review, Medicare believed Appellant to be residing in a long-term care facility. The denial informed Appellant that his medical records show the long-term care facility is safe and equipped to help him with his daily needs. Additionally, Appellant was advised to appeal for a reassessment if he did not plan to return to the long-term care facility. [Ex 8] Whether coverage would have been approved if Appellant was not believed to be a long-term resident is unclear, however, Appellant’s return to the Facility should have been based not only on his right to do so, but also for the purposes of evaluation to ensure skilled services were no longer needed.

Discharge Plan

The Facility has also failed to meet its burden to show the discharge plan and location is safe and appropriate for two reasons. First, the discharge location identified on the Notice of Discharge is to Appellant’s home. [Ex 1] The Facility reported that upon admission the Appellant’s original plan was to return to his home in the community and it was believed his

home was outfitted with some of the necessary durable medical equipment needed. [R1@18:50] Yet, due to Appellant's unexpected and emergent medical care needs, the Facility has improperly taken this as an opportunity to effectuate his admission to the Hospital as a complete discharge. As it has already been established, a hospital is not a safe and appropriate discharge as required under 10 NYCRR 415.3(i)(2)(iii)(b).

Secondly, the Facility has not demonstrated how the discharge location identified on the Notice will adequately meet Appellant's medical needs as required under 10 NYCRR 415.3(i)(1)(vi). In addition, pursuant to 10 NYCRR 415.3(i)(1)(vii), the Facility has not shown an opportunity was given to Appellant or his representative to participate in the discharge plan. Appellant's [REDACTED] [REDACTED] [REDACTED] testified that Appellant requires more care than she can provide and believes Appellant requires full time in a Facility. [R2@ 18:35 – 18:53] Ms. [REDACTED] expressed concern that Appellant appears to make progress in the setting of a facility but once discharged home, Appellant regresses and requires readmission. [R2@ 24:14 – 25:38] For these reasons, Ms. [REDACTED] and Appellant are seeking to return to the Facility and determine further long-term care. Through Natasha Elie, Facility Administrator, the Facility asserted that attempts were made to apply for Medicaid on Appellant's behalf but they were unsuccessful due to Appellant's financial matters. [R1@ 49:56 – 51:19; 1:05:39 – 1:05:47] The purpose of applying for Medicaid was to assist with providing additional services in the community. [R1@1:04:40 – 1:05:00] As clarified by Kim Cheek, Medicaid Coordinator for the Facility, as they attempted to apply for Medicaid for Appellant, it became apparent another Facility was assisting Ms. [REDACTED] with the application process. Ms. Cheek contacted that facility to assist with coordination but to date, the Medicaid application had not been approved. [R1@ 1:10:26 – 1:14:37] Although the Appellant asserts the reason for discharge was based on the denial of Medicaid, the relevant

point is that Appellant's discharge plan to home did not address his needs. Hospital staff testified that Appellant requires care 24 hours per day, yet the Facility has not shown what services were intended to be provided upon discharge. As the Nurse Manager, Ms. Fisher testified, the Facility was working toward a home care evaluation to determine level of care at home, but she believes he would require assistance daily for personal care and medications. [R1@ 19:15 – 20:08; 2035; 21:20 – 21:55] Without the proper assessment and necessary services in place, discharging Appellant to his home would place him at risk for further regression.

ORDER

For the reasons stated above, The Silvercrest Center for Nursing and Rehabilitation has not 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 GRANTED.

1. The Facility is required to admit Appellant to the next immediately available bed.
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: March 16, 2020
Albany, New York