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**Department
of Health**

ANDREW M. CUOMO
Governor

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

LISA J. PINO, M.A., J.D.
Executive Deputy Commissioner

October 9, 2020

CERTIFIED MAIL/RETURN RECEIPT

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

Daniel Ross, Esq.
Mobilization for Justice, Inc.
100 William Street, 6th Floor
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Erica Schwartz, Social Work Supervisor
Pinnacle Multicare Nursing
and Rehabilitation Center
801 Co-op City Boulevard
Bronx, New York 10475

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

[REDACTED],

Appellant,

from a determination by

Pinnacle Multicare Nursing & Rehabilitation Center,
Respondent,

to discharge him from a residential health care facility.

COPY

DECISION

Hearing Before:

Ann H. Gayle
Administrative Law Judge

Held at:

Pinnacle Multicare Nursing & Rehabilitation
Center¹
801 Co-op City Boulevard
Bronx, New York 10475

Hearing Dates:

July 10, 20, and 27, 2020²
The record closed August 26, 2020

Parties:

Pinnacle Multicare Nursing & Rehabilitation
Center³
By: Barbara Phair, Esq.
Frank Mazzagatti, Esq.
Abrams, Fensterman, *et al.*
3 Dakota Drive, Suite 300
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[REDACTED]
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¹ Due to the Covid-19 pandemic, the hearing was held via Webex videoconference

² This hearing, originally scheduled for June 29, 2020, was adjourned to July 10, 2020; on July 9, 2020, the matter was reassigned to the current ALJ

³ formerly Bay Park Center for Nursing & Rehabilitation

Pursuant to Public Health Law (“PHL”) §2801 and Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“10 NYCRR”) §415.2(k), a residential health care facility or nursing home such as Pinnacle Multicare Nursing & Rehabilitation Center (“Respondent” or “Facility”) 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.

Transfer and discharge rights of nursing home residents are set forth at 10 NYCRR §415.3(i). Respondent determined to discharge ██████████ (“Appellant” or “Resident”) from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(i)(1)(i)(a)(2) which provides, in pertinent part:

- (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.

Appellant appealed the discharge determination to the New York State Department of Health, and a hearing on that appeal was held. Pursuant to 10 NYCRR §415.3(i)(2)(iii)(b), the Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate. SAPA § 306(1) provides that the standard of proof shall be by substantial evidence. “Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact; it is less than a preponderance of the evidence but more than mere surmise, conjecture or speculation. ...Put differently, there must be a rational basis for the decision. (Citations omitted)” (*Stoker v. Tarentino*, 101 A.D.2d 651, 652, 475 N.Y.S.2d 562, 564 [App. Div. 3d Dept. 1984], mod. 64 N.Y.2d 994, 489 N.Y.S.2d 43.

A stenographic record (pages 1 - 234) of the hearing was made part of the record. Appellant and Jacquelyn Deas testified for Appellant. Attending Physician Veerabadran Ravichandran, Rehab Supervisor Michele Lopez, Unit Nurse Manager Jeffrey Vargara, and Social Work Director Erica Schwartz testified for Respondent. Appellant's █ participated in the hearing but did not testify.

The following documents were accepted into evidence by the Administrative Law Judge ("ALJ") as ALJ, Facility, and Resident Exhibits:

ALJ:

- I: Notice of Hearing with the Facility's █ 2020 Discharge Notice attached
- II: █ 2020 letter
- III: █, 2020 letter
- IV: █, 2020 letter

Facility:

- 1: 23-page document
- 2: █ pamphlet
- 3: █ 2020 CNA documentation record
- 4: NYS Health Profiles – Adult Care Facility Services

Resident:

- A: 28-page document
- B: █, 2020 PRI
- C: █/2020 MDS

ISSUE

Has Pinnacle Multicare Nursing & Rehabilitation Center established that the transfer is necessary and the discharge plan is appropriate?

FINDINGS OF FACT

Citations in parentheses refer to transcript pages ("T") and exhibits ("Ex") found persuasive in arriving at a particular finding. Conflicting evidence was considered and rejected in favor of the cited evidence.

1. Respondent, Pinnacle Multicare Nursing & Rehabilitation Center (“Pinnacle”) is a residential health care facility located in Bronx, New York. (Ex I)
2. Appellant, █, age █ was admitted to the Facility in █ 2010. Appellant has received rehabilitative services particularly PT and OT (physical and occupational therapy) periodically during his ten-year stay at the Facility. Appellant’s most recent PT and OT was from █ to █, 2020; he was discharged when he reached his goals in each discipline by returning to baseline following his █ to █ 2020 hospitalization. Appellant requires assistance with his ADLs (activities of daily living). (Ex 1; Ex 3; Ex A; Ex C; T 24, 52-58; 72)
3. By notice dated █ 2020, Respondent advised Appellant that it had determined to discharge him on the grounds that his health has improved sufficiently so that he no longer needs the services provided by the Facility. (Ex I; Ex A)
4. Respondent’s discharge plan is to discharge Appellant to New █ located at █, with prescriptions for his medications, his wheelchair, a raised toilet seat, grab bars, and any other DME (durable medical equipment) he requires.. (Ex I; Ex 1; Ex A; T 54-55)
5. It is the professional opinion of Appellant’s caregivers at the Facility that discharge to the community, including █ which has accepted but not interviewed Appellant, is appropriate for Appellant. (T 28-29, 54-55, 61, 77-78, , 141, 153-156, 158-159, 203-204)
6. Appellant has remained at Pinnacle pending the outcome of this proceeding.

DISCUSSION

Respondent has the burden of proving both the grounds stated in its Discharge Notice that Appellant no longer requires the services it provides and that the discharge location is appropriate for an involuntary discharge of Appellant. Respondent seeks to discharge Appellant

to █████ an Adult Care Facility (“ACF”). The Parties submitted briefs and reply briefs, and Appellant also submitted a sur-reply brief on the issue of whether a facility can involuntarily discharge a resident to an ACF. The post-hearing submissions also contained closing arguments.

10 NYCRR 415.11(d) reads, in part

(d) ...When the facility anticipates discharge, the facility shall prepare a discharge summary that includes:

- ...
- (2) a final summary of the resident's status to include information set forth in paragraph (a)(2) of this section, at the time of the discharge that shall be available for release to authorized persons and agencies, with the consent of the resident or legal representative; and
- (3) a post-discharge plan of care that shall be developed with the participation of the resident and his or her family, which will assist the resident to adjust to his or her new living environment and assure that needed medical and supportive services have been arranged and are available to meet the identified needs of the resident.

Discharge to an ACF requires a resident’s input and consent. Appellant refuses to participate in a virtual tour or interview with █████ or even to consider consenting to this or any discharge from the Facility. There is a bit of a catch-22 situation here. Facilities are required to offer meaningful discharge planning to residents deemed ready for discharge but Appellant has adamantly and repeatedly refused to so engage. Appellant’s stated reasons for refusing █████ were that █████ cannot meet his needs and that it is too far and inconvenient for family and friends to visit. However, when questioned Appellant acknowledged that he would not consider a discharge to a place closer to the Facility or any place Respondent could place him. Appellant testified, “since I arrived here [10 years ago] my █████ [deceased four years] stated that he didn’t want me going to another facility. Plus I have a lot of friends here” (T202). Having friends in a facility and adhering to a family member’s wishes are not grounds for remaining in a facility.

ACFs are licensed by NYSDOH and authorized to provide various levels of care. ACFs with Assisted Living Programs (“ALP”) provide a higher level of care than those without the

ALP certification. Respondent contends that █████ has an ALP on-site and that it can meet Appellant's needs but other than Ms. Schwartz's testimony to that effect, documentation shows that █████ is a 172-bed Adult Home with no ALP certification (Ex A, pages 18-19).

Not much weight can be given to Respondent's conflicting, unreliable records offered into evidence by both parties. For example, Dr. Ravichandran's █████, 2020 letter for submission to █████ (which he is not sure when he signed) reads in part, "Your facility [█████] is requesting that [Appellant] be Covid-19 negative prior to admission into your facility. [Appellant] is not showing any symptoms of Covid-19; therefore a test is not warranted at this time" (Ex A, page 28). Yet, Respondent on that very day (█████) called an ambulance twice (shortly after midnight and late afternoon) to have Appellant transferred to a hospital for a Covid-19 test due to a single episode of fever six days prior (█████). An 8:15 a.m. "correction" note on █████ by Remar Acob, RN, reads in part, "911 was called and arrived to unit at 1:30AM for [Appellant] who has a hospital transfer order from MD/NP for evaluation of fever episode █████ on █████/20. Resident was assessed by the 911 staff with the following VS— █████ ... [Appellant] firmly declined the transfer." (Ex A, page 22). A 6:26 p.m. note later that day by █████ reads in part, "[Appellant] left the unit via stretcher at 5:20 pm accompanied by EMS ... and was transported to █████ for evaluation." (Ex A, page 22).

Other unreliable, conflicting evidence included Respondent's witnesses referring to █████ as an Assisted Living Facility ("ALF") then being recalled as witnesses on a subsequent date following Respondent's acknowledgement at the end of day one's hearing that █████ is an ACF, not an ALF. Their testimony on the subsequent date, in sum and substance, was that their original testimony (that █████ is an ALF and appropriate for Appellant) would not change now

that they know █ is an ACF because ACFs and ALFs provide a similar level of care, both of which are appropriate to meet Appellant's needs. There are distinctions between the care provided by ACFs and ALFs, and both provide a lower level of care than the Facility.

The discharge notice was issued on █, 2020, the hearing was held on July 10, 20, and 27, 2020, and Respondent's records (the █ MDS, █ Rehab summaries, and █ and █ CNA records) do not reflect precisely what Appellant's needs were in that timeframe. The █ 2020 Rehab summaries (Ex 1, pages 9-14) show Appellant to be moderate independent in dressing, toileting, grooming, and transfers, and independent in bed mobility. The █ 2020 MDS form reports Appellant's functional status for ADLs as needs limited assistance/one person physical assist for bed mobility, transfers, locomotion on and off unit, toilet use, and bathing. The MDS further reports Appellant's balance during transitions and walking as "not steady, only able to stabilize with staff assistance" for moving from seated to standing position, moving on and off toilet and surface-to-surface transfer (emphasis on MDS form). (Ex C, pages 11 and 12 of 48). Both the MDS and Rehab summaries were prepared after the Discharge Notice was issued but before the hearing began.

While Respondent contends that Appellant is highly independent, the evidence shows that Appellant does require assistance with some of his ADLs, and Mr. Vergara testified that he was not in Appellant's room when CNAs were providing care and therefore does not know the extent of the assistance (T 69-70). The █ and █ 2020 CNA records show that Appellant required assistance on all or most shifts from █ █ to █ █ but that he curiously became and remained quite independent beginning on the first hearing date and continuing during the pendency of the hearing (July 10-24). The ADL Coding Key (Ex A, page 17) for Bed Mobility, Transfer, and Toilet Use explains that "2" for Self-Performance is "Limited Assistance: if

resident was highly involved in activity and received physical help in guided maneuvering of limb(s) or other non-weight-bearing assistance” and “2” for Support Provided is “One Person Physical Assist: if the resident was assisted by one staff person.” From ██████ to ██████ the CNA records show “2” in Self-Performance and Support Provided for Bed Mobility and Transfer every day, every shift (except a handful of times). Beginning on the day the hearing began (July 10) and continuing until the Friday before the final day of hearing Appellant’s needs for these ADLs became “0” every day, every shift (except a few occasions). “0” for Self-Performance is “Independent: if resident completed activity with no help or oversight.” “0” for Support Provided is “No Setup Or Physical Help From Staff: if resident completed activity with no help or oversight.” Toileting consistently remained “2” (with some exceptions) from ██████ to ██████ ██████ (Ex 3; Ex B, pages 10-17).

Respondent failed to meet its burden of proving that Appellant’s health has improved sufficiently that he no longer requires the services of the Facility. As such, I will not address the issue of whether the discharge location is appropriate for Appellant. Although Respondent failed at this hearing to meet its burden that Appellant is ready for discharge, the totality of the evidence does indicate that Appellant is likely to be ready for discharge in the foreseeable future. Appellant is strongly encouraged to work with Respondent and/or independently (with or without his attorney’s assistance) on pursuing housing options, programs, and services in the community and to engage in meaningful discharge planning with Respondent so that he can provide important input into where he might be discharged.

CONCLUSION

Respondent has not proven that Appellant’s health has improved sufficiently that he no longer requires skilled care at this time.

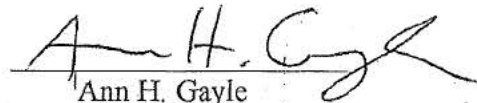
DECISION

I find that the transfer is not necessary at this time.

The appeal by Appellant is therefore GRANTED.

This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

Dated: New York, New York
October 9, 2020


Ann H. Gayle
Administrative Law Judge

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