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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

June 3, 2021

CERTIFIED MAIL/RETURN RECEIPT

██████████ ██████████
c/o New Franklin Center for Rehabilitation and Nursing
142-27 Franklin Avenue
Flushing, New York 11355

Debby Tzu-Ling Tseng, Social Work Director
New Franklin Center for Rehabilitation and Nursing
142-27 Franklin Avenue
Flushing, New York 11355

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: nm
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 :
: **New Franklin Center for Rehabilitation and Nursing,** :
: Respondent, :
: to discharge him from a residential health care facility. :
:

COPY

DECISION

Hearing Before: Ann Gayle
Administrative Law Judge

Held: Via Cisco Webex

Hearing Date: May 12, 2021
Record closed May 27, 2021

Parties: New Franklin Center for Rehabilitation and Nursing
By: Debby Tzu-Ling Tseng, Social Work Director


Pro Se

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 New Franklin Center for Rehabilitation and Nursing (“Franklin,” “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 [REDACTED] [REDACTED] (“Appellant” or “Resident”) from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(i)(1)(i)(a)(1):

- (1) With regard to 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:
 - (1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in 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 §415.3(i)(2)(iii)(b), the Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate.

A recording of the hearing was made part of the record. Appellant testified on his own behalf. Ombudsman Juliana Nunez assisted Appellant and testified at the hearing. Social Work Director Debby Tzu-Ling Tseng, Social Worker Judy Fouch, Nurse Practitioner Ella Miyerov, Nursing Director Doreen Sim, and Nursing Supervisor Rosalina Dinglas testified for Respondent. Administrator Derek Murray and PT Assistant Angel Hernandez participated in the hearing, and Recreation Leader Jennifer Ng assisted Appellant with technology.

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

ALJ

I: Notice of Hearing with attached Notice of Discharge/Transfer

Facility:

- 1: Medical progress notes
- 2: Nursing progress notes
- 3: Social Work progress notes

Appellant:

A: Dana Leifer, M.D. report

ISSUE

Has New Franklin Center for Rehabilitation and Nursing established that the discharge is necessary and the discharge plan is appropriate?

FINDINGS OF FACT

Citations in parentheses refer to testimony (“T”) and exhibits (“Ex”) found persuasive.

1. Respondent, New Franklin Center for Rehabilitation and Nursing, is a residential health care facility located in Flushing, New York. (Ex I)
2. Appellant, [REDACTED] [REDACTED] age [REDACTED] was admitted to the Facility on [REDACTED] 2020, with diagnoses including [REDACTED]
[REDACTED] (Ex A; Ex 1; Ex 2; T Miyerov, Dinglas, Sim)
3. It is the professional opinion of Appellant’s caregivers at the Facility that discharge to [REDACTED] a skilled facility that provides services similar to Franklin, is appropriate for Appellant. By notice dated [REDACTED] 2021, Respondent advised Appellant that it had determined to discharge Appellant to [REDACTED] on the grounds that Appellant’s welfare and his needs cannot be met after reasonable attempts at accommodation in the facility in that he “has

Franklin / [REDACTED]

been refusing care/treatment/medications provided by staff on unit.” (Ex I; T Miyerov, Dinglas, Sim, Fouch, Tzu-Ling Tseng)

DISCUSSION

The evidence presented by both Respondent and Appellant demonstrated that Appellant has refused to accept medication and treatment from some caregivers at the Facility, particularly from those whose approach and/or handling of him Appellant deems to be [REDACTED] or [REDACTED]

Testimony at the hearing and documents in evidence showed that Appellant is [REDACTED], and other items in his room, and that [REDACTED] Appellant uses to [REDACTED] in his room are often left on the floor. Respondent offered this evidence to show that the health or safety of individuals in the facility is endangered. 10 NYCRR §415.3(i)(1)(i)(a) subsections (3) and (4) include such grounds for discharge, but these grounds (which are included on Respondent’s pre-printed [REDACTED], 2021 discharge notice) were not checked, and Respondent gave no details of these allegations in its [REDACTED] discharge notice. In other words, Respondent did not provide proper notice to Appellant that it was seeking to discharge him on the grounds that the health and/or safety of individuals in the facility was endangered. The testimony was accepted at the hearing but it is not being considered to determine whether Respondent proved the discharge grounds it alleges (*i.e.*, resident’s welfare and resident’s needs cannot be met).

Appellant testified that he does not wish to remain at the Facility long-term, his health is improving, and he looks forward to returning to living in the community when he has resources and a location to do so. Appellant and Respondent are working on seeking housing through [REDACTED] and income such as Social Security Disability (“SSD”) for Appellant.

Ombudsman Nunez testified that the care plan meeting with the interdisciplinary care team in consultation with the resident as required by 10 NYCRR §415.3(i)(1)(i) had not occurred

prior to Respondent issuing its 30-day notice to Appellant. There was also testimony and discussion that: Appellant had upcoming SSD and medical appointments; a particular diagnosis was to be removed from Appellant's chart; and PRIs (patient review instruments) would be sent to facilities agreed to by Appellant. The record remained open for the parties to report the progress of these issues. The parties reported on a May 27 conference call that: the care plan meeting was held; Appellant attended his SSD and medical appointments; they're still awaiting an SSD determination; the diagnosis was removed from the chart; there were no acceptances to the PRIs; Appellant wishes to remain at Franklin; and Respondent preferred to await a decision following hearing rather than attempt to resolve the matter.

Respondent failed to meet its burden of proving that Appellant's welfare and his needs cannot be met so that transfer is necessary. When Appellant has explained to nursing supervisors, and other facility personnel why he won't accept care and treatment from particular caregivers, Respondent has made reasonable attempts at accommodation such as the nursing supervisors providing the care themselves or having other caregivers provide the care. The reasonable accommodations have enabled Appellant's needs to be met.

Although Respondent failed at this hearing to meet its burden that transfer/discharge is necessary at this time, the totality of the evidence does indicate that Appellant needs to part with the [REDACTED] items and stop creating [REDACTED] and leaving [REDACTED] on the floor in his room. Appellant testified that his weight increased so drastically that he no longer [REDACTED] into the now [REDACTED] his family provided for him. Appellant further testified that he "[REDACTED] in his room because he did not wish to [REDACTED] in the [REDACTED] room with "[REDACTED] other people" during the pandemic. Appellant must (on his own or with assistance from Respondent and/or the

Franklin / [REDACTED]

Ombudsman) work on safer bathing arrangements and on making arrangements for removing all the [REDACTED] and other items from his room.

Since Respondent has not proven that discharge is necessary at this time, I will not address whether the discharge location is appropriate for Appellant.

The parties are encouraged to engage in meaningful discharge planning so that Appellant will understand his discharge options and he can provide important input into where he might be discharged if/when grounds for discharge exist.

DECISION

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

The appeal by Appellant is therefore GRANTED.

Respondent is not authorized to discharge Appellant in accordance with the [REDACTED], 2021 Discharge Notice. However, Appellant may leave the Facility if an alternate location acceptable to Appellant becomes available or for any other reason Appellant chooses to leave.

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
June 3, 2021

Ann Gayle

Ann Gayle
Administrative Law Judge

TO: [REDACTED] [REDACTED]
c/o New Franklin Center for Rehabilitation and Nursing
142-27 Franklin Avenue
Flushing, New York 11355

Debby Tzu-Ling Tseng, Social Work Director
New Franklin Center for Rehabilitation and Nursing
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