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

NEW YORK STATE OF OPPORTUNITY. Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, M.D., M.P.H.
Commissioner

JOHANNE E. MORNE, M.S.
Acting Executive Deputy Commissioner

November 3, 2023

CERTIFIED MAIL/RETURN RECEIPT

Susan Rosier, DSW
Waterview Heights Rehabilitation
& Nursing Center
425 Beach Avenue
Rochester, New York 14612

[redacted]
c/o Waterview Heights Rehabilitation
& Nursing Center
425 Beach Avenue
Rochester, New York 14612

Michael Bass, Esq.
Barbara Phair, Esq.
Abrams Fensterman, LLP
3 Dakota Drive, Suite 300
Lake Success, New York 11042

Jeffrey Nieznanski, Esq.
Kristen Small, Esq.
Legal Assistance of Western New York, Inc
1 W. Main Street, Suite 400
Rochester, New York 14614

RE: In the Matter of [redacted] – 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,

Natalie J. Bordeaux

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: 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

Waterview Heights Rehabilitation & Nursing Center,

Respondent,

to discharge him from a residential health care facility.

DECISION

DA23-6134

Hearing Before: Jeanne T. Arnold
Administrative Law Judge

Held via: WebEx Videoconference

Hearing Dates: October 4, 2023, October 23, 2023

Parties:

Waterview Heights Rehabilitation & Nursing Center
425 Beach Avenue
Rochester, New York 14612
By: Michael Bass, Esq.
Barbara Phair, Esq.
Abrams Fensterman, LLP
54 State Street
Suite 803
Albany, New York 12207

[redacted]
Waterview Heights Rehabilitation & Nursing Center

By: Jeffrey P. Nieznanski, Esq.
Kristin Small, Esq.
Legal Assistance of Western New York, Inc.
1 W. Main Street, Suite 400
Rochester, New York 14614

JURISDICTION

Waterview Heights Rehabilitation & Nursing Center (Facility), a residential health care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge resident [redacted] (Appellant) from care and treatment in the Facility to the [redacted] County Department of Human Services (DHS) for shelter placement. The Appellant appealed the discharge determination to the New York State Department of Health (Department) pursuant to 10 NYCRR 415.3(i).

HEARING RECORD

Facility witnesses:	Ashley Bullard, Nurse Practitioner Cynthia Pourzynal, Nurse Manager Erica Ianello, Assistant Director of Rehabilitation Susan Rosier, Director of Social Work
Facility exhibits:	1-6
Appellant witnesses:	[redacted] Appellant
Appellant exhibits:	A-Y; AA-EE
ALJ exhibit:	I

Digital recording (R) of the hearing was made (R Day 1 3h:15m; R Day 2 2h:36m).

FINDINGS OF FACT

1. The Appellant is a [redacted]-year-old male who was transferred from [redacted] Hospital to the Facility and admitted on [redacted], 2023, for acute, physical rehabilitation after a fall, which resulted in a six-week hospital stay and surgery of the [redacted] evacuation of a [redacted]. The Appellant also has been diagnosed with, among other things, [redacted]. (Exhibits X, CC.)

2. On [redacted] 2023, the Appellant suffered another fall at the Facility, resulting in a [redacted] (Exhibit CC.)

3. During his stay at the Facility, the Appellant received physical, occupational, and speech therapy services. He was discharged from Occupational Therapy (OT) on [redacted] 2023, from Speech Therapy (ST) on [redacted] 2023, and from Physical Therapy (PT) on [redacted] 2023, when rehabilitation staff determined that he had reached his maximum functional ability and no longer required such services. (Exhibits 2, 3, Q; R Day 1 0:10-0:11.)

4. The Appellant independently performs activities of daily living (ADLs), including toileting, personal hygiene, and bed mobility. The Appellant requires set up assistance with eating and bathing, and he is supervised while showering. The Appellant is independent in transfers and walking in his room with a four-wheeled walker but requires a wheelchair for safety for independent locomotion on the unit floor. (Exhibit 4; R Day 1 1:59.)

5. By notice dated [redacted], 2023, the Facility determined to discharge the Appellant on [redacted], 2023, because his health has improved sufficiently so that he no longer requires the services provided by the Facility. The notice advised the Appellant that he would be discharged to DHS, in [redacted] for shelter placement. (ALJ Exhibit I.) The Facility did not provide a discharge plan.

6. On [redacted] 2023, the Appellant requested this hearing to contest the Facility's discharge determination. The Appellant remains at the Facility pending the outcome of the hearing.

7. On [redacted] 2023, the Facility updated the Appellant's clinical record with a note from Nurse Practitioner Ashley Bullard detailing that the Appellant has been evaluated and deemed safe to discharge to DHS. (Exhibit 5.)

8. On [redacted] 2023, the second day of testimony, the Facility again updated the Appellant's clinical record with a note from the Facility's Physician stating that "upon review of this patient's chart" the Appellant does not have any skilled nursing needs and is medically stable for discharge. (Exhibit 6.)

ISSUES

Has the Facility established that the Appellant's discharge is necessary and that the discharge plan is 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).

Public Health Law § 2803-z and Department regulations at 10 NYCRR 415.3(i) describe the transfer and discharge rights of residential health care facility residents.

The regulations at 10 NYCRR 415.3(i) state, 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.

When the facility transfers or discharges a resident for this reason, the facility shall ensure that the resident's clinical record contains complete documentation made by the resident's

physician and, as appropriate, the resident's interdisciplinary care team. 10 NYCRR 415.3(i)(1)(ii)(a). The Facility must ensure that the discharge is documented in the resident's medical record and must include documentation from the resident's physician. 42 CFR 483.15(c)(2)(ii)(A).

PHL §2803-z(1)(b) states that prior to a facility initiating a discharge of a resident, the facility shall use its best efforts, including compliance with applicable federal and state regulations to secure appropriate placement or a residential arrangement for the resident, other than temporary housing assistance (or shelter placement). The facility must 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. 10 NYCRR 415.3(i)(1)(vi). The discharge summary shall include, in addition to a recapitulation of the resident's stay and a final summary of the resident's status, a post-discharge plan of care "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 service have been arranged and are available to meet the identified needs of the resident." 10 NYCRR 415.11(d). The facility must also 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 facility has the burden of proving that the discharge was necessary and the discharge plan appropriate. 10 NYCRR 415.3(i)(2)(iii)(b); State Administrative Procedure Act § 306(1).

DISCUSSION

The Appellant was admitted to the Facility on [redacted], 2023 for short-term rehabilitation, post-hospitalization, after a fall that resulted in a [redacted]. (Exhibits X, CC.) The Appellant then fell again on [redacted], 2023 at the Facility and [redacted]. (Exhibit CC.) Although the Appellant still requires a four-wheeled walker and utilizes a wheelchair for safety (Exhibits 3, 4; R Day 1 1:59), he is mostly independent with ADLs, requiring only set up assistance with eating and bathing. (Exhibit 4; R Day 1, 1:59.) Ms. Pourzynal, a registered nurse who is the unit manager of the floor where the Appellant resides at the Facility, testified that the Appellant independently performs ADLs (R Day 1 1:51) including eating and bathing, as she explained that it is Facility policy to provide set up help for all residents. (R Day 1 1:59; Exhibit 4.) Similarly, Ms. Bullard explained that the Appellant is supervised when he takes a shower only because all residents are required to be supervised. (R Day 1 0:32.)

Although the Appellant previously refused to take one of his medications, [redacted] requiring supervision of his medicinal intake in [redacted] 2023 (Exhibit O, p 5), Facility nurses testified that the Appellant now takes all his medications when they are handed to him and that he is capable of independently administering them. (R Day 1 0:33, 1:47-1:48, 1:54-1:58.) The Appellant is prescribed 13 medications (Exhibit T), some of which are taken on an as-needed basis. (R Day 1 2:50). The Appellant also independently uses his [redacted] and [redacted] when Facility staff bring them to him. (R Day 1 2:30-2:31.)

The Appellant was discharged from ST on [redacted], 2023, due to a plateau in progress. (Exhibit Q.) Similarly, the Appellant was discharged from OT on [redacted], 2023 because he reached his maximum potential, although he still required supervision with medication management and with laundry, meal preparation and housekeeping. (Exhibit 2.) An OT note dated

[redacted], 2023 indicates that the Appellant made limited progress (Exhibit R), yet the Appellant's interdisciplinary team discussed that the Appellant could be upgraded to independent with ADLs per note dated [redacted] 2023, more than one month after the discharge notice at issue herein. (Exhibit 3.) Ms. Ianello, who is an occupational therapist, explained that OT services ceased in [redacted] to allow the Appellant to focus on overcoming his physical limitations and it was anticipated that with improved movement, the Appellant would then reach OT goals. (R Day 2 1:10-1:11.) Ms. Ianello stated that the Appellant has reached independence with OT goals, has maximized his potential with ADLs and does not qualify for nursing home care because he has reached his maximum potential of independence, schedules appointments, and demonstrates abilities required to function in the community. (R Day 2 0:10-0:11, 1:12.) Similarly, Ms. Bullard testified that the Appellant has attained his therapy goals and that the Appellant may be safely discharged into the community. (R Day 1 0:12.) Likewise, Ms. Pourzynal testified that the Appellant is independent with all ADLs and is a healthy adult who can take care of himself without nursing home care. (R Day 1 1:51-1:52.)

The Appellant received PT services at the Facility off and on. As early as [redacted] 2023, it was noted that, although the Appellant had not made any progress, PT services would end that week. (Exhibit V.) PT continued per Facility note dated [redacted] 2023 (Exhibit M) and the Appellant had PT services at the Facility throughout [redacted] and [redacted] 2023 (R Day 1 0:46-0:50; Exhibit B). On [redacted], 2023, the Appellant's Primary Care Physician (PCP) prescribed additional PT. (Exhibit P.) The Facility's records indicate that PT recommenced on [redacted], 2023 and ended on [redacted] 2023. (Exhibit 3.) Although the Facility indicated that the Appellant was discharged from PT services on [redacted] 2023 (Exhibit 3), the Appellant was prescribed

continued PT that same day after outside [redacted] consultation. (Exhibit AA; R Day 1 0:20-0:21.)

While the Appellant requires PT and has pain (R Day 2 2:18), the Appellant sees an [redacted] doctor outside of the Facility every three months for a [redacted] in his [redacted] and the Facility contends that PT could likewise also occur outside of the Facility. (R Day 1 0:26, 1:18-1:19, 1:49; R Day 2 1:09; Exhibit AA.) The Facility indicated that an outside PT referral would be provided once discharge occurs. (R Day 1 1:20-1:21; R Day 2 0:10-0:11.)

The Appellant fell at the Facility several times, at a minimum on [redacted], 2023 (Exhibit CC); on [redacted] 2023, when the Appellant reported a fall in the bathroom at the Facility and reported pain in his [redacted] but no [redacted] was found (Exhibits V, Y); on [redacted] 2023, when the Appellant reported that he fell and had a [redacted] cm [redacted] area to the [redacted] (Exhibits A, p 52, H, p 5); and on [redacted] 2023, when the Appellant's roommate reported that the Appellant fell because he missed his wheelchair while attempting to make his bed. (Exhibit A, p 43.) However, there have been no reported falls since [redacted] and Ms. Pourzynal opined that the Appellant was an average risk level for falls. (R Day 1 1:39.) To the contrary, the Appellant testified that since suffering from a [redacted], he still gets [redacted] and must be vigilant to prevent falls by getting up slowly. (R Day 2 2:15-2:17.)

The Appellant was admitted to the Facility from the hospital after [redacted] surgery with additional diagnoses of [redacted] health issues including [redacted]. (Exhibits X, CC.) In [redacted] 2023, an additional adult [redacted] diagnosis was added by a Facility nurse as she documented the issues the Appellant faced after quitting [redacted]. (R Day 1 0:51-0:52; Exhibit L.) Around the same time, the Appellant's family reported that the Appellant had [redacted]. (R Day 1 2:19-

2:21; Exhibit K.) In [redacted] 2023, the Appellant was noted to exhibit [redacted], [redacted] and the goal was for the Facility to work with the Appellant to lessen these symptoms by [redacted] 2023 (Exhibit H, p 7), two days before the proposed discharge. In [redacted] 2023, it was noted that the Appellant has [redacted] issues and [redacted] (Exhibit H, p 6.)

Ms. Pourzynal described that the Appellant has [redacted] (R Day 1 2:12) and [redacted] issues especially involving [redacted] (R Day 1 1:51-1:53), but down-played that such issues could be caused by adverse reactions in mixing medications (R Day 1 2:14) and chronic pain (R Day 1 2:20), despite reports that the Appellant was having more difficulty holding attention since his [redacted] injury. (R Day 1 2:25; Exhibit Q.)

The Appellant has abstained from [redacted] weeks. (R Day 2 2:20.) Just prior to the fall that landed him in the hospital, the Appellant was in a [redacted] rehabilitation center. (R Day 2 2:21.) The Appellant described that he has been able to remain clean due, in part, to the care he receives in the Facility. (R Day 2:19-2:20.)

The Facility Physician indicated in the Appellant's file by note dated [redacted], 2023, the second day of hearing testimony, that "upon review of the [Appellant's] chart [he] determined that [the Appellant] does not have any skilled nursing needs and is medically stable for discharge." The Facility Physician never attested to examining the Appellant. (Exhibit 6.) The Appellant's own PCP, who has known the Appellant since 2005, submitted a statement dated [redacted] 2023, after examining the Appellant on [redacted] 2023. (Exhibit BB.) He attested that the Appellant has difficulty performing ADLs, requires aid to ambulate and cannot walk more than [redacted] steps without pain, is unable to manage medical and personal needs independently, and opined that the Appellant cannot be safely discharged *to a homeless shelter*. (Exhibit BB [emphasis added].)

The opposing physician statements do not dispute that the Appellant has needs; the issue is whether those needs rise to the level of requiring continued nursing home care. While the Appellant's PCP opined that the Appellant cannot be safely discharged to a homeless shelter, he did not explicitly state that the Appellant requires nursing home care. (Exhibit BB.) The Appellant himself has indicated all along that he does not want to remain at the Facility and wants to return to independent living. (Exhibits A, V, M.)

The Facility has proven that the Appellant's progress has plateaued, and that the Appellant is no longer utilizing services provided at the Facility. However, while the Appellant's condition improved in some areas, he still requires services and there is a regulatory framework that the Facility must follow prior to discharge. Not only must the Facility use its best efforts to secure appropriate placement other than a shelter (PHL §2803-z[1][b]) but regulations require the Facility to provide sufficient preparation and orientation to the Appellant to ensure a safe and orderly discharge in the form of a plan which assures that needed medical and supportive service "have been arranged and are available to meet the identified needs of the (Appellant)." 10 NYCRR 415.11(d)(3), 10 NYCRR 415.3(i)(1)(vi); *see Matter of Blue v Zucker*, 192 AD3d 1693, 1697-1698 (4th Dep't 2021).

Here, the Facility's discharge plan for the Appellant is to accompany him to the DHS office for placement in an unknown shelter, and to ensure that he has an appointment with his PCP and that his prescriptions are sent to a pharmacy. (R Day 2 1:20.) While the Facility indicated that any necessary referrals will be done and made at discharge by list (R Day 2 1:20-1:22, 1:48-1:51; Exhibit 5), the Facility did not have that list or plan for medical and supportive services arranged for the Appellant as required. 10 NYCRR 415.11(d)(3).

The Facility offered a note by Ms. Bullard, written more than one month after the Notice of Discharge, stating that the Appellant was evaluated and "is deemed safe to discharge to DSS/Shelter." (Exhibit 1.) While the Facility's witnesses testified generally that discharge to a shelter is appropriate for the Appellant (R Day 1 0:12, 1:33-1:37; R Day 2 1:11, 1:21-1:22), the witnesses had only scant familiarity with the Appellant himself. Ms. Bullard testified that she was "briefly familiar" with the Appellant (R Day 1 0:09-0:10), having met with the Appellant only twice (R Day 1 0:53) and Ms. Ianello admitted that she never evaluated the Appellant. (R Day 2 0:11.) Ms. Pourzynal believed the Appellant was admitted to the Facility for therapy on his [redacted] (R Day 1 1:29.)

Facility Social Worker Susan Rosier testified that she knows the Appellant and assisted with devising his discharge plan. (R Day 2 1:17.) She referred the Appellant to the [redacted] and believes that [redacted] has been working with the Appellant to secure independent housing options. (R Day 2 1:21.) She also received a call from [redacted], after the Appellant recently contacted them directly, and believes they may assist the Appellant in locating supportive housing. (R Day 2 1:19-1:20.) Ms. Rosier explained that discharge to DHS was a last resort because, although the Facility referred the Appellant to four Assisted Living Facilities more than once each, they denied the Appellant due to his prior [redacted]. (R Day 2 1:18-1:19; Exhibit 5.) However, the Facility did not address how such issues of the Appellant will be otherwise addressed by placement in a shelter without specific referrals in place.

The Appellant testified that discharge to a shelter is not a good idea due to his [redacted] history and because he has untreated [redacted] health issues and [redacted] (R Day 2 2:18-2:20.) Further, the Appellant requires a wheelchair to ambulate independently. (Exhibit 3; R Day

2 2:18.) While the Appellant wishes to move to independent housing and has completed approximately seven housing applications already (R Day 2 2:20), he has yet to receive the required assistance to make that a viable option.

Here, given all the Appellant's physical limitations, [redacted] challenges, and [redacted] health needs, the Facility has not demonstrated that discharge to DHS -- without a specific plan with appropriate referrals reviewed with the Appellant -- is adequate. A shelter for adults cannot legally admit anyone who requires services beyond those that the shelter is authorized to provide by law and regulation, and its operational plan, and/or who has a mental or physical condition that makes such placement inappropriate or otherwise may cause damage to himself or others (18 NYCRR 491.9[c][1]), and/or is incapable of ambulation on stairs without personal assistance, unless such a person can be assigned a room on a floor with ground level egress or the shelter is equipped with an elevator. 18 NYCRR 491.9(c)(5). The Facility did not provide proof that DHS accepted the Appellant for placement in an appropriate shelter.

In sum, the Facility failed to establish that its discharge plan was appropriate and the discharge plan cannot be sustained.

DECISION

Waterview Heights Rehabilitation & Nursing Center failed to establish that its determination dated [redacted], 2023 to discharge the Appellant from its Facility to [redacted] County Department of Human Services is appropriate.

Dated: November 2, 2023
Rochester, New York

Jeanne T. Arnold
Administrative Law Judge