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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

Ms. [REDACTED]  
c/o Hebrew Home for the Aged at Riverdale  
5901 Palisade Avenue  
Riverdale, New York 10471

James A. Shannon, Esq.  
Jackson Lewis P.C.  
677 Broadway, 9<sup>th</sup> Floor  
Albany, New York 12207

Joshua B. Kiel, Esq.  
New York Legal Assistance Group  
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Ms. Anne Weisbrod  
Hebrew Home for the Aged at Riverdale  
5901 Palisade Avenue  
Riverdale, New York 10471

**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,

James F. Horan  
Chief Administrative Law Judge  
Bureau of Adjudication

JFH: cmg  
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH

-----X  
In the Matter of an Appeal, pursuant to :  
10 NYCRR § 415.3, by :

[REDACTED]

Appellant, :

from a determination by :

Hebrew Home for the Aged at Riverdale :

Respondent, :

to discharge her from a residential health :  
care facility. :

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DECISION

-----X  
A Notice of Transfer/Discharge dated [REDACTED] 2020 was issued  
to [REDACTED] (Appellant) by the Hebrew Home for the Aged at  
Riverdale (Facility). The Appellant appealed the proposed  
discharge. 10 NYCRR 415.3(i)(2). On September 3, 2020, a hearing  
was held by videoconference before Dawn MacKillop-Soller,  
Administrative Law Judge. Evidence was received (Appellant's 1-16  
and Facility's 1-17) and a transcript of the hearing was made.  
[Transcript, p. 1-306.]

The Appellant was represented by Joshua Kiel, Esq. The Facility  
was represented by James A. Shannon, Esq. Beena Alexander, M.D.,  
Sharon Praigrod, RN, Molly Little, social worker, and Anne Weisbrod,  
Director of Social Work, testified for the Facility. The Appellant  
testified on her own behalf.

The record remained open until September 18, 2020 for the parties to submit additional documentation. The following 16 documents from the Appellant were received into evidence:

1. NYC Department of Homeless Services policy, June 28, 2018;
2. CDC, coronavirus disease, August 14, 2020;
3. MAYO Clinic, Laminectomy;
4. NYC Health, COVID-19 data;
5. New York Times article, June 21, 2020;
7. <sup>1</sup>Coalition for the Homeless article, June 2020;
8. DOH administrative hearing decision, September 20, 2019;
9. DOH administrative hearing decision, September 28, 2018;
10. NYC DHS referral form;
11. NYS Education Department, licensed clinical social work requirements;
12. DOH administrative hearing decision, July 13, 2018;
13. Affidavit of [REDACTED];
14. Report of CT, [REDACTED], 2019;
15. Letter from [REDACTED], MD, [REDACTED], 2020;
16. Letter from the Appellant, September 18, 2020.

The following 17 documents from the Facility were received into evidence:

1. [REDACTED], 2020 physician note;
2. [REDACTED] and [REDACTED] 2019 medical notes;
3. [REDACTED] and [REDACTED] and [REDACTED] and [REDACTED] 2019 discharge planning notes;
4. April 2020 emails, Facility and [REDACTED] Shelter;
5. May 2019 and April and May 2020 emails, Facility and [REDACTED] Center and [REDACTED] Center;
6. NYC DHS referral form;
7. physician's orders;
8. May 2019 and 2020 emails, Facility and [REDACTED] Shelter;
9. DOH administrative hearing decision, April 8, 2011;
- 9a. DOH administrative hearing decision, September 20, 2019;
10. DOH administrative hearing decision, May 26, 2011;
11. DOH administrative hearing decision, March 13, 2013;
12. DOH administrative hearing decision, May 29, 2018;
13. DOH administrative hearing decision, July 9, 2018;
14. Physical therapy progress note dated [REDACTED], 2020;

<sup>1</sup> There is no Exhibit 6 for the Appellant.

15. Affidavits of Sharon Praigrod, RN, Beena Alexander, MD, and Samantha Merry;
16. Voicemail of the Appellant;
17. NYC DHS referral form.

#### Issues

Has the Facility met its burden of proving that the Appellant's health has improved sufficiently so she no longer needs skilled nursing care services, and that its discharge plan is appropriate?

#### Findings of Fact

1. Hebrew Home for the Aged at Riverdale is a residential health care facility. [ALJ 1.]

2. The Appellant, age [REDACTED] was admitted to the Facility on [REDACTED] 2019 for short term rehabilitation following [REDACTED] [REDACTED]. Prior to her [REDACTED] surgery, she resided at [REDACTED] a homeless shelter. Her diagnoses include [REDACTED] and [REDACTED].

[ALJ 1, Appellant 15, Facility 2 and 7; Transcript, p. 38, 54.]

3. On [REDACTED] [REDACTED] 2019, the Appellant was discharged from occupational and physical therapies. She is medically cleared for weight bearing and completes transfers independently. She uses a quad cane or rollator to ambulate inside and outside the Facility to attend doctors' appointments, participate in religious services, and visit a friend. [Facility 2 and 14; Transcript, p. 23-24, 32, 62-63, 85, 99, 196-197, 201-202, 204, 288-290.]

4. The Appellant does not have any cognitive limitations and is capable of managing her own medications, which include [REDACTED]

██████████, and Tylenol ██████████  
for pain as needed. [Facility 7; Transcript, p. 38, 43, 54, 63-64,  
98.]

5. The Appellant has met her treatment goals and is independent with her activities of daily living. [Transcript, p. 23, 34, 62, 73-74, 148.]

6. The Facility's proposed discharge plan is to transfer the Appellant to ██████████ Shelter, a homeless shelter at ██████████ ██████████ [ALJ 1.]

7. The Appellant does not require skilled nursing care. She objects to the discharge and to the discharge plan on the grounds that she is incapable of completing her activities of daily living and her ██████████ places her at high risk for COVID-19. [Appellant's brief, p. 1; Transcript, p. 191-192.]

8. The Appellant's care team at the Facility and the Facility's physician, Beena Alexander, M.D., have determined that the Appellant is not in need of nursing home care and that the Facility's discharge plan is safe and appropriate. The physician's opinion is documented in the medical record and is based on her evaluation of the Appellant, review of the medical records, and discussions with Facility staff. [Facility 1, 2, and 14; Transcript, p. 23, 34, 62, 73-74, 148, 173-174.]



Applicable Law

1. Transfer and discharge rights of nursing home residents are set forth in 10 NYCRR 415.3(i), which 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;

2. The Facility has the burden of proving that the "discharge or transfer is/was necessary and the discharge plan appropriate."

10 NYCRR 415.3(i)(2)(iii)(b).

Discussion

The Facility proved by substantial evidence that the Appellant's health has improved sufficiently so she no longer needs skilled nursing care and that its discharge plan to transfer her to [REDACTED] Shelter is appropriate. The Appellant has reached her restorative therapy goals and no longer requires skilled nursing care. [Facility 1 and 2; Transcript, p. 24, 49, 62, 68, 173.]

The Appellant claims she continues to need nursing home care for physical therapy due to her inability to complete her activities of daily living. [Appellant's brief, p. 5.] The Facility's medical and interdisciplinary team credibly testified and her clinical record documents, however, that the Appellant successfully manages her activities of daily living and independently ambulates inside and outside the Facility using a rollator or cane. The care team unanimously agree that the Appellant requires no oversight with ambulating, managing her medications, or attending to her personal care. [Facility 1 and 2; Transcript, p. 24, 34, 38-39, 49, 62-63, 68, 103.]

Beena Alexander, M.D. testified the Appellant does not require physical therapy services and she ambulates without assistance or difficulties. [Transcript, p. 33-34.] Sharon Praigrod, RN, testified to her personal observations of the Appellant walking in and out of the Facility, managing the timing and administration of her daily medications, and arranging for her own transportation to leave the Facility. [Transcript, p. 63-64, 83-86, 99, 103.] Ms. Praigrod described how the Appellant "does everything" for herself, including completing such tasks with "no help" from Facility staff. [Transcript, p. 62-63.] Molly Little, social worker, concluded that the consensus of Facility staff is that the Appellant "does not require any assistance with her activities of daily living." [Transcript, p. 148.] Ms. Little and Ms. Praigrod also described



their observations of the Appellant walking around the Facility without assistive devices, belying the Appellant's claim of needing a cane or rollator for ambulation. [ALJ 1; Transcript, p. 102-104, 119-120.]

The Appellant presented no persuasive evidence to support her claim that she requires physical therapy services to complete her activities of daily living. [Appellant's brief, p. 4-5; Transcript, p. 189-191.] Dr. Alexander never "acknowledged (the Appellant's) need for physical therapy," as the Appellant contends. [Appellant's brief, p. 5.] Dr. Alexander testified that the physical therapy evaluation performed at the Appellant's request on [REDACTED] 2020 showed she did not require physical therapy services. [Facility 14; Transcript, p. 33, 49.]

The physical therapist also noted the Appellant's abilities to independently perform bed mobility, functional transfers, and ambulation using a rollator or quad cane without difficulties. [Facility 14.] The Facility's medical evidence documents as far back as [REDACTED] [REDACTED] 2019 that the Appellant was in "good physical condition," had "recovered completely" from her [REDACTED] surgery and was ambulating "without an assistive device." [Facility 2.] This medical note details the Appellant's ability to walk "up and down stairs in [REDACTED]," shoes the Appellant described as [REDACTED] [REDACTED] she wore during this period for "long walks." [Facility 2; Transcript, p. 220-221.] The Appellant produced no credible evidence

in support of her claim that her condition has since changed. [Transcript, p. 189-190, 220.] The Appellant relies on prior administrative hearing decisions to claim she still needs nursing home care, but those cases involved wheelchair dependent residents still in need of rehabilitation and medical care at a residential health care facility, scenarios unlike this case. [Appellant 9 and 12.]

A report the Appellant submitted from [REDACTED] [REDACTED] [REDACTED], M.D. dated [REDACTED] 2020 speculates on the Appellant needing skilled nursing services "for approximately the next [REDACTED] months" due to pain in her [REDACTED] [REDACTED] [REDACTED] [REDACTED], and difficulties with feeding, dressing, showering, household chores, and administering medications. None of these challenges are substantiated by the Appellant's Facility record or by any medical evidence as being significant enough to require nursing home care. [Appellant 15.] To the contrary, the Facility's medical evidence and progress notes confirm the Appellant's capabilities to complete such tasks and that the "pains and [REDACTED]" she reported to Dr. Alexander can be addressed with exercise. [Facility 2; Transcript, p. 32-33, 43, 49-50, 108, 62, 189-190, 192.]

The Appellant also relies on a report of a [REDACTED] scan performed on [REDACTED] 2019 for "a [REDACTED]" to claim she needs nursing home care. [Appellant's brief, p. 4; Appellant 14.] The [REDACTED] scan report accounts for the mass as a [REDACTED]

potentially [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] - conditions that hardly justify skilled nursing services. Nursing homes are medical facilities reserved for patients requiring on-site and continuous nursing care. PHL § 2801; 10 NYCRR 415.2(k).

The Appellant's claim that it is "unconscionable" to discharge her to a shelter because her [REDACTED] places her at high risk for COVID-19 and she will not have a private room disregards her current congregate setting in a nursing home and her frequent travels offsite, which also expose her to the public. [Appellant's brief, p. 1; Appellant 15; Transcript, p. 153.] Dr. Alexander described the nursing home as "a place where people live together" with public hallways and entry areas. [Transcript, p. 50-51.] These communal areas, which the Appellant frequently uses, are also found at the shelter.

Anne Weisbrod, Director of Social Work, described the nursing home and the shelter as "congregate settings" and concluded the Appellant "would be safe in a shelter." [Transcript, p. 165, 173.] The Appellant's objection to a shelter because it is less safe than a nursing home for contracting COVID-19 is undermined by her testimony that she contracted the disease in [REDACTED] of 2020 while residing in a nursing home setting. [Transcript, p. 261-262.] Dr. Alexander also pointed out that the Appellant's persistent refusal of care by Facility staff and strong preference for outside

providers establishes the successful management of her health care concerns by providers in the community. [Facility 3; Transcript, p. 24-25, 35, 43, 55, 165-166.]

Without presenting any other discharge plan, the Appellant asserts a general objection that "Any plan to discharge (her) to a homeless shelter during the pandemic is indefensible." [Appellant's brief, p. 1.] However, more than one year has passed since the Appellant's discharge appeal against the Facility was granted and a decision was issued requiring the parties to "work diligently, together and independently, to find a suitable discharge location." Matter of Rivkah Boorstein, Dept. of Health Admin. Decision, AJL Ann Gayle, September 20, 2019. The Appellant objects to her discharge to a shelter, yet she has not taken any meaningful steps since her admission to the Facility [REDACTED] months ago, in [REDACTED] of 2019, to identify and secure a different discharge location. 10 NYCRR 415.3(i)(1)(v)(ii).

The Facility, on the other hand, has made several attempts at alternative placements for the Appellant, including assisted living facilities and [REDACTED] public and [REDACTED] housing. All have failed due to the Appellant's unwillingness to cooperate with the discharge planning process. The Appellant has repeatedly obstructed the Facility's placement efforts by claiming she has no time to talk, rejecting requests for evaluations to assess her suitability, or by making unworkable and unrealistic requests. [Facility 3; Transcript,

p. 24, 115-117, 124, 131-134, 136-142, 149, 165-169.] Her understandable dislike of shelters, which she expressed in her testimony, does not establish a medical need for skilled nursing services in a nursing home. [Facility 3; Transcript, p. 249-251, 271-273.]

The Appellant objects to the Facility's shelter referral on the grounds that she does not consent to a shelter and the shelter has not approved her transfer. [Appellant's brief, p. 4.] The Facility's evidence, however, includes proof of the shelter's acceptance of the Appellant. [Facility 4, 5 and 8; Transcript, p. 119.] The Appellant's unwillingness to consent to the shelter does not render the Facility's discharge plan inappropriate. The Appellant cannot defeat an otherwise appropriate discharge plan by refusing to agree to it. 10 NYCRR 415.3(i)(2); 18 NYCRR 491.9(c). The Appellant is entitled to decide whether she will partake in the shelter system but not entitled to remain in nursing home care she does not need.

The Facility's determination to discharge the Appellant is appropriate because the Facility has proven by substantial evidence that the Appellant's condition has improved sufficiently so that she no longer needs skilled nursing services. The discharge plan of transfer to [REDACTED] Shelter is also appropriate. The Facility chose this placement as a last resort given the Appellant's reluctance to cooperate in identifying housing options, her lack of

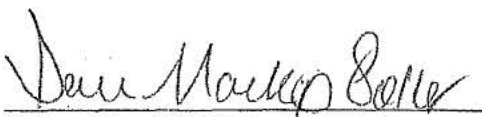
family or friends in the community, and its exhaustion of other possibilities. [ALJ 1; Appellant's 13.] Shelter placement is familiar to the Appellant and will enable her to access outpatient physical therapy, continue visits with her outside clinicians, and focus on pursuing photography, an activity she enjoys. [Transcript, p. 158, 296.] Ms. Little also confirmed that the shelter can accommodate the Appellant's dietary requests. [Transcript, p. 153, 161-162.]

The Facility is authorized to transfer the Appellant in accordance with its discharge plan, which includes instructions for medication management and referrals for medical care and equipment, if the Appellant so desires.

Order

The Facility is authorized to discharge the Appellant to the location identified in the notice of discharge and in accordance with its discharge plan, which includes instructions for medications and referrals for medical care and equipment.

Dated: Albany, New York  
October 9, 2020

  
Dawn MacKillop-Soller  
Administrative Law Judge

To: Ms. [REDACTED]  
Hebrew Home for the Aged at Riverdale  
5901 Palisade Avenue  
Riverdale, New York 10471

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