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# Department of Health

**KATHY HOCHUL**  
Governor

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

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

May 21, 2024

**CERTIFIED MAIL/RETURN RECEIPT**

[REDACTED]  
c/o Dr. Susan Smith McKinney Nursing  
594 Albany Avenue  
Brooklyn, New York 11203

Sara Freizer, DSW  
Dr. Susan Smith McKinney Nursing  
594 Albany Avenue  
Brooklyn, New York 11203

**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  
Chief Administrative Law Judge  
Bureau of Adjudication

NJB: cmg  
Enclosure

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

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In the Matter of an Appeal, pursuant to  
10 NYCRR 415.3, by

██████████,

Appellant,

from a determination by

DR. SUSAN SMITH MCKINNEY NURSING,

Respondent,

to discharge her from a residential health care facility.

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COPY

DECISION

Before: Tina M. Champion  
Administrative Law Judge

Held at: Videoconference via WebEx

Date: May 20, 2024

Parties: ██████████  
c/o Dr. Susan Smith McKinney Nursing  
594 Albany Avenue  
Brooklyn, New York 11203  
By: Pro Se

Dr. Susan Smith McKinney Nursing  
594 Albany Avenue  
Brooklyn, New York 11203  
By: Sara Freizer, Director of Social Work

**JURISDICTION**

By notice dated [REDACTED], 2024, Dr. Susan Smith McKinney Nursing (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [REDACTED] (the Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes, Rules, and Regulations (NYCRR) 415.3(i).

The hearing was held in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulations (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR.

Evidence was received and witnesses were examined. A digital recording was made of the proceeding.

**HEARING RECORD**

ALJ Exhibit:            1 – Letter with Notice of Hearing and Discharge/Transfer Notice [REDACTED]/24)

Facility Exhibits:     1 – PT Discharge Summary  
                              2 – Social Work Progress Notes  
                              3 – Physician Progress Notes  
                              4 – IDT Progress Notes  
                              5 – Assisted Living / The W Group email

Appellant Exhibits:   None

Facility Witnesses:    Sara Freizer, Director of Social Work  
                              Laura Mason, Assistant Director of Nursing  
                              Ha Nguyen, Nurse Practitioner

Appellant Witness:    [REDACTED], Appellant  
                              [REDACTED], Appellant's [REDACTED]

### FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old female who was admitted to the Facility on [REDACTED] [REDACTED] 2023, for short-term rehabilitation. (Exhibit [Ex.] 1; Testimony [T.] Freizer.)
2. The Appellant received physical therapy (PT) at the Facility from [REDACTED], 2023, through [REDACTED] 2024. (Ex. 1.)
3. The Appellant testified, uncontradicted by the Facility, that there were gaps of time when she did not receive PT, or the prescribed amount of PT, due to unavailability of therapists at the Facility. (T. Appellant.)
4. On [REDACTED], 2024, the Appellant was discharged from PT for the stated reason of "Highest Practical Level Achieved". (Ex. 1.)
5. The Appellant's PT Discharge Summary reflects that the Appellant can ambulate [REDACTED] feet on level surfaces with "Supervision or touching assistance" and can manage [REDACTED] steps with "Partial/moderate assistance". With respect to steps, the PT Discharge Summary elaborates that the Appellant can negotiate "[REDACTED] steps with both hands on one rail" and that it is "[n]ot a barrier to [discharge]". (Ex. 1; T. Freizer; Mason.)
6. The Appellant ambulates on the unit with a rolling walker. (T. Mason.)
7. As of the date of the hearing, the Facility's Assistant Director of Nursing testified that the Appellant is independent with all her activities of daily living (ADLs). The Appellant's PT Discharge Summary indicates that as of [REDACTED] 2024, the Appellant required either supervision or touching assistance, or partial/moderate assistance, with various ADLs including mobility, transfers and ambulation. (T. Mason.)
8. The Facility's Nurse Practitioner has opined that the Appellant is medically stable and cleared for discharge to the community. (Ex. 3; T. Nguyen.)

9. An Interdisciplinary Team Progress Note for the Appellant dated [REDACTED] 2024, states that the Appellant has "received medical clearance from both the MDs and the Rehabilitation Director for a safe discharge" and that the Appellant is "capable of managing [REDACTED] flights of stairs." (Ex. 4.)

10. The Appellant is cognitively intact and able to manage her own medications. (T. Nguyen.)

11. The totality of evidence supports that the Appellant does not need skilled nursing care. (Exs. 1-5; T. Freizer, Mason, Nguyen.)

12. On [REDACTED], 2024, the Facility issued a Discharge/Transfer Notice to the Appellant which proposed discharge to [REDACTED]. The identified address is the Appellant's apartment in the community, which she shares with her [REDACTED]-year-old [REDACTED] (ALJ Ex. I.)

13. The Discharge/Transfer Notice states that the Appellant will be transferred because the Appellant's health has improved sufficiently such that the Appellant no longer requires the services of the Facility. (ALJ Ex. I.)

14. The Appellant timely appealed the Facility's discharge determination and proposed discharge location.

15. The Appellant has remained at the Facility during the pendency of the appeal.

### ISSUES

Has the Facility established that its determination to discharge the Appellant is correct and that its discharge plan is appropriate?

### APPLICABLE LAW

A residential health care facility, also referred to in the Department of Health Rules and Regulations as a 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].)

A resident may only be discharged pursuant to specific provisions of the Department of Health Rules and Regulations. (10 NYCRR 415.3[i][1].)

The Facility alleged that the Appellant's discharge is permissible pursuant to 10 NYCRR 415.3(i)(1)(i)(a)(2), which states:

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.

A Facility must ensure complete documentation in the resident's clinical record when a resident is discharged. (10 NYCRR 415.3[i][1][ii].)

Facilities are required to provide written notice of transfer or discharge that includes the following:

- (a) The reason for transfer or discharge;
- (b) The specific regulations that support, or the change in Federal or State law that requires, the action;
- (c) The effective date of transfer or discharge;
- (d) The location to which the resident will be transferred or discharged;
- (e) A statement that the resident has the right to appeal the action to the State Department of Health, which includes:
  - (1) an explanation of the individual's right to request an evidentiary hearing appealing the decision;
  - (2) the method by which an appeal may be obtained;
  - (3) in cases of an action based on a change in law, an explanation of the circumstances under which an appeal will be granted;
  - (4) an explanation that the resident may remain in the facility (except in cases of imminent danger) 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;

(5) in cases of residents discharged/transferred due to imminent danger, a statement that the resident may return to the first available bed if he or she prevails at the hearing on appeal; and

(6) a statement that the resident may represent him or herself or use legal counsel, a relative, a friend, or other spokesman;

(f) the name, address and telephone number of the State long term care ombudsman;

(g) for nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act;

(h) for nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

(10 NYCRR 415.3[i][1][v].)

Facilities are also required to "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."

(10 NYCRR 415.3[i][1][vi].)

Under the hearing procedures at 10 NYCRR 415.3(i)(2)(iii), the Facility bears the burden to prove a discharge is necessary and appropriate.

### DISCUSSION

The Appellant is a [REDACTED]-year-old female who was admitted to the Facility on [REDACTED] 2023, for short-term rehabilitation. The testimony and documentation reflect that the Appellant is cognitively intact, able to manage her medications, and does not need skilled nursing care. Although there was no testimony offered from the rehabilitation department, the documentation

also reflects that the Appellant has progressed from her baseline functioning levels at time of admission through her discharge from PT on [REDACTED], 2024, and that she has achieved her highest practical level. The totality of evidence supports that a lower-level of care than skilled nursing is appropriate for the Appellant.

The Facility has proposed discharge to the Appellant's apartment within the community, located in [REDACTED] New York. The Appellant shares the apartment with her [REDACTED]-year-old [REDACTED] who appeared and testified at the hearing. The apartment is on the [REDACTED] floor of the building and the Appellant credibly testified that access to the apartment is gained with the following progression: [REDACTED]

[REDACTED]

The Appellant's PT Discharge Summary specifically states that the Appellant can manage [REDACTED] steps with "Partial/moderate assistance" and that the Appellant can negotiate [REDACTED] steps with both hands on one rail". Ms. Mason testified that the Appellant can manage [REDACTED] flights of stairs with rest between each flight. Access to the Appellant's apartment requires managing [REDACTED] flights of stairs. The Appellant ambulates with a rolling walker and would be discharged to her home with one. As per the Facility, the Appellant requires both hands on one rail to manage stairs. Upon inquiry, the Facility was unable to provide any solution for how the Appellant is to get herself and her rolling walker up [REDACTED] flights of stairs other than to have someone else carry the rolling walker the [REDACTED] flights for her. While the Appellant lives with her [REDACTED] tasking an [REDACTED]-year-old woman with being available every time the Appellant needs to come and go from her home or, more alarmingly, to carry a walker up [REDACTED] flights of stairs, is not acceptable as a safe discharge plan for the Appellant.

The Facility has identified an assisted living facility (ALF) in [REDACTED] that has a bed immediately available for the Appellant. The Appellant has declined to go to that ALF as it is too

far for her [REDACTED] to visit. The Facility has also identified another ALF in [REDACTED] that will accept the Appellant to its next available female bed. The Facility is willing to let the Appellant stay at the Facility until a bed is available in that [REDACTED] ALF. The Appellant, after researching the [REDACTED] ALF online, has declined that placement for concerns over reported roaches and bedbugs. While an ALF, in general, appears to be sufficient to meet the level of care needed by the Appellant at this time, such a placement is not identified by the Facility on the Discharge/Transfer Notice and cannot be ordered as a discharge location in this proceeding.


The Facility has shown that the Appellant does not need skilled nursing care. However, it has failed to show that the discharge plan of the Appellant's apartment in the community is appropriate.

#### DECISION

Dr. Susan Smith McKinney Nursing has established that its determination to discharge the Appellant was correct, but it has not established that its discharge plan is appropriate.

1. The Appellant may not be discharged in accordance with the [REDACTED], 2024 Discharge/Transfer Notice.
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.

DATED: Albany, New York  
May 21, 2024

  
Tina M. Champion  
Administrative Law Judge

TO:

[REDACTED]  
c/o Dr. Susan Smith McKinney Nursing  
594 Albany Avenue  
Brooklyn, New York 11203  
[REDACTED]

Sara Freizer, Director of Social Work  
Dr. Susan Smith McKinney Nursing  
594 Albany Avenue  
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