

cc: DOH.sm.DCAppeals@health.ny.gov by scan
SAPA File
BOA by scan



**Department
of Health**

KATHY HOCHUL
Governor

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

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

August 29, 2024

CERTIFIED MAIL/RETURN RECEIPT

██████ ██████
c/o The Phoenix Rehab & Nursing
140 St. Edwards Street
Brooklyn, New York 11201

Phoebe Liew
Tatyana Polyak
The Phoenix Rehab & Nursing
140 St. Edwards Street
Brooklyn, New York 11201

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,

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: 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

**The Phoenix Rehabilitation
and Nursing Center,**

Respondent,

to discharge her from a residential
health care facility.

COPY

DECISION
AFTER
HEARING

#DA24-6424

Hearing before: Eric J. Mantey
Administrative Law Judge
August 20, 2024
By WebEx Videoconference

Parties: The Phoenix Rehabilitation and Nursing Center
140 Saint Edwards Street
Brooklyn, New York 11201

By: Phoebe Liew, Social Worker
Tatyana Polyak, Director of Social Work

██████████ ██████████
The Phoenix Rehabilitation and Nursing Center
140 Saint Edwards Street
Brooklyn, New York 11201

By: *pro se*

JURISDICTION

By notice dated [REDACTED] 2024, The Phoenix Rehabilitation and Nursing Center, (Respondent), a residential health care facility subject to Article 28 of the Public Health Law (PHL), determined to discharge [REDACTED] [REDACTED] (Appellant) from care and treatment in its facility. The Appellant appealed the determination to the New York State Department of Health pursuant to 10 New York Codes, Rules, and Regulations (NYCRR) Section 415.3(i).

The hearing was held in accordance with 10 NYCRR § 415.3, 42 CFR § 483.15, 10 NYCRR Part 51, and New York State Administrative Procedure Act §301(1). Evidence was received and witnesses were examined. A digital recording of the hearing was made. (Length – 01:22:49.)

HEARING RECORD

ALJ Exhibits:

- I. Notice of Hearing and Notice of Discharge/Transfer

Respondent Exhibits:

1. Case Summary
2. Resident Face Sheet

4. Referral to Shelter
5. Progress Notes
6. Physical Therapy Discharge Summary
7. Occupational Therapy Discharge Summary
8. Physician Discharge Summary
9. Brief Interview for Mental Status (BIMS) Assessment

Appellant Exhibits:

- A. HCF-DHS Referral Form
- B. Therapeutic Leave Forms

Respondent Witnesses:

1. Phoebe Liew, Social Worker

Appellant Witnesses:

1. [REDACTED]
2. Cynthia Tait, Care Manager

ISSUES

Has the Respondent established that its determination to discharge the Appellant is necessary and that its discharge plan is appropriate?

FINDINGS OF FACT

1. The Appellant, [REDACTED] years in age, was admitted to the Respondent on [REDACTED] 2024, from [REDACTED] where she was treated for lack of coordination and difficulty in walking caused by [REDACTED] injuries she sustained when [REDACTED] (Respondent Exhibit [R. Ex.] 1, 2, and 8.)

2. After making significant improvements in physical therapy (PT) and occupational therapy (OT), the Appellant's treating physician at the Respondent determined and documented that the Appellant's health has improved and she is appropriate to be discharged to a shelter. (Respondent Exhibit [R. Ex.] 8.)

3. The Appellant is independent in all Activities of Daily Living (ADLS). (R. Ex. 1.)

4. The Respondent engaged the Appellant in discharge planning in [REDACTED] 2024. The Appellant was homeless upon admission to the Respondent and a transfer to Assisted Living was explored, but she declined that type of housing. The Respondent then initiated a discharge to the [REDACTED]" to which she was accepted. (R. Ex. 1, 4 and 5.)

5. Respondent social worker Liew and the Appellant discussed living with friends and family, but the Appellant has no one who can support her for housing purposes. (Testimony [T.] Liew, 00:17:02; R. Ex. 2.)

6. The discharge notice, dated [REDACTED] 2024, advised the Appellant she would be discharged on [REDACTED] 2024, to the [REDACTED], a shelter part of the [REDACTED], located at [REDACTED] [REDACTED] because her health has improved sufficiently so she no longer needs the services provided by the facility. (ALJ Ex. I.)

7. The Appellant ambulates via wheelchair. (R. Ex. 1.)

8. The Appellant remains at the Respondent pending the outcome of this hearing.

APPLICABLE LAW

A residential health care facility, or nursing home, 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. PHL § 2801; 10 NYCRR § 415.2(k). Transfer and discharge rights of nursing home residents have been codified in PHL § 2803-z and are set forth at 10 NYCRR § 415.3(i) which provides, in pertinent part, that the facility shall:

(1) (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.

...
(vi) 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. . .

The facility shall ensure complete documentation in the resident's clinical record by the resident's physician when discharge is on grounds that the resident no longer needs nursing home care. 10 NYCRR § 415.3(i)(1)(ii)(a); 42 C.F.R. § 483.15(c)(2)(ii)(A).

The Respondent has the burden of proving that the discharge is necessary and that the discharge plan is appropriate. 10 NYCRR § 415.3(i)(2)(iii)(b).

DISCUSSION

PT and OT notes dated [REDACTED] 2024, document that the Appellant completed PT and OT; she can independently ambulate in her wheelchair; she can self-transfer; and she is independent with all ADLs. (R. Ex. 6, 7, and 1.) Social worker Liew's testimony was consistent with the Respondent's case record documentation and further confirms that the Appellant's primary goal of achieving independence has been met. (T. Liew, 00:12:30, 00:12:49 and 13:37.) The Appellant completed a Brief Interview for Mental Status (BIMS) that resulted in a score of [REDACTED] (R. Ex. 9.) This demonstrates that she is capable of making her own decisions. (T. Liew, 00:17:37.)

Dr. Olusegun Ogunfowora is the Appellant's physician. (R. Ex. 2.) On [REDACTED] [REDACTED] 2024, Dr. Ogunfowora documented in the Appellant's patient record that that her discharge is appropriate because her health has improved sufficiently so she no longer

needs the services provided by the Respondent. (R. Ex. 8.) The Respondent has met its burden of proving permissible grounds for discharge. The discharge plan, however, is not appropriate for the following reasons.

The Respondent's [REDACTED], 2024, discharge notice stated a discharge date of [REDACTED] 2024. (ALJ I.) A social services note dated [REDACTED], 2024, also documents a Respondent determination to discharge the Appellant on [REDACTED] 2024. (R. Ex. 5.) Resident discharge on the Respondent's stated grounds requires notice at least 30 days prior to the date of discharge. PHL § 2803-z has eliminated the 10 NYCRR § 415.3(i)(1)(iv)(c) exception to that 30-day notice requirement under the discharge grounds in this case.

The Appellant ambulates via wheelchair. In a case summary, the Respondent states that the discharge location is to the "[REDACTED]" where "intake" is wheelchair accessible. (R. Ex. 1.) However, the discharge notice lists the discharge location of a specific shelter. (ALJ Ex. I.)

The Appellant contacted the [REDACTED] located at [REDACTED] on two occasions and she was informed that the shelter is on the [REDACTED] floor of a building that does not have an elevator. (T. Appellant, 00:46:40, 00:47:01 – 00:47:38, and 00:49:04.) The Appellant's Care Manager testified that she is familiar with the discharge location, recalling that the shelter at that location does not have an elevator and it is not wheelchair accessible. (T. Tait, 01:14:35 – 01:14:55.)

The Respondent's evidence states that the [REDACTED] has wheelchair accessible shelters; however, the Appellant's witness credibly testified that the specific shelter listed on the discharge notice is not wheelchair accessible. The

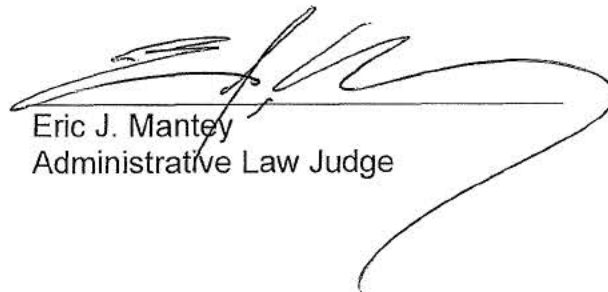
Respondent was given the opportunity to rebut that testimony, but it chose not to do so.

The discharge plan to transfer the wheelchair dependent Appellant on 5 days' notice to a shelter that cannot be accessed by wheelchair is not appropriate.

ORDER

1. The Respondent is not authorized to discharge the Appellant in accordance with the [REDACTED], 2024, discharge 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: Menands, New York
August 29, 2024



Eric J. Mantey
Administrative Law Judge

To: The Phoenix Rehabilitation and Nursing Center
140 Saint Edwards Street
Brooklyn, New York 11201
Attn: Phoebe Liew
Tatyana Polyak

[REDACTED] [REDACTED]
c/o The Phoenix Rehabilitation and Nursing Center
140 Saint Edwards Street
Brooklyn, New York 11201