UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JANE DOE,

Plaintiff,

v.

LIVANTA LLC AND STEVEN H. STEIN,

Defendants.

MEMORANDUM AND ORDER
20-CV-4264

LASHANN DEARCY HALL, United States District Judge:

Plaintiff Jane Doe filed a motion for a temporary restraining order ("TRO") on September 11, 2020, seeking to enjoin Defendant Livanta LLC ("Livanta") from affirming the decision of a skilled nursing facility ("SNF") to discharge her to at-home care. (Pl.'s Mot. TRO, ECF No. 4.) On September 13, 2020, the Court denied Defendant's motion. (Mem & Order, ECF No. 6.) On September 17, 2020, Plaintiff filed a motion an "Emergency Stay of an Order Denying Plaintiff's Motion for a Temporary Restraining Order." (Pl.'s Reconsid. Mot, ECF No. 9.)

BACKGROUND

I. Factual Background

Defendant Livanta is a Quality Improvement Organization ("QIO"),which hears appeals by Medicare recipients of discharge determinations by health care facilities in New York State.[1] (Compl. ¶¶ 8-9; 20.) Defendant Stein serves as Livanta's medical director. (Id. ¶ 10.) Plaintiff

[1] Livanta is a Beneficiary and Family Centered Care Quality Improvement Organization (BFCC-QIO). See https://www.livantaqio.com/en/About/BFCC-QIO (Accessed Sept. 23, 2020). BFCC-QIOs "handle cases in which beneficiaries want to appeal a health care provider's decision to discharge them from the hospital or discontinue other types of services." See https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityImprovementOrgs (Accessed Sept. 23, 2020).

is a 79-year-old Medicare beneficiary. (Id. ¶ 7.) Plaintiff previously resided in an in-patient rehabilitation facility and is alleged to suffer from medical conditions requiring neuro-muscular rehabilitation. (Id. ¶¶ 13, 15.)

On June 11, 2020, Plaintiff was admitted to Maimonides Medical Center (the "Hospital"), for treatment of a septic bone infection related to a bed sore. (Id. ¶ 14.) On June 24, 2020, the Hospital "sought to discharge" Plaintiff to a SNF. (Id. ¶ 17.) Plaintiff requested that Livanta conduct an expedited review of the Hospital's decision to discharge Plaintiff to an SNF as opposed to an in-patient rehabilitation facility. (Id. ¶¶ 20, 23.) In support of her request, Plaintiff submitted 49 pages of written evidence to Livanta. (Id. ¶¶ 21-22.) On June 26, 2020, Livanta affirmed the Hospital's discharge determination and found that Plaintiff was liable for hospital costs as of June 27, 2020 at noon. (Id. ¶ 23-24.) According to Plaintiff, Livanta's evaluation was limited to Plaintiff's bone infection related to her bed sore and did not evaluate her ongoing need for other rehabilitation. (Id. ¶ 26.)

On June 27, 2020, Plaintiff requested an expedited reconsideration of the Hospital's June 24, 2020 discharge determination. (Id. ¶ 28) Upon reconsideration, on June 29, 2020, Livanta again affirmed the Hospital's decision. (Id. ¶¶ 28-29.) Plaintiff was discharged from the Hospital and admitted to the SNF the same day. (Id. ¶ 35.)

On July 3, 2020, Plaintiff appealed Livanta's June 29, 2020 decision on the expedited reconsideration to the Office of Medicare Hearings and Appeals ("OMHA"). (Id. ¶ 36.) Before the OMHA, Plaintiff argued that "Livanta QIO arbitrarily disregarded the incompleteness of [Hospital]'s planning for [Jane Doe]'s 'postdischarge care' for rehabilitative services[.]" (Id. ¶ 36 (modifications in original).) On August 19, 2020, a hearing was held before an OMHA administrative law judge ("ALJ"). (Id. ¶ 40.) The ALJ found that the Hospital was liable for

costs from June 27, 2020 until Plaintiff was discharged from the Hospital on June 29, 2020. (Id. ¶ 43.) The ALJ made no findings with respect to Plaintiff's need for neuro-muscular rehabilitation. (Id. ¶ 44.)

On September 2, 2020, Plaintiff's health care proxies were notified by the SNF that she would be discharged on September 14, 2020 to stay-at-home care. (Id. ¶ 46.) Plaintiff's discharge was subsequently delayed to September 17, 2020. (See 9/18/20 Hearing Tr. at 22:21-24, Draft on file with Chambers.) Plaintiff appealed the SNF's decision to discharge Plaintiff to at-home care to Livanta on September 17, 2020 arguing that the SNF failed to properly consider Plaintiff's need for neuro-muscular rehabilitation. (Aff. Supp. Mot. Reconsideration TRO ("Pl.'s Aff") ¶ 12, ECF No. 10.) Livanta affirmed the SNF's decision to discharge Plaintiff on September 18, 2020. (Id. ¶ 13.)

II. Procedural History

On September 11, 2020, Plaintiff filed a complaint against Livanta and Stein pursuant to 42 U.S.C. § 1983 alleging deprivation of her constitutional rights. (Compl. ¶ 1.) More specifically, Plaintiff alleged that she was denied due process in connection with the expedited review and reconsideration of the "hospital-initiated discharge" because "Defendants had a duty to impose liability on Hospital for any failure to arrange for Jane Doe's post-discharge rehabilitation care needs, less a possible grace period of at most two (2) days beyond such failure." (Compl. ¶ 52.) As alleged in the complaint, Defendants knowingly and willfully omitted discussion of Plaintiff's rights to post-discharge rehabilitation care in their decisions to affirm the Hospital's discharge decision. (Id. ¶ 53.) Further, Defendants "knowingly and willfully disregard[ed] the invalid nature of the of the Detailed Notice of Discharge that the hospital issued[.]" (Id. ¶ 54.)

Plaintiff also sought a motion for a temporary restraining order. (Pl.'s TRO Mot.) Plaintiff argued that the Hospital's June 24, 2020 discharge decision posed an immediate threat of harm to Jane Doe." (Pl.'s Mot. TRO ¶ 50.) As such, Plaintiff requested that the court enjoin Defendants from issuing any determination affirming Plaintiff's discharge from the SNF to at-home care. (Id. at 13.)

Although Plaintiff had cast her complaint as one brought pursuant to § 1983, in her memorandum of law in support of the temporary restraining order, Plaintiff made no mention of § 1983, nor did she advance any argument that she had met the elements of any claim. (See Pl.'s Mot. TRO.) Instead, to support her request, Plaintiff relied primarily on the Supreme Court's determination in Blum v. Yaretsky, 457 U.S. 991 (1982), that "the threat of facility-initiated discharges or transfers to lower levels of care is sufficiently substantial that respondents have standing to challenge their procedural adequacy… at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." (Id. ¶ 48.)

On September 13, 2020, the Court denied Plaintiff's motion for a TRO. (Mem & Order, ECF No. 6.) In denying the TRO, the Court focused on the lack of potential merit of Plaintiff's § 1983 claim and declined to address the myriad of other deficiencies within Plaintiff's filings. Ultimately, the Court found that Plaintiff would be unable to show that "the conduct at issue [was] committed by a person acting under color of state law." (Mem & Order 3.) The Court noted that Plaintiff's quoted language from Blum was taken from the Supreme Court's discussion on standing. (Id.) But as to the question of state action, the Blum court found that nursing homes' decisions to discharge or transfer particular patients do not constitute state action because those decisions "ultimately turn on medical judgments made by private parties according to

professional standards that are not established by the State." (Mem & Order 4 (citing Blum, 457 U.S. at 1008).) The Court found no reason to reach a different conclusion in this case.

On September 15, 2020, Plaintiff filed a notice of appeal to the Second Circuit. (ECF No. 8.) Then, on September 17, 2020, Plaintiff filed an "Emergency Stay of an Order Denying Plaintiff's Motion for a Temporary Restraining Order." (ECF No 9.) That same day, the Court held an ex-parte status hearing. (9/17/20 Minute Entry and Order.) The Court indicated that it could not undertake consideration of Plaintiff's motion at that time because, by filing a notice of appeal, Plaintiff had divested the Court of jurisdiction over the case. (Id.) Plaintiff withdrew her Second Circuit appeal on September 21, 2020. (ECF No. 11.)

The Court now considers the instant motion, which it construes as a motion for reconsideration of the order denying the TRO.[2] (9/17/20 Minute Entry and Order.) By her motion, Plaintiff "concedes that 42 U.S.C. § 1983 is inapplicable" to the instant case. (Mem. Law Supp. Pl.'s Mot. Reconsid. ("Pl.'s Reconsid. Mem.") 1, ECF No 9-1.) Instead, Plaintiff asks the Court to analyze her claim as one arising under the due process clause of the Fifth Amendment . Nevertheless, for the reasons set out fully below, the Court's conclusion remains unchanged.

DISCUSSION

I. Scope of Plaintiff's TRO Request

A prudent starting point is to set out the scope of Plaintiff's request for injunctive relief, as her submission is muddled at best. In her September 11, 2020 motion for a temporary restraining order, Plaintiff maintained that the "Hospital's [June] discharge decision not to return Jane Doe to an inpatient rehabilitation facility level of care posed an immediate threat of harm to

[2] To the extent Plaintiff maintains that the motion is in fact a motion to stay, it would be denied for the same reasons set forth in this opinion.

Jane Doe." (Pl.'s Mot. TRO ¶ 50.) In support of the instant motion, Plaintiff now argues that "the issue is whether Defendants' June 26, 2020 issuance of an expedited discharge determination and June 29, 2020 issuance of an expedited discharge reconsideration constituted 'state action[s]' for purposes of the Fifth Amendment Due Process Clause." (Pl.'s Reconsid. Mem. 3.) Plaintiff's current position is as flawed as the first. That is, Defendants' months-old decisions cannot operate as a basis to find an immediate threat to Plaintiff at this juncture.

In any event, Plaintiff's initial motion for a temporary restraining order also sought to enjoin Defendants from affirming the SNF's September 2, 2020 decision to discharge her to at-home care. (Pl.'s Mot. TRO at 13.) At oral argument, Plaintiff clarified that ultimately what she seeks is for Livanta to be required to review her entire medical record (presumably to include issues regarding her medical conditions that require neuro-muscular rehabilitation), and for the Court to "signal to Livanta that this has to be taken seriously." (9/18/20 Hearing Tr. at 20:2-7.) However, and most notably, at the time of filing the TRO, on September 11, 2020, Plaintiff had not yet appealed the SNF's discharge decision to Defendants. Indeed, Plaintiff's appeal to Livanta was not filed until six days later on September 17, 2020. (Pl.'s Aff. ¶ 12.) On September 18, 2020, Livanta affirmed the SNF's decision. (Id. ¶ 13.)

II. Applicable Standard of Review is for a Mandatory Injunction

Preliminary injunctive relief "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Moore v. Consol. Edison Co. of N.Y., Inc., 409 F.3d 506, 510 (2d Cir. 2005) (internal quotation marks and citation omitted). "It is well established that in this Circuit the standard for an entry of a TRO is the same as for a preliminary injunction." Andino v. Fischer, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008). A movant must demonstrate: "1) irreparable harm absent injunctive relief; 2) either a likelihood of success on the merits, or a serious question going to the merits to make

them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and 3) that the public's interest weighs in favor of granting an injunction." Metro. Taxicab Bd. of Trade v. City of New York, 615 F.3d 152, 156 (2d Cir. 2010) (internal citations omitted).

Importantly, there are two types of injunctive relief—prohibitory or mandatory. N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc., 883 F.3d 32, 36 (2d Cir. 2018). Prohibitory injunctions maintain the status quo pending resolution of the case; mandatory injunctions alter it. Id. Because mandatory injunctions disrupt the status quo, a party seeking one must meet a heightened legal standard by showing "a clear or substantial likelihood of success on the merits." Id. at 37. To determine the status quo, the Court must determine "the last actual, peaceable uncontested status which preceded the pending controversy." Id.

As of the time of the filing of the motion for reconsideration, the status quo was that Plaintiff was set to be discharged from the SNF and Plaintiff sought to enjoin Defendants from affirming the SNF's September 2, 2020 decision to discharge Plaintiff to at-home care. Accordingly, Plaintiff's requested relief disrupts the status quo.[3] And as such, Plaintiff must

[3] The status quo merits further explanation. The Court has already detailed the procedural history in this case at length, but recounts the relevant events here. Plaintiff filed her motion for reconsideration of the Court's denial of the TRO on September 17, 2020. (ECF No. 9.) Plaintiff had not yet been discharged at the time of her filing of the motion for reconsideration, nor had she requested an appeal of that determination. In effect, she was requesting the Court bar any future theoretical adverse decision by Livanta in a theoretical appeal. Only after filing her motion for reconsideration, did Plaintiff appeal the SNF's discharge order to Livanta. (Pl.'s Aff. ¶ 12.) Livanta denied Plaintiff's appeal of the SNF's discharge decision on September 18, 2020. (Id. ¶ 13.) Moreover, at the time Plaintiff filed her motion for reconsideration, the Court was divested of jurisdiction over this case because Plaintiff had filed an appeal of the Court's denial of the TRO in the Second Circuit on September 15, 2020. (ECF No. 8.) The USCA Mandate reflecting that Plaintiff withdrew her Second Circuit appeal was issued on September 18, 2020, but was not docketed until September 21, 2020. (ECF No. 11.) At that point, the Court regained jurisdiction. Plaintiff has not provided the Court with an update indicating the current status of her discharge or whether she moved for reconsideration of Livanta's September 18, 2020 decision on the appeal. Nevertheless, the applicable standard would remain unchanged under either scenario. The status quo is either a planned discharge or an actual discharge from the SNF. Any relief Plaintiff could obtain at this point would require a disruption of the status quo.

meet a heightened legal standard for a mandatory injunction by showing a clear or substantial likelihood of success on the merits.

III. No Clear or Substantial Likelihood of Success on the Merits

As discussed above, Plaintiff's complaint as drafted brought a claim under § 1983 against Defendants Livanta and Stein alleging that they acted under the color of New York state law to deprive Plaintiff of her due process rights. Relying on Blum and its progeny, the Court denied her motion for a TRO as she failed to demonstrate state action under § 1983. (Mem & Order 3-4.) In her motion for reconsideration, Plaintiff concedes there is no state action under § 1983. (Pl.'s Reconsid. Mem. 1.) Nonetheless, Plaintiff presses that denial of her motion for a temporary restraining order for want of state action is in error because Defendants' actions are attributable to the federal government for purposes of a Fifth Amendment due process claim, for the same reasons the Second Circuit found state action in Kraemer v. Heckler, 737 F.2d 214 (2d Cir. 1984).[4] (Id. 3-4.) Plaintiff is wrong.

"To state a [Fifth Amendment] Due Process claim, a plaintiff must show that: (1) state action (2) deprived him or her of liberty or property (3) without due process of law." Barrows v. Burwell, 777 F.3d 106, 113 (2d Cir. 2015). A due process claim cannot lie against a private actor unless the allegedly unconstitutional conduct is "fairly attributable to the State." Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50, (1999). In other words, the due process clause provides "no shield against merely private conduct, however discriminatory or wrongful." Blum, 457 U.S. at 1002. Of particular relevance here, the standard a court must apply to determine whether a plaintiff has met the statutory requirement of action "under color of state

[4] In arguing for reconsideration, Plaintiff only argues there is state action with respect to Livanta's June 2020 decisions to affirm the Hospital's discharge determination. (Pl.'s Reconsid. Mem. 2-4.) The Court will construe these arguments as applying to Defendants' affirmance of the SNF's discharge decision as well.

law" pursuant to § 1983 or the "state action" requirement of a due process claim is the same. See Alexander v. Azar, No. 3:11-CV-1703 (MPS), 2020 WL 1430089, at *43 (D. Conn. Mar. 24, 2020) (appeal filed May 22, 2020) (citing § 1983 caselaw in describing the state action requirement for a Fifth Amendment due process claim against the Secretary of Health and Human Services for deprivation of Medicare benefits); see also Beverley v. Douglas, 591 F. Supp. 1321, 1329 (S.D.N.Y. 1984) (summarizing the relationship between the Fifth Amendment, Fourteenth Amendment and § 1983 and collecting cases for the proposition that the same standard is used to determine whether conduct is fairly attributable to the state under § 1983 or the federal government under Fifth Amendment's due process clause).

In determining whether there was state action here, the Court will undertake an analytical approach similar to the one taken in Alexander, 2020 WL 1430089, at *43-48, which relied heavily on three key precedential cases – Blum, Kraemer and Catanzano v. Dowling, 60 F.3d 114 (2d Cir. 1995). In Alexander, the court noted that these key precedential cases were decided well before Sybalski v. Indep. Grp. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008), in which the Second Circuit articulated the compulsion, joint action, and public function state action tests. 2020 WL 1430089, at *44. And, because the relevant precedent dealt with "closely analogous" issues, the Alexander court deemed it prudent to apply those cases to the facts before it, rather than move mechanically through each of Sybalski tests. Id. This Court agrees with the Alexander court's approach, as its analysis reflected the principles underpinning the Sybalski tests, while at the same time allowed for the benefit of applying the Supreme Court and Second Circuit's state action analysis to facts particularly analogous to the case at bar.

In Blum, the relevant issue was whether there was state action under the Fourteenth Amendment with respect to health care facilities' decisions to transfer patients to lower levels of

care. 457 U.S. at 1012 (detailing holding applied to "nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care"). Ultimately, the Supreme Court found that the state is not responsible for discharge decisions by nursing homes and attending physicians in connection with the Medicaid program so as to activate the procedural requirements of the Fourteenth Amendment. Id. Significantly, the Court emphasized that in that case the plaintiffs were not challenging the adjustment of benefits, but "the discharge to lower levels of care without adequate notice or hearings." Id. at 1005. Moreover, the Court rejected arguments that it could find state action on the basis that any discharge must comply with the Medicaid regulatory scheme and must be reported to New York State. Id. at 1007-1010. Rather, Blum found that discharge decisions made by physicians and nursing home administrators turned on "medical judgments made by private parties according to professional standards that are not established by the State." Id. at 1008.

Kraemer, decided two years later by the Second Circuit, addressed a question left open by Blum—whether a Utilization Review Committee's ("URC") determination that an admission or a continued stay in a health care facility was not a "medical necessity" under Medicare regulations constituted state action for purposes of a due process violation. 737 F.2d at 214, 216. Importantly, the Kraemer court emphasized that Plaintiffs were challenging "the adjustment of benefits," not simply the discharge determination to lower level of care, as had been the case in Blum. Id. at 220.

In evaluating whether URC decisions constituted state action, the court in Kraemer first defined the role of an URC. As explained by the court, URCs are required by statute to provide for periodic review of the "medical necessity of the services ... [to promote] the most efficient use of available health facilities and services...." Id. at 216. A URC decision that services are no

longer medically necessary operates effectively to terminate Medicare coverage, as Medicare coverage is terminated within 72 hours from the date the provider receives notice of an adverse URC decision. Id. The Kraemer court observed that such URC determinations are "governed largely by statute, regulation, [] manuals, and transmittal letters." Id. at 220. Furthermore, physician-members of URCs are required to act "in accordance with guidelines established by the Secretary" to "select or develop written criteria and standards for reviewing the necessity for admissions and continued stays and conducting medical care evaluation studies." Id. Finally, the court noted that a decision by a URC "does not constitute a discharge order and does not preclude the beneficiary from remaining in the facility or seeking alternative payment." Id. at 216. Against this backdrop, the court concluded that "there is a far stronger basis for finding state action in the decisions of URCs which evaluate entitlement to Medicare benefits than in the decisions of attending physicians and nursing home administrators." Id. at 219.

Somehow, Plaintiff reads Kraemer to stand for the proposition that where any decision relates to care covered by Medicare, it implicates state action while, as set out in Blum, decisions related to care covered by Medicaid do not. (9/18/20 Hearing Tr. at 13:22-14:10.) Plaintiff misapprehends the Kraemer decision.

The import of Blum and Kraemer may be clearer in view of their application. For example, in Catanzano v. Dowling, the Second Circuit evaluated whether certified home health care agencies ("CHHAs") were state actors for the purposes of a due process claim. 60 F.3d 114 (2d Cir. 1995). Under the Medicaid scheme at issue there, CHHAs performed a "fiscal assessment" of home health care services that were prescribed by a patient's physician. Id. CHHAs were required to deny treatment prescribed by a patient's physician if the CHHA concluded that the prescribed home health care was not medically necessary and there were ways

to deliver the care that were less expensive than home care. Id. at 115-116 (detailing the "Medical Necessity and Safety Step" and the "Economies Step" of CHHAs' process, which were at issue on appeal). The Second Circuit found that these decisions constituted state action for purposes of a due process claim. Id. at 120. Significantly, the Second Circuit noted that, as in Kraemer, and unlike in Blum, the decisions made by the CHHAs were not "purely medical judgments made according to professional standards," but involved the application of regulatory rules. Id. at 119. The Catanzano court also noted that CHHAs' decisions were influenced by the State's efforts to control costs, distinguishing them from the more independent decisions at issue in Blum. Id. Catanzano concluded that "the State has exercised coercive power [and] has provided such significant encouragement" that CHHA determinations could be deemed those of the state for purposes of a due process claim. Id. at 220.

Alexander v. Azar, decided more recently, provides a useful application of Blum, Kraemer and Catanzano. 2020 WL 1430089. There, the court confronted a situation involving individuals who were admitted as inpatients to a hospital based on determinations made by treating physician. Id. at *1, 45. However, during their stay, a URC reviewed the physicians' decisions and determined that, notwithstanding the physicians' findings, the inpatients did not qualify for Medicare Part A coverage. Id. at *1, 45. The patients' status was, therefore, changed from "inpatient" to "observation" or "outpatient." Id. Trial evidence showed that such changes were caused by the URC's staff applying "mandatory, nationwide standards" set by the Center for Medicaid and Medicare Services ("CMS"), in response to "significant pressure" from the Secretary. Id. After a searching analysis of Blum, Kraemer, and Catanzano, the Alexander court found that the URC determinations were "not purely medical judgments made according to professional standards, but involve[d] the application of a standard prescribed by CMS." Id. at

*47. Moreover, the court observed that while "this standard leaves some room for professional judgment, it is designed to closely circumscribe this judgment, and CMS expects it to be applied with a high degree of consistency." Id. Accordingly, the Alexander court found that "when a hospital URC causes a patient's status to be changed to observation, CMS has provided such significant encouragement that the URC's conduct is fairly attributable to the state[.]" Id. at *48.

Here, the Court generously construes Plaintiff's arguments to suggest a theory that the appeals process of the SNF's discharge decision—which is handled by Livanta—is analogous to a URC's decision to effectively withdraw Medicare coverage. However, the Court is not persuaded that Plaintiff has demonstrated a clear or substantial likelihood that this theory is viable. Here, there is a medical determination, made by the SNF, that Plaintiff is ready for discharge. In that way, the gravamen of the complaint is a "medical judgment made by private parties according to professional standards that are not established by the State." Blum, 457 U.S. at 1008. That Livanta manages any appeal of a facility's medical decision to discharge, and must operate in accordance with Medicare regulations, does not transform Defendants into state actors. See id. at 1004 ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State[.] . . . The complaining party must also show that there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." (internal quotations and citations omitted)).

Plaintiff, while she argues otherwise, is not challenging the adjustment of her benefits, like the plaintiffs in Kraemer, Catanzano or Alexander as she has included no allegations in her complaint or subsequent filings that support a finding that Defendants are making determination about her Medicare coverage. See, e.g., Kraemer, 737 F.2d at 219 ("It appears that there is a far

stronger basis for finding state action in the decisions of URCs which evaluate entitlement to Medicare benefits than in the decisions of attending physicians and nursing home administrators."). Likewise, there are no plausible allegations that any state actor is influencing Livanta's decision. See Catanzano, 60 F.3d at 119; Alexander, 2020 WL 1430089 at *1, 45. Furthermore, in stark contrast to Kraemer, Catanzano or Alexander, where medical determinations by physicians were overruled or changed, here, Livanta is affirming the medical decision of the SNF. See, e.g., Catanzano, 60 F.3d at 115-116 (discussing that CHHAs denied home health care treatment prescribed by a physician if certain criteria were met). That Defendants' decision to affirm a discharge from the SNF means "that the [federal government] responds to such actions by adjusting benefits does not render it responsible for those actions." Blum, 457 U.S. at 1005 (emphasis in the original). As such, as this Court previously held, there is not a clear or substantial likelihood that the Court would find state action, a requisite for any due process claim.[5]

[5] Even if Plaintiff could show state action, she has not shown a clear or substantial likelihood she would succeed on her due process claim. Plaintiff argues that Defendants have failed to comply with Medicare regulations that protect her due process rights. (See, e.g., Pl.'s Aff. ¶ 14.) But her allegations do not support such a finding. Plaintiff's views were solicited during Livanta's appeal process as required by 42 C.F.R. § 405.1206(d)(4), as she submitted a twelve page letter in support of her appeal, which included medical evidence. (Pl.'s Aff., Ex 1, ECF No. 10-1.) She was apprised of Livanta's decision. (Pl.'s Aff. ¶ 13.) While she alleges that the appeal determination did not convey that Defendants had reviewed all of Plaintiff's medical records, (Pl.'s Aff. ¶¶ 16-17), she did not identify any regulation that Defendants violated in failing to issue a fulsome explanation for their determination, nor any caselaw that would support a finding that such an omission constitutes a due process violation. By way of comparison, Kraemer and Alexander found that URC determinations violated plaintiffs' due process rights because they included no procedural safeguards. See Kraemer, 737 F.2d. at 222 ("Neither the patient nor her or his family [were] notified [of the URC's decision], much less given the opportunity to submit evidence or arguments."); Alexander, 2020 WL 1430089, at *50 (D. Conn. Mar. 24, 2020) ("As an initial matter, at present, the Plaintiffs are currently entitled to no procedural safeguards whatsoever."). To be sure, there may be a situation in which some procedural protections were afforded, but a due process claim could lie. This is not that case. At bottom, the thrust of Plaintiff's complaint appears to be that she disagrees with the outcome of Livanta's appeal process. As such, she has failed to meet her burden of persuasion that there a clear and substantial likelihood of success on the merits of a due process claim.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for reconsideration of the Court's denial of a temporary restraining order is DENIED.

SO ORDERED.

Dated: Brooklyn, New York
September 24, 2020

/s/ LDH
LASHANN DEARCY HALL
United States District Judge