



# Department of Health

ANDREW M. CUOMO  
Governor

HOWARD A. ZUCKER, M.D., J.D.  
Acting Commissioner

SALLY DRESLIN, M.S., R.N.  
Executive Deputy Commissioner

January 11, 2017

## CERTIFIED MAIL/RETURN RECEIPT

Joanne Eisen, Director of SS  
Beach Gardens Rehabilitation &  
Nursing Center  
17-11 Brookhaven Avenue  
Far Rockaway, New York 11691

[REDACTED], Resident  
c/o Beach Gardens Rehabilitation &  
Nursing Center  
17-11 Brookhaven Avenue  
Far Rockaway, New York 11691

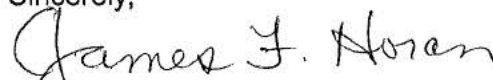
**RE: In the Matter of [REDACTED] [REDACTED] – Discharge Appeal**

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:cah  
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

**Beach Gardens Rehab & Nursing Center,**  
Respondent,

to discharge him from a residential health care facility.

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**DECISION**

**COPY**

**Hearing Before:**

Ann H. Gayle  
Administrative Law Judge

**Held at:**

Beach Gardens Rehab & Nursing Center  
17-11 Brookhaven Avenue  
Far Rockaway, New York 11691

**Hearing Date:**

December 28, 2016  
The record closed on December 30, 2016

**Parties:**

Beach Gardens Rehab & Nursing Center  
By: Joanne Eisen, Director of Social Work

██████████  
*Pro Se*

Pursuant to Public Health Law (“PHL”) §2801 and Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“10 NYCRR”) §415.2(k), a residential health care facility or nursing home such as Beach Gardens Rehab & Nursing Center (“Respondent” or “Facility”) 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.

Transfer and discharge rights of nursing home residents are set forth at 10 NYCRR §415.3(h). Respondent determined to discharge █ (“Appellant” or “Resident”) from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(h)(1)(i)(a)(2) which provides, in pertinent part:

- (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.

Appellant appealed the discharge determination to the New York State Department of Health, and a hearing on that appeal was held. Pursuant to 10 NYCRR §415.3(h)(2)(iii)(b), the Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate.

This hearing was digitally recorded and transferred to a compact disc (“CD”); the CD has become part of the record. Appellant testified on his own behalf. Joanne Eisen—Director of Social Work, Michael Biderman—Administrator, and David Wendt—Social Worker testified for Respondent. Juliana Nunez—Ombudsman participated, at Appellant’s request, by telephone.

The following documents were accepted into evidence by the Administrative Law Judge (“ALJ”) as ALJ and Facility Exhibits:

ALJ:

- I: Notice of Hearing with the Facility's Discharge Notice attached

Facility:

- 1: Progress notes – 6 pages
- 2: Resident Out on Pass documents: daily █/2016, and █/2016
- 3: █/16 fax cover sheet; █/16 summary; and █/16 physician letter
- 3: Guide to Senior Living and Care booklet

Appellant was given the opportunity but did not offer any documents into evidence.

**ISSUE**

Has Beach Gardens Rehab & Nursing Center established that the transfer is necessary and the discharge plan is appropriate?

**FINDINGS OF FACT**

Citations in parentheses refer to testimony (“T”) of witnesses and exhibits (“Ex”) found persuasive in arriving at a particular finding. Any conflicting evidence was considered and rejected in favor of the cited evidence.

1. Respondent, Beach Gardens Rehab & Nursing Center, is a residential health care facility located in Far Rockaway, New York. (Ex I)
2. Appellant, █, age █ was admitted to the Facility on █ 2012 for short-term skilled nursing services. Appellant, who is independent in all his ADLs (activities of daily living), currently receives no skilled care at the Facility. (Ex 3; T Biderman, Eisen, Appellant)
3. By notice dated █, 2016, Respondent advised Appellant that it had determined to discharge him because he has no skilled needs. (Ex I; T Biderman)
4. Respondent's discharge plan is to transfer Appellant to the █ (“Shelter”) located at █. The Shelter has resources to assist Appellant in locating suitable housing. (Ex I; T Eisen, Wendt)

5. It is the professional opinion of Appellant's caregivers at the Facility, including the Facility's physician, that Appellant is completely independent with all his ADLs, and that discharge to the community, including the Shelter, is appropriate for Appellant. Appellant schedules all his medical appointments in the community and ambulates without any assistive devices. He is able to travel independently by foot and by public transportation, and goes out unescorted for at least a few hours to more than twelve hours daily. (Ex 1; Ex 2; Ex 3; T Biderman, Eisen, Appellant)
6. Appellant has remained at the Facility pending the outcome of this proceeding.

#### DISCUSSION

Respondent's proposal to discharge Appellant is based on his complete independence. Appellant dresses, grooms, and feeds himself, and he regularly leaves the Facility, unescorted, for medical appointments and to shop and go to libraries and other destinations in Queens and Manhattan. Appellant acknowledged that he does not presently require or receive skilled care but he challenges Respondent's determination to discharge him now because he believes his medical condition has not really changed in the four years he has been in the Facility. Appellant contends that because his current condition is similar to his condition ██████ years ago upon admission, he should be able to remain in the Facility.

Although Appellant required skilled care upon admission in 2012, it has been several years since he has required such care, and he does not presently require or receive skilled care or services at the Facility. Why Respondent is seeking discharge now instead of earlier in Appellant's ██████-year stay at the Facility is not an issue for this hearing.

The testimony presented at the hearing indicated that Appellant was approved for SSI approximately one year ago, and although Appellant would not offer into evidence the

documents from which he was reading, he testified that his current benefit for his “total disability” related to a finding of “██████████ out of ██████████ in [his] ██████████ with ██████████” (“condition”) is \$██████████ per month, and that amount would increase if/when he is discharged from the Facility to the community. Appellant explained that this condition does not require assistive devices such as a ██████████ or ██████████ and although the condition can be addressed with ██████████ Appellant said he is able to travel and function without wearing the ██████████ he received from the Facility. Appellant’s condition and approval for SSI disability benefits do not render him in need of continued skilled care; nor do they rule out the Shelter as a possible discharge outlet.

The evidence clearly established that Appellant leaves the Facility unescorted on a daily basis. Respondent claims that Appellant is away from the Facility as much as 16 hours when he travels to Manhattan and 4 hours when he travels locally. Appellant admitted that he goes out for at least 13 hours, from 8:30 a.m. to 9:30 p.m., approximately 2 days each week when he travels to the Science, Industry and Business Library (“SIBL”) or elsewhere in Manhattan<sup>1</sup> and that he goes out at least 1½ to 2 hours when he goes to the local library and stores in Far Rockaway approximately 5 days each week<sup>2</sup>. Respondent testified that Appellant eats breakfast at the Facility and then eats lunch and dinner out on the days he travels to Manhattan, and Appellant testified that he eats breakfast at the Facility but he does not eat meals away from the Facility on those days because the staff saves his dinner until he returns.

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<sup>1</sup> Mr. Biderman testified that Appellant leaves the Facility at 7 a.m. and returns at 11 p.m. (16 hours) when he goes to Manhattan; the Out on Pass documents (Exhibit 2) for December 1, 5, 7, 8, 13, 20, 21, 22, and 27, 2016 showed departure times from 7:15 to 9:45 a.m. with return times of 10:30 p.m. (approximately 12-15 hours).

<sup>2</sup> Mr. Biderman testified that Appellant leaves the Facility at 1 p.m. and returns at 5 p.m. (4 hours) when he travels to local establishments. The Out on Pass documents (Exhibit 2) for the remaining December 2016 dates showed departure times from 12:10 to 1:00 p.m. with return times of 4 to 5 p.m. (approximately 3 to 4 hours).

Whether Appellant is out 13 hours or 16 hours twice weekly and whether he eats meals while he's out or when he returns on those days, and whether he is out a few hours or 4 hours the remainder of the week, it is abundantly clear that Appellant is extremely self-sufficient and absolutely does not require continued placement in a skilled facility. The record clearly shows that Appellant currently has no skilled needs and that discharge from the Facility is warranted at this time.

The discharge location identified by Respondent as a last resort is the Shelter. Appellant testified that he does not wish to be discharged to the Shelter. He believes it is not appropriate to go directly from a skilled care facility (which provides such a high level of care, care that allegedly costs \$██████/month) to the Shelter, and that there must be an intermediate level of care between the two. Appellant claims that Paula Wolff from the Long Term Care Ombudsman's office, with whom he spoke the day prior to the hearing, informed him that he is "not supposed to be discharged to the ██████ Shelter ... they can't do that; that's not allowed." While Ms. Nunez (the representative from the Ombudsman's office who participated in the hearing by telephone) confirmed that Appellant had a conversation with Ms. Wolff the day prior to the hearing, Ms. Nunez stated that Ms. Wolff is not part of the Ombudsman program.

There are discharge options that provide the intermediary level of care Appellant claims he needs. Joanne Eisen (Director of Social Work) and other social workers have attempted to work with Appellant on discharge planning for more than a year, but Appellant has not cooperated. He goes out on pass almost daily, and when he is in the Facility, he does not make himself available to staff when they try to work with him on discharge planning. Despite Appellant's lack of cooperation with discharge planning, Ms. Eisen has provided Appellant with information on Adult Homes, Assisted Living facilities, and the Shelter. Appellant rejected the

Adult Homes and Assisted Living facilities in the Rockaways because he does not wish to reside in the ██████████ (except to remain at the Facility, which is in the ██████████ and the cost of the ██████████ facility which Ms. Eisen identified was, according to Appellant, beyond his means. Appellant testified that he had informed Ms. Eisen that he would like to live in ██████████ or in ██████████ locations that are ██████████ of the ██████████ and closer to ██████████

During the hearing, the Parties agreed to work with each other to identify housing options for Appellant that are in or close to ██████████ and an arrangement was made for Respondent to provide Appellant with a realistic list of such options<sup>4</sup>. A conference call was scheduled for December 30, 2016 at 10:00 a.m. for the Parties to provide the ALJ with an update. The agreed time of the call was selected so that Appellant could go out on pass after the call. Appellant and Respondent agreed to take the call on a speaker phone in a conference room, and Appellant requested that Ms. Juliana Nunez from the Ombudsman's office participate in the conference call<sup>5</sup>.

The call was placed at 10 a.m. on December 30; present on the call were Mr. Biderman, Ms. Eisen, Ms. Nunez, and the ALJ. Ms. Eisen and Mr. Biderman reported that although their records indicated that Appellant had not yet sought an Out on Pass for that day, they could not find him anywhere in the Facility. They also reported that Appellant was provided, on December 28, with the previously discussed list of housing options in or near ██████████ Ms. Nunez then asked if Respondent would continue to make efforts to work with Appellant on finding and securing housing options other than the Shelter, and they indicated that indeed they would.

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<sup>3</sup> Appellant challenged Ms. Eisen's contention that he told her he would only consider living in ██████████

<sup>4</sup> Ms. Eisen had previously provided Appellant a list of housing options throughout the entire State of New York, which included locations as far away as ██████████

<sup>5</sup> Appellant did not provide an alternate phone number due to problems he was having with his cell phone.



I find that Respondent has proven that Appellant does not require skilled care. He travels from the Facility on foot and by navigating the NYC public transportation system to manage his medical care and other business in the community, and he receives no skilled care at the Facility.

I further find that Respondent has proven that the Shelter is an appropriate discharge location for Appellant. Appellant has not cooperated with Respondent's efforts to find other suitable housing for him. Although Appellant did not participate in the December 30, 2016 conference call, or contact the ALJ's office on or subsequent to that date to explain his absence from the call or for any other reason, Respondent indicated that it would continue to make efforts to work with Appellant to seek permanent housing in the community.

#### **CONCLUSION**

I find that Respondent has proven that Appellant is not currently in need of skilled care, and that the Shelter, which is available and has resources to assist Appellant in securing more permanent housing, is an appropriate discharge location.

#### **DECISION**

I find that the transfer is necessary and the discharge plan is appropriate.

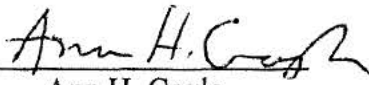
The appeal by Appellant is therefore DENIED.

Respondent—Beach Gardens Rehab & Nursing Center is authorized to discharge Appellant in accordance with the █ 2016 discharge notice, but Appellant may remain at the Facility until █, 2017 to continue (independently or with Respondent's assistance) to explore and possibly secure discharge to an adult home, assisted living facility, or other housing. Respondent may not discharge Appellant until on or after █, 2017. Appellant, however, may leave the Facility at any time prior to █, 2017.

█ / Beach Gardens

This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

Dated: New York, New York  
January 9, 2017

  
Ann H. Gayle  
Administrative Law Judge

TO: █  
c/o Beach Gardens Rehab & Nursing Center  
17-11 Brookhaven Avenue  
Far Rockaway, New York 11691

Joanne Eisen, Director of Social Work  
Beach Gardens Rehab & Nursing Center  
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