



**Department  
of Health**

ANDREW M. CUOMO  
Governor

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

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

November 15, 2017

**CERTIFIED MAIL/RETURN RECEIPT**

Liana Rutenberg, LNHA  
Fordham Nursing & Rehab Center  
2678 Kingsbridge Terrace  
Bronx, New York 10463

[REDACTED], Resident  
c/o Fordham Nursing & Rehab Center  
2678 Kingsbridge Terrace  
Bronx, New York 10463

**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: ISM  
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH

In the Matter of

█/Fordham Nursing & Rehabilitation Center

Administrative Law Judge's Decision

Appeal from a Nursing Home Resident Involuntary Discharge pursuant to Title 10 (Health) of the Official Codes, Rules and Regulations of the State of New York (NYCRR) §415.3(h)

Before:

Administrative Law Judge (ALJ) James F. Horan

For Fordham Center for  
Rehabilitation (Facility):

Liana Rutenberg-Diaz, Administrator

For Resident █ (Appellant):

*Pro Se*

The Facility in Bronx County proposes to discharge the Appellant nursing home resident involuntarily to the █ Shelter █ (Shelter █). The Facility states that grounds exist for the discharge because the Appellant's condition has improved sufficiently so that he no longer requires care in a nursing home. The Appellant requested that he remain in the Facility until he underwent surgery on his █ and argued that the Shelter System would be an inappropriate discharge location. After considering the record, the ALJ ordered that the Appellant remain in the Facility until he received the surgery on his █. Now, following the surgery, the ALJ finds that the Appellant's condition has improved so that he no longer requires care in a skilled nursing facility and that the Facility has proposed an appropriate discharge to the Shelter System.

## I. Background

Under Title 10 (Health) of the Official Codes, Rules and Regulations of the State of New York (NYCRR) § 415.3(h), a nursing home resident holds certain rights concerning transfer or discharge. Title 10 NYCRR § 415.3 (h)(1)(i)(a)(2) allows involuntary discharge if a resident's health has improved sufficiently so that the resident no longer requires the services that the facility provides. Under the standards at 10 NYCRR § 415.2(k), a nursing home provides nursing and professional services twenty-four hours per day for patients who require those services, but do not require services in a general hospital. In effect, this proceeding acts as a stay on any discharge until the decision on the discharge appeal. If a decision approves the discharge grounds and discharge plan, the proceeding ends with the decision and the discharge may proceed pursuant to the discharge plan.

The Facility provided a Discharge Notice [ALJ Exhibit I, Notice of Hearing] to the Appellant on [REDACTED] 2017. As grounds for the discharge, the Discharge Notice stated that the Appellant no longer requires services in a skilled nursing facility and the Notice identified the Shelter System's main intake shelter at [REDACTED] [REDACTED] [REDACTED] as the discharge location. The Appellant then requested the hearing that took place at the Facility in the Bronx on September 7 and September 26, 2017. The ALJ conducted the hearing pursuant to New York State Administrative Procedure Act (SAPA) Articles 3-5 (McKinney Supp. 2017) and Title 10 NYCRR Part 415.

At the hearing, the Appellant spoke on his own behalf. The Facility presented as witnesses Medical Director Amir Saxena, M.D., Social Worker Michael Tise, Physical Therapist Purnima Bathla, Occupational Therapist Marie Anne Alva and Wound Care Nurse Liezl Lim,

R.N. The ALJ received the Notice of Hearing into the record as ALJ Exhibit I and received an October 10, 2017 letter from the ALJ to the parties into the record as ALJ Exhibit II. The Appellant offered ten documents that the ALJ received into the record:

- A Basics Clinic Record,
- B Fordham Consultation,
- C Physician Consultation Foot,
- D Surgeon Appointment for [REDACTED] 2017,
- E Medical Appointments,
- F Diagnoses,
- G Letter from Essen Health,
- H Chart Review Print,
- I Post-operative Discharge Instruction,
- J Consultation Report Dr. Jules.

The Facility offered 10 exhibits into evidence which the ALJ received into the record:

- 1 Discharge Notice,
- 2 Discharge Summary,
- 3 Physical Therapy Discharge Summary,
- 4 Occupational Therapy Discharge Summary,
- 5 Physician Progress Note [REDACTED]/17,
- 6 E-Mail Update [REDACTED]/17,
- 7 Progress Notes [REDACTED]/17,
- 8 Consultation [REDACTED] 17,
- 9 Consultation Report [REDACTED]/17,
- 10 Progress Notes [REDACTED]/17.

The record also included a digital audio recording from the hearing on two Compact Discs (CD).

References to testimony from the recording will indicate the time in the recording at which the testimony occurs (e.g. "CDI at 12:40" means that the testimony occurs on the hearing recording for the first hearing day at 12 minutes and 40 seconds into that recording).

Under the hearing procedures at §415.3(h)(2)(ii), the Facility bears the burden to prove a discharge necessary and appropriate. Under SAPA § 306(1), a decision in an administrative proceeding must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or fact; less

than preponderant evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision, Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 (3<sup>rd</sup> Dept. 1984), appeal dismissed 63 N.Y.2d 649.

## II. Findings of Fact

The references in brackets following the findings reflect testimony from the hearing recording or exhibits in evidence [Ex] on which the ALJ relied in making the findings. If contradictory information appears elsewhere in the record, the ALJ considered that information and rejected it.

1. The [REDACTED]-year-old Appellant entered the Facility on [REDACTED], 2014 for rehabilitation following a [REDACTED] [Ex 2].
2. The Appellant's diagnoses include [REDACTED], with a history significant for [REDACTED] [Ex 5].
3. The Appellant has completed physical therapy and can ambulate with a [REDACTED] walker [CDI at 17:32].
4. The Appellant has completed occupational therapy and can wash, bath and feed himself [CDII at 19:45].
5. The Appellant suffers from a [REDACTED] on the [REDACTED] of the [REDACTED], which requires dressing [Ex 5].
6. The Appellant has received training in wound care and is capable to perform his own wound care dressing [CDI 22:50, 25:09].

7. The Appellant has received education on wound care and self-medication [CDII 48:03, 48:45].
8. The Resident is independent and requires no skilled nursing assistance with the activities of daily living [Ex 5].
9. Facility physician George Ramalanjaona, M.D. has determined that the Appellant possesses the capacity to make medical decisions, make medical appointments and follow up with medical care [Ex 5].
10. Dr. Ramalanjaona determined further that the Appellant is safe for discharge to the community [Ex 5].
11. The Appellant's age and lack of income made the Appellant unacceptable for placement in an assisted living facility [CDI 8:19].
12. The Appellant underwent [REDACTED] surgery on [REDACTED], 2017 [Ex 10].
13. The Progress Notes following surgery recommended that the Appellant [REDACTED] [REDACTED] and avoid prolonged bed rest [Ex 10].
14. Nursing Progress notes for [REDACTED] 2017 indicated that the Appellant was stable and ambulating without complaint [Ex 10].

### III. Conclusions

Under 10 NYCRR § 415.3(h)(1)(i)(a)(2) a skilled nursing facility may discharge a resident involuntarily if the resident's health has improved sufficiently so the resident no longer needs the facility's services. The evidence demonstrates that the Appellant has completed rehabilitation and no longer needs skilled nursing care. The testimony by the Facility staff and the

documentation demonstrates that the Appellant was independent and able to function in the community and was appropriate for discharge back to the Shelter System.

The Appellant opposed the discharge prior to the time of his [REDACTED] 2017 surgery. The Appellant submitted a written statement from his surgeon, Dr. Jules of the [REDACTED] New York, concerning the proposed surgery and the need for proper post-operative care. The ALJ initially mislabeled that statement as Exhibit H. It should be Exhibit J. With the statement from Exhibit J as the basis, the ALJ issued an interim Order that the Appellant remain in the Facility for the surgery [ALJ Ex II]. The Facility's Post-Operative Progress Notes indicated that the Appellant was functioning well without complaint following the surgery, with a recommendation to avoid prolonged bed rest [Ex 10]. The Appellant produced no documentation following the surgery that indicated that the Appellant needed any Post-Operative rehabilitation or skilled nursing care. The Appellant also indicated at hearing that he had no intention to remain in the Facility forever, but rather requested to remain until he had the additional surgery. The Appellant has now undergone the surgery, so the ALJ concludes that the Appellant no longer needs care in a skilled nursing Facility. The grounds exist, therefore, for the Appellant's involuntary discharge.

The Facility's Social Worker, Mr. Tice, testified that there have been on-going efforts to find a post-discharge placement for the Appellant with no success. The Facility attempted to find placement in an assisted living facility, but the Appellant's age and lack of income resulted in the Appellant's rejection by assisted living. The hearing evidence indicated that the Appellant can continue his search for an independent living placement from the Shelter System. The ALJ finds the proposed discharge location appropriate.

ORDER

NOW; after considering the request for Hearing, the testimony and the documents in evidence, the ALJ issues the following Order:

1. The ALJ affirms the Facility's determination that grounds exist under Title 10 NYCRR § 415.3 (h)(1)(i)(a)(2) for the Appellant's involuntary discharge.
2. The ALJ finds the proposed discharge plan appropriate.
3. The discharge may proceed as soon as the Shelter System indicates that it can accept the Appellant.

Dated: Menands, New York  
November 15, 2017



James F. Horan  
Administrative Law Judge



To:

Diana Rutenberg-Diaz, Administrator  
Fordham Nursing & Rehabilitation  
2678 Kingsbridge Terrace  
Bronx, NY 10463

Resident ■■■  
c/o Fordham Nursing & Rehabilitation  
2678 Kingsbridge Terrace  
Bronx, NY 10463