



# Department of Health

ANDREW M. CUOMO  
Governor

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

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

March 19, 2018

## CERTIFIED MAIL/RETURN RECEIPT

Anne Weisbrod, Director of Social Services  
The Hebrew Home for the Aged at Riverdale  
5901 Palisade Avenue  
Riverdale, New York 10471

[REDACTED]  
c/o The Hebrew Home for the Aged at Riverdale  
5901 Palisade Avenue  
Riverdale, New York 10471

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* /EAC

James F. Horan  
Chief Administrative Law Judge  
Bureau of Adjudication

JFH: cac  
Enclosure

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

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

[REDACTED]

Appellant,

from a determination by

**The Hebrew Home for the  
Aged at Riverdale**

Respondent,

to discharge him from a residential  
health care facility.

**COPY**

**DECISION**

Hearing Before:

Natalie J. Botdeaux  
Administrative Law Judge

Held at:

The Hebrew Home for the Aged at Riverdale  
5901 Palisade Avenue  
Riverdale, New York 10471

Hearing Date:

February 22, 2018  
The record closed March 6, 2018.

Parties:

The Hebrew Home for the Aged at Riverdale  
By: Anne Weisbrod, Director of Social Services

[REDACTED]

*Pro Se.*

**JURISDICTION**

By notice dated ██████████ 2018, The Hebrew Home for the Aged at Riverdale (the Respondent), a residential health care facility subject to Article 28 of the New York Public Health Law, determined to discharge ██████████ (the Appellant) from the facility. The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 NYCRR § 415.3(h).

**HEARING RECORD**

Respondent witnesses: Anne Weisbrod, Director of Social Services  
Sharon Praigrod, Nurse Manager  
Dr. Rebecca Magbag, Staff Physician  
Yamil Velazquez, Director of Security

Respondent exhibits: 1-10

Appellant witnesses: ██████████ friend  
Silvia Blumenfeld, Ombudsman, New York State Long-Term Care Ombudsman Program

Appellant exhibits: A-B

The notice of hearing, discharge notice, and the accompanying cover letter were marked as ALJ Exhibit I. A digital recording of the hearing was made.

**ISSUES**

Has the Hebrew Home for the Aged at Riverdale established that its determination to discharge the Appellant was correct and that its discharge plan is appropriate?

**FINDINGS OF FACT**

1. The Appellant is a ██████████ year-old male who was admitted to The Hebrew Home for the Aged at Riverdale on ██████████, 2014 after having ██████████ on his ██████████ (Respondent Exhibit 1.)

2. The Appellant's admitting diagnoses were [REDACTED] [REDACTED] (Respondent Exhibit 1.)
3. By notice dated [REDACTED] 2018, the facility determined to discharge the Appellant on [REDACTED] 2018 because his smoking on facility property endangers the safety of others, and because his health has improved sufficiently that he no longer requires skilled nursing care. The notice proposes to discharge the Appellant to [REDACTED] a [REDACTED] shelter located at [REDACTED] [REDACTED] (Respondent Exhibit 3; ALJ Exhibit I.)
4. The Appellant's clinical record contains documentation from the Appellant's physicians and interdisciplinary care team that the Appellant's needs can be met in the community, and that discharge to the shelter is appropriate. (Respondent Exhibits 6 and 10.)
5. The Appellant remains at The Hebrew Home for the Aged at Riverdale pending the outcome of this appeal.

#### APPLICABLE LAW

A residential health care facility (also referred to in the regulations as a nursing home) is a facility which provides regular nursing, medical, rehabilitative, and professional services to residents who do not require hospitalization. Public Health Law §§2801(2)-(3); 10 NYCRR § 415.2(k).

Department regulations at 10 NYCRR § 415.3(h) describe the transfer and discharge rights of residential health care facility residents. They state, in pertinent part:

(1) With regard to the transfer or discharge of residents, the facility shall:

(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:

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(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;

(3) the safety of individuals in the facility is endangered.

The residential health care facility must prove by substantial evidence that the discharge was necessary, and that the discharge plan was appropriate. 10 NYCRR § 415.3(h)(2)(iii); State Administrative Procedure Act § 306(1).

#### DISCUSSION

The Appellant, [REDACTED] was admitted to the facility of [REDACTED], 2014 from a hospital after undergoing [REDACTED]. His admitting diagnoses were: [REDACTED]

[REDACTED] (Respondent Exhibit I.) The Respondent's [REDACTED] 2018 discharge notice provides two reasons for its determination: that the Appellant's smoking endangers the safety of others, and the Appellant's health has improved so that he no longer requires skilled nursing services.

With regard to the Appellant's cigarette smoking, the Director of Security, Mr. Velázquez, acknowledged that the Appellant had never smoked inside the building, and stated that the Appellant was mainly found smoking on the facility's Great Lawn area, a large grassy area containing concrete slabs that is located between 200 – 500 yards from the facility. (Recording @ 26:17; 1:28:00; Respondent Exhibit 10.) Mr. Velasquez, Ms. Weisbrod, and Ms. Praigrod all alleged that the Appellant violated State law (New York State Public Health Law § 1399-o(2)(b) prohibits smoking on residential health care facility grounds) and his admission

agreement by smoking on facility grounds. They are frustrated by the Appellant's unwillingness to correct his behavior. (Recording @ 32:35; Respondent Exhibit 5.)

The Appellant admitted that he had smoked several cigarettes during his residence at the facility when he felt ██████████. However, he insisted that his cigarette smoking did not jeopardize anyone's safety because it was impossible for the building materials (concrete floor, red brick building, and aluminum) to catch fire from the cigarette temperature. (Recording @ 1:11:38.) While the Appellant likely violated New York State Public Health Law § 1399-o(2)(b) and the facility's smoking policy, a danger to other resident's safety is not established by evidence that the Appellant smoked on facility grounds.

Regarding the Appellant's need for nursing home care, the Appellant's medical records document markedly improved functional abilities, even though the Appellant still requires a wheelchair for ambulation. On ██████████ 2017, the Appellant was observed as requiring the physical assistance of one person for bed mobility, transfers, dressing, toileting, hygiene, bathing, and locomotion. However, since ██████████ 2017, nurse reviewers and medical staff have consistently concluded that the Appellant is independently able to perform all tasks. The Appellant wheels himself out of his unit, and out of the building, unassisted. (Respondent Exhibit 10; Recording @ 14:48; 17:23.) In addition, he regularly utilizes the facility swimming pool without assistance. (Recording @ 14:42; 16:31; 17:25; 41:54.)

The Appellant's medical records consistently describe his independent ability to care for himself, and his frequent rejection of care. Since ██████████ 017, certified nurse aides have reported that the Appellant is independent, has refused routine monitoring of his hearing and skin, and that the aides provide no services to the Appellant. (Respondent Exhibit 10.)



Dr. Magbag (the Appellant's physician since his transfer from a different unit several months earlier) testified that the Appellant's abilities are significantly improved. He understands his medical conditions and performs his own [REDACTED], but also refuses medications and ignores medical advice. (Recording @ 10:30.) Ms. Praigrod emphasized that the facility provides no care to the Appellant. (Recording @ 16:31.) Dr. Magbag, Dr. Palace (the Appellant's previous physician), Ms. Praigrod, and Ms. Weisbrod all agree that the Appellant's conditions can be managed in the community, and that a shelter is an appropriate discharge location. (Respondent Exhibits 6 and 10; Recording @ 15:51; 38:06; 1:27:04.)

The Appellant asserted that his health has declined since his transfer from a different unit. He claims that he has lost [REDACTED] pounds, and that his [REDACTED] [REDACTED] has become [REDACTED]. He attributes his decline, in part, to the facility decreasing the weekly permissible hours for swimming. (Recording @ 41:54; 1:04:08.) While the Appellant characterized his use of the facility swimming pool as "hydrotherapy", his medical records show no connection between his swimming and any medical or therapeutic directive issued for him.

The Appellant presented a list of his medical conditions, none of which demonstrate a need for inpatient nursing and medical services. Although the Appellant contended that his [REDACTED] not stable, he has managed his [REDACTED] testing, directed his care, and adjusted his own diet, oftentimes in contravention of medical advice. (Respondent Exhibit 10; Recording @ 12:00; 59:43.) His list of medical conditions indicates that he has received pain treatment for [REDACTED] however, the facility's records show that the Appellant regularly refuses pain medication. (Appellant Exhibit A; Respondent Exhibit 10.)

The Appellant contended that he has developed a ██████████ problem, which has made it very difficult for him to eat, and for which he is now required to provide ██████████

██████████ (Recording @ 1:07:35.) He asserted that the facility provides him with staff physicians, arranges outpatient appointments, and provides necessary nursing services.

(Recording @ 46:00; 1:03:13.) The facility has referred the Appellant for outpatient care in the disciplines of ██████████ (Recording @ 42:50; 48:00; 52:18.)

The Appellant contended that a shelter will not provide him with a swimming pool, exercise, or his medication. (Recording @ 41:18; 1:18:59.) He does not want to live in an assisted living facility because he believes that his medical conditions are not stable. (Recording @ 1:02:18.) While he aspires to live independently in an apartment, he does not believe that his medical needs will be tended to in the community.

Ms. Weisbrod has assisted the Appellant with application submissions for apartments, and for assisted living facilities. However, he rejected all apartments offered, and repeatedly declined to apply for placement in an assisted living facility. (Respondent Exhibit 4; Recording @ 9:00; 35:41; 1:38:19.) Ms. Weisbrod selected the discharge location because it is situated in a central and accessible location, in accord with the Appellant's request for residence in

██████████ (Recording @ 36:33.) She confirmed that the Appellant would leave the facility with medication, and that he would be able to take his medical equipment with him. She explained that homeless shelters employ social workers to assist shelter residents with accessing medical care. (Recording @ 37:00; 1:26:30.)

Ms. Blumenfeld, the Ombudsman at the hearing, asserted that the Appellant's discharge to a ██████████ shelter is unsafe because the ██████████ that he utilizes for ██████████ are



She advocated for the Appellant to be placed in a more supportive, community-based setting. (Recording @ 1:29:10.) The Appellant's refusal to live in an assisted living facility precludes his discharge to such a setting since assisted living facilities may not accept individuals transferred involuntarily. 18 NYCRR § 494.4(c)(5). In addition, he cannot be discharged to a rental apartment without agreeing to sign a lease. Therefore, a shelter is currently the Appellant's only available discharge location.

### CONCLUSION

The facility has failed to prove that the Appellant's smoking endangers the safety of others. The Appellant's comprehensive assessments all report that the Appellant has not exhibited behavior which placed the Appellant or others at significant risk for injury, and the Appellant was never found smoking within or near any building on the facility's premises.

The facility has, however, established that the Appellant's medical conditions have improved to the extent that he no longer requires the care provided in a skilled nursing setting. The Appellant is physically independent, and he self-manages his medical conditions, none of which require inpatient medical assistance or monitoring. The facility's main role has been to arrange the Appellant's medical appointments, a service available in the community.

The facility has also established that its discharge plan for the Appellant is appropriate. The Appellant has rejected all attempted placements to rental apartments and to assisted living facilities. Although it appears that the Appellant's best result would be a discharge to an assisted living facility, Ms. Weisbrod has been unable to place the Appellant in such a setting because he has rejected it. He will be able to access medical care in the community. For these reasons, the facility's determination is sustained.

At the facility's request during a March 6, 2018 conference call with the parties, this determination shall take effect 30 days from the date of this decision. During this period, the Appellant may reconsider alternate discharge locations.

**DECISION**

The Hebrew Home for the Aged at Riverdale has established that its determination to discharge the Appellant and to transfer the Appellant to a shelter was correct.

1. The Hebrew Home for the Aged at Riverdale is authorized to discharge the Appellant based upon ██████████ 2018 determination.
2. In accordance with the agreement made by The Hebrew Home for the Aged at Riverdale, this decision shall take effect 30 days from this decision date.

Dated: March 19, 2018  
New York, New York

*Natalie Bordeaux*

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Natalie J. Bordeaux  
Administrative Law Judge