



# Department of Health

ANDREW M. CUOMO  
Governor

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

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

August 7, 2018

## CERTIFIED MAIL/RETURN RECEIPT

Jordan Thaler  
Director of Social Work  
Fort Tryon Center for  
Rehabilitation and Nursing  
801 West 190<sup>th</sup> Street  
New York, New York 10040

[REDACTED]  
C/o Fort Tryon Center for  
Rehabilitation and Nursing  
801 West 190<sup>th</sup> Street  
New York, New York 10040

**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: 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

**Fort Tryon Center for Rehabilitation and Nursing,**  
Respondent,

to discharge him from a residential health care facility.

---

**COPY**

**DECISION**

**Hearing Before:**

Ann H. Gayle  
Administrative Law Judge

**Held at:**

Fort Tryon Center for Rehabilitation and Nursing  
801 West 190th Street  
New York, New York 10040

**Hearing Date:**

July 27, 2018; record closed August 3, 2018

**Parties:**

Fort Tryon Center for Rehabilitation and Nursing  
By: Jordan Thaler, Director of Social Services

[REDACTED]

*Pro Se*<sup>1</sup>

---

<sup>1</sup> with the assistance of Charles Gourgey of the NYS Office of the Long Term Care Ombudsman

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 Fort Tryon Center for Rehabilitation and Nursing (“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 [REDACTED] (“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. SAPA § 306(1) provides that the standard of proof shall be by substantial evidence. “Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact; it is less than a preponderance of the evidence but more than mere surmise, conjecture or speculation. . . . Put differently, there must be a rational basis for the decision. (Citations omitted)” (*Stoker v. Tarentino*, 101 A.D.2d 651, 652, 475 N.Y.S.2d 562, 564 [App. Div. 3d Dept. 1984], mod. 64 N.Y.2d 994, 489 N.Y.S.2d 43.

A digital recording of the hearing was made part of the record. Appellant and Charles Gourgey, Ombudsman, testified for Appellant. The following witnesses testified for Respondent: Renee Fishweicher, D.P.T., Director of Rehabilitation; Myrtle Murphy, R.N., Nursing Supervisor; and Jordan Thaler, Director of Social Services.

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

ALJ:

- I: Notice of Hearing and attached Facility Discharge Notice
- II: July 10, 2018 letter

Facility:

- 1: Medical progress notes
- 2: Attending Physician’s statement
- 3: Quarterly PT screening form
- 4: Medication orders
- 5: Nutritionist’s quarterly assessment<sup>2</sup>
- 6: Quarterly nursing evaluation

Resident:

- A: Face Sheet
- B: [REDACTED] /18 and [REDACTED] 18 physician orders
- C: Progress notes
- D: Nursing report of ADLs
- E: [REDACTED] 18 letter re [REDACTED] candidacy
- F: Article re [REDACTED] disease dietary requirements
- G: June 28, 2018 [REDACTED] referral from healthcare facilities policy
- H: Emails regarding Shelter referral and forms
- I: July 23, 2018 letter from Legal Aid Society attorney to Mr. Gourgey
- J: ADA dietary guidelines

**ISSUE**

Has Fort Tryon Center for Rehabilitation and Nursing established that the transfer is necessary and the discharge plan is appropriate?

---

<sup>2</sup> This document was marked for identification but not accepted into evidence upon Appellant’s objection.

**FINDINGS OF FACT**

Citations in parentheses refer to testimony (“T”) of witnesses and exhibits (“Ex”) found persuasive in arriving at a particular finding.

1. Respondent, Fort Tryon Center for Rehabilitation and Nursing (“Fort Tryon”), is a residential health care facility located in New York, New York. (Ex I)
2. Appellant [REDACTED], age [REDACTED] was admitted to the Facility in [REDACTED] 2017, for [REDACTED] term rehabilitation. Appellant’s medical conditions include [REDACTED]  
[REDACTED]  
[REDACTED], and [REDACTED] pain. Appellant completed occupational and physical therapy, he is independent in all his ADLs (activities of daily living) and he does not receive any skilled care or services at the Facility. Appellant’s medical conditions can be treated in the community. (Ex 1; Ex 3; Ex 4; Ex A; Ex B; Ex C; T Murphy; Appellant)
3. By notice dated [REDACTED] 2018, Respondent advised Appellant that it had determined to discharge him on the grounds that his health has improved sufficiently so that he no longer needs the services provided by the Facility. (Ex I)
4. Respondent’s discharge plan is to transfer Appellant to the [REDACTED] Shelter (“Shelter”) located at [REDACTED] (Ex I)
5. It is the professional opinion of Appellant’s caregivers at the Facility, including the Facility’s physician, that discharge to the community, including the Shelter, is appropriate for Appellant. Appellant will be discharged with prescriptions for medications, referrals (if needed) for medical appointments, and remaining unused medications, as appropriate. (Ex 1; Ex 2; T Fishweicher, Murphy, Thaler)

6. Appellant has remained at Fort Tryon pending the outcome of this proceeding.

DISCUSSION

Respondent is seeking to discharge Appellant to the Shelter on the grounds that his health has improved sufficiently so that he no longer requires the services of the Facility. In his opening statement, Mr. Gourgey explained that Appellant is contesting Respondent's proposed discharge and he alleged that: (1) Appellant's medical conditions have not improved sufficiently for placement in the Shelter, (2) there was inadequate discharge planning, and (3) Respondent did not comply with the "spirit" of the 2018 Shelter protocols. The evidence presented by Respondent, however, proved that Appellant completed his rehabilitative services, he is independent with his ADLs, he does not receive any services at the Facility, his chronic conditions are stable, and those medical conditions can be treated in the community.

In regard to Appellant's ADLs, Dr. Fishweicher testified that Appellant ambulates independently throughout the Facility and that he is able to handle his ADLs "completely independently." Appellant challenged this by citing the 2018 to 2018 Nursing Quarterly & Annual Note (Exhibit 6/Exhibit D), which reflects that Appellant performs his ADLs with supervision. However, Nursing Supervisor Murphy explained that "Supervision" was checked because the Facility must oversee its residents' performance of their ADLs even when the resident is independent in all ADLs. Appellant is independent in his ADLs and he requires no services from the Facility.

Regarding Appellant's medical conditions, Appellant has

In 2018, Appellant learned that he was and that he was placed "on the as of /2018" (Ex E), but there is no timeframe or estimate for when a might occur. Appellant testified

that the Facility is not providing him with any services, he receives all his medical attention from his community physicians at ██████████ “no doctors at [the Facility] have me except maybe one time,” and this Facility “has been the wrong place for me since day one.” Appellant further testified that he does not want to be evaluated for, or receive, physical therapy at the Facility due to both his and his community physicians’ alleged concerns that it could ██████████ Appellant cannot remain in the Facility while he awaits a potential ██████████ when he is independent with his ADLs and his medical conditions, which are ██████████ are being treated in the community.

Appellant, who was previously in the Shelter ██████████ strongly opposes Respondent’s determination to discharge him to the Shelter, and Mr. Gourgey argued that Respondent has not complied with the “spirit” of the ██████████ 2018 Referral from Healthcare Facilities Policy (Exhibit G). Mr. Thaler testified that he had not submitted a referral to ██████████ for Appellant to be discharged to the Shelter because Appellant has not provided Respondent with his consent for such referral. Mr. Thaler testified that, absent Appellant’s consent, he could not submit the Referral to ██████████ until there was an order/decision in this matter.

Mr. Gourgey further argued that Respondent has not provided adequate discharge planning for Appellant including not timely assisting Appellant when he recently applied for Social Security Disability. Mr. Thaler’s testimony demonstrated, however, that Appellant has not cooperated with his attempts to work with Appellant on discharge planning. Appellant did not deny this, and he acknowledged that he did not and would not give his consent to be discharged to the Shelter or for the referral to be made.

By the end of the July 27, 2018 hearing, the Parties agreed to work together on discharge planning, and to provide an update on a conference call. The Parties reported on the August 3, 2018 conference call that Mr. Thaler is preparing the [REDACTED] referral for Shelter placement and that Mr. Thaler identified assisted living facilities which might be suitable for Appellant, but Appellant did not wish to pursue those potential placements due to their cost. The Parties expressed their commitment to continue to work together to seek housing for Appellant, and they represented that neither Party wants Mr. Thaler to submit the [REDACTED] referral, even if it was complete by August 6 (as anticipated by Mr. Thaler), until a decision in this Matter was issued.

The evidence presented by Respondent demonstrated that the Shelter, which was identified as a last resort, would be an appropriate discharge location for Appellant who is capable of caring for himself and managing his medical care in the community.

#### DECISION

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

The appeal by Appellant is therefore DENIED.

Respondent, Fort Tryon Center for Rehabilitation and Nursing, is authorized to discharge Appellant, [REDACTED], in accordance with its [REDACTED] 2018 discharge notice. The discharge shall occur no sooner than [REDACTED] 2018. Appellant may leave the Facility sooner than [REDACTED] 2018, if housing suitable and acceptable to him is secured prior to that date or for any other reason Appellant chooses to leave.

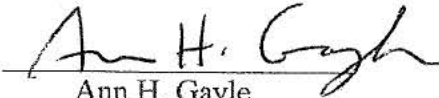
Respondent is directed to submit the [REDACTED] referral as soon as practicable following receipt of this Decision, and to expeditiously provide any additional documentation if such is requested by [REDACTED]




Fort Tryon

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  
August 7, 2018

  
Ann H. Gayle  
Administrative Law Judge

TO: Jordan Thaler  
Director of Social Work  
Fort Tryon Center for Rehabilitation and Nursing  
801 West 190th Street  
New York, New York 10040

  
c/o Fort Tryon Center for Rehabilitation and Nursing  
801 West 190th Street  
New York, New York 10040

Charles Gourgey  
(address withheld)