



# Department of Health

ANDREW M. CUOMO  
Governor

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

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

July 9, 2019

**CERTIFIED MAIL/RETURN RECEIPT**

Miriam Schenker, Administrator  
King David Center for Nursing & Rehab  
2266 Cropsey Avenue  
Brooklyn, New York 11214

██████████  
c/o King David Center for Nursing & Rehab  
2266 Cropsey Avenue  
Brooklyn, New York 11214

Bruce Provda, Esq.  
Sharova Law Firm  
147 Prince Street, 4<sup>th</sup> Floor  
Brooklyn, New York 11201

**RE: In the Matter of ██████████ – 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: cmg  
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

**King David Center for  
Nursing and Rehabilitation**

Respondent,

to discharge him from a residential  
health care facility.

ORIGINAL

DECISION

Hearing Before: Natalie J. Bordeaux  
Administrative Law Judge

Held at: King David Center for Nursing and Rehabilitation  
2266 Cropsey Avenue  
Brooklyn, New York 11214

Hearing Date: June 25, 2019

Parties: King David Center for Nursing and Rehabilitation  
By: Miriam Schenker, Administrator  
King David Center for Nursing and Rehabilitation  
2266 Cropsey Avenue  
Brooklyn, New York 11214

[REDACTED]  
By: Bruce Provda, Esq.  
Sharova Law Firm  
147 Prince Street  
4<sup>th</sup> Floor  
Brooklyn, New York 11201

**JURISDICTION**

By notice dated ██████████ 2019, King David Center for Nursing and Rehabilitation (the Facility), a residential health care facility subject to Article 28 of the New York Public Health Law, determined to discharge ██████████ (the Appellant). 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**

Facility witnesses: Stephanie Johnson, Social Worker  
Franz Mojica, Certified Occupational Therapy Assistant  
Jhonny Duman, Physical Therapy Assistant  
Dr. M. Hamdani, Medical Director  
Paulo Bautista, Physical Therapist  
Usman Ayub Otril, Occupational Therapist

Facility exhibits: 1-5

Appellant witnesses: ██████████, Appellant  
██████████ Appellant's ██████████

Appellant exhibits: A-D

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 King David Center for Nursing and Rehabilitation 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 transferred to the Facility from ██████████ Hospital on ██████████, 2019 after receiving treatment for an ██████████ and ██████████ in his ██████████ and ██████████ caused by a ██████████. The



services provided by the facility. The notice proposes to discharge the Appellant to his apartment in ██████████ where his ██████ currently resides. (Exhibit 1.)

8. The Appellant was not accepted to three assisted living facilities to which the Facility applied for his placement in ██████ and ██████ 2019. (Exhibit 4.)

9. The Appellant's clinical record contains documentation from the Appellant's physician and interdisciplinary care team that the Appellant no longer requires the services of a skilled nursing facility and that his needs can be met in the community. (Exhibits 3 and 5.)

10. The Appellant remains at the Facility 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;

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

### DISCUSSION

The Appellant was hospitalized in [REDACTED] 2019 after falling in his apartment and [REDACTED] for several hours while awaiting emergency assistance from the [REDACTED]. He was then transported to [REDACTED] Hospital for treatment of acute conditions. (Recording @ 45:30, 1:24:19, 1:54:01.)

The Appellant was subsequently admitted to the Facility (a nursing home located in Brooklyn, New York) for rehabilitation and monitoring of the acute conditions that were successfully treated during his hospitalization, specifically, [REDACTED] and [REDACTED] of other specified [REDACTED] caused by a [REDACTED] infection. (Exhibits 1, 3, 4.) The infection has not recurred during his stay at the Facility. (Recording @ 19:18.) The [REDACTED] in the Appellant's [REDACTED] requires medication for at least six months. However, the Appellant has had no symptoms emanating from the [REDACTED] (Recording @ 1:06:00.)

Although the Appellant's chronic medical conditions persist, they are all stable and do not require medical or skilled nursing intervention. (Recording @ 19:00, 21:57; 1:04:49.) The Appellant independently utilizes a [REDACTED] to [REDACTED]. (Recording @ 2:10:19.) He is also independently able to move around with use of a wheelchair. (Recording @ 10:27.) The Appellant was discharged from all rehabilitative therapies because he has maintained his maximum functional potential. However, he continues to require assistance with

performing many activities of daily living, including transfers, bed mobility, toileting, bathing, and [REDACTED] dressing. (Exhibit 3.)

The Appellant's attending physician at the Facility has determined that the Appellant may be safely discharged. Practitioners in other disciplines, including nursing, social work, and rehabilitation, also agree that the Appellant does not require specialized services from the Facility, and that his needs can be met in the community. (Exhibits 3-5; Recording @ 19:35, 28:30.)

As a means of refuting the Facility's determination that the Appellant's health has improved, the Appellant's attorney contended that the Appellant's chronic conditions, including [REDACTED] have not resolved. However, the Appellant's [REDACTED] conditions are life-long and have not required medical or skilled nursing intervention by Facility staff. These diagnoses do not justify his continued stay at a skilled nursing facility. (1:01:53.)

Although the Appellant stated that he receives nursing assistance at the Facility on a frequent basis, the Facility's administrator clarified that the Appellant regularly receives the assistance of a certified nurse aide (CNA). (Recording @ 2:05:47, 2:07:27.) CNAs are not authorized to provide nursing services. They render personal care assistance to patients. 10 NYCRR §§ 415.13(c) and 415.26(d).

The Appellant was admitted to nursing homes on five separate occasions in the past six years after numerous hospitalizations. His [REDACTED] has observed her [REDACTED] continued decline with each discharge. She fears that he will be hospitalized and again return to another nursing home if he is discharged. (Recording @ 1:32:49.) Given the stability of the Appellant's medical conditions, the fears expressed by the Appellant's [REDACTED] are inadequate justification for

the Appellant's continued stay at the Facility. It is unacceptable to allow a patient to remain at a nursing home simply because he may need hospital treatment at an unknown date in the future. As the Facility's Medical Director Dr. Hamdani explained, the Appellant's continued stay in a custodial setting when his conditions are stable may prove even more detrimental to his health. (Recording @ 1:20:17.) Rejection of the Appellant's transfer request by three local nursing homes is consistent with the Facility's determination that it is inappropriate for the Appellant to remain in a residential health care facility. (Exhibit 4.)

The admission of patients to a nursing home for short-term rehabilitation are not intended to be permanent placements. Rather, these admissions are designed to restore a patient to his optimal level of functional well-being and effectuate a safe discharge when a patient no longer needs skilled nursing services. The Facility has established that the Appellant no longer requires the services of a skilled nursing facility.

The Facility proposes to discharge the Appellant to his apartment in Bro [REDACTED] [REDACTED], where he resided before his hospital admission. (Exhibit 2; Recording @ 16:50.) Dr. Hamdani confirmed that discharge to the community was medically appropriate and further opined that the Appellant's quality of life was adversely impacted by a continued stay at the Facility. He stated that the Appellant would be able to manage his chronic medical conditions with monitoring by a community doctor. Social Worker Stephanie Johnson explained that the Appellant would be discharged with home care services in place. (Recording @ 20:22, 28:22, 1:20:17.) Home health aides and personal care aides are tasked with providing personal care assistance in a community setting. 10 NYCRR §§ 700.2(b)(9) & (14).

The Facility has explored other discharge options in compliance with its obligation to permit residents and their representatives the opportunity to participate in deciding where the



resident will reside after discharge. 10 NYCRR 415.3(h)(1)(vii). Within approximately one month of his stay at the Facility, social workers engaged the Appellant and his █ in discussions regarding discharge preferences. At their request, social workers contacted three local nursing homes to procure the Appellant's placement. However, he was not accepted by the nursing homes identified by the Appellant and his █. In █ and █ 2019, the Appellant was also not approved for placement at three assisted living facilities. (Exhibit 4.)

In █ 2019, Ms. Johnson attempted to confer with the Appellant and his █ regarding the Appellant's discharge to his home. She informed the Appellant that he was approved for Medicaid coverage and that he would need to complete an application for enrollment in a Managed Long-Term Care (MLTC) Plan to be evaluated for personal care services in the community. However, the Appellant and his █ refused to cooperate in completing the application. (Recording @ 28:45.)

Enrollment in an MLTC Plan is currently a pre-requisite to obtaining a personal care services authorization or other long-term services in the community. *See* February 2013 New York State Department of Health Medicaid Redesign Team (MRT) #90 Report to the Governor and Legislature. Prior to obtaining a personal care services authorization, the Appellant must receive a nursing assessment to evaluate the functions and tasks that he requires, and the degree of assistance needed. New York State Medicaid Program Personal Care Services Provider Manual Policy Guidelines. Without necessary plan enrollment and an evaluation, neither the Appellant nor social work staff at the Facility possess specific information regarding the amount of personal care services for which the Appellant would qualify. The Appellant's multiple objections to discharge to the community (described below) are thus based upon speculation.

In determining to provide personal care services for a recipient, the Medicaid Program considers the availability of voluntary assistance from family members, assistance from programs other than Medicaid, and the recipient's ability to safely and effectively utilize adaptive equipment. Personal care services are covered by the Medicaid Program when the services are essential to the patient's health and safety in the home. The individual's medical conditions must be stable, and the individual must be able to self-direct his care or identify a responsible person able to direct his care. 18 NYCRR §§ 505.14(a)(1)-(3). The Appellant is self-directing and effectively makes his needs known. (Recording @ 21:36.)

The Appellant's need for assistance with activities of daily living is undisputed. Both parties also agree that the Appellant requires a wheelchair for safe movement. In devising the discharge plan, the Facility considered the Appellant's inability to assist him with activities of daily living. (Recording @ 1:26:31.) Yet, in stark contrast to the testimony of Dr. Hamdani and members of the Facility's rehabilitation department, the Appellant and his insist that it is unsafe for the Appellant to leave the Facility and that discharge to his home may have dire consequences.

The Appellant had previously received personal care assistance from home health aides or personal care aides when living in his apartment. He recalled substantial turnover in home health aides assigned to his case in the past and claimed that certain aides refused to assist him with his personal care needs. (Recording @ 2:14:20.) Dissatisfaction with the caliber of assigned home health aides is outside the scope of this hearing.

Noting that the Appellant has fallen twice during his stay at the Facility, the Appellant's attorney challenged the Facility's discharge plan on the grounds that it would not adequately prevent the Appellant from falling. The logical response to this argument, provided by Dr.

Hamdani at the hearing, is that the Appellant requires safety measures in any setting. If he fell in a custodial care setting such as a skilled nursing facility, he may fall anywhere. (Recording @ 1:17:00.)

Both the Appellant and his [REDACTED] testified that the Appellant would be unable to navigate their apartment with a wheelchair, an assistive device which the Appellant requires for independent mobility. The Appellant's [REDACTED] described the apartment as being very small, with several narrow entry ways, and said that the Appellant would be unable to enter the bathroom and bedroom with his wheelchair. The Appellant concurred with these statements. (Recording @ 1:38:58, 1:52:37.)

Personal care services, as provided by the Medicaid Program, include environmental supports. 18 NYCRR § 505.14(a)(1). The Medicaid Program also offers medically necessary adaptive equipment to recipients. 18 NYCRR § 505.5. If a nursing evaluation finds that the Appellant's apartment is partly or mostly inaccessible by wheelchair, the evaluator will design a plan of care that will address these difficulties by procuring assistive equipment and allotting sufficient time for an aide to help the Appellant with transfers and ambulation for areas of the apartment where his wheelchair does not fit.

The Facility afforded the Appellant several opportunities to participate in deciding where he would reside after discharge, as required by 10 NYCRR § 415.3(h)(1)(vii). However, neither he nor his wife cooperated with Facility staff once it became clear that the only viable discharge plan would involve the Appellant's return to his home. Their obstinacy left the Facility no choice and permitted the Facility to devise a discharge plan that addresses the Appellant's medical needs and how those needs will be met after discharge without input from the Appellant or his [REDACTED]. Specific details regarding the Appellant's discharge plan are missing only because

of the Appellant's unwillingness to enroll in an MLTC Plan. It is incumbent upon the Appellant to cooperate with the Facility in effectuating his MLTC Plan enrollment to ensure that assistance with environmental support and personal care functions are secured. He has already allowed more than two months to pass without working with Ms. Johnson.

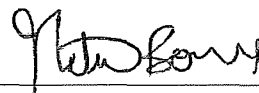
No reasonable explanation was provided to explain why the Appellant cannot be safely discharged to his home with personal care services in place. The Appellant receives the same services at the Facility as he would receive at home. He also faces the same safety risks at home as he has faced during his short-term rehabilitation stay. Neither the Appellant nor his [REDACTED] have proposed an alternative discharge plan to the plan offered by the Facility. They are entitled to make other discharge arrangements if they desire but have shown little effort to do so. Simply refusing to entertain the possibility that the Appellant may be discharged is unacceptable. The Facility has established that its discharge plan is appropriate.

For the reasons stated above, the Facility's May 1, 2019 determination is affirmed.

### **DECISION**

King David Center for Nursing and Rehabilitation is authorized to discharge the Appellant based upon its [REDACTED] 2019 discharge notice.

Dated: July 8, 2019  
Menands, New York



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Natalie J. Bordeaux  
Administrative Law Judge