



# 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, 2019

## CERTIFIED MAIL/RETURN RECEIPT

Lorraine Whyte, Director of Social Work  
Triboro Center  
1160 Teller Avenue  
Bronx, New York 10465

██████████  
c/o Triboro Center  
1160 Teller Avenue  
Bronx, New York 10465

**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

**ORIGINAL**

In the Matter of  
[REDACTED] Triboro Center

Administrative Law Judge's Decision

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

Before: Administrative Law Judge (ALJ) James F. Horan

For Triboro Center (Facility): Lorraine White, Director of Social Work

For Resident [REDACTED] (Appellant): *Pro Se*

The Facility provided a Notice to the Appellant stating the intent to discharge the Appellant (Discharge Notice) on the grounds that the Appellant's condition has improved sufficiently so that she no longer requires care in a nursing home. The Facility proposed discharge to the [REDACTED] Shelter System (System). The Appellant challenged the discharge to the System, arguing that the Facility failed to provide the Appellant sufficient assistance in finding placement in the community and that the System was an inappropriate discharge location. In this proceeding, the parties called witnesses and presented documents into the record at the hearing and the ALJ left the record open to receive additional documentation. After reviewing the entire record, the ALJ dismisses the Discharge Notice because the Facility has failed to prove that a physician determined that the Appellant's condition has improved or that discharge to the System is appropriate.

## Background

The Medicaid Act at Title 42 U.S.C. §1396r(c)(2) establishes standards for resident transfer and discharges that nursing homes must meet as a prerequisite to receiving reimbursement from Medicaid, Grammer v. John Kane Regional Centers – Glen Hazel, 570 F.3d 520 (3d Cir 2009). The Act at 42 U.S.C. §1396r(e)(3) requires the States to provide an appeal process for residents to challenge the discharges and transfers. The New York State Nursing Home Code at Title 10 NYCRR § 415.3(h) establishes the appeal process in this State, which provides nursing home residents certain rights regarding 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 § 415.3(h)(1)(ii)(a), a nursing home proposing discharge due to improvement in condition must insure complete documentation in the resident's record made by the resident's physician and, as appropriate, interdisciplinary care team.

The Facility provided a Discharge Notice [ALJ Exhibit I] to the Appellant on [REDACTED] 2019 and the Appellant then requested the hearing that took place at the Facility in Bronx County on June 27, 2019. The Appellant testified on her own behalf and provided a statement over the telephone from the Resident's [REDACTED]. This Decision uses initials for the Resident and her [REDACTED] to protect the Resident's privacy. The Facility presented six witnesses: Assistant Rehab Director Mikhail Ayunah; Unit Manager Olive Leung, R.N.; Assistant Director of Nursing Roland McDermott; Director of Therapeutic Recreation Rose Ferreira; Social Worker Evadne Barrett and Social Work Director Lorraine Whyte. No physician testified for the Facility.

The ALJ received the Notice of Hearing, with the Discharge Notice attached, into the record as ALJ Exhibit I. The Facility offered eleven documents at hearing that the ALJ received into the record:

|                     |   |
|---------------------|---|
| Facility Exhibit 1  | Recreation Assessment,                  |
| Facility Exhibit 2  | Intervention/Tasks,                     |
| Facility Exhibit 3  | Transfer/Discharge Report,              |
| Facility Exhibit 4  | Social Work Discharge Summary,          |
| Facility Exhibit 5  | Out-On- Pass Record,                    |
| Facility Exhibit 6  | Emails,                                 |
| Facility Exhibit 7  | Radiology Report,                       |
| Facility Exhibit 8  | Transmittal Letter Whyte to Department, |
| Facility Exhibit 9  | Medical Record – Selected Pages,        |
| Facility Exhibit 10 | Nursing Documentation,                  |
| Facility Exhibit 11 | Out-On-Pass Assessment.                 |

The Facility offered no physician progress notes into the record. The Appellant offered several documents into the record at the hearing, which the ALJ designated as A-J. The ALJ received eight of those documents into the record:

|                     |                                       |
|---------------------|---------------------------------------|
| Appellant Exhibit A | Physician Statement [REDACTED], M.D., |
| Appellant Exhibit B | [REDACTED] Flyer,                     |
| Appellant Exhibit D | Problem List,                         |
| Appellant Exhibit E | Consultation Report [REDACTED]/19,    |
| Appellant Exhibit F | [REDACTED] Radiology and Imaging,     |
| Appellant Exhibit G | After Visit Summary [REDACTED] 19,    |
| Appellant Exhibit I | After Visit Summary [REDACTED]/19,    |
| Appellant Exhibit J | Facility Consultation Report.         |

Following the hearing, the ALJ left the record open to receive additional documentation from the parties. The Appellant submitted a further package of medical records that entered the record as Exhibit K. The ALJ then advised the parties by letter [ALJ Exhibit II] that the record would close for further submissions on August 2, 2019. There were no further submissions.

The record also included a digital audio recording from the hearing on compact disc (CD). References to statements from the recording will reference the time on the CD at which the

statement occurs (e.g. "CD at 12:40" means that the statement occurred at 12 minutes and 40 seconds into the recording).

Under the hearing procedures at §415.3(h)(2)(iii)(b), the Facility bears the burden to prove a discharge necessary and appropriate. Under N.Y. Administrative Procedure Act 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 conclusion or fact; less than preponderance of 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.

#### Conclusions

As this Determination noted above, the Nursing Home Code at 10 NYCRR § 415.3(h)(1)(ii)(a) requires that a nursing home proposing discharge due to improvement in condition must insure complete documentation in the resident's record made by the resident's physician and, as appropriate, interdisciplinary care team. The Facility has failed to provide documentation indicating that the Appellant's physician determined that the Appellant no longer requires skilled nursing care and failed to provide documentation that the Appellant's physician found discharge to the System appropriate.

At the hearing, the Facility offered a package of documents into the record as Exhibit 9. The Facility represented that these documents were sent to the Health Department Case Resolution Unit in response to the unit's request. The Facility also presented as Exhibit 8 the June 11, 2019 cover letter that accompanied the documents (attached). The cover letter indicated

that the package included the face sheet from the Appellant's medical chart, a Social Work Summary, Discharge Notice and Discharge Plan, Rehab Department Note and note from the Appellant's attending physician. The ALJ found no physician note in Exhibit 9. The package did contain a one-page document, with no date, no signature and no indication that the document came from the Facility (also attached). There is no indication that the Appellant's attending physician wrote this document and no indication when anyone prepared the document. The document gives no indication that there was an examination of the Appellant or a review of the Appellant's record and no indication that the document's author was aware that the Facility proposed discharge to the System.

The ALJ concludes that the Facility has failed to sustain its burden to prove that grounds exist for the proposed involuntary discharge and to prove that the proposed discharge plan is appropriate.

#### ORDER

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

The ALJ dismisses the Discharge Notice.

Dated: Menands, New York  
August 7, 2019



James F. Horan  
Administrative Law Judge

To: Lorraine Whyte, Director of Social Work  
Triboro Center  
1160 Teller Avenue  
Bronx, NY 10465

■ Resident  
c/o Triboro Center  
1160 Teller Avenue  
Bronx, NY 10465

Appendix

Exhibit 8

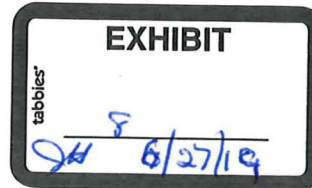
Exhibit 9      One Page Selected From Document





# TRIBORO CENTER

June 11, 2019



Ms. Alice Ostrowski, DOH Investigator  
DOH Case Resolution Unit,  
875 Central Avenue  
Albany, NY 12206

Re: [REDACTED]  
Case#: [REDACTED]

Dear Ms. Ostrowski,

Please find enclosed as per your request:

1. A copy of resident's facesheet
2. Social Work Summary why Resident was admitted and why she's being discharged
3. Discharge notice
4. Discharge/post discharge plans
5. Note from Attending Physician regarding discharge
6. Note from Rehab department

Please feel free to contact me at (718) 293-1500 ext. 1414 if you have any further questions or concerns. Thank You.

Respectfully,

Lorraine Whyte, MSW  
Director of Social Services  
Triboro Center for Rehabilitation and Nursing  
1160 Teller Avenue  
Bronx, NY 10456  
Tel: 718.293.1500 ext:1414  
Fax: 718-581-5697  
Email: [lwhyte@triborocenter.net](mailto:lwhyte@triborocenter.net)

Triboro Center for Rehabilitation and Nursing

1160 Teller Avenue Bronx, NY 10456

[www.triborocenter.net](http://www.triborocenter.net)

Ms. [REDACTED] a [REDACTED]-year-old female with co-morbid of [REDACTED] [REDACTED] sent for short term rehab from [REDACTED] s/p fall with [REDACTED] and [REDACTED] to [REDACTED].

She was evaluated for PT/OT on [REDACTED]-2019 and her baseline was [REDACTED] assistance for transfers and non-ambulatory due to weight bearing restriction on [REDACTED]. She made great progress from therapy and on [REDACTED] 2019 she was discharged for skilled therapy services for she met all rehab goals. At present, she is able to do activities of daily living and self-care independently, able ambulate independently with her rollator throughout the facility, outside the community and is able to do more than [REDACTED] steps independently using the handrails. She is not a candidate for therapy and is a good candidate for community placement.

