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# Department of Health

KATHY HOCHUL  
Governor

MARY T. BASSETT, M.D., M.P.H.  
Commissioner

KRISTIN M. PROUD  
Acting Executive Deputy Commissioner

July 14, 2022

## CERTIFIED MAIL/RETURN RECEIPT

██████████ ██████████  
c/o Brooklyn Center for Rehabilitation and Nursing  
170 Buffalo Avenue  
Brooklyn, New York 11213

David Schorr, Administrator  
Brooklyn Center for Rehabilitation and Nursing  
170 Buffalo Avenue  
Brooklyn, New York 11213

**RE: In the Matter of ██████████ ██████████ – Discharge Appeal**

Dear Parties:

Enclosed please find the Decision Following Motion to Reargue 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,

Sean D. O'Brien  
Acting Chief Administrative Law Judge  
Bureau of Adjudication

SDO: nm  
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH

COPY

In the Matter of an Appeal pursuant to 10 NYCRR §415.3 by  
 [REDACTED]  
 Appellant,  
 from a determination by  
 Brooklyn Center for Rehabilitation and Nursing,  
 Respondent,  
 to discharge him from a residential health care facility.

DECISION  
FOLLOWING  
MOTION TO REARGUE

Hearing Before: Ann Gayle  
Administrative Law Judge

Held: Via Cisco Webex

Hearing Date: June 29, 2022  
Scheduled for June 15, 2022  
Adjourned to June 23, then June 29, 2022

Decision Issued: July 6, 2022

Motion to Reargue: July 13, 2022

Parties: Brooklyn Center for Rehabilitation and Nursing  
By: David Schorr, Administrator

[REDACTED]  
*Pro Se*

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 Brooklyn 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(i). Respondent determined to discharge ██████████ ██████████ (“Appellant” or “Resident”) from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(i)(1)(i)(a)(2):

- (1) With regard to 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:
      - (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 §415.3(i)(2)(iii)(b), the Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate.

A recording of the hearing was made part of the record. Appellant testified on his own behalf. Director of Social Services Michelle Jordan, Assistant Director of Rehab Mahmoud Nagy, Nurse Practitioner Thomas Skurtu, Administrator David Schorr, and Director of Nursing

Dorett Williams, R.N., testified for Respondent. Also present were Director of Rehab Judy Manalili, Nurse Manager Amanda Peters, R.N., and Social Worker Tekeyra Foncette; they were identified by Appellant as potential witnesses but neither party called upon them to testify.

Via email on July 13, 2022, Appellant sent a post decisional motion to reargue, which was granted.

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

ALJ:

- I: Notice of Hearing with attached Notice of Discharge/Transfer
- II: June 10, 2022 letter re June 23, 2022 hearing date
- III: June 24, 2022 letter re June 29, 2022 hearing date

Facility:

- 1: Visual Bedside Kardex as of ████████/22
- 2: POC Response History – Locomotion on Unit
- 3: POC Response History – Locomotion off Unit
- 4: Rehab Referral
- 5: POC Response History – Walk in Corridor Self-Performance
- 6: POC Response History – Walk in Room Self-Performance

Appellant:

A through I:

On June 14, 2022, the ALJ’s office received an email from Appellant; it contained ten attachments consisting of nine images and a document. The ALJ marked the nine images Exhibits A through I. The document was marked “Exhibit J.” At the start of the hearing, Appellant explained that the nine images were not intended to be exhibits. As such, they were not officially marked for identification or offered into evidence.

- J: ██████████ Post-Acute Care Transfer Report
- K: Resident’s statement
- L: ██████████
- M: Fall from bed
- N: ██████████
- O: Progress notes
- P: Two-hour gym
- Q: Bicycle exercise
- R: Prescription for ██████████ ██████████
- S: Urinals
- T: ██████████ surgery



**DISCUSSION**

A Decision was issued on July 6, 2022 (“July 6 decision”). The July 6 decision found “the evidence presented by Respondent demonstrated that Appellant is independent with his ADLs; he no longer requires skilled care; he ambulates independently; and discharge to the Shelter is an appropriate discharge plan for Appellant.” The July 6 decision was based on the evidence presented at the hearing. Upon Appellant’s July 13, 2022 motion to reargue, the decision and hearing record was reviewed.

10 NYCRR 415.3(i)(1)(ii)(a) requires the following:

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

.....

(ii) ensure complete documentation in the resident's clinical record when the facility transfers or discharges a resident under any of the circumstances specified in subparagraph (i) of this paragraph. The documentation shall be made by:

(a) the resident's physician and, as appropriate, interdisciplinary care team, when transfer or discharge is necessary under subclause (1) or (2) of clause (a) of subparagraph (i) of this paragraph (emphasis added).

Testimony by and documentation of members of the interdisciplinary care team was received at the hearing. There was no testimony or documentation from the resident’s physician approving of the discharge to the Shelter as required by the regulations.

Respondent’s exhibits in evidence and the testimony of its witnesses demonstrated that Appellant is independent in his ADLs, and the Shelter has indicated its acceptance of Appellant. However, Respondent’s failure to present testimony or evidence of the resident’s physician’s documentation in Appellant’s record to show the resident’s health has improved sufficiently so the resident no longer needs the services provided by the facility requires the reversal of the July 6 decision denying Appellant’s appeal.

**CONCLUSION**

Respondent has not proven that Appellant's health has improved sufficiently that he no longer requires skilled care. As such, it is not necessary to determine at this time whether discharge to the Shelter is appropriate for Appellant.

**DECISION**

The July 6, 2022 decision is REVERSED.

The appeal by Appellant is GRANTED.

Respondent, Brooklyn Center for Rehabilitation and Nursing, is not authorized to discharge Appellant in accordance with the ██████████ 2022 discharge notice.

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  
July 14, 2022

*Ann Gayle*

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Ann Gayle  
Administrative Law Judge

TO: ██████████ ██████████  
c/o Brooklyn Center for Rehabilitation and Nursing  
170 Buffalo Avenue  
Brooklyn, New York 11213

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Brooklyn Center for Rehabilitation and Nursing  
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