



# Department of Health

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April 5, 2018

## EMAIL

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**HAND DELIVERED BY IRENE LYNCH**

**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*  
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

**Silvercrest Center for  
Nursing and Rehabilitation**

Respondent,

to discharge him from a residential  
health care facility;

COPY

DECISION  
AND  
ORDER

Hearing Before:

Natalie J. Bordeaux  
Administrative Law Judge

Held at:

Long Island Jewish Medical Center  
270-05 76<sup>th</sup> Avenue  
New Hyde Park, NY 11040

Hearing Date:

March 30, 2018

Parties:

Silvercrest Center for Nursing and Rehabilitation  
144-45 87<sup>th</sup> Avenue  
Briarwood, NY 11435

By: Harvey Mervis, Esq.  
Hinman, Howard & Kattell, LLP  
80 Exchange Street  
Binghamton, NY 13902

[REDACTED]

*Pro Se*

JURISDICTION

On [REDACTED] 2018, Silvercrest 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 [REDACTED] (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

Facility witnesses: Maureen Peters, LCSW, Director of Social Work  
 Natasha Elie Louissaint, Associate Administrator  
 Dr. Daniel Russo, Medical Director  
 Julieann Regis, Assistant Director of Nursing  
 Margaret Maxwell-Wellington, Vice President of Nursing

Facility exhibits: 1-11

Appellant witnesses: Dr. John Raimo, Attending Physician, LIJ Medical Center (LIJ)  
 Dr. Annabella Salvador, Associate Medical Director, LIJ  
 Patricia Daly, LCSW, Social Worker, LIJ  
 Christine Brooks, Nurse Manager, LIJ  
 Irene Lynch, Asst. Director of Social Work, LIJ  
 Dr. Madeleine Fersh, Attending Physician (Psychiatry), LIJ  
 Dr. Sean Lavine, Attending Physician (Medicine), LIJ

Appellant exhibits: 1-2

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

ISSUES

Has Silvercrest 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 [REDACTED]-year-old male who was admitted to Silvercrest Center for Nursing and Rehabilitation on [REDACTED] 2017 for [REDACTED] term [REDACTED] of infected pressure

ulcers in the area [REDACTED] his [REDACTED] and wound therapy for infections in [REDACTED]

[REDACTED] Facility Exhibit 2.)

2. The Appellant's admitting diagnoses were: [REDACTED] pressure ulcers in the [REDACTED], open wound in the [REDACTED]

[REDACTED] with a history of

[REDACTED] (Facility Exhibit 2.)

3. On [REDACTED] 2018, the Facility contacted the 911 emergency system to have the Appellant removed from the premises because the Facility's administration believed the Appellant to present an [REDACTED]. The dispatched ambulance transported the Appellant to [REDACTED] emergency department for evaluation. Upon receiving medical and [REDACTED] clearance for discharge that same day, the hospital contacted the Facility to arrange for his return. (Appellant Exhibit 1.)

4. The Facility refused to readmit the Appellant. (Appellant Exhibit 1.)

5. The Facility failed to issue a notice of discharge or to establish a discharge plan.

6. The Appellant requested this hearing on March 21, 2018. The Facility subsequently issued a discharge notice dated [REDACTED] 2018, alleging that the Appellant endangered other residents' safety, and advising that he will be discharged to [REDACTED] an acute-care hospital. (ALJ Exhibit I; Facility Exhibit 5.)

7. The Appellant's clinical record contains no documentation from a physician that the Appellant's needs can be met at a lower level of care than what is provided in a nursing home.

8. The Appellant remains a [REDACTED] pending the outcome of this appeal. (T 66.)

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

When discharge is deemed necessary because a resident's behavior jeopardizes others' safety, the resident's clinical record must include documentation prepared by a physician to support the facility's determination. 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 is wheelchair-bound, after [REDACTED] caused [REDACTED]. His [REDACTED] and [REDACTED]. On [REDACTED] 2017, the Appellant was admitted to the Facility for open wound treatment [REDACTED].

term [REDACTED] (Facility Exhibits 2 and 5.) His medical conditions are stable and do not require hospital intervention. (T 57, 66, 78.)

Facility nurse Delicia Lewis alleged that on the evening of Sunday, [REDACTED], 2018, the Appellant suggested to Ms. Lewis that he would [REDACTED]. On Monday, [REDACTED] 2018, Ms. Lewis treated the Appellant without incident, and subsequently relayed the Appellant's statements to her supervisor, Irene Grysman. Although Ms. Grysman's written statement indicates that she was alarmed, she did not advise anyone else of the Appellant's alleged comments until Tuesday, [REDACTED] 2018. (Facility Exhibit 6; T 103.)

The Facility responded to the Appellant's alleged [REDACTED] 2018, nearly [REDACTED] days after the incident. An interdisciplinary care team, including Medical Director Dr. Russo, determined to discharge the Appellant. (T 16-18; 141-43.) The Appellant was transported to [REDACTED] for evaluation, where hospital staff were informed that the Appellant is "at [REDACTED] to others, having advised Facility staff that "he has a [REDACTED]. After emergency department psychiatric and general medical staff cleared the Appellant for release and return to the Facility on [REDACTED] 2018, the hospital was advised that the Facility would not accept the Appellant's return. The hospital had no choice but to admit the Appellant because the Facility provided no discharge plan. (Appellant Exhibits 1 and 2; T 66-67, 82, 92-94; *see also* 10 NYCRR § 405.9(a)(4).)

The Facility was required to advise the Appellant in writing that he was being discharged, and the reasons why he was being discharged. 10 NYCRR § 415.3(h)(1)(iii)&(iv). Although the Facility's Exhibit 5 includes a discharge notice dated [REDACTED] 2018 (the date upon which this hearing was held, and [REDACTED] days after the Facility discharged him), the Appellant did not receive the notice before he was taken to [REDACTED] at any time thereafter.

The Facility's Social Work Director, Ms. Peters, asserted that the notice should have been dated [REDACTED], 2018, and that the [REDACTED] 2018 date was a typographical error. She believes that a copy of the [REDACTED], 2018 notice was sent to the Appellant's [REDACTED] a statement which the Appellant denied. (T 13-15.) Informing anyone other than the Appellant of the Facility's intentions was improper because the Appellant is mentally competent to make decisions. His [REDACTED] is not his designated representative. 10 NYCRR § 415.2(f).

The Facility's cited reason for removing the Appellant on [REDACTED] 2018 was that the Appellant's "[REDACTED] behavior," including reports that he has a [REDACTED] endangered the safety of others. (Facility Exhibit 5.) When a nursing home cites a resident's [REDACTED] behavior as its discharge basis, the facility must ensure that the resident's clinical record contains documentation prepared by a physician regarding the discharge determination. 10 NYCRR § 415.3(h)(1)(ii)(b). However, the Appellant's clinical record contains no such documentation.

Nor has the Facility established that the stated discharge reason was correct. Staff testimony consisted of suspicions which were not supported by the evidence. Dr. Russo and Ms. Peters mischaracterized Ms. Lewis' statements, alleging that the Appellant threatened to [REDACTED] [REDACTED], a statement that Ms. Lewis had not attributed to the Appellant. (T 16, 55, 153.)

The Appellant denied speaking with Ms. Lewis, and stated that he does not [REDACTED]. He is a [REDACTED] because of [REDACTED] and does not believe in using [REDACTED] (T 161-66.)

Dr. Russo opined that the Appellant "probably" has friends in the community who may have access to [REDACTED] (T 54.) Ms. Wellington, the Facility's Vice President of Nursing, claimed that that the Appellant's statement that he had [REDACTED] when considered with the Appellant's previous [REDACTED] and history of [REDACTED] since [REDACTED] necessitated the Appellant's rapid discharge. (T 32.) Neither Ms. Lewis nor Ms.

Gryzman felt compelled to take swift action regarding the Appellant's comments. The Facility witnesses' speculation regarding the Appellant's propensity and potential criminal friendships does not prove that the Appellant posed a credible threat to the safety of others.

Ms. Peters explained that the Appellant was taken to the hospital several days before his discharge to [REDACTED] because he was [REDACTED] smelled of [REDACTED] (staff knew of his off-site [REDACTED]). His [REDACTED] report showed [REDACTED], even though the Facility found empty [REDACTED] (Facility Exhibit 9.) Associate Administrator Ms. Louissaint noted that [REDACTED] in the Appellant's possession. Ms. Louissaint and Ms. Wellington believe that the Appellant's [REDACTED] use, [REDACTED] and [REDACTED] involvement in [REDACTED] activity. (T 18, 26, 32-40.) This is conjecture.

Ms. Peters noted the Appellant's dissatisfaction with the Facility's offered social activities. (T 52.) Dr. Russo reacted harshly to the Appellant's contentions that the Facility had provided inadequate social support. (T 146.) Criticism does not constitute [REDACTED] behavior.

Facility witnesses stated that they discovered suspicious items (including [REDACTED] [REDACTED] but no [REDACTED] in the Appellant's room *after* he was removed. However, the Appellant's possession of those items was not the Facility's reason for discharging him, and do not even create an impression that the Appellant has [REDACTED] tendencies. (T 33, 35-38, 121; Facility Exhibits 7 and 8.) The Appellant received [REDACTED] from staff for [REDACTED] and the [REDACTED] was provided in a [REDACTED]. He utilized [REDACTED] for a cigarette lighter. (T 116-19, 166-67.)

The Facility had previously concluded that the Appellant was "an [REDACTED] because he allegedly threatened to hit a resident, and attempted to [REDACTED] [REDACTED] Facility witnesses cite the complainants' versions of these events as establishing the



Appellant's dangerous nature, even though the Facility's evidence does not in fact reflect this characterization. (Facility Exhibit 4; T 18-20.) On [REDACTED] 2018, Facility resident [REDACTED] alleged that the Appellant argued with him about unfair practices at the facility, and threatened to [REDACTED]

[REDACTED] An eyewitness advised the investigating social worker that he had overheard the argument, but heard no threats. (Facility Exhibit 1.)

On [REDACTED] 2018, resident [REDACTED] charged that the Appellant had made several attempts to [REDACTED] after an argument over bingo. However, three eyewitnesses (all of whom are Facility employees) confirmed that the Appellant argued with [REDACTED], "had his [REDACTED] within [the other resident's] [REDACTED]" near [REDACTED] and then left the room. (Facility Exhibit 1.) The Appellant's testimony corresponds to the eyewitness' account. (T 98-101.)

[REDACTED] allegations were unfounded. Ms. Wellington contended that verbal threats are the equivalent of physical violence. (T 115-16.) The Appellant did not threaten either resident.

Nevertheless, on [REDACTED] 2018, medical staff accepted [REDACTED]'s and [REDACTED]'s versions of the events, concluded that the Appellant is dangerous, and effectuated his removal from the Facility to another local hospital. (Facility Exhibits 1 and 4.) The Appellant was returned to the Facility the next day because the hospital's emergency room [REDACTED] found that the Appellant did not pose a danger to anyone. (Facility Exhibit 1.)

The Appellant's treating physicians, social workers, and nurses at [REDACTED] all concur that the Appellant has acted appropriately throughout his inpatient stay. Nurse Manager Ms. Brooks confirmed that the Appellant is polite with everyone (including roommates), and accepts treatment. [REDACTED] attending [REDACTED] physician, Dr. Fersh, was surprised that the Appellant was prescribed [REDACTED] medication, as there seemed to be no medical need. (T 68-81, 85-89.)

While testifying, the Appellant spoke [REDACTED] His manner of speaking cannot be considered the equivalent of behavior that endangers others' safety. Despite being upset with the Facility's allegations, and notwithstanding his physical proximity to several Facility witnesses, the Appellant displayed no signs of aggression. The Facility has failed to establish that its discharge determination was correct.

The [REDACTED] 2018 notice advises that the Appellant is discharged to [REDACTED] which the Facility agrees is not an appropriate discharge plan. (Facility Exhibit 5; T 55, 144.) The Facility's attorney argued that the Appellant should remain at the hospital until [REDACTED] and the Facility find a suitable place for the Appellant. (T 59-60, 148-151.) Although counsel repeatedly contended that [REDACTED] is obligated to procure a suitable discharge location for the Appellant, that argument belies applicable regulations. Silvercrest is responsible for the Appellant's care, including discharge plans. Its determination to discharge him to an acute care hospital does not comport with these requirements.

### CONCLUSION

The Facility failed to provide the Appellant with written notice that he was being discharged, and the reason for his discharge. The Appellant's clinical record contains no documentation regarding the reasons for the Appellant's discharge, and no documentation from a physician that the Appellant should be discharged. The Facility has failed to establish an appropriate discharge plan because discharge to an acute care hospital is not appropriate. In addition, the Facility has not established a legitimate, factual basis for its determination, as it presented no evidence that the Appellant engaged in behavior towards staff or residents that endangered their safety.

Nursing homes are required to consider residents' unique needs, based upon each resident's life experiences, values, attitudes, desires, and clinical and psychosocial needs. 10 NYCRR § 415.1(a). It is the Facility's obligation to assist the Appellant with needed psychosocial support. While the Facility clearly finds the Appellant's personality and overall temperament unpleasant, staff has not considered the Appellant's personal history and setbacks, and have not provided the Appellant with individualized care. Instead, they seek to use his life experiences solely to justify a determination that is not legally justifiable.

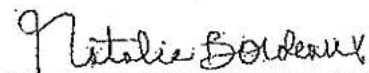
There is no doubt that the Appellant has argued with other residents at the Facility. However, the Facility's own documentation concerning the alleged incidents fails to substantiate allegations of threats and physical violence. The Facility overlooked independent accounts which refuted those complaints. Furthermore, the Facility does not dispute that the Appellant cannot remain in an acute care hospital. The Facility's determination is not sustained.

#### **DECISION ORDER**

Silvercrest Center for Nursing and Rehabilitation has not established that its determination to discharge the Appellant was correct or that its discharge plan is appropriate.

1. Silvercrest Center for Nursing and Rehabilitation is directed to readmit the Appellant to the first available semi-private bed prior to admitting any other person to the facility, pursuant to 10 NYCRR § 415.3(h)(2)(i)(d).

Dated: April 5, 2018  
New York, New York



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Natalie J. Bordeaux  
Administrative Law Judge