



# Department of Health

ANDREW M. CUOMO  
Governor

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

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

May 2, 2019

## CERTIFIED MAIL/RETURN RECEIPT

██████████  
c/o Fishkill Center for Rehabilitation & Nursing  
22 Robert R. Kasin Way  
Beacon, New York 12508

Mr. Michael Zyskind, Administrator  
Fishkill Center for Rehabilitation & Nursing  
22 Robert R. Kasin Way  
Beacon, New York 12508

**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

-----X  
In the Matter of an Appeal, pursuant to :  
10 NYCRR § 415.3, by :

COPY

[REDACTED]

Appellant, :

from a determination by :

DECISION

FISHKILL CENTER FOR :  
REHABILITATION and NURSING :

Respondent, :

to discharge him from a residential health :  
care facility. :

-----X  
Hearing Before:

Matthew C. Hall  
Administrative Law Judge

Held at:

Fishkill Center for Rehabilitation  
and Nursing  
22 Robert R. Kasin Way  
Beacon, New York 12508

Hearing Date:

April 10, 2019

Parties:

Fishkill Center for Rehabilitation  
and Nursing

[REDACTED]

*Pro Se*

JURISDICTION

By notice dated [REDACTED] [REDACTED] 2019, Fishkill Center for Rehabilitation and Nursing (the Facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] [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 New York Codes Rules, and Regulations (NYCRR) § 415.3(h).

HEARING RECORD

ALJ Exhibits: 1 - Notice of Hearing and attached Facility Discharge Notice

Facility Exhibits:

- 1 - Notice of Discharge/Transfer
- 2 - Admission Face Sheet
- 3 - Andrea Lohman, Unit Manager, statement
- 4 - Careplan Summary
- 5 - Tracey Cassel-Dworetzky, statement
- 6 - Trisha Augustine, DSW, statement
- 7 - Brief Interview for Mental Status
- 8 - Mood Evaluation
- 9 - Progress Notes
- 10 - Benefits Application
- 11 - Medical Discharge Summary [REDACTED] /19)
- 12 - Medical Discharge Summary [REDACTED] /19)
- 13 - Melinda Delazar, [REDACTED] [REDACTED]
- 14 - [REDACTED] Tool

Appellant's Exhibits: A - Discharge Instructions

Facility Witnesses: Michael Zyskind - Administrator  
Andrea Lohman - L.P.N., Unit Manager  
Tracey Cassell-Dworetzky - Director of Rehab  
Tisha Augustine - Director of Social Work

Appellant's Witness: Appellant testified on his own behalf

### ISSUES

Has the Facility established that the determination to discharge (the Appellant) is correct and that its discharge plan is appropriate?

### FINDINGS OF FACT

Citations in parentheses refer to testimony (T.) of witnesses and exhibits (Ex.) found persuasive in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of cited evidence.

1. The Appellant is a [REDACTED]-year-old man who was admitted to the Facility on [REDACTED], 2018. (Ex 2.)

2. He was admitted originally for sub-acute rehabilitation after injuries sustained in a [REDACTED] [REDACTED]. He was diagnosed with [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. (Ex 2,3.)

3. By notice dated [REDACTED] 2019, the Facility determined to discharge the Appellant on [REDACTED] [REDACTED], 2019 because his "health

improve(d) sufficiently so that the Resident no longer needs the services of the Facility." (Ex. 1.)

4. The Facility determined to discharge the Appellant to the Department of Social Services (DSS), located at [REDACTED] [REDACTED]. (Ex. 1.)

5. At the time of his admission, the Appellant required assistance with dressing, bathing and transfers. He was deconditioned (decreased endurance). He could ambulate up to [REDACTED] feet but required the assistance of a walker. He also needed assistance in all his Activities of Daily Living (ADLs). (Ex. 3, 6; T. Cassel-Dworetzky.)

6. On [REDACTED] [REDACTED] 2018, the Appellant was discharged from sub-acute rehabilitation and transferred to long-term rehabilitation for continued assistance with his medications. Upon discharge, the Appellant could ambulate an indefinite distance with no assistance. His strength was improved, and he no longer needed assistance with his ADLs, dressing, bathing or transfers. (Ex. 3, 6; T. Cassel-Dworetzky.)

7. The Appellant owns a home. However, at the time of this hearing, he and his [REDACTED] who lives in the home, were in the process of getting a [REDACTED] and his [REDACTED] had an [REDACTED] [REDACTED]

██████████ against the Appellant. Therefore, returning to his home was not an option for the Appellant. (T. Cassel-Dworetzky.)

8. The Facility investigated the possibility of sending the Appellant to an assisted living facility. The Appellant, however, did not have a "payer source" or the means to pay for assisted living on his own. (T. Cassel-Dworetzky.)

9. It is the professional opinion of Appellant's caregivers at the Facility, including the Facility's Attending Physician, Administrator, Director of Social Work, and Director of Rehabilitation, that discharge to the community, including to the Department of Social Services, is appropriate. (Ex. 11; T. Zyskind, Lohman, Cassell-Dworetzky, Augustine.)

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 Department of Health Rules and 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).

A resident may only be discharged pursuant to specific provisions of the Department of Health Rules and Regulations (10 NYCRR 415.3[h][1]).

The Facility alleged that the Resident's discharge is permissible pursuant to 10 NYCRR § 415(h)(1)(i)(a)(2), which states:

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.

Under the hearing procedures at Title 10 NYCRR §415.3(h)(2)(ii), the Facility bears the burden to prove a discharge necessary and appropriate. Under the New York State Administrative Procedures Act (SAPA) § 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.

DISCUSSION

Reason for Discharge

Regarding whether the resident's health improved sufficiently and the resident no longer require(s) the services of a skilled nursing facility:

The Appellant was admitted to the Facility on [REDACTED], 2018, after time spent in a hospital due to a [REDACTED]. He was admitted with diagnoses including [REDACTED] [REDACTED] [REDACTED] [REDACTED]. At the time of his admission to the Facility, the Appellant required the Facility's assistance with ambulating, transferring, showering and all ADL's. By [REDACTED], 2018, however, the Appellant had made significant improvements in all these areas and indeed, presented as a healthy [REDACTED]-year-old man at the hearing. He was able to walk with no assistance. His endurance was increased and he was independent in all his ADLs. He had no further need for rehabilitation. Further, the Appellant owns a car and during his time at the Facility, had been making and keeping his own out-patient appointments in the community. (T. Zyskind.) Importantly, the Appellant's attending physician at the Facility provided that "the [patient] is independent and can take care of himself." (Ex. 11.) The Appellant testified on his own behalf and made it known



that he did not want to leave the Facility but was unable to provide evidence that he still required the assistance of a skilled nursing facility.

Accordingly, the Facility has proven that its determination to discharge the Appellant is correct.

#### Discharge Location

As discussed above, the Appellant owns his own home, but due to an existing [REDACTED] favoring his [REDACTED] and against him, returning home is not currently an option for him. Returning to his home, however, could become a viable option in the future. In the meantime, it is clear from the evidence that the Appellant no longer needs the assistance of a skilled nursing facility. He is unable to pay for an assisted living facility and at the hearing, he expressed serious reservations about being placed in one. The Facility intends to discharge the Appellant to the Department of Social Services, where the Appellant will immediately be provided with food and shelter. Further, as the Appellant is now physically capable and has the desire to work, he would be eligible for the "Job Ready Program" available to DSS residents who are "willing and able to work." This program would provide the Appellant with an opportunity to work and enable him

to earn a level of financial independence that will allow him to eventually afford a private living arrangement. (T. Augustine.)

The Appellant made it clear during his testimony that he is hesitant to be placed with the Department of Social Services due to the several "characters" in such a facility that the Appellant feels will make his life difficult. (T. Appellant.) The Appellant's options are limited, however, and the Department of Social Services would provide the Appellant with immediate shelter and sustenance and afford him the opportunity to advance to a more private and comfortable living situation.

Accordingly, the Facility has proven that its determination to discharge the Appellant to the Department of Social Services is appropriate.


#### DECISION

Fishkill Center for Rehabilitation and Nursing has established that its determination to discharge the Appellant was correct, and that transfer to the Department of Social Services is appropriate.

1. Fishkill Center for Rehabilitation and Nursing is authorized to discharge the Appellant in accordance with its discharge plan on or after [REDACTED] 2019.

2. This decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules.

DATED: Albany, New York  
May 1, 2019

  
MATTHEW C. HALL  
Administrative Law Judge

To:

■ ■■■■■  
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22 Robert R. Kasin Way  
Beacon, New York 12508

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