



**Department  
of Health**

**ANDREW M. CUOMO**  
Governor

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

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

November 21, 2019

**CERTIFIED MAIL/RETURN RECEIPT**

[REDACTED]  
Wingate of Ulster  
1 Wingate Way  
Highland, New York 12528

Jonathan Scharf, Esq.  
Wingate Healthcare  
One Charles River Place  
63 Kendrick Street  
Needham, Massachusetts 02494

Carl Kelly, Administrator  
Wingate of Ulster  
1 Wingate Way  
Highland, New York 12528

[REDACTED] 4

Clayton Harbby, Administrator  
Wingate of Dutchess  
3 Summit Court  
Fishkill, New York 12524

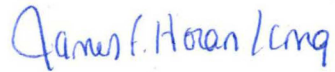
**RE: In the Matter of [REDACTED] – Discharge Appeal**

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  
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

██████████,

Appellant,

from a determination by

WINGATE OF DUTCHESS

to discharge him from a residential health care facility.

---

**ORIGINAL**

**DECISION**

Before: Tina M. Champion  
Administrative Law Judge

Held at: Wingate of Ulster  
1 Wingate Way  
Highland, New York 12528

Date: October 17, 2019

Parties: ██████████  
Wingate of Ulster  
1 Wingate Way  
Highland, New York 12528  
By: Pro Se

Wingate of Dutchess  
3 Summit Court  
Fishkill, New York 12524  
By: Jonathan Scharf, Esq.  
Wingate Healthcare  
One Charles River Place  
63 Kendrick Street  
Needham, Massachusetts 02494

### JURISDICTION

In [REDACTED] 2019, Wingate of Dutchess (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), transferred [REDACTED] (the Appellant) from the Facility to Wingate of Ulster. 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).

The hearing was held in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulations (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR.

Evidence was received and witnesses were examined. An audio recording of the proceeding was made.

### HEARING RECORD

ALJ Exhibits: I – Letter with Notice of Hearing  
II – Rescheduling Letter

Facility Exhibits: 1 – [REDACTED] 19 Statement of Alicia Alfred  
2 – [REDACTED] 19 Statement of Alicia Alfred  
3 – [REDACTED] /19 email from Bryan Rossano  
4 – [REDACTED] /19 email from Tracy Raleigh  
5 – Facility Talking Points Regarding [REDACTED]  
6 – Facility Transfer or Discharge Notice Policy  
7 – Facility Involuntary Discharge Hearing Request Form

Appellant Exhibits: None

Facility Witnesses: Alicia Alfred, LMSW at Wingate of Dutchess  
Clayton Harbby, LNHA at Wingate of Dutchess

Appellant Witnesses: Appellant testified on his own behalf  
[REDACTED], Appellant's [REDACTED]

### FINDINGS OF FACT

1. The Appellant is a male in his [REDACTED] who was initially admitted to the Facility in 2017 for rehabilitation. Following a hospital admission, he was readmitted to the Facility on [REDACTED] 2019 and required a [REDACTED] (Testimony [T.] Alfred, Harbby.)

2. A business decision to move toward closing the [REDACTED] unit at the Facility was made in or around 2016 and in early 2018 the Facility began the Certificate of Need process with the New York State Department of Health to obtain approval for closure of the unit. (T. Harbby.)

3. In early 2019, Mr. Harbby received communication from the Department of Health that led him to believe that approval for closure of the [REDACTED] unit at the Facility would be occurring in the near future. (Facility Exs. 3-4; T. Harbby.)

4. The Facility then offered current residents of the [REDACTED] unit the option to transfer from the Facility to Wingate of Ulster so that the residents could stay relatively close to where they had been residing. Some residents chose to transfer to Wingate of Ulster and some residents chose to stay at the Facility. No residents were involuntarily transferred from the Facility because of the Facility's plan to close its [REDACTED] unit. (T. Alfred, Harbby.)

5. The Appellant's [REDACTED], lives in [REDACTED] near Wingate of Dutchess. He is and always has been very active in the Appellant's health care and visits him daily. (T. Alfred, [REDACTED].)

6. Upon the Appellant's readmission to the Facility on [REDACTED], 2019, [REDACTED], the Appellant's [REDACTED] questioned Alicia Alfred, LMSW regarding the recent discharge of some other residents from the Facility, at which time she directed him to speak with Clayton Harbby, the Facility's Administrator. (T. Alfred.)

7. [REDACTED] then questioned Mr. Harbby about the potential closure of the [REDACTED] unit at the Facility, at which time Mr. Harbby told [REDACTED] that he believed the closure would

happen soon and that there was a bed available for the Appellant at Wingate of Ulster. (T. Harbby.)

8. Subsequent to [REDACTED] discussion with Mr. Harbby, [REDACTED] sought input from Ms. Alfred as to whether the Appellant should stay at the Facility or transfer to a different facility, to which Ms. Alfred informed [REDACTED] that it was the Appellant's choice. (T. Alfred.)

9. The day after his discussion with Mr. Harbby [REDACTED] verbally directed Mr. Harbby to reserve a bed for the Appellant at Wingate of Ulster. (T. [REDACTED])

10. The Appellant was moved from the Facility to Wingate of Ulster on [REDACTED] 2019. (T. Alfred.)

11. The Appellant's medical record at the Facility does not contain documentation evidencing voluntariness of his transfer or that the transfer was self-initiated. (T. Harbby.)

12. The Facility did not provide the Appellant with a Notice of Transfer or Discharge. (T. Alfred.)

13. The Appellant has remained at Wingate of Ulster during the pendency of the appeal.

14. The ventilator unit at the Facility remains open with [REDACTED] beds occupied as of the hearing, and the Facility believes that the Department of Health's approval of closure will occur once there are no occupied beds in the unit. (T. Harbby.)

### ISSUES

Has the Facility established that its transfer of the Appellant was not involuntary and, if involuntary, that it was correct and that its discharge plan appropriate?

### 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. (PHL § 2801[2][3]; 10 NYCRR 415.2[k].)

A resident may only be transferred or discharged pursuant to specific provisions of the Department of Health Rules and Regulations. (10 NYCRR 415.3[h][1].) Those provisions do not apply where transfer or discharge is "made in compliance with a request by the resident, the resident's legal representative or health care agent or health care agent, as evidenced by a signed and dated written statement." (10 NYCRR 415.3[h].)

Under the hearing procedures at 10 NYCRR 415.3(h)(2)(iii), the Facility bears the burden to prove a discharge is necessary and appropriate. Under 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. It is less than a preponderance of evidence but more than mere surmise, conjecture or speculation, and it constitutes a rational basis for a decision. (Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3d Dept. 1984], appeal dismissed 63 N.Y.2d 649.)

### DISCUSSION

The Facility contends that it did not involuntarily transfer or discharge the Appellant. It contends that the Appellant was transferred from the Facility to Wingate of Ulster at the directive of the Appellant's [REDACTED] on the Appellant's behalf.

The Appellant testified briefly at the hearing, indicating that his [REDACTED] was heavily involved in his care and visited frequently. He also stated that he desires to be in [REDACTED] to be

closer to his home, family, and friends. The Appellant testified that he was told "second hand" in [REDACTED] 2019 that he had to go to Wingate of Ulster. When asked specifically about this, the Appellant stated that his [REDACTED] told him he had to leave. The Appellant did not testify, or even insinuate, that the Facility told him that he needed to leave.

[REDACTED] testified that he had heard "rumors" about the [REDACTED] unit closing at the Facility for some time, and that he heard "strong" rumors that the unit would be closing "soon" when the Appellant was readmitted to the Facility on [REDACTED], 2019. [REDACTED] elaborated that those rumors came from Facility staff and from the family members of other residents that had decided to stay at the Facility rather than transfer to a ventilator unit at a different location.

[REDACTED] testified that he spoke with Mr. Harbby about the unit closing and he felt that it "seemed imminent." [REDACTED] testified that he was offered a [REDACTED] unit bed at Wingate of Ulster for the Appellant and, after researching other options and finding that there were no available [REDACTED] unit beds in [REDACTED], decided to move the Appellant to the available bed at Wingate of Ulster. [REDACTED] testified that he "had to make a decision quickly" as he was "afraid the bed in Ulster would go away" and the Appellant would be "worse off." He also said that the decision was made based on "a lot of pressure" that if the Appellant did not go to Wingate of Ulster and the [REDACTED] unit at the Facility closed then he did not know where the Appellant would end up. [REDACTED] testified that he directed Mr. Harbby to reserve a bed for the Appellant at Wingate of Ulster.

While [REDACTED], a clearly loving and devoted [REDACTED] undoubtedly felt a lot of pressure to make the best choice for the Appellant given the Facility's ultimate plans for closure of the [REDACTED] unit, there is no indication in the record that the Appellant was forced or coerced into leaving the Facility. To the contrary, [REDACTED] acknowledged that he was aware that other residents in the [REDACTED] unit had chosen to stay at the Facility for as long as they were able, and



that he directed Mr. Harbby to reserve a bed at Wingate of Ulster for the Appellant. [REDACTED] also acknowledged that he was the one that initiated conversations with Facility administration regarding the possible closure. While his actions show the utmost concern for the Appellant, they were not based upon a determination by the Facility to involuntarily transfer or discharge the Appellant or to coerce a voluntary transfer.

The Facility records are lacking a signed and dated written statement evidencing that the transfer was made in compliance with a request by the resident. However, given [REDACTED] acknowledgement that he directed the transfer and the Appellant's acquiescence to that directive, along with the significant passage of time of approximately four and a half months between transfer and appeal, readmission of the Appellant to the Facility is not an appropriate remedy to address the Facility's failure to obtain a signed and dated written statement.


### **DECISION**


Wingate of Dutchess has established that the Appellant's transfer to Wingate of Ulster was voluntary. Accordingly, it is unnecessary to reach a determination on the appropriateness of the transfer and the plan, and the appeal is dismissed.

1. Wingate of Dutchess is not required to readmit the Appellant but is urged to offer a first-chance readmission to the Appellant should its desire to close its [REDACTED] unit change or if its closure plan is denied by the Department of Health.
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  
November 20, 2019

  
Tina M. Champion  
Administrative Law Judge

TO:   
Wingate of Ulster  
1 Wingate Way  
Highland, New York 12528

  
Jonathan Scharf, Esq.  
Wingate Healthcare  
One Charles River Place  
63 Kendrick Street  
Needham, Massachusetts 02494

Clayton Harbby, Administrator  
Wingate of Dutchess  
3 Summit Court  
Fishkill, New York 12524

Carl Kelly, Administrator  
Wingate of Ulster  
1 Wingate Way  
Highland, New York 12528