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**Department  
of Health**

**ANDREW M. CUOMO**  
Governor

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

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

March 11, 2020

**CERTIFIED MAIL/RETURN RECEIPT**

██████████  
c/o Andover Subacute & Rehab Ctr.  
99 Mulford Road  
Andover, New Jersey 07821



Frank Garcia, SW  
Andover Subacute & Rehab Ctr.  
P.O. Box 1279  
Andover, New Jersey 07821-1279

Wendy Brewster, DON  
Middletown Park Rehab & Health Center  
121 Dunning Road  
Middletown, New York 10940

**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: nm  
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH

-----X  
 In the Matter of an Appeal, pursuant to :  
 10 NYCRR § 415.3, by :  
 :  
 [REDACTED] :  
 :  
 Appellant, :  
 :  
 from a determination by :  
 :  
 MIDDLETOWN PARK REHABILITATION :  
 AND HEALTH CENTER :  
 :  
 Respondent, :  
 :  
 to discharge him from a residential health :  
 care facility. :  
 -----X

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DECISION

Hearing Before: Matthew C. Hall  
Administrative Law Judge

Hearing Date: March 5, 2020

Parties: Middletown Park Rehabilitation  
and Health Center  
By: Wendy Brewster - D.O.N.

By: [REDACTED] - [REDACTED]

JURISDICTION

On [REDACTED], 2019, Middletown Park Rehabilitation and Health Center (the Facility), a residential care facility subject to Article 28 of the New York Public Health Law, transferred [REDACTED] (the Appellant) from the Facility to Andover Subacute and Rehabilitation Center (Andover). 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). A hearing was held telephonically. Evidence was received and witnesses were examined. A recording of the proceeding was made.

HEARING RECORD

ALJ Exhibits: I - Discharge Appeal and progress notes

Facility Exhibits: 1 - Investigative Summary  
2 - Statement - [REDACTED] - SW  
3 - Statement - [REDACTED] - LPN

Facility Witnesses: Wendy Brewster - Director of Nursing (DON)  
[REDACTED] - Social Worker  
[REDACTED] - LPN Unit Manager

Appellant Exhibits: None

Appellant Witness: [REDACTED] - Appellant's [REDACTED]

Other Witness: Frank Garcia - Social Worker at Andover

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 was 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 Facility is a Nursing Home located in Middletown, New York.

2. The Appellant is a [REDACTED]-year-old man who was admitted to the Facility on [REDACTED] 2016 for short-term rehabilitation and subsequently transferred to long-term. (Ex. 1.)

3. He was admitted with diagnoses including [REDACTED], [REDACTED] behavior, [REDACTED] cognitive impairment, [REDACTED], [REDACTED], and [REDACTED]. (Ex 1.)

4. The Appellant was transferred from the Facility to Andover Subacute and Rehabilitation Center on [REDACTED], 2019. Prior to

his transfer, the Appellant's [REDACTED] informed the Facility that she wanted her [REDACTED] transferred to another skilled nursing facility to accommodate her recent relocation from [REDACTED] [REDACTED] [REDACTED] to [REDACTED] [REDACTED]. (Ex. 1,2,3; T. [REDACTED] Brewster.)

5. The Facility sent out Patient Review Instruments (PRIs) to various skilled nursing facilities in the area. Due to the Appellant's [REDACTED] [REDACTED] behavior, however, nearly all of the area's nursing facilities declined the Appellant's request for transfer to their facilities. (Ex. 1.)

6. Due to the Appellant's [REDACTED] behaviors, a plan was then developed by the Facility, with the Appellant's [REDACTED] input, to seek entry into a facility with a behavior management and psychosocial program designed to manage the care of residents with [REDACTED] behavior problems. (Ex. 1.)

7. Of all the PRIs sent out to local nursing homes, only one facility, Andover, agreed to accept the Appellant as a resident. The Appellant's [REDACTED] agreed and the Appellant was transferred on [REDACTED], 2019. (Ex. 1.)

8. At no time during the PRI and transfer process, did the Appellant's [REDACTED] object to the transfer. (Ex. 1.)

9. The Appellant's [REDACTED] was constantly updated and even spoke with the Facility by phone on the day of the Appellant's transfer.

During those communications, she agreed to allow the Appellant to be transferred to Andover and at "no time did she defer any change to the plan." (Ex. 1; T. [REDACTED] [REDACTED])

10. The Facility heard nothing further from the Appellant or his [REDACTED] until a few weeks later when they were notified of the instant appeal request. (Ex. 1.)

11. As of the date of this hearing, Andover was willing to continue to provide care for the Appellant. (T. Garcia.)

12. The Appellant has remained at Andover 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](i)(a)). 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, 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)(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 a 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

The Appellant was admitted to the Facility on [REDACTED] 2016, with diagnoses including [REDACTED] [REDACTED] cognitive impairment, [REDACTED] [REDACTED] [REDACTED] [REDACTED] and [REDACTED] [REDACTED] [REDACTED]. (Ex 1.) As he is [REDACTED] skills, he has relied heavily on his [REDACTED] as an advocate and communicator regarding his



treatment. During his nearly [REDACTED] years in the Facility, his behaviors became [REDACTED] [REDACTED] toward the staff and other residents. The Facility, however, allowed him to stay at the Facility and continued to care for his needs. At some point, the Appellant's [REDACTED] decided to relocate from [REDACTED] [REDACTED] [REDACTED] to [REDACTED] [REDACTED] [REDACTED]. As such, she requested that the Facility assist her in finding a new skilled nursing facility closer to her new residence. The Facility complied and sent out PRIs to several locations, but nearly all of them rejected the Appellant due to his reported [REDACTED] behaviors. The Appellant's [REDACTED] persisted, however, calling "several times to request the resident to be transferred." (Ex. 2.) Eventually, Andover, a facility in [REDACTED] [REDACTED] accepted the referral for transfer. Andover is a facility better suited to care for the Appellant as they provide a "specialized psychosocial program, which...is designed to manage the care of residents with [REDACTED] behavior problems." (Ex. 2.) The Appellant's [REDACTED] agreed to the transfer. She was asked if she would like to tour the new facility first, but she declined, indicating that she "knew where the facility (was)." (Ex. 3.) On the day of the discharge, the LPN Unit manager spoke with the Appellant's [REDACTED] and "she did not offer any questions or concerns regarding the discharge to Andover." (Ex. 3.) At no time did

either the Appellant or his [REDACTED] indicate that they did not want the transfer. (Ex. 2.) Indeed, the Appellant's [REDACTED] attended the Appellant's care plan meetings and raised no objections. (Ex. 2.) Frank Garcia, a social worker at Andover testified that during the Appellant's transfer, he was assured that the Appellant "came to us as voluntary patient." The Appellant's [REDACTED] was aware of the transfer and he had "no idea that (she) would oppose." (T. Garcia.)

Subsequent to the Appellant's discharge, the Appellant's [REDACTED] filed the instant appeal and reported that "her [REDACTED] is not happy in his current location." (ALJ I.) She would like him to return to the Facility. As recently as [REDACTED] [REDACTED], 2019, the Facility had agreed to allow the Appellant to return, but subsequently learned of [REDACTED] [REDACTED] behaviors by the Appellant at Andover, including the [REDACTED] of another resident. Therefore, the Facility no longer felt that they were able to provide adequate care to the Appellant. (T. Brewster.)

During the hearing, the Appellant's [REDACTED] testified that she did not agree to the transfer. This assertion is belied by the sworn testimony of three medical professionals at the Facility. The Facility records are lacking a signed and dated written statement indicating that the transfer was made at the Appellant's request. However, considering the consistent sworn testimony by

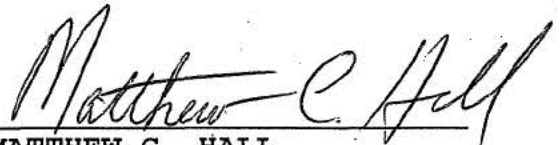
the Facility's nursing staff, the Facility's account is accepted. The Appellant's transfer from the Facility to Andover is deemed "voluntary" and therefore not subject to the requirements for "involuntary discharge" enumerated in 10 NYCRR 415.3[h][1](i)(a).

DECISION

The Facility has established that the Appellant's transfer from the Facility to Andover 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. Middletown Park Rehabilitation and Health Center is not required to readmit the Appellant.
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  
March 11, 2020

  
MATTHEW C. HALL  
Administrative Law Judge

To: Mr. [REDACTED] [REDACTED]  
c/o Andover Subacute and Rehabilitation Center  
99 Mulford Road  
Andover, New Jersey 07821

Ms. [REDACTED]  
[REDACTED]

Mr. Frank Garcia, Social Worker  
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Ms. Wendy Brewster, Director of Nursing  
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