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# Department of Health

**KATHY HOCHUL**  
Governor

**JAMES V. McDONALD, M.D., M.P.H.**  
Acting Commissioner

**MEGAN E. BALDWIN**  
Acting Executive Deputy Commissioner

March 20, 2023

## CERTIFIED MAIL/RETURN RECEIPT

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██████████  
BY EMAIL ONLY

**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,

Natalie J. Bordeaux  
Chief Administrative Law Judge  
Bureau of Adjudication

NJB: nm  
Enclosure



**JURISDICTION**

On [REDACTED], 2022, Cayuga Nursing and Rehabilitation Center (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined [REDACTED] [REDACTED] (the Appellant) to be discharged from the Facility against medical advice. 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(i).

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. A recording of the proceeding was made.

**HEARING RECORD**

The Appellant was not present during the hearing.

Facility Witnesses: David Chess, MD  
Austen Holochak, Acting NHA  
Shalom Braunstein, Owner/Operator

Facility Exhibits: 1 – 9

Hospital Witnesses: Clifford Ehmke, MD  
Candice Oliver, DO

Hospital Exhibits: none

Other Witnesses: [REDACTED] [REDACTED] Appellant's [REDACTED]

ALJ Exhibits: I – Letter with Notice of Hearing

### FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old male with [REDACTED] (Testimony [T.] Ehmke.)
2. The Appellant was admitted to the Facility in [REDACTED] 2022. (T. Chess.)
3. The Appellant has an Airstream trailer on property he owns in the [REDACTED]. The trailer was last known to be without running water and electricity. (T. [REDACTED] [REDACTED])
4. The Appellant suffers from [REDACTED] but has expressed at various times since his admission to the Facility that he wants to go home. (T. Chess, Holochak.)
5. The Appellant is approximately [REDACTED] feet tall and weighs approximately [REDACTED] pounds. He has no physical limitations. At times he exhibits behaviors associated with his [REDACTED] that make Facility staff nervous in part because he is a "[REDACTED] man." (T. Chess, Holochak.)
6. On [REDACTED], 2022, the Appellant became "[REDACTED]" about the food at the Facility and expressed that he wanted to go home. The Appellant exited the Facility in what the Facility understood was an attempt to begin walking home.<sup>1</sup> Facility nurses were concerned about the Appellant's wellbeing and a Facility LPN closely followed the Appellant for approximately two miles. The Appellant stumbled and fell twice, sustaining injury to his [REDACTED]. He was then transported to Cayuga Medical Center by ambulance. (Facility Ex. 9; T. Chess, Holochak.)
7. The Appellant has been at Cayuga Medical Center since [REDACTED], 2022. He has received four [REDACTED] of [REDACTED] while at the hospital – administered on [REDACTED], 2022; [REDACTED] 2022; [REDACTED], 2023; and [REDACTED], 2023. The [REDACTED] has been discontinued but is known to remain therapeutic for approximately four weeks before self-tapering, meaning that Appellant is likely still receiving a benefit from the medication. (T. Ehmke.)
8. The Appellant has not exhibited any [REDACTED] at the hospital since [REDACTED] 2022 and has been medically cleared for discharge back to the Facility. (Facility Ex. 9; T. Ehmke.)

<sup>1</sup> A Google Maps search of the distance between the Facility and [REDACTED] New York, reflects that the locations are approximately [REDACTED] miles apart and walking would take approximately [REDACTED].

9. The Facility executed a "Discharge Against Medical Advice Release of Liability and Responsibility" form dated [REDACTED], 2022. The form is unsigned by the Appellant. It is stated on the Appellant's signature line that "Resident was [REDACTED] and set on leaving facility. He refused to sign any papers or listen to reason." The form is signed by an LPN. (Facility Ex. 8.)

10. The Facility has refused to allow the Appellant to return, taking the position that the Appellant voluntarily discharged himself on [REDACTED], 2022, and that it is not able to appropriately care for the Appellant. (T. Chess; Braunstein.)

11. Prior to scheduling a hearing on this matter, the parties were afforded time to locate a mutually agreeable safe and appropriate discharge location for the Appellant. Attempts to locate such a location were unsuccessful and a hearing was scheduled.

12. The Appellant has remained at Cayuga Medical Center during the pendency of the appeal.

### ISSUES

Has the Facility established that its discharge determination is correct?

### 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 and discharged pursuant to specific provisions of the Department of Health Rules and Regulations. (10 NYCRR 415.3[i][1].) Excluding reasons of nonpayment and facility closure, a resident may be transferred only when:

- (1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in the facility;

- (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;
- (3) the safety of individuals in the facility is endangered; or
- (4) The health of individuals in the facility is endangered;

(10 NYCRR 415.3[i][1][i][a].)

Those requirements for transfer and discharge 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[i].)

If transfer or discharge is necessary pursuant to 10 NYCRR 415.3(i)(1)(i)(a), facilities are required to provide written notice of transfer or discharge that includes the following:

- (a) The reason for transfer or discharge;
- (b) The specific regulations that support, or the change in Federal or State law that requires, the action;
- (c) The effective date of transfer or discharge;
- (d) The location to which the resident will be transferred or discharged;
- (e) a statement that the resident has the right to appeal the action to the State Department of Health, which includes:
  - (1) an explanation of the individual's right to request an evidentiary hearing appealing the decision;
  - (2) the method by which an appeal may be obtained;
  - (3) in cases of an action based on a change in law, an explanation of the circumstances under which an appeal will be granted;
  - (4) an explanation that the resident may remain in the facility (except in cases of imminent danger) pending the appeal decision if the request for an appeal is made within 15 days of the date the resident received the notice of transfer/discharge;
  - (5) in cases of residents discharged/transferred due to imminent danger, a statement that the resident may return to the first available bed if he or she prevails at the hearing on appeal; and
  - (6) a statement that the resident may represent him or herself or use legal counsel, a relative, a friend, or other spokesman;
- (f) the name, address and telephone number of the State long term care ombudsman;
- (g) for nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible

for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act;

(h) for nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

(10 NYCRR 415.3(i)(1)(v).)

Facilities are also required to “provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility in the form of a discharge plan which addresses the medical needs of the resident and how these will be met after discharge.”

(10 NYCRR 415.3(i)(1)(vi).)

Under the hearing procedures at 10 NYCRR 415.3(i)(2)(iii)(b), 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 argues that the Appellant discharged himself against medical advice when he walked out the door on [REDACTED] 2022. The Facility’s supporting documentation is a “Discharge Against Medical Advice Release of Liability and Responsibility” form that is not signed by the Appellant, the Appellant’s legal representative, or the Appellant’s Health Care Agent. Rather, the form contains an entry from an LPN stating “Resident was [REDACTED] and set on leaving facility. He refused to sign any papers or listen to reason.” The Appellant has no physical limitation that would prevent him from signing the form. (T. Chess.) The parties disagree as to the Appellant’s



capacity to make medical decision for himself, with the Facility arguing that the Appellant had capacity on [REDACTED], 2022 and Cayuga Medical Center arguing that the Appellant did not and does not have capacity. While the totality of evidence supports a conclusion that the Appellant did not have capacity,<sup>2</sup> it is irrelevant as the Facility's Discharge Against Medical Advice form is lacking an appropriate signature and is therefore insufficient to nullify the requirements for transfer or discharge set forth by regulation. Furthermore, the Facility's argument that it cannot appropriately take care of the Appellant due to his [REDACTED] with behaviors is insufficient to establish that transfer/discharge is necessary, particularly when weighed against the informed and credible testimony of Drs. Ehmke and Oliver from Cayuga Medical Center. Additionally, the Facility has not provided any written notice to the Appellant to meet the requirements of 10 NYCRR 415.3(i)(1)(v) or engaged in any discharge planning pursuant to 10 NYCRR 415.3(i)(1)(vi).

The Facility's reliance on the "CMS State Operations Manual" with respect to "Resident-initiated transfer or discharge" is unpersuasive as a means to circumvent the obligations set forth above. Notably, the excerpt submitted by the Facility defines resident-initiated transfer or discharge as follows: "Means the resident, or if appropriate, the resident representative has provided verbal or written notice of intent to leave the facility (**leaving the facility does not include the general expression of a desire to return home** or the elopement of residents with cognitive impairment)." (Facility Ex. 7 [emphasis added].)

The Appellant is medically cleared for discharge and has been inappropriately, and inhumanely in the opinion of Dr. Ehmke, residing in a non-residential setting at Cayuga Medical

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<sup>2</sup> The testimony of Dr. Ehmke is given significantly more weight than that of Dr. Chess for reasons including that the Appellant was known to and evaluated by Dr. Ehmke prior to and subsequent to [REDACTED], 2022, whereas Dr. Chess has never met the Appellant, and because the Appellant has been at Cayuga Medical Center for the last four months. The Facility is also lacking sufficient documentation to convincingly support a conclusion that the Appellant had capacity to make medical decisions, which is also evidenced by the fact that a nurse from the Facility was so concerned about the wellbeing of the Appellant that she followed him for approximately [REDACTED] miles upon his leaving the Facility.


Center since [REDACTED], 2022. The Appellant has not been properly discharged or transferred from the Facility, and the Facility must resume care of the Appellant, taking whatever steps are necessary to properly care for the Appellant, as well as other Facility residents, until such time as the Facility correctly discharges/transfers the Appellant pursuant to an appropriate discharge plan.

**DECISION**


Cayuga Nursing and Rehabilitation Center has not established that its determination that the Appellant was discharged against medical advice was correct or that the Appellant's discharge was necessary and that the discharge plan was appropriate.

1. Cayuga Nursing and Rehabilitation Center 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(i)(2)(i)(d).
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 20, 2022

  
Tina M. Champion  
Administrative Law Judge

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