



# Department of Health

ANDREW M. CUOMO  
Governor

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

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

July 16, 2018

## CERTIFIED MAIL/RETURN RECEIPT

Dania D'amberville, DSW  
Brooklyn Center for Rehabilitation  
and Residential Health Care  
1455 Coney Island Avenue  
Brooklyn, New York 11230

[REDACTED]  
C/o Brooklyn Center for Rehabilitation  
and Residential Health Care  
1455 Coney Island Avenue  
Brooklyn, New York 11230

Lawrence S. Rosen, Esq.  
LaRocca Hornik Rosen  
Greenberg & Blaha, LLP.  
40 Wall Street, 32<sup>nd</sup> Floor  
New York, New York 10005

RE: In the Matter of [REDACTED] - Discharge Appeal

Dear Parties:

Enclosed please find the Interim 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

**BROOKLYN REHABILITATION CENTER  
and RESIDENTIAL HEALTH CARE**  
Respondent,

to discharge him from a residential health care facility.

**COPY**

**DECISION**

Hearing Before:

Jean T. Carney  
Administrative Law Judge (ALJ)

Held at:

Brooklyn Center for Rehabilitation  
and Residential Health Care  
1455 Coney Island Avenue  
Brooklyn, New York 11230

Hearing Date:

June 20, 2018

Parties:

Brooklyn Center for Rehabilitation  
and Residential Health Care

By: Dania Dambreville, Social Work Director

[REDACTED] Appellant

By: Lawrence S. Rosen, Esq.  
LaRocca Hornik Rosen  
Greenberg & Blaha, LLP  
40 Wall Street, 32<sup>nd</sup> Floor  
New York, New York 10005

## JURISDICTION

By notice dated [REDACTED] 2018, Brooklyn Center for Rehabilitation and Residential Health Care (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [REDACTED] (Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) §415.3(h).

## HEARING RECORD

|                       |   |
|-----------------------|---|
| ALJ Exhibits:         | I – Physical Therapy Notes<br>II – Medication Review Report<br>III – Notice of Hearing  |
| Facility Exhibits:    | 2 – Physical Therapy Assessment/Screen Form<br>3 – Physical therapy Discharge Summary<br>4 – Social Work Notes<br>7 – Physician H & P<br>8 – Discharge Packet |
| Facility Witnesses:   | Maria Enriquez, Rehabilitation Director<br>Ann Marie Akinyouye, Director of Nursing   |
| Appellant's Exhibits: | None  |
| Appellant's Witness:  | Herschel Sauber, Owner, Orthocraft, Inc.<br>Appellant testified in 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

An opportunity to be heard having been afforded the parties, and evidence having been duly considered, it is hereby found:

1. The Appellant is a [REDACTED] year-old male who was admitted to the Facility on [REDACTED] 2017 with relevant diagnoses of [REDACTED]. He requires a wheelchair when outside, and when ambulating distances greater than [REDACTED] feet. (Testimony of Marie Enriquez @ 42; Facility Exhibit 2, and ALJ Exhibit II).
2. The Appellant's medications include [REDACTED]. In addition, the Appellant is prescribed an [REDACTED] to be taken with a [REDACTED] (ALJ Exhibit II).
3. Upon admission to the Facility, the Appellant required [REDACTED] term skilled nursing care, physical therapy, and occupational therapy. The Appellant was admitted without a [REDACTED] so his rehabilitation was delayed until he was properly [REDACTED] for, and was given, his [REDACTED] (Facility Exhibit 8; Testimony of Appellant @1:16 and 1:18).
4. The Appellant began physical therapy on [REDACTED] 2018, and although community mobility and stairs were never attempted, he was discharged from physical therapy on [REDACTED] 2018, upon his ability to ambulate on a level surface up to [REDACTED] feet, after which he required a wheelchair. (Facility Exhibit 3).
5. The Appellant was re-evaluated by physical therapy on [REDACTED] 2018. At that time, he was still recommended to use a wheelchair for long distances, and when outside for safety and

endurance. The Appellant does not currently have a wheel chair. (Facility Exhibit 2; Testimony of Maria Enriquez @42; Testimony of Appellant @1:49).

6. The Appellant has been medically cleared for discharge to an assisted living facility despite his inability to manage his medications and medical conditions. The Appellant was accepted into Brooklyn Adult Care Center Assisted Living, which does not allow wheelchairs. (Testimony of Ann Marie Akinyouye @ 1:04 and 1:11; Testimony of Appellant @ 1:40; Facility Exhibits 4 and 8).

#### APPLICABLE LAW

A residential health care facility, also referred to 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] and [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 alleges 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 of proving by substantial evidence that the discharge is necessary and the plan is appropriate. 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 [1984]).

#### DISCUSSION

The Facility failed to meet its burden of showing that the Appellant's health has improved sufficiently so that he no longer requires skilled nursing care, and may be discharged. The record indicates that the Appellant relies on staff for administering his medications, including at [REDACTED] [REDACTED] that requires [REDACTED] and [REDACTED] for his [REDACTED]. The treatment team acknowledged this, and admitted that the Appellant also required oversight of his diet to manage his [REDACTED] and [REDACTED] (Testimony of Ann Marie Akinyouye @1:11). In addition, the record shows that the Appellant continues to require a wheelchair while ambulating outside, and for distances exceeding [REDACTED] feet. (Exhibit 2). Despite the Appellant's needs, the Facility replaced his wheelchair with a rollator, and recommended discharging him to an assisted living facility that prohibits wheelchairs. The Appellant testified that he did not feel safe ambulating with the rollator and had recently fallen while attempting to [REDACTED] (Testimony of Appellant @1:31 and 1:33). In the alternative, the Facility recommends discharge to the community, even while admitting that the Appellant requires additional physical therapy to increase his balance and comfort level with the rollator; and to help him navigate uneven surfaces, stairs, and curbs. (Testimony of Maria Enriquez @51).


In conclusion, the record does not support the contention that the Appellant's health has sufficiently improved. Rather, he still requires skilled nursing care, and therefore discharge to either an assisted living facility, which the Appellant opposes, or to the community is not appropriate.

#### DECISION

The Discharge Notice dated [REDACTED] 2018, is dismissed. The Brooklyn Center for Rehabilitation and Residential Health Care has failed to prove by substantial evidence that the Appellant's condition has sufficiently improved so that he no longer needs skilled nursing care.

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**  
**July 13, 2018**

  
**JEAN T. CARNEY**  
**Administrative Law Judge**