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## Department of Health

**KATHY HOCHUL**  
Governor

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

**JOHANNE E. MORNE, M.S.**  
Acting Executive Deputy Commissioner

August 30, 2023

### CERTIFIED MAIL/RETURN RECEIPT

██████████  
c/o The Grand at Delaware  
1205 Delaware Avenue  
Buffalo, New York 14209

Timothy Srye, NHA  
The Grand at Delaware  
1205 Delaware Avenue  
Buffalo, New York 14209

Bria Lewis, Esq.  
Center for Elder Law & Justice  
438 Main Street, Suite 1200  
Buffalo, New York 14209

**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

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

**The Grand Rehabilitation and Nursing at  
Delaware Park,**

Respondent,

to discharge him from a residential  
health care facility.

COPY

**DECISION**

DA23-6110

Hearing Before: Jeanne T. Arnold  
Administrative Law Judge

Held via: WebEx Videoconference

Hearing Date: August 28, 2023

Parties: The Grand Rehabilitation and Nursing at Delaware Center  
1205 Delaware Avenue  
Buffalo, New York 14209  
By: Timothy Srye, Administrator

██████████  
The Grand Rehabilitation and Nursing at Delaware Center

By: Bria Lewis, Esq.  
Center for Elder Law & Justice  
438 Main Street, Suite 1200  
Buffalo, New York 14209

**JURISDICTION**

The Grand Rehabilitation and Nursing at Delaware Center (Facility), a residential health care facility subject to Article 28 of the New York Public Health Law (PHL), determined to

discharge resident (Appellant). The Appellant appealed the discharge determination to the New York State Department of Health (Department) pursuant to 10 NYCRR 415.3(i).

**HEARING RECORD**

Facility witnesses: Timothy Srye, Administrator  
Jessica Wingard, Director of Nursing  
Jeffrey Caliano, Director of Social Work

Facility exhibits: 1-9

Appellant witness: Appellant

Appellant exhibits: A

ALJ exhibit: I (hearing and discharge notices)

A digital recording of the hearing was made (1:25:00 in duration).

**FINDINGS OF FACT**

1. The Appellant is a -year-old male who was transferred from to the Facility and admitted on 2022, for aftercare following surgery of the . The Appellant also has been diagnosed with, among other things, Exhibit 1.) His Brief Interview for Mental Status (BIMS) score is /15. (Recording @ 0:06:00.)
2. During his stay at the Facility, the Appellant received and physical therapy, as well as pain control and . (Exhibit 6.) As early as 2023, the Appellant was cleared for discharge from the Facility as he could ambulate safely and no longer required nursing home services. (Exhibits 2, 6; Recording @ 0:13:00.)
3. The Appellant does not currently receive any medical or therapeutic services at the Facility. (Exhibits 2, 3, 4, 5, 6, 7.)

4. The Appellant independently performs all activities of daily living (ADLs), ambulates without assistance, and leaves the Facility on passes without assistance. (Exhibits 2, 3, 4, 5, 6, 7, 8; Recording @ 0:11:40, 0:18:00, 0:34:00, 0:48:00.)
5. By notice dated [REDACTED], 2023, the Facility determined to discharge the Appellant because his health has improved sufficiently so that he no longer requires the services provided by the Facility. The notice advised the Appellant that he would be discharged to the [REDACTED] [REDACTED] of Social Services (DSS). (Exhibit I.)
6. The Appellant's clinical record contains documentation from his interdisciplinary team, including his physician and social worker, that his condition has improved such that he no longer requires the services of a nursing home, and that discharge to DSS for shelter placement is appropriate. (Exhibits 6, 7; Recording @ 0:44:00, 0:48:00.)
7. On [REDACTED] 2023, the Appellant requested this hearing to contest the Facility's discharge determination.
8. The Appellant remains at the Facility pending the outcome of the hearing.

**ISSUES**

Has the Facility established that the Appellant's discharge is necessary and that the discharge plan is appropriate?

**APPLICABLE LAW**

A residential health care facility, or 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).

PHL § 2803-z and Department regulations at 10 NYCRR 415.3(i) describe the transfer and discharge rights of residential health care facility residents.

The regulations at 10 NYCRR 415.3(i) state, in pertinent part:

(1) With regard to the transfer or discharge of residents, the facility shall:

(i) permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless such transfer or discharge is made in recognition of the resident's rights to receive considerate and respectful care, to receive necessary care and services, and to participate in the development of the comprehensive care plan and in recognition of the rights of other residents in the facility:

(a) the resident may be transferred only when the interdisciplinary care team, in consultation with the resident or the resident's designated representative, determines that:

(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.

When the facility transfers or discharges a resident for this reason, the facility shall ensure that the resident's clinical record contains complete documentation made by the resident's physician and, as appropriate, the resident's interdisciplinary care team. 10 NYCRR 415.3(i)(1)(ii)(a).

PHL § 2803-z (1) (b) states that prior to a facility initiating a discharge of a resident, the facility shall use its best efforts, including compliance with applicable federal and state regulations, to secure appropriate placement or a residential arrangement for the resident, other than temporary housing assistance (or shelter placement).

The facility has the burden of proving that the discharge was necessary and the discharge plan appropriate. 10 NYCRR 415.3(i)(2)(iii)(b); State Administrative Procedure Act § 306(1).

### **DISCUSSION**

To prove that the Appellant's health has improved sufficiently so that he no longer needs the services provided by the Facility, the Facility presented provider/physician notes detailing that he has no current medical needs that require nursing home care. (Exhibits 2, 3, 4, 5, 6.) The physician noted that the Appellant can ambulate without assistance, no longer receives physical

therapy and is safe for discharge. (Exhibits 2, 3, 4, 5, 6.) The physician detailed that often when he raised the subject of discharge because the Appellant no longer has medical need for nursing home care, the Appellant became ████████ (Exhibit 2, 3, 5.) The Appellant countered that he needed to stay in the Facility because he required ████████ surgery (Exhibits 2, 3), or because he cannot control his ████████ (Exhibit 5); however, the physician believed the Appellant exhibited ████████ and ████████ behaviors. (Exhibits 2, 3, 5.) While the Appellant testified that he was never examined by the Facility’s physician, he later admitted he was “seen” by the physician. (Recording @ 1:05:00, 1:16:00.)

The Appellant contends that he still requires the Facility’s services because of his ████████ injuries, including a ████████ in his ████████ and a ████████ in his ████████. (Recording @ 0:58:00.) He testified that he has an appointment with a surgeon on ████████ 2023, to discuss surgery for his ████████ (Recording @ 0:59:00, 1:05:00, 1:09:00.) The Appellant did not submit medical documentation of any ████████ injury, although the record was left open for one day to allow his counsel to do so.

The Appellant also testified that he is scheduled for ████████ by Dr. Dyskin and will be wheelchair bound. (Recording @ 1:11:00.) Dr. Dyskin wrote a letter dated ████████, 2023, stating that the Appellant’s ████████ is scheduled and will require in-home services after the surgery, in particular physical therapy. (Exhibit A.) Notably, however, the letter neither indicates when the manipulation is scheduled, nor that any manipulation would require nursing home care, but only “suitable housing” and “an environment where he can receive in-home services.” (Exhibit A.) Again, the hearing record was left open for the Appellant to send medical documentation of any scheduled surgery, but no such documentation was presented.

The Appellant also contended that his overall health, including consequences of [REDACTED] surgery, have not improved but [REDACTED] (Recording @ 0:57:00.) He testified that he is a fall risk and has fallen seven times at the Facility. (Recording @ 1:00:00.) The Appellant insists he still walks with a crutch and, although he admits he left the Facility on passes, stated that he had some unspecified assistance. (Recording @ 1:08:00.) The Appellant later admitted that if he was not independent, he would not have been able to leave the Facility on a pass. (Recording @ 1:09:00.)

The Appellant testified that he has [REDACTED] because of his [REDACTED] (Recording @ 1:01:00.) He faults the Facility for his [REDACTED], due to the diet served of [REDACTED] [REDACTED] (Recording @ 1:02:00), yet he wishes to remain in the Facility.

The Facility's multidisciplinary team concurred that the Appellant is safe for discharge and any lingering medical ailments can be followed up outpatient with the Appellant's primary care physician as well with physical therapy treatment in the community. (Exhibits 6, 7; Recording @ 0:43:00-0:44:00.) The Appellant did not offer any contrary medical proof.

With respect to the proposed discharge plan, the Facility complied with PHL § 2803-z(1)(b) and applicable federal and state regulations in making efforts to secure an appropriate placement for the Appellant before resorting to placement with DSS. (Exhibits 6, 7, 9; Recording @ 0:43:00-0:47:00.)

From the Appellant's admission to the Facility, the Facility's social worker attempted to work with the Appellant on discharge planning but found the Appellant to be resistant to planning. (Recording @ 0:43:00, 0:47:00.) The Facility's social worker testified that prior to the Appellant's admission he was homeless (Recording @ 0:44:00), and although he worked with the Appellant to apply for multiple subsidized housing opportunities and apartment complexes, the Appellant



was denied or wait-listed. (Recording @ 0:45:00, 0:52:00-0:53:00.) The social worker also testified that he discussed with the Appellant alternative placements, such as assisted living facilities, but the Appellant was not interested. (Recording @ 0:46:00.) The social worker on cross-examination stated that the Appellant was informed about [REDACTED] but the Appellant did not request a referral there. (Recording @ 0:50:00-0:52:00.) The social worker emphasized that he applied to any housing options that the Appellant requested and that he found some to apply for as well, but that there is a housing crisis and wait lists are long. (Recording @ 0:52:00-0:53:00.)

The Appellant testified that from the moment he arrived at the Facility, he searched independently for housing, but admitted that the Facility's social worker submitted the housing applications for him. (Recording @ 1:03:00-1:04:00.) The Appellant first denied he was homeless prior to admission at the Facility, but then explained that he was in a special shelter that would afford him the opportunity for pursuing his education. (Recording @ 1:01:00.)

Pursuant to 10 NYCRR 415.3(i)(1)(vii), the Facility was required to permit the Appellant an opportunity to participate in deciding where he will reside after discharge, and it did afford him opportunity to do so. (Exhibit 9; Recording @ 0:43:00-0:48:00.) The Appellant did not identify any viable options other than DSS. (Recording @ 0:54:00.)

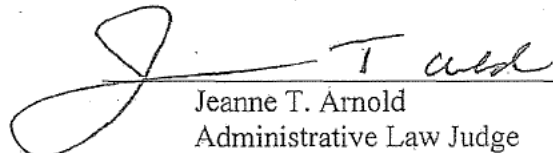
The Facility has established that the Appellant currently is appropriate for discharge because he does not need nursing home care. (Exhibits 2, 3, 4, 5, 6, 7, 9; Recording @ 0:44:00, 0:48:00.) The Appellant has been accepted for discharge to DSS, where there is a Single Point of Access (SPOA), rapid housing team and connection to community benefits. (Recording @ 0:47:00.) The Facility will provide the Appellant's medications and referrals for physical therapy,

as requested and needed. (Exhibits 6, 7.) The Facility's proposed discharge plan addresses the Appellant's needs and how those needs will be met after discharge. 10 NYCRR 415.3(i)(1)(vi).

**DECISION**

The Grand Rehabilitation and Nursing at Delaware Center established that its determination to discharge the Appellant is correct and that its discharge plan is appropriate.

Dated: August 30, 2023  
Rochester, New York

  
Jeanne T. Arnold  
Administrative Law Judge