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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

November 30, 2023

## CERTIFIED MAIL/RETURN RECEIPT

David Berov, NHA  
Premier Nursing & Rehab Ctr of Far Rockaway  
2241 Newhaven Ave.  
Far Rockaway, New York 11691

██████████ ██████████  
c/o Mt. Sinai-Beth Israel  
10 Nathan D. Perlman Place  
New York, New York 10003

Michael Bass, Esq.  
Barbara Phair, Esq.  
Abrams Fensterman, LLP  
3 Dakota Drive, Suite 300  
Lake Success, New York 11042

Ilise Fay, SW  
Mount Sinai-Beth Israel Hospital  
10 Nathan D. Perlman Place  
New York, New York 10003

Dassy Fishman, Guardian  
Family Guardian Services, Inc.  
680 Central Avenue, Suite 117  
Cedarhurst, New York 11516

**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

**Premier Nursing and Rehab  
Center of Far Rockaway**  
Respondent,  
to discharge him from a residential  
health care facility.

**COPY**

**DECISION  
#DA23-6205**

Hearing before: Kendra Vergason  
Administrative Law Judge

Hearing date: November 14, 2023  
By videoconference

Parties: Premier Nursing and Rehab Center of Far Rockaway  
2241 Newhaven Ave.  
Far Rockaway, New York 11691  
By: Michael Bass, Esq.  
Barbara Phair, Esq.  
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By: Family Guardian Services, Inc.  
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[dfishman@fgservices.org](mailto:dfishman@fgservices.org)

Also appearing: Mount Sinai-Beth Israel Hospital  
10 Nathan D. Perlman Place  
New York, New York 10003  
By: Ilise Fay, social worker  
[Ilise.Fay@mountsinai.org](mailto:Ilise.Fay@mountsinai.org)



appointment of a guardian for personal needs decisions and property management. Family Guardian Services, Inc was appointed Guardian for the Appellant. (Exhibit G.)

3. On ██████████, 2023, the Respondent transferred the Appellant back to ██████████ for evaluation for ██████████. (Exhibit 2.) Upon transfer to ██████████ Respondent issued to Appellant a Transfer/Discharge Notice dated ██████████, 2023, informing the Appellant that he was discharged from Respondent facility to ██████████ on ██████████ 2023, because his needs cannot be met at the facility. (Exhibit ALJ I.) No written notice of discharge was provided to Appellant's Guardian. (Exhibit 6.)

4. Appellant was admitted to ██████████ and transferred to Mount Sinai Beth Israel Hospital (MSBI) ██████████ unit on ██████████ 2023. (Exhibits 3, 4, 5, E.) ██████████ and MSBI are general hospitals within the meaning of PHL § 2801(10).

5. On ██████████, 2023, the Appellant received a Preadmission Screening and Resident Review (PASRR) Level II evaluation, which concluded that the Appellant's needs can be appropriately met in a nursing facility setting and that he requires no specialized services. (Exhibit F.)

6. On or about ██████████, 2023, MSBI Social Worker Ilise Fay was informed by the Respondent that it would not accept Appellant back to the facility. Ms. Fay had sent referrals to several other nursing homes to procure an alternative discharge location, but the Appellant was not accepted by any of those facilities. (Exhibit B.)

7. On ██████████ 2023, Ms. Fay requested this hearing on the Appellant's behalf to contest the Facility's refusal to re-admit him. (ALJ Exhibit I.)

8. The Appellant remains at MSBI pending the outcome of this hearing.

### ISSUES

Has the Respondent complied with the requirements for discharge of the Appellant, and established that discharge was necessary and the discharge plan is appropriate?

### APPLICABLE LAW

A residential health care facility (RHCF), or nursing home, is a residential facility providing nursing care to sick, invalid, infirm, disabled or convalescent persons who need regular nursing services or other professional services but who do not need the services of a general hospital. PHL 2801; 10 NYCRR 415.2(k).

Transfer and discharge rights of nursing home residents have been codified in Public Health Law 2803-z and are set forth in Department regulations at 10 NYCRR 415.3(i) and federal regulations at 42 CFR 483.15(c). They include the requirement that before it transfers or discharges a resident, the nursing home must notify the resident and designated representative, if any, and, if known, family member of the resident of the transfer or discharge and the reasons for the move in writing. The required written notice must include, among other things:

- the reason for the transfer or discharge
- the specific regulations that support the action
- the effective date of the transfer or discharge
- the location to which the resident will be transferred or discharged
- a statement that the resident has the right to a hearing to appeal the discharge
- the name, address and telephone number of the State long term care ombudsman

10 NYCRR 415.3(i)(1)(iii),(iv)&(v); 42 CFR 483.15(c)(3)&(5).

When residents are sent emergently to an acute care setting, such as a hospital, it is considered a facility-initiated transfer, NOT discharge, and the resident must be permitted to return to the facility. 10 NYCRR 415.3(i)(3); 42 CFR 483.15(e)(1); DAL-NH 19-07, August 20, 2019. Not permitting a resident to return following hospitalization constitutes a facility-

initiated discharge and requires the facility to meet the requirements of the Public Health Law and state and federal regulations. Permissible grounds for discharge include that the discharge or transfer is necessary for the resident's welfare and the facility cannot meet the resident's needs. 10 NYCRR 415.3(i)(1)(i)(a)(1); 42 CFR 483.15(c)(1)(i)(A).

Where the facility initiates discharge while the resident is in the hospital following emergency transfer, the facility must have evidence that the resident's status at the time the resident seeks to return to the facility (not at the time the resident was transferred for acute care) meets the stated basis for discharge. DAL-NH 19-07, August 20, 2019; see also, CMS State Operations Manual, 100-07, Appendix PP.

When discharge is alleged to be necessary on the grounds that the resident's needs cannot be met in the facility, the medical record must contain documentation of the specific resident needs that cannot be met, facility attempts to meet those needs, and the service available at the receiving facility to meet the needs. PHL § 2803-z(d); 10 NYCRR 415.3(i)(1)(ii)(a); 42 CFR 483.15(c)(2)(i)-(ii).

Before the facility discharges or transfers a resident, it must notify the resident, his or her representative, and the State Long-Term Care Ombudsman in writing of the discharge, including notification of appeal rights. 10 NYCRR 415.3(i)(1)(iii); 42 CFR 483.15(c)(3) and (5)(iv). Where an immediate transfer or discharge is required by the resident's urgent medical needs, the written notice of transfer or discharge must be given to the resident and the resident's representative no later than the date on which the determination was made to transfer or discharge the resident. 10 NYCRR 415.3(i)(1)(iv); 42 CFR 483.15(c)(4)(ii)(D).

The Respondent facility has the burden of proving that the discharge or transfer is or was necessary and that the discharge plan is appropriate. 10 NYCRR 415.3(i)(2)(iii)(b).

### DISCUSSION

The Respondent has failed to comply with the requirements for the transfer or discharge of a resident from a nursing home, has failed to establish that the discharge was necessary, and has failed to establish the discharge plan is appropriate.

The Respondent was aware that Appellant had a court-appointed guardian and was required to notify the Guardian in writing before discharging him. At the hearing, the Respondent did not even allege, much less present evidence to establish that written notice was ever provided to the Guardian. Instead, the Respondent offered three nursing notes dated [REDACTED] 2023, indicating it notified the Guardian by telephone. (Exhibit 6.) Telephone calls to the Guardian do not constitute written notice at the time of discharge and are not what the regulation requires. The Respondent failed to give written notice of the discharge to the Appellant's Guardian thereby rendering the [REDACTED] notice invalid.

Respondent inappropriately sought to discharge the Appellant to a hospital contrary to federal and state regulations and guidance clearly proscribing such action. Department policy disseminated to nursing home administrators by "Dear Administrator Letter" (DAL) explicitly confirms the applicable requirements if a nursing home does not want to readmit a resident who has been hospitalized:

Q: If a resident is sent to the hospital due to the resident's clinical or behavioral status that endangers the health and/or safety of other individuals in the facility, do I need to issue a Discharge/Transfer Notice?

A: A hospital is not an appropriate discharge location. Admission assessments are key to ensuring the facility can care for the residents admitted. If there is evidence a facility cannot meet the resident's needs, or the resident poses a danger to the health and safety of his/herself or others, the facility must follow all the requirements as they apply to discharge including the basis for discharge, provide notice to the resident, his/her representative and the LTCOP, reason for discharge, discharge location and appeal rights information. A facility's determination not to permit a



resident to return must not be based on the resident's condition when originally sent to the hospital. DAL-NH 19-07, August 20, 2019.

While Appellant's emergent transfer to the hospital on [REDACTED] [REDACTED] may have been necessary, Respondent's attempt to discharge the Appellant to [REDACTED] was wholly inappropriate.

Lastly, the Respondent failed to produce medical record documentation by the Appellant's physician at the time he sought readmission that the Appellant's care needs could not be met at the facility. The Respondent maintains that the basis for refusing to readmit the Appellant remains that which was stated in the [REDACTED], 2023 notice: "this transfer/discharge notice is being issued for your welfare as your needs cannot be met in the facility." (Exhibit ALJ I.) Discharging a resident for this reason requires documentation from the Appellant's physician describing the Appellant's needs which could not be met, the efforts made to meet those needs, and the specific services the discharge location will provide to meet the needs which the facility is unable to meet. PHL 2803-z(1)(d); 10 NYCRR 415.3(i)(1)(ii)(a); 42 CFR 483.15(c)(2). When the discharge occurs because the facility refuses to allow the resident to return following hospitalization, the required documentation must be based on the resident's status at the time he seeks to return to the facility – not at the time he was transferred to the hospital. 10 NYCRR 415.3(i)(3); 42 CFR 483.15(e)(1). The documentation offered by the Respondent fails to meet these requirements.

At the hearing, the only medical documentation offered by the Respondent from the Appellant's physician at the facility was a single progress note by a nurse practitioner dated [REDACTED], describing the Appellant's behavior that prompted his transfer to the hospital. (Exhibit 2.) This document is not relevant to this hearing as it does not describe the Appellant's status and care needs at the time the Respondent refused to readmit him. Interestingly, though, within this progress note, there is also a reference to a [REDACTED] 2023,

Psychiatry consult recommending “[i]f residents behavior persists and further destabilizes he should be transferred to a hospital to be stabilized in a safe and structured environment.” (Exhibit 2.) This is consistent with the clear intent of state and federal regulations and Department policy that if hospitalization does become necessary, once stabilized the Appellant should return to the facility. 10 NYCRR 415.3(i)(3); 42 CFR 483.15(e)(1); DAL-NH 19-07, August 20, 2019.

The Respondent also offered three MSBI physician progress notes dated [REDACTED] [REDACTED] and [REDACTED] 2023. There is nothing in these progress notes to support the Respondent’s assertion that the Appellant’s needs cannot be met at its facility. In fact, each of the progress notes offered by the Respondent, plus nineteen additional MSBI physician progress notes and two current patient assessment evaluations (PRI and PASARR), are all evidence that Appellant’s needs are appropriate for nursing home placement.

The Respondent’s witnesses expressed an unwillingness to re-admit the Appellant because of his history of refusing medication, and claimed that unlike hospitals, nursing homes are not permitted to administer medications over objection. The Respondent offered no persuasive authority for this claim. On the contrary, the [REDACTED] 2023 Order appointing Guardian of the Appellant (Exhibit B), PHL Article 29-CC, and Department guidance draw no distinction between a hospital and a nursing home with regard to the process and authority for administration of medication over objection. PHL 2994-a(18); 2994-d; 2994-r(a); DAL:DRS-NH 10-04. In any event, a resident’s declination of treatment is not grounds for discharge. The Respondent is required to conduct the appropriate patient assessments and make necessary revisions to the care plan to allow the facility to meet the resident’s needs.

All the professional medical evidence supports the view that the Appellant requires care in a residential health care facility but not inpatient care in a general hospital. The Respondent has failed to develop a discharge plan for the Appellant if he does not return to its nursing home. MSBI, which has been forced to retain this resident in a hospital bed he does not need, has made referrals to other nursing homes, so far without success. (Exhibit B.) It is the responsibility of the Respondent, not the hospital, to arrange for this care elsewhere if the Respondent is not willing to undertake it. In the meantime, the discharge appeal is granted.


#### DECISION AND ORDER

Respondent Premier Nursing and Rehab Center of Far Rockaway has not established that its determination to discharge the Appellant was correct or that the discharge plan was appropriate.

The Respondent is directed to readmit the Appellant to the first available semi-private bed prior to admitting any other person to the facility. 10 NYCRR 415.3(i)(2)(i)(d).

This decision is made by, Kendra Vergason, Bureau of Adjudication, who has been designated to make such decisions.

Dated: Rochester, New York  
November 29, 2023

  
Kendra Vergason  
Administrative Law Judge  
Bureau of Adjudication