

cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan  
SAPA File  
BOA by scan



# Department of Health

**KATHY HOCHUL**  
Governor

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

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

January 5, 2024

## CERTIFIED MAIL/RETURN RECEIPT

██████████ ██████████  
c/o The Grand at South Point  
1 Long Beach Road  
Island Park, New York 11558

Samantha DiClemente, MSW  
The Grand at South Point  
1 Long Beach Road  
Island Park, New York 11558

Julius Toonkel, Esq.  
Law Offices of Julius Toonkel  
386 Kingston Avenue  
Brooklyn, New York 11225

**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: cmg  
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 AT SOUTH POINT

to discharge them from a residential health care facility.

---

Before: Kimberly A. O'Brien  
Administrative Law Judge

Held at: Videoconference via WebEx

Dates: November 15, 2023, November 30, 2023, December 12, 2023

Parties: The Grand at South Point  
1 Long Beach Road  
Island Park, New York 11558  
By: Samantha DiClemente, DSW  
[sdiclemente@thegrandhealthcare.com](mailto:sdiclemente@thegrandhealthcare.com)

██████████ ██████████ Resident  
C/o Samantha DiClemente, DSW  
The Grand at South Point  
1 Long Beach Road  
Island Park, New York 11558  
By: Julius Toonkel, Esq.  
Law Offices of Juilus Toonkel  
386 Kingston Avenue  
Brooklyn, New York 11225  
[jtnylaw@yahoo.com](mailto:jtnylaw@yahoo.com)

COPY

DECISION

## PROCEDURAL HISTORY

By notice dated [REDACTED], 2023, The Grand at South Point (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [REDACTED] [REDACTED] (Appellant) from the Facility. 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. At the December 12, 2023 hearing the Facility's Director of Social Work, Samantha DiClemente, presented one witness, Theresa Iacopelli, Director of Rehabilitation Services. Julius Toonkel, Esq. represented [REDACTED] [REDACTED] Appellant, who appeared at the hearing along with Semeen Pathan, Ombudsperson, and [REDACTED], Appellant's [REDACTED]<sup>1</sup> The Facility offered one exhibit, *Physical Therapy Discharge Summary*, and it was admitted. The ALJ admitted the Notice of Hearing with Discharge Notice, and the resident face sheet, and they were marked as ALJ 1, and ALJ 2, respectively. A transcript of the hearing was made.

The hearing was originally noticed for November 15, 2023. The Appellant requested an adjournment to obtain counsel and the Facility did not have the necessary witnesses to move forward. The adjournment was granted. A lengthy prehearing conference was held, and the parties discussed having the Facility go into the Appellant's home to perform a home assessment, and

---

<sup>1</sup> [REDACTED] understands "[REDACTED]" but was provided with a [REDACTED] Interpreter, Galina Tchadlies.

about the possibility of settling the matter. Subsequently, the Appellant's [REDACTED] did not cooperate with allowing the Facility into the home to perform an assessment. [Tr. 4-5, 15-16.] At the November 30, 2023 hearing, Mr. Toonkel appeared on behalf of the Appellant, and requested an adjournment to prepare for the hearing. A lengthy prehearing conference was held. The Facility did not have the necessary witnesses available to provide testimony and an adjournment was granted. [Tr. 4-6, 15-16.] At the [REDACTED], 2023 hearing, Theresa Iacopelli, Director of Rehabilitation Services, began her testimony revealing that the Appellant requires assistance and supervision with transfers and ambulation. In the midst of Ms. Iacopelli's testimony, the Facility requested an adjournment to obtain counsel. Mr. Toonkel did not oppose the request and the adjournment was granted. [Tr. 15-17.] The ALJ notified the parties that if the Facility did not have its counsel appear by [REDACTED] 2023, the ALJ would grant the Appellant's appeal and the case would be closed.

#### FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old male who suffered a [REDACTED] and was admitted to the Facility from an acute care hospital on [REDACTED], 2023. [ALJ Exhibit (Ex.) 2.]
2. On [REDACTED] 2023, the Facility issued a Transfer/Discharge Notice (Discharge Notice) to the Appellant. The Discharge Notice states that the Appellant will be transferred because the Appellant's health has improved sufficiently such that the Appellant no longer requires the services of the Facility. The proposed discharge is to his home, [REDACTED] New York. [ALJ Ex. 1.]
3. The Appellant timely appealed the Facility's discharge determination. The Appellant has remained at the Facility during the pendency of the appeal.

4. The Appellant has “modified independence” with “supervision assist” for transfers. The Appellant uses a rolling walker and requires “supervision assist” with ambulation and requires the services the Facility provides. [Facility Ex. 1; Tr. 6-15.]

#### ISSUES

Has the Facility established that its determination to discharge the Appellant is correct and that its discharge plan is appropriate?

#### 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 discharged pursuant to specific provisions of the Department of Health Rules and Regulations (10 NYCRR 415.3[i][1]). The Facility alleged that the Appellant’s discharge is permissible pursuant to 10 NYCRR 415(i)(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 10 NYCRR 415.3(i)(2)(iii)(b), the Facility bears the burden to prove a discharge is necessary and the discharge plan is appropriate. Under SAPA §306(1), a decision in an administrative proceeding must be in accordance with substantial evidence.

#### DISCUSSION

The Facility’s Discharge Notice states that the Appellant’s health has improved sufficiently, and they no longer require the services it provides and proposed the Appellant be

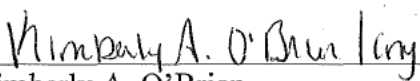
discharged home with services provided by a home health agency. The Facility has the burden of proof. The Facility was provided with multiple opportunities to present its case and on three occasions did not have the necessary witnesses and documentation to move forward with the hearing. While the Facility was granted an adjournment to obtain counsel to continue its presentation, counsel was not obtained, and the Facility has not communicated about continuing the hearing. The limited testimony and documentation provided by the Facility at the December 12, 2023 hearing reflects that the Appellant requires supervision and assistance with activities of daily living including transfers and ambulation. By failing to appear on the adjourned date, the Facility has abandoned its intent to proceed with discharging the Appellant. The Facility has failed to meet its burden to show that the Appellant's health has improved sufficiently such that they no longer need the services it provides. The ALJ did not reach a determination about whether the proposed discharge home with services is appropriate to meet the Appellant's needs.

#### DECISION

The Facility has failed to establish that its determination to discharge the Appellant was correct, and that its discharge/transfer location is appropriate.

1. The appeal is GRANTED, the Facility is not authorized to discharge 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  
January 5, 2024

  
\_\_\_\_\_  
Kimberly A. O'Brien  
Administrative Law Judge