



# Department of Health

ANDREW M. CUOMO  
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Commissioner

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

May 9, 2017

## Certified Mail-Return Receipt Requested

Renee Jeffrey, DSW  
Rockaway Care Center  
353 Beach 48<sup>th</sup> Street  
Far Rockaway, NY 11691

██████████, Resident  
c/o Rockaway Care Center  
353 Beach 48<sup>th</sup> Street  
Far Rockaway, NY 11691

**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,

James F. Horan  
Chief Administrative Law Judge  
Bureau of Adjudication

JFH: mw  
Enclosure

COPY

STATE OF NEW YORK : DEPARTMENT OF HEALTH

In the Matter of

█/Rockaway Care Center

Administrative Law Judge's Decision

Appeal from a Nursing Home Resident Involuntary Discharge pursuant to Title 10 (Health) of the Official Codes, Rules and Regulations of the State of New York (NYCRR) §415.3(h)

Before:

Administrative Law Judge (ALJ) James F. Horan

For Fordham Nursing and Rehab.  
Center (Facility):

Abidla Fernandez, Director of Nursing

For Resident █ (Appellant):

*Pro Se*

The Facility in Queens County proposes to discharge involuntarily the Appellant nursing home resident to an adult home in █ County. The Facility state that grounds exist for the discharge because the Appellant's condition has improved sufficiently so that he no longer requires care in a nursing home. The Appellant argued at hearing that the discharge is retaliation for complaints he made against the Facility and opposes the █ discharge location due to the distance his family would have to travel to the discharge location. After considering the record, the ALJ dismisses the discharge notice, because the Facility has failed to produce credible physician documentation to support the grounds for the proposed discharge.

I. Background

Under Title 10 NYCRR § 415.3(h), a nursing home resident holds certain rights in regard to transfer or discharge. Title 10 NYCRR § 415.3 (h)(1)(i)(a)(2) allows involuntary discharge if a resident's health has improved sufficiently so that the resident no longer requires the services that

the facility provides. Under the standards at 10 NYCRR § 415.2(k), a nursing home provides nursing and professional services twenty-four hours per day for patients who require those services, but do not require services in a general hospital. In effect, this proceeding acts as a stay on any discharge until the decision on the discharge appeal. If a decision approves the discharge grounds and discharge plan, the proceeding ends with the decision and the discharge may proceed according to the discharge plan.

The Facility provided a Discharge Notice [ALJ Exhibit I, Notice of Hearing] to the Appellant on [REDACTED] 2017. As grounds for the discharge, the Discharge Notice stated that the Appellant no longer requires services in a skilled nursing facility. The Facility proposed discharge to [REDACTED], an adult home that provides a lower level of care than the skilled nursing care that the Appellant receives in the Facility. The Appellant then requested the hearing that took place at the Facility in Far Rockaway on March 20, 2017. The ALJ conducted the hearing pursuant to New York State Administrative Procedure Act (SAPA) Articles 3-5 (McKinney Supp. 2017) and Title 10 NYCRR Part 415.

At the hearing, the Appellant spoke on his own behalf and he presented [REDACTED] to testify. The Facility presented as witnesses: Director of Nursing Abilda Fernandez, Social Services Director Renee Jeffrey and Social Worker Betina Perez. The ALJ received the following documents into the record:

ALJ Exhibit I	Notice of Hearing
Facility Exhibit A	Physician Orders [REDACTED] 2017,
Facility Exhibit B	Psychiatric Evaluation,
Facility Exhibit C	Progress Notes [REDACTED]/2017,
Facility Exhibit D	Rockaway Cate Center Neurology Consult [REDACTED]/16,
Facility Exhibit E	Adult Home Fact Sheet.
Appellant Exhibit 1	Nursing Home Complaint Form [REDACTED]

The record also included a digital audio recording from the hearing on Compact Disc (CD). References to testimony from the recording will indicate the time in the recording at which the testimony occurs (*e.g.* "CD at 12:40" means that the testimony occurs on the hearing recording 12 minutes and 40 seconds into that recording). The hearing record closed on March 20, 2017.

Under the hearing procedures at §415.3(h)(2)(ii), the Facility bears the burden to prove a discharge 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 a conclusion or fact; less than preponderant 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. Under SAPA § 307(4), an agency may take official notice of all facts for which a court can take judicial notice, including the texts of statutes or regulations.

## II. Findings of Fact

The references in brackets following the findings reflect testimony from the hearing recording or exhibits in evidence [Ex] on which the ALJ relied in making the findings. If contradictory information appears elsewhere in the record, the ALJ considered that information and rejected it.

1. The Appellant, who suffers from [REDACTED] and [REDACTED] entered the Facility on [REDACTED], 2015 [CD at 0:33, 48:52, 50:05].
2. A Physician Progress Note for [REDACTED] 2016 states that the Appellant was stable for discharge to the community and that Social Work would explore the possibility of community discharge [Ex C, second page].
3. A Physician Progress Note for [REDACTED] 2017 states that the Appellant goes to the community on a daily basis, independently and doesn't require skilled nursing facility placement. The Note indicated that Social Work would explore an alternate level of care [Ex C, first page].
4. A Physician's Order for [REDACTED] 2017 stated that the Physician certified that the Appellant is in need of continued skilled nursing facility care that is reasonable and necessary [Ex A, second page].

### III. Conclusions

Under 10 NYCRR § 415.3(h)(1)(i)(a)(2) a skilled nursing facility may discharge a resident involuntarily if the resident's health has improved sufficiently so the resident no longer needs the facility's services. Title 10 NYCRR § 415.3(h)(1)(i)(c)(ii)(a) requires that a resident's physician and the interdisciplinary care team ensure complete documentation to support the grounds for discharge.

No physician testified at this hearing, but the Facility presented physician documentation in the form of two Physician Progress Notes and one Physician Order. The Order totally contradicted the statements in the Notes. Further, the [REDACTED] Order was the most recent of

the three documents. The Order stated that the Appellant continued to need care in a skilled nursing facility. The sequence of the documents suggested that, rather than improving, the Appellant's condition must have deteriorated during the time sequence between the Notes and the Order.

The Facility bears the burden to prove that grounds exist for the proposed discharge and to produce the documentation that the regulations require. The Facility has failed to meet that burden.

#### ORDER

NOW; after considering the request for Hearing, the testimony and the documents in evidence, the ALJ issues the following Order:

The ALJ upholds that the Appellant's appeal from the [REDACTED] 2017 Discharge Notice.

Dated: Menands, New York  
May 9, 2017



James F. Horan  
Administrative Law Judge

To:

Renee Jeffrey, DSW  
Rockaway Care Center  
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