



# Department of Health

ANDREW M. CUOMO  
Governor

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

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

January 3, 2017

## CERTIFIED MAIL/RETURN RECEIPT

Jennifer Bennett, Director of SS  
Lawrence Nursing Care Center  
350 Beach 54<sup>th</sup> Street  
Arverne, New York 11692

[REDACTED], Resident  
c/o Lawrence Nursing Care Center  
350 Beach 54<sup>th</sup> Street  
Arverne, New York 11692

Thomas J. Cone, Esq.  
708 3<sup>rd</sup> Avenue – 5<sup>th</sup> Floor  
New York, New York 10017


**RE: In the Matter of [REDACTED] – 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:cah  
Enclosure

**STATE OF NEW YORK  
DEPARTMENT OF HEALTH**

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In the Matter of an Appeal pursuant to  
10 NYCRR §415.3 by

██████████,

Appellant,

from a determination by

**Lawrence Nursing Care Center,**

Respondent,

to discharge her from a residential health care facility.

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DECISION

COPY

**Hearing Before:**

Ann H. Gayle  
Administrative Law Judge

**Held at:**

Lawrence Nursing Care Center  
350 Beach 54<sup>th</sup> Street  
Arverne, New York 11692

**Hearing Dates:**

December 1 and 19, 2016  
The record closed on December 30, 2016

**Parties:**

Lawrence Nursing Care Center  
By: Thomas J. Cone, Esq.

██████████

*Pro Se*

Pursuant to Public Health Law (“PHL”) §2801 and Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“10 NYCRR”) §415.2(k), a residential health care facility or nursing home such as Lawrence Nursing Care Center (“Respondent” or “Facility”) 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.

Transfer and discharge rights of nursing home residents are set forth at 10 NYCRR §415.3(h). Respondent determined to discharge ██████████ (“Appellant” or “Resident”) from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(h)(1)(i)(a)(2) which provides, in pertinent part:

(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.

Appellant appealed the discharge determination to the New York State Department of Health, and a hearing on that appeal was held. Pursuant to 10 NYCRR §415.3(h)(2)(iii)(b), the Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate.

A digital recording of the hearing held at the Facility on December 1 and 19, 2016, as well as the conference call held on December 30, 2016, was made and transferred to a compact disc (“CD”); the CD has become part of the record. On December 19, 2016, Appellant testified for Appellant, and the following Facility representatives testified for Respondent: Daniel Buff, M.D.–Primary Care Physician and Medical Director, Henrietta Hall, R.N.–Director of Nursing, and Jennifer Bennett–Director of Social Work. Also present at the December 19 hearing were the

following Facility representatives: Raquel Braverman--Administrator, Robyn Weiner--Social Worker, and Stacey-Ann Francis--Social Worker; and Juliana Nunez--Ombudsman participated by telephone. Present at the December 1, 2016 hearing date were Appellant and the following Facility representatives: Daniel Buff, M.D., Henrietta Hall, R.N., Raquel Braverman, Robyn Weiner, and Stacey-Ann Francis; Danielle Lubin--Ombudsman participated by telephone. A brief conference call was held on December 29, 2016 and rescheduled for December 30, 2016. The December 30, 2016 conference call participants were Appellant, Ms. Braverman, Ms. Weiner, Ms. Nunez, and Ms. McSweeney (Appellant's friend of many years). Thomas J. Cone, Esq. represented the Facility at all hearing dates and conference calls.

The following documents were accepted into evidence by the Administrative Law Judge ("ALJ") as ALJ, Facility, and Resident Exhibits:

ALJ:

- I: Notice of Hearing with the Facility's Discharge Notice attached
- II: December 6, 2016 letter regarding the December 19, 2016 hearing date
- III: December 6, 2016 letter regarding the December 20, 2016 hearing date<sup>1</sup>

Facility:

- 1: Dr. Buff's ██████████/16 letter
- 2: Social Worker Yolanda Bryan's ██████████/15 letter
- 3: ██████████/15 fax cover sheet/Section Q referral form
- 4: ██████████/15 social services notes
- 5: ██████████/16 psychosocial evaluation
- 6: Ms. Bennett's ██████████/16 note
- 7: ██████████/16 NYC Shelter application
- 8: ██████████/16 NHTD application

Resident:

- A: Dr. Chung's ██████████/16 consultation report
- B: NHTD provider list
- C: 34-page fax including information about Dr. Mann; research articles; and emails<sup>2</sup>

<sup>1</sup> Each party fully presented its case on December 19, therefore the December 20 hearing date was cancelled.

<sup>2</sup> This was accepted into evidence on the recorded December 30, 2016 conference call.

**ISSUE**

Has Lawrence Nursing Care Center established that the transfer is necessary and the discharge plan is appropriate?

**FINDINGS OF FACT**

Citations in parentheses refer to testimony (“T”) of witnesses and exhibits (“Ex”) found persuasive in arriving at a particular finding. Any conflicting evidence was considered and rejecting in favor of the cited evidence.

1. Respondent, Lawrence Nursing Care Center, is a residential health care facility located in Arverne, New York. (Ex I)
2. Appellant, Regina McMahon, age 64, was admitted to the Facility from Kingsbrook Jewish Medical Center on October 1, 2014. Appellant, who is alert and oriented times three and independent in all her ADLs (activities of daily living), currently receives no skilled care at the Facility. (Ex 1; Ex 2; T Buff, Hall)
3. By notice dated [REDACTED], 2016, Respondent advised Appellant that it had determined to discharge her on the grounds that her health has improved sufficiently so that she no longer needs the services provided by the Facility. (Ex I)
4. Appellant’s past and present medical conditions include [REDACTED], [REDACTED], [REDACTED]. These conditions, including Appellant’s risk factors for their continuation, potential recurrence and/or need for surgery in the future, can be treated in the community. (Ex 7; Ex A; T Buff, Appellant)
5. Respondent’s discharge plan is to transfer Appellant to the [REDACTED] [REDACTED] (“Shelter”) located at [REDACTED]. (Ex I)

6. It is the professional opinion of Appellant's caregivers at the Facility, including the Facility's medical director, that discharge to the community, including the Shelter, is appropriate for Appellant who is very independent, intelligent, and capable of making her needs known and managing her finances, medications and medical treatment. (Ex 1; T Buff, Hall, Bennett).
7. Appellant has remained at Lawrence Nursing Care Center pending the outcome of this proceeding.

### DISCUSSION

Respondent's proposal to discharge Appellant pursuant to 10 NYCRR §415.3(h)(1)(i)(a)(2) is based on the ability of Appellant's multiple, but stable, medical conditions to be treated in the community and on her independence with her ADLs. The evidence presented by Respondent demonstrated that Appellant required skilled care upon admission in 2014, she completed rehabilitative services in 2015 when she plateaued in therapy, and she no longer requires or receives skilled care.

Appellant, who has an extensive knowledge of and professional experience with pharmaceuticals and medical conditions, researches her symptoms, conditions, and diagnoses, and then makes medical appointments in the community and requests changes in her medications and supplements. Dr. Buff testified that he approves the community medical appointments Appellant arranges because patients/residents have a right to request medical attention, and that many of the additional medications and supplements she is now taking result from the treatment she seeks in the community, but the "important" medications have remained constant during her stay at the Facility. Dr. Buff testified that nothing in Dr. Chung's ██████████ 16 report of consultation (Exhibit A) indicates that Appellant needs skilled care. Dr. Buff also testified that although Appellant is at risk for ██████████ she is treated (and will continue to be treated in the

community) with medications to reduce the risk. While no one can guarantee that Appellant will not have another ██████ remaining in a skilled facility when there is no skilled need is not appropriate or permissible.

Ms. Hall (Director of Nursing) testified that Appellant takes care of all her ADLs and receives no skilled care at the Facility. The nursing staff offers Appellant her medications, and Appellant accepts the ones she wants to take. Appellant testified that the reason for her challenging the medications and treatments recommended by the Facility is due to her extensive knowledge, experience and ongoing reading and research on medical issues and pharmaceuticals, coupled with her belief that the Facility's physicians, nurses, and dieticians are not sufficiently knowledgeable about her conditions and medical needs.

Ms. Bennett (Director of Social Work) testified that discharge planning for Appellant began in 2015, and that several options and discharge outlets were, and continue to be, explored. Respondent has made referrals to, and arranged appointments and meetings with, representatives from adult homes, assisted living facilities, and organizations that assist with identifying and locating housing and housing options. But, until recently, Appellant has repeatedly rejected and not followed through with Respondent's efforts and assistance. Appellant's rejection of the various discharge outlets led Respondent to identify the Shelter as a last resort. Appellant claims that Respondent's first identifying the Shelter as a discharge location and then determining to discharge her to the Shelter were done as punitive measures following her calling the police to report two residents who attacked her or for calling 311 to report a missing person, which resulted in the police being called. Ms. Hall denied this, and Respondent has shown that its determinations were made because Appellant neither requires nor receives skilled care and Appellant consistently refused efforts to explore discharge options other than the Shelter.

Appellant does not want to go to the Shelter. She is concerned that her intelligence and inability to walk quickly will make her a target in a Shelter, and she is █

█ Appellant testified that due to her history of having experienced many █ episodes in her life, combined with her █

█, she is concerned that placement in a Shelter would cause █ that could lead to █ or other detrimental outcome.

Appellant testified that her treatment records and/or report from Samuel Mann, M.D. would support these contentions. The record remained open to provide Appellant an opportunity to obtain Dr. Mann's record/report, and a conference call was scheduled for December 29, 2016 for such purpose.

During the December 29 conference call, Appellant reported that she did not have a copy of Dr. Mann's record or report, but that she had another document she wished to offer into evidence. Another conference call was scheduled for December 30, 2016 so that Appellant could provide Respondent with that document and it could be faxed to the ALJ if Respondent's counsel did not object. With no objection from Mr. Cone, the document was accepted into evidence during the recorded December 30 conference call. I gave the document very little weight in large part because it was general and not –due to lack of corroborating testimony or medical record evidence– specific to Appellant; as such, it did not convince me that Appellant should not or could not be discharged to the Shelter as long as Respondent proved that the Shelter was an appropriate discharge location for Appellant.

I find that Respondent has proven that Appellant's health has improved sufficiently that she no longer requires skilled care. Appellant is independent in all her ADLs, she already



manages her medical needs and treatments including medications in the community, and she receives no skilled care at the Facility.

I further find that Respondent has proven that the Shelter is an appropriate discharge location for Appellant. Appellant had not cooperated with Respondent's efforts to find suitable housing for her, although her recent actions demonstrated her willingness and desire to find suitable housing. In November, Appellant agreed to pursue housing through the Home and Community Based Services Medicaid Waiver, Nursing Home Transition and Diversion ("NHTD") program. Ms. Moe, who is affiliated with that program, confirmed on the December 29, 2016 conference call that the process has begun and will continue. Appellant confirmed on the December 30, 2016 conference call that a ██████████ and ██████████ from ██████████ are assisting Appellant in finding housing. Ms. Bennett testified at the hearing that a representative from ██████████ visited Appellant on ██████████, 2016 and indicated that they would accept Appellant; Respondent confirmed on the December 30 conference call that this is still an option. Ms. Bennett further testified that the Shelter would assist Appellant with her medical needs, medications, and efforts to find suitable, appropriate housing, and that such assistance would include following up with the applications and efforts that are already in progress as well as identifying and assisting with additional housing resources.

#### CONCLUSION

I find that Respondent has proven that Appellant's health has improved sufficiently so that she no longer needs the services provided by the facility, and that the Shelter is an appropriate discharge plan. As such, this case will be resolved in favor of Respondent as sufficient improvement of health is an explicitly authorized reason for discharge, and an appropriate discharge location has been identified. Speculation that past or current medical

conditions might recur or worsen in the future or that the discharge location might trigger an unfavorable medical event is not sufficient to warrant Appellant remaining in a skilled facility when she has no skilled needs, the discharge location has been shown to be appropriate, there is no report from Appellant's treating physician's medical record of Appellant or related testimony to support Appellant's speculations, and Appellant has not cooperated, for an extended period, with efforts to secure housing other than the Shelter which was identified as a last resort.

Appellant's recent demonstration of her willingness and desire to find suitable housing other than the Shelter is not sufficient, when there is no skilled need, to allow Appellant to remain in the Facility indefinitely while alternate housing options are explored.

#### **DECISION**

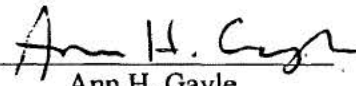
I find that the transfer is necessary and the discharge plan is appropriate.

The appeal by Appellant is therefore DENIED.

Respondent—Lawrence Nursing Care Center is authorized to discharge Appellant in accordance with the █ 2016 discharge notice, but, in order to give Appellant an opportunity (independently or with Respondent's assistance) to continue to explore and possibly secure discharge to an adult home, assisted living facility, or other acceptable housing, Respondent may not discharge Appellant earlier than █ 2017. Appellant, however, may request discharge prior to █ 2017.

This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

Dated: New York, New York  
January 3, 2017

  
Ann H. Gayle  
Administrative Law Judge

██████████ / Lawrence

TO: ██████████  
c/o Lawrence Nursing Care Center  
350 Beach 54<sup>th</sup> Street  
Arverne, New York 11692

Jennifer Bennett, Director of Social Work  
Lawrence Nursing Care Center  
350 Beach 54<sup>th</sup> Street  
Arverne, New York 11692

Thomas J. Cone, Esq.  
708 Third Avenue, 5<sup>th</sup> Floor  
New York, New York 10017