



**Department  
of Health**

**ANDREW M. CUOMO**  
Governor

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

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

May 2, 2018

**CERTIFIED MAIL/RETURN RECEIPT**

Thomas J. Cone, Esq.  
C/o Briarcliff Manor Center for  
Rehabilitation and Nursing Care  
620 Sleepy Hollow Road  
Briarcliff Manor, New York 10510

[REDACTED] Appellant  
C/o Briarcliff Manor Center for  
Rehabilitation and Nursing Care  
620 Sleepy Hollow Road  
Briarcliff Manor, New York 10510

Victoriya Bardenshteyyn, MSW  
Briarcliff Manor Center for  
Rehabilitation and Nursing Care  
620 Sleepy Hollow Road  
Briarcliff Manor, New York 10510

**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* /eac  
James F. Horan  
Chief Administrative Law Judge  
Bureau of Adjudication

JFH:  
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH

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

[Redacted]

Appellant,

from a determination by

BRIARCLIFF MANOR CENTER FOR REHABILITATION  
AND NURSING CARE

Respondent,

to discharge him from a residential health  
care facility.

COPY

DECISION

Hearing Before:

Matthew C. Hall  
Administrative Law Judge

Held at:

Briarcliff Manor Center for  
Rehabilitation and Nursing Care  
620 Sleepy Hollow Road  
Briarcliff Manor, New York 10510

Hearing Date:

April 20, 2018

Parties:

Briarcliff Manor Center for  
Rehabilitation and Nursing Care  
By: Thomas J. Cone, Esq.

[Redacted]

Pro Se

JURISDICTION

By notice dated [REDACTED] 2018, Briarcliff Manor Center for Rehabilitation and Nursing Care (the Facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] (the Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 NYCRR § 415.3(h).

HEARING RECORD

Facility Witnesses: Dr. Arthur Holmberg - Attending Physician  
Mary Courtney - R.N., Director of Nursing  
Shadia Adeyemi - PT/OT Therapist  
Victoriya Bardenshteyn - Social Worker

Facility Exhibits: 1 - Briarcliff Manor Discharge Notice  
1a - Amended Discharge Notice  
2 - Progress Notes [REDACTED]/18)  
3 - Physician's Orders  
4 - Physical Therapy Evaluation (Initial)  
5 - Physical Therapy Discharge Summary  
6 - Resident Summary by Social Worker  
7 - Progress Notes [REDACTED]/18)

Appellant's Witness: 1 - Appellant Testified on his own behalf

ISSUES

Has Briarcliff Manor Center for Rehabilitation and Nursing Care established that the determination to discharge [REDACTED] (the Appellant) is correct and that its discharge plan is appropriate?

FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old man who was admitted to the Facility of [REDACTED] 2016. (Facility 6).

2. His admitting diagnoses were: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. By notice dated [REDACTED] 2018, the Facility determined to discharge the Appellant on [REDACTED] 2018 because his discharge was deemed "necessary for the continued safety (and health) of the other individuals in the facility who would otherwise be endangered by" his continued residency in the Facility. (Facility 1). The Facility subsequently amended the discharge notice to note that the resident's "health improved sufficiently and the resident no

longer require(s) the services of a skilled nursing facility.”  
(Facility 1a).

4. The Facility determined to discharge the Appellant to a  
[REDACTED] shelter at the [REDACTED]  
[REDACTED]

5. During his stay at the Facility, the Appellant has been  
extremely uncooperative with the Facility staff, has not followed  
medical advice or orders, and has not taken a [REDACTED] He  
[REDACTED]

[REDACTED] He has also disobeyed the  
Facility's smoking policy by storing cigarettes and lighters in  
his room. He has also been [REDACTED] abusive to the Facility staff.  
(Facility 2, 6).

6. During his stay, the Appellant's health has improved  
significantly. On [REDACTED], 2018, the Appellant refused Physical  
Therapy/Occupational Therapy (PT/OT) for the third consecutive  
time, and was therefore discharged from the Facility's PT/OT  
program.

7. As of the date of this hearing, the Appellant no longer  
required skilled nursing care, and could perform all activities of  
daily living (ADLs) independently. (Recording @ 15:50).

8. In addition to a [REDACTED] shelter, the Appellant has a variety of other discharge options available to him, including a

[REDACTED] The Appellant has been uncooperative with Facility staff, however, in their attempts to help him find a more suitable discharge location. (Facility 6).

9. The Appellant remains at Briarcliff Manor Center for Rehabilitation and Nursing Care pending the outcome of this appeal.

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. Public Health Law §§ 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[h][1]).

The Facility alleged that the Resident's discharge is permissible pursuant to 10 NYCRR §§ 415(h)(i)(a)(3) and (4), which state:

The safety (and health) of individuals in the Facility (are) endangered.

The Facility also alleged that the Resident's discharge is permissible pursuant to 10 NYCRR § 415(h)(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 Title 10 NYCRR §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 conclusion or fact; less than preponderance of 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.

## DISCUSSION

### Reasons for Discharge

Regarding whether the safety and health of individuals in the Facility are endangered:

The Appellant was admitted to the Facility on [REDACTED] 2016, with multiple diagnoses including [REDACTED]

[REDACTED]

Mary Courtney, the Director of Nursing at the Facility (D.O.N.), and Victoriya Bardenshteyn, a Facility social worker assigned to care for the Appellant, testified that prior to being banned, the Appellant was a smoker and took part in the Facility's smoking program. This program allows residents to smoke in a designated outdoor location four times per day for "about a half hour." (Recording @ 58:50) Aside from those designated smoking times, residents are not permitted to smoke, and are not allowed to have tobacco, or any other smoking paraphernalia in their rooms. The resident agreed to follow these rules, but was found on several occasions to have various items related to smoking, including "packs of cigarettes" [REDACTED], and a "cigarette lighter." As a result, the resident was prohibited



from all smoking activities at the Facility. (Facility 7 and Recording @ 52:50).

In addition to his smoking policy transgressions, the D.O.N. and Ms. Bardenshteyn testified that the resident had other habits that were a danger to other resident's health or safety. Specifically, the resident's [REDACTED] and he admittedly did not take a [REDACTED]

[REDACTED] Instead of using a [REDACTED] the resident [REDACTED] [REDACTED] (Recording @ 19.30). The resident was also a [REDACTED] He stored collections of [REDACTED] [REDACTED] in his room. (Facility 7).

The Appellant testified on his own behalf and admitted that he was a smoker, and he did not deny that the pack of cigarettes and lighter were found in his room. He denied however, that he ever smoked in his room or used tobacco in any way that was dangerous. He also admitted to not taking a [REDACTED] while at the facility, but testified that he kept himself [REDACTED]

[REDACTED] He further admitted to storing certain items in his room, but denied that any of the items were dangerous, including any food items, which he testified were all within expiration dates.

While the habits described above are not desirable for a resident living among other residents in a nursing home, they

cannot be considered dangerous to the safety and health of individuals in the Facility. They are better described as infractions of the Facility's policies which could be addressed by sanctions or penalties short of discharge from the Facility.

Regarding whether the resident's health improved sufficiently and the resident no longer require(s) the services of a skilled nursing facility:

Dr. Arthur Holmberg, the Appellant's Attending Physician, testified that he first examined the Appellant on [REDACTED] 2017, and has been seeing him regularly ever since. According to Dr. Holmberg, the Appellant needed skilled nursing care when he was first admitted to the Facility due to a [REDACTED] and a variety of other diagnoses as listed above. Dr. Holmberg testified, however, that the Appellant no longer needs skilled nursing as "his care can be dealt with in the community," and his "wounds have healed." Further, he is not cooperative with attempts to provide care, and has been caring for himself "on his own schedule." (Recording @ 19:00) When asked if the Appellant still needed to live in a nursing home, Dr. Holmberg replied, "No. He hasn't needed long term care for months." When asked if the resident was medically suited to be transferred to a homeless

shelter, the doctor replied, "Absolutely." (Recording @ 20:55)

It should be noted that Dr. Holmberg's testimony is not consistent with the information he provided only two weeks prior to this hearing. On the "Physician's Orders," under the "General" category, Dr. Holmberg wrote, "I certify the above-named resident (the Appellant) is in need of continued NF care." (Facility 3). This is clearly at odds with his testimony that the Appellant "hasn't needed long term care for months." His assertion that the Appellant no longer needs long term care was corroborated by two other witnesses for the Facility, however, and was not effectively contested by the Appellant. The D.O.N. testified that the Appellant "currently has no skilled needs," and that "his wounds are healed." Shadia Adeyemi, the Appellant's PT/OT specialist, testified that the Appellant no longer required the assistance of a PT/OT specialist and was discharged from the PT/OT program on [REDACTED] 2018, for refusing PT/OT assistance three consecutive times. (Facility 5 and Recording @ 1:11:40). The Appellant admitted that he was not cooperative with attempts by the Facility to provide him with medical care. He testified that he does not accept help from the Facility because he likes to "do things on his own schedule," because he is a [REDACTED]. The Appellant was

asked directly, "Can you take care of yourself"? He responded, "Yea. Basically, I can take care of myself." (Recording @ 1:57:20).

The Appellant is no longer in need of skilled nursing care. At the time of this hearing, he was essentially living at the Facility and caring for himself, while rejecting any assistance from the Facility.

#### Discharge Location

As discussed above, the Appellant has been uncooperative with the Facility at almost every turn, including its attempts to find him a suitable discharge location. The Facility's social worker, Victoriya Bardenshteyn, has made continuous efforts to assist the Appellant despite his resistance to her help. The Facility determined that the Appellant is not an appropriate candidate for assisted living due to financial concerns. However, Ms. Bardenshteyn has offered to provide the Appellant with guidance regarding how to secure residence at an adult home. Again, the resident refused her help. The resident testified that he has a

[REDACTED] who could possibly help and he also testified that he has "[REDACTED]

[REDACTED] When questioned regarding this option, however, the Appellant provided unclear and inconsistent testimony.

CONCLUSION

The Facility has not proven that the Appellant was a danger to the health and safety of others at the Facility. It did prove, however, that the Appellant is no longer in need of skilled nursing care and is therefore an appropriate candidate for discharge. The Appellant contended that he should not be discharged to a homeless shelter. Yet, the record reflects that the Appellant has failed to cooperate with the Facility's efforts to secure an adult home residence or other more suitable living arrangements. The Appellant is entitled to and encouraged to pursue other living arrangements.

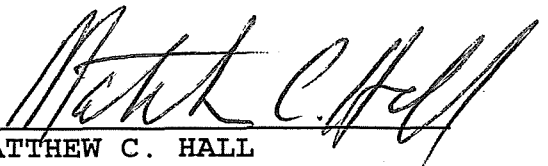
DECISION

Briarcliff Manor Center for Rehabilitation and Nursing Care has established that its determination to discharge the Appellant was correct, and that transfer to a homeless shelter is appropriate.

1. Briarcliff Manor Center for Rehabilitation and Nursing Care is authorized to discharge the Appellant in accordance with its discharge plan on or after [REDACTED] 2018.

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  
April 30, 2018

  
MATTHEW C. HALL  
Administrative Law Judge