



# Department of Health

ANDREW M. CUOMO  
Governor

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

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

February 13, 2019

## CERTIFIED MAIL/RETURN RECEIPT

[REDACTED]  
c/o Martine Center  
12 Tibbits Avenue  
White Plains, New York 10606

Sharon Matthew, Social Worker  
Martine Center  
12 Tibbits Avenue  
White Plains, New York 10606

[REDACTED]  
Michael Kaufman, Ombudsman  
WILC  
10 County Center Road, Suite 203  
White Plains, New York 10607

**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: cmg  
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

**Martine Center,**

Respondent,

to discharge her from a residential health care facility.

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**ORIGINAL**

**DECISION**

**Hearing Before:**

Ann H. Gayle  
Administrative Law Judge

**Held at:**

Martine Center  
12 Tibbits Avenue  
White Plains, New York 10606

**Hearing Dates:**

May 17, June 7, 27, 28, July 11, August 15, 17,  
September 27, October 23, November 13, 29, 2018,  
January 3, 23, 2019

**Parties:**

Martine Center  
By: Sharon Matthew, Director of Social Work

██████████  
*Pro Se*<sup>1</sup>

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<sup>1</sup> ██████████ was assisted by her ██████████/Power of Attorney, ██████████. ██████████ participated by telephone from ██████████ at all hearing dates and on all conference calls.

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 Martine 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 was made part of the record. Appellant appeared and testified on her own behalf. Facility residents ██████. and ██████., Appellant’s ██████ Appellant’s ██████, and Appellant’s community physician ██████, M.D., were called as witnesses for Appellant. ██████ ██████ ██████

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<sup>2</sup> ██████.

Regional Lead, and the following Facility representatives were also called as witnesses by Appellant: Marie Rose Noel-CNA, Christina Decker-LPN, Anna Bernardo-PT, Janet Campbell-CNA, Jaya Mathew-FNP, Dynahlee Payano-LPN, Lauren Burckhard-PTA, Nicholas Hanzely-PTA, Shragi Weisz-Administrator, Martha Tyler-CNA, Nora Eusebio-DNS, Kaysanda Alexander-CNA, and Michelle Herring-ADNS. The following Facility representatives were called as witnesses by Respondent: Larry Kamer-Dir. of Rehab., Christine Stubenvoll-Nurse Manager, Lori Gest-former Soc. Serv. Dir., Sharon Mathew-current Soc. Serv. Dir., and Social Workers Raquel Bennett and Gwen DeSuza. Rajasekhar Buddhavarapu, M.D.-Medical Dir., was called to testify by both Appellant and Respondent on separate days. Michael Kaufman of the NYS Ombudsman's office<sup>3</sup> assisted Appellant at most of the hearing days and gave testimony.

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

ALJ:

- I: Notice of April 12, 2018 Hearing with the Facility's Discharge Notices attached
- II: Notice of May 17, 2018 Hearing with the Facility's Discharge Notices attached
- III: Dr. ██████ request for an adjournment
- IV-XII: Letters informing the parties of additional hearing dates

Facility:

- 1: Rehab therapy notes
- 2: Nursing documentation
- 3: Social Work documentation
- 4: Medical notes from physician and nurse practitioner
- 5: ██████ 8 medical note
- 6: ██████/18 rehab note
- 7: ██████ 19 email from ADNS to IDT re another resident returning to the Facility<sup>4</sup>

Resident:

- A: ██████ 17 ██████ medical records
- B: Appellant's transfer from ██████ to ██████
- C: Appellant's witness list – 2 pages

<sup>3</sup> Lynda Kaufman of the NYS Ombudsman's office was present on one hearing day.

<sup>4</sup> Facility Exhibit 7 was marked for identification but not accepted into evidence; the document remained with Respondent.

- D: PT progress report - █/18 notes
- E: Physician's recommendation leading to admission to Facility
- F: █18 physician order
- G: Appointment notes
- H: █/18 nursing progress note
- I: Medicaid 2020 form with numerous attachments from Resident's medical chart
- J: Appellant's █/18 letter
- K: Appellant's █/18 letter

### ISSUE

Has Martine 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, Martine Center, is a residential health care facility located in White Plains, New York. (Ex I; Ex II)
2. Appellant, █, age █ was admitted to the Facility on █ 2017, for rehabilitative therapy. Appellant received physical therapy ("PT") from early █ 2017, and from █, 2018; Appellant was discharged from PT in █ 2017 and █ 2018 when she reached her maximum potential/plateaued. (Ex 1; T Kamer, Bernardo, Burckhard)
3. Appellant is alert and oriented and independent in her ADLs (activities of daily living); she receives no skilled care at the Facility. Appellant's past and present medical conditions, including █ can be further evaluated and treated in the community. (Ex 4; Ex 5; Ex F;

T Buddhavarapu, J. Mathew, Eusebio, Herring, Folk, Buddhavarapu, J. Mathew, Campbell, Payano, Alexander)

4. By notice dated ██████, 2018, 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. Respondent's discharge plan is to transfer Appellant to the ██████ DSS District Office ("Shelter") located ██████ (Ex I; Ex II)

5. 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 and capable of making her needs known and managing her medications and medical treatment. Appellant will be discharged with a wheelchair and other necessary devices, referrals for medical care in the community, prescriptions for medications, and transportation to the Shelter. (Ex 2; Ex 3; Ex 5; T Buddhavarapu, J. Mathew, Gest, Bernardo, Kamer, DeSuza, Bennett)

6. Appellant remained at Martine Center pending the outcome of this proceeding<sup>5</sup>.

### DISCUSSION

The evidence presented by Respondent demonstrated that: Appellant completed her rehabilitative services; she is independent with her ADLs; she has no skilled needs; her condition is stable; her medical conditions can be treated in the community; she is capable of administering and managing her medications; she goes out on pass with family members for hours or days; and

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<sup>5</sup> Appellant left the Facility with a family member on ██████ 2019, and Respondent refused to allow her back into the Facility. An Interim Order directing Respondent to allow Appellant to return to the Facility was issued on ██████ 2019. Attached to the Interim Order were a purported Out on Pass Agreement, a notarized statement from Nurse Practitioner Mathew, and a notarized statement from a Nurse Supervisor Abraham. It is unknown if Appellant is currently residing at Martine Center.



██████ / Martine

summer of 2018 (Ex 1; T Gest, Appellant), and ██████ referred Appellant's case to ██████ ██████ in ██████ 2018. ██████ testified at the ██████ 2018 and ██████, 2019 hearing dates. Mr. ██████ testified that he assists applicants/participants with finding subsidized housing wherein participants pay ██████ of their monthly income (minus necessary expenses such as utilities) toward the rental. When Mr. ██████ testified (on Oct. 23) that he had received no response from Ms. Gest to his ██████ email, Ms. Gest represented (at the October 23 hearing) that she would reply "as soon as her very busy scheduled allowed" to provide Mr. ██████ with the Facility's documentation which the ██████ requires.

On January 23, 2019, Mr. ██████ testified that Ms. Gest provided incorrect documentation in late ██████ 2018, and he did not receive further documentation from Ms. Gest despite his requests. Mr. ██████ further testified that subsequent to Ms. Gest's departure from the Martine Center, Gwen DeSuza provided the correct required documentation in ██████ 2019 (within a few days of his conversation with Ms. DeSuza) and Mr. ██████ was able to continue the process of having Appellant approved for the rental subsidy and transitional housing support services. Before Mr. ██████ left the hearing room, Appellant provided him with leads for four potentially available apartments she located in the community, and Mr. ██████ represented that he would follow up on those leads and on completing the final steps for Appellant's participation in the program.

Appellant, Mr. ██████ Dr. ██████ and Appellant's ██████ testified that they do not believe the Shelter is an appropriate discharge location for Appellant and that they believe Appellant's conditions require that she remain in the Facility to receive further physical therapy and to obtain medical evaluations/studies outside of the Facility in the hope that her medical conditions will improve and that she will walk again.



Mr. █ testified that he saw improvement when Appellant's PT was reinstated in █ 2018, but Appellant cannot ambulate when she is out on pass; she can stand for "only about 5 minutes" and she needs his assistance particularly with pushing Appellant in her wheelchair in stores. Appellant's █ testified that he cannot carry Appellant up the █ steps to their home but that it was "pretty easy" to help Appellant in and out of the bath when she was home on pass. Resident █ testified that he has had to help Appellant get around the Facility in her wheelchair, but that he has seen Appellant get out of bed on her own by bracing herself on the bed to get to her wheelchair.

Dr. █ testified that Appellant needs █, and █ and evaluations to fully and properly explore the causes of her conditions, make proper diagnoses, and direct further treatment. Dr. █ believes Appellant is not adequately prepared to live on her own in the community, especially in the Shelter, and that she should remain in the Facility pending the evaluations, but he did acknowledge that those studies would be done in the community even if Appellant continued to reside in the Facility.

Dr. Buddhavarapu testified on June 28 and July 11, 2018, that Appellant is ready for discharge; she is medically and cognitively stable and she has no skilled needs such as PT or occupational therapy or wound care or medication administration by staff. When Dr. Buddhavarapu was asked by Appellant if the diagnoses in Appellant's Exhibit F contraindicate discharge to the community, Dr. Buddhavarapu testified that these conditions can be "treated safely in the community" and that Appellant can seek out-patient therapy when she is discharged. Finally, Dr. Buddhavarapu testified on █, 2019, that he needs to speak with Dr. █ to determine if he would authorize Dr. █ recommendations for additional medical evaluations and imaging studies but Dr. █ had not yet returned Dr. Buddhavarapu's calls.

Appellant submitted twelve documents into evidence and called several Facility employees to testify on her behalf. The documents and testimony further demonstrated that Appellant is very independent, that she works toward accomplishing tasks and goals but only when she is motivated and interested in doing so, and that discharge to the community is appropriate at this time.

While Appellant's Exhibit I shows instances wherein Appellant, over the course of her stay at the Facility, has required varying degrees of assistance such as one-person assist, two-person assist, supervision, or limited assistance with one or more of her ADLs on any given day or shift, Respondent has proven that Appellant is independent with her ADLs, and that she has been able (in PT) to walk various distances and with different levels of assistance with a walker. Also, when questioning Ms. Bernardo (on 11/13/18) Appellant pointed out that she was on the bike that week, and Ms. Bernardo confirmed that Appellant transfers herself to the bike. Additionally, all the therapists who testified concurred that Appellant made little progress in PT by the time she plateaued/reached maximum potential, that she is able to function independently in her room but unable to perform tasks in PT and elsewhere when therapists are observing her, that Appellant is capable of ambulating with a walker but she prefers her wheelchair, and that Appellant is very self-directed; if she wants to walk she tries but when she doesn't want to try to walk she won't. (T Eusebio, Buddhavarapu, Kamer, Bernardo, Burckhard, Payano, Appellant)

CNA Campbell testified that she "sets up" for Appellant and Appellant cleans and dresses herself. Ms. Campbell also testified that although she has not seen Appellant walk and although she doesn't know exactly how Appellant transfers to and from the commode, she finds Appellant on the commode. CNA Noel, who took care of Appellant for approximately one year, testified that she empties Appellant's commode and gives her supplies for bathing but never

provides the care; Appellant does it herself. Ms. Noel also testified that she knows that Appellant is able to stand because she has seen Appellant standing in front of the window watering her plants and standing in front of her dresser. Ms. Noel further testified that she believes Appellant can function in the community because Appellant “does everything herself;” she gets into and out of her wheelchair on her own; she has asked Ms. Noel for sheets to change her bed; and on one occasion Appellant moved her bed closer to the TV.

CNA Alexander testified that when she accompanied Appellant to medical appointments with Dr. ██████ she did not recall herself and “James” carrying Appellant in her wheelchair up and down the steps to Dr. ██████ office, but she did recall that Appellant, after several visits, was making progress getting into and out of his office. Similar to Ms. Campbell’s and Ms. Noel’s testimony, Ms. Alexander testified that she gives Appellant water, towels, soap, etc., but does not have to provide the care for these ADLs as Appellant does it herself.

### **CONCLUSION**

Respondent has proven that Appellant’s health has improved sufficiently that she no longer requires skilled care, and that discharge to the Shelter is appropriate for Appellant.

### **DECISION**

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


The appeal by Appellant is therefore DENIED.

Respondent–Martine Center is authorized to discharge Appellant in accordance with the ██████ 2018 discharge notice.

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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  
February 13, 2019

  
Ann H. Gayle  
Administrative Law Judge

TO: ██████████  
c/o Martine Center  
12 Tibbits Avenue  
White Plains, New York 10606

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