



**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 7, 2019

CERTIFIED MAIL/RETURN RECEIPT

Allison Bellin, DSW
Beth Abraham Center for Rehabilitation
and Nursing
612 Allerton Avenue
Bronx, New York 10467

Tanya Kessler
Mobilization for Justice
100 William Street
6th Floor
New York, New York 10038

██████████
c/o Beth Abraham Center for Rehabilitation
and Nursing
612 Allerton Avenue
Bronx, New York 10467

Mario C. Giannettino
Kaufman Borgeest & Ryan LLP
200 Summit Lake Drive
Valhalla, New York 10595

RE: In the Matter of ██████████ – Discharge Appeal

Dear Parties:

Enclosed please find the Decision on Motion in the above referenced matter.

The party who did not prevail in this Motion 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 Motion 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 Motion.

Sincerely,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: cmg
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

**Beth Abraham Center for
Rehabilitation and Nursing,**

Respondent,

to discharge him from a residential health care facility.

ORIGINAL

**DECISION
ON
MOTION**

Before: Natalie J. Bordeaux
Administrative Law Judge

Parties: Beth Abraham Center for Rehabilitation and Nursing
612 Allerton Avenue
Bronx, New York 10467

By: Mario C. Giannettino, Esq.
Kaufman Borgeest & Ryan LLP
200 Summit Lake Drive
Valhalla, New York 10595

[REDACTED], Appellant
c/o Beth Abraham Center for Rehabilitation and Nursing
612 Allerton Avenue
Bronx, New York 10467

By: Tanya Kessler, Esq.
Mobilization for Justice
100 William Street
New York, New York 10038

BACKGROUND

On [REDACTED] 2018, Beth Abraham Center for Rehabilitation and Nursing (the Facility) determined to discharge the Appellant on [REDACTED] 2018 because the Appellant's "health has improved sufficiently...that [he] no longer needs the services provided by the facility." The notice also advised the Appellant that he would be discharged to the [REDACTED] [REDACTED] Shelter, located at [REDACTED] [REDACTED] [REDACTED]. Appellant appealed the discharge determination to the New York State Department of Health ("the Department"), and by Notice of Hearing dated [REDACTED] 2018, a hearing on that appeal was scheduled for November 30, 2018.

On November 27, 2018, Tanya Kessler, Senior Staff Attorney with Mobilization for Justice, requested an adjournment of the November 30 hearing on the grounds that her organization was just retained to represent the Appellant at the hearing. The hearing was rescheduled for December 20, 2018. On December 5, 2018, the Facility informed the Bureau of Adjudication that it would be represented at the hearing by Mario C. Giannettino, Esq., of Kaufman Borgeest & Ryan LLP ("KBR"). On December 19, 2018, Ms. Kessler informed the Bureau of Adjudication that Appellant intended to bring a reporter from National Public Radio ("NPR") to the hearing the following day. The Facility strongly opposed the presence of a reporter at the upcoming hearing. To accommodate the parties' schedules and for the attorneys to brief the issue, the hearing was rescheduled for February 15, 2019¹. The briefs and reply briefs were submitted on January 8 and 15, 2019, respectively.

¹ By written request dated February 5, 2019, Ms. Kessler requested further postponement of this hearing while she attempts to procure alternate housing arrangements for the Appellant. With Mr. Giannettino's consent, the hearing is currently rescheduled for March 11, 2019.

ISSUE

Does a First Amendment right of access exist for members of the press to observe the Appellant's nursing home discharge appeal hearing?

APPLICABLE LAW

Transfer and discharge rights of nursing home residents are set forth at 10 NYCRR § 415.3(h). A resident has the right to request a hearing to contest a discharge determination within 60 days from the date upon which the notice was received. 10 NYCRR § 415.3(h)(2)(i)(a). At the hearing, the resident or the resident's representative must be given the opportunity to bring witnesses. 10 NYCRR § 415.3(h)(2)(ii)(b). A witness is a person "who testifies to what he has seen, heard, or otherwise observed." *See* Black's Law Dictionary 5th ed. 1983. 10 NYCRR § 415.3(h) does not provide for the presence of individuals other than those directly involved in the matter.

The hearing must be conducted in accordance with Article 3 of the State Administrative Procedure Act ("SAPA"). 10 NYCRR § 415.3(h)(2)(i)(a) and (iii). SAPA explicitly allows public inspection and copying of any written final decision, determination or order. SAPA § 307.3. Similarly, the Freedom of Information Law (FOIL) requires access to agency and legislative records. *See* N.Y. Pub. Off. L. §§ 84-90.

DISCUSSION

The Appellant contends that Cindy Rodriguez, a reporter with WNYC² should be permitted to attend the hearing³, for three reasons: (1) public policy favors open proceedings; (2) there is no compelling interest justifying closure of the hearing because Appellant is waiving his confidentiality and privacy rights; and (3) the public policy of favoring openness is particularly

² NYC/local public radio station and NPR affiliate.

³ Ms. Rodriguez seeks to conduct audio recording of the hearing (if permitted), and report on the proceeding.

strong in this case because the hearing involves a matter of public interest or concern. In support of these assertions, the Appellant relies on the New York Court of Appeals' decision in *Herald Co. v. Weisenberg*, 59 N.Y.2d 378 (1983), which held that an unemployment insurance hearing is presumed to be open, and may not be closed to the public unless there is a compelling reason for closure and only after the affected members of the news media are given an opportunity to be heard.

At the outset, *Weisenberg* is readily distinguishable from the facts at hand because the applicable labor law provisions for unemployment insurance hearings contained no confidentiality requirements. In addition, as the Court of Appeals noted in *Matter of Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1 (1990), "the posture of the Commissioner of Labor and the long-standing position of the Attorney General...were supportive of a policy of public access to such hearings." *Id.* at 9. By contrast, the regulatory provision pertinent to nursing home discharge appeals identifies the individuals who may be present at the hearing: the resident and/or a representative and witnesses (including adverse witnesses).

Nursing home discharge appeal hearings are also subject to stringent confidentiality requirements pertaining to residents' protected health information under the federal Health Insurance Portability and Accountability Act (HIPAA.). The pertinent regulatory provision describing residents' rights (10 NYCRR § 415.3), including their discharge appeal hearing rights, also describes residents' rights to confidentiality of their personal and clinical records. As discussed below, while the Appellant may certainly choose to disclose his personal and clinical information, his choices do not absolve the Facility of its continued obligations under HIPAA.

Case law subsequent to *Weisenberg*, both state and federal, offers more refined guidance as to whether a hearing should be open to the public. In determining whether a First Amendment

right of access to proceedings exists, the United States Supreme Court has emphasized two considerations: (1) whether the place and process have historically been open to the press and general public; and (2) whether public access plays a significant positive role in the functioning of the particular process in question. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). New York courts have consistently applied this two-tiered test to matters of First Amendment access. *Matter of Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1 (1990) (quoting *Matter of Johnson Newspaper Corp. v. Melino*, 151 A.D.2d 214 (3rd Dept. 1989)); *Forcucci v. Bd. Of Educ. of Hamburg Cent. Sch. Dist.*, 151 A.D.3d 1660 (4th Dept 2017). Upon application of the facts at hand to this two-tiered test, it is determined that no First Amendment right of access exists in nursing home discharge appeal proceedings.

With respect to the first consideration articulated by the United States Supreme Court, a “tradition of accessibility implies the favorable judgment of experience.” *Press-Enterprise*, 478 U.S. 1, 8 (1986). Nursing home discharge appeals have never been accessible by members of the general public and the press. They are held in closed rooms, usually within a nursing home or a hospital, which are not even accessible to uninvolved staff members. These hearings involve two private parties (a nursing home and a resident) and two issues germane only to the particular resident: whether the discharge determination was correct and whether the discharge plan is appropriate. 10 NYCRR § 415.3(h)(2)(iii)(b). The resident has the right to have a representative present and may bring witnesses possessing relevant information to support the resident’s statements and/or refute information proffered by the nursing home. 10 NYCRR § 415.3(h)(2).

Similarly, public access has not played a role in the functioning of discharge appeal hearings. As the U.S. Supreme Court cautioned in *Press-Enterprise*, “it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated

if conducted openly.” *Press-Enterprise*, 478 U.S. 1, 8-9. Rather than promoting proper functioning of the discharge appeal process, the presence of members of the public and of the press, would likely disrupt the proceedings or prompt witnesses to evade testifying as to any information adverse to either party.

Granting public access to discharge appeal hearings would also prevent nursing homes from fulfilling their obligations under HIPAA with respect to residents’ protected health information. Although the Appellant in this case has offered to authorize his attorney and WNYC to receive his information, the Facility remains liable for any misuse of his information stemming from the discharge appeal proceedings. Granting public access to discharge appeal hearings would leave the Facility with the impossible task of maintaining an accounting of all members of the public and/or press who received the Appellant’s protected health information disseminated during the discharge appeal hearing. 45 C.F.R. § 164.528. Invariably, such accounting must include those individuals present at each discharge appeal proceeding, as their presence would constitute disclosure of the resident’s protected health information, but also individuals who subsequently gain access to the resident’s distributed clinical records from an observing member of the public or press. The Facility cannot be required to perform this accounting function amidst its countless other legal obligations to its residents.

WNYC, the entity seeking access, has been afforded an opportunity to explain its purpose in observing the Appellant’s discharge appeal hearing. (Appellant’s brief, Exhibit B.) Through its legal counsel, WNYC explained that it considers issues in the hearing to be matters of public interest or concern in that the Appellant faces discharge to a homeless shelter and WNYC is interested in examining the incidence and process by which nursing home residents are discharged to public shelters. Ms. Kim, WNYC’s Associate General Counsel, asserts that

“deliberations in administrative hearings over how our healthcare and public welfare systems are regulated and monitored are clearly a legitimate matter of public interest [and that] its public affairs reporter will help shed light on the complex problem of how our healthcare system responds to individuals in our community who are frail, susceptible to illness and destitute.”

In support of the requested access, Ms. Kim cites the Manual for Administrative Law Judges and Hearing Officers (2011) and FOIL. However, as the ALJ Manual’s Foreword explains, this document is designed to provide a starting point and general reference for administrative law judges. It is not authoritative. Nor does her reference to FOIL justify WNYC’s presence at the hearing, as its provisions seek to ensure solely that the public has access to agency and legislative records. No other provisions set forth in the Public Officers Law are instructive in this matter, either. While public access to open meetings (“official convening of a public body for the purpose of conducting public business”) other than executive sessions is required, discharge appeals are not conducted by a “public body,” as defined in Public Officers Law § 102(2). Thus, these requirements are inapplicable.

Regarding Ms. Kim’s substantive rationale for WNYC’s presence, it appears that she has misunderstood the purpose of a discharge appeal. Discharge appeals do not offer “deliberations” for observation. Nor do they demonstrate how healthcare is regulated and monitored. No legitimate public interest has been shown.

CONCLUSION

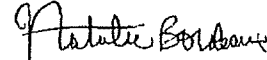
WNYC is afforded sufficient opportunity to obtain the information that it seeks through SAPA § 307.3’s allowance of public inspection of any written final decision, determination or order. Similarly, the Public Officers Law requires access to agency and legislative records, but does not require the openness of discharge appeal proceedings to the public.

The press has been given the opportunity to articulate and argue its position of why its reporter should be allowed to attend the hearing. However, a discharge appeal hearing is not the forum for the information that WNYC purportedly seeks. Public access does not play a significant positive role in the functioning of the discharge appeal process. These hearings have never been open to the public. The U.S. Supreme Court in *Press-Enterprise* aptly characterized these considerations as “tests of experience and logic.” *Press-Enterprise*, 478 U.S. 1, 9. There is no logical benefit to granting the public and the press access to a nursing home discharge appeal hearing. Any relevant information may be obtained from the final determination in this matter and, if necessary, the hearing transcript.

DECISION

The Appellant’s request to have a reporter from WNYC attend the hearing is DENIED.

Dated: New York, New York
February 6, 2019



Natalie J. Bordeaux
Administrative Law Judge