



# Department of Health

ANDREW M. CUOMO  
Governor

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

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

January 15, 2019

## CERTIFIED MAIL/RETURN RECEIPT

Miriam Schenker, Administrator  
King David Center for Nursing & Rehab  
2266 Cropsey Avenue  
Brooklyn, New York 11214

[REDACTED]  
c/o King David Center for Nursing & Rehab  
2266 Cropsey Avenue  
Brooklyn, New York 11214

[REDACTED]  
Deidre Garrett-Scott, Director  
NYC Ombudsman Program  
841 Broadway, Suite 301  
New York, New York 10003

**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: nm  
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

**King David Center for Nursing  
and Rehabilitation,**

Respondent,

to discharge him from a residential  
health care facility.

**ORIGINAL**

**DECISION**

Hearing Before: Natalie J. Bordeaux  
Administrative Law Judge

Hearing Location: King David Center for Nursing and Rehabilitation  
2266 Cropsey Avenue  
Brooklyn, New York 11214

Hearing Date: December 13, 2018  
The record closed January 15, 2019

Parties: King David Center for Nursing and Rehabilitation  
By: Miriam Schenker, Administrator  
2266 Cropsey Avenue  
Brooklyn, New York 11214

[REDACTED], Appellant's Daughter  
[REDACTED]

Deirdre Garrett-Scott, Director, NYC Ombudsman Program  
841 Broadway, Suite 301  
New York, New York 10003

**JURISDICTION**

By notice dated ██████████ 2018, King David Center for Nursing and Rehabilitation (the Facility), a residential health care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge ██████████ (the Appellant). 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: Joseph Eisen, Billing  
Daria Callahan, Medicaid Coordinator  
Lyubov Elbert, Social Worker

Facility exhibits: 1-8

Appellant witnesses: ██████████, Appellant's Daughter and  
Attorney-in-Fact  
Deirdre Garrett-Scott, NY Ombudsman Program

Appellant exhibits: None

ALJ exhibits: I-II

A digital recording of the hearing was made.

**ISSUES**

Has King David Center for Nursing and Rehabilitation established that its determination to discharge the Appellant was necessary and the discharge plan appropriate?

**FINDINGS OF FACT**

1. The Appellant is an 84-year-old male who was admitted to the Facility on ██████████, 2018 after being hospitalized for ██████████ injuries. (Exhibit 7.)

2. The Appellant's admitting diagnoses were: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and a history of [REDACTED]. (Exhibit 7.)
3. The Appellant has been a Medicare recipient since the date of admission. However, [REDACTED] has not yet been deemed eligible for Medicaid coverage. (Exhibit 7.)
4. The Facility receives the Appellant's monthly Social Security Retirement benefits and monthly pension benefits. The Appellant has no other assets or means of payment. (Exhibit 8; Recording @ 21:31.)
5. By notice dated [REDACTED], 2018, the Facility determined to discharge the Appellant on [REDACTED], 2018 because [REDACTED] has "failed, after reasonable and appropriate notice, to pay" for [REDACTED] nursing home stay. The notice proposes to discharge the Appellant to [REDACTED] home. (Exhibit 1.)
6. Facility staff handed the discharge notice to the Appellant and did not provide the discharge notice to [REDACTED] daughter. (Recording @ 42:12.)
7. The Appellant's cognition is impaired and [REDACTED] is unable to make decisions for [REDACTED] self. (Exhibits 4 and 7; Recording @ 7:08.)
8. The Appellant remains at King David Center for Nursing and Rehabilitation pending the outcome of this appeal.

#### APPLICABLE LAW

A residential health care facility (also referred to in the regulations as a nursing home) is a facility which provides regular nursing, medical, rehabilitative, and professional services to residents who do not require hospitalization. PHL §§ 2801(2)&(3); 10 NYCRR § 415.2(k).

Regulations at 10 NYCRR § 415.3(h) describe the transfer and discharge rights of residential health care facility residents. They state, in pertinent part:

(1) With regard to the transfer or discharge of residents, the facility shall:

(i) permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless such transfer or discharge is made in recognition of the resident's rights to receive considerate and respectful care, to receive necessary care and services, and to participate in the development of the comprehensive care plan and in recognition of the rights of other residents in the facility:

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(b) transfer and discharge shall also be permissible when the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare, Medicaid, or third-party insurance) a stay at the facility... Such transfer or discharge shall be permissible only if a charge is not in dispute, no appeal of a denial of benefits is pending, or funds for payment are actually available and the resident refuses to cooperate with the facility in obtaining the funds;

The residential health care facility must prove by substantial evidence that the discharge was necessary, and the discharge plan was appropriate. 10 NYCRR § 415.3(h)(2)(iii); State Administrative Procedure Act § 306(1).

### DISCUSSION

The Appellant was admitted to the Facility on [REDACTED], 2018. By notice dated [REDACTED], 2018, the Facility determined to discharge [REDACTED] on [REDACTED], 2018 because [REDACTED] has failed, after reasonable and appropriate notice, to pay for [REDACTED] stay at King David Center for Nursing and Rehabilitation. (Exhibit 1.)

The Appellant, who is diagnosed with [REDACTED] and [REDACTED], is incapable of making decisions for [REDACTED] self. (Exhibit 7; Recording @ 7:08.) The Appellant's daughter makes all decisions on her [REDACTED]'s behalf. (Recording @ 33:20.) Yet, the Facility never apprised her of the Appellant's outstanding balance. The Appellant's daughter was first informed of [REDACTED] remaining financial liability when she found the [REDACTED], 2018 discharge notice in the Appellant's stack of papers in [REDACTED] room. (Recording @ 42:23.) The Facility also

failed to notify the Appellant's daughter (the Appellant's designated representative pursuant to 10 NYCRR § 415.2(f)) in writing that the Appellant was being discharged, and the reason why ██████████ was being discharged. 10 NYCRR § 415.3(h)(1)(iii). (Recording @ 42:23.)

At the hearing, the Facility submitted bills dated ██████████, 2018 and ██████████, 2018 to establish the basis for its determination. (Exhibit 6.) The statements reflect daily Medicare coinsurance for the Appellant's stay that has accrued each day since ██████████, 2018 without crediting the Appellant's payments of approximately \$5,000 as of the date of the hearing. (Recording @ 23:19.) The charges that the Facility claimed were outstanding are inaccurate and do not acknowledge receipt of those payments. Once the Appellant's daughter discovered the Appellant's outstanding balance at the Facility, she arranged for the Facility to receive all of ██████████ monthly income. (Recording @ 27:00.)

The Appellant's daughter has continuously cooperated with the Facility's efforts to obtain Medicaid coverage for her ██████████. However, when she advised the Facility that she was unable to afford the cost of the Appellant's bank statements from the previous 5 years (information necessary to obtain nursing home Medicaid coverage) and that the bank insisted that the Facility would be able to obtain the records free of charge, the Facility made no effort to assist with procuring the required documents. (Recording @ 4:50.) Instead, the Facility issued the ██████████ 2018 discharge notice.

The Appellant has no available funds for payment over and above ██████████ monthly income which the Facility received. The Appellant's designated representative has diligently attempted to cooperate with the Facility in obtaining all available funds, including completing a Medicaid application. (Recording @ 15:14, 54:00.) Although the Facility has now updated the Appellant's bill to show only Medicaid budgeting and the resulting outstanding balance, no

evidence was presented to show that the Appellant is able to pay the remaining amount owed. (ALJ Exhibit II.) The Facility has failed to establish that the Appellant's discharge is necessary.

Regarding its discharge plan, the Facility purports to discharge the Appellant to ██████ home in the community, a rented apartment where ██████ has lived alone. (Facility Exhibit 1; Recording @ 19:04.) The Appellant is currently receiving nursing services and restorative therapy. (Recording @ 12:22.) Lyubov Elbert, the Appellant's former social worker at the Facility, contended that the Appellant could safely be discharged to ██████ home with home care services in place. However, she conceded that home care would only be possible if the Appellant is deemed eligible for Medicaid, and ██████ has not yet been deemed so eligible. (Recording @ 52:21.) The discharge plan also fails to consider the other services that the Appellant currently receives on-site. The Facility has not devised a feasible discharge plan.

The Appellant's daughter asserted that her ██████ cannot safely be discharged to ██████ home, even with home care services. She explained that she was previously paying for private home care services and the Appellant still ██████ ██████ in ██████ home, resulting in ██████ hospitalization and transfer to the Facility. The Appellant's daughter also stated that the Appellant's ██████ diagnosis causes ██████ when he wakes up. (Recording @ 20:25.)

The Appellant's history of ██████ and ██████ are both documented in the Facility's records. (Exhibit 7.) The Facility's discharge plan does not address the Appellant's medical needs and how those needs will be met after discharge. 10 NYCRR § 415.3(h)(1)(vi). Its determination fails to comport with procedural and substantive requirements and is therefore not sustained.

**DECISION AND ORDER**

King David Nursing and Rehabilitation Center has not established that its determination to discharge the Appellant was necessary and its discharge plan appropriate.

1. King David Nursing and Rehabilitation Center is not authorized to discharge the Appellant based upon its ██████████, 2018 notice.

Dated: January 15, 2019  
New York, New York

*Natalie Bordeaux*

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Natalie J. Bordeaux  
Administrative Law Judge