



# Department of Health

ANDREW M. CUOMO  
Governor

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

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

April 11, 2019

## CERTIFIED MAIL/RETURN RECEIPT

██████████  
c/o Bay Park Center for Nursing & Rehabilitation  
801 Co-op City Boulevard  
Bronx, New York 10475

Barbara Stegun Phair, Esq.  
Abrams Fensterman  
3 Dakota Drive, Suite 300  
Lake Success, New York 11042

John F. Mackay, Director of Social Work  
Bay Park Center for Nursing  
& Rehabilitation  
801 Co-op City Boulevard  
Bronx, New York 10475

**RE: In the Matter of ██████████ – 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

[REDACTED],

Appellant,

from a determination by

**Bay Park Center for Nursing & Rehabilitation,**  
Respondent,

to discharge him from a residential health care facility.

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**COPY**

**DECISION**

**Hearing Before:** Ann H. Gayle  
Administrative Law Judge

**Held at:** Bay Park Center for Nursing & Rehabilitation  
801 Co-op City Boulevard  
Bronx, New York 10475

**Hearing Date:** April 2, 2019

**Parties:** Bay Park Center for Nursing & Rehabilitation  
By: Barbara Phair, Esq.  
Abrams Fensterman

[REDACTED]  
*Pro Se*

Pursuant 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 Bay Park Center for Nursing & Rehabilitation (“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)(1) 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:
  - (1) the transfer or discharge is necessary for the resident's welfare as the resident's needs cannot currently be met by the services available at 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. SAPA § 306(1) provides that the standard of proof shall be by substantial evidence. “Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact; it is less than a preponderance of the evidence but more than mere surmise, conjecture or speculation. . . . Put differently, there must be a rational basis for the decision. (Citations omitted)” (*Stoker v. Tarentino*, 101 A.D.2d 651, 652, 475 N.Y.S.2d 562, 564 [App. Div. 3d Dept. 1984], mod. 64 N.Y.2d 994, 489 N.Y.S.2d 43.

A digital recording of the hearing was made part of the record. Appellant appeared and testified on his own behalf. Appellant's ██████████, testified for Appellant and assisted him at the hearing, and Appellant called the following Facility representatives as witnesses: Icilma Barzey-George, Dietician; Stephanie Maharaj, Assistant Administrator; and Jehanny Alcon, Social Work Intern. Respondent called the following Facility representatives as witnesses: Stephan Schink, R.N., Nurse Manager; Grace Bonus, Assistant Director of Rehabilitation; and Joan Bryan, Social Worker. Both Appellant and Respondent called the following Facility representatives as witnesses: Veerabadrán Ravichandran, M.D., Attending Physician; and John F. Mackay, Director of Social Work. 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

Facility:

- 1: ██████████ 2019 physician note
- 2: IDT discharge form
- 3: PT evaluation and progress notes
- 4: Social Services progress notes

Resident:

- A: Medical progress notes
- B: Medications and diagnoses sheets
- C: OT and PT progress notes

**ISSUE**

Has Bay Park Center for Nursing & Rehabilitation 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.

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1. Respondent, Bay Park Center for Nursing & Rehabilitation is a residential health care facility located in Bronx, New York. (Ex I)
2. Appellant, ██████, age ██████ was admitted to the Facility for short-term care on ██████ 2016, following a hospitalization for injuries sustained in a ██████ (Ex 1; Ex A; Ex B)
3. By notice dated ██████ 2019, Respondent advised Appellant that it had determined to discharge him on the grounds that the discharge was for Appellant's welfare as his needs cannot currently be met by the services available at the Facility. The discharge location is the ██████ ██████ Shelter ("the Shelter") located at ██████ ██████ ██████ (Ex I)
4. It is the professional opinion of Appellant's caregivers at the Facility, including Appellant's Facility attending physician, that discharge to the Shelter is appropriate for Appellant. (T Ravichandran, Schink, Bonus, Bryan, and Mackay)
5. Appellant has remained at Bay Park Center for Nursing & Rehabilitation pending the outcome of this proceeding.

#### DISCUSSION

Respondent's ██████ 2019 discharge notice informed Appellant that it determined to discharge him on the grounds that the discharge is necessary for Appellant's welfare and that his needs cannot be met because Appellant is not compliant with all areas of care. The evidence demonstrated that Appellant refused care and services from Respondent prior to receiving the discharge notice, and that when Appellant became motivated to accept services once the discharge notice was served on him, he has been making significant, remarkable progress with those services, particularly physical therapy ("PT"). It was anticipated that Appellant's course of PT would be complete approximately two weeks from the April 2 hearing date.

Appellant's facility attending physician, Dr. Ravichandran, testified that he was very impressed with and pleased by how much progress Appellant was making ambulating with a rolling walker in the few weeks since Appellant became motivated to accept PT. Dr. Ravichandran "expects" Appellant to have a full recovery and resume his profession of secretarial work; Dr. Ravichandran believes Appellant will be able to walk "even without a walker." Assistant Director of Rehabilitation, Grace Bonus, testified that Appellant's ability to ambulate "██████████ feet" in the short span of three weeks (██████████, 2019) was "extremely remarkable." Ms. Bonus testified that previous attempts in the past year or more to have Appellant ambulate with a rolling walker were unsuccessful due to Appellant's refusal to participate in PT. Ms. Bonus explained that the pain and ██████████ Appellant is currently experiencing is due to his not having used his ██████████ for more than a year. Both Dr. Ravichandran and Ms. Bonus expressed how pleased they are that Appellant finally accepted services (after the discharge notice was given to him) and is benefitting so much from PT.

Social Worker, Joan Bryan, testified that for more than a year she regularly urged Appellant to complete and submit the appropriate SSD or SSI applications that she gave him so that he could potentially have income and return to the community in a setting he desired, but that Appellant did not follow up until ██████████ 2019, when Appellant agreed to begin the application process by telephone. Both Ms. Bryan and Appellant's ██████████ testified that the application was not complete at the time of the hearing because despite their urging him to do so Appellant had not provided the Social Security Administration with the required employment history.

Nurse Manager, Stephan Schink, testified that prior to receiving the ██████████ 2019 discharge notice, Appellant's non-compliance with care included "pu ██████████ ██████████" and refusing to respond when nurses attempted to speak with him and provide care, and refusing for more than a year to sign a release for Respondent to receive the results of tests Appellant received at Mt. Sinai hospital. Mr. Schink further testified that after receiving the discharge notice, Appellant began to ask the CNAs for help, but Appellant, both prior to and since ██████████ 2019, has been independent with his ADLs. Mr. Schink testified that Appellant is able to manage the few medications he takes and his medical care follow-up in the community.

Additional evidence of Appellant's non-compliance with his care prior to receiving the ██████████ discharge notice was supplied by Appellant's witnesses, dietician Icilma Barzey-George, and social work intern, Jehanny Alcon. On ██████████ 2019, Appellant was invited to participate in an IDT discharge meeting scheduled for ██████████ (Exhibit 4). Ms. Alcon testified that when she approached Appellant on ██████████ to bring him to the IDT meeting, Appellant declined to attend. Ms. Barzey-George testified that while Appellant was compliant with his non-restrictive diet in that he "eats well," he was not compliant with being weighed.

Both Appellant's and Respondent's evidence demonstrated that until ██████████ 2019, when the discharge notice was given to him, Appellant's needs could not be met at the Facility due to Appellant's refusal to accept services and care; the non-compliance included Appellant's refusal to work with Respondent on discharge planning. Due to Appellant's lack of income, and his not having a residence in the community prior to his admission to the Facility in ██████████ 2016, Respondent identified the Shelter as a discharge location for Appellant.

Dr. Ravichandran, Mr. Schink, Ms. Bonus, Ms. Bryan, and Mr. Mackay all testified that they believe the Shelter is a safe and appropriate discharge location for Appellant, and that

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Appellant's rapid improvement since ██████████ when he accepted and began complying with PT, demonstrates that he no longer needs the services of the Facility and is ready for discharge. They testified that Appellant would be discharged with his remaining medications and "e-scripts" for a 30-day supply of his medications, a prescription for out-patient PT, a wheelchair, a rolling walker, and referrals for medical appointments with physicians in the community or at ██████████ hospital, and that the Shelter will provide Appellant with assistance with seeking income, finding more permanent housing, and obtaining out-patient PT, medical and other services.

Appellant's ██████████, testified that when she met Appellant at their ██████████ in ██████████ twelve years ago, Appellant was living in an apartment which he kept in "immaculate" condition but that he lost it and became homeless when his disability payments "ran out." Ms. ██████████ testified that she had encouraged Appellant over the years to get back on his feet and "██████████," and that during his stay at the Facility she has continued to encourage him to accept the Facility's services and do more to improve his condition and be prepared for returning to the community. Ms. ██████████ testified that she agrees with the discharge plan to the Shelter as she believes the Shelter will provide Appellant with "what he needs to get back on his feet and move forward."

Appellant testified that his goals are to be able to walk independently without shaking, and to live in a "clean, healthy environment" where he can pursue his plans of going back to work and continuing his education so that he "can function properly in society and in [his] community." Appellant does not want to be discharged to the Shelter, but due to his non-compliance with all areas of care and having not initiated and then not completed the SSD application he began in ██████████ Appellant does not currently have a source of income, which



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severely restricts independent living. Additionally, Respondent has proven that the Shelter is an appropriate discharge plan for Appellant.

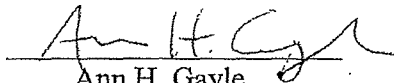
**DECISION**

I find that the Facility has proved by substantial evidence that the discharge is necessary. The appeal by Appellant is therefore DENIED.

Respondent, Bay Park Center for Nursing & Rehabilitation, is authorized to discharge Appellant in accordance with the ████████ 2019 Discharge Notice. The discharge shall occur no sooner than the next weekday following the date Appellant (1) is discharged from his current course of facility rehabilitation, and (2) is accepted by the Shelter upon formal application, whichever occurs later.

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  
April 11, 2019

  
Ann H. Gayle  
Administrative Law Judge

TO: ████████  
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