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# 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 28, 2020

## CERTIFIED MAIL/RETURN RECEIPT

██████████  
c/o Queens Hospital Center  
82-68 164<sup>th</sup> Street  
Jamaica, New York 11432

Mark White  
Queens Hospital Center  
82-68 164<sup>th</sup> Street  
Jamaica, New York 11432

Andrea Gibbon, DON  
Highland Care Center  
91-31 175<sup>th</sup> Street  
Jamaica, New York 11432

**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**

In the Matter of an Appeal, pursuant to 10 NYCRR 415:3, by

██████████, Appellant

from a determination by

**Highland Care Center**

to transfer from a residential health care facility.

COPY

Before: Rayanne L. Babich  
Administrative Law Judge (ALJ)

Held at: Queens Hospital Center  
82-68 164<sup>th</sup> Street  
Jamaica, New York 11432

Parties: ██████████, Appellant  
c/o Queens Hospital Center  
82-68 164<sup>th</sup> Street  
Jamaica, New York 11432

Highland Care Center  
91-31 175<sup>th</sup> Street  
Jamaica, New York 11432

Interested Persons: Queens Hospital Center  
82-68 164<sup>th</sup> Street  
Jamaica, New York 11432

Through notice dated ██████████ 2020, Highland Care Center (Facility), a residential health care facility subject to Article 28 of New York Public Health Law (PHL), sought to transfer ██████████ (Appellant) from the Facility. The Appellant requested an appeal with the New York State Department of Health (DOH) pursuant to Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York. (NYCRR Part 415.3(i).

The hearing was held on February 21, 2020 and in accordance with the PHL; Part 415 of 10 NYCRR; Title 42, Part 483 of the United States Code of Federal Regulation (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR. An audio recording was made of the hearing in three parts which appear in the record on one compact disc. [R 1@-22:00; 2@34:21; 3@22:27]

### RECORD

ALJ Exhibits: I – Letter with Notice of Hearing  
II – Notice of Discharge dated [REDACTED], 2020  
III – DAL NH 15-06: Transfer & Discharge Requirements for Nursing Homes, dated September 23, 2015 (NYS DOH)

Facility Exhibits: 1 – Written Statement from Kortney Simmons, RN Unit Manager  
2 – Psychiatric Consult note dated [REDACTED] 2020  
3 – Highland Care Center; record of Statement of Occurrence dated [REDACTED], 2020  
4 – Highland Care Center; record of Statement of Occurrence dated [REDACTED], 2020

Appellant Exhibits: A – Psychiatry Consult Noted dated [REDACTED], 2020

Facility Witnesses: Andrea Gibbon, Director of Nursing  
Sharon Sklar, Director of Social Work  
Kortney Simmons, RN Unit Manager

Appellant Witnesses: Appellant testified on his own behalf  
Mark White, Director of Social Work, Queens Hospital Center

### FINDINGS OF FACT

The Findings of Fact were made after considering all testimony and documents admitted into evidence. The items that appear in parentheses following the findings indicate exhibits [Ex] or recording time [R] in evidence. In instances where any evidence contradicted other evidence, it was considered by the ALJ and rejected.

1. Highland Care Center is a skilled nursing facility as defined under PHL §2801 (2)-(3).

2. Upon discharge from Queens Hospital Center (Hospital) on [REDACTED] 2020, Appellant was admitted to the Facility with several diagnoses, including: [REDACTED]  
[REDACTED]  
[REDACTED] [Ex 2; R1@ 12:12]
3. Upon admission, Appellant's care needs were rehabilitative in nature and the expected discharge plan was to return to his home in the community. [R2@ 8:55]
4. On [REDACTED], 2020, Appellant was evaluated at the Facility by a psychiatrist documented in the clinical record. [Ex 2]
5. No behavioral incidents were reported from [REDACTED] 2020 through [REDACTED] 2020 other than re-directing Appellant when using [REDACTED]. [R1@ 10:00 – 11:48]
6. On [REDACTED] 2020, Appellant [REDACTED] another resident and used [REDACTED] with Facility staff. Appellant's visitor used [REDACTED] with Facility staff [Ex 1; R1@ 6:25]
7. On [REDACTED] 2020, Facility issued a Notice of Discharge identifying "Queens Hospital Center" as the discharge location and transferred Appellant to the Hospital. [Ex II; R2@ 9:30]
8. At the Hospital on the same day, Appellant was evaluated in the Emergency Department by medicine and psychiatry and cleared by both for discharge. [R@2 31:00 – 33:02; Ex A]
9. The Facility refused to accept Appellant for readmission and Appellant was admitted to the Hospital. [R2@ 29:50]

## ISSUE

Whether the facility has met its burden to show that its determination to discharge Appellant was proper and whether the discharge plan is safe and appropriate?

## APPLICABLE LAW

A residential health care facility, or 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). Under 10 NYCRR 415.3(i)(1)(i)(a)(3), a resident may be transferred or discharged if “the safety of individuals in the facility is endangered.” In addition, pursuant to 415.3(i)(1)(ii), the facility shall:

(ii) ensure complete documentation in the resident's clinical record when the facility transfers or discharges a resident under any of the circumstances specified in subparagraph (i) of this paragraph. The documentation shall be made by:

- (a) the resident's physician and, as appropriate, interdisciplinary care team when transfer or discharge is necessary under subclause (1) or (2) of clause (a) of subparagraph (i) of this paragraph; and
- (b) a physician when transfer or discharge is necessary due to the endangerment of the health of other individuals in the facility under subclause (3) of clause (a) of subparagraph (i) of this paragraph; (emphasis added)**

Beyond developing the grounds for discharge, under 10 NYCRR 415.3(i)(1)(vii)-(viii), the Facility must:

- (vi) provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility, in the form of a discharge plan which addresses the medical needs of the resident and how these will be met after discharge, and provide a discharge summary pursuant to section 415.11(d) of this Title; and

(vii) permit the resident, their legal representative or health care agent the opportunity to participate in deciding where the resident will reside after discharge from the facility.

Furthermore, the Facility has the burden to prove that the discharge plan and location is safe and appropriate. 10 NYCRR 415.3(i)(2)(iii)(b). The standard of proof is substantial evidence. (SAPA § 306(1)).

### DISCUSSION

#### Grounds for Transfer

The Facility has not met its burden to show its determination to transfer Appellant was proper under 10 NYCRR 415.3(i). Through its Notice of Discharge, the Facility alleges the transfer is proper under 10 NYCRR 415.3(i)(1)(i)(a)(3) because the safety of the residents is endangered. [Ex II] In support of its argument, the Facility offers an incident occurring on [REDACTED], 2020 in which the Appellant [REDACTED] to [REDACTED] another resident because she was [REDACTED]. [Ex 1] The exact context of this statement is unknown, however, any concern for potential harm should trigger the need for further evaluation. Instead, the Facility chose to “return [Appellant] back to the facility he originated from.” [R2@ 17:10] Additionally, the Facility offers none of the necessary documentation to fulfill 415.3(i)(1)(ii) which requires the Facility, when seeking to transfer under subclause (3) of clause (a), ensure that documentation by a physician is placed in the clinical record. Ordinarily, such documentation supporting the ground for transfer or discharge is presented. Instead, the Facility offers from the clinical record only a psychiatric consult note dated three days earlier on [REDACTED] 2020 which demonstrates that “there were no acute incidents reported recently but he has not displayed any episodes of [REDACTED] behavior nor [REDACTED] [Ex 2] The psychiatric recommendation as



documented is for the Appellant's underlying medical etiology to be treated, no medications ordered and "psy follow up as needed." [Ex 2] Although offered by the Facility, this documentation not only negates the grounds for discharge due to safety of others, it supports the Appellant's need for continued services provided by the Facility. When inquired, the Facility was unable to produce any documentation from the clinical record supporting the transfer of Appellant. [R2@ 4:49 – 6:36]

The other argument raised by the Facility is Appellant's verbal outbursts and use of [REDACTED] that occurred on [REDACTED] 2020. As documented through testimony and two "Statement(s) of Occurrence," which are not part of the clinical record, the Facility alleges that the Appellant made [REDACTED] referencing his [REDACTED] and [REDACTED] [Ex 3, 4; R1@5:27 – 6:45; R1@14:38 – 15:07; R3@ 6:47] The testimony and corresponding written statement of Kortney Simmons, RN Unit Manager, describe a scenario in which it was the Appellant's visitor who engaged in most of the [REDACTED] and [REDACTED] [REDACTED] used. [Ex 1; R1@ 4:54 – 7:42] The Facility is responsible for taking corrective action in managing the status of a visitor according to its own policy. In response, the Appellant does not deny his own [REDACTED] or use of [REDACTED] but testifies that he does not recall any of the events offered in testimony. [R2@ 19:01 – 19:30] Appellant also expresses his concern for his mental status given because he was [REDACTED] for a significant period of time when he was hospitalized prior to arriving at the Facility. [Ex 2; R3@ 20:40] Regardless of these statements, the Facility has failed to appropriately document in the clinical record. When the Appellant was evaluated by the Hospital's emergency department and released, the Facility's refusal to accept him and its failure to ensure the appropriate documentation in the medical record resulted in an improper transfer not in compliance 10 NYCRR 415.3.



## Discharge Plan

The Facility has also failed to meet its burden to show the discharge plan and location is safe and appropriate. The discharge location identified on the Notice of Discharge is “Queens Hospital Center.” [Ex II] However, the Facility has not demonstrated how this discharge location will adequately meet Appellant’s medical needs as required under 10 NYCRR 415.3(i)(1)(vi). A hospital is not an appropriate discharge location as it is not intended to meet Appellant’s rehabilitative needs already identified and not in dispute. In addition, pursuant to 10 NYCRR 415.3(i)(1)(vii), the Facility has not shown an opportunity was given to Appellant or his representative to participate in the discharge plan. Testimony from Sharon Sklar, Director of Social Work for the Facility, shows that she herself was not involved in the discharge planning and that it was a discussion had by administrative staff which resulted in the decision to transfer Appellant. Ms. Sklar later learned the Notice of Discharge was issued. [R2@8:34 – 8:54] Ms. Sklar also testified that on [REDACTED] 2020 staff “googled” and found information on Appellant’s [REDACTED] and “that is part of what we were looking at, not only [REDACTED] but [REDACTED]” [R2@ 7:20 – 8:30] The Facility’s discharge planning for Appellant was focused solely on his criminal history and verbal outbursts, neither of which alone constitute grounds for transfer, and failed to address his medical and therapeutic needs.

If the Appellant had been transferred to the Hospital for evaluation only, the Facility still remained responsible for the Appellant and any discharge planning needs. The requirements under 10 NYCRR 415.3 are further explained in the DOH *DAL NH 15-06: Transfer & Discharge Requirements for Nursing Homes*, (September 2015). [Ex III] This “Dear Administrator” letter addresses the specific ground for transfer alleged by the Facility, as it states in relevant part, “[w]hen sending residents with episodes of [REDACTED] behavior to hospitals for

treatment, the nursing home is responsible to readmit the resident and/or develop an appropriate discharge plan. In these cases, the hospital is not considered to be the final discharge location. With imminent danger transfers, the facility is required to hold the bed for the resident.” Notably, when evaluated by the Emergency Department at the Hospital, the psychiatric assessment and plan showed Appellant was “... goal-directed, with adequate impulse control, fair insight, and fair judgment. Pt. is not deemed to be an acute threat to himself or others, does not require CPEP admission. Pt. is cleared by CPEP for discharge back to nursing home...” [Ex A] At this moment, it was the Facility’s responsibility and duty to readmit Appellant and provide appropriate therapeutic services, yet it refused to do so. Since admission, the Hospital reports no incidents with Appellant’s behavior. Unfortunately, the Appellant, having been cleared medically and psychiatrically for discharge, has been languishing in the Hospital. [R2@ 29:11]

ORDER

For the reasons stated above, Highland Care Center has not established that its determination for discharge is proper and that its discharge plan is appropriate under 10 NYCRR 415.3(i), and the Appellant’s appeal is GRANTED.

1. The Facility is required to admit Appellant to the next available bed.
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.



Rayanne L. Babich  
Administrative Law Judge

Dated: February 28, 2020  
Albany, New York