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# Department of Health

KATHY HOCHUL  
Governor

MARY T. BASSETT, M.D., M.P.H.  
Commissioner

KRISTIN M. PROUD  
Acting Executive Deputy Commissioner

April 5, 2022

## CERTIFIED MAIL/RETURN RECEIPT

██████████ ██████████  
c/o The Emerald Peak Rehabilitation  
and Nursing  
2000 Main Street  
Peekskill, New York 10566

Charmaine Thomas, Social Work Director  
The Emerald Peak Rehabilitation  
and Nursing  
2000 Main Street  
Peekskill, New York 10566

**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,

Dawn MacKillop-Soller  
Acting Chief Administrative Law Judge  
Bureau of Adjudication

DXM: 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 :

**The Emerald Peak Rehabilitation and Nursing,** :

Respondent, :

to discharge her from a residential health care facility. :

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**COPY**

**DECISION**

**Hearing Before:**

Ann Gayle  
Administrative Law Judge

**Held:**

Via Cisco Webex

**Hearing Date:**

March 28, 2022

**Parties:**

The Emerald Peak Rehabilitation and Nursing  
By: Charmaine Thomas, Social Work Director

██████████  
*Pro Se*

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 The Emerald Peak Rehabilitation and Nursing (“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(i). Respondent determined to discharge ██████ ██████ (“Appellant” or “Resident”) from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(i)(1)(i)(a)(3) and (4):

- (1) With regard to 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:
    - (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:
      - ....
      - (3) the safety of individuals in the facility is endangered; or
      - (4) the health of individuals in the facility is endangered.

Appellant appealed the discharge determination to the New York State Department of Health and a hearing on that appeal was held. Pursuant to §415.3(i)(2)(iii)(b), the Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate.

A recording of the hearing was made part of the record. Appellant testified on her own behalf. Appellant's friends, ██████ and ██████ participated in and testified at the hearing. Social Work Director Charmaine Thomas and Marie Ahmed, LPN, testified for Respondent. May Pura, RN, was present at the hearing.

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

ALJ

- 1: Notice of Hearing with attached Notice of Discharge/Transfer

Facility:

- 1: 30-day Notice
- 2: Physician progress notes
- 3: Social Work progress notes, BIMS form, and Face Sheet

Appellant, given the opportunity, did not offer any documents into evidence.

**ISSUE**

Has The Emerald Peak Rehabilitation and Nursing established that the discharge is necessary and the discharge plan is appropriate?

**FINDINGS OF FACT**

Citations in parentheses refer to testimony (“T”) and exhibits (“Ex”) found persuasive.

1. Respondent, The Emerald Peak Rehabilitation and Nursing, is a residential health care facility located in Peekskill, New York. (Ex I)
2. Appellant, █ █ age █ was admitted to the Facility on █ 2021, with diagnoses including █  
█. (Ex 2; Ex 3; T Ahmed)
3. It is the professional opinion of Appellant’s caregivers at the Facility that discharge to █”) is appropriate for Appellant. By notice dated █ 2022, Respondent advised Appellant that it had determined to discharge her to █ on the grounds that the safety or health of individuals in the facility is endangered. (Ex I; Ex 1; T Ahmed, Thomas)

4. Appellant has remained at the Facility pending the outcome of this proceeding

### DISCUSSION

Respondent's evidence to prove its stated grounds for discharge, "the safety or health of individuals in the facility would be endangered, the risk to others is more than theoretical and all reasonable alternatives to transfer or discharge have been explored and have failed to address the problem" consisted of social work and ████████ progress notes and Ms. Ahmed's and Ms. Thomas' testimony regarding Appellant's alleged behavioral issues.

Appellant was admitted to the Facility in ████████ 2021. Ms. Ahmed testified that the following allegedly occurred in ████████ 2021: physical contact ensued when Appellant went to her then roommate's bed and asked her to ████████ when the roommate kept ████████ Ms. Ahmed's testimony and the ████████/21 social work progress note in Appellant's chart from which Ms. Ahmed was reading, "as per resident roommate tried to ████████ her and ████████ her," seem to reflect that the roommate ████████ Appellant. (Ex 3, page 3; T Ahmed)

Ms. Ahmed further testified that the following allegedly occurred in ████████ 2022: Appellant was on the toilet with the door somewhat ajar; her then roommate stood in the doorway for some time talking to ████████ Appellant; Appellant asked her to leave so she could have some privacy; the roommate did not leave, and Appellant allegedly ████████ the bathroom door on the roommate's ████████ causing ████████ on her ████████ Dr. Spano's notes indicate that Appellant "expressed a ████████ that the other resident got hurt. Recommend that the two residents do not associate or be kept in the same room together. Recommend ████████ 5 mg for her ████████." (Ex 2, page 3).

Appellant testified that the toilet's distance from the door required her to ████████ the ████████ in such a way that she could just move the door toward a closed position; that it was not possible to ████████████████████ the door in a way that could cause an injury. Appellant further testified that the injury occurred not at that time, but three hours later while Appellant was asleep. Appellant was moved to a private room, but Respondent intends to move Appellant back into a semi-private room.

Appellant continues to receive ████████ 5 mg daily. Dr. Spano's ████████/22 progress notes read, "[Appellant] is in a private room, calm and content. This may be contributory to her pleasant state. However, her affect seems improved. This observation was also validated by staff. Although patient denies that she is ████████ or ████████ her family is in full support of treatment as they also report an improvement. ... She may need a dose adjustment once she is out of isolation." (Ex 2, page 4).

Both Appellant and Ms. ████████ testified that Appellant was ████████ when she was first admitted to the Facility. Appellant's ████████ for having to ████████████████████" as she could no longer care for herself caused some ████████████████████ while she was adjusting to residing in the Facility. Appellant is happier now. Ms. ████████ testified that Appellant helps other residents in the Facility "because that's the kind of person she is," and as such, she cannot see how Appellant would be a danger to other residents.

The first incident occurred in ████████ 2021, one month after Appellant was admitted and adjusting to her new home in the Facility, and it is not clear who ████████ or attempted to ████████ whom. The ████████ 2022 incident was triggered by Appellant's understandable need for privacy and dignity while she was on the toilet. According to Appellant, the ████████ 2022 roommate had a history of not respecting Appellant's privacy and belongings.

The progress notes reflect that Appellant might be a candidate for a lower level of care such as an Assisted Living Facility (“ALF”). Ms. Thomas testified that she arranged for two ALFs to evaluate Appellant for potential transfer/discharge. ██████████ ALF, which is located where Appellant’s friends can continue to visit her, did not accept Appellant. ██████████ further away in ██████████ ██████████ did. Appellant might be amenable to residing in an ALF but she does not want to be discharged to ██████████ as friends won’t be able to visit her, and she doesn’t know anything about ██████████, or anyone there.

The first incident occurred a month after admission when Appellant was adjusting to her new home. The second incident occurred six months later. Despite Respondent’s claim that “...all reasonable alternatives to transfer or discharge have been explored and have failed to address the problem” the evidence proves otherwise. Following each incident, Appellant and the roommate involved in each incident were separated which alleviated the problem. Following the second (██████████ 2022) incident, Appellant was placed in a private room and began receiving ██████████. These measures have worked; staff, family and friends observed Appellant’s improvement.

Respondent has not proven its grounds for discharge. Since Respondent has not proven that discharge is necessary at this time, I will not address whether the discharge location, ██████████ is appropriate for Appellant.

**DECISION**

I find that the transfer is not necessary at this time.

The appeal by Appellant is therefore GRANTED.

Respondent is not authorized to discharge Appellant in accordance with the ██████████ 2022 Discharge Notice.



██████ / Emerald Peak

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 4, 2022

*Ann Gayle*  
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Ann Gayle  
Administrative Law Judge

TO: ██████ ██████  
c/o The Emerald Peak Rehabilitation and Nursing  
2000 Main Street  
Peekskill, New York 10566

Charmaine Thomas, Social Work Director  
The Emerald Peak Rehabilitation and Nursing  
2000 Main Street  
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