



**Department  
of Health**

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Commissioner

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Acting Executive Deputy Commissioner

June 10, 2022

**CERTIFIED MAIL/RETURN RECEIPT**

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[REDACTED]  
(BY EMAIL ONLY)

**RE: In the Matter of [REDACTED] [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,

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

DXM: cmg  
Enclosure

cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan  
SAPA File  
BOA by scan

**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 :

**Regeis Care Center,** :

Respondent, :

to discharge him from a residential health care facility. :

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**DECISION  
and  
ORDER**

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

**Held:** Via Cisco Webex

**Hearing Dates:** May 16, 25, and 26, 2022  
Record closed June ---, 2022

**Parties:** Regeis Care Center  
By: Bond Schoeneck & King  
Raul A. Tabora, Jr. – Member  
Mara D. Afzali – Associate

██████████  
By: ██████████ ██████████ ██████████  
██████████ ██████████ ██████████

**Participating:** North Central Bronx Hospital  
By: Ferman Kornfeld & Brennan LLP  
Ita Parnass, Esq.

### JURISDICTION

Regeis Care Center (“Facility,” “Regeis” or “Respondent”), a residential health care facility subject to Article 28 of the New York Public Health Law, determined to discharge ██████ ██████ (“Appellant” or “Resident”). Appellant appealed the discharge determination to the New York State Department of Health (“Department”) pursuant to 10 NYCRR §415.3(i).

### 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 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. Public Health Law (“PHL”) §§2801(2)-(3); Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“10 NYCRR”) §415.2(k).

Department regulations at 10 NYCRR §415.3(i)(1)(i) describe the permissible bases upon which a residential health care facility may transfer or discharge a resident. The residential health care facility must notify the resident and a designated representative, if any, of the transfer or discharge and the reasons for the move in writing. Such notice must be provided no later than the date on which a determination was made to transfer or discharge the resident. 10 NYCRR §§415.3(i)(1)(iii)-(iv). 10 NYCRR 415.3(i) provides, 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. (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:

- ...
- (2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
- (3) the safety of individuals in the facility is endangered; or
- (4) the health of individuals in the facility is endangered;
- ...
- (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;
- ...
- (iii) before it transfers or discharges a resident:
  - (a) notify the resident and designated representative, if any, and, if known, family member of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner the resident and/or family member understand.
- (iv) provide the notice of transfer or discharge ... as soon as practicable before transfer or discharge, but no later than the date on which a determination was made to transfer or discharge the resident, under the following circumstances:
  - (b) the health of individuals in the facility would be endangered.
- (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.

Federal regulations at 42 CFR 483.15 contain substantially identical provisions.

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



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

ALJ:

- I: Notice of Hearing with attached Notice of Discharge/Transfer
- II: May 18, 2022 letter re May 25 and 26, 2022 hearing dates

Facility:

- A: Resident face sheet
- B: Progress notes
- C: ██████████ consultation referral
- D: Care plan activity reports
- E: Cognitive patterns
- F: Discharge notice
- G: State operations manual – Appendix PP 11/22/17
- H: State operations manual – Appendix PP 11/22/17 – chemical restraints
- I: State operations manual – Appendix PP 11/22/17 – standards for nursing homes
- J: Updated hospital notes
- K: Facility MD’s assessment for care plan meeting
- L: ██████████ assessment for care plan meeting
- M: FDA label for ██████████
- N: State operations manual 42 CFR §483.15(e)(1)
- O: Hospital admission ██████████ assessment
- P: Hospital nursing notes, ██████████ 2022

Hospital:

- 1: PASRR Level II Outcome
- 2: ██████████/22 PRI
- 3: MARS Report
- 4: Two weeks of notes
- 5: FDA – RX for ██████████
- 6: Residents’ rights – 10 NYCRR 415.3
- 7: State operations manual – pages 1, 83-85, 167-173
- 8: Facility’s recreation notes

Resident:

- AA: Budget letter

**ISSUE**

Has Regeis Care Center established that its determination to discharge Appellant was correct and that its discharge plan was appropriate?





the PASRR entitled, “IF YOU ARE ADMITTED TO A MEDICAID CERTIFIED NURSING FACILITY, **WHAT SERVICES AND SUPPORTS ARE NURSING FACILITY STAFF REQUIRED TO PROVIDE FOR YOU?**” (Emphasis added). There were no recommendations for disability specific services because Appellant did “not appear to be an imminent risk to [himself] or others and [does] not need ██████████ care.” Appellant “will need to be provided the following ... development of a written, person-centered ██████████ plan of care; ongoing ██████████ consultations and medication management by a ██████████ or licensed prescriber.” Despite the clear language that NURSING FACILITY STAFF are required to “[develop] a written, person-centered ██████████ plan of care...” Respondent erroneously contends that NCB is required to do this. (Ex 1); T 421-425, 448-449, 453)

7. Appellant has neither a ██████████ nor medical need for continued hospitalization. (T 340-341)

### DISCUSSION

Respondent’s ██████████ 2022 Notice addressed to Appellant’s ██████████ states “the resident requested discharge or transfer.” Appellant did not request discharge or transfer, and Appellant’s ██████████ did not receive the Notice. Appellant was sent to NCB for evaluation following ██████████ ██████████ and ██████████ and ██████████ them that day. Respondent’s witnesses and its documents report Respondent’s past behavior to include: ██████████ in his room, in and on equipment; ██████████ equipment such as call bells, an air conditioner grate and a radio; ██████████ a nurse aide’s ██████████ ██████████; wandering into other residents’ rooms; removing his wander guard bracelet; entering stairwells; and difficulty redirecting him. Appellant underwent

██████████ / Regeis

approximately thirteen ██████████ evaluations in his eight-month stay at the Facility, and he was transferred to the hospital twice. (T 39-42, 44, 126-127, 135, 139, 221-224)

Appellant has been stable at NCB for quite some time and remains in a locked ██████████ unit not because his condition requires such but because Regeis refuses to take him back. Dr. Adam described Appellant's affect and behavior from the time of admission to the time Dr. Adam testified as going from night to day. Dr. Adam, Dr. Mohabir, and Ms. Taveras described how Appellant initially remained in bed with little enthusiasm and then became more social and interested in ██████████ Appellant cares for himself and makes his needs known, and is redirectable. Appellant is no longer on 1:1 care, he walks around the unit, interacts with peers, he has not displayed behavioral issues, and he is not an elopement risk. (T 80-81, 83-85, 337-338, 339, 431).

Respondent attempted to portray an occurrence with Dr. Mohabir as indication that Appellant wanders and is an elopement risk. He is not. On ██████████ 2022, when Dr. Mohabir asked Appellant what he wanted to do, he said, "Let's go outside." They walked to the door and Dr. Mohabir told him "we couldn't go outside, let's head back down the hall, which he did willingly. Pt is redirectable." (Ex J, p 14, T 85, 279-280, 351-353, 354-355, 431-432).

Appellant's behavior on ██████████ 2022, the interview date for the PASSR, was addressed in the PASRR (T 436, 439-441). An ██████████, 2022 nursing note reads, "Patient observed to be ██████████ toward staff. Patient ██████████ the staff doing 1:1 on him and later apologized to staff ... Patient remains unpredictable" (Exhibit P). The PASRR reads, "The following information is important for the provider to know about your symptoms, behaviors, diagnosis, or other related needs: When you are not feeling well, your symptoms may consist of ██████████ ██████████, and your actions don't always match the situation or your

██████████ / Regeis

surroundings. Also, you may have unusual behaviors such as ██████████ an aide. Your current behaviors do not pose any danger to yourself or others, and your mental health symptoms are stable.” (Exhibit 1).

The PASRR finds any nursing facility appropriate for Appellant. Respondent believes a facility with a ██████████, and/or ██████████ unit would be more appropriate for Appellant. Respondent, with input from Appellant’s family, has been attempting to secure such facility for Appellant. The parties may continue those efforts if they choose when Appellant returns to Regeis.

██████████ is a first-generation and ██████████ is a second-generation ██████████ medication. (Facility Exhibit I). Appellant was medicated with ██████████ at Regeis. Over the course of Appellant’s stay at Regeis, Dr. Persaud increased Appellant’s initial ██████████ dosage of 2.5 mg twice a day to 15 mg at night, the dose Appellant was receiving when he was sent to NCB on ██████████ 2022. NCB emergency department (“ED”) discontinued ██████████ and ordered ██████████ 2 mg twice a day. Dr. Adam evaluated Appellant when he was admitted from the ED to the ██████████ unit. Dr. Adam increased the ██████████ dosage to 5 mg twice a day. Appellant has remained at this dosage throughout his stay at NCB. Dr. Adam testified that the amount of ██████████ Appellant is receiving is comparably less than the amount of ██████████ was receiving at Regeis. (T 243-248, 274, 333-336, 348-349, 382-383, 386-390, 392-393, 411-412). There was much testimony about whether nursing homes can medicate residents with ██████████ Everyone who was asked if there is a prohibition for this answered that there is no such prohibition or that they were not aware of one. ██████████ may be administered at the Facility.

Respondent wants NCB to consider lowering Appellant’s ██████████ dosage. NCB repeatedly reported that Appellant is doing well on this dosage and they do not want to interfere with what

is working; Facility attending physician, Dr. Russell, supports NCB's approach (T 282, 283). The PASRR report makes clear that nursing staff at Regeis is required to provide Appellant with the "development of a written, person-centered ██████████ plan of care; ongoing ██████████ consultations and medication management by a ██████████ or licensed prescriber." Regeis is obligated to meet Appellant's medication requirements upon his return. (T 376).

Appellant remains ██████████ and medically stable for return to the Facility. He has stayed in NCB's ██████████ unit as a patient ready for discharge since ██████████, meaning that he has occupied an acute care hospital bed he does not need and can be cared for elsewhere, for nearly two months.

Despite the Facility's awareness that NCB is an acute care hospital, it maintains the position that Appellant's needs are best met in NCB's ██████████ unit, indefinitely, as efforts are made to find another facility that might have a ██████████ care, or ██████████ unit. As facilities were advised in a "Dear Administrator" Letter dated September 23, 2015 (DAL-NH 15-06), residential health care facilities may not resort to hospitals as final discharge locations for residents with episodes of acting out behavior who are sent to the hospital for treatment. The Facility's discharge decision contravenes all applicable regulations and further guidance and is inconsistent with the medical evidence.

Once NCB deemed Appellant stable, the Facility remained responsible for readmitting him back into its care or devising another appropriate long-term care plan. Appellant has been evaluated by NCB's ██████████ and medical care teams, all of whom agree the Appellant does not meet the criteria for ██████████ care and is safe for discharge back to the Facility. The Facility has not presented any evidence, such as medical testimony by a physician or an evaluation performed at NCB, to dispute these professional opinions.

Respondent failed to meet its burden of proving its discharge was necessary and that it had an appropriate discharge plan. The discharge appeal is granted. Respondent is ordered to readmit the Appellant prior to admitting any other person.

During the hearing, Facility witnesses expressed an unwillingness to re-admit Appellant because they are not certain that Appellant will not engage in behavior they believe places Appellant and others at risk. This decision is not a guarantee of Appellant's future behavior but serves merely to enforce existing regulations that require nursing homes to maintain responsibility and ultimate custody of individuals that they admit if and until those individuals can be safely discharged to another suitable location.

This order does not prevent the Facility from transporting Appellant for evaluation by a hospital's emergency department if his needs require such. However, as occurred in the present matter, Appellant must be accepted back to the Facility once he is ████████ and/or medically cleared to return. If the Facility is unable or unwilling to continue to provide care for this Resident, it has the obligation to develop an appropriate discharge plan and issue a new discharge notice stating permissible grounds for discharge.

Consistent with SAPA §307.1, an interim order directing Regeis to readmit Appellant to the first available appropriate bed as expeditiously as possible was issued orally at the conclusion of the ████████ 2022 hearing date, and reduced to writing and sent to the parties the following day. The interim order is now moot and superseded by this decision and order.

### **DECISION and ORDER**

Regeis Care Center has not established that its determination to discharge Appellant was correct and that the discharge plan was appropriate.

██████████ / Regeis

Regeis Care Center is directed to readmit Appellant to the first available semi-private bed prior to admitting any other person to the facility, pursuant to 10 NYCRR § 415.3(i)(2)(i)(d).

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  
June 10, 2022

*Ann Gayle*  
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Ann Gayle  
Administrative Law Judge

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