

cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan  
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**Department  
of Health**

**KATHY HOCHUL**  
Governor

**JAMES V. McDONALD, M.D., M.P.H.**  
Commissioner

**MEGAN E. BALDWIN**  
Acting Executive Deputy Commissioner

July 19, 2023

**CERTIFIED MAIL/RETURN RECEIPT**

██████████ Appellant  
c/o Apex Rehabilitation & Care Center  
78 Birchwood Drive  
Huntington, New York 11746

Adam Kahn, Esq.  
LaSalle LaSalle & Dwyer  
309 Sea Cliff Avenue  
Sea Cliff, New York 11579

████████████████████  
████████████████████

Diego Martinez, Social Worker  
Long Island Jewish Medical Center  
270-05 76<sup>th</sup> Street  
New Hyde Park, New York 11040

Felicia Berenson-Reinhardt, Esq.  
The Lichtman Law Firm  
P.O. Box 370  
Pound Ridge, New York 10576

Eli Greenfield, Administrator  
Apex Rehabilitation & Care Center  
78 Birchwood Drive  
Huntington, New York 11746

**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,

Natalie J. Bordeaux  
Chief Administrative Law Judge  
Bureau of Adjudication

NJB: nm  
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

**Apex Rehabilitation & Care Center,**

Respondent,

to transfer Appellant from a residential health care facility.

**COPY**

**DECISION**

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

Date: July 6, 2023

Held at: New York State Department of Health  
Webex videoconference

Parties: ■■■■ Appellant  
c/o Apex Rehabilitation & Care Center  
78 Birchwood Drive  
Huntington, New York 11746  
By: Eun ■■■ Sister/Representative

Apex Rehabilitation & Care Center  
78 Birchwood Drive  
Huntington, New York 11746  
By: Felicia Berenson-Reinhardt, Esq.

Participant: Long Island Jewish Medical Center  
270-05 76<sup>th</sup> Street  
New Hyde Park, New York 11040  
By: Adam Kahn, Esq.

JURISDICTION

By notice dated [REDACTED] 2023, Apex Rehabilitation & Care Center, a residential health care facility (Facility), determined to transfer [REDACTED] (Appellant), from care in its Facility. The Appellant's [REDACTED] and representative, [REDACTED] appealed the proposed discharge on [REDACTED] 2023.

RECORD

- ALJ Exhibits [Ex]: I – Notice of Hearing, June 29, 2023  
II – Notice of Discharge, [REDACTED] 2023
- Facility Exhibits: 1 – Admission Record; Facility Progress Notes, [REDACTED], 2021  
2b – [REDACTED] Hospital Records, [REDACTED] 2023  
3a – Facility's Incident Report, [REDACTED] 2023  
4a – Facility's Summary of Investigation, [REDACTED] 2023  
4b – Stony Brook University Hospital Records for resident [REDACTED]  
[REDACTED] 2023  
4c – Facility Consultation Report for resident [REDACTED] [REDACTED] 2023  
5a – Facility's Incident Report, [REDACTED] 2023
- Appellant Exhibit: None
- Facility Witnesses: [REDACTED], Nurse Practitioner  
Gina Iovino, Director of Nursing  
Eli Greenfield, Administrator
- Appellant Witness: [REDACTED]
- Hospital Witnesses: Xavier Jimenez, M.D., Chief of Consultative [REDACTED] for the Hospital  
Courtney Quaresima, Hospital Social Worker

The hearing was digitally recorded. [R. 2:59:41.] The record closed on July 10, 2023.

SUMMARY OF FACTS

1. On [REDACTED] 2021, the Appellant was transferred to the Facility from an independent living facility. The Appellant resides on a [REDACTED] unit for residents with [REDACTED] who require additional safety and oversight. [Ex 1; R. 1:03:58.]

2. The Appellant's primary diagnosis upon admission was [REDACTED] [REDACTED] [REDACTED]. He is also diagnosed with [REDACTED] t and has a [REDACTED] [REDACTED]. The Appellant is alert but most frequently oriented to himself only. The Appellant's score on the Brief Interview for Mental Status (BIMS) is [REDACTED] out of 15. [Ex 1; 45:39, R. 2:02:40.]
3. The Appellant ambulates independently. He can independently complete his activities of daily living but requires supervision and guidance. [Ex 3a; R. 43:30.]
4. On [REDACTED] 2023, a [REDACTED] altercation occurred in the dining room at the Facility between the Appellant and another resident, identified as [REDACTED]. The Appellant [REDACTED] when [REDACTED] attempted to [REDACTED] from the Appellant. Facility staff observed [REDACTED] had [REDACTED] and [REDACTED] was treated by the Facility and sent to the hospital to be seen by an [REDACTED]. [Ex 3a; R. 1:39:40.]
5. Facility cameras recorded the incident on [REDACTED] 2023. The video was reviewed by the Facility Administrator, Eli Greenfield and Director of Nursing, Gina Iovino, but the video footage was not retained. [3a; R. 1:12:40.]
6. Ms. Iovino investigated the [REDACTED] incident by reviewing the video footage, interviewing staff, and issuing a report on [REDACTED] 2023. Based on the report, the Appellant's interdisciplinary team determined the Appellant required an [REDACTED] placement. [Ex 3a; R. 58:30.]
7. On or about [REDACTED] 2023, the Facility contacted [REDACTED] Hospital, a nearby [REDACTED] facility, to inquire about admitting the Appellant to their facility. The Facility was advised by an unnamed representative of [REDACTED] Hospital that the Appellant

must be first evaluated at an emergency room before he can be admitted to an [REDACTED] unit. [R. 59:55.]

8. On [REDACTED] 2023, the Appellant was transferred to the emergency room at Long Island Jewish Medical Center for evaluation. Hospital staff examined the Appellant and determined that he did not require medical or [REDACTED] admission. The Appellant was cleared to return to the Facility on [REDACTED] 2023. The Facility refused to accept him. [R. 1:00:54, 2:15:28, 2:30:01.]
9. On [REDACTED] 2023, the Facility issued a Notice of Discharge or Transfer to the Appellant which stated that the transfer is “necessary because the health or safety of others is endangered”, and advised that the Appellant was discharged to the Emergency Department at Long Island Jewish Medical Center. [Ex II.]
10. The Appellant remains on a medical unit at Long Island Jewish Medical Center as a “social admission” pending the outcome of this appeal. [R. 2:05:33.]

#### ISSUES

Has the Facility met its burden of proving that the discharge is necessary and that the discharge plan is appropriate?

#### APPLICABLE LAW

1. Transfer and discharge rights of nursing home residents are set forth in 10 NYCRR 415.3(i), which 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:

(3) the safety of individuals in the facility is endangered; or

(4) the health of individuals in the facility is endangered.

2. Before discharging a resident, the Facility must record the reasons in the resident's clinical record. 10 NYCRR 415.3(i)(1)(iii)(b).
3. If the Facility seeks to discharge a resident because the safety of individuals in the facility is endangered, pursuant to 10 NYCRR 415.3(i)(1)(i)(a)(3), documentation in the clinical record shall be made by a physician. 10 NYCRR 415.3(i)(1)(ii)(b).
4. A hospital is not an appropriate discharge location. DOH *DAL NH-19-07: Notice of Transfer or Discharge and Permitting Residents to Return* (August 20, 2019, Redistributed October 11, 2022).
5. The Facility has the burden of proving that the "discharge or transfer is/was necessary and the discharge plan appropriate." 10 NYCRR 415.3(i)(2)(iii)(b).

## DISCUSSION

### Grounds for Discharge

The Facility is seeking to discharge the Appellant because the health and safety of other residents is endangered. [Ex II.] The Facility determined that the Appellant cannot return to the Facility because he has had [REDACTED] altercations with other residents on at least [REDACTED] occasions.

[Ex II; R. 57:20.] The Appellant's [REDACTED] serving as his representative, objected to the discharge because the Facility failed to address the behavior of the other residents involved in

those altercations. [R. 2:44:36.] Ms. [REDACTED] testified that the Appellant's behaviors are a result of the Facility's lack of efforts to ensure other residents do not wander into his room. [R. 2:44:42.]

Facility Administrator, Eli Greenfield, testified that he is aware of [REDACTED] incidents in which the Appellant was involved in a [REDACTED] altercation with another resident. [R. 1:36:00.] Mr. Greenfield explained that on [REDACTED] and [REDACTED] 2023, another resident, identified as [REDACTED] and who suffers from [REDACTED] wandered into the Appellant's room. [R. 1:36:08.] On both occasions, the Appellant [REDACTED] or [REDACTED] with the [REDACTED] incident resulting in injury to [REDACTED] [Ex 4a; R. 1:36:40.] On [REDACTED] 2023, another resident, identified as [REDACTED] and who also suffers from [REDACTED] and the Appellant were in the common room and [REDACTED] the Appellant first. [5a.] The Appellant responded by [REDACTED] [Ex 5a; R. 1:38:38.] The [REDACTED] incident on [REDACTED] 2023 also occurred between the Appellant and [REDACTED] where the Appellant was observed [REDACTED] after a dispute regarding a [REDACTED], but no injuries were reported. [Ex 3a; R. 1:39:26.]

The Director of Nursing for the Facility, Gina Iovino, testified that she completed an investigation of the [REDACTED] incident by reviewing video footage and interviewing staff, and issued a report. [Ex 3a; R. 58:14, 1:09:28.] She testified that after her investigation, the Appellant's interdisciplinary team determined that the Appellant required [REDACTED] placement because the efforts put in place by the Facility to prevent the Appellant from harming others were not successful. [Ex 3a; R. 59:11.] These efforts included placing STOP sign and alarm on the Appellant's doorway to prevent other residents from entering; medical and psychological evaluations after each incident to determine possible causes; emotional support; providing additional snacks to distract the Appellant; and providing art supplies to divert his attention. [R. 1:01:31.] Ms. Iovino testified that the decision was made to transport the Appellant to the



emergency room because the Facility was advised by a [REDACTED] Hospital, a [REDACTED] facility, that the only way for the Appellant to be accepted to their facility was through a hospital.

[Ex 3a; R. 1:00:34.]

Facility Nurse Practitioner, [REDACTED] testified that in addition to a history of [REDACTED] and [REDACTED] the Appellant is diagnosed with [REDACTED] which results in [REDACTED], and cognitive impairment that results in [REDACTED].

[R. 45:12.] Ms. [REDACTED] explained that the Appellant's BIMS score of [REDACTED] out of 15 means that he is [REDACTED]. [R. 47:02.] Ms. [REDACTED] testified that although the Appellant has a history of [REDACTED] behavior toward other residents, he appropriately communicates his needs to staff and generally has no complaints or medical needs. [R. 37:58, 38:54, 43:05, 44:17.]

When a resident's discharge is necessary on alleged grounds that the safety of individuals at the Facility is endangered, the Facility is required to ensure the resident's clinical record at the Facility includes complete documentation by a physician. 10 NYCRR 415.3(i)(1)(ii)(b). The Facility failed to submit any documentation to show its compliance with this requirement.

The only testimony received from a physician was that of Xavier Jimenez, M.D., Director of Consulting [REDACTED] at Long Island Jewish Medical Center. Dr. Jimenez testified that he has evaluated the Appellant on [REDACTED] occasions since he has been admitted to the hospital as a "social admission." [R. 2:05:33.] Dr. Jimenez explained that Appellant has significant cognitive impairment and demonstrates concrete, limited thinking, where he is usually oriented to himself only and sometimes to his surroundings. [R. 2:02:40.] Dr. Jimenez's evaluation of the Appellant showed that although the exact cause of his cognitive impairment may undetermined, the effects and treatment are comparable to dementia. [R. 2:04:49.] Dr. Jimenez opined that a nursing home with a [REDACTED], such as the Facility from which the Appellant came, is the appropriate

setting for the Appellant because it is structured and staffed to address [REDACTED] associated with [REDACTED] [R. 2:11:32.] Dr. Jimenez further testified that the Appellant's behaviors at the Facility are characteristic of the type of patients with the Appellant's diagnoses as well as other patients with [REDACTED] which likely includes other residents at the Facility. [R. 2:10:36, 2:11:32.]

Despite the Appellant's current admission to the hospital, Dr. Jimenez testified that the Appellant had been medically and [REDACTED] cleared for discharge on or about [REDACTED] 2023 but was admitted solely because the Facility refused to accept him back. [R. 2:15:54.] Contrary to the Facility's assertion, the Appellant does not require placement in a [REDACTED] facility. [R. 2:06:01.] Dr. Jimenez and hospital social worker, Courtney Quaresima, testified that the Appellant has had no episodes of [REDACTED] or other behavioral issues toward others. [R. 2:03:12, 2:29:27.] Dr. Jimenez explained that the Appellant required medication at the hospital when becoming argumentative, but this was expected behavior from a patient with his diagnosis. [R. 2:07:49.]

The Facility has failed to meet its burden to prove that the Appellant's transfer is necessary.

#### Discharge Plan

The Appellant's representative argued that the Appellant should return to the Facility because it is the most appropriate location for him. [R. 2:46:18.] The Facility's claim that the plan was for the Appellant to be placed in an [REDACTED] facility by way of referral through the hospital is not persuasive. Although Ms. Iovino testified that the decision was made to transport the Appellant to the emergency room because it was the only way for the Appellant to be considered for placement at an [REDACTED] facility, the Facility failed to identify a [REDACTED] facility that would be appropriate for the Appellant. [Ex 3a; R. 1:00:34.] Once it was determined the Appellant did not meet criteria for an [REDACTED] facility and was

cleared to return to the Facility, the Facility still refused to accept him back. [R. 2:35:20.] Ms. Quaresima testified that her attempts to facilitate the Appellant's return to the Facility were unsuccessful. [R. 2:30:01.]

It is well established that a hospital is not an appropriate discharge location for a resident who still requires nursing home care but not hospitalization. *DOH DAL NH-19-07: Notice of Transfer or Discharge and Permitting Residents to Return* (August 20, 2019, Redistributed October 11, 2022).

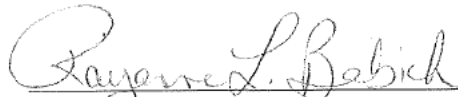
The Facility failed to prove that the proposed discharge location is appropriate.

#### ORDER

Apex Rehabilitation & Care Center has not met its burden to prove that its determination to transfer the Appellant is necessary, or that transfer to Long Island Jewish Medical Center is appropriate.

1. The Facility is not authorized to discharge the Appellant pursuant to the Notice of Discharge dated [REDACTED] 2023.
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.

Dated: July 19, 2023  
Albany, New York

  
Rayanne L. Babich  
Administrative Law Judge

