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Department  
of Health

KATHY HOCHUL  
Governor

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

KRISTIN M. PROUD  
Acting Executive Deputy Commissioner

September 27, 2021

**CERTIFIED MAIL/RETURN RECEIPT**

Mr. [REDACTED]  
c/o Park Center for Nursing and Rehabilitation  
128 Beach 115<sup>th</sup> Street  
Rockaway Park, New York 11694

Abena Osei, Director of Social Work  
Park Center for Nursing & Rehabilitation  
128 Beach 115<sup>th</sup> Street  
Rockaway Park, New York 11694

Frank A. Mazzagatti, Esq.  
3 Dakota Drive/Suite 300  
Lake Success, New York 11042

**RE: In the Matter of [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,

James F. Horan  
Chief Administrative Law Judge  
Bureau of Adjudication

JFH: 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  
PARK CENTER FOR NURSING AND  
REHABILITATION

Respondent,

to discharge him from a residential health  
care facility.

COPY

Hearing Before: Sean D. O'Brien  
Administrative Law Judge

Held via WEB EX

Hearing Date: September 23, 2021

Parties: Park Center for Nursing & Rehabilitation  
128 Beach 115<sup>th</sup> Street  
Rockaway Park, New York 11694

By: Frank A. Mazzagatti, Esq.  
3 Dakota Drive/Suite 300  
Lake Success, New York 11042

██████████ ██████████  
Pro Se

JURISDICTION

By notice dated [REDACTED] 2021, and as amended on [REDACTED] [REDACTED] 2021, Park Nursing and Rehabilitation a residential health care facility, (the Facility) subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] [REDACTED] (the Appellant) from the Facility. The Appellant appealed the determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) Section 415.3(i).

HEARING RECORD

Facility Exhibits: 1-4

Facility Witnesses:

Gillian Bernard, RN, Director of Nursing  
Ward Tucker III, Director of Physical Therapy  
Abena Osei, MSW Director of Social Work

Appellant's Witness: [REDACTED] [REDACTED]

Administrative Law Judge Exhibit 1: Notice of Hearing with Discharge Notice

A digital recording of the hearing was made part of the hearing record via WEB EX.

ISSUE

Has the Facility established that the determination to discharge is correct and that the discharge plan for the Appellant is appropriate?

FINDINGS OF FACT

Citations in parentheses refer to testimony (T.) of witnesses and exhibits (Exhibit) found persuasive in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of cited evidence.

1. The Appellant is a [REDACTED]-year-old male who was admitted to the Facility on [REDACTED], 2021, for a short-term rehabilitation. His diagnoses include [REDACTED] [REDACTED] [REDACTED]. (Exhibit 4).

2. By notice dated [REDACTED] 2021, the Facility determined to discharge the Appellant because his "...health has improved sufficiently..." so that he no longer needs the services of a residential health care facility. The Facility amended the notice on [REDACTED] [REDACTED] 2021, to add that the Appellant also threatened the health and safety of others. (T. Osei 2:45).

3. The Facility determined to discharge the Appellant to the Assisted Living Facility (ALF), [REDACTED] [REDACTED] [REDACTED] where he has been accepted. (Exhibit 4; T. Osei 2:48).

4. At the time of his admission to the Facility, the Appellant needed assistance in all of his Activities of Daily Living (ADLs) including transferring, and showering/bathing. The goal of Appellant's short-term admission was to discharge the Appellant to an ALF because he wished to go to an ALF. In addition, no family members were willing to assist in the Appellant's discharge planning or offered to be a discharge resource. (T. Osei 2:47, T. Tucker 1:34).

5. The Appellant has completed his short-term rehabilitation to the point where he no longer needs skilled nursing care, nor does he need assistance with his ADLs. (Exhibit 4; T. Tucker 1:34).

6. The Appellant can take his own medications, self-direct and is capable of making his own medical appointments. (T. Osei 2:48).

7. The Appellant can transfer independently from his wheelchair. (Exhibit 4; T. Tucker 1:26, T. Osei 2:47).

8. It is the professional opinion of the Appellant's caregivers at the Facility, including the Facility's Medical Director, Social Work Director, Nursing Supervisor, and the Facility's Director of Rehabilitation Therapy that discharge to [REDACTED] is appropriate. (Exhibit 4; T. Osei 2:47, T. Tucker 1:33;, T. Bernard 1:24).

9. The Appellant remains at the Facility pending the outcome of the appeal.

#### APPLICABLE LAW

A residential health care facility (also referred to in the Department of Health Rules and Regulations as a nursing home) is a facility which provides regular nursing, medical, rehabilitative, and professional services to residents who do not require hospitalization. Public Health Law Sections 2801(2)(3); 10 NYCRR Section 415.2(k).

A resident may only be discharged pursuant to specific provisions of the Department of Health Rules and Regulations (10 NYCRR Section 415.3[i][1]).

The Facility alleges the Appellant's discharge is permissible pursuant to 10 NYCRR Section 415.3(i)(1)(i)(a)(2)(3)(4), which state in relevant parts:

(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

Under the hearing procedures at 10 NYCRR Section §415.3(i)(2)(ii), the Facility bears the burden to prove a discharge necessary and the discharge plan is appropriate. Under the New York State Administrative Procedures Act (SAPA) Section 306(1), a decision in an administrative proceeding must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact; less than preponderance of evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision, Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 (3<sup>rd</sup> Dept. 1984), appeal dismissed 63 N.Y.2d 649.

#### DISCUSSION

The Appellant was admitted to the Facility on [REDACTED], 2021, for short-term rehabilitation. At the time of his admission to the Facility, the Appellant required assistance with the ADLs of



ambulating, transferring, and bathing. (Exhibit 4, T. Tucker 1:33, T. Osei 2:45).

By [REDACTED] [REDACTED] 2021, the Appellant had made sufficient improvements in all ADLs areas and had no need for skilled nursing care at the facility. The Facility's Director of Rehabilitation, Ward Tucker III, testified the Appellant has hit all the benchmarks for his physical and occupational therapy. Director Tucker also testified the Appellant at times engages self-limiting behaviors and sometimes resists participation in therapy. Director Tucker further testified the Appellant can transfer from his wheelchair without supervision. (Exhibit 4; T. Tucker 1:26-1:34).

Abena Osei, the resident's social worker, who is also the Facility's Director of Social Work, testified that the Appellant is being discharged to an ALF because the Appellant has no family residential resources available. The Social Worker also testified upon his intake to the Facility the Appellant expressed his wish to be discharged to an ALF. (T. Osei 2:45, 2:48).

Importantly, Dr. Uriel Avezbadalov, the Medical Director at the Facility, in a written medical report stated that the Appellant can be discharged to an ALF. In addition, in his medical report, Dr. Avezbadalov stated the Appellant is cleared to be discharged

from the facility and his medical issues can be addressed in the community on an out-patient basis. (Exhibit 4).

The Appellant offered statements on his own behalf and made it known that he does not want to go to [REDACTED] because it is too far away from the [REDACTED] area where he lived. Appellant also alleges that he is not ready with his physical therapy, but he did not provide any meaningful medical justification to support his position that he must remain in the Facility. Therefore, the Facility has met its burden of establishing valid grounds that the discharge of the Appellant is necessary because the Appellant no longer needs nursing home care. 10 NYCRR Section 415.3(i)(1)(i)(b).

The discharge plan to the community and to [REDACTED] [REDACTED] in particular, is appropriate. The Appellant is able to make medical appointments outside of the Facility and is alert and, oriented. (Exhibit 4; T Osei 2:47). The Appellant stated he wishes to be discharged to an ALF in [REDACTED]. However, there are fewer ALFs in that area and none with available beds at the time of the Hearing. (T. Osei 2:39). The discharge plan put forth by the Facility realistically addresses the medical needs

and personal care needs of the Appellant post discharge. 10 NYCRR Section 415.3(i)(1)(vi).

At [REDACTED], a social worker will be assigned to the Appellant to assist him regarding housing, meals, and medications. The Facility will issue Appellant a wheel chair as durable medical equipment and Appellant's physical therapy will continue at [REDACTED]. In addition, the Appellant's scripts and necessary medical referrals will be made. The health care and physical therapy that the Appellant still requires can be provided on an outpatient basis. Appellant does not require residential health care facility placement. (Exhibit 4; T. Osei 2:48).

The Facility has adequately planned for the Appellant's discharge. The Facility actions sufficiently address the medical needs of the Appellant post discharge. 10 NYCRR Section 415.3(i)(1)(vi). Further, because the Appellant's health has improved to the point where he no longer needs nursing home care, there is no need to address the issue as to whether the Appellant is placing the safety of staff and other residents at risk.

CONCLUSION

Park Nursing and Rehabilitation has proven that its determination to discharge the Appellant is correct and the discharge plan is appropriate.

DECISION

The appeal by Appellant is therefore DENIED.

The Facility is authorized to discharge Appellant in accordance with the [REDACTED] 2021, Discharge Notice.

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).



SEAN D. O'BRIEN

ADMINISTRATIVE LAW JUDGE

Dated: September 27, 2021

Albany, New York

To:

██████████  
c/o Park Center for Nursing and Rehabilitation  
128 Beach 115<sup>th</sup> Street  
Rockaway Park, New York 11694

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