

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

October 24, 2022

## CERTIFIED MAIL/RETURN RECEIPT

██████ ██████  
c/o Triboro Center for Rehabilitation & Nursing  
1160 Teller Avenue  
Bronx, New York 10456

Shragi Goldberg, NHA  
Triboro Center for Rehabilitation & Nursing  
1160 Teller Avenue  
Bronx, New York 10456

Phoenix Rice-Johnson  
Center for Appellate Litigation  
120 Wall Street – 28<sup>th</sup> Floor  
New York, New York 10005

**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: 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

**Triboro Center for Rehabilitation &  
Nursing,**

Respondent,

to discharge him from a residential  
health care facility.

COPY

**Decision  
After Hearing**

#DA22-5872

Hearing before: John Harris Terepka  
Administrative Law Judge

Held at: New York State Department of Health  
by videoconference  
October 21, 2022

Parties: Triboro Center for Rehabilitation & Nursing  
1160 Teller Avenue  
Bronx, New York 10456  
[SGoldberg@triborocenter.net](mailto:SGoldberg@triborocenter.net)  
By: Shragi Goldberg NHA

██████████  
Triboro Center for Rehabilitation & Nursing

By: Phoenix Rice-Johnson  
Center for Appellate Litigation  
120 Wall Street – 28<sup>th</sup> Floor  
New York, New York 10005  
[price-johnson@cfal.org](mailto:price-johnson@cfal.org)

### JURISDICTION

Triboro Center for Rehabilitation & Nursing (the Respondent), a residential health care facility subject to Article 28 of the Public Health Law, determined to discharge [REDACTED] [REDACTED] (the Appellant) from care and treatment in its nursing home. The Appellant appealed the discharge determination to the New York State Department of Health pursuant to 10 NYCRR 415.3(i).

The Respondent presented documents (Exhibits 1-12) and testimony from Samantha Golembo, social worker; Janee Hooks, HMO coordinator; Marleny Sanchez, RN; and Kiran Pillay, director of rehabilitation. The Appellant presented documents (Exhibits A-E) and testified. The notice of hearing and [REDACTED] 2022 discharge notice are in evidence as ALJ Exhibit I. A digital recording of the hearing was made. (2h55m.)

### SUMMARY OF FACTS

1. Respondent Triboro Center for Rehabilitation & Nursing is a residential health care facility, or nursing home, in the Bronx, New York. Appellant [REDACTED] [REDACTED] age [REDACTED] was admitted to the nursing home on [REDACTED] 2022 for short term rehabilitation after hospitalization for a [REDACTED]. He had previously resided in the [REDACTED] shelter system, and the Respondent's plan was to return him there after his rehabilitation was completed. (Exhibit 1; Exhibit 3, page 8.)
2. By notice dated [REDACTED] 2022, the Respondent advised the Appellant that it had determined to discharge him on [REDACTED] 2022. The notice stated:

This transfer/discharge is being issued because the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare, Medicaid, or third-party insurance) a stay at the facility, charges are not in dispute, no appeal of a denial of benefits is pending, or funds for payment are available and the resident refuses to cooperate with the facility in obtaining funds as evidenced by: *denial of services due to no skilled need*. (Exhibit ALJ I.)

3. The notice advised the Appellant that the Respondent's discharge plan is to transfer him to the ██████████ of Homeless Services shelter system at ██████████. (Exhibit ALJ I.)

4. By notice dated ██████████ 2022 the Appellant's Medicaid managed care plan insurer, ██████████ determined it would not approve his nursing home charges after ██████████ because he was no longer in need of nursing home care. (Exhibit 6.) He then enrolled with another insurer, ██████████ which denied coverage because he had attempted to switch plan enrollment while in the nursing home. (Exhibit 5.) The Appellant then reenrolled with ██████████ which, by notice dated ██████████ 2022, approved care from ██████████ until ██████████, 2022, stating;

The medical notes show that you are still at the facility while you work on your discharge. This process has been started on ██████████ 2022 and we have provided you sufficient time to coordinate your discharge back to community.

The notice advised him that approval for his continued nursing home stay after ██████████ would end because "the service is not medically necessary." (Exhibit 7.)

5. The Appellant remains at Triboro Center pending the outcome of this proceeding.

#### ISSUES

Has the Respondent established that the transfer is necessary and the discharge plan appropriate?

#### APPLICABLE LAW

A residential health care facility (RHCF), or nursing home, 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. PHL 2801; 10 NYCRR 415.2(k). Transfer and discharge rights of

nursing home residents have been codified in Public Health Law 2803-z and set forth at 10 NYCRR 415.3(i) which provides, in pertinent part:

(1) With regard to the transfer or discharge of residents...

...  
(i) (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.

...  
(b) Transfer and discharge shall also be permissible when the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare, Medicaid or third-party insurance) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility the facility may charge a resident only allowable charges under Medicaid. Such transfer or discharge shall be permissible only if a charge is not in dispute, no appeal of a denial of benefits is pending, or funds for payment are actually available and the resident refuses to cooperate with the facility in obtaining the funds.

Before it transfers or discharges a resident, the facility must notify the resident of the transfer or discharge and record the reasons in the resident's clinical record. The written notice must include the reason for transfer or discharge, the specific regulations that support the action, the effective date of the transfer and the location to which the resident will be discharged. 10 NYCRR § 415.3(i)(1)(iii)&(v).

The facility shall 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. 10 NYCRR § 415.3(i)(1)(vii). The facility has the burden of proving that the transfer is necessary and the discharge plan appropriate. 10 NYCRR 415.3(i)(2)(iii).

### DISCUSSION

The Appellant, age [REDACTED] was admitted to Triboro Center in late [REDACTED] 2022 for short term rehabilitation after hospitalization for a fall and [REDACTED]. It was the Respondent's plan from the outset that after completing rehabilitation he would return to the shelter system. (Exhibit 3, page 8.) In [REDACTED] 2022 his Medicaid managed care insurer, [REDACTED] determined it would not approve nursing home charges after [REDACTED] because he was no longer in need of nursing home care. (Exhibit 6.)

The Appellant enrolled on [REDACTED] with another insurer, [REDACTED] which denied coverage for his nursing home care on the grounds that he could not switch plans to [REDACTED] while already in the nursing home. (Exhibit 5.) Upon learning of the [REDACTED] denial on [REDACTED], the Respondent determined to discharge the Appellant "for nonpayment and noncoverage." (Exhibit 3, page 3.) On [REDACTED] it issued a discharge notice relying on those grounds even though the Respondent has not billed the Appellant for any charges and even though neither "noncoverage" nor "*denial of services due to no skilled need*," as is stated in the discharge notice, is a permissible grounds for discharge. In the meantime, the Appellant reenrolled with [REDACTED] which on [REDACTED] approved coverage from [REDACTED] until [REDACTED], 2022 in order to provide time to arrange his discharge, but not thereafter because he is not in need of nursing home care. (Exhibit 7.)

The evidence and documentation regarding the level of care the Appellant requires and whether return to the shelter is a discharge plan that is appropriate or could in fact be implemented, is equivocal. The Appellant is in need of continuing medical care and assistance with rehabilitation and housing services, but the documentation in the

clinical record and testimony from the Respondent's witnesses generally supports the assessment of its interdisciplinary care team that his current care needs do not require him to remain in a nursing home. (Exhibits 2, 3, 4, 10, 11; Exhibit C.) This evidence is consistent with the Appellant's Medicaid managed care insurer's denials of continued approval for nursing home care. It remains unclear whether the [REDACTED] Department of Homeless Services will permit the Respondent to transfer him back to it for shelter placement, because the Respondent has not yet initiated the procedures necessary to determine whether the [REDACTED] DHS will, under its current policy, accept a referral by the Respondent of the Appellant in his current condition. (*see* Exhibit E.)

This decision will not determine whether the Appellant can be discharged to the shelter on grounds that he is no longer in need of nursing home care, because the Respondent did not initiate a discharge on those grounds. The Respondent did not issue its discharge notice due to a clinical determination that discharge back to the shelter was appropriate and necessary because the Appellant no longer needs nursing home services. It initiated the discharge upon learning that the Appellant's charges would not be paid by [REDACTED] because of Department of Health rules about switching care plans that had nothing to do with his care needs. (Exhibit 3, page 3; Exhibit 5.)

Grounds for discharge can include, pursuant to 10 NYCRR 415.3(i)(1)(i)(a)(2), that a resident is not in need of nursing home care. The Respondent's discharge notice, however, asserted, checked off and explained only the grounds under 10 NYCRR 415.3(i)(1)(i)(b) of failure to pay for his stay. The box and explanation space on the form where it could have been alleged that the resident is not in need of care are blank.



With regard to the grounds that were specified in the discharge notice, failure to pay, the discharge notice was issued on [REDACTED] before the charges for care not approved by the Appellant's insurer, which are for [REDACTED] 2022, had even accrued. As the Appellant has been approved by his insurer for the period [REDACTED] through [REDACTED], 2022, there are no other unpaid charges. (Exhibit 7.) An insurer's "*denial of services due to no skilled need*" is not grounds for discharge. The Respondent has not met its burden of proving grounds for discharge under 10 NYCRR 415.3(i)(1)(i)(b).

The Appellant should bear in mind that [REDACTED] approval for his nursing home stay will end on [REDACTED] 2022 because he has been determined not to be in need of nursing home care. If he is not in need of nursing home care, as appears to be the case, or if he fails after reasonable and appropriate notice to pay charges for which he is responsible, the Respondent is entitled to issue a new discharge notice setting forth appropriate grounds for discharge and an appropriate discharge plan.

In the meantime, the Respondent continues to offer the Appellant assistance in developing a discharge plan including appropriate referrals to social services agencies. Complicating factors include the limitations presented by his [REDACTED] age, his [REDACTED] status which requires approval for his housing situation, and his lack of resources. (Exhibit 3, pages 1-5.) Should the DHS shelter system refuse to accept a referral, the Respondent will not be able to implement its current discharge plan.

The Appellant objects to discharge back to the shelter, but there is little evidence that he has cooperated with the Respondent in its attempts to develop other discharge planning options or made significant efforts to plan for his own discharge. He cannot expect to stay in a nursing home if he is not in need of nursing home care. If the

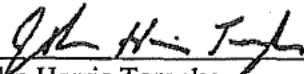
Respondent makes reasonable attempts to assist and work with him to develop a discharge plan, without success, a discharge back to the shelter where he resided before hospitalization, as a last option, can fulfill its obligation to provide an appropriate discharge plan. The Appellant is entitled to make other discharge or transfer arrangements, but having failed to cooperate or participate in the development of a discharge plan he is not entitled to remain at Triboro Center while he does so.

**DECISION:** Respondent Triboro Center has not established valid grounds for the discharge of Appellant [REDACTED] [REDACTED]

The Respondent is not authorized to discharge the Appellant on the basis of its [REDACTED], 2022 discharge notice.

This decision is made by John Harris Terepka, Bureau of Adjudication, who has been designated to make such decisions.

Dated: Rochester, New York  
October 24, 2022

  
\_\_\_\_\_  
John Harris Terepka  
Administrative Law Judge