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**Department  
of Health**

**KATHY HOCHUL**  
Governor

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

**JOHANNE E. MORNE, M.S.**  
Executive Deputy Commissioner

September 27, 2024

**CERTIFIED MAIL/RETURN RECEIPT**

■■■■■  
c/o The Five Towns Premier  
Rehabilitation and Nursing Center  
1050 Central Avenue  
Woodmere, New York 11598

Michael Bass, Esq  
Abrams Fensterman, LLP  
54 State Street  
Albany, New York 12207

Natalie Markfeld, Esq  
■■■■■

Barbara Phair, Esq  
Abrams Fensterman, LLP  
3 Dakota Drive, Suite 300  
Lake Success, New York 11042

**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

**The Five Towns Premier Rehabilitation  
and Nursing Center,**

Respondent,

to discharge him from a residential  
health care facility.

COPY

DECISION

#DA24-6432

Hearing Before:

Natalie J. Bordeaux  
Administrative Law Judge

Held via:

Webex videoconference

Hearing Dates:

September 20 and 25, 2024

Parties:

The Five Towns Premier Rehabilitation and Nursing Center  
1050 Central Avenue  
Woodmere, New York 11598

By: Barbara Phair, Esq.  
Abrams Fensterman, LLP  
3 Dakota Drive, Suite 300  
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Michael Bass, Esq.  
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54 State Street  
Albany, New York 12207

By: ██████████  
Natalie Markfeld, Esq.  
██





would be discharged to the [REDACTED] Assisted Living, located at [REDACTED], [REDACTED]. (Exhibit 8.)

7. In a note dated [REDACTED], 2024, Dr. Khanina confirmed that the Appellant “sits in a wheelchair. He can get up with supervision, no assistance. He is doing well. Continue with all medications as prescribed. He is stable for safe discharge arrangement. No need to stay in the facility.” (Exhibit 1.)

8. On [REDACTED], 2024, the Appellant’s [REDACTED] requested this hearing to contest the Facility’s discharge determination.

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

#### 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 residents who do not require hospitalization. Public Health Law §§ 2801(2)-(3); 10 NYCRR § 415.2(k).

Transfer and discharge rights of residential health care facility residents are set forth in Department regulations at 10 NYCRR § 415.3(i). The regulation states, 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.

When the facility transfers or discharges a resident because the resident's health has improved sufficiently that the resident no longer needs the services provided by the facility, the facility shall ensure that the resident's clinical record contains complete documentation made by the resident's physician and, as appropriate, the resident's interdisciplinary care team. 10 NYCRR § 415.3(i)(1)(ii)(a). The residential health care facility must prove that the discharge was necessary and the discharge plan appropriate. 10 NYCRR § 415.3(i)(2)(iii)(b).

### DISCUSSION

The Appellant was transferred to the Facility in or about [REDACTED] 2021 from a hospital for rehabilitation.<sup>1</sup> He had been brought to the hospital after his [REDACTED] found the Appellant on the [REDACTED] in his home, after suffering a fall and was [REDACTED]. The Appellant was on the [REDACTED] for hours before his [REDACTED] had discovered him. (September 25 recording @ 9:33, 12:24, 58:55, 1:04:39.) At the Facility, the Appellant has periodically received rehabilitative therapies, most recently, physical therapy, from which he was discharged on [REDACTED] 2024. (Exhibits 3, 7. Pursuant to the [REDACTED] 2024 notice at issue in this hearing, the Facility determined that discharging the Appellant is necessary because his health has improved sufficiently so that he no longer needs the services provided by the nursing home. (Exhibit 8.)

The Appellant's [REDACTED] testified that the Appellant's health (physical and mental) has not improved since his admission, and that the Appellant continues to require the services of a nursing home, including additional physical therapy for his [REDACTED] and strength building

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<sup>1</sup> All information regarding the Appellant's admission is based upon the Appellant's [REDACTED] testimony because the Facility did not provide any documentation regarding the date and basis for the Appellant's admission, or the location from which he was transferred.

for improved ambulation. (September 25 recording @ 13:35, 33:41, 41:26.) The Facility presented no documentation made by a physician regarding how the Appellant's health has improved sufficiently so that he no longer needs the services provided by a nursing home. The two progress notes created by attending physician Dr. Khanina, less than two weeks apart, do not describe what conditions have improved, and why the Appellant no longer needs the services provided by a nursing home. Dr. Khanina's [REDACTED], 2024 note documents that the Appellant appeared [REDACTED] without additional explanations or planned follow-up. Dr. Khanina's [REDACTED] note makes no mention of the [REDACTED] she noted a few days earlier, or an evaluation of the [REDACTED] (Exhibit 1.) The Facility has failed to ensure that the Appellant's clinical record contains complete documentation made by a physician regarding its stated ground for discharge, as required by 10 NYCRR § 415.3(i)(1)(ii)(a); ; *see also* 42 CFR § 483.15(c)(2).

With respect to the proposed discharge plan, Dr. Khanina opined in her [REDACTED] progress note that the Appellant is "stable for safe discharge arrangement" and that there is "[n]o need to stay in the facility." (Exhibit 1.) Dr. Khanina's note does not explain what would constitute a safe discharge arrangement for the Appellant.

The Appellant's family objected to the Appellant's proposed discharge to [REDACTED] Assisted Living ([REDACTED]) as an unsafe discharge location because the Appellant lacks the physical independence and mental acuity (due to overall cognitive decline and [REDACTED]) needed to safely live in an assisted living facility. It is the position of the Appellant's family that he is best cared for at the Facility because he is constantly monitored, and staff are required to provide individualized assistance to residents based upon each resident's specific needs, even if extensive assistance is required. (September 25 recording @ 57:42.)

The Appellant's [REDACTED] visited [REDACTED] to discuss his [REDACTED] conditions and needs with its staff. He found that [REDACTED] was unaware of the Appellant's ADL needs (including his [REDACTED] incontinence), cognitive issues, and his need for wheelchair access. The Appellant's [REDACTED] also observed that most, if not all, residents [REDACTED] and another referred assisted living facility, ambulated with a walker. (September 25 recording @ 24:17, 44:33.) After discussing the Appellant's needs and his medical conditions with [REDACTED] staff, the Appellant's [REDACTED] ultimately determined that an assisted living facility would not ensure that the Appellant's medical conditions, and extensive need for ADL assistance would be appropriately monitored and tended to. (September 25 recording @ 21:04, 44:52.)

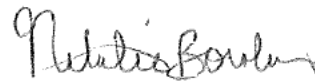
A review of the proposed discharge plan is improper in this case because the Facility failed to establish that the Appellant's health has improved so that he no longer requires the services of a nursing home. The necessity of the Appellant's discharge cannot be ascertained without the complete documentation made by a physician describing the Appellant's health and how his conditions have improved so that he no longer needs the Facility's services. For these reasons, the Facility's determination is not sustained.

**DECISION**

The Five Towns Premier Rehabilitation and Nursing Center has failed to establish that its determination to discharge the Appellant is correct and that its discharge plan is appropriate.

1. The Five Towns Premier Rehabilitation and Nursing Center is not authorized to discharge the Appellant pursuant to its ██████ 2024 discharge notice.
2. Any future discharge determination made by The Five Towns Premier Rehabilitation and Nursing Center requires the issuance of a new discharge notice to the Appellant and his representative.

Dated: September 27, 2024  
Menands, New York



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Natalie J. Bordeaux  
Administrative Law Judge