



# Department of Health

KATHY HOCHUL  
Governor

JAMES V. McDONALD, MD, MPH  
Commissioner

JOHANNE E. MORNE, MS  
Executive Deputy Commissioner

February 5, 2025

**CERTIFIED MAIL/RETURN RECEIPT**



Tatyana Polyak, DSW  
The Phoenix Rehab & Nursing Center  
140 St. Edwards Street  
Brooklyn, New York 11201

**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,

A handwritten signature in cursive script that reads "Natalie J. Bordeaux".

Natalie J. Bordeaux  
Chief Administrative Law Judge  
Bureau of Adjudication

NJB: cmg  
Enclosure

STATE OF NEW YORK: DEPARTMENT OF HEALTH

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In the Matter of an Appeal, pursuant to  
10 NYCRR § 415.3, by

COPY

  
Appellant,

DECISION

from a determination by  
THE PHOENIX  
REHABILITATION & NURSING CENTER  
Respondent,

to discharge him from a residential health care facility

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Hearing Before: Jean T. Carney  
Administrative Law Judge (ALJ)

Held via: Cisco WebEx videoconference

Hearing Date: January 28, 2025

Parties: The Phoenix Rehabilitation & Nursing Center, Respondent  
By: Tatyana Polyak, DSW

, Appellant

## JURISDICTION

By notice dated [REDACTED], 2024, The Phoenix Rehabilitation & Nursing Center (Phoenix or Facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] (Appellant) from the Facility on the grounds that the Appellant's health has improved sufficiently so that he no longer needs the services of the Facility. The proposed discharge location is to the [REDACTED] [REDACTED], New York. The Appellant appealed the discharge determination to the New York State Department of Health (Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) § 415.3(i).

## PROCEDURAL BACKGROUND

The parties were duly served with a Notice of Hearing (ALJ I) scheduling the hearing for January 14, 2025 at 10:00 am, to be held via videoconference. The Appellant requested an adjournment on January 13, 2025, which was granted without objection from the facility. The parties were duly notified of the adjourned date of January 28, 2025. On January 27, 2025, the ALJ sent the link for the hearing to Ms. Polyak at the email she provided, and to the Ombudsman. The Facility was instructed to assist the Appellant in attending the hearing because he did not have email. The Facility submitted proposed hearing exhibits to the ALJ and the Appellant by email at 2:30 pm on January 27<sup>th</sup> (ALJ II)<sup>1</sup>. The Appellant immediately called the Bureau of Adjudication, requesting another adjournment, which was denied. The Appellant was informed that he could raise his concerns at the hearing. At 4:43 pm on January 27<sup>th</sup>, the Facility informed the ALJ that the Appellant had "signed himself out" and that it was "not sure if he will participate in tomorrow's hearing." (ALJ II). The hearing was not cancelled or adjourned. Neither party

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<sup>1</sup> It should be noted that the Notice of Hearing specifies that proposed exhibits should be submitted at least two business days before the hearing. Not only did the facility fail to comply with the Notice of Hearing; but Ms. Polyak initially submitted medical records for a completely different person instead of the Appellant's records. It is unknown whether the Appellant received the correct exhibits.

appeared at the hearing or otherwise contacted the Bureau of Adjudication on January 28, 2025. At 10:30 am, the ALJ closed the hearing.

### ISSUE

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

### APPLICABLE LAW

A residential health care facility, also referred to 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] and [3]; 10 NYCRR § 415.2[k]).

Pursuant to 10 NYCRR § 415.3(i)(1)(i)(a), a resident may only be discharged when the interdisciplinary care team determines that:

- (1) the transfer of discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in the facility;
- (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.

Additionally, 10 NYCRR § 415(i)(1)(ii) requires that the facility ensures complete documentation in the resident's clinical record when transferring or discharging a resident under the above circumstances. 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.

Before it transfers or discharges a resident, the facility must notify the resident of the transfer or discharge, and record the reasons in the clinical record. (10 NYCRR § 415.3[i][1][iii]). The written notice must include the reason for the 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][v]).

The burden is on the Facility to prove by substantial evidence that the discharge is necessary, and the plan is appropriate. (10 NYCRR § 415.3(i)(2)(ii); New York State Administrative Procedure Act [SAPA] § 306[1]). 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[1984]).

### DISCUSSION

The Facility failed to meet its burden of showing that the discharge is necessary, and the discharge plan is appropriate. The Facility failed to show up in any manner, despite the Appellant not having withdrawn his request for a hearing. Ms. Polyak's assertion on the day prior to the hearing that the Appellant was not sure he would participate, is not sufficient to consider the matter resolved. The Facility failed to present any evidence whatsoever that the Appellant's health has improved sufficiently that he no longer needs the services of the Facility. To the contrary, if the Appellant left against medical advice, it would appear that the Facility believes that he needs some skilled nursing services provided by the Facility. Consequently, the facility's determination to


discharge the Appellant is dismissed and it must readmit the Appellant to the first available bed if he returns to the Facility.

**ORDER**

The Phoenix Rehabilitation and Nursing Center has failed to establish that the Appellant's discharge is necessary.

1. The Appellant may not be discharged pursuant to the notice dated [REDACTED] 2024.
2. The Facility must re-admit the Appellant to the first available semi-private bed pursuant to 10 NYCRR § 415.3(i)(2)(i)(d).
3. 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: Albany, New York  
February 4, 2025**

  
**JEAN T. CARNEY**  
**Administrative Law Judge**

**TO:** Tatyana Polyak, Director of Social Work  
The Phoenix Rehabilitation & Nursing Center  
140 Edwards Street  
Brooklyn, NY 11201  
tpolyak@thephoenixrehab.com

[REDACTED]  
[REDACTED]  
[REDACTED]

cc: [DOH.sm.DCAppeals@health.ny.gov](mailto:DOH.sm.DCAppeals@health.ny.gov) by scan  
SAPA File  
BOA by scan