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Governor

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Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

June 9, 2017

CERTIFIED MAIL/RETURN RECEIPT

Theodora Neizer, DSW
Concourse Rehab and Nursing Center
1072 Grand Concourse
Bronx, New York 10456

[redacted], Resident
c/o Concourse Rehab and Nursing Center
1072 Grand Concourse
Bronx, New York 10456

Andrew Lamkin, P.C.
781 Old Country Road
Plainview, NY 11803

[redacted]

Marvin Neiman, Esq.
Neiman & Mairanz, P.C.
39 Broadway
New York, New York 10006

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

[redacted]

Appellant,

from a determination by

Concourse Rehabilitation and Nursing Center,
Respondent,

to discharge him from a residential health care facility.

COPY

DECISION

Hearing Before: Ann H. Gayle
Administrative Law Judge

Held at: Concourse Rehabilitation and Nursing Center
1072 Grand Concourse
Bronx, New York 10456

Hearing Date: May 24, 2017

Parties: Concourse Rehabilitation and Nursing Center
By: Marvin Neiman, Esq.
Neiman & Mairanz P.C.
39 Broadway
New York, New York 10006

[redacted]
By: Andrew Lamkin, Esq.
781 Old Country Road
Plainview, New York 11803

Pursuant to Public Health Law ("PHL") §2801, State Administrative Procedure Act ("SAPA"), and Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("10 NYCRR") §415.2(k), a residential health care facility or nursing home such as Concourse Rehabilitation and Nursing Center ("Respondent" or "Facility") 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.

Transfer and discharge rights of nursing home residents are set forth at 10 NYCRR §415.3(h). Respondent determined to discharge [redacted] ("Appellant" or "Resident") from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(h)(1)(i)(b), which provides, in pertinent part:

> 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.

Appellant appealed the discharge determination to the New York State Department of Health ("NYSDOH").

The hearing on that appeal was held in accordance with 10 NYCRR §415. At the hearing, the Facility had the burden of proving, by substantial evidence, that the discharge is necessary and the discharge plan is appropriate. SAPA §306(1); 10 NYCRR §415.3(h)(2)(iii)(b).

This hearing was digitally recorded and transferred to a compact disc ("CD"); the CD has become a part of the record. Respondent's counsel called the following witnesses to testify in

[redacted]/Concourse

Respondent's direct case: [redacted] ("Appellant's [redacted] [redacted] ("Appellant's [redacted] and the following Facility representatives: Jacob Bokow–Associate Controller, Theodora Neizen–Director of Social Work, Dov Lebovic–Administrator, and Gracie Viruet[1]–Medicaid and HMO Benefits Director. Also present at the hearing were Solomon Neiman–Comptroller, and Appellant's [redacted] [redacted]. Appellant's counsel waived Appellant's right to be present at the hearing. Since Respondent already called Appellant's [redacted] and [redacted] to testify in Respondent's direct case, Appellant did not call any witnesses to testify.

The following documents were accepted into evidence by the Administrative Law Judge ("ALJ") as ALJ and Facility Exhibits:

ALJ

I: Notice of Hearing with attached Notice of Discharge/Transfer

Facility:

1: Document of figures dated [redacted]15
2: [redacted] 2015 email to Appellant's [redacted]
3: [redacted], 2015 email to Appellant's [redacted]
4: Statement dated [redacted]/2017
5: [redacted] 2015 email chain
6: Admission Agreement dated [redacted] 2016
7: NAMI pamphlet
8: [redacted] 2017 email to Appellant's [redacted]
9: Fax cover sheet for PRIs sent to other facilities
10: Copy of PRI sent to other facilities

Appellant was given the opportunity but did not offer any documents into evidence.

ISSUE

Has Concourse Rehabilitation and Nursing Center established that the discharge is necessary and the discharge plan is appropriate?

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[1] *On consent of the Parties, Ms. Viruet testified by telephone.*
[2] *Same name as Appellant's [redacted] different person.*

FINDINGS OF FACT

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

1. Respondent, Concourse Rehabilitation and Nursing Center, is a residential health care facility located in Bronx, New York. (Ex I)

2. Appellant, [redacted], age [redacted] was admitted to the Facility on [redacted], 2015. An Admission Agreement was signed by the Facility and Appellant's [redacted]/representative on [redacted] 2016, almost [redacted] months after Appellant's [redacted] 2015 admission date. (Ex 3; Ex 6; Ex 10)

3. In a series of internal Facility emails regarding Appellant's NAMI, the following was written: on [redacted], 2015, Charolyn Santana/Hicks wrote that Resident "has a NAMI of $[redacted] [redacted] refuses to pay. He says he wants his [redacted] discharged to the [redacted] Hospital." Then on [redacted] 2015, at 10:58 AM, Ms. Santana/Hicks wrote, "Is there a discharge plan for [the Resident]? I sent an email back in [redacted] because the [redacted] refused to cooperate with paying the NAMI. His NAMI is pretty high $[redacted] Please advise." At 1:44 PM on that same date, [redacted] [redacted] 2015, Comptroller Solomon Neiman wrote, "Lets see if something can be done by the end of the month." (Ex 5)

4. By Medicaid Coordinator Gracie Viruet's email dated [redacted], 2015, at 11:00 AM, with attached [redacted] 2015 budget letter from NYC HRA, the Facility notified the Resident's [redacted] that a monthly NAMI of $[redacted] "needs to be paid to the facility. I would like to know when would you start paying that amount." (Ex 3; T Resident's [redacted] and Viruet)

5. In the next email from Ms. Viruet to Resident's [redacted] dated [redacted], 2017, which forwards her [redacted] 2015 email (a gap of almost [redacted] months between emails), Ms. Viruet wrote,

"Please see attached Nami Bill and Budget, as from previous notes[3], you were informed of a Nami bill back when your [redacted] was admitted in 2015. At that time you refused to make any payment or arrangements due to your [redacted] ... was going to be discharged to the [redacted] Hospital, nothing ever took place. Moving forward your [redacted] has an outstanding bill please review and let me know how would you like to take care of it." (Ex 8)

6. Following Ms. Viruet's [redacted], 2017 email, the Resident's family made payments to the Facility of $[redacted] $[redacted] and $[redacted] in [redacted] [redacted] and [redacted] 2017, respectively. The Resident's family has acknowledged that there is a debt due the Facility, and they would like to make a payment arrangement with the Facility for this. (Ex 4; T Resident's son)

7. The Facility's Associate Controller testified that monthly invoices were sent, but no documentation of such monthly invoices was produced at the hearing. Appellant's [redacted] and [redacted] deny receiving monthly bills prior to [redacted] 2017. (T Bokow, Lebovic, Appellant's [redacted] Appellant's [redacted]

8. By notice dated [redacted] 2017, Respondent advised Appellant that it had determined to discharge him on the grounds of failure, after reasonable and appropriate notice, to pay (or have paid under Medicare, Medicaid, or private insurance) for his stay at the Facility. (Ex I)

9. The Facility's [redacted] 2015 email to Resident's [redacted] demonstrates the Facility's notice to the Resident that monthly NAMI in the amount of $[redacted] was due the Facility. The [redacted] 2016 Admission Agreement demonstrates the Resident's agreement to pay NAMI, and the Facility's [redacted] 2017 email demonstrates the Facility's notice to the Resident that there was an outstanding bill due the Facility, but the Facility has not produced documentation, other than the [redacted] 2015 and [redacted], 2017 emails (almost [redacted] months apart from each other),

[3] *Only one note, Ms. Viruet's [redacted] 2015 email, is included in this chain of email; no other notes were produced at the hearing, and Ms. Viruet conceded on cross examination that there was no communication with the family after [redacted], 2015 about any amounts owed until [redacted] or [redacted] 2017.*

that it sought payment from the Resident prior to issuing the [redacted] 2017 Notice of Transfer/Discharge. (Ex 3; Ex 6; Ex 8)

10. The only Statement produced at hearing by the Facility is dated [redacted] 2017, one month after the Notice of Discharge was given. The Statement shows an outstanding balance of $[redacted] calculated from [redacted] 2015 to [redacted] 2017. The intended recipient of this Statement does not appear anywhere on the Statement, despite there being a section with "TO:" printed on it, for such information. Respondent described this Statement as a summary of amount owed the Facility and as a summary of monthly NAMI charges and payments received. (Ex 4)

11. Respondent's discharge plan is to transfer Appellant to another skilled facility, [redacted], in [redacted]. (Ex I; T Neizen)

12. Appellant has remained at Concourse Rehabilitation and Nursing Center pending the outcome of this proceeding.

DISCUSSION

It is a resident's responsibility and obligation to pay for a stay at a facility. When a facility seeks to involuntarily discharge a resident on the grounds set forth in 10 NYCRR §415.3(h)(1)(i)(b), and the resident appeals that determination, the facility has the burden of proving, by substantial evidence, that the resident has failed, *after reasonable and appropriate notice*, to pay for a stay at its facility, and that the discharge location is appropriate. "Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact; it is less than a preponderance of the evidence but more than mere surmise, conjecture or speculation. . . . Put differently, there must be a rational basis for the decision. (Citations omitted)" (Stoker v. Tarentino, 101 A.D.2d 651, 652, 475 N.Y.S.2d 562, 564

[App. Div. 3d Dept. 1984], mod. 64 N.Y.2d 994, 489 N.Y.S.2d 43. Also, Prusky v. Webb, 134 A.D.2d 718, 520 N.Y.S.2d 975 [App. Div. 3d Dept. 1987]; Magro v. Ambach, 122 A.D.2d 321, 503 N.Y.S.2d 924[(App. Div. 3d Dept. 1986]). Substantial evidence demands only that a given inference is reasonable and plausible, not necessarily the most probable (Ridge Road Fire Dept. v. Schiano, 16 N.Y.3d 494, 922 NYS2d 249 [Ct. of Appeals 2011])".

The first issue to be determined at this hearing is whether Appellant has failed, after reasonable and appropriate notice, to pay for his stay at this Facility. As acknowledged by Appellant's [redacted] and [redacted] Appellant owes a debt to the Facility. This debt, and its acknowledgment by the family, is proof that Appellant has failed to fully pay for his stay at the Facility. However, 10 NYCRR §415.3(h)(1)(i)(b) requires not just that a resident has failed to pay for a stay at a facility but also that such failure occurred *after reasonable and appropriate notice* was given. I find that the Facility has not met the Regulation's requirement of providing Appellant and/or his representative *reasonable and appropriate notice* of amounts due the Facility.

Respondent, as the party with the burden of proof, presented its case first, and called Appellant's [redacted] and [redacted] as its first witnesses. They testified, in sum and substance, that they did not receive bills from the Facility and that Facility employees such as social worker(s) and "Gracie" told them, during the course of Appellant's stay at the Facility, that they did not need to worry about or pay the NAMI at those times. I found this testimony difficult to accept upon hearing it, especially because Appellant's [redacted] a [redacted] who was employed in a treatment facility, stated that he is "in this field so I know all about NAMI," should have had at least a general understanding that payment was due. However, when their testimony was taken in conjunction with Respondent's representatives' testimony and its documentary evidence, the

totality of the evidence demonstrated that Respondent did not provide Appellant and/or his [redacted] or [redacted] *reasonable and appropriate notice* of amounts due the Facility.

Mr. Bokow's self-serving testimony that monthly bills were generated and sent, without documentation to back it up, did not prove that *reasonable and appropriate notice* that payment was due the Facility was given to Appellant or his family. The one Statement that the Facility produced is dated [redacted] 2017 (Ex 4), one month after the [redacted], 2017 Notice of Discharge/Transfer was issued, and it does not reflect who the recipient of this Statement was or where it was to be sent, despite there being a section on the Statement for such information. Whether this Statement was offered as a document to demonstrate notice to Appellant of amounts due or prepared for litigation is irrelevant. Mr. Bokow's testimony that monthly bills were sent, with insufficient documentation to back it up, is inadequate proof that Respondent was giving, or had given, Appellant or his family *reasonable and appropriate notice* of amounts due the Facility before the discharge notice was issued.

Respondent's additional documents, to wit, two emails sent [redacted] months apart to Respondent's [redacted] to seek payment of the NAMI, and the Admission Agreement that was entered into [redacted] months after Appellant's admission date, further demonstrated that *reasonable and appropriate notice* of Appellant's financial obligation was not given to Appellant or his family. When the second of the two emails seeking to collect NAMI was sent [redacted] months after the first email, the amount sought was more than $[redacted] an accumulation of each monthly NAMI for which Appellant had not been notified was due. The author of those two emails, Ms. Viruet, testified that she had seven or eight conversations about NAMI payments with Appellant's [redacted] but she admitted that the majority of them were during the Medicaid application period when Appellant's [redacted] promptly responded to and provided everything requested of him. Her testimony

is much less plausible than Appellant's [redacted] and [redacted] testimony given her paucity of emails during that [redacted] month period, coupled with Respondent's complete lack of documentation to demonstrate that monthly NAMI bills were provided to Appellant or his family.

Even without Appellant's [redacted] and [redacted] testimony, the blatant lack of documentary proof that bills (monthly or at any intervals) were given to Appellant or his family is sufficient to establish that Respondent did not give Appellant or his family *reasonable and appropriate notice* of Appellant's financial obligation.

In conclusion, while there was proof that Appellant has failed to fully pay for his stay at the Facility, the testimony and documentary evidence did not prove that such failure was, as required by the regulation, *after reasonable and appropriate notice*. Even though substantial evidence "demands only that a given inference is reasonable and plausible, not necessarily the most probable" or is "more than mere surmise, conjecture or speculation," I find that Respondent has not met its burden. The evidence did not provide proof that could be accepted as "adequate to support a conclusion or ultimate fact" or a "rational basis" for Respondent's claim that monthly NAMI bills were provided to Appellant and/or that Respondent gave reasonable and appropriate notice of Appellant's financial obligation after the DSS budget was established and before a Notice of Discharge was issued. Furthermore, shortly after the [redacted], 2017 email was sent to Appellant's [redacted] monthly payments commenced and the family sought to make arrangements toward payment of their debt[4].

The evidence provided by Respondent, to wit, one Statement for Appellant's more than [redacted] stay, where such Statement (if not prepared for litigation but generated as notice of amounts due) lacks the name and address of the intended recipient and is dated after the Notice

[4] *The Parties represented that a payment plan proposed by Appellant's family to address this debt was not accepted by Respondent; the Parties are encouraged to continue these efforts.*

of Transfer/Discharge was issued, a mere two emails ([redacted] months apart) to Appellant's [redacted] to seek payment of the NAMI, and an Admission Agreement that was entered into [redacted] months after Appellant's admission date, is woefully inadequate proof that Respondent was giving, or had given, Appellant or his family *reasonable and appropriate notice* that monthly NAMI payments were due the Facility.

Having found that Respondent has not proven the grounds for discharge, *i.e.*, that Appellant has failed, *after reasonable and appropriate notice,* to pay for his stay at the facility, I will not address the issue of whether the discharge plan and location is appropriate.

DECISION

I find that the Facility has not proven by substantial evidence that the discharge is necessary.

The appeal by Appellant is therefore GRANTED.

Respondent, Concourse Rehabilitation and Nursing Center, is not authorized to discharge Appellant in accordance with the [redacted] 2017 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).

Dated: New York, New York
June 8, 2017

Ann H. Gayle
Administrative Law Judge

[redacted]/Concourse

TO: Andrew Lamkin, Esq.
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