



# Department of Health

ANDREW M. CUOMO  
Governor

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

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

July 11, 2019

## CERTIFIED MAIL/RETURN RECEIPT

Michael Scott-Kristansen, Esq.  
Pullano & Farrow  
69 Cascade Drive, Suite 307  
Rochester, New York 14614

[REDACTED]  
c/o The Shore Winds  
425 Beach Avenue  
Rochester, New York 14612

Jonathan C. Placito, Esq.  
Legal Assistance of Western New York, Inc.  
1 West Main Street, 4<sup>th</sup> Floor  
Rochester, New York 14614

Alana Russell, LCSW  
Lifespan Ombudsman Program Director  
1900 South Clinton Avenue  
Rochester, New York 14618

**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: cmg  
Enclosure



### JURISDICTION

The Shore Winds (the Respondent), a residential health care facility subject to Article 28 of the Public Health Law, determined to discharge [REDACTED] (the Appellant) from care and treatment in its nursing home. Pursuant to 10 NYCRR 415.3(h), the Appellant appealed the discharge determination to the New York State Department of Health.

### SUMMARY OF FACTS

1. Respondent The Shore Winds is a residential health care facility, or nursing home, located in Rochester, New York.
2. Appellant [REDACTED], age [REDACTED] was admitted to The Shore Winds on [REDACTED], 2017 after a hospital stay. (Exhibit 1.) She signed an admission agreement designating herself as financial representative. (0h9-10, 13m.) She manages her own financial affairs, including her own bank checking account into which is paid her income consisting of social security and pension in the total monthly amount of approximately \$ [REDACTED] (Exhibit 2; 0h43-44m.)
3. The Appellant applied for Medicaid. On [REDACTED] 2018, she was determined eligible for coverage effective [REDACTED] 2018. The [REDACTED] County Department of Human Services, which processed her application, determined that the Appellant's net available monthly income (NAMI) as of [REDACTED] 2018 was \$ [REDACTED]. This amount represents income of the Appellant, which she is required to contribute for the cost of her nursing home care while Medicaid covers the balance. The NAMI increased to \$ [REDACTED] in [REDACTED] 2018, and to \$ [REDACTED] effective [REDACTED] 2019. (Exhibit 4.)

4. By ██████████ 2018 the Appellant's charges for her nursing home care had reached nearly \$██████████. The Respondent recalculated her account to reflect the Medicaid approval, and corrected her bill. A restated bill dated ██████████ 2018 showed her NAMI obligation for the period ██████████ through ██████████ 2018, as determined by the ██████████ 2018 Medicaid determination, to be \$██████████. Thereafter, the Respondent issued monthly statements to the Appellant charging the ongoing NAMI contribution for which she was responsible. (Exhibit 3.)

5. The Respondent's attorneys sent the Appellant a collection letter dated ██████████ ██████████ 2018, advising her that the \$██████████ balance was due and owing to The Shore Winds and requesting payment. (Exhibit 5.) The Appellant did not respond to this letter. The Respondent continued thereafter to send monthly statements for the outstanding balance, which grew in the amount of the NAMI obligation each month. The Appellant failed to make any payments.

6. The balance owed by the Appellant to the Respondent as of ██████████ 2019, all attributable to the NAMI, was \$██████████ (Exhibit 3.) The Respondent has demanded payment and repeatedly billed the Appellant but she has failed to pay the charges for her stay at The Shore Winds. (Exhibits 3, 5.)

7. By notice dated ██████████, 2019, the Respondent advised the Appellant that it had determined to discharge her on ██████████, 2019, on the grounds that she has failed, after reasonable and appropriate notice, to pay for her stay at the facility. (Exhibit ALJ I.)

8. The Appellant continues to require nursing home care. The Respondent's discharge plan is to transfer her to ██████████, a nursing home in ██████████ ██████████ offering a similar level of care to that provided at The Shore Winds. ██████████

[REDACTED] has agreed to admit her. The Respondent's discharge plan includes arrangements for transfer, referral to medical providers, medications, travel and other logistical assistance as needed. (Exhibit 6.)

9. The Appellant remains at The Shore Winds pending the outcome of this proceeding.

### ISSUES

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

### DISCUSSION

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 are set forth at 10 NYCRR 415.3(h). The Respondent relies on 10 NYCRR 415.3(h)(1)(i)(b), which provides:

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.

The hearing was initially scheduled for June 6, 2019 but was rescheduled, at the Appellant's request and with the Respondent's consent, to June 26. The Respondent

presented documents (Exhibits 1-6) and testimony from its collections specialist, Matthew Reed, and director of social work, Maggie Ganon. The Appellant presented documents (Exhibits A-B) and testified on her own behalf. A certified long-term care ombudsman, Alana Russell, also testified on the Appellant's behalf. The hearing notice with attached discharge notice was designated ALJ Exhibit I, and bank statements submitted after the hearing as ALJ Exhibit II. A digital recording of the hearing was made. (1h42m.) The Respondent has the burden of proving that the transfer is necessary and the discharge plan appropriate. 10 NYCRR 415.3(h)(2)(iii).

The Appellant was admitted to The Shore Winds in [REDACTED] 2017 after a hospital stay, applied for Medicaid, and was determined eligible for coverage effective [REDACTED] 2018. Because she has pension and social security income, she has been responsible for a monthly contribution, the "net available monthly income" (NAMI), for the cost of her nursing home care while Medicaid covers the balance. Her income is approximately \$ [REDACTED] per month, and her NAMI, initially a little over \$ [REDACTED] has been a little under \$ [REDACTED] per month since [REDACTED] 2018. She has been regularly billed for these monthly charges since [REDACTED] 2018 but has not paid them.

The Appellant does not dispute the NAMI determination made by the Medicaid Program or the accuracy of the Respondent's accounting of the charges and the balance owed. (Exhibits 3, 4.) The evidence is uncontroverted and fully supports the Respondent's claim that the balance now due is in excess of \$ [REDACTED]. It was only after receiving the [REDACTED] notice of discharge that the Appellant began paying her current NAMI, which she has done for [REDACTED] and [REDACTED] 2019.

The Appellant's suggestion that because names of other contact persons also appeared on the admission agreement she signed, she is not responsible for her failure to pay her charges, is rejected. (0h5m; 1h32-33m.) The Appellant conceded that these persons are not involved in her affairs and that she does not consider them to have had any responsibility for them. (0h40-44m.) In the "rights and responsibilities" attachment to the admission agreement signed only by her she specified, on the same page as these persons were named, that she was reserving to herself the authority to act as her financial representative. (Exhibit 2, attachment B, page 19.) No suggestion has been made by any party that the Appellant is not and has not been fully capable of managing her financial affairs and that, as she expressed it, "I take care of my own, you know, stuff and everything." (0h43m.)

Regarding her failure to make any payments for her care from [REDACTED] 2017 until [REDACTED] 2019 after the notice of discharge was issued, the Appellant testified: "I just assumed it was going to be handled from Medicaid and Medicare... I just thought that was all being taken care of." (0h39m; 1h0m.) For the first seven months, this may have been understandable. The statements she was given from [REDACTED] through [REDACTED] 2018 were for the full charges for her room, which exceeded \$[REDACTED] per month. She understood, correctly, that "I know how the government is sometimes and how they work and take their time" (1h19m) but that Medicaid would eventually pick up most of the cost. The initial statements did not break out any portion that she could reasonably have been expected to pay, and her NAMI was not identified until it was calculated by Medicaid in [REDACTED] and finally appeared on the [REDACTED] 2018 bill as a "Resident Liability." (Exhibit 3.)

After the [REDACTED] 2018 Medicaid determination was made, however, the Appellant continued to ignore her bills. The Respondent sent monthly statements to her for eight months that showed her growing NAMI obligation. The Respondent's corporate business office finally "designated" (0h28m) her for discharge to [REDACTED] and instructed The Shore Winds to issue a discharge notice on [REDACTED] 2019. At that point, all that was offered to the Appellant was transfer to another nursing home if she was unable to come up with the \$ [REDACTED] she owed.

According to the Appellant, these circumstances support a conclusion that "reasonable and appropriate notice" as required by 10 NYCRR 415.3(h)(1)(i)(b) was not given. (1h31-33m.) Nursing homes are required to:

Inform each resident verbally and in writing before, or at the time of admission, and periodically when changes occur during the resident's stay, of services available in the facility and of charges for those services, including any charges for services not covered by sources of third party payment or by the facility's basic per diem rate. 10 NYCRR 415.3(g)(2)(iii).

The Respondent issued monthly statements to the Appellant from [REDACTED] through [REDACTED] 2018, while the Medicaid application was pending, showing charges of over \$ [REDACTED] per month. (Exhibit 3, pages 1-9.) Although these bills stated that the charges were due and payable, they were clearly issued without any expectation that the Appellant would pay them or any portion of them while her Medicaid application was pending. When she ignored the bills from [REDACTED] 2018 through [REDACTED] 2019, just as she had ignored the bills from [REDACTED] through [REDACTED] 2018, the Respondent made little attempt to communicate with her and explain that she was now expected to actually begin paying them.

A collection letter was sent in [REDACTED] 2018, but no questions were asked for the next seven months when the Appellant ignored it. The Respondent's collections



specialist, Mr. Reed, alleged that “demand letters” were also sent (0h19m), but the Respondent did not produce any such letters or any other documentation of efforts to engage with this resident about her growing balance. The Appellant lives at this facility and actively participates in resident life. (0h38-39m; 1h12m.) She is competent and articulate, yet no one from the facility approached her to ask about her continuing failure to pay her NAMI bills until [REDACTED] 2019, when the Respondent’s director of social work, Maggie Ganon, discussed it with her. (Exhibit 6; 0h31m.) Mr. Reed met with her for the first time on [REDACTED] when he served the discharge notice. (0h23m.)

The unpaid arrears are clearly owed by the Appellant and the Respondent is entitled to pursue collection of that debt. However, if the Appellant did not receive “reasonable and appropriate notice,” the arrears from [REDACTED] 2018 to [REDACTED] 2019 might not be appropriate grounds for discharge under 10 NYCRR 415.3(h)(1)(i)(b) so long as current charges are being paid, unless the Respondent identified funds actually available that the Appellant failed to cooperate in securing. The Respondent would remain entitled to issue a new discharge notice if the Respondent identified such funds or if the Appellant failed to meet her ongoing NAMI obligation.

The Appellant’s story, however, fails to square with the evidence. She has little excuse for believing that she could keep her own income for her own uses without paying any contribution for her care at The Shore Winds. The ombudsperson testified that this is an unfortunately common misconception among nursing home residents about Medicaid. (1h24m.) This Appellant, however, who was competent, actively in charge of and entirely responsible for her financial affairs, was given no reason to assume that “it was all being taken care of” by Medicaid or Medicare.

The Appellant did receive reasonable and appropriate notice of her obligation to pay for her stay at The Shore Winds. The statements she admits she received but claims to have "misread" (0h59m) each month beginning in [REDACTED] 2018 were not confusing. They clearly conveyed to her that she owed money to the Respondent and she destroyed them. (0h59-1h1m.) The attorney's collection letter sent to her on [REDACTED], 2018 could not be mistaken for anything but notice that she owed the Respondent \$ [REDACTED] (Exhibit 5.) Asked why she ignored this letter she said "I don't remember ever getting this." (1h17-18m.) She claimed that she did not know she owed money to the Respondent until she was served with the discharge notice by Mr. Reed on [REDACTED] (0h44m; 1h11m), but she had been receiving monthly bills and destroying them because, she said, "I didn't want people to come in my room and see anything like that." (0h59m; 1h1m.) Ms. Ganon testified and documented in the resident record that she spoke with the Appellant about her unpaid bill on [REDACTED], 2019. (Exhibit 6; 0h31m.) Four days later the Appellant finished emptying her bank account. (Exhibit ALJ II.)

Had the Respondent intervened sooner with a more resident care-oriented approach to the Appellant's failure to pay her NAMI, and had the Appellant been confronted earlier about the reality of her NAMI obligation and told that it could lead to discharge if she did not begin to pay it, she might not now be in the position of no longer having a realistic possibility of paying her charges. The Appellant was not, however, misled into believing she did not have to pay for her nursing home care. She allowed herself to believe that she could avoid paying for it. (1h10m.) She chose to retain responsibility for her financial obligations, claiming "I take care of my own stuff," and then chose to ignore reasonable and appropriate notice of those obligations.

The Appellant claimed at the hearing that she has no resources to pay her arrears. (0h44m; 1h13m.) She paid her [REDACTED] 2019 NAMI in full after receiving the discharge notice, paid the [REDACTED] NAMI at the hearing, and paid another \$ [REDACTED] in cash the next day, [REDACTED]. She claims the rest of the pension and social security income deposited into her checking account, which at \$ [REDACTED] per month from [REDACTED] 2018 to [REDACTED] 2019 comes to approximately \$ [REDACTED] is gone. Her explanation for this is that "a couple times a month" for "at least a year" she was sending "pretty much" all of her income to her [REDACTED] to help him out with medical bills. (0h45m; 1h3m.)

The Appellant did not offer any evidence to substantiate her story. Pressed for specifics about just how she was making these payments to her [REDACTED] she eventually explained that an unnamed friend withdrew the income from her checking account each month, in cash, brought the cash to her, and that they together placed the cash in an envelope and mailed it to him. (0h44-45m; 1h2-6m; 1h13m.) After the hearing concluded, the ALJ asked her to submit copies of her bank statements. (Exhibit ALJ II.) Her story is significantly inconsistent with those statements.

The Appellant's bank statements show that she had \$ [REDACTED] in her checking account at the beginning of [REDACTED] 2018, three months after she was first billed for her NAMI. She still had \$ [REDACTED] at the beginning of [REDACTED] 2019. According to her [REDACTED] 2019 Medicaid recertification, she had at that time \$ [REDACTED] in bank accounts. (Exhibit 4.) This was approaching the \$ [REDACTED] Medicaid resource limit for Medicaid eligibility for an individual. Department of Health GIS 18 MA/15. It was at that time that the Appellant began a string of \$ [REDACTED] cash withdrawals from her checking account, fifteen in all between [REDACTED] and [REDACTED] 2019, bringing her balance down to \$ [REDACTED] (Exhibit

ALJ II.) The last \$ [REDACTED] cash withdrawal was made on [REDACTED], four days after director of social work Maggie Ganon spoke with her about her unpaid bill. (Exhibit 6; 0h31m.)

The Appellant offered no explanation at all, much less a plausible one, why she made all of these withdrawals from her checking account in cash if she was sending the money to her [REDACTED] nor does the timing of these withdrawals correspond to her account of having, "a couple times a month" for "at least a year" mailed the money to him. Whatever happened to the income, as it was all withdrawn in cash there is little way of verifying her claim about what she did with it or her denial that anything is now left to pay her debt to The Shore Winds.

The outstanding balance from [REDACTED] 2018 through [REDACTED] 2019 has not been paid after reasonable and appropriate notice. The evidence of the Appellant's bank account shows that funds to pay a substantial portion of her debt were still actually available as late as [REDACTED] 2019 and yet she not only failed to cooperate with the facility in obtaining these funds, she disposed of them in an unexplained manner. The Respondent has met its burden of establishing valid grounds for discharge pursuant to 10 NYCRR 415.3(h)(1)(i)(b).

With regard to the appropriateness of the discharge plan, there is no dispute that the Appellant continues to require the level of care provided by a nursing home. The Respondent proposes to transfer the Appellant to [REDACTED], another nursing home that provides a similar level of care to The Shore Winds. The Appellant did not dispute the testimony of the Respondent's director of social work, Maggie Ganon, that [REDACTED] [REDACTED] is a nursing home offering an appropriate level of care and similar activities as are provided at The Shore Winds.

A nursing home must permit residents and their representatives the opportunity to participate in deciding where the resident will reside after discharge. 10 NYCRR 415.3(h)(1)(vii). The Respondent offered to make referrals to Rochester area nursing homes in which the Appellant expressed an interest. After suggesting a few facilities, which were contacted, she declined to participate in discharge planning, taking the position that she does not want to go anywhere else. (0h29-30, 33m; Exhibit 6.)

The Appellant objects to the Respondent's discharge plan because she feels comfortable and at home at The Shore Winds, and said the thought of moving to a new facility "petrifies" her. (0h45, 55m; 1h14m.) She is primarily concerned about her continuing medical care, in particular the dialysis treatments and careful monitoring of her weight necessary for management of her [REDACTED]. (0h45-47m; Exhibit A.) [REDACTED] is a licensed nursing home authorized to undertake her care and make the appropriate referrals for medical treatment as necessary. Ms. Ganon's discharge planning included verifying that a [REDACTED], and [REDACTED] were available in [REDACTED] and that the Appellant would be followed at [REDACTED] by a primary care physician. (Exhibit 6; 1h30-31m.)

While the Appellant understandably does not want to leave a nursing home she likes and does not want to have to change the medical providers who currently treat her, she offered no evidence to show that her medical needs require that she remain in the care of these providers or that the residential health care she needs will be unavailable at [REDACTED]. The medical records she presented fail to document any professional opinion that transfer to another nursing home providing the same level of care as The Shore Winds is medically inappropriate. (Exhibits A, B.)

Having established permissible grounds for discharge, the Respondent's responsibility is to provide a safe and appropriate plan of care upon discharge. A discharge plan providing for a continuation of the same level of nursing home care as is being provided by The Shore Winds is in place. The proposed transfer to ██████████ meets the Respondent's discharge planning obligation.

**DECISION:** Respondent The Shore Winds has established valid grounds for the discharge of Appellant ██████████ and has established that the discharge plan is appropriate.

The Respondent is authorized to discharge the Appellant in accordance with the ██████████ 2019 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  
July 10, 2019

  
John Harris Terepka  
Administrative Law Judge