



Department of Health

ANDREW M. CUOMO
Governor

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

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

November 19, 2019

CERTIFIED MAIL/RETURN RECEIPT

Marvin Neiman, Esq.
Concourse Rehabilitation & Nursing Center
1072 Grand Concourse
Bronx, New York 10456

██████████
c/o Concourse Rehabilitation
& Nursing Center
1072 Grand Concourse
Bronx, New York 10456

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,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: cmg
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 her from a residential
health care facility.

COPY

DECISION

Hearing Before: Natalie J. Bordeaux
Administrative Law Judge

Hearing Location: Concourse Rehabilitation and Nursing Center
1072 Grand Concourse
Bronx, New York 10456

Hearing Date: November 12, 2019
The record closed on November 18, 2019

Parties: Concourse Rehabilitation and Nursing Center
By: Marvin Neiman, Esq.
Concourse Rehabilitation and Nursing Center
1072 Grand Concourse
Bronx, New York 10456

[REDACTED]
Pro Se

JURISDICTION

By notice dated ██████████ 2019, Concourse Rehabilitation and Nursing Center (the Facility), a residential health care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge ██████████ (the Appellant). The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 NYCRR § 415.3(i).

HEARING RECORD

Facility witnesses: Theodora Neizer, Director of Social Work
 Antonia Collado, Social Worker
 Gracie Viruet, HMO & Medicaid Director
 Eleonora Spivak, Accounts Receivable
 Felicia Harrison, Billing Coordinator

Facility exhibits: 1-5

Appellant witnesses: ██████████, Appellant

Appellant exhibits: None

The notice of hearing and the accompanying cover letter were marked as ALJ Exhibit I. A digital recording of the hearing was made. (52:14 in duration.)

ISSUES

Has the Facility established that its determination to discharge the Appellant is permissible pursuant to 10 NYCRR § 415.3(i)(1)(i)(b) and that the discharge plan is appropriate?

FINDINGS OF FACT

1. The Appellant is a ██████-year-old woman who was originally admitted to the Facility on ██████████ 2015 for short-term rehabilitation. (Exhibit 2.)
2. From the date of admission through ██████████ 2016, the Appellant was in receipt of community-based Medical Assistance (Medicaid). However, due to her continued stay at the Facility, her coverage was converted to chronic care (nursing home) Medicaid, effective ██████████

██████████, 2016. With the Appellant's receipt of nursing home Medicaid coverage, she was required to pay her net available monthly income (NAMI) of \$██████████ to the Facility. (Recording @ 28:35; Exhibit 5.)

3. Each month, the Facility's accounts receivable department has mailed an invoice to the Appellant's home address regarding the Appellant's financial obligation toward the cost of her continued nursing home stay. (Recording @ 14:50; Exhibit 5.)

4. On ██████████ 2017, the Appellant agreed to arrange direct payment of her Social Security Disability checks to the Facility. (Exhibit 4.)

5. The Facility received several of the Appellant's monthly Social Security checks, which were applied toward her outstanding debt. However, the Appellant subsequently advised the Social Security Administration to cease transferring her benefit payments to the Facility and to remit payment directly to the Appellant instead. (Recording @ 8:16, 27:03.)

6. The Appellant has made no further payment to the Facility. (Recording @ 12:49.)

7. By notice dated ██████████ 2019, the Facility determined to discharge the Appellant on ██████████ 2019 because she has failed, after reasonable and appropriate notice, to pay for the cost of her stay. The notice proposes to discharge the Appellant to the ██████████ ██████████ ██████████ located in ██████████. (Exhibit 1.)

8. As of ██████████ 2019, the Appellant has amassed an outstanding balance of \$██████████ resulting from accruing, unpaid NAMI. (Recording @ 13:42; Exhibit 5.)

9. The Appellant remains at Concourse Rehabilitation and Nursing Center pending the outcome of this appeal.

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. PHL §§ 2801(2)&(3); 10 NYCRR § 415.2(k).

Regulations at 10 NYCRR § 415.3(i) describe the transfer and discharge rights of residential health care facility residents. They state, 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:

(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... 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 residential health care facility must prove by substantial evidence that the discharge was necessary, and the discharge plan was appropriate. 10 NYCRR § 415.3(i)(2)(iii); State Administrative Procedure Act § 306(1).

DISCUSSION

The Appellant was admitted to the Facility on [REDACTED], 2015 as a short-term rehabilitation patient. She was subsequently moved to a long-term care bed after it was determined that her needs could not be safely met in the community. (Exhibit 2.) When the Appellant's Medicaid coverage was converted to nursing home Medicaid, a change effectuated as of [REDACTED] 2016,

she was required to pay her NAMI of \$ [REDACTED] to the Facility each month. As of the date of this hearing, the Appellant owes the Facility \$ [REDACTED] for her unpaid NAMI, signifying that she has not paid the NAMI for over 2 ½ years. (Exhibit 5; Recording @ 13:42, 28:35.)

The Appellant was made aware of her financial obligation to the Facility. On [REDACTED] 2017, she signed an agreement to arrange for the direct deposit of her monthly Social Security income benefits to the Facility for payment of her NAMI. (Exhibit 4.) However, after the Facility received a few monthly payments, the Appellant notified the Social Security Administration that she wanted to receive her benefits directly. (Recording @ 8:16, 27:03.) Since this change was effectuated, she has made no payment to the Facility.

At the hearing, the Appellant confirmed that she agreed to arrange payment to the Facility because she was told that Medicaid was not paying for the cost of her stay in full. (Recording @ 11:33.) Nevertheless, the Appellant asserted that she should not have to pay a NAMI when she is paying rent for an apartment in the community. The apartment, which she has not occupied in over four years, is inhabited by her [REDACTED] and a [REDACTED] (Recording @ 17:22, 38:49.)

Throughout her nursing home stay, the Appellant's housing and nearly all other needs have been provided by the Facility. The amount of the Appellant's NAMI and her personal responsibility to pay that amount to the Facility is not negotiable. The Facility has established that the Appellant has failed, after reasonable and appropriate notice, to pay for the cost of her stay.

Regarding its discharge plan, the Facility proposes to discharge the Appellant to [REDACTED] [REDACTED], located in [REDACTED]. (Exhibit 1.) The Appellant requires minimal assistance with activities of daily living and needs wound care

assistance from a nurse once each week. (Exhibit 3; Recording @ 38:33, 42:23.) These needs can be addressed in a community-based setting (e.g., the Appellant's apartment). However, Facility social work staff were advised by the Appellant's [REDACTED] that discharging the Appellant to her home was unrealistic and unsafe because the Appellant cannot navigate the [REDACTED] steps leading to her apartment. Director of Social Work Theodora Neizer explained that the Appellant was previously discharged to her home in 2015 upon completion of short-term rehabilitation. Very shortly after her discharge, the Appellant's [REDACTED] demanded that the Appellant be allowed to return to the Facility. Due to the unavailability of family members to provide back-up support for personal care services aides who might be assigned to assist the Appellant at home, the Facility did not deem the Appellant's apartment to be a realistic discharge location. (Recording @ 37:27, 43:56.)

The Appellant opposes the discharge plan because the distance between [REDACTED] and the [REDACTED] would require her family members to travel more than three hours each way when visiting her. (Recording @ 36:50.) Facility staff attempted to accommodate the Appellant's preferences in its discharge planning efforts. Social Worker Antonia Collado submitted the Appellant's Patient Review Instrument (PRI) to ten nursing homes located in the [REDACTED] all of which have refused to accept the Appellant for long-term care. (Exhibits 2 and 3.)

Although the Appellant was encouraged to participate in the discharge planning process, it is unclear what, if any, efforts she or her relatives have made. The Appellant merely stated that her [REDACTED] unspecified attempts to procure a transfer for the Appellant to other local nursing homes were unsuccessful. (Recording @ 33:47.)

The Appellant deliberately withheld payment of funds that she was legally required to remit to the Facility. As a result, her discharge options are very limited. The [REDACTED] is currently the only nursing home willing to accept her.

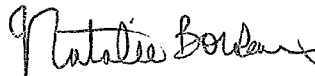
The Facility is required to ensure that a discharge plan addresses the Appellant's medical needs and how those needs will be met after she is discharged. 10 NYCRR § 415.3(i)(1)(vi). The proposed discharge plan is appropriate as it ensures that the Appellant will continue to receive any necessary assistance with activities of daily living and wound care.

The Appellant and her family are free to continue searching for another nursing home willing to accept the Appellant and/or to identify another agreeable discharge plan. However, the Appellant cannot remain at the Facility while the family does so. The Facility's determination is affirmed.

DECISION

Concourse Rehabilitation and Nursing Center has established that its determination to discharge the Appellant was permissible pursuant to 10 NYCRR § 415.3(i)(1)(i)(b) and that the discharge plan is appropriate.

Dated: November 18, 2019
Menands, New York



Natalie J. Bordeaux
Administrative Law Judge