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## Department of Health

**ANDREW M. CUOMO**  
Governor

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

**LISA J. PINO, M.A., J.D.**  
Executive Deputy Commissioner

April 12, 2021

### CERTIFIED MAIL/RETURN RECEIPT



Abe Mostofsky  
Personal Healthcare Management  
20 Wood Court  
Tarrytown, New York 10591

Elena Vega-Castro  
Plattsburgh Rehabilitation & Nursing Center  
8 Bushey Boulevard  
Plattsburgh, New York 12901

**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

**STATE OF NEW YORK : DEPARTMENT OF HEALTH**

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In the Matter of an Appeal pursuant to 10 NYCRR §415.3 by :  
:  , :  
: Appellant, :  
: from a determination by :  
: **Plattsburgh Rehabilitation & Nursing Center,** :  
: Respondent, :  
: to discharge him from a residential health care facility. :  
:

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**DECISION**

**Hearing Before:** Ann H. Gayle  
Administrative Law Judge

**Held:** Via Cisco Webex

**Hearing Date:** February 17, 2021

**Parties:** Plattsburgh Rehabilitation & Nursing Center  
By: Abe Mostofsky, Financial Operations Director

By:   /Representative

Pursuant to Public Health Law (“PHL”) §2801 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 Plattsburgh Rehabilitation & Nursing Center (“Plattsburgh R&NC” “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(i). Respondent determined to discharge █ (“Appellant” or “Resident”) from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(i)(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’s █ on behalf of Appellant, appealed the discharge determination to the New York State (“NYS”) Department of Health and a hearing on that appeal was held. Pursuant to §415.3(i)(2)(iii)(b), the Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate; the standard of proof is substantial evidence. State Administrative Procedure Act §306.1. 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. 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.

A recording of the hearing was made part of the record. Appellant's █ waived Appellant's appearance at the hearing and on all conference calls<sup>1</sup>, and she testified on behalf of Appellant. Financial Operations Director Abe Mostofsky testified for Respondent. Administrator Elena Vega-Castro, Financial Coordinator Amy Simpson, and Financial Supervisor Jen Vivlamore participated in the hearing and some conference calls. Amy Gehrig from the NYS Ombudsman office testified and participated in the hearing and conference calls.

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

ALJ

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

Facility:

- 1: Emails regarding NAMI
- 2: Emails and Clinton County DSS Budget Letter dated █/18
- 3: Bills
- 4: Summary of Discharge Planning
- 5: Affidavit of Director of Nursing
- 6: Respondent statement of case

Appellant:

- A: █/20 Discharge Notice to █
- B: Payment Timeline
- C: Discharge Notice to █
- D: Shared Ownership information
- E: Current monthly expense list
- F: Invoice from Facility
- G: Appellant statement of case

The record closed April 6, 2021, at the conclusion of the second conference call.

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<sup>1</sup> Appellant's █ waived service of this Decision upon Appellant or Appellant's █

ISSUE

Has Plattsburgh R&NC established that the discharge is necessary and the discharge plan is appropriate?

FINDINGS OF FACT

Citations in parentheses refer to testimony (“T”) and exhibits (“Ex”) found persuasive in arriving at a particular finding.

1. Respondent, Plattsburgh R&NC, is a residential health care facility located in Plattsburgh, New York. (Ex I; Ex C; T Mostofsky, ██████████ Gehrig)
2. Appellant, ██████████ age ██████ was admitted to the Facility on ██████████ 2017. The local Medicaid office established Appellant’s NAMI (Net Available Monthly Income) to be \$██████████ per month effective ██████████ 2018. Appellant’s ██████████ acknowledges that at least \$██████████ is due every month. Respondent provided Appellant’s ██████████ with monthly bills and explained NAMI to Appellant’s ██████████ and ██████████ Appellant has inconsistently made NAMI payments. As of the hearing date, \$██████████ was owed the Facility. Appellant’s ██████████ acknowledges that at least \$██████████ is due. Respondent’s presentation at the hearing focused on the uncontested amount, while referencing the remaining contested amount of \$██████████ (Ex 1; 2; 3; B; F; G; T Mostofsky, ██████████)
3. By notice dated ██████████, 2020 (“discharge notice”), Respondent advised Appellant<sup>2</sup> that it had determined to discharge him on the grounds of failure to pay for his stay at the Facility. Respondent specified, “Failure to pay full amount of NAMI or put disputed amount in an escrow account per the admission agreement.” The discharge location is ██████████  
██████████ Respondent’s “██████████ facility” located in ██████████

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<sup>2</sup> The discharge notice was addressed to Appellant’s ██████████ in compliance with Appellant’s admission agreement. (Ex I; C; T Mostofsky, ██████████)

██████/Plattsburgh

██████ provides care and services equivalent to Respondent. (Ex I; C; D; T Mostofsky,

██████

4. Appellant has remained at the Facility pending the outcome of this proceeding.

#### DISCUSSION

It is a resident's responsibility and obligation to pay for a stay at a facility. Testimony and documentary evidence showed that while bills were sent to Appellant's ██████ who signed the admission agreement as Appellant's Power of Attorney, at some point during Appellant's stay at the Facility, Appellant's ██████ began handling Appellant's and Appellant's ██████ financial matters, including such matters with the Facility. Respondent proved that during the course of Appellant's stay at the Facility, Facility representatives discussed with and explained to Appellant's ██████ that Appellant was responsible to pay the monthly NAMI to the Facility. Appellant's ██████ and the Ombudsman acknowledged that a NAMI debt exists and that Appellant's ██████ wants to pay the debt but her family does not have the funds to do so in part because of Appellant's spending habits prior to his admission which resulted in significant debt. Appellant's ██████ contends that the debt owed to Respondent is not because of lack of desire to pay or intentional withholding of available funds, but Respondent is not claiming lack of desire or intentional withholding, nor is Respondent required to do so. The regulation, 10 NYCRR 415.3(i) (1)(i)(b) is a grounds for involuntary discharge 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. Intent is not an element under these grounds for transfer/discharge.

Testimony at the hearing revealed that the parties explored discharge to multiple (at least nine) facilities relatively close in proximity to Plattsburgh R&NC, none of which accepted



Appellant. Respondent then explored discharge to facilities farther away, and ██████████ which provides services similar to Respondent accepted Appellant. Appellant's ██████████ visited Appellant daily prior to the COVID-19 pandemic. Appellant's ██████████ and the Ombudsman testified and expressed it would be nearly impossible for family to visit Appellant so far away at ██████████ and that lack of visits could be detrimental to both Appellant's and Appellant's ██████████ well-being. The parties and the Ombudsman were interested in exploring additional facilities subsequent to the conclusion of the hearing<sup>3</sup>. Additionally, Appellant's hearing with Medicaid/OTDA (Office of Temporary and Disability Assistance), which had been rescheduled and adjourned a few times, was scheduled for ██████████ 2021, the week after this hearing. The record remained open at the conclusion of the ██████████ hearing to give the parties the opportunity to further explore those options and to report on the outcome of the Medicaid/OTDA hearing.

On a March 23, 2021 conference call the parties reported that Appellant was not accepted into any facilities largely due to his non-payment at this Facility, but that at least one facility had not made its final determination pending the Medicaid/OTDA decision. Appellant's ██████████ reported that although she was informed that a decision would be rendered within three to four weeks of the ██████████ Medicaid/OTDA hearing, she still did not have a decision. The Ombudsman expressed concern about transferring Appellant to another facility during the pandemic, and especially the safety of Appellant while traveling such a long distance. Respondent reported that all facilities may accept residents during the pandemic, and that safety protocols would be in place both at the receiving facility and during the transfer by ambulance from ██████████.

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<sup>3</sup> Mr. Mostofsky testified that Respondent would explore additional facilities for discharge even after a decision was issued if such decision was not favorable to Appellant.



██████████/Plattsburgh

An additional conference call was held on ██████████ 2021. Nothing had changed since the ██████████ conference call; no facility close in proximity to Plattsburgh R&NC has accepted Appellant, and the decision from the Medicaid/OTDA hearing has not been received.

**CONCLUSION**

Respondent has proven that Appellant has failed, after reasonable and appropriate notice, to pay his portion of his stay at the facility. The uncontested amount of \$ ██████████ as ██████████ 2021 is still outstanding. Respondent has also proven that ██████████ is an appropriate discharge location for Appellant.

**DECISION**

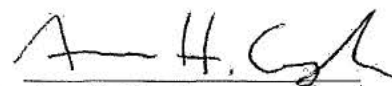
I find that the Facility has proved by substantial evidence that the discharge is necessary and the discharge location is appropriate.

The appeal by Appellant is therefore DENIED.

Respondent, Plattsburgh Rehabilitation & Nursing Center, is authorized to discharge Appellant in accordance with the ██████████ 2020 Discharge Notice. The discharge shall occur no sooner than ██████████, 2021, in order to give the parties the opportunity to further work together on the outstanding balance, explore additional discharge locations, and seek to obtain the Medicaid/OTDA decision. Appellant may leave the Facility sooner for any reason Appellant or Appellant's family chooses to have Appellant leave.

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  
April 12, 2021

  
Ann H. Gayle  
Administrative Law Judge

[REDACTED]/Plattsburgh

TO:

[REDACTED]

Abe Mostofsky  
Personal Healthcare Management  
20 Wood Court  
Tarrytown, New York 10591

Elena Vega-Castro  
Plattsburgh Rehabilitation & Nursing Center  
8 Bushey Boulevard  
Plattsburgh, New York 12901