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**Department
of Health**

KATHY HOCHUL
Governor

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

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

September 22, 2021

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o ██████████, POA
██████████

Kerrie Arena, Admissions & Finance Officer
Salamanca Rehabilitation & Nursing
451 Broad Street
Salamanca, New York 14779

Bria Lewis, Esq.
Center for Elder Law and Justice
438 Main Street, Suite 1200
Buffalo, New York 14202

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

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

██████████ ██████████

Appellant,

from a determination by

SALAMANCA REHABILITATION
AND NURSING

to discharge her from a residential health care facility.

COPY

DECISION

Before: Tina M. Champion
Administrative Law Judge

Held at: Videoconference via WebEx

Date: September 17, 2021

Parties:

██████████ ██████████

By: Bria Lewis, Esq.
Center for Elder Law and Justice
438 Main Street, Suite 1200
Buffalo, NY 14202

Salamanca Rehabilitation and Nursing

By: Abe Mostofsky, Director of Financial Operations
Personal Healthcare Management
20 Wood Court
Tarrytown, NY 10591

JURISDICTION

By notice dated [REDACTED], 2021, Salamanca Rehabilitation and Nursing (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [REDACTED] [REDACTED] (the Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) 415.3(i).

The hearing was held in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulations (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR.

Evidence was received and witnesses were examined. A digital recording was made of the proceeding.

HEARING RECORD

- ALJ Exhibits: I – Letter with Notice of Hearing and Transfer/Discharge Notice ([REDACTED]/21)
II – Letter with Rescheduled Hearing Date [REDACTED]/21)
- Facility Exhibits: 1 – [REDACTED] 21 Invoice
- Appellant Exhibits: None
- Facility Witnesses: Abe Mostofsky, Director of Financial Operations
Kerrie Arena, Admissions and Finance Coordinator
Steve Brundage, Social Worker
- Appellant Witnesses: Kathleen Moriarty Fleming, Esq.
[REDACTED], Resident's [REDACTED] and Power of Attorney (POA)

FINDINGS OF FACT

1. The Appellant has been a resident at the Facility for several years and requires skilled nursing services. (Testimony [T.] Mostofsky, Arena.)

2. The Appellant privately pays for her admission to the Facility. (T. Mostofsky, Arena.)

3. In late 2020, [REDACTED], the Appellant's [REDACTED] and POA, advised the Facility that she was going to apply for Medicaid for the Appellant. (T. Arena.)

4. The Appellant submitted a Medicaid application in or about early 2021. The application was denied due to the Appellant being "over-resourced." (T. Arena.)

5. The Appellant owns a [REDACTED]. The property is under contract with closing expected to occur by the end of [REDACTED] 2021. (T. Fleming.)

6. The unpaid portion of the Appellant's admission charges has accumulated significantly during 2021, with \$ [REDACTED] owed as of the date of the hearing. (T. Mostofsky, Arena; Ex. 1.)¹

7. On [REDACTED] 2021, the Facility issued a Transfer/Discharge Notice to the Appellant which proposed discharge to [REDACTED]

(ALJ Ex. I.)

8. The Transfer/Discharge Notice states that the Appellant will be transferred because of the Appellant's failure, after reasonable and appropriate notice, to pay for her stay at the Facility.

(ALJ I.)

9. The Appellant timely appealed the Facility's discharge determination and proposed discharge location.

10. The Appellant has remained at the Facility during the pendency of the appeal.

¹ This amount includes two months advance pay ([REDACTED] and [REDACTED] 2021) as required by the Facility. (T. Mostofsky, Ex. 1.)

ISSUES

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

APPLICABLE LAW

A residential health care facility, also referred to in the Department of Health Rules and 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].)

A resident may only be discharged pursuant to specific provisions of the Department of Health Rules and Regulations. (10 NYCRR 415.3[i][1].)

The Facility alleged that the Appellant's discharge is permissible pursuant to 10 NYCRR 415(i)(1)(i)(b), which states:

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.

Under the hearing procedures at 10 NYCRR 415.3(i)(2)(iii), the Facility bears the burden to prove a discharge is necessary and appropriate. Under SAPA § 306(1), a decision in an administrative proceeding must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact. It is less than a preponderance of evidence but more than mere surmise, conjecture or

speculation, and it constitutes a rational basis for a decision. (Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3d Dept. 1984], appeal dismissed 63 N.Y.2d 649.)

DISCUSSION

Reason for Discharge

It is undisputed that the Appellant has been a resident of the Facility for several years and requires skilled nursing services. Kerrie Arena, the admissions and finance coordinator at the Facility, testified that the Appellant pays privately and that she has carried a balance on her bill for at least the last three years. Abe Mostofsky, the director of finance at Personal Healthcare Management, testified that up until 2021 the Appellant's payments have been "mostly" on time. Mr. Mostofsky testified, and it is reflected in the invoice submitted by the Facility, that the Appellant has made some partial payments throughout 2021. The unpaid portion of the Appellant's admission charges has accumulated significantly, with \$ [REDACTED] owed as of the date of the hearing.

It is also undisputed that the Appellant submitted a Medicaid application earlier this year that was denied due to the Appellant being over-resourced. The Appellants assets include a [REDACTED] [REDACTED] that is currently under contract. Kathleen Moriarty Fleming, an attorney representing the Estate of [REDACTED] [REDACTED] the Appellant's [REDACTED], testified that the property is under contract with closing expected to occur by the end of [REDACTED] 2021. Attorney Fleming testified that payment in full will be made to the Facility at the time of closing.

The Facility expressed frustration with previously being told that the property was going to close by various dates and that they would be paid, only to be later told that it did not close for one reason or another. Attorney Fleming testified that sale of the property has been challenging

for several reasons, including difficulty in surveying the land, equipment needing to be removed, and environmental issues. However, she testified that as of the date of the hearing she was not aware of any other issues that need to be addressed before closing and that she is "95 to 99 percent" sure that it will close by the end of the month.

Pursuant to 10 NYCRR 415.3(i)(1)(i)(b), transfer and discharge is permissible when the resident has failed, after reasonable and appropriate notice, to pay for a stay at the facility 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 charges owed are not in dispute and no appeal of the Medicaid denial is pending. At the hearing, the Appellant challenged whether the funds are actually available as the sale of property has not closed. The Facility argued that the funds are available, and that the Appellant has known for a long time that her private pay funds would run out and the property would need to be liquidated. The Facility argued that the Appellant should have started the process sooner based on that knowledge. Mr. Mostofsky also referenced several instances and interactions between the Facility and Ms. [REDACTED] that caused him to believe that Ms. [REDACTED] was being less than fully upfront with the Facility regarding the Appellant's assets. For example, at the hearing Ms. [REDACTED] stated that the Appellant had a "[REDACTED]" and Mr. Mostofsky asserted that this was the first time the Facility ever learned of the Appellant receiving a [REDACTED]. Mr. Mostofsky also testified that the Facility offered the Appellant alternatives to immediate payment, namely, a lien on the property and a confession of judgment, both of which were declined by Ms. [REDACTED].

Similar to the Medicaid determination that the Appellant is over-resourced, I find that the Appellant has funds actually available to pay for her stay at the Facility. Accordingly, discharge for nonpayment is permissible in this matter.

Discharge Location

The Facility has proposed discharge to [REDACTED] [REDACTED] is a skilled nursing facility, and the Appellant has not challenged the ability of [REDACTED] to meet her medical needs. However, [REDACTED] is approximately [REDACTED] hours from Salamanca Rehabilitation and Nursing. The Appellant alleges that this is not appropriate as it will prohibit Ms. [REDACTED] as well as other family and friends, from visiting her and being involved in her care. The Facility agrees that the discharge location is not ideal for the Appellant because of the distance but alleges that it was unable to find another closer location given the Appellant's medical need of transportation for [REDACTED] a couple times a week and her [REDACTED] unpaid bill.

Steve Brundage, a social worker at the Facility, in conjunction with Ms. Arena, testified that the Facility explored five other skilled nursing facilities in the same county and neighboring counties. Those facilities were either unable or unwilling to accept the Appellant. Specifically, Mr. Brundage testified that two of the facilities would not take the Appellant because of her unpaid bill, one was full, and the other two failed to respond to the admission referral.

Mr. Mostofsky testified that the Facility identified [REDACTED] as a viable discharge location only after exploring local facilities because [REDACTED] is a [REDACTED] facility and he had knowledge that there was availability at [REDACTED] due to sufficient clinical staffing. Mr. Mostofsky testified that he also had knowledge that the administrator at [REDACTED] was willing to take the financial risk associated with accepting the Appellant.

Ms. [REDACTED] acknowledged that she did not work with the Facility to identify other possible discharge locations despite the Facility asking her for input. She stated her reason for not participating in planning for a discharge location was because she did not want the Appellant moved. However, during the hearing, Ms. [REDACTED] inquired as to why [REDACTED]

████████████████████), approximately ██████████ away from the Facility, had not been explored as an option. The ALJ directly asked Ms. ██████████ if she wanted the Facility to send an admission referral to ██████████ Ms. ██████████ reluctantly agreed and later that same day the Facility reported that ██████████ was unable to accommodate the Appellant.

Although ██████████ undeniably poses a hardship upon the Appellant and her family, it can provide for the medical needs of the Appellant. Further, the Facility attempted and was unable to locate another facility close by that is able and willing to admit the Appellant, and the Appellant declined to participate in the process of identifying another facility. As such, ██████████ is an appropriate discharge location for the Appellant.

Conclusion


The Facility has been patient and accommodating with the Appellant's failure to pay, particularly in agreeing to a significant adjournment of this matter after issuing the Transfer/Discharge Notice to allow for time for the ██████████ property to be sold and payment to be made. The Facility cannot be expected to continue to open-endedly wait out the sale of the property to be paid for its services. However, given the testimony of Attorney Fleming on her level of certainty of the sale closing by the end of the month, it is reasonable and appropriate to delay discharge for a short time to provide the Appellant the one last chance to make payment and remain at the Facility before uprooting the Appellant from the geographical area in which she resides. If sale of the property does not occur by the end of this month as expected, Ms. ██████████ is encouraged to actively engage with the Facility in attempting to identify and explore other discharge locations that are closer to Salamanca prior to the discharge date authorized below.

DECISION

Salamanca Rehabilitation and Nursing has established that its determination to discharge the Appellant was correct, and that its transfer location is appropriate.

1. Salamanca Rehabilitation and Nursing is authorized to discharge the Appellant in accordance with its discharge plan on or after [REDACTED] 2021 unless payment of \$ [REDACTED] is made prior to that date.
2. 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
September 22, 2021


Tina M. Champion
Administrative Law Judge

TO:

Bria Lewis, Esq.
Center for Elder Law and Justice
438 Main Street, Suite 1200
Buffalo, NY 14202
blewis@elderjusticenyc.org

[REDACTED]
c/o [REDACTED], POA
[REDACTED]

Abe Mostofsky, Director of Financial Operations
Personal Healthcare Management
20 Wood Court
Tarrytown, NY 10591
amostofsky@phcare.com

Kerrie Arena, Admissions and Finance Coordinator
Salamanca Rehabilitation and Nursing
451 Broad Street
Salamanca, NY 14779
karena@salamancarnc.com