cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan SAPA File

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# Department of Health

KATHY HOCHUL Goyernor MARY T. BASSETT, M.D., M.P.H. Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

December 12, 2022

## CERTIFIED MAIL/RETURN RECEIPT

Scott O. Frycek, Esq. Lewis Johs Avallone Aviles, LLP 1377 Motor Parkway, Suite 400 Islandia, New York 11749

Tanya Kessler, Esq. Mobilization for Justice, Inc. 100 William Street, 6<sup>th</sup> Floor New York, New York 10038

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.

Natalie J. Bordeaux

Chief Administrative Law Judge

Bureau of Adjudication

NJB: nm Enclosure

# STATE OF NEW YORK DEPARTMENT OF HEALTH

In the Matter of an Appeal, pursuant to 10 NYCRR § 415.3, by



Appellant,

DECISION

from a determination by

**Hudson Pointe at Riverdale Center** for Nursing and Rehabilitation

Respondent,

to discharge her from a residential health care facility.

Hearing Before:

Natalie J. Bordeaux

Administrative Law Judge

Held via:

Cisco WebEx videoconference

Hearing Date:

December 7, 2022

Parties:

Hudson Pointe at Riverdale Center for Nursing and Rehabilitation Scott O. Frycek, Esq. By:

Lewis Johs Avallone Aviles, LLP

1377 Motor Parkway, Suite 400 Islandia, New York 11749

By: Tanya Kessler, Esq.

Mobilization for Justice, Inc. 100 William Street, 6th Floor New York, New York 10038

## JURISDICTION

Hudson Pointe at Riverdale Center for Nursing and Rehabilitation (the Facility), a residential health care facility subject to Article 28 of the New York Public Health Law, 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:

Emanuel Lichtik, Administrator

Dr. Robert Samaniego, Attending Physician Yaneika Olivo, Director of Social Service

Facility exhibits:

1 - 13

Appellant witnesses:

Appellant

Maureen Sammon, Medicaid Coordinator, Hudson Pointe

Appellant exhibits:

E-G

The hearing notice and accompanying cover letter were marked as ALJ Exhibit I. A digital recording of the proceeding was made (6:11:46 in duration<sup>1</sup>).

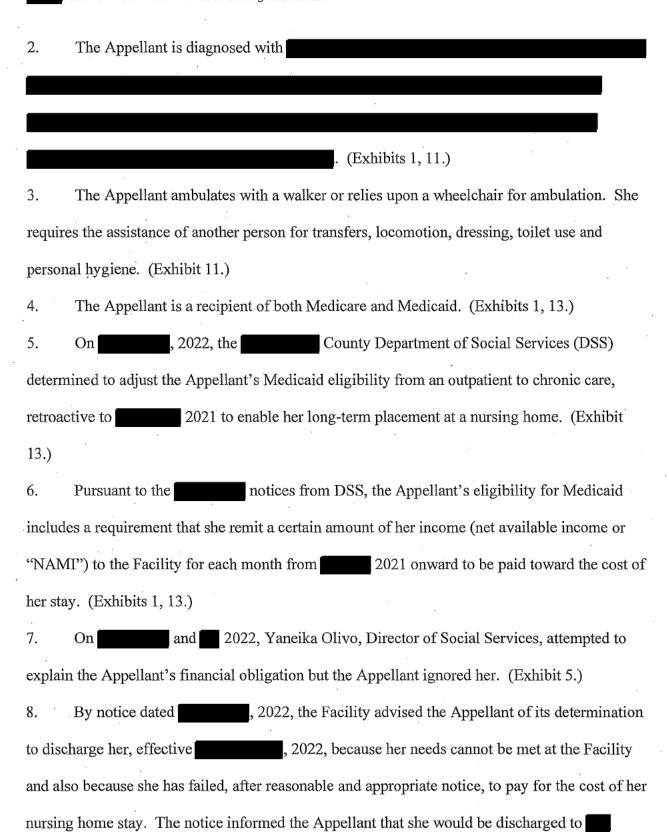
#### **ISSUES**

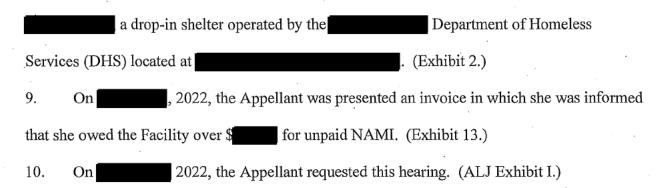
Has Hudson Pointe at Riverdale Center for Nursing and Rehabilitation established that its determination to discharge the Appellant is correct and that its discharge plan is appropriate?

#### FINDINGS OF FACT

1. The Appellant is a year-old female who was admitted to the Facility on 2019 after a lengthy hospital stay. (Exhibits 1, E.)

<sup>&</sup>lt;sup>1</sup> Due to data size, the recording is divided into two files. Contains the first six hours, three minutes, and 58 seconds. Contains the subsequent and final seven minutes and 48 seconds. This decision refers only to testimony in the file entitled "Contains".





#### APPLICABLE LAW

A residential heath 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.
    - (a) The resident may be transferred only when the interdisciplinary care team, in consultation with the resident or the resident's designated representative, determines that:
      - (1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation 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

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are actually available and the resident refuses to cooperate with the facility in obtaining the funds;

The residential health care facility has the burden of proving that the discharge is necessary and that the discharge plan is appropriate. 10 NYCRR § 415.3(i)(2)(iii); State Administrative Procedure Act § 306(1).

#### DISCUSSION

This hearing was requested to contest both grounds for discharge set forth in the Facility's , 2022 discharge notice, as well as the proposed discharge plan. For reasons set forth below, the Facility has not met its burden of establishing either stated basis for discharge. On the issue of the Appellant's purported failure to pay for the cost of her stay, the record fails to establish that the Appellant was provided reasonable and appropriate notice of her financial obligation. By two DSS notices dated , 2022, the Facility was advised that the Appellant's Medicaid eligibility and corresponding budgeting was adjusted, retroactive to 2021, to reflect her long-term placement at a nursing home, thereby resulting in a NAMI obligation. Ms. Sammon, the Facility's Medicaid Coordinator, received these notices several days later. Director of Social Service Yaneika Olivo attempted to discuss payment with the She was accompanied by Ms. Sammon on Appellant on and (Exhibit 5.)

The hearing record contains no evidence that the Appellant was apprised of any personal financial obligation for the cost of her stay before . The first invoice provided to the Appellant is dated two days after the Facility issued the discharge notice to the Appellant alleging non-payment. (Exhibit 13.) Within a week after receiving the invoice, the Appellant agreed to have her Social Security benefits made payable directly to the Facility.

Because her retains Power of Attorney over her financial affairs, she is unable to access

her bank account to verify its balance and transfer any additional sums to the Facility. The Appellant is working with Adult Protective Services to assist her with revoking her legal status as Power of Attorney in order to address the outstanding amount and regain control of her finances. At this time, the only funds available to the Appellant are being paid to the Facility. She is paying current charges and is actively pursuing efforts to secure the additional funds to catch up on arrears which have taken her by surprise.

The \_\_\_\_\_\_\_, 2022 discharge notice also informed the Appellant that she was being discharged, in part, for her "welfare" because her needs cannot be met at the Facility. (Exhibit 2.) The Facility offered no documentation from a physician describing the Appellant's needs which could not be met, the efforts made to meet those needs, and the specific services the discharge location will provide to meet the needs which the Facility is unable to meet. 42 CFR § 483.15(c)(2); 10 NYCRR §§ 415.3(i)(1)(ii) and (iv); see also Department "Dear Administrator" Letter dated August 20, 2019 (DAL-NH 19-07) entitled "Notice of Transfer or Discharge and Permitting Residents to Return".

The Appellant explained that she had previously refused wound care on days in which her wounds were being treated by a provider outside of the confines of the facility. After she no longer received such outpatient care, she has accepted wound care at the Facility more frequently. She also receives Facility assistance with ADLs, including bathing daily after use of her bed pan in order to on her on her administration of over 20 medications.

(Exhibits 5, 6, 9, 11, E, F.) The Appellant's must be carefully applied under the supervision of a nurse to avoid fatal consequences. Her is monitored before she utilizes her prescribed and her blood pressure must be read before she is given ... (Exhibits E, F.) For all of these needs, the Appellant is fully accepting of Facility care.

Although not central to this case, given the Facility's failure to establish a basis for its discharge determination, the Facility has also failed to establish that its discharge plan, a drop-in shelter operated by DHS, is appropriate. The Appellant has a demonstrated need for assistance with ADLs, wound care, monitoring of blood pressure before authorizing use of medication, monitoring of before authorizing use of medication via and nursing supervision of the administration of her authorizing use of medication via preparation for the Appellant's discharge to the shelter system acknowledges that the Appellant would require at least 12 weeks of nursing service. (Exhibit E.) The proposed discharge plan fails to address the Appellant's medical needs and how these needs will be met after discharge.

# **DECISION**

Hudson Pointe at Riverdale Center for Nursing and Rehabilitation has not established that its determination to discharge the Appellant is correct and that the discharge plan is appropriate.

Dated: December 12, 2022 Menands, New York

> Natalie J. Bordeaux Administrative Law Judge