

cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan  
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**Department  
of Health**

**KATHY HOCHUL**  
Governor

**JAMES V. McDONALD, M.D., M.P.H.**  
Acting Commissioner

**MEGAN E. BALDWIN**  
Acting Executive Deputy Commissioner

January 9, 2023

**CERTIFIED MAIL/RETURN RECEIPT**

Kaitlin E. O'Brien, Esq.  
Harris Beach, PLLC  
99 Garnsey Road  
Pittsford, NY 14534

Stacy Bastion, NHA  
Absolut Care of Aurora  
292 Main Street  
East Aurora, New York 14052

██████████ ██████████  
c/o Absolut Care of Aurora  
292 Main Street  
East Aurora, New York 14052

**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,

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,

COPY

from a determination by

DECISION

**ABSOLUT at AURORA PARK**

Respondent,

to discharge her from a residential health care facility.

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Hearing Before: Jean T. Carney  
Administrative Law Judge

Held via: Cisco WebEx videoconference

Hearing Date: December 13, 2022  
Record closed on December 27, 2022

Parties: Absolut at Aurora Park, Respondent  
By: Kaitlin E. O'Brien, Esq.  
Harris Beach, PLLC  
kobrien@harrisbeach.com

██████████ ██████████ Appellant, *pro se*

## JURISDICTION

By notice dated [REDACTED], 2022, Absolut at Aurora Park (Facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] [REDACTED] (Appellant) from the Facility and place her in another residential care facility. The Appellant appealed the discharge determination to the New York State Department of Health (Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) § 415.3(i).

## HEARING RECORD

In support of its determination, the facility presented documents (Exhibits 5, 6, 8, 9, and 11)<sup>1</sup>; and the testimony of Anthony Sorrentino, Business Office Manager; and Tanya Ludwig, Discharge Planner. The Appellant testified in her own behalf and presented no documentary evidence. The Notice of Hearing with discharge notice, the resident face sheet, and correspondence with attachments dated [REDACTED] 2022 were admitted as ALJ I, II, and III respectively. The hearing was digitally recorded and made part of the record.

## ISSUES

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

## FINDINGS OF FACT

Citations in parentheses refer to testimony (T) and exhibits (Exh) found persuasive in arriving at a particular finding. Conflicting evidence, if any, was rejected in favor of

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<sup>1</sup> Facility proposed exhibits 1-4, 7, and 10 were marked for identification but not admitted into evidence.

cited evidence. An opportunity to be heard having been afforded the parties, and evidence having been duly considered, it is hereby found:

1. The Appellant is a [REDACTED]-year-old female who was admitted to the Facility for long term care on [REDACTED] 2020. (T Mr. Sorrentino; ALJ II).

2. The Appellant applied for Medicaid on [REDACTED] 2021, and was approved retroactively to [REDACTED] 2020. The Medicaid program calculated the Appellant's monthly contribution, also known as the Net Available Monthly Income (NAMI), for [REDACTED] 2020 to be \$ [REDACTED]. The Appellant was responsible for paying the entire amount charged by the Facility from her admittance in [REDACTED] 2020, until her Medicaid was approved in [REDACTED] 2020. The Appellant's NAMI was adjusted for the 2021 calendar year to \$ [REDACTED] total contribution per month. For the calendar year 2022, the Appellant's NAMI is calculated at \$ [REDACTED] per month. (Exhs 5, 6 and 8; T Mr. Sorrentino).

3. The Facility made numerous attempts to discuss the Appellant's financial obligations with her, and delivered invoices to her each month detailing the amounts owed. The Facility also sent the Appellant a year-end statement dated [REDACTED] 2022, detailing the amounts owed and the amounts paid since the date of her admission. The Appellant began making partial payments in [REDACTED] 2021; but has failed to make a full payment in any given month. As a result, her outstanding debt continues to increase. As of the date of the hearing, the Appellant had an outstanding balance due of \$ [REDACTED] (Exhs 8 and 9; T Mr. Sorrentino).

4. The Facility made referrals to at least 38 nursing homes in the same geographic area as the Facility; but the Appellant was not accepted at any of them. The only facility that accepted the Appellant is located outside the Appellant's preferred geographic area. (T Ms. Ludwig; ALJ III).

6. The Facility intends to discharge the Appellant to [REDACTED] in [REDACTED], New York. [REDACTED] is approximately a [REDACTED] hour drive from the facility. (ALJ I; T Ms. Ludwig and Ms. [REDACTED])

#### APPLICABLE LAW

A residential health care facility, also referred to as a nursing home, is a facility which provides regular nursing, medical, rehabilitative, and professional services to residents who do not require hospitalization. (Public Health Law §§ 2801[2] and [3]; 10 NYCRR § 415.2[k]).

Pursuant to 10 NYCRR § 415.3(i)(4)(b), a resident may be discharged when the resident has failed to pay for a stay at the facility after being given reasonable and appropriate notice. If a resident becomes eligible for Medicaid, the facility may only charge the amount allowed by Medicaid. (10 NYCRR § 415.3[i][4][b]).

The burden is on the Facility to prove by substantial evidence that the discharge is necessary, and the plan is appropriate. (10 NYCRR § 415.3(i)(2)(ii); New York State Administrative Procedure Act [SAPA] § 306[1]). Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact; less than preponderance of evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision. (*Stoker v. Tarantino*, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3<sup>rd</sup> Dept. 1984], *appeal dismissed* 63 N.Y.2d 649[1984]).

#### DISCUSSION

The Facility alleges that the Appellant has failed to pay for her stay after being given reasonable notice that payment is due. The proposed discharge location is another nursing home that will provide the same level of care. The Facility has presented

sufficient evidence that the Appellant's discharge is necessary, and the discharge plan is appropriate.

The evidence shows that the Appellant has incurred charges in excess of \$ [REDACTED]. The Facility provided the Appellant with sufficient notice of her obligation to pay, and the consequences of her failure to pay.

The Appellant testified that for a period of time, the facility's bills were being mailed to the Appellant's [REDACTED] who did not tell the Appellant about them. However, this is not supported by the evidence. The Appellant also testified that she would like to be discharged to her [REDACTED] but this does not appear to be a reasonable discharge plan given the Appellant's healthcare needs. The Appellant is adamantly opposed to being discharged to [REDACTED] because it is so far away, and her family will not be able to visit her.


In determining an appropriate discharge location, the Facility should make reasonable efforts to find a place within the resident's geographic area. The resident should be included in discharge planning, and her input taken into consideration. (10 NYCRR 415.11[d][3]). Here, the Appellant wanted to remain near her family, but she was not accepted at any of the nursing homes Ms. Ludwig contacted prior to the hearing. The record was left open to enable the Facility to contact more discharge locations in the Appellant's preferred geographic area. In all, the Facility contacted 39 nursing homes, and [REDACTED] was the only one to accept the Appellant.

The Facility has established that its determination to discharge the Appellant was correct, and that transfer to a comparable facility is appropriate.

DECISION

1. The Facility has shown that the Appellant's discharge is necessary.
2. The Facility may discharge the Appellant pursuant to the discharge notice dated [REDACTED], 2022.
3. This Decision may be appealed to a court in the appropriate jurisdiction.
4. This Decision shall become effective upon service to the parties.

**DATED: Albany, New York  
January 9, 2023**

  
**JEAN T. CARNEY**  
**Administrative Law Judge**

**TO: Kaitlin E. O'Brien, Esq.**  
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