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Department of Health

KATHY HOCHUL
Governor

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

JOHANNE E. MORNE, M.S.
Acting Executive Deputy Commissioner

January 16, 2024

CERTIFIED MAIL/RETURN RECEIPT

██████████ ██████████
c/o Niagara Rehab & Nursing Center
822 Cedar Avenue
Niagara Falls, New York 14301

Barbara Stegun Phair, Esq.
Abrams Fensterman, LLP
3 Dakota Drive
Suite 300
Lake Success, New York 11042

Ashley Eason, NHA
Niagara Rehab & Nursing Center
822 Cedar Avenue
Niagara Falls, New York 14301

Mary Shaw, Ombudsman
People, Inc.
Long Term Care Ombudsman Program
2747 Main Street, 2nd Floor
Buffalo, New York 14214

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:
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

Niagara Rehabilitation and Nursing Center,

Respondent,

to discharge him from a residential
health care facility.

COPY

DECISION
AFTER
HEARING

Hearing before: Kathleen Dix
Administrative Law Judge
January 3, 2024
By WebEx Videoconference

Parties: By: Niagara Rehabilitation and Nursing Center
Barbara Stegun Phair, Esq.
Abrams Fensterman, LLP
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Suite 300
Lake Success, New York 11042

██████████ ██████████
c/o Niagara Rehabilitation and Nursing Center
822 Cedar Avenue
Niagara Falls, NY 14301

JURISDICTION

By notice dated [REDACTED] 2023, Niagara Rehabilitation and Nursing Center, (Respondent), a residential health care facility subject to Article 28 of the Public Health Law (PHL), determined to discharge / transfer [REDACTED] [REDACTED] (Appellant) from care and treatment in its facility. The Appellant appealed the determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes, Rules, and Regulations (NYCRR) Section 415.3(i).

The hearing was held on January 3, 2024, in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulations (CFR); and the New York State Administrative Procedure Act (SAPA); via Webex videoconference. (1h 37m.) Evidence was received and witnesses were examined. A digital recording of the hearing was made.

HEARING RECORD

ALJ Exhibits:

- I Notice of Hearing

Respondent's Exhibits:

1. Doctor's note dated [REDACTED], 2023
2. Occupational and Physical Therapy discharge summary
3. Bedside Kardex Report
4. Patient Review Instrument
5. IDT Discharge Instructions
6. Net Available Monthly Income (NAMI) Statements
7. Facility Invoice
8. Social Worker Note dated [REDACTED], 2023
9. [REDACTED] descriptive information

Appellant's Exhibit:

- A. Photographs of Appellant's [REDACTED] (10 pages)

Respondent's Witnesses:

1. Hongbiao Liu, M.D.
2. Derek Smaczniak, Director of Rehabilitation
3. Kathleen Wannemacher, Acting Director of Nursing/Director of Quality Assurance
4. Nicole Ramos, Business Office Assistant
5. Ebone Wedlington, Director of Social Services
6. Ashley Eason, Administrator

Appellant's Witnesses:

1. [REDACTED] Appellant

Also present:

1. Mary Shaw, Ombudsmen

ISSUES

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

FINDINGS OF FACTS

1. The Respondent, Niagara Rehabilitation and Nursing Center, is a residential health care facility, specifically a nursing home, within the meaning of PHL § 2801.2 and 10 NYCRR 415.2(k), located in Niagara Falls, New York.

2. The Appellant is a [REDACTED]-year-old male who was admitted to the Respondent's facility on [REDACTED] 2021. The Appellant was admitted to the facility with a primary diagnosis of [REDACTED] and additional diagnoses including an [REDACTED].

3. By notice dated [REDACTED], 2023, the Respondent advised the Appellant of its determination to discharge him on [REDACTED] 2024, on the grounds that his health has improved sufficiently that he no longer needs the services provided by the facility and because the Appellant has failed, after reasonable and appropriate notice, to pay for his stay at the Respondent's facility. (ALJ Exhibit I.)

4. The discharge notice advised the Appellant he would be discharged to [REDACTED], an Assisted Living Facility (T. Wedlington 45:02, ALJ Exhibit I.)

5. The Patient Review Instrument (PRI) dated [REDACTED] 2023, indicates that the primary payor for the Appellant is Medicaid. (Exhibit 4.)

6. The [REDACTED] County Department of Social Services (DSS) calculated the Appellant's required contribution toward the cost of his care at the Respondent's facility

under the Medicaid program based upon the Appellant's net available monthly income (NAMI). (Exhibit 7.)

7. The Respondent billed the Appellant monthly for his required contribution, *i.e.*, his "NAMI", and there is currently outstanding a balance of \$ [REDACTED] as of [REDACTED] 2024. (T. Ramos 34:22; Exhibit 7.)

8. The Appellant is independent in all activities of daily living and uses a wheelchair for mobility. (T. Liu 18:28, T. Smaczniak 27:00-27:42, T. Appellant 1:29:21; Exhibit 3.)

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

10. The Appellant remains at the Respondent's facility pending the outcome of this hearing.

APPLICABLE LAW

A residential health care facility (RHCF), or nursing home, 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. PHL § 2801; 10 NYCRR 415.2(k). Transfer and discharge rights of nursing home residents have been codified in PHL § 2803-z and set forth at 10 NYCRR 415.3(i) which provides, in pertinent part, that the facility shall:

(1) (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:

...

(2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by 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. 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

...

(vi) provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility, in the form of a discharge plan which addresses the medical needs of the resident and how these will be met after discharge, and provide a discharge summary pursuant to section 415.11(d) of this Title.

When alleging that a transfer or discharge is appropriate because the resident's health has improved sufficiently such that the resident no longer needs the services provided by the facility, the necessity of the transfer or discharge must be documented in the resident's medical record by the resident's physician. 10 NYCRR 415.3(i)(1)(ii)(a) and (iii)(b); 42 C.F.R. § 483.15(c)(2)(ii)(A).

The Respondent has the burden of proving that the discharge or transfer is necessary and that the discharge plan is appropriate. 18 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

Grounds for Discharge

As stated in the notice dated [REDACTED] 2023, the Respondent advised the Appellant of its determination to discharge him on [REDACTED] 2024, on the grounds that his health has improved sufficiently such that he no longer needs the services provided by the Respondent's facility and because the Appellant has failed, after reasonable and appropriate notice, to pay for his stay at the facility. (ALJ Exhibit I.)

Improved health

The Respondent asserts that the Appellant's health has improved so that he no longer requires skilled nursing services (ALJ Exhibit I). The Appellant, a [REDACTED]-year-old man, was admitted to the Respondent's facility on [REDACTED] 2021, following a [REDACTED]. (Exhibits

1 and 4). Hongbiao Liu, M.D., the Respondent's attending physician has provided routine primary care to the Appellant since 2021. (T. Liu 16:01-16:30.) Dr. Liu testified that the Appellant had a [REDACTED] secondary to [REDACTED] and received occupational and physical therapy at the facility; that he has seen the Appellant walk with the [REDACTED] and noted that the [REDACTED] doesn't fit the Appellant very well, and he understands that the Appellant currently does not use his [REDACTED]. (T. Liu 17:07-18:08.) Dr. Liu further testified that the Appellant uses his wheelchair for his activities of daily living which activities he can perform by himself. (T. Liu 18:28.) Dr. Liu described the status of the Appellant's current medical conditions, including that the wounds on the Appellant's [REDACTED], and opined that all the Appellant's medical treatment can be done on an outpatient basis. (T. Liu 18:37-22:27.) Finally, Dr. Liu testified that the Appellant is not in need of nursing home care and that an assisted living facility is a safe discharge plan. (T. Liu 22:43, 22:57.) Dr. Liu's December 24, 2023 report, which describes all of the Appellant's medical conditions as stable, is consistent with his testimony at this hearing. (Exhibit 1.)

Derek Smaczniak, the Director of Rehabilitation for the Respondent testified that the Appellant is completely independent and that the Appellant is able to perform all functional tasks independently from a wheelchair level. (T. Smaczniak 27:00-27:42.) Kathleen Wannemacher, the Acting Director of Nursing, testified that the only nursing care that the Appellant is currently receiving is dressing changes (to his [REDACTED]) three times per week, and that while the nurses bring the Appellant his medications, the Appellant is able to take his medications by himself. (T. Wannemacher 29:39-29:51.)

The Appellant's interdisciplinary care team has determined that the Appellant no longer needs nursing home care. (T. Liu 22:43, T. Smaczniak 27:56, T. Wannemacher 30:38, T. Eason 51:24.)

The Appellant testified that he doesn't believe his health has improved, that he has a lot of other health issues, has a [REDACTED] problem, has [REDACTED] and that he was just told he has a [REDACTED]. (T. Appellant 1:01:39, 1:01:44-1:02:00, 1:08:09-1:08:11, 1:13:31.) The Appellant contends that he needs more care at the Respondent's facility, that he doesn't think an assisted living facility can save his [REDACTED] if he gets sick while there, that his [REDACTED] is getting [REDACTED] and that he doesn't want his [REDACTED].

(T. Appellant 1:07:44-1:07:54, 1:09:46-1:10:00.) However, the Appellant also testified that the only care he receives at the facility is dressing changes and water pills for his [REDACTED] (T. Appellant 1:08:37-1:09:05.) The Appellant stated that he is "independent and can take care of himself". (T. Appellant 1:29:21.)

The Appellant was discharged from occupational therapy on [REDACTED] 2021, having achieved the "highest practical level", and was discharged from physical therapy in [REDACTED] 2022 as he refused treatment relative to use of his [REDACTED]. (Exhibit 2.) The Appellant independently uses a wheelchair for mobility. (T. Liu 18:28, T. Smaczniak 27:00-27:42.) The Appellant admits that he is independent with his activities of daily living. (T. Appellant.1:29:21.) The Appellant does need assistance for dressing changes for wounds on his [REDACTED], but this can be done on an outpatient basis. (T. Liu 22:11-22:27).

The Respondent has established that the Appellant is no longer in need of nursing home care.

Non-payment

Nicole Ramos, Business Office Assistant, testified that after the Appellant was admitted to the Respondent's facility, the Respondent applied for Medicaid on the Appellant's behalf, which was approved. (T. Ramos 32:23.) In accordance with his Medicaid approval, the Appellant is required to contribute to cost of his care (his NAMI). (Exhibit 6, T. Ramos 32:23.) The Appellant's only income is from Social Security. (Exhibit 6.) The Appellant's NAMI is an amount equal to his Social Security benefits, less [REDACTED], which the Appellant is allowed to keep. (Exhibit 6, T. Ramos 36:11.)

To facilitate the payment of the NAMI, the Respondent applied to Social Security several times to become the Appellant's representative payee whereby the Appellant's Social Security benefits would be paid directly to the Respondent but the Appellant "reversed it". (T. Ramos 32:46, 34:05.) Thus, the Appellant collects his Social Security benefits directly. The Appellant was billed monthly for his NAMI and Ms. Ramos explained the billing and mail procedures at the facility whereby the Appellant would have received monthly bills for his NAMI and which bills would show his outstanding balance. (T. Ramos 1:18:08-1:18:20.) Ms. Ramos testified that she saw

correspondence addressed to the Appellant from the Respondent, though she could not say what was in the envelope. (T. Ramos 1:18:41.) Ms. Ramos also testified that on several occasions she personally brought the Appellant a billing statement and tried to discuss the Appellant's outstanding balance with him; and that the last time she approached the Appellant a couple of months prior, he became very upset and closed a door in her face. (T. Ramos 32:10, 1:18:53-1:21:02.) As of [REDACTED] 2024, the Appellant owes the Respondent \$ [REDACTED] in back NAMI amounts for his stay and care at the facility. (Exhibits 6, 7; T. Ramos 13:23.)

The Appellant asserted that the Respondent withholds some of his mail, that he gets postcards and collections [notices] from a credit card, but he does not receive everything that is sent to him. (T. Appellant 1:22:29, 1:25:55.) The Appellant denied the receipt of monthly statements from the Respondent for the amount he owed but acknowledged receiving a statement in [REDACTED] 2023. (T. Appellant 59:36, 1:06:00, 1:10:29, 1:11:00.) The Appellant testified that he believed the balance shown on the [REDACTED] 2023 bill, which was about \$ [REDACTED] was incorrect as he believed Medicaid and Medicare were paying for his care, and that Medicaid should have been paying half of his NAMI. (T. Appellant 1:10:38-1:12:04). The Appellant stated that if he knew he had a balance owed, he would have paid part of it with his Social Security benefits. (T. Appellant 59:24, 1:05:52, 1:10:38.)

The Appellant testified that he does not feel it is right for the Respondent to take his Social Security income and leave him with only \$ [REDACTED] [per month] as he relies on his Social Security income for bills he has to pay, e.g., cell phone and internet. (T. Appellant 58:51, 1:01:23.) The Appellant stated that he uses his Social Security money to buy snacks for himself and the other residents as the food is not good at the facility and he shouldn't be forced to eat the facility's food. (T. Appellant 56:02, 57:37.)

Though the Appellant denies receipt of monthly bills from the Respondent and alleges that he was unaware he had an outstanding balance owed, these assertions are not credible. It is clear from the record that the Appellant was aware of his financial obligation to pay the NAMI amount set by DSS to the Respondent. The Appellant chose not to do so because he wanted to keep his Social Security benefits as he felt the \$ [REDACTED] per month allowance he would keep was insufficient for the Appellant to pay his bills and

buy snacks. Though the Appellant questioned the calculation of the amount of the balance shown on the [REDACTED] 2023 statement, the record reflects no legitimate basis upon which to dispute the amount due to the Respondent.

The Respondent has shown that it has provided reasonable and appropriate notice to the Appellant of the amounts due, and that the Appellant has failed to pay for his stay. Therefore, discharge for nonpayment is permissible.

Consequently, the Respondent has met its burden of establishing valid grounds for discharge. 10 NYCRR Section 415.3(h)(1)(i)(b).

Discharge Plan

The Appellant objects to the Respondent's discharge plan to refer him to a [REDACTED] because he would like to be closer to [REDACTED] New York. (T. appellant 11:50, 53:05.) The Respondent wants to be transferred to [REDACTED], an assisted living facility in [REDACTED] New York. (T. Eason 49:32-49:53, 52:56.) The Respondent did send a request to [REDACTED] but there was no bed available for the Appellant and/or [REDACTED] does not take wheelchair bound patients. (T. Appellant 12:05, T. Wedlington 47:45, T. Eason 49:32-49:53.) The Appellant has not identified other specific options for the Respondent to explore. (T. Appellant 11:50, 1:28:12-1:28:41.) The Respondent has agreed to look into other discharge options. (T. Eason 52:03.) There is no evidence that the Appellant has made significant effort of his own to develop a discharge plan. The Appellant is not entitled to remain in nursing home care he no longer requires. The Respondent's discharge plan is appropriate, and the Respondent is entitled to proceed with it.


The Respondent has developed an appropriate post-discharge plan of care for the Appellant that addresses his long-term care and medical needs and how they will be met after discharge, as required by 10 NYCRR 415.3(i)(1)(vi).

DECISION

Niagara Rehabilitation and Nursing Center has established that the discharge of the Appellant was necessary and that the discharge plan was appropriate.

1. Niagara Rehabilitation and Nursing Center is authorized to discharge the Appellant pursuant to the Notice of Discharge dated [REDACTED] 2023.
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: Menands, New York
January 16, 2024



Kathleen Dix
Administrative Law Judge

To: Niagara Rehabilitation and Nursing Center
Ashley Eason, Nursing Home Administrator
822 Cedar Avenue
Niagara Falls, NY 14301

[REDACTED]
[REDACTED]
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