



**Department  
of Health**

**ANDREW M. CUOMO**  
Governor

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

**SALLY DRESLIN, M.S., R.N.**  
Executive Deputy Commissioner

June 29, 2018

**CERTIFIED MAIL/RETURN RECEIPT**

Katerina M. Kramarchyk, Esq.  
Pullano & Farrow  
69 Cascade Drive, Suite 307  
Rochester, New York 14614

[REDACTED]  
C/o The Shore Winds  
425 Beach Avenue  
Rochester, New York 14612

Maggie Ganon, DSW  
The Shore Winds  
425 Beach Avenue  
Rochester, New York 14612

[REDACTED]

**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* / CAE  
James F. Horan  
Chief Administrative Law Judge  
Bureau of Adjudication

JFH: cac  
Enclosure

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

In the matter of an appeal, pursuant to  
10 NYCRR 415.3, by

[REDACTED]

Appellant,

from a determination by

**The Shore Winds, LLC,**

Respondent,

to discharge her from a residential  
health care facility.

**COPY**

**Decision  
After Hearing**

Hearing before:

John Harris Terepka  
Administrative Law Judge

Held at:

The Shore Winds  
425 Beach Avenue  
Rochester, New York 14612-2011

Hearing dates:

June 14 & 22, 2018

Parties:

The Shore Winds, LLC  
425 Beach Avenue  
Rochester, New York 14612-2011  
By: Katerina M. Kramarchyk, Esq.  
Pullano & Farrow  
69 Cascade Drive, Suite 307  
Rochester, New York 14614

[REDACTED]

The Shore Winds  
425 Beach Avenue  
Rochester, New York 14612-2011  
By: [REDACTED]

### JURISDICTION

The Shore Winds (the Respondent), a residential health care facility subject to Article 28 of the Public Health Law, determined to discharge [REDACTED] (the Appellant) from care and treatment in its nursing home. Pursuant to 10 NYCRR 415.3(h), the Appellant appealed the discharge determination to the New York State Department of Health.

### SUMMARY OF FACTS

1. Respondent The Shore Winds is a residential health care facility, or nursing home, located in Rochester, New York. Appellant [REDACTED] was admitted to the facility in [REDACTED] 2017.

2. The Appellant applied for Medicaid and was accepted effective [REDACTED] 2017. The [REDACTED], which processed her application, determined that the Appellant's net available monthly income (NAMI) as of [REDACTED] 2017 was [REDACTED]. This amount represents Social Security and pension income of the Appellant, which she is required to contribute for the cost of her nursing home care while Medicaid covers the balance. (Exhibit 8.)

3. The Appellant initially agreed to have her Social Security income paid directly to the Respondent as "representative payee." The Respondent received this portion of the NAMI, in the amount of [REDACTED] per month, from [REDACTED] through [REDACTED] 2017. Commencing in [REDACTED] 2017, the Appellant's [REDACTED] and designated representative, [REDACTED], arranged to have herself designated as the representative payee for the Social Security as well as pension income. The Appellant's pension and Social Security

income, in an amount sufficient to pay the NAMI, was thereafter paid to ██████████ who has failed to make any payments for the Appellant's care. (Exhibits 1, 8, 9.)

4. The balance owed by the Appellant to the Respondent as of ██████████ 2018, all attributable to her failure to pay the NAMI, was ██████████ (Exhibit 1.) The Respondent has repeatedly advised the Appellant and ██████████ of the outstanding bill, but they have made no payments.

5. By notice dated ██████████ 2018, the Respondent advised the Appellant that it had determined to discharge her on ██████████ 2018, on the grounds that she has failed, after reasonable and appropriate notice, to pay for her stay at the facility. (Exhibit 3.)

6. The Appellant continues to require nursing home care. The Respondent's discharge plan is to transfer her to ██████████ a nursing home in ██████████ offering a similar level of care to that provided at the Respondent's facility. ██████████ has agreed to admit her. (Exhibit 5.) The Respondent's discharge plan includes arrangements for transfer, medications, travel and other logistical assistance to be provided as needed. (Exhibit 6.)

7. The Appellant remains at The Shore Winds pending the outcome of this proceeding.

### ISSUES

Has the Respondent established that the transfer is necessary and the discharge plan appropriate?

### DISCUSSION

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 are set forth at 10 NYCRR 415.3(h). The Respondent relies on 10 NYCRR 415.3(h)(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.

The Respondent presented documents (Exhibits 1-9) and testimony from its collections manager, Matthew Reed, and director of social work, Maggie Gannon. The Appellant's [REDACTED] and representative [REDACTED] (Exhibit 2), her [REDACTED] [REDACTED], and [REDACTED] also appeared and testified. The Appellant was present but unable to meaningfully participate. A certified long term care ombudsman, [REDACTED] and health care advocates [REDACTED] and [REDACTED] [REDACTED] advised of the hearing through issuance of the discharge notice, also participated on the Appellant's behalf. A digital recording of the hearing was made. (6/14,19m; 6/22,1h25m.) The Respondent has the burden of proving that the transfer is necessary and the discharge plan appropriate. 10 NYCRR 415.3(h)(2)(iii).

The Appellant was admitted to The Shore Winds in [REDACTED] 2017 and accepted for Medicaid effective her date of admission. Because she has Social Security and pension

income, however, the Appellant has been responsible for a monthly contribution, the "net available monthly income" (NAMI), for the cost of her care. Her NAMI is in the amount of [REDACTED]. The Social Security benefit was initially paid to the Respondent as "representative payee" which meant that [REDACTED] per month of the NAMI was paid directly to the Respondent. The balance of the NAMI, attributable to the Appellant's pension income, has never been paid. In [REDACTED] 2017, [REDACTED] who was the representative payee for the Appellant's pension income, arranged to have herself designated instead of the Respondent as representative payee for the Social Security income as well. (Exhibit 9.) Since then no payments whatsoever have been made toward the Appellant's NAMI. (Exhibit 1; 6/22, 10-13m.)

The Respondent presented an account showing that the Appellant's balance due for care at its facility grew steadily from the date of admission in [REDACTED] 2017. (Exhibit 1.) The Appellant does not dispute the accuracy of the Respondent's accounting of the charges and the remaining balance owed. The evidence is uncontroverted and fully supports the Respondent's claim that the balance now due is in excess of [REDACTED] and is growing by [REDACTED] more each month.

The Appellant's family and the Respondent had been attempting to put into place arrangements that would enable the Appellant to return home. By [REDACTED] 2018, however, those plans had fallen through because adequate services and support could not be arranged and the outside service coordinator had "pulled out of the d/c plan." (Exhibit 4, page 3; 6/22, 23-24m, 35-38m.) Discharge home was therefore not an appropriate plan and the Appellant still required nursing home care. Five days later, the Respondent issued the notice of discharge and transfer to [REDACTED] (Exhibit 4.)

The responsibility for this situation lies squarely with the Appellant's [REDACTED] who, assuming responsibility for managing the Appellant's finances, caused all of the Appellant's income to be diverted to her and then completely failed to pay for her [REDACTED] care. The Appellant's income is in an amount sufficient to pay the NAMI, yet [REDACTED] has failed to apply any of it to the cost of her nursing home care, even after the [REDACTED] discharge notice was issued making her aware of the gravity of the situation.

The outstanding balance has not been paid nor has the Appellant's family evidenced any good faith effort to address it and enable the Appellant to remain at The Shore Winds. [REDACTED] acknowledged she receives the Appellant's monthly pension and Social Security income, in an amount sufficient to pay the NAMI, on or about the third of each month. (6/22, 1h22m.) The family received the notice of discharge, which advised them of the intended discharge and the reason for it, in [REDACTED] 2018. They nevertheless appeared at this hearing on June 14 and again on June 22, 2018, having received the Appellant's benefits in excess of [REDACTED] in early [REDACTED] and failed to pay or offer to pay even that amount. No explanation has been offered for this continuing failure to use the Appellant's income to pay for the Appellant's nursing home care. It is concluded that the Appellant's family has no intention of paying for the cost of her care at The Shore Winds. The Respondent has met its burden of establishing valid grounds for discharge pursuant to 10 NYCRR 415.3(h)(1)(i)(b).

With regard to the appropriateness of the discharge plan, there is no dispute that the Appellant continues to require the level of care provided by a nursing home. The Respondent proposes to transfer the Appellant to [REDACTED], another nursing home

providing a similar level of care to The Shore Winds. The Appellant did not dispute the testimony of the Respondent's director of social work, Maggie Gannon, that [REDACTED] is an appropriate nursing home offering an appropriate level of care. (6/22, 28m.) The Appellant's family's objection to the plan is that [REDACTED] is [REDACTED] miles from Rochester. The Appellant's [REDACTED] and other family members all live in the [REDACTED] area and the Appellant's [REDACTED] and representative [REDACTED] does not drive. (6/22, 50m, 59m.) In [REDACTED] the Appellant could hardly expect the same level of family contact evidenced, for example, by the appearance of three family members for both dates of this hearing.

There is no evidence that before issuing the discharge notice the Respondent made efforts to identify any nursing home for the transfer other than [REDACTED] a facility under the same ownership, in a remote discharge location, which has an empty bed. (6/22, 28m.) The Respondent's own discharge planner, Maggie Ganon, acknowledged that she was not involved in the issuance of the discharge notice. It was prepared by the Respondent's collections manager, Mr. Reed. Ms. Ganon did not know how the discharge location was identified even though he [REDACTED] progress note had documented an intention to follow up with discharge planning after the proposed return to home proved unworkable. (Exhibit 4, page 1.) She learned of the planned discharge location when it was identified by Mr. Reed, and she did not pursue any other discharge planning until after the notice was issued. (6/22, 14-18m, 38-43m.)

A nursing home must permit residents and their representatives the opportunity to participate in deciding where the resident will reside after discharge. 10 NYCRR 415.3(h)(1)(vii). This opportunity was not offered in this case until after the discharge



determination had been made with a discharge location already identified. (Exhibits 4, 5, 7.) For the most part this opportunity was only provided after the first day of this hearing. (6/22, 24m, 43m.)

Department regulations articulate an intention that nursing homes not be at arm's length with residents, but instead act to protect them:

The facility shall ensure that all residents are afforded their right to a dignified existence, self-determination, respect, full recognition of their individuality, consideration... and communication with and access to persons and services inside and outside the facility. The facility shall protect and promote the rights of each resident, and shall encourage and assist each resident in the fullest possible exercise of these rights. 10 NYCRR 415.3(a).

The Respondent's circumvention of its own discharge planner and resort to a remote but readily available nursing home bed placed expedience ahead of its responsibility to this vulnerable resident. The Respondent had already contacted [REDACTED] and arranged this transfer by [REDACTED] 2018. (Exhibit 5.) Some effort should have been made to avoid sending the Appellant so far away from her family except as a last resort. In this case it was the first resort.

The Appellant's family and health care advocates still maintain that their goal is to return the Appellant to her home. The hearing was adjourned from June 14 to 22 in order to permit the Appellant's family to work with the Respondent and the health care advocates to develop an alternative discharge plan. They were unable to put a safe plan in place by the second date of this hearing or to offer any specific evidence that such a plan is feasible and foreseeable. When the hearing continued on June 22, the Respondent also offered evidence of additional efforts to identify a nursing home in the Rochester area that would accept the Appellant. These efforts included contacting all local nursing

homes in which the Appellant's family expressed an interest, but failed to identify an available bed. (Exhibit 7; 6/22, 24m.)

Unfortunately, it is the Appellant's family, not the Appellant or the Respondent, that is primarily responsible for her predicament. They expect the Respondent to continue to provide care at The Shore Winds while indefinite plans to bring the Appellant home are considered. They do so while retaining the Appellant's own available resources intended to meet the undisputed and ongoing costs of that care.

The Respondent's responsibility is to provide a safe and appropriate plan of care upon discharge. A discharge plan providing a safe and appropriate level of care is in place. Given the family's continuing intransigence about meeting the Appellant's financial responsibilities from her own available resources, the proposed transfer to [REDACTED] a facility providing a similar level of care, meets the Respondent's discharge planning obligation.

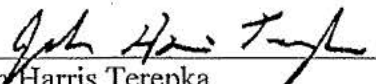
The discharge is granted, however the date of discharge will be stayed to [REDACTED] as requested by the health care advocates at the hearing, to allow alternative discharge efforts, which appear to be ongoing, to be more thoroughly explored. (6/22, 1h22m.)

**DECISION:** Respondent The Shore Winds has established valid grounds for the discharge of Appellant [REDACTED] and has established that the discharge plan is appropriate.

The Respondent is authorized to discharge the Appellant to [REDACTED] on or after [REDACTED] 2018.

This decision is made by John Harris Terepka, Bureau of Adjudication, who has been designated to make such decisions.

Dated: Rochester, New York  
June 27, 2018

  
John Harris Terepka  
Administrative Law Judge