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**Department of Health**

**KATHY HOCHUL**  
Governor

**MARY T. BASSETT, M.D., M.P.H.**  
Commissioner

**KRISTIN M. PROUD**  
Acting Executive Deputy Commissioner

March 10, 2022

**CERTIFIED MAIL/RETURN RECEIPT**

██████████ ██████████  
c/o Charles Lewis, Administrator  
Sunset Nursing and Rehabilitation Center  
232 Academy Street  
Booneville, New York 13309

Jason Atlas, Esq.  
Schwartz Sladkus Reich Greenberg Atlas  
444 Madison Avenue  
New York, New York 10022



**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,

Dawn MacKillop-Soller  
Acting Chief Administrative Law Judge  
Bureau of Adjudication

DXM: cmg  
Enclosure

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

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

██████████ ██████████  
Appellant,

from a determination by

Sunset Nursing and Rehabilitation Center,  
Respondent,

to discharge her from a residential health care facility.

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Decision

Before: Kimberly A. O'Brien  
Administrative Law Judge

Held at: Videoconference via WebEx

Date: March 9, 2022

Parties: ██████████ ██████████  
Sunset Nursing and Rehabilitation Center  
232 Academy Street  
Booneville, New York 13309  
By: Jason Atlas, Esq.

On [REDACTED] 2022, Sunset Nursing and Rehabilitation Center (Respondent or facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), issued a discharge notice stating that it determined to discharge [REDACTED] [REDACTED] (Appellant or resident) from the facility and the resident<sup>1</sup> appealed the discharge determination to the New York State Department of Health (Department) pursuant to Title 10 of the 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.

The facility offered one 14-page exhibit that includes "Statement"/Invoice and Medicaid Budget Letter with Net Available Monthly Income, and it was marked and admitted into evidence as Facility Exhibit 1. The ALJ admitted the Notice of Hearing, reschedule letter and the discharge notice, and marked it as ALJ Exhibit 1. Jessica Petrulis, Director of Social Work testified on behalf of the facility. The resident refused to participate in the hearing.<sup>2</sup>

#### FINDINGS OF FACT

1. The Appellant has been a resident at the facility since [REDACTED] 2019. (Exhibit [Ex.] 1 at pages 1)

<sup>1</sup> A notice of hearing and reschedule letter was sent to the resident and [REDACTED] [REDACTED] the resident's [REDACTED] and Power of Attorney (POA). Ms. [REDACTED] did not appear. During the March 2, 2022 prehearing conference, the facility indicated that it had worked with Ms. [REDACTED] to resolve this issue. Ms. [REDACTED] had arranged for the pension checks to go to the facility, but the resident then redirected the checks back to herself.

<sup>2</sup> The resident was present for the prehearing conference and left just as the hearing was about to begin. A recess was taken. The resident told Ms. Petrulis that she intended to sign over the pension checks to the facility and that she would not return to participate in the hearing.

2. The Appellant began receiving Medicaid coverage in [REDACTED] 2019 and is responsible for paying her net available monthly income (NAMI) to the facility which includes her Social Security and pension benefit. The facility has regularly communicated with the Appellant about her responsibility to pay the pension benefit to the facility and she has been advised about the outstanding NAMI balance. (Testimony [T.] Petrusis; Ex. 1 at pages 1- 14)

3. The Appellant has not paid her pension benefit to the facility and owed approximately \$ [REDACTED] as of [REDACTED] 2022. (T. Petrusis; Ex. 1 at pages 1-4)

4. The [REDACTED] 2022 Transfer/Discharge Notice (discharge notice) states that the transfer/discharge is necessary because the Appellant after reasonable and appropriate notice has failed to pay for her stay. (T. Petrusis; ALJ Ex. 1)

5. The facility has proposed to transfer/discharge Appellant to another nursing home, [REDACTED]. (T. Petrusis; ALJ Ex. 1)

6. The Appellant has remained at the facility during the pendency of the appeal (ALJ Ex. 1)

#### 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 415.3(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).

#### ISSUES

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

#### DISCUSSION

The hearing was originally scheduled to proceed on March 2, 2022. There was extensive prehearing discussion. It was made clear to the resident that her NAMI includes her monthly pension benefit and that it must be paid to the facility. The hearing was adjourned to March 9,

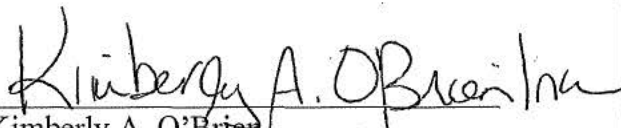
2022 to give the parties an opportunity to explore settlement. The prehearing discussion on March 9, 2022 revealed nothing new. The ALJ advised the parties that the hearing would go forward; that the facility has shown it provided reasonable and appropriate notice and the resident has failed to pay for her stay; and that the proposed discharge plan is appropriate, as it is available and provides the same level of care. (See FOF 1-5)

### DECISION

Respondent has established that its determination to discharge the Appellant was correct, and that its transfer/discharge location is appropriate.

1. Respondent is authorized to discharge the Appellant in accordance with its [REDACTED] 2022 discharge notice on or after [REDACTED] 2022.
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  
March 10, 2022

  
Kimberly A. O'Brien  
Administrative Law Judge

To: [REDACTED]  
C/o Charles Lewis, Administrator  
Sunset Nursing and Rehabilitation Center  
232 Academy Street  
Booneville, New York 13309

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Schwartz Sladkus Reich Greenberg Atlas  
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[REDACTED]