



**Department
of Health**

ANDREW M. CUOMO
Governor

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

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

February 21, 2018

CERTIFIED MAIL/RETURN RECEIPT

Ben Messam, DSW
Brookside Multicare Nursing Center
7 Route 25A
Smithtown, NY 11787

Jason Atlas, Esq.
Schwartz Sladkus Reich Greenberg Atlas, LLP
270 Madison Avenue
New York, NY 10016

[REDACTED] Appellant
C/o Ben Messam, DSW
Brookside Multicare Nursing Center
7 Route 25A
Smithtown, NY 11787

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 /CAC
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

██████████ Appellant,

from a determination by

BROOKSIDE MULTICARE NURSING CENTER, Respondent,

to discharge her from a residential health care facility.

COPY

DECISION
AND
ORDER

A Transfer /Discharge Notification, was issued to ██████████ “resident”) by Brookside Multicare Nursing Center (“facility”). The resident appealed the facility’s proposed transfer/discharge. The pre-transfer/discharge hearing was held before Kimberly A. O’Brien, Esq., Administrative Law Judge (“ALJ”), on January 19, 2018, at Brookside Multicare Nursing Center, Smithtown, New York.¹

The Facility was represented by Jason Atlas, Esq. The Resident appealed the transfer/discharge on her own behalf.² The Hearing was held in accordance with the Public

¹ The hearing was originally scheduled to take place on January 5, 2018. The January 5th date was agreed to by the parties on a December conference call. On or about January 2, 2018, the resident contacted the ALJ’s office to request an adjournment because she had a medical appointment, but she withdrew the request when the facility agreed to coordinate transportation to the late afternoon appointment. Ultimately, due to a weather forecast for a major snow storm, the facility requested and the resident consented to an adjournment. The matter was adjourned to January 19, 2018.

² In the late afternoon on January 18th, the resident contacted the ALJ’s office to request an adjournment because she did not have transportation. The ALJ was in transit to the hearing and could not be reached, but the ALJ’s office notified the facility of the resident’s request. When the ALJ arrived at the facility on the morning of the 19th, she was told that the resident was refusing to appear at the hearing; she said she was not feeling well. The facility physician examined the resident on both the evening of the 18th and on the morning of the 19th and determined that the resident was well enough to participate in the hearing. Ultimately, the resident agreed to appear, via speaker phone in her room, and with the support and assistance of the facility administrator and her social worker, both remained with the resident throughout the hearing. The resident was provided with copies of the facility exhibits.

Health Law of the State of New York; Part 415 of Volume 10 of the New York Code of Rules and Regulations (“NYCRR”); the United States Code of Federal Regulations (“CFR”) 42 CFR Subpart E (§§431.200 - 431.246) and 42 CFR Part 483; the New York State Administrative Procedure Act; and 10 NYCRR Part 51.

Evidence was received, witnesses were sworn or affirmed and examined. The following individuals were present at the hearing: Ben Messam, Director of Social Work; Elsie Rivera, Social Worker; Rosalie Reyes, BSN, RN, Assistant Director of Nursing; Jeryle Lohan, Fiscal Director; Carol Cicchetti, Fiscal Coordinator; Bobby Thariath, Administrator; Jason Atlas, Esq., Facility Counsel; and [REDACTED] Resident. A digital recording of the proceeding was made.

STATEMENT OF THE CASE

The facility’s [REDACTED] 2017 transfer/discharge notice states that the resident has not paid for her stay. The facility proposes to transfer/ discharge the resident to a [REDACTED] facility [REDACTED] Nursing & Rehabilitation, [REDACTED] [ALJ Ex. 1 *NOH & Transfer/Discharge Notice*]. The Resident is aware of the facility’s assertions and appealed her transfer/discharge. The facility shall have the burden of proof and must show that the transfer/discharge is necessary and the transfer/discharge plan is appropriate, 10 NYCRR §415.3(h)(2)(ii).

FINDINGS OF FACT

1. The resident was originally admitted to the Facility on or about [REDACTED] 2014 [Facility Ex. 1 – *Resident Face Sheet*].
2. The resident is alert, oriented and able to make her needs known. The resident schedules her own medical appointments in the community including regular wound care treatments, but she requires residential skilled nursing services [Testimony of Ms. Reyes, Mr. Messam, and

Resident].

3. A portion of the resident's stay at the facility is covered by Medicaid [Facility Ex. 2 – *Billing*; Testimony of Ms. Cicchetti and Ms. Lohan].

4. The Medicaid Program determined that the resident is required to pay the facility her Net Available Monthly Income (“NAMI”) [Facility Ex. 2 – *Billing*].

5. Since the resident's admission to the facility in [REDACTED] 2014, the resident has paid the facility approximately [REDACTED]. The balance due and owing to the facility in [REDACTED] 2018 was in excess [REDACTED] [Facility Ex. 2 – *Billing*].

6. The facility has made reasonable efforts to notify the resident of the outstanding balance, and the facility has explained to the resident that her NAMI must be paid to the facility [Facility Ex. 1- *Discussion Notes*, Ex. 2- *Billing*; Testimony of Ms. Cicchetti and Ms. Lohan].

7. [REDACTED] Nursing & Rehabilitation, [REDACTED] [REDACTED] is a residential skilled nursing facility. [REDACTED] is an appropriate transfer discharge location [Testimony of Ms. Reyes and Mr. Messam].

DISCUSSION

A portion of the resident's stay at the facility is covered by Medicaid. Pursuant to 10 NYCRR §415.3(h)(1)(i)(b), non-payment is a permissible basis for discharge provided that the charges are allowable under Medicaid and the facility has given the resident reasonable and appropriate notice that payment is due.

December 2017 Conference Call

In December 2017, the ALJ held a lengthy conference call with the parties (“call”). The resident acknowledged that in [REDACTED] of 2017 she received a facility transfer/discharge notice; that she has an outstanding balance; and that she receives her NAMI on or about the 3rd

day of each month. The resident does not dispute that she has an outstanding balance due to the facility, but she believes that the facility has failed to consider her request to set up a payment plan. The resident said that she cannot pay the facility her full NAMI each month because she is paying off a [REDACTED] that she received from a [REDACTED] who does not accept Medicaid ("private [REDACTED]"). She also said that she needs to save her future NAMI payments so she can pay for future [REDACTED] work and live independently in the community.

During the call, the facility agreed to follow up on her concerns about a specific Medicaid approved [REDACTED] that provided services to her at the facility; provide the resident with access to a different [REDACTED] in her Medicaid plan ("plan [REDACTED]"); and coordinate with the resident to arrange to have her plan [REDACTED] consult with the private [REDACTED] about [REDACTED] work already received and discuss any future [REDACTED] work that might be necessary. The facility acknowledged that the resident's application for a "community housing program" was accepted, but the resident still requires nursing home care and placement in community housing is a long process that can take years. Mr. Atlas, facility counsel, said that the facility might be willing to withdraw its discharge notice, but only if the resident began paying her NAMI to the facility each month.

January 19, 2018 Hearing

At the January 19th hearing, the resident acknowledged that she has an outstanding balance due and owing to the facility; she confirmed that she did not pay her [REDACTED] NAMI to the facility; and she will not pay for her stay until after she leaves the facility and is living in the community. While the resident does not have family in Suffolk County, she does not want to leave her local medical providers, and she wants to live independently in the community.

The facility's fiscal representatives testified that the resident is aware that she has an outstanding bill, and that she is aware that she is required to pay her NAMI to the facility each

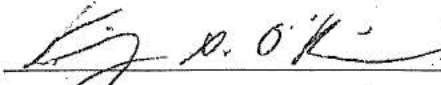
month [FOF 3-6]. Mr. Atlas, facility counsel, told the resident that if she would change her mind and agree to pay her NAMI to the facility each month, he still might be able to get the facility to agree to allow her to stay. The resident's caregivers testified that the resident still requires residential skilled nursing services; that [REDACTED] is a residential skilled nursing facility that can meet the resident's needs and the outpatient clinic where the resident receives regular wound care treatments is much closer to [REDACTED] and that the resident has skilled needs and cannot be safely discharged into the community [FOF 1, 2 & 7].

At the conclusion of the hearing, the ALJ denied the resident's appeal and ruled on the record that the facility has met its burden in showing that the resident, after reasonable notice, has failed to pay for her stay; and that [REDACTED] is an appropriate transfer/discharge location. If the parties have not reached a post-hearing settlement or if the facility has not already transferred/ discharged the resident, it may do so in accordance with this Decision & Order.

ORDER

1. The appeal by [REDACTED] is **DENIED**;
2. The facility is authorized to transfer/ discharge [REDACTED] to [REDACTED] [REDACTED] Nursing & Rehabilitation, [REDACTED] [REDACTED] in accordance with this Determination & Order;
3. This Order may be appealed to a court of competent jurisdiction pursuant to the New York Civil Practice Law and Rules; and
4. This Order shall be effective on service on the parties.

DATED: Albany, New York
February 16, 2018



KIMBERLY A. O'BRIEN
Administrative Law Judge

[REDACTED] Appellant

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