



# Department of Health

ANDREW M. CUOMO  
Governor

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

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

August 27, 2019

## CERTIFIED MAIL/RETURN RECEIPT

Cheryl Unterborn, NHA  
The Shore Winds  
425 Beach Avenue  
Rochester, New York 14612

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c/o The Shore Winds  
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**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,

James F. Horan  
Chief Administrative Law Judge  
Bureau of Adjudication

JFH: cmg  
Enclosure



### JURISDICTION

The Shore Winds (the Respondent), a residential health care facility subject to Article 28 of the Public Health Law, determined to discharge Dennis O'Brien (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.
2. Appellant [REDACTED], age [REDACTED] was admitted to the facility on [REDACTED] 2018. His diagnoses include [REDACTED], and he is wheelchair bound. (Exhibit 6, pages 5-6; Exhibits B, D.) The Appellant signed his admission agreement and acts as his own representative. (Exhibit 2; 1h38m.) He has no designated representative or power of attorney and manages his own financial affairs.
3. The Appellant applied for Medicaid. By notice dated [REDACTED], 2018, the [REDACTED] County Department of Human Services, which processed his application, approved nursing home coverage effective [REDACTED] 2018. (Exhibit E, page 13.)
4. The [REDACTED] Medicaid determination advised the Appellant that his net available monthly income (NAMI) was \$ [REDACTED] in [REDACTED] 2018 and \$ [REDACTED] for the period [REDACTED] through [REDACTED] 2018. (Exhibit E, page 14.) This amount represented social security and disability income of the Appellant, which he was required to contribute each month for the cost of his nursing home care while Medicaid covered the balance. The Respondent billed him for these charges on [REDACTED], 2018. (Exhibit 3, page 27.) By

notice dated [REDACTED], 2019 the County corrected an error in its budget calculations, retroactively reducing the [REDACTED] NAMI to \$ [REDACTED] and the [REDACTED] through [REDACTED] 2018 NAMI to \$ [REDACTED] (Exhibit E, pages 54, 64.)

5. The Appellant failed to make any payments for his care from his admission in [REDACTED] through [REDACTED] 2018. His charges for care during that time, attributable to his NAMI obligation, are \$ [REDACTED]. His remaining unpaid balance for these charges is \$ [REDACTED] (Exhibit 3, page 1.)

6. The Appellant's disability income ended on [REDACTED] 2018, and his NAMI was accordingly adjusted down to \$ [REDACTED] effective [REDACTED] 2018. (Exhibit E, page 63.) The Appellant began to pay this NAMI amount to the Respondent beginning in [REDACTED] 2018, and eventually designated the Respondent as representative payee for his social security income. His ongoing charges at The Shore Winds have been fully paid in this manner since [REDACTED] 2018. (Exhibit 3, page 1.)

7. The Respondent issued monthly statements to the Appellant beginning in [REDACTED] 2018 that consistently showed a balance due for his care. (Exhibit 3.) The Respondent repeatedly advised the Appellant in direct conversation, by issuing written monthly statements, and by collection letter dated [REDACTED], 2019 that he was in arrears on the charges for his care. He has failed to pay the \$ [REDACTED] in charges owed for the period [REDACTED] through [REDACTED] 2018. (Exhibit 4; Testimony of Reed, Ganon; Exhibit A, page 10.)

8. By notice dated [REDACTED], 2019, the Respondent advised the Appellant that it had determined to discharge him on [REDACTED] 2019, on the grounds that he has failed, after reasonable and appropriate notice, to pay for his stay at the facility. (Exhibit 1.)

9. The Appellant continues to require nursing home care. (1h15m.) The Respondent's discharge plan is to transfer him to [REDACTED], a nursing home in [REDACTED] offering a similar level of care to that provided at the Respondent's facility. [REDACTED] has agreed to admit him. The Respondent has also more recently identified a nursing home in [REDACTED] [REDACTED] that has agreed to admit him if he prefers that facility. (1h16-19m; Exhibit 6.) The Respondent's discharge plan includes arrangements for transfer, medications, travel and other logistical assistance to be provided as needed. (Exhibits 5, 6.)
10. The Appellant remains at The Shore Winds pending the outcome of this proceeding.

#### ISSUES

Has the Respondent established grounds for discharge and an appropriate discharge plan?

#### 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:

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 1-6) and testimony from its collections manager, Matthew Reed, and director of social work, Maggie Ganon. The Appellant presented documents (Exhibits A-E) and testified. His [REDACTED] and a certified long term care ombudsman, Linda Weissegger, also testified on the Appellant's behalf. A digital recording of the hearing was made. (2h53m.) The Respondent has the burden of proof that the discharge or 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] 2018 and accepted for Medicaid effective the date of admission. Since [REDACTED] 2018 he has paid his ongoing charges (Exhibit 3, page 1.) The unpaid charges on which this discharge is based are attributable to his first four months at The Shore Winds, when he was receiving both social security and disability income yet failed to pay anything to the Respondent.

The Appellant's failure to pay his charges during the first two months of his stay is understandable. The Respondent was not expecting him to pay while they were waiting for the Medicaid determination that would establish his NAMI contribution. The Medicaid approval, however, was issued on [REDACTED] 2018. (Exhibit E, page 13.) It advised him that his monthly NAMI obligation was \$ [REDACTED]. The Respondent promptly issued a statement on [REDACTED] that recalculated his account accordingly and advised him that he owed a balance of \$ [REDACTED] (Exhibit 3, page 27.) Although this

amount was eventually adjusted and reduced to \$ [REDACTED] (Exhibit 3, pages 9, 11; Exhibit E, page 64), the Appellant was never given any reason to believe that he would not have to pay anything for his nursing home care during these first four months.

The Appellant received both disability and social security income during the months of [REDACTED] through [REDACTED] 2018 in an amount sufficient to pay his charges, but by his own account spent all of it even after receiving the Medicaid determination and restated bill in early [REDACTED] (2h22-24m.) He did not pay anything to the Respondent until [REDACTED] 2018 when he began signing over his social security check to pay current charges. Between [REDACTED] 2018 and [REDACTED] 2019, he also made \$ [REDACTED] payments toward the arrears out of his monthly personal allowance, but he stopped paying even that in [REDACTED] 2019 (Exhibit 3, page 1), and testified that he has no resources with which to pay his past due charges. (2h15, 25m.)

The Appellant argues that while the amount due is not in dispute, this discharge is not authorized because he did not receive "reasonable and appropriate notice" of the charges as required under 10 NYCRR 415.3(h)(1)(i)(b). The admission agreement he signed stated:

You agree to remain personally liable for any cost of care determined not covered by any third-party payor including Medicare, Medicaid or any third-party insurance carrier... If the Resident is a Medicaid recipient... Resident expressly agrees to pay and hereby directs his/her Agents to pay Facility the amount specified in the NAMI Budget Letter as may be amended from time to time. (Exhibit 2, page 2.)

As the Appellant himself pointed out, he agreed at the time of admission to pay the charges for his stay not covered by Medicaid and expected that he would have to pay those charges out of his income. (1h40-41m.)

The Appellant's Medicaid budget was confusing but only in the sense that such documents generally are to persons unfamiliar with them. The budget changed several times, but such changes are also routine. (Exhibit E.) The budget calculations and changes are not attributable to the Respondent. They reflect the vicissitudes of the Medicaid application process and changes in the Appellant's income. The Respondent and the County, which processed his Medicaid application, notified him of the changes and corrections as they occurred, and the Respondent's monthly statements accurately reflected the status of his account when they were issued. (Exhibit E; Exhibit 3.) The Respondent did not take any steps to discharge the Appellant until [REDACTED] 2019, three months after his Medicaid coverage and charges were completely sorted out in [REDACTED] 2019 and one year after the charges first accrued. (Exhibit E, pages 53-54, 63-64.)

The balance that appeared on the Respondent's monthly statements varied from month to month. What did not change was notice that the Appellant was responsible for substantial charges not covered by Medicaid. The Appellant suggests that because there were several Medicaid budgeting determinations and changes, he did not understand the statements issued to him. If he did not understand these changes it does not follow that he is not responsible for the charges. The Medicaid notices and the Respondent's statements did not mislead at any time by suggesting that the Appellant owed the Respondent less than he undisputedly owes. To the extent the notices and statements were inaccurate to begin with they did not understate, they overstated his indebtedness to the Respondent.

The Appellant acknowledges that he nevertheless spent all of the approximately \$[REDACTED] in social security and disability income he received from [REDACTED] through [REDACTED]



2018, while he was receiving monthly statements showing significant charges for his care. As early as [REDACTED] 2018, a facility progress note records a social worker “was asked to speak [with] resident regarding financial concerns” and discussed the Appellant’s unpaid bill with him. (Exhibit A, page 10.) Mr. Reed spoke with him about it on multiple occasions, warning him in [REDACTED] 2018 that he had a balance due and that spending his income on other things could create a “future problem.” (0h29m.)

The Appellant faults the Respondent for not reaching out to the Appellant’s [REDACTED] or outside organizations who might try to assist him. As the Appellant is competent and is in charge of his own affairs, it was not the Respondent’s obligation to find someone to act for him without his involvement and consent. Facility progress notes going back to [REDACTED] 2018 not only show little evidence of family or any other interested person that the Respondent could have contacted, they demonstrate that the Appellant actively discouraged facility efforts to reach out to anyone on his behalf. (Exhibit A, pages 5, 19, 22, 34, 35.) Ms. Ganon pointed out that even when she engaged with him in [REDACTED] 2019 about discharge planning the Appellant still did not ask her to contact his family or anyone else. (1h32m.) The Appellant faults the Respondent but took no steps himself to reach out to anyone for assistance if he was confused about the bills he was receiving.

The Appellant also argues that the Respondent has failed to meet its burden of proving “the discharge or transfer is/was necessary” as required under 10 NYCRR 415.3(h)(2)(iii)(b). According to the Appellant, discharge is not necessary because it will not address the problem of his unpaid arrears and he is paying his current charges. This argument construes “necessary” as if it must mean “necessary in order to obtain payment of the arrears.” Even if discharge will not solve the payment issue, it is “necessary” in

the sense of authorizing the Respondent to terminate an admission agreement with a resident who has failed to comply with its terms. (Exhibit 2, page 4, par. 4.2.)

Regardless of what “necessary” might actually mean in this case, discharge is required to be necessary only when it is on grounds that the resident’s welfare and needs cannot be met after reasonable attempts at accommodation in the facility. 10 NYCRR 415.3(h)(1)(i)(a)(1). In this case, discharge is authorized by 10 NYCRR 415.3(h)(1)(i)(b), which provides that discharge for failure to pay the charges for a stay at the facility is “permissible.” It is not a reasonable interpretation of “necessary” in 10 NYCRR 415.3(h)(2)(iii)(b) to conclude that it allows a resident to run up a substantial bill while dispersing his income, and then avoid an otherwise permissible discharge by beginning to pay current charges. The Respondent has met its burden of establishing valid grounds for discharge pursuant to 10 NYCRR 415.3(h)(1)(i)(b). It is not alleging nor is it required to prove that discharge is also in some sense “necessary.”

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. (1h15m.) The Respondent’s [REDACTED] discharge notice proposed to transfer him to [REDACTED] [REDACTED] another nursing home providing a similar level of care to The Shore Winds.

A nursing home must permit residents the opportunity to participate in deciding where the resident will reside after discharge. 10 NYCRR 415.3(h)(1)(vii). The Appellant told the Respondent’s director of social work, Maggie Ganon, that he would prefer to remain in [REDACTED] Ms. Ganon accordingly worked with him to identify alternative discharge locations, and identified a nursing home in [REDACTED] that has offered to admit him. (1h16-19m; Exhibit 5, pages 3, 4, 7-8; Exhibit 6, page 1.)

While the Appellant testified that he would “prefer” to stay at The Shore Winds (2h12m), he did not dispute Ms. Ganon’s testimony that [REDACTED] and [REDACTED] are nursing homes that offer an appropriate level of care. (1h19-22m; Exhibits 5, 6.)

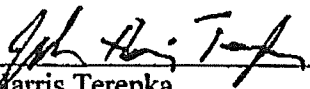
The Respondent’s responsibility is to provide a safe and appropriate plan of care upon discharge. A discharge plan providing a safe and appropriate level of care is in place. The proposed transfer to [REDACTED], a facility providing a similar level of care, or to [REDACTED] if the Appellant prefers that facility and a bed is available, meets the Respondent’s discharge planning obligation.

**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 in accordance with the [REDACTED] 2019 discharge notice.

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

Dated: Rochester, New York  
August 26, 2019

  
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John Harris Terepka  
Administrative Law Judge