

cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan
SAPA File
BOA by scan



Department of Health

ANDREW M. CUOMO
Governor

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

LISA J. PINO, M.A., J.D.
Executive Deputy Commissioner

May 7, 2021

CERTIFIED MAIL/RETURN RECEIPT

[REDACTED]
c/o Rochester Center for Rehab and Nursing
525 Beahan Road
Rochester, New York 14624

[REDACTED]

Michael Gestetner, Facility Administrator
c/o Rochester Center for Rehab and Nursing
525 Beahan Road
Rochester, New York 14624

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
Chief Administrative Law Judge
Bureau of Adjudication

JFH: cmg
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

Creekview Nursing and Rehabilitation Center

Respondent,

to discharge her from a residential health care facility.

COPY

DECISION

Before: Rayanne L. Babich
Administrative Law Judge (ALJ)

Date: April 6, 2021

Held at: Webex videoconference

Parties: ██████████ ██████████ Appellant
c/o Creekview Nursing and Rehabilitation Center
525 Beahan Road
Rochester, New York 14624

Michael Gestetner, Facility Administrator
Creekview Nursing and Rehabilitation Center¹
525 Beahan Road
Rochester, New York 14624

JURISDICTION

By notice dated ██████████ 2021, Creekview Nursing and Rehabilitation Center (Facility), a residential health care facility subject to Article 28 of New York Public Health Law (PHL), sought to discharge ██████████ ██████████ (Appellant) from the Facility. The Appellant and

¹ Upon the filing of the Appellant's appeal, the name of the Facility was Creekview Nursing and Rehab Center. At the time of hearing, the Facility's name had changed to Rochester Center for Rehabilitation and Nursing.

his representative, [REDACTED] [REDACTED] ([REDACTED]) were duly served with the Notice of Hearing pursuant to 10 NYCRR 51.3. The Appellant requested an appeal with the New York State Department of Health. 10 NYCRR 415.3(i). The hearing was held and in accordance with the PHL §2803; Part 415 of 10 NYCRR; Title 42, Part 483 of the United States Code of Federal Regulation (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR. The Facility was represented by Michael Gestetner, Administrator. The hearing was digitally recorded. Upon the written request of the Appellant's representative, a two-week adjournment was granted. The hearing was reset to April 6, 2021, but the representative did not appear.

RECORD

ALJ Exhibits: I – Letter with Notice of Hearing
II – Notice of Discharge dated [REDACTED] 2021

Facility Exhibits: 1 – Invoice Statements, [REDACTED] 2020 through [REDACTED] 2021
2 – Medicaid Authorizations for Short-Term Rehabilitation and Notices of Intent to Establish a Liability Toward Chronic Care, [REDACTED] 2019 through [REDACTED] 2021
3 – Email authored by Tracy Sugar, [REDACTED]; 2020; Admission Record; Fax cover sheets
4 – Progress note, [REDACTED] 2021

Appellant Exhibits: None

Facility Witnesses: Michael Gestetner, Facility Administrator
Tracy Sugar, Business Office Director
Christina Adams, Director of Social Work

Appellant Witnesses: None

FINDINGS OF FACT

1. Creekview Nursing and Rehab Center (now known as Rochester Center for Rehabilitation and Nursing) is a residential health care facility as defined under PHL §2801 (3). [Ex II.]
2. The Appellant is a [REDACTED]-year-old male who was admitted to the Facility on [REDACTED] 2019. The Appellant's medical conditions include [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. [Ex 4; R@31:34.] His current medications include [REDACTED], [REDACTED], [REDACTED], [REDACTED], aspirin, [REDACTED]. [Ex 4.]
3. The Appellant is wheelchair dependent and requires assistance and supervision to complete his activities of daily living. The Appellant can perform minor self-grooming tasks such as brushing his hair and teeth, and with reminders he is able to feed himself. He is not able to manage his own medications. [Ex 4; R@1:08:54, 1:14:09.]
4. The Appellant's representatives are his former [REDACTED] [REDACTED] [REDACTED] and his [REDACTED] [REDACTED]. [R@31:48, 56:59.]
5. The Appellant was admitted to the Facility for short-term rehabilitation services for physical therapy to obtain [REDACTED], and for custodial care, with a plan for him to return to his home in the community when his representatives were able to secure appropriate services in the home. [R@31:39, 1:06:58.]
6. At the time of admission, the Facility assisted with converting the Appellant's community Medicaid benefit to Medicaid's short-term rehabilitative services to cover his nursing home expenses. [Ex 2; R@32:25.]

7. Medicaid determines the Net Adjusted Monthly Income (NAMI) rate the Appellant must pay the Facility for each month services are provided. [R@36:18.] The Facility and Appellant's representatives entered into a verbal agreement that each month, the amount of \$ [REDACTED] would be paid to the Facility, and if the NAMI was more than \$ [REDACTED] the overage would be due under a payment plan to be established when the Appellant was discharged. [R@33:50.]
8. The Appellant's representatives were unable to obtain services in the community, and on or about [REDACTED] 2020, it was determined that Appellant's care would be converted to long-term care because he continued to require nursing home care. [Ex 4; R@32:05, 33:25.]
9. Medicaid determined that the Appellant's NAMI for [REDACTED] 2019 was \$ [REDACTED] [REDACTED] through [REDACTED] 2019 was \$ [REDACTED] [REDACTED] through [REDACTED] 2020 was \$ [REDACTED] and [REDACTED] 2020 through [REDACTED] 2021 is \$ [REDACTED] [Ex 2.]
10. On or about [REDACTED] 2021, the Facility advised the representative by telephone, U.S. mail and e-mail, that the Appellant was now responsible for the full NAMI payment each month based on his long-term care status as well as the overage amounts previously accrued. [Ex 3; 58:37, 59:15.]
11. Through his representatives, the total amount the Appellant has paid toward the cost of his care is \$ [REDACTED] and the remaining balance owed to the Facility is \$ [REDACTED] [Ex 1.]
12. On [REDACTED] [REDACTED], 2021, the Facility issued a Notice of Discharge stating "the transfer/discharge is being made as a result of your failure, after reasonable and appropriate notice, to pay for care in the facility or to have paid under Medicare or

Medicaid. Charges are not in dispute and Medicaid is not pending.” The discharge location is [REDACTED]

[REDACTED] [Ex II.]

13. The Appellant’s representatives continue to send payments each month for \$ [REDACTED] [Ex I; R@34:26.]

ISSUE

Has the Facility met its burden to show that its determination to discharge Appellant was proper due to nonpayment and whether the discharge plan is appropriate?

APPLICABLE LAW

1. A residential health care facility, or 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).

2. A transfer or discharge is 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...

10 NYCRR 415.3(i)(1)(i)(b). *See also* PHL §2803-z(1)(a).

3. In planning for discharge, a facility must:

(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; and

(vii) permit the resident, their legal representative or health care agent the opportunity to participate in deciding where the resident will reside after discharge from the facility.

10 NYCRR 415.3(i)(1)(vi)-(vii).

4. The Facility has the burden to prove that the discharge plan and location is safe and appropriate. 10 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

The Facility has proven by substantial evidence that the Appellant has failed to pay the outstanding balance owed to the Facility totaling \$ [REDACTED] and that its discharge plan to [REDACTED], a skilled nursing facility, is appropriate pursuant to 10 NYCRR 415.3(i).

Grounds for Transfer

The Appellant was admitted for short-term rehabilitation services and custodial care with the intention to return to the community, but his admission was converted to long term care when his family was unable to secure the necessary services in the community for the Appellant to return to his home. [R@31:39, 32:25.] The Facility is seeking to transfer the Appellant due to his failure to pay the outstanding balance and his representatives are refusing to pay the accruing charges. [Ex II.] A transfer or discharge is appropriate when, after notice, the resident has failed to pay for a stay at the facility, there is no dispute as to the funds owed and Medicaid benefits are not pending. 10 NYCRR 415.3(i)(1)(i)(b); PHL §2803-z(1)(a).

The Facility submitted an invoice showing the balance due of \$ [REDACTED] [Ex 1.] Tracy Sugar, Business Office Director, testified that upon admission, she assisted with converting the Appellant's Medicaid benefits to cover the cost of his anticipated short-term rehabilitation

services. [R@32:25.] The Facility entered into a verbal agreement to accept \$ [REDACTED] per month toward the cost of his care, and that any remaining balance of the Net Adjusted Monthly Income (NAMI) would be due under payment plan to be established once the Appellant was discharged.

[R@33:50.] Ms. Sugar also testified that the agreement was made in [REDACTED] 2019 because it was reported that the Appellant still had expenses related to his home in the community, to which he planned to return. [R@33:46, 38:20, 42:07.] The Appellant's representative began paying \$ [REDACTED] each month on in [REDACTED] 2020 and continues to pay this amount each month.

[Ex 1; R@34:26, 38:20.]

However, Ms. Sugar testified that on or about [REDACTED] 2020, the Appellant's admission would be converted to long-term care, and she informed the representatives that the full NAMI was due. [R@33:15, 35:55, 43:59, 1:30:36.] Ms. Sugar testified that she made several attempts to address the outstanding balance owed and provide various financial options as allowed by Medicaid with the Appellant's representatives, and although it was verbally agreed to participate in the process, they have failed to follow through. [Ex 3, R@34:08, 59:15; 1:31:11.] In addition, the monthly financial statements from the Facility, along with authorization and NAMI statements from Medicaid, have been sent by U.S. mail to the address on record for the Appellant's representatives. [R@58:37.]

Michael Gestetner, Administrator at the Facility, testified that multiple efforts were made to work with the Appellant's representatives to secure payment, but they were unwilling to abide by the agreement to pay or follow up with emails and telephone calls regarding payment. [R@1:21:25.] Their persistent refusal to cooperate also included not responding to the Facility's requests to disclose details concerning the sale of the Appellant's home in the community.

[R@1:22:45.]

While the Appellant's representative continues to pay \$ [REDACTED] each month, the Appellant's current NAMI is \$ [REDACTED] and this amount will continue to accrue. [Ex 2.] The Appellant's representatives failed to appear at the hearing to discuss these issues or to explain the reasons for their continued non-payment. The Facility is entitled to be paid for its services. I find the Facility has met its burden to show that the Appellant, despite reasonable and appropriate notice, has failed to pay for his stay at the Facility.

Discharge Plan

The Facility has met its burden to show that its discharge plan to transfer the Appellant to [REDACTED] is appropriate. [Ex II.]

The Appellant's attending physician, Vincent Yavorek, M.D., documented in the Appellant's medical record that the discharge location is appropriate for the Appellant because it is "similar to his current facility" and contains on-site primary care, physical, occupational and speech therapies, and has pharmacy and [REDACTED] services available. [Ex 4.] Dr. Yavorek further documented that "[REDACTED] [REDACTED] is very compatible to this facility and is able to meet his current medical and [REDACTED] needs. They are able to provide the same level of care he is currently receiving." [Ex 4.]

Christina Adams, Director of Social Work, testified that the Appellant continues to require nursing home care because he has [REDACTED] is wheelchair dependent and requires assistance and supervision with his activities of daily living, including bathing, dressing, toileting and transferring. [R@1:06:24, 1:08:44.] Due to his diagnosis of [REDACTED], the Appellant also receives [REDACTED] care through medications and support from social work and nursing staff. [R@1:06:43, 1:08:15.]

Ms. Adams completed seven (7) referrals to skilled nursing facilities who had available beds in the local area, but none accepted the Appellant because they did not have the resources to provide the [REDACTED] care the Appellant is currently receiving. [Ex 3; R@1:10:24, 1:17:46.]

Ms. Adams and Dr. Yavorek determined that the discharge location is suitable and appropriate for the Appellant because it will be able to provide the same services he is currently receiving.

[R@1:11:58.]

The Appellant and his representatives have ignored the Facility's efforts to discuss alternative discharge placement locations by not responding to several requests to attend discharge planning meetings and they have offered no other placement options. [R@1:05:46.]

I find the Facility has proven that the discharge plan is appropriate because the discharge location will be able to meet the Appellant's current needs.

ORDER

The Facility is authorized to discharge the Appellant to the location identified in the Notice of Discharge dated January 14, 2021, and in accordance with its discharge plan.

Dated: May 4, 2021
Albany, New York



Rayanne L. Babich
Administrative Law Judge

TO:

██████████ Appellant
c/o Rochester Center for Rehabilitation and Nursing
525 Beahan Road
Rochester, New York 14624

██████████
██████████
██████████

Michael Gestetner, Facility Administrator
c/o Rochester Center for Rehabilitation and Nursing
525 Beahan Road
Rochester, New York 14624