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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

June 7, 2022

CERTIFIED MAIL/RETURN RECEIPT

██████ ██████
c/o East Neck Nursing and Rehabilitation
134 Great East Neck Road
Room ██████
West Babylon, New York 11704

Keith Powers, NHA
East Neck Nursing and Rehabilitation
134 Great East Neck Road
West Babylon, New York 11704

Erika Verrill, Esq.
Nassau-Suffolk Law Services
1757 Veterans Highway/Suite 50
Islandia, New York 11798

Katie A. Barbieri, Esq.
225 Crossways Park Drive
Woodbury, New York 11797

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

-----X

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

██████████ ██████████

Appellant, :

from a determination by :

EAST NECK NURSING AND :
REHABILITATION CENTER :

:
Respondent, :

to discharge her from a residential health :
care facility. :

-----X

COPY

DECISION

Hearing Before: Sean D. O'Brien
Administrative Law Judge

Held via WEB EX

Hearing Date: June 2, 2022

Parties: East Neck Nursing and Rehabilitation
134 Great East Neck Road
West Babylon, New York 11704

By: Katie A. Barbieri, Esq.
225 Crossways Park Drive
Woodbury, New York 11797

██████████ ██████████ Resident

By: Erika S. Verrill, Esq.
Nassau-Suffolk Law Services
1757 Veterans Highway/ Suite 50
Islandia, New York 11798

JURISDICTION

By notice dated [REDACTED] [REDACTED] 2022, East Neck Nursing and Rehabilitation Center (the Facility), a residential health care facility subject to Article 28 of the New York Public Health Law, determined to discharge/transfer [REDACTED] [REDACTED] (the Appellant) from the Facility. The Appellant appealed the determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) Section 415.3(i).

HEARING RECORD

ALJ Exhibits: I Notice of Hearing and the Facility
Discharge Notice attached.

Facility Exhibits: 1-5

Facility Witnesses: Leslie Rosier, Business Manager
Keith Powers, Administrator
Michelle Konik, Social Worker
Jillian Bosinius, Director of Social Work
Dr. Natasha Tessonno, Attending physician

A digital recording of the hearing via WEB EX was made part of the record. The Appellant decided not to appear at the Hearing, but the Appellant's attorney, Erika S. Verrill Esq., appeared and participated in the Hearing.

ISSUE

Has the Facility met its burden of the proving the Appellant has failed to pay for her care and stay at the Facility and is the discharge plan appropriate for the Appellant?

FINDINGS OF FACT

Citations in parentheses refer to testimony (T) of witnesses and exhibits (Exhibit) found persuasive in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of cited evidence.

1. The Appellant is a competent [REDACTED] year old female with diagnoses that include [REDACTED]. The Appellant was admitted to the Facility on [REDACTED] [REDACTED] 2019, for long term care. (Exhibit 1; T Bosinius 26:00, T Tessonc 42:15, 45:16, T Konik 52:38).

2. During the period at issue, the Appellant's Net Available Monthly Income (NAMI) amount was set at [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] a month starting in [REDACTED] 2020. (Exhibits 1,2,3; T Rosier 17:40).

3. The [REDACTED] County Department of Social Services (DSS) determined the Appellant is required to pay [REDACTED] as the Appellant's portion of the NAMI for institutional care. The

NAMI is based on Appellant's monthly Social Security and a workers compensation award. Medicaid covers the balance of the Appellant's costs at the Facility. (Exhibits 1,2,3; T Rosier 19:17).

4. There is no appeal pending DSS' determination of Appellant's NAMI amount. (Exhibits 2,3; T Rosier 22:08).

5. The Appellant has failed to pay the full NAMI monthly amount to the Facility from [REDACTED] 2020 through [REDACTED] 2022 and [REDACTED] is now owed the Facility. (Exhibits 1, 2, 3; T Rosier 16:35).

6. The Facility notified the Appellant and her family members on several occasions by written notifications and verbal communications of the amount owed. However, no payments have been made on the balance the Appellant owes. (Exhibits 1, 2, 3; T Rosier 21:56, T Powers 1:08).

7. The Appellant still requires residential care, and the proposed discharge location is the only residential care facility willing to take the Appellant due to the Appellant's failure to pay the NAMI and the outstanding balance owed to the Facility. (Exhibits 4, 5; T Tessonno 44:00, T Bosinius 31:35, 34:11).

8. By notice dated [REDACTED], 2022, the Facility advised Appellant that it had determined to discharge the Appellant on the grounds of failure to pay the Facility after being given reasonable notice. The discharge location is [REDACTED] [REDACTED] [REDACTED] [REDACTED]. (Exhibits 4, 5 and ALJ Exhibit I, attached discharge notice; T Powers 13:10).

9. The Appellant remains at the Facility pending the outcome of this appeal.

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. Public Health Law Sections 2801(2)(3); 10 NYCRR Section 415.2(k).

A resident may only be discharged pursuant to specific provisions of the Department of Health Rules and Regulations (10 NYCRR Section 415.3[i][1]).

The Facility alleges the Appellant's discharge is permissible pursuant to 10 NYCRR Section 415(i)(1)(i)(b), which states in relevant part:

[T]ransfer and discharge shall be permissible when the resident has failed, after reasonable and appropriate notice, to pay for...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...

Under the hearing procedures at 10 NYCRR Section §415.3(i)(2)(ii), the Facility bears the burden to prove a discharge necessary and the discharge plan is appropriate. Under the New York State Administrative Procedures Act (SAPA) Section 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; less than preponderance of evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision, Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 (3rd Dept. 1984), appeal dismissed 63 N.Y.2d 649.

DISCUSSION

The Appellant was admitted to the Facility for long term care on [REDACTED] [REDACTED] 2019. (Exhibits 1, 3; T Bosinius 26:00, T Konik 52:38).

The [REDACTED] County Department of Social Services (DSS) determined the amount of the Appellant's NAMI to be paid to the Facility is [REDACTED] per month. (Exhibits 1,2,3; T Rosier 17:40). Due to the Appellant's failure to pay the NAMI amounts over the past twenty-three months the Facility states the amount the Appellant owes the Facility is [REDACTED] (Exhibits 1,2,3; T Rosier 16:35, 17:40).

There is no appeal pending before the DSS regarding the set NAMI amount. The NAMI amount is based on the Appellant's Social Security payment and a worker's compensation award. The Appellant understands the NAMI is to be paid to the Facility. (Exhibit 2; T Rosier 21:56, T Powers 1:08).

However, the Appellant and her family members have simply decided not to pay the Facility the Worker's Compensation award portion of the required NAMI amount. (T. Rosier 19:38, 21:56, T Powers 1:20).

The Facility has proven its determination to transfer/discharge the Appellant is correct due the Appellant's failure to pay the required NAMI amount after being given appropriate notices. The Appellant has decided not to pay the NAMI amount for her stay and care at the Facility. The Facility has met its burden of establishing valid grounds for discharge. 10 NYCRR Section 415.3(h)(1)(i)(b).

The Appellant, however, still needs the medical care of a residential care facility and the proposed discharge location is such a facility. The Facility attempted to find a closer Facility to her current location. However, due to the Appellant's continuing failure to pay her NAMI no other residential care facility closer to the Appellant's current location is willing to accept her. In addition, Adult Living Facilities are not appropriate discharge locations due to the Appellant not being independent in her Activities of Daily Living and her use of a wheelchair. Finally, the Appellant's family members are not discharge resources. (T Bosinius 31:35, T Tessono 41:36, 45:27 T Konik 51:34, 51:48, 53:28, 56:40).

CONCLUSION

East Neck Nursing and Rehabilitation Center has established that its determination to discharge/transfer the Appellant is

correct and the proposed discharge/transfer location is appropriate.


DECISION

The appeal by Appellant is therefore DENIED.

East Neck Nursing and Rehabilitation Center is authorized to discharge the Appellant in accordance with the Discharge Notice dated [REDACTED] 2022.

This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

DATED: Albany, New York
June 7, 2022


Sean D. O'Brien
Administrative Law Judge

To:

Keith Powers, Administrator
East Neck Nursing and Rehabilitation Center
134 Great East Neck Road
West Babylon, New York 11704

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