



**Department
of Health**

ANDREW M. CUOMO
Governor

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

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

September 7, 2018

CERTIFIED MAIL/RETURN RECEIPT

[REDACTED]
c/o Evergreen Commons Rehabilitation
& Nursing Center
1070 Luther Road
East Greenbush, New York 12061

Richard C. Lewis, Esq.
Hinman, Howard & Kattell, LLP
700 Security Mutual Building
80 Exchange Street
P.O. Box 5250
Binghamton, New York 13902

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

COPY

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

[REDACTED]

Appellant,

DECISION

from a determination by

EVERGREEN COMMONS REHABILITATION
AND NURSING CENTER

to discharge her from a residential health care facility.

Before: Tina M. Champion
Administrative Law Judge

Held at: Evergreen Commons Rehabilitation and Nursing Center
1070 Luther Road
East Greenbush, New York 12061

Date: August 28, 2018

Parties: [REDACTED]
By: Pro Se

Evergreen Commons Rehabilitation and Nursing Center
By: Hinman, Howard & Kattell, LLP
Richard C. Lewis, Esq., of Counsel

JURISDICTION

By notice dated [REDACTED] 018, Evergreen Commons Rehabilitation and Nursing Center (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to transfer/discharge [REDACTED] (the Appellant) from the Facility to another residential care facility. The Appellant appealed the transfer/discharge determination to the New York State Department of Health (the Department) pursuant to Title 10 of the New York Codes Rules, and Regulations (NYCRR) 415.3(h).

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.

Evidence was received and witnesses were examined. An audio recording of the proceeding was made.

HEARING RECORD

- ALJ Exhibits: 1 – Letter with Notice of Hearing and attached Notice of Discharge [REDACTED] (18)
- Facility Exhibits: 1 – Invoice [REDACTED] (18)
2 – Medicaid Application with bank account information [REDACTED] (18)
3 – Medicaid Decision [REDACTED] (18)
- Appellant Exhibits: None
- Facility Witnesses: Filomena Vigorito, Business Officer Manager
Kathleen Joy, Social Worker
Caitlin Sanzi, Director of Social Services
- Appellant Witnesses: Appellant testified on her own behalf

FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old female who was admitted to the Facility on [REDACTED] 2017. (Facility Ex. 2; T. Vigorito.)
2. Invoices for the Appellant's stay at the Facility were initially mailed to the Appellant's [REDACTED]. In or around [REDACTED] 2018, the Facility began mailing the invoices directly to the Appellant, and the business office manager also periodically provided the Appellant with the invoices in person and discussed them with her. (T. Vigorito.)
3. With assistance from the Facility, the Appellant applied for Medicaid on or around [REDACTED] 2018. (Facility Ex. 2; T. Vigorito.)
4. While assisting the Appellant with her Medicaid application, the Facility discovered that a significant amount of money had been transferred out of the Appellant's bank account since her admission to the Facility. (Facility Ex. 2; T. Vigorito.)
5. The Appellant is not eligible for Medicaid until [REDACTED] 2018, due to a "Transfer of Assets Penalty". (Facility Ex. 3.)
6. No payments have been made to the Facility by the Appellant. As of [REDACTED] 2018, the balance due to the Facility was [REDACTED]. (Facility Ex. 1; T. Vigorito.)
7. The Appellant has been provided notice of the balance owed on a periodic basis since in or around [REDACTED] 2018 and does not dispute the charges. (T. Vigorito, Farrell.)
8. The Appellant is "very independent" but needs assistance with medication management. She is able to ambulate on her own but receives showering assistance. She is considered to require "supervision level" care by the physical therapy department. (T. Sanzi.)
9. On [REDACTED] 2018, the Facility issued a transfer/discharge notice to the Resident which proposed transfer to [REDACTED] Rehabilitation and Nursing [REDACTED]. (ALJ Ex. I.)

10. The Notice of Transfer/Discharge states that the Appellant is being transferred/discharged for failure to pay and that charges are not in dispute. (ALJ Ex. I.)

11. The Appellant timely appealed the Facility's discharge determination and proposed discharge location.

12. The Appellant has remained at the Facility during the pendency of the appeal.

ISSUES

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

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[h][1].)

The Facility alleged that the Appellant's discharge is permissible pursuant to 10 NYCRR 415(h)(1)(i)(b), which states:

Transfer and discharge shall...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....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(h)(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.)

DISCUSSION

Reason for Discharge

The Facility has determined to discharge the Appellant and transfer her to another skilled nursing facility due to her failure to pay for her stay at the Facility. (ALJ Ex. I.)

The Appellant was admitted to the Facility on [REDACTED] 2017. The Appellant testified that she was unaware that she was going to the Facility at the time of admission and elaborated further during a telephone conference prior to the hearing that she thought her family was taking her to [REDACTED] when they brought her to the Facility.

Facility invoices for the Appellant's stay at the Facility were initially mailed to the Appellant [REDACTED] but in or around [REDACTED] 2018 the Facility began mailing the invoices directly to the Appellant due to lack of payment by the Appellant's [REDACTED] (T. Vigorito.) Ms. Vigorito, the Facility Business Office Manager, testified that she also personally provided the Appellant with the invoices periodically and discussed them with her. (T. Vigorito.) The Appellant testified that she did not know anything about what was happening with her finances and that she did not have her purse or checkbook with her at the Facility. (T. Farrell.)

The Appellant applied for Medicaid on or around [REDACTED] 2018, with assistance from the Facility. (Facility Ex. 2; T. Vigorito.) During this process, the Facility discovered that a significant amount of money had been transferred out of the Appellant's bank account since her admission to the Facility. (Facility Ex. 2; T. Vigorito.) The Facility discussed these transfers with the Appellant on multiple occasions and the Appellant denies having any knowledge of the transfers. (T. Vigorito, Joy, Sanzi, Farrell.)

The Facility's belief that the Appellant's family has taken significant advantage of her was discussed at length during a telephone conference with the parties on August 9, 2018, in person immediately prior to the hearing, and during the hearing itself. The Facility has maintained since the telephone conference on August 9, 2018, that they are willing to withdraw the Notice of Transfer/Discharge if the Appellant agrees to file a police report and consent to the appointment of a limited guardian for the purpose of civilly recovering the Appellant's funds and pursuing obtaining Medicaid benefits.

The Facility has called the local police on the Appellant's behalf in both the municipalities of the Facility and the Appellant's home, contacted Adult Protective Services for the Appellant, and repeatedly encouraged the Appellant to file a police report and to attempt to recover the funds that were transferred. Ms. Joy, the Facility Social Worker, has even driven by the Appellant's home in the community to check on its condition and status, which appeared to be maintained and lived in despite a prior assertion by the Appellant [REDACTED] to the Facility that the home was unlivable, [REDACTED] (T. Joy.) The Facility has demonstrated a genuine concern for the Appellant and both a desire and willingness to work with her to protect her interests. At the hearing the Facility indicated that it would again be contacting the police for the Appellant regarding more information it had just received regarding the Appellant's family members selling the Appellant's [REDACTED]

Medicaid has determined, due to a Transfer of Assets Penalty, that the Appellant is not eligible for Medicaid until November 18, 2018. (Facility Ex. 3.) The balance due to the Facility through July 31, 2018, [REDACTED] Facility Ex. 1; T. Vigorito.) As of the hearing date, the Appellant has been unwilling to pursue any attempts to recover of her funds.

Although seemingly from extremely unfortunate and disturbing circumstances, the evidence supports that the Appellant has failed to, after reasonable and appropriate notice, pay for her stay at the Facility. The charges by the Facility are not in dispute and the Appellant has refused to cooperate with the Facility in attempting to recover her funds that would enable her to pay the outstanding balance. The Facility has proven that transfer of the Appellant is permissible.

Discharge Location

The Facility has proposed transferring the Appellant to Bridgewater Center for Rehabilitation and Nursing (Bridgewater) in Binghamton, New York. (ALJ Ex. I.) Ms. Sanzi, the Facility Director of Social Services testified that the Appellant is "very independent" but needs assistance with medication management. She can ambulate on her own but receives showering assistance, and she is considered to require "supervision level" care by the physical therapy department. (T. Sanzi.)

[REDACTED] facility to Evergreen Commons Rehabilitation and Nursing Center. It is a skilled nursing facility, has a spot available for the Appellant, and is willing to accept her. The Facility's attorney represented that the Facility has identified two other possible locations to where it can transfer the Appellant, namely, [REDACTED] facility in [REDACTED] and a [REDACTED] facility in [REDACTED] [REDACTED] to Evergreen Commons Rehabilitation and Nursing Center.

The Appellant testified that she would rather stay in East Greenbush than go to [REDACTED] but provided no reason why [REDACTED] would be unable to meet her needs. (T. Farrell.) She testified that the extent of family or friend involvement is that she has [REDACTED] who visit her approximately once a month. (T. Farrell.)

The Facility has proven that its plan to transfer the Appellant to [REDACTED] is appropriate.

DECISION

Evergreen Commons Rehabilitation and Nursing Center has established that its determination to discharge the Appellant was correct, and that its transfer location is appropriate.

1. Evergreen Commons Rehabilitation and Nursing Center is authorized to discharge the Appellant in accordance with its discharge plan on or after [REDACTED] 2018.
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
September 6, 2018


Tina M. Champion
Administrative Law Judge

TO: [REDACTED]
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1070 Luther Road
East Greenbush, New York 12061

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