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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

August 20, 2020

CERTIFIED MAIL/RETURN RECEIPT

██████████
Utica Rehabilitation and Nursing Center
2535 Genesee Street
Utica, New York 13501

Krystal Wheatley Curley
Senior Program Coordinator
NYS Long Term Care Ombudsman Program
PO Box 210
Utica, New York 13502

Tracy Margott, Administrator
Utica Rehabilitation and Nursing Center
2535 Genesee Street
Utica, New York 13501

Abe Mostofsky
Director of Financial Operations
Personal Healthcare Management
20 Wood Court
Tarrytown, New York 10591

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

STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

[REDACTED]

Appellant,

from a determination by

UTICA REHABILITATION
& NURSING CENTER

to discharge her from a residential health care facility.

COPY

DECISION

Before: Tina M. Champion
Administrative Law Judge

Held at: Videoconference via WebEx

Date: July 29, 2020

Parties: [REDACTED]
Utica Rehabilitation & Nursing Center
2535 Genesee Street
Utica, New York 13501
By: Pro Se
Assisted by Krystal Wheatley Curley, Ombudsman

Utica Rehabilitation & Nursing Center
By: Abe Mostofsky, Director of Financial Operations
Personal Healthcare Management
20 Wood Court
Tarrytown, New York 10591

JURISDICTION

By notice dated [REDACTED], 2020, Utica Rehabilitation & Nursing Center (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [REDACTED] (the Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) 415.3(i).

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. A stenographic reporter prepared a transcript of the proceeding.

HEARING RECORD

ALJ Exhibits: 1 – Letter with Notice of Hearing and Transfer/Discharge Notice

Facility Exhibits: 1 – [REDACTED] 2018 Email Correspondence
 2 – [REDACTED] & [REDACTED] 2018 Email Correspondence
 3 – Payment Authorization
 4 – [REDACTED] 2020 Invoice
 5 – [REDACTED], 2020 Notice

Appellant Exhibits: A – Email with Payment Receipts

Facility Witness: Abe Mostofsky, Director of Financial Operations

Appellant Witnesses: Appellant testified on her own behalf

FINDINGS OF FACT

1. The Appellant is a female in her [REDACTED] who was admitted to the Facility in [REDACTED] 2017. (Testimony [T.] [REDACTED])
2. The Appellant has been receiving pension payments for some time. Her pension income was previously excluded from her required net available monthly income (NAMI) payments because of a pending legal guardianship proceeding. The guardianship proceeding ended in or around [REDACTED] 2020. (T. Mostofsky.)
3. On [REDACTED], 2020, the Medicaid Eligibility Unit at the [REDACTED] Department of Social Services (DSS) issued a notice to the Appellant advising her that her NAMI was recalculated due to her pension not being included in her income until the guardianship proceeding resolved. The total amount of the income adjustment is [REDACTED]. The notice specified that to make the adjustment, the Appellant's NAMI would increase from [REDACTED] to [REDACTED] effective [REDACTED] 2020. It further specified that the Appellant's NAMI will be [REDACTED] effective [REDACTED] 2020. (Facility Ex. 5.)
4. On [REDACTED], 2020, the Facility issued a Transfer/Discharge Notice to the Appellant which cited discharge to [REDACTED] on [REDACTED], 2020. (ALJ Ex. I.)
5. The Transfer/Discharge Notice states that the Appellant will be transferred as a result of the Appellant's failure, after reasonable and appropriate notice, to pay for her stay at the Facility. The Transfer/Discharge Notice specified that the Appellant's "account is in arrears of [REDACTED] for the month of [REDACTED] (ALJ Ex. I.)
6. The Appellant timely appealed the Facility's discharge determination and proposed discharge location.

7. On [REDACTED] 2020, the Facility issued an invoice showing amounts owed for [REDACTED] and [REDACTED] 2020 that totaled \$ [REDACTED]. (Facility Ex. 4.)

8. Subsequently on [REDACTED] 2020, the Appellant made two payments to the Facility. The payments were in the amounts of \$ [REDACTED] and \$ [REDACTED] (Resident Ex. A.)

9. 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[j][1].)

The Facility alleged that the Appellant's discharge is permissible pursuant to 10 NYCRR 415.3(i)(1)(i)(b), which states:

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.

10 NYCRR 415.3(i)(1)(vi) states that a facility must

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, subdivision (d) of this Title.

10 NYCRR 415.11(d)(3) requires that, when a facility anticipates discharge,

a post-discharge plan of care that shall be developed with the participation of the resident and his or her family, which will assist the resident to adjust to his or her new living environment and assure that needed medical and supportive service have been arranged and are available to meet the identified needs of the resident.

Under the hearing procedures at 10 NYCRR 415.3(i)(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 that the Appellant should be discharged due to her failure to pay her recently recalculated NAMI. It is undisputed that as of the hearing on this matter the Appellant owed the Facility \$ [REDACTED] less the two payments she made on [REDACTED] 2020. Pursuant

to 10 NYCRR 415(i)(1)(i)(b), the Facility can only discharge the Appellant for nonpayment if the Appellant had reasonable and appropriate notice of her obligation to pay.

Abe Mostofsky, Director of Financial Operations, testified that the Appellant had knowledge of the amount due to the Facility because she is listed as the addressee on the [REDACTED] 2020 DSS NAMI recalculation notice and because the Facility has a billing system that should have generated a monthly bill to the Appellant. Mr. Mostofsky conceded that he does not know whether the Appellant actually received the DSS notice or monthly invoices from the Facility for the months of [REDACTED] [REDACTED] and [REDACTED] 2020. Mr. Mostofsky cited to two chains of email correspondence from 2018, which do not include the Appellant, in support of the Facility's position that the Appellant had notice that her pension money would be included in the NAMI after resolution of the guardianship proceeding. Mr. Mostofsky also testified that he was told by the attorney in the guardianship proceeding that the Appellant had indicated that she had no intention of paying her pension income to the Facility. The email correspondence and testimony as to comments the Appellant may have made prior to payment becoming due is not probative or compelling and was not considered in making this determination.

The Appellant testified that she received the DSS notice on [REDACTED] 2020 when Tracy Margott, Administrator, and Jim Enos, Social Worker, hand-delivered it to her with the [REDACTED] 2020 Transfer/Discharge Notice. The Appellant testified that she then requested a bill detailing what she owed to the Facility. The Appellant further testified that the bill she requested and was provided on [REDACTED] 2020 was the only bill she ever received from the Facility.

The [REDACTED] 2020 DSS notice was mailed to the Appellant, and the Appellant acknowledged that she received a copy of it from the Facility on [REDACTED], 2020 along with the bill. I find this is sufficient to constitute reasonable and appropriate notice of the amount the Appellant owes to the Facility.

Notably, the Facility has offered to forgive any back amounts owed by the Appellant and withdraw its Transfer/Discharge Notice based on the Appellant's assertion that she no longer has the pension funds available, provided the Appellant prove the lack of funds by disclosing her last four months of bank statements. The Appellant adamantly refused to do so, and she is not required to share her bank statements with the Facility. However, she cannot simply remain at the Facility without paying or without proving that she does not have the funds available.

Discharge Location

There is no dispute that the Appellant continues to require skilled nursing care. The Facility has determined to discharge the Appellant to [REDACTED] [REDACTED] [REDACTED] another nursing home with whom the Facility has a relationship and that provides a similar level of care. Mr. Mostofsky testified that this location was selected after the Facility asked the Appellant where she wanted to go when discharged and the Appellant merely replied that she did not want to leave. Mr. Mostofsky testified that [REDACTED] [REDACTED] has beds that it wants to fill and is willing to assume the financial risk of not being paid by the Appellant. Mr. Mostofsky further testified, without particularity, that subsequent to selecting [REDACTED] as the discharge location and receiving resistance from the Appellant, the Facility sent referrals to other locations closer to Utica but none would accept the Appellant.

The Appellant testified that she does not want to move from Utica to [REDACTED]. She testified that she was recently hospitalized in Utica for over [REDACTED] weeks, that she had surgery, and that she has another upcoming surgery. The Appellant expressed concern about leaving the doctors involved in her care with her current medical issues. The Appellant also testified that her

██████████ who visited her every day prior to the COVID-19 pandemic, lives in the Utica area as well as her ██████████

While the Appellant's concern over being relocated to an area a significant distance from the doctors with whom she is familiar is understandable, the Facility has identified a discharge location that provides a level of care similar to that which the Appellant is currently receiving, the level of care the Appellant needs is not in dispute, and the Appellant has offered no evidence to rebut the Facility's determination that the Appellant's needs will be met in ██████████

The Appellant's concern of being separated by distance from her family is also understandable. However, Mr. Mostofsky's testimony that the Facility offered the Appellant an opportunity to participate in identifying a discharge location of her choosing and his testimony that the Facility subsequently sent referrals to nursing homes closer to Utica, although not particularized or substantiated by documentary evidence, was not disputed by the Appellant. The testimonial evidence supports that the Facility has complied with its obligation pursuant to 10 NYCRR 415.3(i)(1)(vi) and 10 NYCRR 415.11(d)(3).

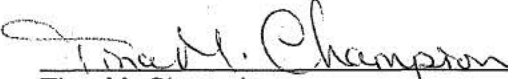
The proposed transfer to ██████████ meets the Facility's discharge planning obligation and its discharge plan is appropriate. Considering the significant distance from Utica to ██████████ and the lack of particulars provided by the Facility with respect to locating an appropriate location closer to Utica, the discharge shall be scheduled for at least three weeks from the date of this decision. During this time, the Facility is encouraged to meaningfully engage with the Appellant to identify another location for transfer that is closer to Utica and that is desirable to the Appellant. Similarly, the Appellant is encouraged to utilize this time period to actively participate in discussions with the Facility to improve her own outcome rather than merely rejecting the notion of discharge while at the same time refusing to pay her bill or prove that she no longer has the funds available.

DECISION

Utica Rehabilitation & Nursing Center has established that its determination to discharge the Appellant for nonpayment is necessary and the Appellant's discharge plan is appropriate.

1. The appeal by Appellant is therefore DENIED.
2. The Facility is authorized to discharge Appellant in accordance with the [REDACTED] 2020, Discharge Notice on or after [REDACTED], 2020.
3. 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: Menands, New York
August 19, 2020


Tina M. Champion
Administrative Law Judge

TO: [REDACTED] y
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