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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

December 3, 2021

## CERTIFIED MAIL/RETURN RECEIPT

██████████ ██████████  
c/o Archcare at Carmel Richmond Healthcare  
and Rehabilitation  
88 Old Town Road  
Staten Island, New York 10304

Barbara Sylvester, DSW  
Archcare at Carmel Richmond Healthcare  
and Rehabilitation  
88 Old Town Road  
Staten Island, New York 10304

Michael Fuller, CIDNY Ombudsman  
CIDNY  
841 Broadway, Suite 301  
New York, New York 10003

████████████████████  
████████████████████  
████████████████████

**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/cmj*

Dawn MacKillop-Soller  
Acting Chief Administrative Law Judge  
Bureau of Adjudication

DXM: cmj  
Enclosure

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

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COPY

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

██████████

Appellant,

Decision

from a determination by

Archcare at Carmel Richmond Healthcare and Rehabilitation Center,  
Respondent,

to discharge her from a residential health care facility.

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Before: Kimberly A. O'Brien  
Administrative Law Judge

Held at: Videoconference via WebEx

Date: December 1, 2021

Parties: ██████████  
Pro se /with support from Michael Fuller, CIDNY Ombudsman

Archcare at Carmel Richmond Healthcare and Rehabilitation Center  
88 Old Town Road  
Staten Island, New York 10304  
By: Barbara Sylvester, DSW

## JURISDICTION

On [REDACTED] 2021, Archcare at Carmel Richmond Healthcare and Rehabilitation Center (Respondent or facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), issued a discharge notice stating that it determined to discharge [REDACTED] [REDACTED] (Appellant or resident) from the facility. Appellant appealed the discharge determination to the New York State Department of Health (Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) 415.3(i).<sup>1</sup>

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.

Both the Appellant and [REDACTED] [REDACTED] Appellant's [REDACTED] were served with a notice of hearing. [REDACTED] [REDACTED] did not appear at the hearing.<sup>2</sup> The facility offered one exhibit that includes: Face Sheet; [REDACTED] 2021 Discharge Notice; Invoice; Facility notes dated [REDACTED]/21 through [REDACTED]/21" showing communications with Appellant and [REDACTED] [REDACTED] Appellant's [REDACTED] about the outstanding balance; and a [REDACTED] 2021 Physician's Letter. The facility witnesses included Mary Beth Francis, Administrator; Jayne Ragab, Financial Screener; Barbara Sylvester, DSW. [REDACTED], Appellant, testified on her own behalf and [REDACTED], CIDNY Ombudsperson, provided supporting testimony. A recording of the proceeding was made.

<sup>1</sup> The facility served the resident and Mr. [REDACTED] with a copy of the discharge notice. (Ex. 1 at pages 2-4)

<sup>2</sup> The Bureau of Adjudication (Adjudication) called Mr. [REDACTED] to notify him about the hearing and he said he would likely not attend because he had to work. Adjudication emailed him the Notice of Hearing. (ALJ 1).

## FINDINGS OF FACT

1. The Appellant has been a resident at the facility since [REDACTED] 2021 (Testimony [T.] Francis; Facility Exhibit [Ex.] 1 at page 1 & 8).
2. The Appellant began receiving Medicaid coverage in [REDACTED] 2021 and is responsible for paying a net available monthly income (NAMI) to the Facility which includes her Social Security and pension benefits. The facility has telephoned, emailed and sent correspondence to [REDACTED] [REDACTED] Appellant's [REDACTED] and also communicated with the resident about the outstanding NAMI balance. (T. Ragab, Francis, Sylvester; Ex. 1 at pages 5-7)
3. The Appellant has never paid her NAMI to the facility and owed \$ [REDACTED] as of [REDACTED] 2021. (T. Ragab, Francis; Ex. 1 at page 5-7)
4. The [REDACTED] 2021 Transfer/Discharge Notice (discharge notice) states that Appellant will be transferred because the Appellant "after reasonable and appropriate notice" has failed to pay for her stay. (T. Francis, Ragab; Ex. 1 at pages 2-7)
5. Appellant is medically stable and is appropriate to receive a lower level of care "such as Assisted Living or Adult Home" (AL/AH). The facility has proposed to discharge the resident to [REDACTED] [REDACTED]. (T. Francis, Sylvester; Ex. 1 at pages 2-4, 8)
6. 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[i][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.

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

The facility has shown that after providing reasonable and appropriate notice the Appellant has failed to pay for her stay and that the proposed discharge plan is appropriate.<sup>3</sup>

Ms. Ragab testified that the resident's Medicaid application was approved in [REDACTED] of 2021 and that the resident's NAMI payment was explained to the resident and her [REDACTED] [REDACTED] who has power of attorney (POA). Ms. Ragab testified that Mr. [REDACTED] told her that Anthony Danna, Esq., who filed the resident's Medicaid application said that the resident did not have to pay anything to the facility. He gave Ms. Ragab Attorney Danna's telephone number and authorized her to call his office. Ms. Ragab was told by Attorney Danna's office that it was made clear that the resident's NAMI, which included Social Security and pension benefits, must be paid to the facility. Since on or about [REDACTED] 2021 Ms. Ragab has been calling, sending emails and letters to Mr. [REDACTED] about the outstanding NAMI balance and also discussing it with the resident. Ms. Ragab testified that initially Mr. [REDACTED] denied that he had access to the resident's bank account where the resident's social security check and pension benefits are deposited, but he subsequently revealed that there was "\$ [REDACTED] in the account. By email on [REDACTED] 2021, Ms. Ragab requested a copy of Mr. [REDACTED] POA, and on [REDACTED] 2021 she notified him that if the facility did not receive payment the resident may be discharged to an assisted living facility in the [REDACTED]. In a [REDACTED] 2021 email to Ms. Ragab, Mr. [REDACTED] refused to provide the POA, requested a hearing, and protested the resident's transfer to the Bronx (*See* Ex.1 at page 6).

<sup>3</sup> The ALJ ruled on the record that the resident can be discharged on or after [REDACTED], 2021, pursuant to the [REDACTED], 2021 discharge notice.



The resident testified that the money is in the bank, but she does not have any of her personal information including identification cards, bank account information and checkbook.<sup>4</sup>

The resident testified that she does not believe Mr. [REDACTED] has access to her account.

Prior to the hearing, the resident and Mr. [REDACTED] expressed to the facility that the resident wishes to remain in [REDACTED], and the resident reiterated her wishes at the hearing. The facility indicated that the resident could go home with services, but the resident said she could not go home to live with her [REDACTED]. The facility sent patient review instruments (PRI's) to several assisted living and adult home facilities in [REDACTED] and to one in [REDACTED]. Ms. Sylvester testified that the resident is a good candidate for the AL/AH facilities, however, once the resident's finances are exposed including her history of non-payment she is denied placement. At the time of the hearing there were two AL/ AH facilities on [REDACTED] that were going to "interview" the resident, and in the unlikely event that the resident is accepted at either facility she can choose to be discharged to the local facility. Ms. Sylvester testified that [REDACTED], which is in the [REDACTED] is available to the resident because it is an Archcare sister facility.

#### DECISION

Respondent has established that its determination to discharge the Appellant was correct, and that its transfer location is appropriate.

1. The facility is authorized to discharge the Appellant in accordance with its discharge plan on or after [REDACTED], 2021.

<sup>4</sup> The ALJ encouraged the resident to reach out to Attorney Danno's office to obtain a copy of her Medicaid Application file, which should have all her personal and account information. Ombudsman Fuller and the facility agreed to assist the resident with making the record request.



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  
December 3, 2021

Kimberly A. O'Brien  
Kimberly A. O'Brien  
Administrative Law Judge

To: Barbara Sylvester, DSW  
Archcare at Carmel Richmond Healthcare and Rehabilitation Center  
88 Old Town Road  
Staten Island, New York 10304

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