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Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, M.D., M.P.H.
Commissioner

JOHANNE E. MORNE, M.S.
Executive Deputy Commissioner

July 12, 2024

CERTIFIED MAIL/RETURN RECEIPT

[REDACTED]
Queens Boulevard Extended Care
61-11 Queens Boulevard
Woodside, New York 11277

Patrick Mielo, Esq.
310 W. Hills Road
Huntington, New York 11746

Jonathan Mawere, NHA
Queens Boulevard Extended Care
61-11 Queens Boulevard
Woodside, New York 11277

Barbara Phair, Esq.
Abrams Fensterman, LLP
3 Dakota Drive, Suite 300
Lake Success, New York 11042

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,

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: 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

Queens Boulevard Extended Care Facility
Respondent,

to discharge her from a residential
health care facility.

COPY

DECISION

DA24-6345

Hearing Before: Jeanne T. Arnold
Administrative Law Judge

Held via: WebEx Videoconference

Hearing Date: July 10, 2024

Parties: Queens Boulevard Extended Care Facility
61-11 Queens Boulevard
Woodside, New York 11377
By: Barbara Phair, Esq.
Abrams Fensterman, LLP
3 Dakota Drive
Suite 300
Lake Success, New York 11042
BPhair@abramslaw.com

[REDACTED]
c/o Queens Boulevard Extended Care Facility
By: Patrick Mielo, Esq.
310 West Hills Road
Huntington Station, New York 11746
[REDACTED]

JURISDICTION

Queens Boulevard Extended Care Facility (Facility), a residential health care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge resident [REDACTED] (Appellant) from care and treatment in the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (Department) pursuant to 10 NYCRR 415.3(i).

HEARING RECORD

Facility witnesses: Stefanie Chodkowski, Director of Social Work
Nicholas Corona, Esq.
Michael Leahy, Controller
Maureen Sammon, Medicaid Coordinator
Norrele Silvero, Director of Nursing

Facility exhibits: 1-4

Appellant witness: [REDACTED], Appellant

Appellant exhibit: A

ALJ exhibits: I Notice of Hearing and Transfer/Discharge Notice
II Resident Face Sheet
III Electronic Mail Message dated [REDACTED] 2024
IV Electronic Mail Message dated [REDACTED] 2024

Digital recording (R) of the hearing was made (2h:09m). Testimony is indicated by "T".

FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old female who was admitted to the Facility on [REDACTED] 2023, from the hospital with diagnoses of [REDACTED]

[REDACTED]

(Exhibit II.)

2. Medicare paid for the Appellant's stay at the Facility until [REDACTED] 2023. The Appellant was approved for Medical Assistance (Medicaid) on [REDACTED], 2023, retroactive to [REDACTED] 2023. The Medicaid program calculated the Appellant's required monthly contribution to the cost of the Facility, or Net Available Monthly Income (NAMI), from [REDACTED] to [REDACTED] 2023 at \$ [REDACTED] from [REDACTED] to [REDACTED] 2023 at \$ [REDACTED] from [REDACTED] to [REDACTED] 2024 at \$ [REDACTED] and from [REDACTED] 2024 to present at \$ [REDACTED] (Exhibit 4.)

3. The Appellant never paid her NAMI to the Facility and, as [REDACTED] 2024, the Appellant owes the Facility \$ [REDACTED] (Exhibit 1.)

4. The Appellant was made aware of the amount owed to the Facility every month (T Sammon) and admits owing money to the Facility (Exhibit 2).

5. By Transfer/Discharge Notice dated [REDACTED] 2024, the Facility determined to discharge the Appellant on [REDACTED], 2024, because the Appellant has failed to pay for her stay at the Facility. The notice advised the Appellant that she would be discharged to [REDACTED] [REDACTED], [REDACTED]. (Exhibit I.)

6. The Appellant timely requested this hearing to appeal the Facility's discharge determination.

7. The Facility brought a separate action against the Appellant in Supreme Court, Queens County, for the recovery of funds the Appellant owed the Facility. In a Stipulation of Settlement sworn to on May 6, 2024 (Stipulation of Settlement), the Appellant agreed to pay the Facility \$ [REDACTED] by [REDACTED], 2024, and to vacate the Facility "no later than [REDACTED] 2024." (Exhibit 2.)

8. At the scheduled hearing date for the current discharge appeal on [REDACTED] 2024, the Appellant's counsel and Power of Attorney withdrew the Appellant's appeal based upon the

parties' Stipulation of Settlement and confirmed that the Appellant would vacate the Facility no later than [REDACTED], 2024. (Exhibit III.)

9. On [REDACTED], 2024, the Appellant did not vacate the Facility. (T Appellant.)

10. By Electronic Mail Message (email) dated [REDACTED] 2024, to the Department's Bureau of Adjudication and copied to the Appellant's Counsel, the Facility requested that the discharge appeal be reopened. (Exhibit IV.) The reopened hearing was scheduled for July 9, 2024, both by letter dated and emailed on July 3, 2024 and by Web Ex invitation.

11. The Appellant remains at the Facility pending the outcome of the hearing.

ISSUE

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

APPLICABLE LAW

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).

Regulations at 10 NYCRR 415.3(i) describe the transfer and discharge rights of residential health care facility residents. They state, in pertinent part:

(1) With regard to the transfer or discharge of residents, the facility shall:

(i) permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless such transfer or discharge is made in recognition of the resident's rights to receive considerate and respectful care, to receive necessary care and services, and to participate in the development of the comprehensive care plan and in recognition of the rights of other residents in the facility:

(b) 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... 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.

The residential health care facility must prove that the discharge was necessary, and the discharge plan was appropriate. 10 NYCRR 415.3(i)(2)(iii)(c); New York State Administrative Procedure Act § 306(1).

DISCUSSION

The Appellant first argues that this discharge appeal was improperly reopened, yet simultaneously admits that she refused to leave the Facility on [REDACTED] 2024, and contends that she does not withdraw her appeal to the Facility's Transfer/Discharge Notice dated [REDACTED], 2024. Both were preconditions to the current appeal's dismissal on the record on June 7, 2024. (Exhibit III.) The Facility's request for the reopening dated July 2, 2024 was copied to counsel for the Appellant (Exhibit IV) and both a letter rescheduling the hearing and a WebEx Invitation for the hearing scheduled for July 9 were sent to the Appellant and to her counsel on July 3. On July 9, the Appellant and her counsel appeared and were granted an adjournment until July 10, due to scheduling conflicts for both. Appellant was not prejudiced by the reopening of the hearing as she has been aware of the Facility's notice of discharge since its issuance on [REDACTED], and the Facility's notice never was withdrawn or canceled.

The Facility determined to discharge the Appellant, effective [REDACTED], 2024, on the grounds that she "has failed, after reasonable and appropriate notice, to pay for...a stay at the facility." (Exhibit I.) There is no dispute as to the NAMI (Exhibit 4) and that the Appellant owes the Facility \$ [REDACTED] as detailed by invoice dated [REDACTED] 2024. (Exhibit 1; T Appellant.) The

Appellant admitted in the Stipulation of Settlement that “she is justly indebted” to the Facility in the sum of \$ [REDACTED] for care and services provided by the Facility from [REDACTED] 2023 through [REDACTED] 2024. (Exhibit 2.) Since the signing of the Stipulation of Settlement, the Appellant also owes the Facility her NAMI for [REDACTED] and [REDACTED] (Exhibit 1.)

Appellant’s counsel argued that since the Appellant signed a Confession of Judgment dated May 6, 2024 and the Stipulation of Settlement allows the Confession of Judgment to be entered upon the Appellant’s default in paying the Settlement Sum of \$ [REDACTED] on or before [REDACTED] and failure to vacate the Facility by [REDACTED] this is in effect a payment and demonstrates the Appellant’s cooperation and willingness to pay. He contends that the Facility cannot have it both ways by acting on the Confession of Judgment and discharging for non-payment.

The Appellant testified that by signing the Confession of Judgment on May 6, 2024 and authorizing her counsel to obtain a [REDACTED] so she can pay the Facility, she believed she was meeting her financial obligation. She said that she was first informed by the Facility’s Controller, Michael Leahy, that she owed the Facility approximately \$ [REDACTED] sometime around the beginning of 2024 and she told Mr. Leahy that she could not pay that amount. While the Appellant contends that Mr. Leahy did not approach her again, Mr. Leahy testified that after several meetings with the Appellant, she refused to let him back into her room. Mr. Leahy admitted that the initial invoice he presented to the Appellant was large because the Appellant has multiple sources of income and thus a high NAMI, but that the Appellant never offered to make even a good-faith payment or to commence paying her NAMI to the Facility. The Appellant admitted that the Facility’s Medicaid Coordinator, Maureen Sammon, visited her room and explained about her monthly NAMI obligation. Ms. Sammon testified that despite her explanation to the Appellant about her NAMI obligation as early as [REDACTED] or [REDACTED] 2023, the Appellant never paid. Ms.

Sammon testified that both she and the Facility's Director of Social Work, Stefanie Chodkowski, went to the Appellant's room monthly and presented invoices to the Appellant, which the Appellant disputes. Ms. Sammon said that even if the Appellant's monthly income went directly to a pool trust, the Appellant had an obligation to inform the trust that she was residing in the Facility so that the NAMI would be paid.

The Appellant admitted that "she is justly indebted" to the Facility in the sum of \$ [REDACTED] for care and services provided by the Facility from [REDACTED] 2023 through [REDACTED] 2024. Counsel's argument that the Confession of Judgment constitutes payment fails because, as both Mr. Leahy and Attorney Corona testified, even after a Confession of Judgment is filed, it does not guarantee payment to the Facility and can take years to collect on. Therefore, the Facility has met its burden of proving that discharge on the grounds of nonpayment is permissible.

The Facility has proposed discharge to [REDACTED]. It takes approximately 20 minutes by automobile to travel from the Facility to the proposed discharge location. (T Chodkowski.)

Ms. Chodkowski testified that she understands that the Appellant prefers to be discharged to her home residence located in [REDACTED] but such a plan currently is not safe because the Appellant needs assistance with her Activities of Daily Living (ADLs). The Appellant requires two or more people to assist her with ADLs, a [REDACTED] from [REDACTED] bed to wheelchair and, at present, requires 24-hours care. (T Chodkowski, Silvero.) Ms. Chodkowski testified that she has been actively engaged in discharge planning with the Appellant, they continue to look for home assistance to meet the Appellant's needs, and they would get her home if it was safe to do so.

While the Appellant indicated that if she must be discharged to a nursing home, she prefers remaining in [REDACTED] Ms. Chodkowski testified that the Facility could not locate an appropriate

█████ nursing home that would accept the Appellant. Ms. Chodkowski admitted that ██████
████████████████████ was chosen as the discharge location months ago but was adamant
that discharge planning has been on-going. She said approximately one or two weeks ago, she
contacted the ████████████████████ located in ██████ on the
Appellant's behalf, but they did not have bariatric beds available. Additionally, she continues to
make calls to ██████ facilities, and she will send Patient Review Instruments (PRIs) to any nursing
homes that appear as a possible match for the Appellant. The Facility's Director of Nursing,
Norrele Silvero, testified that ████████████████████ is a safe discharge
location because it is a skilled nursing facility which offers the same services as the Facility. While
Ms. Silvero admitted that she does not have personal knowledge of the services offered by the
████████████████████, they are a certified facility and accepted the Appellant
as a resident knowing the Appellant's needs.

The Appellant stated that she refuses to relocate to the ████████████████████
█████ because it received bad ratings and is a charitable place for poor people, yet the Appellant
failed to offer an alternative feasible discharge plan. While she testified that her plan was to
continue with her rehabilitation therapies at the Facility through the end of ██████ and then to
return home, the Appellant previously indicated that she would be ready to return home by ██████
to no avail. (Exhibit 2.) She rejected the Facility's contention that they worked with her to find a
suitable discharge location yet admitted that she chose three potential nursing homes from a list,
although was told that such nursing homes had not responded. The Appellant challenged the
Facility's medical attention to her needs yet admitted she is receiving excellent therapy services,
is not ready to return home and did not identify any medical issues that require attention.

The Facility has continued to make efforts to locate a skilled nursing facility in [REDACTED] that could meet the Appellant's needs, but its efforts have proved fruitless. Ultimately, [REDACTED], which provides the same level of care as the Facility, accepted the Appellant and was the best option. The Appellant has not identified another viable option.

The Appellant is entitled to an appropriate discharge plan that meets her medical needs. The Appellant's ability to be safely discharged to home is dependent on arrangement of appropriate home care services including utilization of a [REDACTED] and assistance of two people. While such an arrangement may be possible, no known arrangement is currently available, and the Appellant is not entitled to remain at the Facility without paying her charges. The Facility's proposed discharge plan is appropriate.

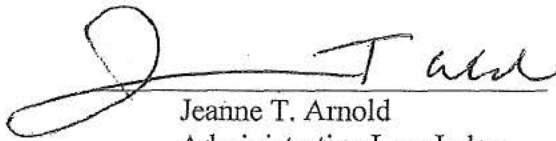
DECISION AND ORDER

The Facility has established that its determination dated [REDACTED], 2024 to discharge the Appellant from its Facility to [REDACTED] is authorized and that the discharge plan is appropriate.

It is, therefore,

ORDERED that Queens Boulevard Extended Care Facility is authorized to discharge the Appellant in accordance with its Transfer/Discharge Notice dated [REDACTED], 2024.

Dated: July 11, 2024
Rochester, New York


Jeanne T. Arnold
Administrative Law Judge