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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 23, 2022

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o Peconic Bay Medical Center
Skilled Nursing Facility
1 Heroes Way
Riverhead, New York 11901

Paul Furbeck, Administrator
Peconic Bay Medical Center
Skilled Nursing Facility
1 Heroes Way
Riverhead, New York 11901

██████████
██████████
██████████

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

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,

Natalie J. Bordeaux /cmg

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

Peconic Bay Skilled Nursing Facility,

Respondent,

to discharge Appellant from a residential health care facility.

COPY

**DECISION
AFTER
HEARING**

Before: Rayanne L. Babich
Administrative Law Judge

Dates: December 20, 2022

Held at: New York State Department of Health
Webex videoconference

Parties: [REDACTED] Appellant
c/o Peconic Bay Medical Center Skilled Nursing Facility
1 Heroes Way
Riverhead, New York 11901

By: [REDACTED]

Paul Furbeck, Administrator
Peconic Bay Medical Center Skilled Nursing Facility
1 Heroes Way
Riverhead, New York 11901

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

JURISDICTION

By notice dated [REDACTED] 2022, Peconic Bay Medical Center Skilled Nursing Facility (Facility), determined to discharge a resident, [REDACTED] [REDACTED] (Appellant), from care in its Facility pursuant to Title 10 of the Official Compilation of the New York Code Rules and Regulations (NYCRR) Part 415.3(i). The Appellant's [REDACTED] [REDACTED] (Appellant's representative), serves as Appellant's designated representative and appealed the proposed discharge. 10 NYCRR 415.3(i)(2).

A Notice of Hearing scheduling the hearing for December 19, 2022 was served upon the parties, and the Facility and Appellant's Representative appeared. The Appellant's representative requested a brief adjournment to prepare for the hearing. The adjournment was granted, and the hearing was scheduled for December 20, 2022 upon agreement by the parties. The Appellant's representative did not appear at the December 20, 2022 hearing and the matter proceeded without the Appellant's representative.

RECORD

ALJ Exhibits: I – Notice of Discharge, [REDACTED] 2022; Notice of Hearing, December 14, 2022
II – Resident Face Sheet, [REDACTED], 2022

Facility Exhibits: 1 – Physician progress note, [REDACTED], 2022
2 – Facility summary
3 – Department of Health written correspondence, [REDACTED] 2022
4 – Facility Resident/Family meeting minutes, [REDACTED], 2022
5 – Family notification letter to Appellant/Family, [REDACTED], 2022
6 – Social work progress notes, [REDACTED] [REDACTED] 2022

Appellant Exhibits: None

Facility Witnesses: Paul Furbeck, Facility Administrator
Heather Ortiz, LCSW, Director of Social Work Services

Appellant Witnesses: None

The hearing was digitally recorded. [R. 26:45.]

FINDINGS OF FACT

1. The Facility is a residential health care facility (nursing home) located in Suffolk County, New York. [Ex I-II.]
2. The Appellant, age [REDACTED] was admitted to the Facility on [REDACTED] 2022 for long term care. [Ex II; R. 22:18.]
3. The Appellant's current primary medical diagnosis is [REDACTED] and she requires 24-hour supervision. The Appellant ambulates with a rolling walker and requires supervision and assistance from one person for her activities of daily living. [Ex II, 1; R. 22:48.]
4. On November 3, 2022, the Department of Health (DOH) approved the Facility's plan for closure. The approval authorized the Facility's implementation of the closure plan and advised that "when no residents remain in the nursing home, and all elements of the closure plan have been met, you must surrender your Operating Certificate to the Department." The official closure date is January 6, 2023. [Ex 3; R. 6:46, 8:51.]
5. On [REDACTED] 2022, the Facility conducted an in-person meeting with the residents and their representatives to advise of the pending closure. The Appellant and the Appellant's representative were present for the meeting. [Ex 4; R. 7:35.]
6. On [REDACTED], 2022, the Facility sent a written letter to the Appellant's representative advising of the pending closure and the availability of assistance with discharge planning. [Ex 5; R. 9:04.]
7. On [REDACTED] 2022, social work staff met with the Appellant's representative to discuss options for a discharge location. [Ex 6.]
8. On [REDACTED] through [REDACTED] 2022, referrals were sent to approximately 20 local nursing homes. The Appellant was accepted by two of those facilities; [REDACTED]

██████████ and ██████████ agreed to accept the Appellant if there was an immediate transfer, and ██████████ offered to accept the resident up and until ██████████ 2023. The Appellant's representative rejected both options. [Ex 5; 6; 14:54.]

9. The Appellant's representative requested that the Appellant be transferred to a different nursing home, ██████████, but the Appellant was not accepted by this facility because they did not have a bed available. [Ex 2, 6; R. 19:02.]
10. On ██████████ 2022, the Facility issued a Notice of Discharge citing that the discharge/transfer is necessary because the Facility is closing and that the discharge location is ██████████ [Ex I.]
11. Evan Nadal, M.D., the Appellant's physician, documented in the medical record that the Appellant is appropriate for discharge/transfer to another nursing home including ██████████ [Ex 1.]

ISSUE

Has the Facility met its burden of proving that the discharge/transfer is necessary and that the discharge plan is appropriate?

APPLICABLE LAW

1. Transfer and discharge rights of nursing home residents are set forth in 10 NYCRR 415.3(i), which provides, 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.
- (c) transfer or discharge shall also be permissible when the facility discontinues operation and has received approval of its plan of closure in accordance with subdivision (i) of section 401.3 of this Title. *See also* PHL 2803-z.
2. The Facility has the burden of proving that the "discharge or transfer is/was necessary and the discharge plan appropriate." 10 NYCRR 415.3(i)(2)(iii)(b).
 3. Federal regulations at 42 CFR 483.15 contain substantially identical provisions to the forgoing provisions of 10 NYCRR 415.3(i).

DISCUSSION

The Facility has established grounds for discharge because it has received approval from the DOH to implement its plan for closure and will cease to operate as of [REDACTED] 2023. 10 NYCRR 415.3(i)(1)(i)(c). The Facility has also established that its proposed discharge location is appropriate because it can provide the same level of care that the Appellant currently receives at the Facility and has a bed available. 10 NYCRR 415.3(i)(2)(iii)(b).

Grounds for Transfer

Paul Furbeck, Facility Administrator, testified that plans to close the Facility began in September 2022, and the final approval was received from the DOH on November 3, 2022. [Ex 2; T. 6:14.] Mr. Furbeck explained that a meeting was held on November 8, 2022, to advise the residents and their representatives of the pending closure. [T. 7:41.] The meeting provided information regarding the closure process and how the residents will be assisted with transfer/

discharge. [Ex 4.] Following the meeting, the Facility also provided the residents and their representatives written notice for the pending closure, a list of nursing home facilities in Suffolk County, and offered assistance with discharge planning. [Ex 4, 5.] At the time of hearing, the Appellant was the last remaining resident at the Facility. [R. 9:25.]

Discharge Plan

Heather Ortiz, Director of Social Work Services for the Facility, testified that after the Appellant and her representative were notified of the pending closure, she began working with the Appellant's representative for discharge planning. [Ex 6; R. 14:54.] The Appellant's representative identified three facilities as preferred discharge locations, including [REDACTED] where the Appellant was accepted, but declined the offer of admission because her preference was for another facility that did not have a bed available. [Ex 6; R. 15:08 15:18.] Ms. Ortiz testified that an additional 17 referrals were sent to facilities in the local area, but the Appellant was not accepted. [Ex 6; R. 15:52.] Ms. Ortiz explained that [REDACTED] is appropriate because it provides the same or similar services the Appellant is currently receiving. [R. 25:04.] The Appellant will continue to receive 24-hour supervision and assistance with her activities of daily living. [R. 22:48.] Documentation in the clinical record from Evan Nadal, M.D., the Appellant's physician, confirmed that the Appellant is medically stable, has no concerning or complicated medical issues, and is appropriate for discharge to [REDACTED] [Ex 1.]

ORDER

1. The Facility is authorized to discharge the Appellant on [REDACTED] 2023 according to its discharge plan.
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: December 23, 2022
Albany, New York

Rayanne L. Babich/cmj
Rayanne L. Babich
Administrative Law Judge

TO:

██████████ Appellant
c/o Peconic Bay Medical Center Skilled Nursing Facility
1 Heroes Way
Riverhead, New York 11901

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