



Department of Health

ANDREW M. CUOMO
Governor

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

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

February 10, 2017

CERTIFIED MAIL/RETURN RECEIPT

Philip Buchsbaum, Administrator
Buffalo Center for Rehab and Nursing
1014 Delaware Avenue
Buffalo, New York 14209



Regina A. Del Vecchio, Esq.
Erie County Medical Center
462 Grider Street
Buffalo, New York 14215


c/o Erie County Medical Center
462 Grider Street
Buffalo, New York 14215

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:nm
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

**Buffalo Center for Nursing
and Rehabilitation,**

Respondent,

to discharge him from a residential
health care facility.

CCPY

DECISION

Hearing Before: John Harris Terepka
Administrative Law Judge

Held at: Erie County Medical Center
462 Grider Street
Buffalo, New York 14215
February 7, 2017

Parties: Buffalo Center for Nursing and Rehabilitation
1014 Delaware Avenue
Buffalo, New York 14209
By: Philip Buchsbaum, administrator

[REDACTED]
Erie County Medical Center
462 Grider Street
Buffalo, New York 14215
By: [REDACTED]

Also appearing: Erie County Medical Center
462 Grider Street
Buffalo, New York 14215
February 7, 2017
By: Regina A. Del Vecchio, Esq.

JURISDICTION

Buffalo Center for Nursing and Rehabilitation (the Respondent), a residential health care facility (RHCF) subject to Article 28 of the Public Health Law, discharged [REDACTED] (the Appellant) from care and treatment in its nursing home. The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 NYCRR 415.3(h).

SUMMARY OF FACTS

1. Respondent Buffalo Center for Nursing and Rehabilitation is a nursing home located in Buffalo, New York.
2. Appellant [REDACTED], age [REDACTED] was admitted as a resident at the facility on [REDACTED] 2016 for [REDACTED] term rehabilitation after suffering a [REDACTED]
3. On [REDACTED], 2017, the Respondent transferred the Appellant to Erie County Medical Center (ECMC) for a [REDACTED] evaluation after he became [REDACTED] and [REDACTED] a [REDACTED] at the Respondent's facility. (Exhibit 5.)
4. The Respondent simultaneously issued a discharge notice to the Appellant which stated the grounds for discharge as: "The continued safety of individuals in the facility would otherwise be endangered by your continued residency." (ALJ Exhibit I, notice of discharge dated [REDACTED] 2017.)
5. The notice of discharge stated the Appellant was being discharged to ECMC, an acute care hospital in Buffalo.
6. ECMC has not admitted the Appellant because it has found no medical basis for admission. A [REDACTED] assessment concluded he does not require [REDACTED] treatment or any other inpatient treatment at an acute care hospital. The hospital

recommends placement in a ██████ term residential health care facility with the speech therapy, occupational therapy and rehabilitation services that were being provided at the Respondent's facility. ECMC is prepared to return him to the Respondent's care. (Exhibit A.)

7. The Appellant continues to need ██████ term rehabilitation services at a residential health care facility.
8. The Respondent has refused to readmit him to its nursing home.
9. The Appellant remains at ECMC pending the outcome of this hearing.

ISSUES

Has the Respondent established that the Appellant's transfer from Buffalo Center for Nursing and Rehabilitation is necessary and that the discharge plan is appropriate?

APPLICABLE LAW

Transfer and discharge rights of RHCF residents are set forth in Department regulations at 10 NYCRR 415.3(h). This regulation 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:
 - (a) the resident may be transferred only when the interdisciplinary care team, in consultation with the resident or the resident's designated representative, determines that:
 - ...
 - (3) the safety of individuals in the facility is endangered.
 - ...
 - (vi) 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(d) of this Title; and

(vii) permit the resident, their legal representative or health care agent the opportunity to participate in deciding where the resident will reside after discharge from the facility.

...

- (2) The department shall grant an opportunity for a hearing to any resident who requests it because he or she believe the facility has erroneously determined that he or she must be transferred or discharged in accordance with the following:

...

(iii) (b) the nursing home shall have the burden of proof that the discharge or transfer is/was necessary and the discharge plan appropriate.

DISCUSSION

The Appellant, age ██████ suffered a ██████ in 2016 and was hospitalized at ██████ Hospital. On ██████ 2016, he was discharged from ██████ to the Respondent's nursing home for ██████ term rehabilitation services including speech and physical therapy, occupational therapy and rehabilitation with the goal of ultimately enabling him to return home. He is subject to ██████ and ██████ and has had episodes of ██████ attributable to his ██████ and ██████

Within a day after admission to the Respondent's facility in ██████ the Appellant's ██████ behavior caused the Respondent to send him to ECMC for ██████ evaluation. The Respondent issued no discharge notice, yet refused to accept him back after ECMC found no reason to admit him. It was only after the Appellant requested a hearing, held on ██████ 2017, that the Respondent agreed to his return.

Upon the Appellant's return to the Respondent on ██████ 2017, the facility's records document that he often refused care, but his behavior was manageable. (Exhibit 5.) On ██████, he "██████ but ended up at ECMC and returned that day to the

Respondent without further incident. (Exhibit 4.) The next day he became [REDACTED] a [REDACTED], was [REDACTED] and was taken back to ECMC. He remains at ECMC because the Respondent again refuses to readmit him.

ECMC has not admitted the Appellant because he is not in need of [REDACTED] inpatient care or any other care that requires hospitalization. Assessment at ECMC concluded he is not in need of [REDACTED] care, and that his refusal of care and other behavioral issues were "likely due to [REDACTED] and [REDACTED] leading to [REDACTED] (Exhibit 3.) It is undisputed that what he requires is rehabilitation services, such as are provided in a nursing home, to enable him to recover from his [REDACTED] to the point where he can return home. ECMC is prepared to discharge the Appellant back to the Respondent's care where he might continue to receive such services.

The Respondent takes the position that, having brought the Appellant to ECMC and left him there, it has fulfilled its discharge responsibilities. The Respondent refuses to accept the Appellant back or to make any other plan for his [REDACTED] term care. The Respondent claims its discharge responsibilities have been met with the transfer to ECMC, and that any further discharge planning is the responsibility of ECMC.

ECMC's discharge planners have made extensive inquiries to find some other [REDACTED] term placement for the Appellant during the pendency of this proceeding, but have not to date found another nursing home able to admit him. The Respondent, which has the discharge planning responsibility, has made no attempts to secure an appropriate placement elsewhere.

The care planning issues faced by the Respondent are not new. The Respondent first attempted to discharge the Appellant on [REDACTED] 2016 by sending him to ECMC

with no discharge notice and no discharge plan, and refusing to take him back when ECMC found no reason to admit him. It was not until a hearing requested by the Appellant was held on [REDACTED], 2017, that the Respondent agreed to readmit him. At that hearing, the Respondent was reminded of its regulatory responsibilities, in particular that it could not discharge a resident without a written notice and an appropriate discharge plan. Even with this explicit reminder, as of the date of this hearing two months have now passed in which the Respondent has taken no steps to develop an appropriate care plan for any discharge or transfer. The Respondent's failures in its handling of both discharges have caused the Appellant to spend nearly eight weeks at ECMC, not receiving the rehabilitation services he needs.

The Respondent's position that having transferred the Appellant to ECMC for evaluation and stabilization, his long term care planning is now ECMC's problem, is rejected. Referral to a hospital for acute care does not absolve the Respondent of its responsibility to discharge a resident only with an appropriate discharge plan. ECMC never admitted the Appellant because it found no appropriate reason to do so. ECMC is ready to return him to the Respondent's care. If the Respondent rejects that plan, there is no plan. ECMC is a short term solution that places the entire care planning burden on ECMC, to whose care he has never even been admitted, and on the Appellant, who is in no position to cope with it. Department regulations clearly intend that this burden be on the Respondent.

The Respondent has failed to establish that it cannot now resume the provision of care and rehabilitation, and has failed to offer an appropriate discharge plan for such care elsewhere. It is noted that one of the nursing homes to which ECMC tried to refer the

Appellant is [REDACTED] ECMC's own affiliated nursing home. [REDACTED] administrator, Anthony DePinto, testified that [REDACTED] has evaluated the Appellant and found him to be an appropriate candidate for rehabilitation and care at its facility, but has placed him on a long waiting list because it does not have a bed available. Asked, "if you had a patient that exhibited this behavior and you had already provided them with one-on-one," Mr. DePinto pointed out:

I would have to keep him in the facility until there was an appropriate discharge. I would have to implement a care plan change, whether it's a med, maybe he needs two-on-one. There's lots of different things we would be obligated to do... If they sent him back, I would take him back... until an appropriate discharge could be formed... I have residents that I have two on one supervision, that we've been waiting for years to find an appropriate place to discharge. As you know, there's not a lot of places that are – would be considered appropriate, available, or that have beds to offer. So that's the burden that we bear. (Hearing record, minutes 48-51.)

The resident care planning problem presented by this resident cannot be solved in this hearing process, but responsibility for it can be and accordingly is reaffirmed. If the Respondent continues to find it difficult to manage the Appellant's care, the Respondent has the option and responsibility to develop an appropriate discharge plan that will meet his care needs, and issue a notice of discharge with an appropriate care plan. The Respondent can and should be expected to take the necessary steps in the short term to meet the Appellant's needs unless and until it complies with these obligations. In the meantime, the Respondent having failed to establish an appropriate discharge plan, the discharge appeal is granted and the Respondent is directed to readmit the Appellant.

DECISION: Respondent Buffalo Center for Nursing and Rehabilitation has failed to establish that the discharge of Appellant ██████████ from was necessary and that its discharge plan was appropriate.


The Respondent is not authorized to discharge the Appellant without an appropriate discharge plan.

Pursuant to 10 NYCRR 415.3(h)(2)(i)(d), the Respondent is directed to readmit the Appellant prior to admitting any other person.

This decision is made by John Harris Terepka, Bureau of Adjudication, who has been designated to make such decisions.

Dated: Rochester, New York

February 10 2017



John Harris Terepka
Administrative Law Judge
Bureau of Adjudication