



Department of Health

ANDREW M. CUOMO
Governor

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

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

October 5, 2017

CERTIFIED MAIL/RETURN RECEIPT

[REDACTED]
c/o Ideal Senior Living Center
601 High Avenue
Endicott, New York 13760

Charles Ingraham, Esq.
Aswad & Ingraham, LLP
46 Front Street
Binghamton, New York 13905

Jerry Halbert, Assistant Administrator
Ideal Senior Living Center
601 High Avenue
Endicott, New York 13760

[REDACTED]

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,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:ISM
Enclosure

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

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



Appellant,

from a determination by

Ideal Senior Living Center,
Respondent,



to discharge him from a residential
health care facility.

DECISION

Hearing Before: John Harris Terepka
Administrative Law Judge

Held at: Ideal Senior Living Center
601 High Avenue
Endicott, New York 13760
September 28, 2017

Parties: Ideal Senior Living Center
601 High Avenue
Endicott, New York 13760
By: Charles Ingraham, Esq.
Aswad & Ingraham
46 Front Street
Binghamton, New York 13905


Ideal Senior Living Center
601 High Avenue
Endicott, New York 13760
By: 

JURISDICTION

Ideal Senior Living Center (the Respondent), a residential health care facility (RHCF) subject to Article 28 of the Public Health Law, determined to discharge ██████████ (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).

HEARING RECORD

Respondent witnesses: Haley Burns, R.N.
Amber Johnson, social worker/discharge planner
Jerry Halbert, assistant administrator
Spencer Eisenberg, D.O.

Respondent exhibits: A (progress notes, ██████████ consultation notes)
B (summary of stay)
C (medical evaluations)

Appellant witnesses: ██████████

Appellant exhibits: 1 (progress notes)

The notice of hearing and discharge notice were marked as ALJ Exhibit I. A digital recording of the hearing was made.

SUMMARY OF FACTS

1. Respondent Ideal Senior Living Center is a residential health care facility, or nursing home, located in Endicott, New York.
2. Appellant ██████████, age ██████ was admitted as a resident at the facility on ██████████ 2016 for rehabilitation after being hospitalized for a ██████████. His diagnoses include ██████████ and ██████████.
3. By notice dated ██████████, 2017, the Respondent determined to discharge the Appellant. The discharge notice stated:

The regulatory reason for your discharge is: the safety of individuals is endangered.... Specifically, your continued targeting of [REDACTED] residents on your unit in an effort to develop a [REDACTED], even though unwanted, has put those [REDACTED] residents at risk. All attempts to change your behavior have failed to prevent your [REDACTED] behavior towards those residents and staff alike. (Exhibit ALJ I.)

4. The discharge notice advised the Appellant he would be discharged to [REDACTED] a nursing home in [REDACTED] [REDACTED], that offers a similar level of care and has an [REDACTED] residential unit. [REDACTED] is approximately [REDACTED] miles from [REDACTED] where the Appellant's [REDACTED] and her [REDACTED] live.

5. The Appellant's behavior prompted referrals for [REDACTED] evaluations by specialists in [REDACTED] which were conducted on [REDACTED] 2016; [REDACTED] and [REDACTED] 2017. (Exhibit A, "[REDACTED] consultation" notes.) They document that the Appellant's [REDACTED] and [REDACTED] behavior with [REDACTED] residents was a concern as early as [REDACTED] 2016.

6. Medication adjustment and management have failed to improve the Appellant's [REDACTED] behaviors toward [REDACTED] residents. (Exhibit C, [REDACTED]/2017 page 1, [REDACTED]/17 page 1, [REDACTED]/2017 page 1; Exhibit 1, [REDACTED]/17 medical note; Testimony of Dr. Eisenberg.)

7. The Appellant's treating physician at the Respondent's facility is Spencer Eisenberg, D.O. Dr. Eisenberg agrees that the safety of other residents in the facility is endangered by the Appellant's [REDACTED] behavior toward [REDACTED] residents, and that medication adjustment and other attempts to control such behaviors have failed to protect residents from further risk of harm. Dr. Eisenberg recommends transfer to a nursing home with an [REDACTED] unit as the only way

to protect other residents. (Recording, 1h22-36m.) The nearest facility with an ██████████ unit is ██████████.

8. The Appellant remains at Ideal Senior Living Center pending the outcome of this appeal.

ISSUES

Has the Respondent established that the Appellant's transfer from Ideal Senior Living Center 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.

The facility must ensure complete documentation in the resident's clinical record is made by a physician when the transfer or discharge is necessary due to the endangerment of the health of other individuals in the facility. 10 NYCRR 415.3(h)(1)(ii)(b). The facility has the burden of proving that the discharge or transfer is necessary and the discharge plan appropriate. 10 NYCRR 415.3(h)(2)(iii)(b).

DISCUSSION

The Appellant suffered a [REDACTED] in 2016 and was hospitalized at an acute care hospital. On [REDACTED] 2016, he was discharged from the hospital to the Respondent's nursing home for rehabilitation and care. His diagnoses include [REDACTED] and [REDACTED], which in his case can manifest themselves in [REDACTED] behavior.

The Appellant's [REDACTED] leads to various behaviors not limited to his conduct toward [REDACTED] residents. He can be [REDACTED] and [REDACTED] with other residents and staff and [REDACTED] about his [REDACTED] and his [REDACTED]. He has been, for example, [REDACTED] about the [REDACTED] being provided in his room. (Exhibit 1.) He suffers from [REDACTED] is [REDACTED] about his [REDACTED] [REDACTED] about his [REDACTED] and consequently has been unable to get along with roommates. The Respondent has attempted to accommodate him by moving him to a private room, but this does not prevent his [REDACTED] behavior with [REDACTED] residents.

Occasional [REDACTED] behavior is to be expected in a [REDACTED] or [REDACTED] unit where the Appellant has been placed. A residential care facility can and should be expected to handle such behaviors, and the Respondent has attempted to do so. For example, a [REDACTED] with one resident that began in [REDACTED] 2016 was at first deemed [REDACTED] but eventually became [REDACTED]. The resident was moved to another unit in [REDACTED] 2017. (Exhibit C, [REDACTED] 2017 page 1; Amber Johnson testimony.)

The Appellant, however, has continued to demonstrate [REDACTED] behaviors; [REDACTED] with [REDACTED] residents, and an inability and/or refusal to

recognize boundaries of appropriate behavior. He has entered their rooms, attempted to [REDACTED] and approached and attempted to [REDACTED] them in public areas. He has also attempted to [REDACTED].

The Appellant's progress notes are replete with documentation of his [REDACTED] behavior towards female residents. (Exhibit 1; Exhibit A.) In [REDACTED] 2017 he was counseled about [REDACTED] when they were [REDACTED]. He denied ever doing so. (Exhibit A, page 6.) He thereafter continued to [REDACTED], including [REDACTED], and had to be removed. [REDACTED] /17, [REDACTED] /17, [REDACTED] /17, [REDACTED] /17, [REDACTED] 17, [REDACTED] /17, [REDACTED] 17, [REDACTED] /17, [REDACTED] /17, [REDACTED] /17, [REDACTED] /17.) One [REDACTED] resident, [REDACTED] was a particular object of his attentions and [REDACTED]. This resident reported to staff that she was [REDACTED] of him, but his [REDACTED], which included [REDACTED], continued. [REDACTED] /17, [REDACTED] /17, [REDACTED] /17, [REDACTED] /17, [REDACTED] 17, [REDACTED] 17.)

The Appellant becomes [REDACTED] and [REDACTED] with staff when attempts are made to redirect or counsel him. He also routinely denies his [REDACTED] behavior even to the staff who directly observe it. In [REDACTED] 2017, nurse manager Haley Burns discovered a pair of [REDACTED] in the Appellant's room. Asked about them, the Appellant denied any knowledge or responsibility, saying "[REDACTED]." (Burns testimony, m15-16.) In [REDACTED] 2017, Ms. Burns saw the Appellant place a [REDACTED] resident's [REDACTED] [REDACTED]. On [REDACTED], 2017, Ms. Burns saw the Appellant using his [REDACTED] to [REDACTED] residents' [REDACTED]. When she addressed him about this conduct, he became [REDACTED] and simply denied he had done what Ms. Burns had just observed. On [REDACTED] in the dining room, he put his [REDACTED] on a [REDACTED] resident's [REDACTED].

and told her she [REDACTED]. This resident told Ms. Burns he made her feel [REDACTED] and had [REDACTED] her before. On the morning of this hearing, a [REDACTED] resident complained again to Ms. Burns about his [REDACTED]. (Burns testimony, m15-27.)

Ms. Burns and social worker and discharge planner Amber Johnson both testified that the Respondent always denies any inappropriate behavior such as entering female resident's rooms, even when he is directly observed to be engaging in it. They both expressed the concern that many residents on the "[REDACTED] unit" are not able to give [REDACTED] to [REDACTED] (Burns, Johnson testimony.)

Dr. Spencer Eisenberg is the Appellant's treating physician at the facility. He confirmed the Appellant's diagnoses of [REDACTED] behavior and [REDACTED]. He supports the determination that the Appellant presents a risk to other residents. In consultation with the [REDACTED] who repeatedly evaluated the Appellant (Exhibit A), he made attempts at medication adjustment, but has seen little improvement in the Appellant's [REDACTED] [REDACTED] behaviors. Reinforcement of appropriate behavior, and "[REDACTED]" for [REDACTED] behavior have not been successful, as the Appellant completely denies any [REDACTED] behavior. Consequently, for the protection of [REDACTED] residents, Dr. Eisenberg agrees with discharge planner Amber Johnson that the Appellant needs placement in an [REDACTED] unit. As Dr. Eisenberg pointed out, a risk to other residents has been demonstrated. It is not known how far his behaviors could go and it is not appropriate to just "wait until something happens." (Exhibit C; Eisenberg testimony, 1h22-36m.)

The Appellant's family should be and, it seems, is aware that the Appellant's behaviors are a manifestation of his [REDACTED] and not necessarily reflective of his true character. His denials of his [REDACTED] behavior may well be genuine, in the sense that he himself is unaware that he is engaging in it. This also means, however, that the establishment of "[REDACTED]" for his behavior, as they suggest, is likely to be futile. While the Appellant may not be to blame for his conduct, other residents are nevertheless entitled to feel safe and to be protected from it.

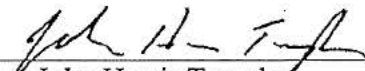
An [REDACTED] unit is the obvious solution to the Appellant's [REDACTED] [REDACTED] and [REDACTED] behavior with [REDACTED] residents. The Respondent does not have such a unit. The Appellant's [REDACTED] and her [REDACTED] who are his closest family, object that [REDACTED] it is not as close to them as the Respondent's facility, but it is the nearest facility that does have an [REDACTED] unit and can provide the level of care the Appellant needs. Under these circumstances, it is an appropriate discharge plan and the Respondent is entitled to proceed with it.

DECISION: Respondent Ideal Senior Living Center has established that the discharge of Appellant [REDACTED] is necessary and that its discharge plan is appropriate.

The Respondent is authorized to discharge the Appellant to [REDACTED] [REDACTED] in accordance with its discharge plan.

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

Dated: Rochester, New York
October 5, 2017


John Harris Terepka
Administrative Law Judge
Bureau of Adjudication