



Department of Health

ANDREW M. CUOMO
Governor

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

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

June 18, 2019

CERTIFIED MAIL/RETURN RECEIPT

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

Kelly Barrett, Esq.
Center for Elder Law & Justice
438 Main Street, Suite 1200
Buffalo, New York 14202

Dawn LaMagna, Director of Nursing
Buffalo Community Healthcare Center
1205 Delaware Avenue
Buffalo, New York 14209

Regina DelVecchio, Esq.
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: 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

**Buffalo Community Healthcare
Center,**

Respondent,

to discharge him from a residential
health care facility.

COPY

DECISION

Hearing before:

John Harris Terepka
Administrative Law Judge

Held at:

Erie County Medical Center
462 Grider Street
Buffalo, New York
June 17, 2019

Parties:

Buffalo Community Healthcare Center
1205 Delaware Avenue
Buffalo, New York 14209
By: Dawn LaMagna, director of nursing

[REDACTED]
Erie County Medical Center
By: Kelly M. Barrett, Esq.
Center for Elder Law & Justice
438 Main Street
Buffalo, New York 14202

Also appearing:

Erie County Medical Center
By: Regina A. Del Vecchio, Esq.

JURISDICTION

Buffalo Community Healthcare Center (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 pursuant to 10 NYCRR 415.3(h).

SUMMARY OF FACTS

1. Respondent Buffalo Community Healthcare Center is a residential health care facility, specifically a nursing home within the meaning of PHL 2801.2, located in Buffalo, New York.
2. Appellant [REDACTED], age [REDACTED] was admitted as a resident on [REDACTED] 2018 with diagnoses that include [REDACTED] (Exhibit 3.)
3. On [REDACTED], 2019, the Respondent transferred the Appellant to Erie County Medical Center (ECMC) for evaluation after he [REDACTED] and [REDACTED] with another resident. (Exhibit A.)
4. Erie County Medical Center is a general hospital within the meaning of PHL 2801.10. ECMC evaluated the Appellant but did not admit him, determining that he does not require inpatient treatment at a general hospital. (Exhibit B.) ECMC advised the Respondent that the Appellant was ready to return to the Respondent's care. The Respondent refused to readmit him. (Exhibit D.)
5. On [REDACTED], 2019, the Respondent issued a notice of discharge to the Appellant that stated:

The continued safety of individuals in the facility would otherwise be endangered by your continued residency.

An immediate transfer or discharge was required due to the resident's urgent medical needs. Please specify: Violent behaviors towards others.

The notice identified the location of transfer/discharge as Erie County Medical Center.

(ALJ Exhibit I.)

6. The Respondent's discharge plan is to leave the Appellant at ECMC, where he has not been admitted because he does not require hospital care. (0h37-38m; 1h11m.)

7. The Respondent did not develop an appropriate post-discharge plan of care for the Appellant that addresses his long-term care and medical needs and how they will be met after discharge, as required by 10 NYCRR 415.3(h)(1)(vi) and 415.11(d).

8. The Appellant remains at ECMC as a "social admit" pending the outcome of this hearing.

ISSUES

Has the Respondent established that the Appellant's discharge from Buffalo Community Healthcare Center is necessary and that the discharge plan is appropriate?

HEARING RECORD

Respondent witnesses: Dawn LaMagna, director of nursing

Respondent exhibits: 1-4

Appellant witnesses: Becky Del Prince, ECMC
Liz Rivera, social worker ECMC
Anthony De Pinto, nursing home administrator

Appellant exhibits: A-F

ALJ exhibit: ALJ I (hearing notice and notice of discharge)

The hearing was held at ECMC, the general hospital to which the Respondent discharged the Appellant. The Appellant was not present at the hearing. A digital recording of the hearing was made. (1h11m.)

APPLICABLE LAW

A residential health care facility (RHCF), or nursing home, is a residential facility providing nursing care to sick, invalid, infirm, disabled or convalescent persons who need regular nursing services or other professional services but who do not need the services of a general hospital. PHL 2801; 10 NYCRR 415.2(k).

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; or
 - (4) the health 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.

The Respondent has the burden of proving that the discharge or transfer is or was necessary and that the discharge plan is appropriate. 10 NYCRR 415.3(h)(2)(iii)(b).

DISCUSSION

The Appellant first came to Buffalo Community Healthcare Center in [REDACTED] 2018. He is [REDACTED] years old, with diagnoses including [REDACTED]. On [REDACTED] 2019, he became [REDACTED] and [REDACTED] with another resident. The Respondent had him transported to ECMC, where he was evaluated in its [REDACTED] Emergency Program ([REDACTED] (Exhibit B.) ECMC determined within hours that he did not require hospital care and notified the Respondent that it was prepared to return him to its facility. The Respondent refused to accept him back and instead issued the discharge notice. The Appellant remains at ECMC as a "social admit" because he does not require admission to a general hospital. (Exhibit D.)

When a resident is hospitalized, a nursing home is required to establish and follow a written policy that includes readmission to the facility if the resident requires nursing home care. 10 NYCRR 415.3(h)(3); 42 CFR 483.15(e). The Respondent instead sent the Appellant to ECMC with the discharge notice and has refused to consider him for readmission, even though the Respondent and ECMC both agree he continues to require some form of long-term residential care.

The Appellant may be a [REDACTED] and [REDACTED] resident, whose behaviors require careful supervision and management, but the Respondent has failed to establish that it does not have the resources and cannot be expected to provide the care and supervision he requires unless and until it finds a more appropriate placement. The discharge was initiated because the Appellant began [REDACTED] with another resident with whom he did not get along. He [REDACTED] at the other resident. It was the other resident, however, who [REDACTED] the [REDACTED] by [REDACTED] the Appellant. (0h8,14m.)

When discharge is alleged to be necessary due to the [REDACTED] of the health or safety of other individuals in the facility, the resident's clinical record must include complete documentation made by a physician. 10 NYCRR 415.3(h)(1)(ii)(b); 42 CFR 483.15(c)(2)(ii)(B). The Respondent submitted a [REDACTED], 2019 history and physical examination by the Appellant's treating physician at [REDACTED], and notes by a nurse practitioner dated [REDACTED], 2018, [REDACTED] and [REDACTED], 2019. These notes reflect a history of [REDACTED] and [REDACTED] behavior and need for supervision, but do not document the Appellant to be a [REDACTED]. Dr. [REDACTED] noted on [REDACTED] that he needed "full observation." The most recent note was dated [REDACTED], five weeks before the discharge. It mentions "[REDACTED] behaviors," and he is noted as "having an aide with him pretty much all the time," but this is stated to be "due to the fact that he does try to smoke." (Exhibit 3.)

The Respondent has clearly been aware that this resident requires careful supervision and management. The Respondent's own documentary evidence includes a [REDACTED] 2019 evaluation done at ECMC, which notes:

At this time, the residence [Respondent] was advised to allow his return but at a last chance. This residence was advised to pursue eviction if the behavior continued. (Exhibit 4.)

In spite of this "last chance" in [REDACTED] 2019, the Respondent, which has discharge planning responsibility for its residents, took almost no steps to develop a discharge plan that addresses the Appellant's care needs. The Respondent presented a PASSR Level II evaluation done in [REDACTED] 2019 which suggested that an assisted living facility or adult home would be appropriate for him. (Exhibit 1; Oh6m.) The Respondent's director of nursing Dawn LaMagna, however, testified that the Respondent has made only one

attempt to refer him to such a facility. (0h6m; 0h37m.) The Respondent instead resorted to "eviction" on [REDACTED] by simply sending him off to ECMC.

ECMC's patient review instrument (PRI) evaluation, conducted after the Appellant arrived on [REDACTED], concluded he still belongs in a nursing home. In contrast to the Respondent's virtually nonexistent efforts to arrange a suitable discharge plan for the last six months, Liz Rivera, a social worker at ECMC - which does not have the responsibility for the Appellant's long-term discharge planning - has contacted 38 nursing homes in the [REDACTED] area in an attempt to find a safe place for him since [REDACTED] when the Respondent refused to take him back. (Exhibit E.)

Discharge to a general hospital does not meet the Respondent's responsibility to provide an appropriate discharge plan. Shifting a difficult resident off to a general hospital without any discharge plan, and then refusing to take him back, is known as a "hospital dump." Department policy disseminated to nursing home administrators by "Dear Administrator Letter" is explicit:

State and Federal regulations require that nursing home residents who are temporarily hospitalized be allowed to return to the facility following hospitalization... Hospitals are not acceptable discharge locations. When sending residents with episodes of acting out behavior to hospitals for treatment, the nursing home is responsible to readmit the resident and/or develop an appropriate discharge plan. In these cases, the hospital is not considered to be the final discharge location. DAL 15-06, September 23, 2015.

ECMC is an inappropriate, costly and medically unnecessary solution that places the care management and planning burden on a hospital to which the Appellant has not even been admitted. Department regulations clearly intend that the discharge planning burden remain on the nursing home that undertook his residential care.

The Appellant does not require hospitalization and ECMC is prepared to discharge him back to the Respondent's care. If the Respondent rejects that plan, there is no plan. The Respondent takes the position that it is now entirely the responsibility of ECMC, not the Respondent, to find an appropriate discharge plan for the Appellant. (1h11m.) Ms. LaMagna flatly stated "he is discharged on my books... I consider him a permanent discharge at this time." Although ECMC is not a permissible discharge plan, according to Ms. LaMagna "it is for us." (0h37-38m.)

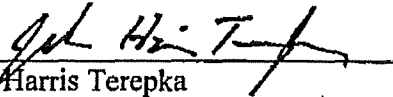
The care planning issues presented by this resident cannot be solved in this hearing decision, but responsibility for them can be and accordingly is reaffirmed. The Respondent may have to devote extra resources to providing supervision if the Appellant does not get along with other residents, but the Respondent is required to do so until it meets its obligation to develop an appropriate discharge plan that will meet his care needs. If the Respondent continues to find it burdensome to manage the Appellant's care, the Respondent has the option and responsibility to develop an appropriate discharge plan and to then issue a new notice of discharge. In the meantime, the discharge appeal is granted and the Respondent is directed to readmit the Appellant.

DECISION: Respondent Buffalo Community Healthcare Center has failed to establish that the discharge of Appellant [REDACTED] was necessary and that its discharge plan was appropriate.

The Respondent is directed to readmit the Appellant.

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

Dated: Rochester, New York
June 17, 2019


John Harris Terepka
Administrative Law Judge
Bureau of Adjudication