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Department of Health

ANDREW M. CUOMO
Governor

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

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

March 9, 2020

CERTIFIED MAIL/RETURN RECEIPT

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

Howard B. Frank, Esq.
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2503 Niagara Street
Buffalo, New York 14207

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2747 Main Street, 2nd Floor
Buffalo, New York 14214

Mary Swartz, Director
Niagara Rehabilitation & Nursing Center
822 Cedar Avenue
Niagara Falls, New York 14301

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: nm
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

COPY

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

[REDACTED],

DECISION

Appellant,

from a determination by

NIAGARA REHABILITATION & NURSING CENTER

to discharge him from a residential health care facility.

Before: Tina M. Champion
Administrative Law Judge

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

Date: February 26, 2020

Parties:

[REDACTED]

By: Howard B. Frank, Esq.
Temporary Special Needs Guardian
Nuchereno & Nagel, PLLC
2503 Niagara Street
Buffalo, New York 14207

By: Susan Fenster, Ombudsman
2747 Main Street, 2nd Floor
Buffalo, New York 14214

Niagara Rehabilitation & Nursing Center

By: Mary Swartz, Director
Niagara Rehabilitation & Nursing Center
822 Cedar Avenue
Niagara Falls, New York 14301

Interested Party: Erie County Medical Center

By: Regina A. Del Vecchio, Esq.
Office of General Counsel
Erie County Medical Center Corporation
462 Grider Street
Buffalo, New York 14215

JURISDICTION

By notice dated [REDACTED] 2020, Niagara Rehabilitation & Nursing Center (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [REDACTED] (the Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) 415.3(i).

The hearing was held in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulations (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR.

Evidence was received and witnesses were examined. An audio recording of the proceeding was made.

HEARING RECORD

The Appellant was not present during the hearing due to his behaviors being uncondusive to the hearing process. He appeared through his Temporary Special Needs Guardian and Long Term Care Ombudsman, who relied on the evidence and testimony offered by Erie County Medical Center.

Facility Exhibits: 1 – 8

Facility Witnesses: Mary Swartz, Director – Niagara Rehabilitation & Nursing Center

Hospital Exhibits: A – K

Hospital Witnesses: Siva Yedlapati, M.D., Attending Physician – ECMC
Sheila Kennedy, Supervisor of Discharge Planning – ECMC
Deborah Bernier, Operations Manager – Terrace View LTC Facility

ALJ Exhibits: I – Letter with Notice of Hearing and Discharge Notification

FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old male who was sent from the Facility to Erie County Medical Center (ECMC) by ambulance on [REDACTED], 2020 and has been there since that date. (Facility Ex. 2.)

2. The Appellant has an [REDACTED] history that is noted as beginning at [REDACTED] years of age. He has spent the majority of his life residing at [REDACTED]. (Facility Ex. 1.)

3. The Appellant's diagnoses include [REDACTED] and [REDACTED]. He has a long-standing history of [REDACTED] [REDACTED] toward people and objects, and [REDACTED] [REDACTED]

4. The Facility admitted the Appellant in 2017. Since his admission, the Facility has sent him to the hospital numerous times for [REDACTED] behaviors. The timeline immediately preceding the Appellant's [REDACTED], 2020 transport to ECMC is as follows:

- a. [REDACTED], 2020 – Facility sent Appellant to ECMC
- b. [REDACTED], 2020 – Appellant returned to the Facility
- c. [REDACTED] 0, 2020 – Facility sent Appellant to Niagara Memorial
- d. [REDACTED], 2020 – Appellant returned to the Facility
- e. [REDACTED] 2020 – Facility sent Appellant to ECMC

(Facility Exs. 2, 4.)

5. The Facility issued a "Transfer/Discharge Notice" dated [REDACTED], 2020, which stated it was discharging the Appellant to ECMC. The reason cited is that the "health and/or safety of individuals in the facility would otherwise be endangered" and the Facility specified that "Resident is [REDACTED] & a [REDACTED] behaviors even with medications." (ALJ Ex. 1.)

6. On [REDACTED], 2020, ECMC determined during a [REDACTED] consultation that there was “no evidence of [REDACTED]” and no evidence that “[REDACTED] symptoms [were] contributing to his [REDACTED] behavior” and therefore that there was “little benefit to considering acute [REDACTED] treatment.” (Hosp. Ex. C.)

7. ECMC notified the Facility that the Appellant was ready to be discharged from the Emergency Room on [REDACTED] 2020 and the Facility refused to allow the Appellant to return. (Hosp. Ex. F.)

8. Upon the Facility’s refusal to readmit the Appellant, ECMC admitted the Appellant to the hospital as a “social admission” on a medical floor in the hospital. (Hosp. Ex. F; T Yedlapati; Kennedy.)

9. ECMC maintains that the Appellant does not require [REDACTED] hospitalization. (Hosp. Ex. D.; T. Yedlapati.)

10. ECMC has made numerous referrals to other facilities, all of whom have declined the Appellant. (Hosp. Ex. F; T. Kennedy.)

11. The Appellant timely appealed the Facility’s discharge determination and proposed discharge location.

12. The Appellant has remained at ECMC during the pendency of the appeal.

ISSUES

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

APPLICABLE LAW

A residential health care facility, also referred to in the Department of Health Rules and Regulations as a 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].)

A resident may only be discharged pursuant to specific provisions of the Department of Health Rules and Regulations. (10 NYCRR 415.3[i][1].) Excluding reasons of nonpayment and facility closure, a resident may be transferred only when:

- (1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in the facility;
- (2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
- (3) the safety of individuals in the facility is endangered; or
- (4) The health of individuals in the facility is endangered;

(10 NYCRR 415.3[i][1][a].)

A Facility must ensure complete documentation in the resident's clinical record when a resident is discharged. When discharge is necessary due to the endangerment of the health of other individuals in the facility, documentation shall be made by a physician. (10 NYCRR 415.3[i][1][b].)

Facilities are required to provide written notice of transfer or discharge that includes the following:

- (a) The reason for transfer or discharge;
- (b) The specific regulations that support, or the change in Federal or State law that requires, the action;
- (c) The effective date of transfer or discharge;
- (d) The location to which the resident will be transferred or discharged;
- (e) a statement that the resident has the right to appeal the action to the State Department of Health, which includes:
 - (1) an explanation of the individual's right to request an evidentiary hearing appealing the decision;
 - (2) the method by which an appeal may be obtained;
 - (3) in cases of an action based on a change in law, an explanation of the circumstances under which an appeal will be granted;
 - (4) an explanation that the resident may remain in the facility (except in cases of imminent danger) pending the appeal decision if the request for an appeal is made within 15 days of the date the resident received the notice of transfer/discharge;

(5) in cases of residents discharged/transferred due to imminent danger, a statement that the resident may return to the first available bed if he or she prevails at the hearing on appeal; and

(6) a statement that the resident may represent him or herself or use legal counsel, a relative, a friend, or other spokesman;

(f) the name, address and telephone number of the State long term care ombudsman;

(g) for nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act;

(h) for nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

(10 NYCRR 415.3(i)(1)(v).)

Facilities are also required to "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."

(10 NYCRR 415.3(i)(1)(vi).)

Under the hearing procedures at 10 NYCRR 415.3(i)(2)(iii)(b), the Facility bears the burden to prove a discharge is necessary and appropriate. Under SAPA § 306(1), a decision in an administrative proceeding must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact. It is less than a preponderance of evidence but more than mere surmise, conjecture or speculation, and it constitutes a rational basis for a decision. (Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3d Dept. 1984], appeal dismissed 63 N.Y.2d 649.)

DISCUSSION

The Facility seeks to discharge the Appellant on the grounds that the health and/or safety of individuals in the facility would otherwise be endangered. (ALJ Ex. I.) The Facility offered

uncontroverted testimony and documentary evidence that make clear that the Appellant is an [REDACTED] difficult individual to care for and to have residing in its nursing home. He is [REDACTED] and [REDACTED]. He is resistive to care and has injured himself, staff, and other residents at the Facility. His behaviors are unpleasant and disruptive – having [REDACTED] at the Facility, [REDACTED] such as on the nurse's station, [REDACTED] on the walls and himself, and made [REDACTED] and requests to staff. Even the hospital has had a police officer stationed on the floor where Appellant has been placed to control Appellant's behaviors if necessary. (T. Yedlapati.) However, the nursing home did not submit any clinical documentation from a physician stating that discharge from the Facility is necessary due to the endangerment of the health of other individuals in the facility, as required by 10 NYCRR 415.3[i][1][ii][b]. On cross examination, Mary Swartz, Director of the Facility, acquiesced that the Facility did not have any such documentation. (T. Swartz.) Accordingly, the Facility has failed to prove a discharge is necessary and appropriate pursuant to 10 NYCRR 415.3(i)(2)(iii)(b).

Furthermore, even if the Facility had met its burden to prove that discharge is necessary and appropriate, it has failed to develop an appropriate discharge plan for the Appellant. The Facility listed ECMC as the discharge location on its [REDACTED] 2020 discharge notice. Discharge to a hospital, an acute care facility, is not an appropriate discharge plan, nor does it address how Appellant's medical needs will be met after discharge. While the Facility was authorized to and understandably did send the Appellant to ECMC for medical evaluation following his behaviors in [REDACTED] 2020, the Facility has no authority to refuse to re-admit the Appellant after he was evaluated and cleared by ECMC to return.

While clearly challenging, it is the responsibility of the Facility to find an appropriate discharge location and develop an appropriate discharge plan for the Appellant if it is necessary to discharge him as provided for by the applicable regulations. The Facility cannot unilaterally place this responsibility on ECMC. It is foreseeable that the Appellant will continue to engage in

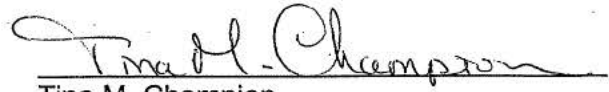
behaviors that may require hospital evaluation upon the Appellant's return to the Facility. The Facility should be prepared to accept the Appellant back after any further incidents unless and until it is able to prove that discharge is necessary and it develops an appropriate discharge plan. The potential cycle of back and forth trips between a hospital and the Facility is a realistic possibility under the current circumstances and is likely to further aggravate the Appellant. Therefore, the Facility is urged to try new, previously unattempted strategies to manage the Appellant's behaviors, such as those suggested by Deborah Bernier, Operations Manager at Terrace View Long Term Care Facility (i.e. increasing his supervision ratio, consistency with caregivers, weighted furniture, etc.).


DECISION

Niagara Rehabilitation & Nursing Center has not established that the Appellant's discharge was necessary and that the discharge plan was appropriate.

1. Niagara Rehabilitation & Nursing Center is directed to readmit the Appellant to the first available semi-private bed prior to admitting any other person to the Facility, pursuant to 10 NYCRR 415.3(i)(2)(i)(d).
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: Albany, New York
March 6, 2020


Tina M. Champion
Administrative Law Judge

TO: 
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