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 21, 2019

<u>CERTIFIED MAIL/RETURN RECEIPT</u>

Phyllis Leffler, NHA
Gowanda Rehabilitation
100 Miller Street
Gowanda, New York 14070

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

Regina DelVecchio
Erie County Medical Center
462 Grider Street
Buffalo, New York 14215

[REDACTED]

Susan Fenster, Ombudsman
NYS Long Term Care Ombudsman Program
People Inc.
2747 Main Street, 2nd Floor
Buffalo, New York 14214

Michael Scott-Kristansen, Esq
Law Offices of Pullano & Farrow
69 Cascade Drive, Suite 307
Rochester, New York 14614

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:
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

Gowanda Rehabilitation &
Nursing Center,

Respondent,

to discharge him from a residential
health care facility.

ORIGINAL

DECISION

Hearing before: John Harris Terepka
Administrative Law Judge

Held at: Erie County Medical Center
462 Grider Street
Buffalo, New York
June 20, 2019

Parties: Gowanda Rehabilitation and Nursing Center
100 Miller Street
Gowanda, New York 14070
By: Michael Scott-Kristansen, Esq.
Pullano & Farrow
69 Cascade Drive, Suite 307
Rochester, New York 14614

[redacted]
By: [redacted]

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

Susan Fenster, Long Term Care Ombudsman Program
People Inc.
2747 Main Street, 2nd floor
Buffalo, New York 14214

JURISDICTION

Gowanda Rehabilitation & Nursing Center (the Respondent), a residential health care facility (RHCF) subject to Article 28 of the Public Health Law, discharged Robert Green (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 Gowanda Rehabilitation & Nursing Center is a residential health care facility, specifically a nursing home within the meaning of PHL 2801.2, located in Gowanda, New York.

2. Appellant age was admitted as a resident on 2019 with diagnoses of and . (Exhibit 2.)

3. On , 2019, the Respondent transferred the Appellant to Erie County Medical Center (ECMC) for evaluation after he was an year-old female resident with (Exhibit 4.)

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. ECMC advised the Respondent that the Appellant was ready to return to the Respondent's care. The Respondent refused to readmit him. (Exhibit A.)

5. On 2019, the Respondent issued a notice of discharge to the Appellant that stated:

> This transfer/discharge notice is being issued because your health has improved sufficiently so that you no longer need the services provided by our facility.

Facts that led to determination:
[REDACTED] Eval: not able to return due [REDACTED].

The notice stated that the effective date of discharge was [REDACTED], 2019, and it identified the location of transfer/discharge as ECMC. (Exhibit 1.)

6. The Appellant requested this hearing by his [REDACTED].

7. The Appellant is not in need of inpatient care at a general hospital. (Exhibits A, C, D, 5, 7; Testimony of Dr. Kenney.)

8. The Respondent did not develop, at the time of discharge or at any time thereafter, 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).

9. 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 Gowanda Rehabilitation & Nursing Center is necessary and that the discharge plan is appropriate?

HEARING RECORD

Respondent witnesses:	[REDACTED], Appellant's [REDACTED] Crystal Heeter, screener Phyllis Leffler, administrator Marlene Graff, RN
Respondent exhibits:	1-8 (Exhibit 8 is a is a thumb drive containing video)
Appellant witnesses:	Patrick Kenney, MD
Appellant exhibits:	A-F

The hearing was held at ECMC, the general hospital to which the Respondent discharged the Appellant. The Appellant was not present. A digital recording of the hearing was made. (1h46m.)

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:
>
> (1) 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;
>
> ...
>
> (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 Gowanda Rehabilitation & Nursing Center on 2019 after his brought him to ECMC because she was unable to care for him. (0h13m.) He was at ECMC from to for placement due to unsafe living conditions at home. (Exhibit C, page 2.) He is years old, with diagnoses that include (Exhibit 2.) He does not have any other diagnoses or any history of .

One characteristic effect of the Appellant's is a in his behavior. On , 2019, he entered the room of an year-old female resident with He was discovered by staff of the resident with their clothing He was and was directed to return to his own room directly across the hall. He readily complied without incident. (Exhibit 4, page 18.)

The Respondent conducted an investigation and sent the Appellant to ECMC for evaluation of "." (Exhibit 4.) ECMC determined within hours that he did not require hospital care, was not a danger to himself or others, 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 A; 1h18m.)

It is recognized that the Appellant's stay at Gowanda has been relatively brief. The length of his stay, however, provides no legal basis for relieving the Respondent of its responsibilities under 10 NYCRR 415.3(h)(1)&(2). The Respondent relies on 10 NYCRR 415.3(h)(3), which requires facilities to establish and implement certain bed-

hold and admission policies. (0h3m.) There is nothing in 415.3(h)(3) that exempts nursing home residents of less than thirty days, whether they are eligible for Medicaid or not, from the requirements of 415.3(h)(1),(2)&(4) that the facility establish permissible grounds for the discharge and an appropriate discharge plan. In particular, there is nothing in the regulation relied upon that relieves the facility of its "burden of proof that the transfer is/was necessary and the discharge plan appropriate." 10 NYCRR 415.3(h)(2)(iii)(b).

The Respondent presented no evidence to suggest that the Appellant is a danger to himself, as was alleged in the discharge notice. He has , is unaware of his surroundings with , and , but is also alert, cooperative and redirectable. (Exhibit D, page 1.) As the Respondent's own investigation noted, "Resident gets up and just ." (Exhibit 4, page 3.)

The Respondent also failed to present any evidence to establish that the Appellant's health has improved sufficiently so he no longer needs the services provided by the Respondent, as is alleged in the discharge notice. This allegation is inconsistent with Respondent's decision to discharge him to a general hospital for evaluation on and is inconsistent with the Respondent's argument at this hearing that he requires further evaluation and treatment at ECMC before an appropriate discharge plan can be developed for him. All the evidence supports the view of Dr. Kenney, who has followed him while he has been at ECMC for the past three weeks, that the Appellant requires residential care for his

As to the allegation that the Appellant is a danger to others, when discharge is alleged to be necessary for this reason the nursing home is required to ensure that the resident's clinical record includes complete documentation made by a physician. 10 NYCRR 415.3(h)(1)(ii)(b); 42 CFR 483.15(c)(2)(ii)(B). The Respondent alleged that its medical director determined the Appellant is a danger because of his "predatory behavior" (0h33-34, 38-39m) but produced no documentation from its clinical record made by any physician in compliance with this requirement. When the ECMC emergency department attempted to reach the Appellant's treating physician at Gowanda:

> ED case manager spoke with nursing staff at Gowanda nursing and rehabilitation, who confirmed that they were unable to take the patient back as this was in nature but did not give details. Nurse stated that this is per attending physician Dr. Steven Barnes, messages were left for him at [phone number] with no call back on multiple attempts. (Exhibit A, page 4; Exhibit C, page 2.)

The Respondent requested this hearing be continued for several weeks, while the Appellant remained at ECMC, in order to have its medical director who recently underwent surgery testify. The request was denied because testimony given over a month after the discharge would not have cured the documentation deficiencies in the Respondent's clinical record, or address the urgent discharge planning issues raised by the Respondent's decision to leave the Appellant at ECMC for no medical reason. (0h34-37m.)

The documentation the Respondent did produce was a report of an investigation that was completed on , which contains no mention of any physician's involvement in the investigation or the determination that discharge was necessary. The Respondent offered no documentation to show that the Appellant had a history of behavior in its nursing home. That the Respondent was allowing

him to wander the halls of its nursing home completely unsupervised suggest there was no such history. (Exhibit 8.)

The investigation report documents a plan to implement a room change, motion detector on the Appellant's door, and "stop strips" on nearby resident room doors. These are entirely appropriate precautions for a nursing home to take in its supervision of a resident with and they are completely consistent with the medical opinions Dr. Kenney expressed at the hearing. The Respondent does not, however, appear to have actually implemented this plan, instead simply discharging the Appellant to ECMC on and refusing to take him back.

Also missing from the Respondent's follow up plan after this incident is any suggestion that it might be a good idea for staff to keep an eye on this resident who is and has a tendency to wander. At ECMC a Patient Safety Companion, also known as "one on one" supervision, has been provided to the Appellant as necessary for these purposes. (Exhibit E.) The Respondent does not appear to have considered such a precaution.

The evidence does show the Appellant requires careful supervision and management. As Dr. Kenney explained at the hearing, a characteristic feature of his is , which can present a risk of behavior if he is not adequately supervised. The Respondent has failed to establish that it does not have the resources and cannot be expected to provide that supervision.

The evidence from both the Respondent (Exhibit 4) and ECMC is that the Appellant is compliant with supervision and with directives given to him. He is "alert, cooperative, often redirectable though sometimes inappropriate" because of his

(Exhibit D.) He is redirectable when his leads to behavior. The Respondent's administrator, Ms. Leffler, characterized surveillance video of the incident as showing him in the hallway checking to see he was not observed before entering the room. (0h26m; Exhibit 8.) When he was found in the female resident's room on he was but completely compliant with redirection. (Exhibit 4, pages 1, 18, 19, 23.) This evidence supports the view that the Appellant can be prevented from engaging in such behavior by appropriate supervision.

The Respondent has also failed to develop a discharge plan that addresses the Appellant's residential care needs. 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.

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 proposes that the Appellant stay at ECMC while further evaluation and treatment is conducted. In particular, the Respondent's witness Ms. Graff complained that ECMC has not conducted a evaluation and initiated treatment that would ensure his behavior would change. (0h55m-1h4m.) As Dr. Kenney

explained, the Appellant's symptoms and behaviors are attributable to and completely explained by his known not by a disorder. He has no history of issues, nor is there any other indication of any now. (1h13-16m; 1h25-30m.) In addition to Dr. Kenney's testimony and ECMC clinical records, ECMC's SCREEN evaluation documented with no diagnosis or documented history of or or eligibility or referral for services, no evidence of cognitive deficits or adaptive skill deficits indicative of , and determined nursing home placement was appropriate for him. (Exhibit 7.)

There is simply no evidence in this hearing record that the Appellant has any other condition or illness other than He requires care and treatment for his and this can be and is appropriately to be provided in a residential health care facility. Dr. Kenney's medical opinion on these issues was credible, clear, and consistent with the opinion of the other ECMC physicians who documented treatment of the Appellant. (Exhibits A, C, D, 5.) It was not controverted by anything other than the Respondent's complaint that he should have evaluation and treatment that ECMC has determined is not indicated.

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. All the evidence supports the view of Dr. Kenney that the Appellant requires care in a residential health care facility, and that the most appropriate placement is where he can be safe and secure, such as a unit. (1h36-38m; Exhibit 5.) While the Respondent does not

have a dedicated unit (0h25m), it is the responsibility of the Respondent, not ECMC, to arrange for this care elsewhere if the Respondent is not willing to undertake it. (1h42-43m.)

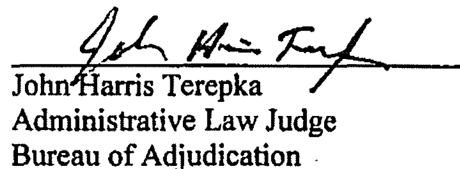
The supervision and care planning issues presented by this resident cannot be solved in this hearing decision, but responsibility for them can be and accordingly is reaffirmed. The Respondent may have to devote extra resources to providing the supervision the Appellant needs, but the Respondent is required to do so until it meets its obligation to develop an appropriate discharge plan that will meet his care needs. It is obvious that the Appellant cannot be simply allowed to wander in this or any other facility, completely unobserved and unsupervised, as he was on the morning of . The Respondent can be expected to take steps to ensure he does not do so. (1h43m.) If the Respondent finds it burdensome to manage this resident'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 Gowanda Rehabilitation & Nursing Center has failed to establish that the discharge of Appellant 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 21, 2019



John Harris Terepka
Administrative Law Judge
Bureau of Adjudication