



# 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 1, 2018

## CERTIFIED MAIL/RETURN RECEIPT

[REDACTED]  
Niagara Memorial Medical Center  
621 10<sup>th</sup> Street  
Niagara Falls, New York 14301

Vicky Widman, Director of SW  
Niagara Memorial Medical Center  
621 10<sup>th</sup> Street  
Niagara Falls, New York 14301

Michael Tilton, SW  
Niagara Memorial Medical Center  
621 10<sup>th</sup> Street  
Niagara Falls, 14301

Roxane Amborski, DON  
193 South Union Street  
Williamsville, New York 14221

**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: cmg  
Enclosure



### JURISDICTION

Williamsville Suburban, LLC (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).

The hearing was held at Niagara Memorial Medical Center, the general hospital to which the Respondent discharged the Appellant. The Respondent presented two witnesses, Director of Nursing Roxane Amborski and Director of Social Work Jacklynn Gingerich, and documents. (Exhibits 1-6.) The Appellant testified on his own behalf. At the Appellant's request, Vicky Wideman, Director of Social Work at Niagara Memorial Medical Center, also participated in the hearing and testified. The hearing was digitally recorded. (1h06m.)

### SUMMARY OF FACTS

1. Respondent Williamsville Suburban, LLC is a residential health care facility, or nursing home, within the meaning of PHL 2801.2, located in Williamsville, New York.

2. Appellant [REDACTED] age [REDACTED] was first admitted as a resident at Williamsville Suburban in [REDACTED] 2017. He was transferred home for a time, but then readmitted in [REDACTED] 2018 with diagnoses including [REDACTED]  
[REDACTED]

3. On [REDACTED] 2018, the Respondent transferred the Appellant to Niagara Memorial Medical Center for [REDACTED] evaluation after he became uncooperative and [REDACTED]  
[REDACTED]

4. On [REDACTED] the Respondent also issued a discharge notice to the Appellant that stated as grounds for discharge: [REDACTED]. The notice identified the location of discharge as Niagara Memorial Medical Center. (Exhibit 2.) The notice contained most, but not all of the information required to be on a discharge notice pursuant to 10 NYCRR 415.3(h)(1)(v).<sup>\*</sup> The Respondent also added onto the printed discharge notice a handwritten note stating "I received this notice on [REDACTED] 18. I do not want to return to this facility," and had the Appellant sign it. (Exhibit 2; 0h13m, 38m, 1h1m.)

5. Niagara Memorial Medical Center is a general hospital within the meaning of PHL 2801.10. It evaluated and admitted the Appellant on [REDACTED] for care, treatment and stabilization. The hospital assessed him to be [REDACTED] and determined he had not been taking his medications. (0h45m.)

6. The Appellant no longer requires inpatient treatment at a general hospital. Niagara Memorial Medical Center has determined that return to a residential health care facility is appropriate and necessary to meet his care needs. (0h46m, 47-48m.)

7. Niagara Memorial Medical Center advised the Respondent that the Appellant was ready for discharge back to the Respondent's care. The Respondent refuses to readmit him. Because the Appellant wants to return to the Respondent's facility, the hospital submitted on his behalf a request for this hearing. (0h43-44m.)

8. The Respondent did not develop, at the time of the discharge or at any time thereafter, an appropriate post-discharge plan of care for the Appellant that addresses his

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<sup>\*</sup>The notice did not include: (b) the specific regulations that supported the action; (e)(1) an explanation of the Appellant's right to request an evidentiary hearing appealing the decision; (5) a statement that the Appellant could return to the first available bed if he prevailed at the hearing; or (6) a statement that the Appellant could represent himself or use legal counsel, a relative, a friend or other spokesperson.

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 Niagara Memorial Medical Center pending the outcome of this hearing.

**ISSUES**

Has the Respondent established that the Appellant's discharge from Williamsville Suburban 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; 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; 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. 10 NYCRR 415.3(h)(1)(i)(a).

At this hearing the Respondent has the burden of proving that the discharge or transfer is or was necessary and that the discharge plan is appropriate. 18 NYCRR 415.3(h)(2)(iii)(b).

### DISCUSSION

The Appellant is [REDACTED] wheelchair bound [REDACTED] with diagnoses of [REDACTED] (Exhibit 3.) He first came to the Williamsville Suburban in [REDACTED] 2017, returned home for a time, and then was readmitted in [REDACTED] 2018 for rehabilitation after the [REDACTED]. The Respondent subsequently moved him from its [REDACTED] unit to [REDACTED] term care in its [REDACTED] and behavioral unit in order to more closely monitor his behaviors. (0h8m, 39m.)

The Appellant is subject to episodes of verbal [REDACTED] and has [REDACTED] [REDACTED] (0h5-9m, 24m; Exhibit 4.) This behavior is particularly evident when he becomes [REDACTED] and refuses his medications. (0h56-57m.) He also has had a habit, while in the nursing home, of making [REDACTED] resulting in his transport to a hospital for [REDACTED] evaluation. He was transferred many times for hospital evaluation because of this behavior, and then returned to the nursing home. His return from the last such hospitalization was on [REDACTED] 2018. (0h5-7m.)

On [REDACTED], 2018, the Appellant again became [REDACTED] and [REDACTED]. He [REDACTED] (0h18-19m; Exhibit 6.) The Respondent had him transported to Niagara Memorial Medical Center for [REDACTED] evaluation. This time, the Respondent also issued a discharge notice to him. Although the Appellant was at the time [REDACTED] and in the process of being

transported to a hospital for [REDACTED] evaluation, the Respondent added a handwritten statement to the bottom of the notice that read: "I do not want to return to this facility" and had him sign it. (0h10-11m, 29-30m, 38m, 1h01-02m; Exhibit 3.) The Respondent argues, on the basis of his [REDACTED] and his signing of this statement, that it was "his choice" to repeatedly claim he wanted to [REDACTED] and "his choice" to leave the Respondent's facility. (0h23m.)

The Respondent has failed to meet its burden of proving grounds for discharge or an appropriate discharge plan. As an initial matter, it failed to establish that it ensured any documentation in the Appellant's clinical record, made by a physician, that the discharge was necessary due to the endangerment of individuals in the facility, as required under 10 NYCRR 415.3(h)(1)(ii)(b). The documentation produced at the hearing consisted of three days of nursing notes, and undated security photographs. (Exhibits 4, 6.) The Respondent offered no evidence of a physician's determination that discharge was necessary.

The Appellant is clearly a difficult resident, with mental issues and resulting behaviors that require [REDACTED]. The Respondent's evidence, however, failed to establish that these are behaviors unfamiliar to a nursing home, which is a health care facility that can and should be expected to address them with appropriate attention and supervision before proceeding to an involuntary discharge. The Respondent moved the Appellant from the second to first floor of the facility after he [REDACTED] [REDACTED] (0h15m.) It also initiated "1 to 1" supervision, but then discontinued it for budgetary reasons after approximately twenty-four hours. (0h27-28m.) When the Appellant's [REDACTED] the Respondent failed to take steps to control

his use of the [REDACTED] Respondent's claims it had to allow him to communicate with family and was unable to in some way monitor or control his use of the [REDACTED]. (0h25-27m.)

Most importantly, the Respondent has not proposed a discharge plan that addresses the Appellant's care needs. It has failed to produce or even articulate anything that resembles an adequate, coherent or feasible discharge plan. The Respondent suggested that it planned a discharge to the Appellant's [REDACTED] but produced no evidence that such a plan is or was ever actually in place. It became clear at the hearing that the Appellant's [REDACTED] is neither willing nor able to take him in. He requires assistance with his personal care needs and medication supervision, is wheelchair bound, and her home has stairs. (0h11m, 14m, 28-29m, 33-34m, 40m, 44-45m, 46m, 54m.) He still requires care in a residential health care facility.

The Respondent's DON Amborsky claimed "there really was never an opportunity to put down something on paper" because the Appellant's [REDACTED] [REDACTED] meant "he was directing his own care." (0h24m, 27m, 32m.) The Respondent argued at one point that the Appellant, whose BIMS score is 15 (0h24-25m; Exhibit 3), was and [REDACTED] and able to manage his own care. It later contended that "he is not as [REDACTED] as they say," is [REDACTED] (1h3m), and that "he has mental health issues, he needs mental health care... there are mental health facilities that can help him, that's where he needs to be." (0h35m.) These inconsistent assertions do not explain or excuse, they illustrate the Respondent's failure to fulfill its care planning obligations to this resident.



DON Amborski appeared to be under the impression that it is now the hospital's responsibility to evaluate and document care needs and develop and implement a care plan. (0h49-50m.) At the hearing the Respondent claimed, without substantiating by documentation or providing specific details, that it attempted numerous referrals to other nursing homes without success. (0h36m.) DON Amborski then expressed doubt about the extent of Niagara Memorial's efforts to find a nursing home for the Appellant, claiming "every nursing home in Western New York has beds open." (0h49m.)

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). The Respondent instead issued a discharge notice, and has refused to reevaluate or consider him for readmission since the hospital advised it that he was ready for discharge back to the Respondent. Shifting a troublesome resident off to a general hospital without any discharge plan, and then refusing to take him back, is known as a "hospital dump."

Discharge to a general hospital does not meet the nursing home's responsibility to provide an appropriate discharge plan. Niagara Memorial Medical Center is a short term, costly and medically unnecessary solution that places the care planning burden on the hospital. Department regulations clearly intend that this burden remain on the nursing home that undertook the Appellant's residential care.

The Respondent objects to the burden of having to devote extra resources to meeting the Appellant's needs if he returns, but the Respondent is required to do just that unless and until it meets its obligation to develop an appropriate discharge plan. 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 to then issue a new notice of discharge. The Respondent can and should be expected to take the necessary steps to meet the Appellant's needs unless and until it complies with these obligations. In the meantime, the discharge appeal is granted and the Respondent is directed to readmit the Appellant.

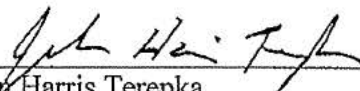
**DECISION:** Respondent Williamsville Suburban has failed to establish that the discharge of Appellant [REDACTED] was necessary and that its discharge plan was appropriate.

The Respondent is not authorized to discharge the Appellant.

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  
September 28, 2018

  
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John Harris Terepka  
Administrative Law Judge  
Bureau of Adjudication