



Department of Health

ANDREW M. CUOMO
Governor

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

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

May 17, 2019

CERTIFIED MAIL/RETURN RECEIPT

Sabina Avdagic, Director of Social Work
Humboldt House Rehabilitation
and Nursing Center
64 Hager Street
Buffalo, New York 14208

██████████
c/o Humboldt House Rehabilitation
and Nursing Center
64 Hager Street
Buffalo, New York 14208

Caroline McDonough, Esq.
Center for Elder Law and Justice
438 Main Street
Buffalo, New York 14202

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

██████████,

Appellant,

from a determination by

**Humboldt House Rehabilitation
and Nursing Center,**

Respondent,

to discharge him from a residential
health care facility.

COPY

DECISION

Hearing Before:

John Harris Terepka
Administrative Law Judge

Held at:

Humboldt House Rehabilitation and Nursing Center
64 Hager Street
Buffalo, New York 14208
May 15, 2019

Parties:

Humboldt House Rehabilitation and Nursing Center
64 Hager Street
Buffalo, New York 14208
By: Sabina Avdagic, Director of Social Work

██████████
Humboldt House Rehabilitation and Nursing Center
By: Caroline McDonough, Esq.
Center for Elder Law & Justice
438 Main Street
Buffalo, New York 14202

JURISDICTION

Humboldt House Rehabilitation and Nursing Center (the Respondent), a residential health care facility (RHCF) subject to Article 28 of the Public Health Law, determined to discharge [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 Humboldt House Rehabilitation and Nursing 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 at Humboldt House in [REDACTED] 2017 for rehabilitative care after hospitalization. He is ambulatory with a cane, and currently able to climb [REDACTED] steps. He continues to require physical therapy services. (Exhibit 2.)
3. The Appellant has a history of [REDACTED] and has been [REDACTED] and in violation of facility policies about bringing [REDACTED] into the facility. The Appellant has been [REDACTED] abusive with staff and other residents when [REDACTED] (Exhibits 4, 6.)
4. By notice dated [REDACTED] 2019, the Respondent advised the Appellant that it had determined to discharge him on [REDACTED] 0, 2019, on the grounds that the health and safety of individuals in the facility would otherwise be endangered because "Resident to bring [REDACTED] in the facility." (Exhibit ALJ I.)

5. The Respondent's discharge plan is to send the Appellant to the home of a friend who has offered to take him in as an alternative to shelter placement. The Respondent has taken no steps to evaluate the appropriateness of the proposed discharge location.
6. The Appellant remains at Humboldt House pending the outcome of this hearing.

ISSUES

Has the Respondent established that the Appellant's discharge from Humboldt House 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:
 - (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;
 - ...
 - (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.

(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)

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 notice of hearing with attached notice of discharge was marked as ALJ Exhibit I. The Respondent's documents were marked as Exhibits 1-7. Mycalyne Turman, director of nursing, Chevaun Lewis, social worker, and Philip Polisano, physical therapist, testified for the Respondent. The Appellant and his friend [REDACTED] testified for the Appellant. A digital recording of the hearing was made. (1h32m.)

The Respondent has failed to meet its burden of proving its grounds for discharge or an appropriate discharge plan. The Respondent alleges that the Appellant brings [REDACTED] into the nursing home and is regularly [REDACTED] there. When [REDACTED] he is [REDACTED] abusive and [REDACTED] with staff and other residents. He has had falls when [REDACTED] (Testimony; Exhibit 4.)

When discharge is alleged to be necessary due to the endangerment of the health 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). The Respondent failed to demonstrate compliance with this requirement. The only documentation by a physician that the Respondent offered was a statement that the Appellant no longer needs nursing home care. (Exhibit 1.)

The Respondent also failed to meet its burden of proving that the Appellant's own health, or the safety of individuals in the facility is endangered. The Appellant is clearly

a [REDACTED] and [REDACTED] resident, with behavioral issues that require supervision and management. In particular, his [REDACTED] use, in violation of facility policy, causes problems with staff and other residents. Violation of facility policies, however, is not a grounds for discharge authorized by Department regulations.

The Respondent has an obligation to provide the supervision this resident requires and manage his behaviors. The Respondent's evidence failed to establish that the Appellant has [REDACTED] [REDACTED] or otherwise gone beyond [REDACTED] abuse and [REDACTED] to any staff or residents. (Exhibit 4.) According to the Respondent's representative at the hearing, an alleged [REDACTED]" posed by the Appellant is to the Respondent's staff in picking him up after a fall. The Appellant's [REDACTED] in his room is behavior a nursing home is required to take reasonable steps to deal with. The Respondent offered little evidence it has taken even such rudimentary steps as room checks to ensure he does not bring and keep [REDACTED] in the facility.

The Respondent criticizes the Appellant for failing to cooperate with efforts to address his [REDACTED] abuse. (Exhibit 6.) The Appellant, in return, complains: "I still need help. I don't understand why they're mad at me for needing help. That's what I am here for." (1h9m.) He continues to receive physical therapy, and the Respondent's [REDACTED], 2019 therapy progress report stated that he "requires skilled PT services." (Exhibit 2.) The Respondent's notice of discharge does not allege, nor does the evidence suggest, that his needs cannot be met in this facility. 10 NYCRR 415.3(h)(1)(i)(a)(1).

As the Respondent has failed to establish valid grounds for discharge, it is unnecessary to decide the appropriateness of the discharge plan. It is noted, however, that the Respondent has offered as a discharge location to send him to a friend's house.

Mr. Butler came forward on [REDACTED] 2019 to say he was willing to give the Appellant a place to stay as an alternative to a shelter. (Exhibit 4, page 8; Testimony.) The Respondent did not perform any other discharge planning once it had this offer. It settled on the offer as its discharge plan and issued the [REDACTED] discharge notice identifying Mr. [REDACTED] home as the discharge location. (Exhibit 4, page 7.)

All Mr. [REDACTED] has to offer is a [REDACTED] on his [REDACTED]. The Appellant cannot manage the [REDACTED] to the [REDACTED]. The Respondent did not visit the proposed discharge location or perform the evaluation that its physical therapy department customarily does to ensure the surroundings are adequate and safe. Its discharge planner simply relied on a well-intentioned offer to try to take the Appellant in, made by a friend who has no discernible expertise in health care or home care needs.

The Respondent's discharge plan obviously presumes that the Appellant no longer requires nursing home care. The Respondent did produce evidence that is the case, including the medical opinion of his treating physician that he can be safely discharged into the community. (Exhibit 1.) The Respondent did not, however, allege this as grounds for discharge and it will not be considered as such in this decision. The Respondent must issue a notice alleging such grounds, and an appropriate discharge plan, if it intends to discharge the Appellant for that reason.

The Appellant is not entitled to violate facility policies and safety rules. The Respondent is entitled to enforce those policies, and the Appellant can expect closer and more intrusive supervision if he continues to violate them. If the Appellant [REDACTED] [REDACTED] into his room and becomes [REDACTED] a reasonable attempt to address this issue is to impose steps, including room searches, to ensure he does not have [REDACTED] in his

room and cannot [REDACTED] on the premises. These are reasonable conditions to place on a resident who has demonstrative uncooperative and problematic behaviors. The Appellant is not obligated to remain at Humboldt House if he is not willing to comply with these policies.

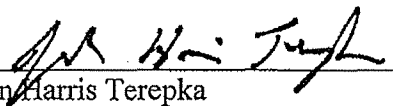
If the Respondent continues to find it burdensome to manage the Appellant's care or takes the position that he does not require nursing home care, the Respondent has the option and responsibility to develop an appropriate discharge plan that will meet his care needs and to then issue a new notice stating authorized and appropriate grounds for discharge. In the meantime, the discharge appeal is granted.

DECISION: Respondent Humboldt House Rehabilitation and Nursing Center has failed to establish that the discharge of Appellant [REDACTED] was necessary or that its discharge plan was appropriate.

The Respondent is not authorized to discharge 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
May 17, 2019



John Harris Terepka
Administrative Law Judge
Bureau of Adjudication