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Governor

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

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

May 26, 2020

CERTIFIED MAIL/RETURN RECEIPT

Peter Fadeley, Administrator
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[redacted]
c/o Bonnie McLaughlin, Esq.
Erie County Department of Social Services
95 Franklin Street – Room 746
Buffalo, New York 14202

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: dmj
Enclosure

cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan
SAPA File
BOA by scan

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

Niagara Rehabilitation & Nursing Center,

Respondent,

to discharge him from a residential health care facility.

ORIGINAL

DECISION AFTER HEARING

Hearing before: John Harris Terepka
Administrative Law Judge
May 22, 2020

Parties: Niagara Rehabilitation & Nursing Center
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Also appearing: Erie County Medical Center
462 Grider Street
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By: Regina A. Del Vecchio, Esq.

JURISDICTION

Niagara Rehabilitation & Nursing 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(i).

SUMMARY OF FACTS

1. Respondent Niagara Rehabilitation & Nursing Center is a residential health care facility, specifically a nursing home within the meaning of PHL 2801.2, located in Niagara Falls, New York.

2. Appellant [redacted] age [redacted] was admitted as a resident in [redacted] 2017 with diagnoses that included history of [redacted]. He has a history of [redacted] and [redacted] behavior, and since at least [redacted] 2020 has repeatedly been referred to acute care hospitals and then returned to the Respondent's nursing home care.

3. On [redacted] 2020, the Respondent transferred the Appellant to Erie County Medical Center (ECMC) after he again became [redacted] at staff and [redacted]

4. Erie County Medical Center is a general hospital within the meaning of PHL 2801.10. ECMC evaluated the Appellant and determined that he does not require inpatient medical or psychiatric care 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.

5. On [redacted], 2020, the Respondent issued a notice of discharge to the Appellant that stated:

> This transfer/discharge notice is being issued because the health and safety of individuals in the facility would otherwise be endangered.
>
> Per MD Francis is a danger to both himself and staff as he is [redacted] as evidenced by [redacted] at staff, [redacted] staff, [redacted] & [redacted]

The notice identified the location of transfer/discharge as ECMC. (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.

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(i)(1)(vi) and 415.11(d).

8. Since his hospitalization at ECMC, the Appellant has tested negative for COVID-19 twice. He remains at ECMC as a "social admit" pending the outcome of this hearing.

ISSUES

Has the Respondent established that the Appellant's discharge from Niagara Rehabilitation & Nursing Center is necessary and that the discharge plan is appropriate?

HEARING RECORD

Respondent witnesses:	Philip M. Savageau, MD	medical director
	Dayan Ruffin	director of nursing
	Peter Fadeley	administrator
	Mary Swartz	director of facilities
Respondent exhibits:	1-7	
Appellant witnesses:	Siva Yedlapati, MD	ECMC internal medicine
	Yoghesh Bakhai, MD	ECMC psychiatry
	Sheila Kennedy	ECMC discharge planning
	Bonnie McLaughlin, Esq.	Erie County DSS
Appellant exhibits:	A-D	

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

The hearing was held by Webex videoconference. The Appellant was not present at the hearing. A transcript of the hearing was made.

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(i). 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 was necessary and that the discharge plan is appropriate. 10 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

The Appellant first came to Niagara Rehabilitation & Nursing Center in 2017. He is [redacted] years old, with diagnoses including a history of [redacted]. Before admission to the Respondent's nursing home, he had spent much of his life at [redacted] ([redacted] (Exhibit 7.) He is a [redacted] and [redacted] resident, whose behaviors require careful supervision and management. He has a history of [redacted] and [redacted] behavior which includes [redacted] and [redacted] at staff, and [redacted].

Since [redacted] 2019 the Respondent has sent the Appellant to area hospitals several times, but each time he has been determined not to require hospital care and returned to the Respondent. On [redacted] 2020 the Respondent again had him transported to ECMC, refused to readmit him, and issued the discharge notice that is the subject of this appeal.

The Appellant has again been evaluated by ECMC, which has determined that he does not require hospital care and has not admitted him. He has been tested twice for COVID-19 and the results are negative. (Exhibit C.) Because the Respondent refuses to readmit him, he remains at ECMC as a "social admit" because he does not require admission to a general hospital.

When discharge is alleged to be necessary due to the endangerment 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(i)(1)(ii)(b); 42 CFR 483.15(c)(2)(ii)(B). The Respondent's documentation to show compliance with this requirement consisted of a follow up visit note by Dr. Savageau, the Respondent's

medical director, dated [redacted] 2020. Dr. Savageau practices internal medicine and he is not a psychiatrist. His medical note concluded: "Again, this patient is a danger to both himself and to the staff and I feel he does need to be readmitted to ECMC and perhaps [redacted]." (Exhibit 4.)

It is the opinion of the medical and psychiatric staff at ECMC that the Appellant does not require hospital admission for either medical or psychiatric reasons although "a safe disposition will need to be arrived at." (Exhibits 2, 3.) These assessments are consistent with previous evaluations by both Niagara Falls Memorial Medical Center and ECMC, which have repeatedly declined to admit the Appellant each time the Respondent has sent him to a hospital. It is the opinion of the two psychiatrists who most recently evaluated him, Dr. Bakhai and Dr. Leo, that the Appellant does not require acute psychiatric or medical admission. Dr. Bakhai, ECMC's chief of psychiatry, further testified that psychiatric institutionalization is not appropriate because the Appellant's needs for behavioral interventions can be managed in a nursing home with the proper supervision.

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(i)(3); 42 CFR 483.15(e). If the resident is not appropriate for return to the nursing home, discharge to a general hospital does not meet the nursing home's responsibility to provide an appropriate discharge plan. 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. (Exhibit A.)

The Respondent has every reason to know, having already been issued a hearing decision (Exhibit B) on an attempted discharge of this resident on essentially the same facts presented in this hearing, of these Department and federal regulations and directives.

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." 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 and federal regulations clearly intend that the discharge planning burden remain on the nursing home that undertook his residential care.

The Respondent has long been aware that this resident requires careful supervision and management. Dr. Savageau testified that his behaviors began to be of concern as early as [redacted] 2018, and that he was sent to ECMC for evaluation in [redacted] and [redacted] 2019. In [redacted] 2019, according to director of nursing Dayan Ruffin, the Respondent explored the possibility of a group home without success. In spite of this history, there is little evidence that the Respondent has made other efforts to develop an alternative placement that addresses the Appellant's long-term care needs. Instead of pursuing other options, the Respondent has repeatedly resorted to the expedient of sending him to an acute care hospital in Niagara Falls or Buffalo with no intention of readmitting him.

The evidence further shows that the Respondent has been actively trying to discharge the Appellant for over four months. In [redacted] 2020 the Respondent sent

him to ECMC and then refused to readmit him. It was not until [redacted], and only after a Department decision after hearing dated March 6, 2020 directed it to do so (Exhibit B), that the Appellant readmitted him. It then discharged him again four weeks later, again without an appropriate discharge plan. Although it has the burden of proof, the Respondent offered no evidence at this hearing of active attempts to develop an appropriate discharge plan during these last four months.

The Respondent now invokes emergency rules promulgated in response to the COVID-19 crisis to justify its refusal to readmit or otherwise arrange for its resident's long-term care. The Respondent cites an Executive Order dated May 10, and a Department Directive dated May 11, 2020 for its assertion that it is not obligated to readmit the Appellant. (Exhibit 6.) The DOH Directive states:

> In accordance with 10 NYCRR 415.26, NHs must only accept and retain those residents for whom the facility can provide adequate care. ACFs have an obligation to provide care to residents and ensure their life, health, safety and welfare are protected... Therefore, no hospital shall discharge a patient to a NH or ACF unless the facility administrator has first certified that they are able to provide that patient with adequate care. (Exhibit 6.)

Nothing in the Executive Order or the Department Directive relieves nursing homes who have already admitted a resident - and the Respondent admitted this resident nearly three years ago – of their discharge planning responsibilities. It is further noted that these directives did not exist when the Respondent discharged the Appellant on [redacted] 2020. To the extent they are now applicable, ECMC records document that the Appellant has twice tested negative for COVID-19. (Exhibit C.)

The Appellant does not require hospitalization at a general hospital, 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.

Dr. Savageau, the Respondent's medical director, repeatedly made it clear that in his view it is up to ECMC to determine the Appellant's needs and devise a care plan. His recommendation is that the Appellant receive "a proper evaluation and a proper environment" - which he assumes means [redacted] or some other similar facility. According to Dr. Savageau, "it's up to them [ECMC]" to do "whatever they think" and "whatever it takes" to effect a proper disposition. At the same time Dr. Savageau, an internist, also said he disagreed with the medical opinion of the ECMC staff and physicians, including its psychiatrists, that a psychiatric hospital admission is not appropriate and that a nursing home can be expected to manage the Appellant's behaviors. Dr. Savageau, who assumed direct medical care of the Appellant only from [redacted] to [redacted] 2020, admitted that none of the medical records he has reviewed recommend hospitalization or institutionalization at a psychiatric facility. He nevertheless repeatedly opined that it is up to ECMC to arrange [redacted] hospitalization and then [redacted] even though ECMC has evaluated him and determined such a plan is not appropriate.

According to the Respondent, ECMC is uncooperative because it will not either admit the Appellant for psychiatric hospitalization and then arrange for his transfer to [redacted] or place the Appellant in ECMC's affiliated nursing home, Terrace View. ECMC will not admit the Appellant because it is the medical opinion of its physicians and psychiatrists - an opinion that has consistently been reached several times before both at ECMC and at Niagara Falls Memorial Medical Center – that the

Appellant does not require hospital admission. ECMC cannot transfer the Appellant to Terrace View because it does not have an available bed, has a long waiting list, and has no obligation to assume responsibility for the Appellant's residential care.

The Respondent repeatedly claimed that ECMC can effectuate the Appellant's placement at [redacted] ignoring that the professional staff including psychiatrists at ECMC, at Niagara Falls Memorial Medical Center, and psychiatric consultations the Respondent had with the University of Rochester all repeatedly concluded that inpatient psychiatric hospitalization is not indicated. The Respondent appears to be under the impression that if ECMC will just admit the Appellant, a transfer to [redacted] could then be accomplished. This would require ECMC to reject the consistent, repeatedly arrived at medical opinion of its own staff, physicians and psychiatrists that hospitalization is not medically indicated, and instead defer to the opinion of the Respondent's medical director, who is not a psychiatric but rather an internal medicine practitioner, that he should be "perhaps institutionalized in a psychiatric facility." (Exhibit 4.) Even if ECMC were to go along with this expedient that the Respondent believes would solve its problem, Dr. Bakhai, chief of psychiatry at ECMC, who has extensive experience in working with [redacted] testified that [redacted] still will not take him. The Respondent has offered no reason to doubt his assessment.

The Respondent concedes that ECMC is not an appropriate discharge plan for the Appellant, and identifies the problem to be finding a facility that will accept him. In contrast to the Respondent's virtually nonexistent efforts to arrange an appropriate discharge plan for the last six months, ECMC - which does not have the responsibility for the Appellant's long-term discharge planning - has made extensive efforts to find a safe

discharge location for him since the Respondent refused to take him back. ECMC discharge planner Sheila Kennedy testified that ECMC has reached out to fifty-two nursing homes in an effort to secure a long-term placement for him. (Exhibit D.) The Respondent did not detail what efforts it has made to do "whatever it takes" to find an appropriate long-term care placement if it believes a specialized behavioral unit is required. During this hearing, Ms. Kennedy was quickly able to turn up, by a simple Google search, several residential care facilities across the state that have behavioral units. The Respondent was unaware of these facilities and asked for their names.

The Respondent's administrator, Peter Fadeley, nevertheless accuses ECMC of a "lack of teamwork," claiming it "only wants to return him" to the Respondent. Mr. Fadeley complained "I have been unable to work with ECMC," but in his view "work with" apparently means ECMC arranging for inpatient admission and transfer to [redacted] or some other psychiatric facility, contrary to the medical opinion of ECMC's own staff, physicians and psychiatrists who have determined such an admission is not indicated. Mr. Fadeley also claimed the problem is that ECMC needs to "stabilize him first" and that working on a discharge plan is not possible until that is done; but Dr. Yedlapati, the internist who oversees the Appellant's care at ECMC, flatly stated that "his current condition is his baseline condition." The medical evidence in this hearing record all supports this conclusion.

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. It is the decided opinion of both the medical and psychiatric staff at ECMC that a nursing home such as the Respondent can and should be expected to meet the Appellant's care

needs. If the Respondent does not have or is unwilling to devote the resources necessary to provide the care and supervision he requires, and believes some other placement is appropriate, it has the responsibility to find that placement and develop an appropriate discharge plan for him.

Pursuant to 10 NYCRR 415.3(i)(2)(i)(d) the Respondent is directed to secure a safe and appropriate long-term care placement for the Appellant, either at Niagara Rehabilitation & Nursing Center or elsewhere, prior to admitting any other person to its facility. It is noted that pursuant to the May 10, 2020 Executive Order relied on by the Respondent at this hearing:

> The Commissioner of Health is authorized to suspend or revoke the operating certificate of any nursing home or adult care facility if it is determined that such facility has not complied with this Executive Order, or any regulations or directives issued by the Commissioner of Health. (Exhibit 6.)

DECISION: Respondent Niagara Rehabilitation & Nursing Center has failed to establish that the discharge of Appellant [redacted] was necessary and that its discharge plan is appropriate.

The Respondent is directed, pursuant to 10 NYCRR 415.3(i)(2)(i)(d), to readmit the Appellant, or secure an appropriate placement for him in another long-term residential care facility, prior to admitting any other person to Niagara Rehabilitation & Nursing Center.

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

Dated: Rochester, New York
May 25, 2020

John Harris Terepka
Administrative Law Judge
Bureau of Adjudication