



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 26, 2018

CERTIFIED MAIL/RETURN RECEIPT

James Lockwood, Director of Nursing
Emerald South Nursing & Rehabilitation
1175 Delaware Avenue
Buffalo, New York 14209

Regina A. Del Vecchio, Esq.
Erie County Medical Center
462 Grider Street
Buffalo, New York 14215

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

Susan Fenster
Long Term Care Ombudsman
2747 Main Street, 2nd Floor
Buffalo, New York 14214

[REDACTED]

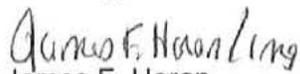
RE: In the Matter of [REDACTED] - Discharge Appeal

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

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

**Emerald South Nursing and
Rehabilitation Center,**
Respondent,

to discharge him from a residential
health care facility.

COPY

DECISION

Hearing Before: John Harris Terepka
 Administrative Law Judge

Held at: Erie County Medical Center
 462 Grider Street
 Buffalo, New York 14215
 October 24, 2018

Parties: Emerald South Nursing and
 Rehabilitation Center
 1175 Delaware Avenue
 Buffalo, New York 14209
 By: James Lockwood, Director of Nursing


Erie County Medical Center

Also appearing: Erie County Medical Center
 462 Grider Street
 Buffalo, New York 14215
 By: Regina A. Del Vecchio, Esq.

Susan Fenster
Long Term Care Ombudsman
2747 Main Street, 2d floor
Buffalo, New York 14214

JURISDICTION

Emerald South Nursing and Rehabilitation 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(h).

The hearing was held at Erie County Medical Center (ECMC), the general hospital to which the Respondent discharged the Appellant. The Respondent presented witnesses and documents. (Exhibits 1-5.) The Appellant did not participate in the hearing, but Long Term Care Ombudsman Susan Fenster, after consulting with him, appeared on his behalf. Representatives from ECMC also participated in the hearing and presented documents (Exhibits A-F) and witnesses on the Appellant's behalf. The hearing was digitally recorded. (1h43m.)

SUMMARY OF FACTS

1. Respondent Emerald South Nursing and Rehabilitation 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] ag [REDACTED] was admitted as a resident at Emerald South in [REDACTED] 2017 with diagnoses including [REDACTED] (Exhibit 5, page 1.)

3. On [REDACTED], 2018, the Respondent transferred the Appellant to Erie County Medical Center (ECMC) for a [REDACTED] evaluation after he became [REDACTED]

4. On [REDACTED] 2018, simultaneously with the transfer to ECMC, the Respondent issued a transfer/discharge notice to the Appellant that stated as grounds for discharge: "the safety of the individuals in the facility would be endangered." The notice identified the location of transfer/discharge as ECMC. The Respondent's Director of Nursing, James Lockwood, added onto the printed discharge notice a handwritten note stating:

We cannot accept this resident back because he poses imminent danger to my staff and the residents of Emerald South due to his increasing [REDACTED] [REDACTED] (Exhibit 2.)

5. ECMC is a general hospital within the meaning of PHL 2801.10. ECMC assessed the Appellant and found no medical basis for admission. Emergency room and [REDACTED] assessments concluded he does not require inpatient [REDACTED] treatment or any other inpatient treatment at a general care hospital. (Exhibits A, B, C.)

6. The Appellant does not require inpatient [REDACTED] treatment or any other inpatient treatment at a general hospital. ECMC has determined that return to a residential health care facility is appropriate and necessary to meet his care needs

7. The Respondent, having determined to discharge the Appellant on [REDACTED] 2018 and not accept him back, has not reassessed the Appellant since that time, and continues to refuse to readmit him to its nursing home.

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 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" who has no medical or reason to be admitted as a patient, pending the outcome of this hearing.

ISSUES

Has the Respondent established that the Appellant's discharge from Emerald South 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

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 first came to Emerald South in [REDACTED] 2017 for nursing home care after being discharged from a [REDACTED] hospital. He suffers from [REDACTED] and has exhibited episodes of [REDACTED] behavior toward staff. Between [REDACTED] 2018, he was transferred to ECMC several times for evaluation because of this behavior but was always returned to the Respondent. He has consistently been determined to require continued skilled nursing facility, not hospital care. (Exhibits 5, A, B, C.)

On [REDACTED] 2018, the Appellant again became [REDACTED] and [REDACTED]. On [REDACTED] after he [REDACTED] staff attempting to secure his return, the Respondent again had him transported to ECMC for evaluation. The Respondent also issued the discharge notice to him that stated he would not be accepted back.

The Appellant is clearly a [REDACTED] resident, with [REDACTED] issues and resulting behaviors that require careful supervision and management. ECMC has not admitted him, however, because he is not in need of [REDACTED] inpatient care or any other care that requires hospitalization. He initially exhibited some [REDACTED] behavior in the ECMC emergency room. (Exhibit A, page 4.) Medication adjustments increasing his [REDACTED] and adding, then increasing [REDACTED] however, have controlled these behaviors. (Exhibits C, D, E.) A progress note by an attending physician dated [REDACTED] 2018, the day of this hearing, stated:

Pt. has been under my care since [REDACTED] 8 with the exception of yesterday, and during that time Nursing staff has only noted [REDACTED] of [REDACTED] requiring [REDACTED] overnight. Pt seen and examined in am daily by myself, pt always pleasant and cooperative. (Exhibit E.)

The Respondent has failed to meet its burden of proving grounds for discharge or an appropriate discharge plan. As an initial matter, the Respondent 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 did not include a physician's determination that discharge was necessary.

Furthermore, 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). In this case, the Respondent instead issued a discharge notice at the time of the referral to ECMC that stated it would not readmit the Appellant. It has refused even to reevaluate or consider him for readmission since then.

The Respondent has also failed to establish that it cannot provide the care and supervision this resident requires. The Respondent and ECMC agree he should be placed in a secure [REDACTED] unit. The Respondent has such a unit, but did not place the Appellant in it because it claims he had a [REDACTED]. While the Respondent did initiate [REDACTED] supervision upon the Appellant's return on [REDACTED] it assigned mostly female staff who were [REDACTED] because it has fewer male staff to perform this supervision. These actions evidence a failure, not an inability, to provide the necessary care and supervision.

The Respondent's awareness of this resident's care needs is not new. The Appellant's behaviors led [REDACTED] transfers for hospital evaluation in [REDACTED] 2018. (Exhibit 5.) In [REDACTED] 2018 the Respondent again sent him to ECMC with no discharge notice and

no discharge plan and yet refused to take him back when ECMC found no reason to admit him. It was not until a hearing requested by the Appellant was held on July 5, 2018 that the Respondent agreed to readmit him.

Even with this history, the Respondent has failed to develop a plan for transfer or discharge that addresses the Appellant's care needs. The Appellant still requires care in a residential health care facility. The Respondent, which has the discharge planning responsibility, has made some attempts to arrange a transfer to another facility: It produced evidence of such attempts since 2018, only three of which were made between the discharge and the request for this hearing. (Exhibit 3.) In contrast, since discharge planners have made inquiries of approximately other residential care facilities to find term care placement for the Appellant. ECMC needs the bed that the Appellant occupies for no medical reason, for patients who do need hospitalization.

Discharge to a general hospital does not meet the Respondent's responsibility to provide an appropriate discharge plan. 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." ECMC is prepared to discharge the Appellant back to the Respondent's care. If the Respondent rejects that plan, there is no plan.

The Respondent, to its credit, does recognize that it continues to have discharge planning responsibility for this resident. It proposes, however, that he stay at ECMC until some other placement is found. ECMC is an inappropriate, costly and medically unnecessary solution that places the care management and planning burden on a hospital

to which he has not even been admitted. Department regulations clearly intend that this burden remain on the nursing home that undertook the Appellant's residential care.

The care planning problem presented by this resident cannot be solved in this hearing decision, but responsibility for it can be and accordingly is reaffirmed. The Respondent may have 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 burdensome 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:

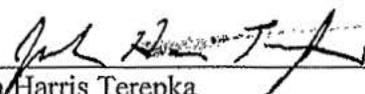
Respondent Emerald South Nursing and Rehabilitation has failed to establish that the discharge of Appellant [REDACTED] was necessary and that its discharge plan was appropriate.

The Respondent is not authorized to discharge the Appellant in accordance with the [REDACTED] 2018 discharge notice.

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
October 25, 2018



John Harris Terepka
Administrative Law Judge
Bureau of Adjudication