

cc: Ms. Suzanne Caligiuri/Division of Quality & Surveillance by scan
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Department
of Health

KATHY HOCHUL
Governor

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

LISA PINO, M.A., J.D.
Executive Deputy Commissioner

August 26, 2021

CERTIFIED MAIL/RETURN RECEIPT



Regina DelVecchio, Esq.
Erie County Medical Center
462 Grinder Street
Buffalo, New York 14215

Bria Lewis, Esq.
Center for Elder Law and Justice
438 Main Street, Suite 1200
Buffalo, New York 14202

Isaac Williams, NHA
Safire Rehabilitation at Southtowns
300 Dorrance Avenue
Buffalo, New York 14220

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

Safire Rehabilitation at Southtowns



Respondent,
to discharge him from a residential
health care facility.

DECISION

Hearing before: John Harris Terepka
Administrative Law Judge

Hearing date: August 26, 2021
By videoconference

Parties: Safire Rehabilitation at Southtowns
300 Dorrance Avenue
Buffalo, New York 14220
By: Isaac Williams, administrator
iwilliams@southtownscarecenter.com



By: Bria Lewis, Esq.
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blewis@elderjusticenv.org

Also appearing: Erie County Medical Center
462 Grider Street
Buffalo, New York 14215
By: Regina DelVecchio, Esq.
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JURISDICTION

Safire Rehabilitation at Southtowns (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 Safire Rehabilitation at Southtowns 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] [REDACTED] age [REDACTED] was admitted as a resident in [REDACTED] 2021. His diagnoses include [REDACTED].
3. On [REDACTED] 2021, the Respondent transferred the Appellant to Erie County Medical Center (ECMC) for evaluation after he became [REDACTED] and was refusing care. (Exhibit 3.)
4. Erie County Medical Center is a general hospital within the meaning of PHL 2801.10. ECMC evaluated the Appellant in its [REDACTED] emergency program ([REDACTED]) but did not admit him because it determined 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 5.)
5. On [REDACTED] 2021, the Respondent issued a notice of discharge to the Appellant that stated:

Mr. [REDACTED] continue to escalate. He refuses care & treatment. He is now becoming [REDACTED] towards staff and peers. He is a threat to himself and peers. Facility can not accept back.

The notice stated that the effective date of discharge was [REDACTED] 2021, and it identified the location of transfer/discharge as "ECMC [REDACTED] (Exhibit ALJ 1.)

6. The Appellant is not in need of inpatient care at a general hospital. (Exhibits 6-11.)

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

8. 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 Safire Rehabilitation at Southtowns is necessary and that the discharge plan is appropriate?

HEARING RECORD

Respondent witnesses:	Isaac Williams, administrator
Respondent exhibits:	None
Appellant witnesses:	Dr. Yegesh Bakhai, director of [REDACTED] ECMC Debbie Bernier, director of operations Terraceview NH Becky DelPrince, ECMC
Appellant exhibits:	1-3, 5-11
ALJ exhibits:	I (notice of hearing with notice of discharge)

The hearing was held and recorded by videoconference. (1h59m.)

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

DISCUSSION

The Appellant first came to Safire Rehabilitation in [REDACTED] 2021 from residence at a group home associated with [REDACTED], where he had become physically unable to care for himself in the group home setting. He is [REDACTED] years old, with diagnoses that include [REDACTED].

On [REDACTED] 2021, the Respondent sent the Appellant to ECMC for evaluation because he refused medication and hygiene services and became [REDACTED] and uncooperative. He became [REDACTED] [REDACTED] the medical response team with [REDACTED] and was [REDACTED] and taken to ECMC. (Exhibit 3.) ECMC determined that he did not require hospital care 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. (Exhibit ALJ I.)

When discharge is alleged to be necessary under 10 NYCRR 415.3(i)(1)(i)(a)(3) on the grounds that the resident is a threat to himself or others the nursing home is required to ensure that the resident's clinical record includes complete documentation made by a physician. 10 NYCRR 415.3(i)(1)(ii)(b); 42 CFR 483.15(c)(2)(ii)(A). The Respondent produced no documentation at this hearing to show compliance with this requirement.

The evidence does show the Appellant requires supervision and management. However, Dr. Yegesh Bakhai, director of [REDACTED] at ECMC, testified after evaluating the Appellant and his medical record, that a nursing home such as the Respondent can and should be expected to meet these care needs. The Respondent has failed to establish that it does not have the resources and cannot be expected to provide that 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. (Exhibit 2.)

The Respondent offered no authority for its suggestion that the apparent failure to have a [REDACTED] evaluation conducted prior to its admission of the Appellant to Safire relieved it of its responsibilities under 10 NYCRR 415.3(i). Department regulations clearly intend that the discharge planning burden remain on the nursing home that undertook a resident's care.

All the evidence supports the view that the Appellant requires care in a residential health care facility but not inpatient care in a general hospital. The Respondent has made no efforts to develop a discharge plan for the Appellant if he does not return to Safire. ECMC has made referrals to other nursing homes, so far without success, but it is the responsibility of the Respondent, not ECMC, to arrange for this care elsewhere if the Respondent is not willing to undertake it.

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. The Respondent may have to devote extra resources to providing the supervision the Appellant needs, but the Respondent is required to do just that unless and until it meets its obligation to develop an appropriate discharge plan that will meet his care needs. In

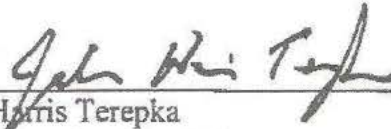
the meantime, the discharge appeal is granted and the Respondent is directed to readmit the Appellant to the first available bed. 10 NYCRR 415.3(i)(v)(e)(5).

DECISION: Respondent Safire Rehabilitation at Southtowns 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
August 26, 2021



John Harris Terepka
Administrative Law Judge
Bureau of Adjudication