



Department of Health

ANDREW M. CUOMO
Governor

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

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

August 21, 2018

CERTIFIED EMAIL/RETURN RECEIPT & E-MAIL

Wendy Egner, RN, DON
Fiddler's Green Manor
168 West Main Street
Springville, New York 14141
wegner@fgmanor.com

[REDACTED]
c/o ECMC
462 Grider Street
Buffalo, New York 14215
PLEASE HAND DELIVER

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

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 /CAC
James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: cac
Enclosure

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

**Fiddler's Green Manor
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: Erie County Medical Center
462 Grider Street
Buffalo, New York 14215
August 20, 2018

Parties: Fiddler's Green Manor
Rehabilitation and Nursing Center
168 West Main Street
Springville, New York 14141
By: Wendy Egner, Director of Nursing

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

Also appearing: Erie County Medical Center
462 Grider Street
Buffalo, New York 14215
February 7, 2017
By: Regina A. Del Vecchio, Esq.

JURISDICTION

Fiddler's Green Manor Rehabilitation and 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(h).

At this hearing the Respondent presented witnesses and documents. (Exhibits 1-3.) The Appellant testified on his own behalf. At the Appellant's request, Erie County Medical Center (ECMC), the acute care hospital to which the Respondent discharged him, presented documents (Exhibits A-D) and witnesses on his behalf. The hearing was digitally recorded. (1h35m.)

SUMMARY OF FACTS

1. Respondent Fiddler's Green Manor Rehabilitation and Nursing Center is a residential health care facility, or nursing home, located in Springville, New York.

2. Appellant [REDACTED] age [REDACTED] was admitted as a resident at Fiddler's Green Manor in [REDACTED] 2017 with diagnoses including [REDACTED] [REDACTED] (Exhibit 2, page 1.)

3. On [REDACTED] 2018, the Respondent transferred the Appellant to Erie County Medical Center (ECMC) for a [REDACTED] evaluation after he was found smoking in his bathroom at the Respondent's facility, was [REDACTED] and [REDACTED] (Exhibits 1, 2.)

4. ECMC is an acute care hospital in Buffalo. ECMC did not admit the Appellant because it found no medical basis for admission. He does not require inpatient

█ treatment or any other inpatient treatment at an acute care hospital. ECMC determined that continued placement in a residential health care facility was appropriate.

(Exhibits B, D.)

5. On █ 2018, ECMC advised the Respondent that it was not admitting the Appellant and that it sought to return him to the Respondent's care. The Respondent refused to readmit him to its nursing home. (Exhibit C, page 3.)

6. On █ the Respondent issued a discharge notice to the Appellant that stated as grounds for discharge: "the health and/or safety of individuals in the facility would otherwise be endangered..." (ALJ Exhibit I.)

7. The notice of discharge stated:

Pursuant to the discharge plan, you will be discharged to ECMC – CPEP... A copy of your discharge plan and summary will be provided to you either with this notice or during the week of your planned discharge. (ALJ Exhibit I.)

8. The Respondent has not developed an appropriate discharge plan or provided such a plan. It proposes that the Appellant continue to stay at ECMC, where he has not been admitted, until appropriate discharge planning can be done by "[c]ollaboration of facility S.W. and ECMC to continue seeking alternate placement." (Exhibit 1, page 3; Exhibit 3.)

9. The Appellant remains at ECMC pending the outcome of this hearing.

ISSUES

Has the Respondent established that the Appellant's discharge from Fiddler's Green Manor 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. 18 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, age [REDACTED] came to the Respondent's nursing home in [REDACTED] 2017. He is a [REDACTED] bound [REDACTED] subject to episodes of [REDACTED] [REDACTED] in [REDACTED] 2018 he was found smoking in his room. He was also [REDACTED] and when staff intervened he became [REDACTED] [REDACTED] The police were called and they found a [REDACTED]

[REDACTED] in his room. No arrest was made, but the Respondent had the Appellant transported to ECMC for [REDACTED] evaluation. The Appellant agreed to this.

ECMC found no reason to admit the Appellant because he is not in need of acute [REDACTED] inpatient care or any other care that requires hospitalization. He remains at the hospital as a "social admit" because the Respondent refuses to take him back. The Respondent takes the position that it will not readmit him without being directed to do so as a result of this hearing. This tactic of discharging a troublesome resident by shifting him off to an acute care hospital without an appropriate discharge plan, and then refusing to take him back, is known as a "hospital dump."

The Respondent has failed to meet its burden of proving grounds for discharge and an appropriate discharge plan. The Appellant can be [REDACTED] and he is a frequent [REDACTED]. He is particularly possessive about his personal property and [REDACTED]. He has twice been caught smoking in his room, which is not allowed by the Respondent, and [REDACTED] has also been found in his room. He can be [REDACTED] abusive and [REDACTED] when upset but has no history of harming any resident or staff at Fiddler's Green Manor and has presented no behavioral problems while at ECMC. While he clearly made himself unpopular at Fiddler's Green he has harmed no one. None of these circumstances justifies an involuntary discharge to an acute care hospital without a discharge plan.

The Respondent has failed to meet its burden of proving that the health or safety of individuals in the facility has been endangered. Even the [REDACTED] incident the Respondent relies on in its discharge notice did not present a situation that the

Respondent was unable to deal with. The Appellant acknowledged he was smoking, was [REDACTED] but his [REDACTED] consisted mainly of [REDACTED]. The only [REDACTED] act he is accused of was [REDACTED] [REDACTED] who caught him smoking. He was thereafter cooperative with the police, for the ambulance transport, and at the hospital. (Exhibits A, B.) Earlier behaviors described by the Respondent to show endangerment of the health or safety of persons at the facility are even less persuasive than this episode. (Exhibits 1, 2.) In particular, there is no evidence that, for all his bluster, the Respondent actually harmed or even tried to harm any other facility resident.

The Respondent's evidence is of behaviors that a nursing home can and should be expected to make an attempt to address with appropriate attention and supervision. The evidence fails to establish appropriate steps were taken to do so. The Respondent's own failure to take any of the obvious steps indicated to address the Appellant's conduct undermines the credibility of its current allegations about endangerment of the health or safety of persons at the facility.

The Respondent acknowledged that safety checks of the Appellant's room for smoking materials were effective but the Respondent stopped performing them after two weeks. At ECMC the Appellant has been put on a [REDACTED] to help control smoking urges. The Respondent did not offer this to him.

The Appellant came to Fiddler's Green in [REDACTED] 2017 with [REDACTED] in place. The therapist terminated the Appellant's treatment on [REDACTED] 2018 for [REDACTED] (Exhibit 2, page 6.) The Respondent failed to arrange a referral for further treatment thereafter although the Respondent agrees the

Appellant's behavior was not a problem until his therapy was terminated and that he needs such therapy.

Although it claims the Appellant has presented [REDACTED] the Respondent did not implement any special or individual supervision of him as a security precaution. The Respondent claims he was a danger to others but continued his assignment to a room shared with three other residents although it acknowledges the availability of single rooms.

There is little to say about the Respondent's discharge plan because it does not have one. The Respondent suggested that the Appellant has no skilled care needs and is able to manage independently in the community, but also acknowledges he has no housing options available, that he needs to have [REDACTED] counseling and medical care services in place, and that in particular he needs appropriate [REDACTED] treatment. The Respondent has not proposed a discharge plan that addresses any of these care needs.

The Respondent instead proposes that the Appellant remain at ECMC, an acute care hospital, while the Respondent and ECMC "collaborate" in establishing a discharge plan. The Respondent's offered justification for this proposal is that its staff and residents should not have to deal with this difficult resident. The Respondent has not explained why ECMC, which has not even admitted him, should be required to deal with him instead. ECMC is a short term, costly and medically unnecessary solution that places the care planning burden on an acute care hospital to which the Appellant has not even been admitted. Department regulations clearly intend that this burden be on the nursing home that undertook his care. The Respondent complains about devoting extra resources to meeting the Appellant's needs if he returns to Fiddler's Green, 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 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.

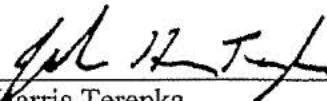
DECISION: Respondent Fiddler's Green Manor has failed to establish that the discharge of Appellant [REDACTED] was necessary and that its discharge plan was appropriate.

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
August 21, 2018



John Harris Terepka
Administrative Law Judge
Bureau of Adjudication