



Department of Health

ANDREW M. CUOMO
Governor

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

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

June 3, 2019

CERTIFIED MAIL/RETURN RECEIPT

Vicky Wideman, Director of Social Services
Niagara Falls Memorial Center
621 Tenth Street
Niagara Falls, New York 14302

██████████
Niagara Falls Memorial Center
621 Tenth Street
Niagara Falls, New York 14302

Michael Toole, DON
Newfane Rehabilitation and Health Care Center
2709 Transit Road
Newfane, New York 14108

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

**Newfane Rehab and Health
Care Center,**

Respondent,

to discharge him from a residential
health care facility.

COPY

DECISION

Hearing Before:

John Harris Terepka
Administrative Law Judge

Held at:

Niagara Falls Memorial Medical Center
621 Tenth Street
Niagara Falls, New York
May 29, 2019

Parties:

Newfane Rehab and Health Care Center
2709 Transit Road
Newfane, New York 14108
By: Michael Toole, director of nursing

██████████
Niagara Falls Memorial Medical Center
621 Tenth Street
Niagara Falls, New York 14302

Also appearing:

Niagara Falls Memorial Medical Center
By: Vicky Wideman, director of social services

JURISDICTION

Newfane Rehab and Health Care 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).

SUMMARY OF FACTS

1. Respondent Newfane Rehab and Health Care Center is a residential health care facility, specifically a nursing home within the meaning of PHL 2801.2, located in Newfane, New York.

2. Appellant [REDACTED], age [REDACTED] was admitted as a resident at Newfane on [REDACTED] 2018 with diagnoses including [REDACTED]. (Exhibit 2.) He was and remains wheelchair bound. (1h10m.)

3. On [REDACTED] 2019, the Appellant became [REDACTED] and [REDACTED] with staff. He also attempted to injure himself. Respondent transferred the Appellant to Niagara Falls Memorial Medical Center (NFMMC) for evaluation. (Exhibit 7, page 3.)

4. Niagara Falls Memorial Medical Center is a general hospital within the meaning of PHL 2801.10. NFMMC evaluated and admitted the Appellant to its inpatient behavioral health unit for care, treatment and stabilization. NFMMC subsequently determined that the Appellant does not require inpatient treatment at a general care hospital and that return to a residential health care facility is appropriate and necessary to meet his care needs. (Exhibits A-C.) By May 17, NFMMC had determined:

Client is appropriate to return back to his nursing home... Client is stable for discharge back to his nursing facility. Client may be discharged as soon as his facility is ready to accept. There are no other recommendations. (Appellant C.)

NFMMC advised the Respondent that the Appellant was ready for discharge back to the Respondent's care. The Respondent refused to readmit him.

5. On ██████████ 2019, the Respondent issued a notice of discharge to the Appellant that stated:

The transfer/discharge is necessary for the resident's welfare and the resident's needs cannot be met in this facility after reasonable attempts at accommodation.

The notice stated that the effective date of discharge was ██████████ 2019, and it identified the location of transfer/discharge as NFMMC. (ALJ Exhibit I.)

6. According to NFMMC's chief of ██████████ the Appellant is stable and ready for discharge to a skilled nursing facility. (1h30-31,42,45m.) Because the Appellant wants to return to Newfane, NFMMC submitted on his behalf a request for this hearing. (0h37-38m.)

7. The Respondent, having determined to discharge the Appellant effective ██████████ 2019 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). (1h6-7m.)

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

ISSUES

Has the Respondent established that the Appellant's discharge from Newfane Rehab and Health Care Center is necessary and that the discharge plan is appropriate?

HEARING RECORD

Respondent witnesses: Michael Toole, director of nursing
Pamela Toole, director of quality assurance

Respondent exhibits: 1-7

Appellant witnesses: Aaron Mruk, director of [REDACTED], NFMCC
Jane Kou, MD, chief of [REDACTED] NFMCC

Appellant exhibits: A-C

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

The hearing was held at NFMCC, the general hospital to which the Respondent discharged the Appellant. The Appellant was present, but at his request [REDACTED], director of social work at NFMCC, spoke on his behalf and called witnesses. (0h2,6m.) A digital recording of the hearing was made. (1h49m.)

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(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:

7, page 98; 0h12,18m.) A staff nurse reported incidents of his [REDACTED] and [REDACTED] her on [REDACTED] and [REDACTED], 2019. (Exhibit 3.)

There were three hospital referrals for evaluation for [REDACTED] injuries. In early [REDACTED] 2019 the Appellant was sent to an emergency room with an [REDACTED] [REDACTED] incurred in a fight with another resident. On [REDACTED] 2019 he was sent to NFMCC after an outburst in which he [REDACTED] himself with a [REDACTED]. On [REDACTED] 2019 he was transported to a [REDACTED] emergency room for evaluation after [REDACTED] against a wall. Each time he was evaluated, found to present no threat to himself or others, and returned to the Respondent's care the same day. (Exhibit 4, page 1; Exhibit 7, pages 11-12, 32; 0h9m; 1h40m.)

On [REDACTED], 2019, the Appellant again became [REDACTED] with staff and attempted to injure himself by repeatedly [REDACTED]. The Respondent called the [REDACTED] County sheriff and had him transported to NFMCC. (Exhibit 7, page 3.) He was admitted for observation and stabilization, but by [REDACTED] NFMCC was ready to return him to Newfane. The Respondent refused to accept him back and instead issued the notice advising him he had been discharged to NFMCC.

The Respondent has failed to comply with several requirements set forth in Department regulations at 10 NYCRR 415.3(h) and at 42 CFR 483.15(c).

The Respondent's discharge notice relies on 10 NYCRR 415.3(h)(1)(i)(a)(1), alleging that the discharge is necessary for the Appellant's welfare and his needs cannot be met after reasonable attempts at accommodation. A written notice of discharge alleging such grounds must be provided at least 30 days before the resident is discharged. 10 NYCRR 415.3(h)(1)(iv); 42 CFR 483.15(c)(4)(i). The Respondent has not complied

with this regulation, having transferred the Appellant to the hospital on [REDACTED] discharged him on [REDACTED], and issued the written discharge notice on [REDACTED].

A discharge under 10 NYCRR 415.3(h)(1)(i)(a)(1) must be documented in the resident's clinical record by the resident's physician. 10 NYCRR 415.3(h)(1)(ii)(a); 42 CFR 483.15(c)(2)(i)(B)&(ii)(A). The nurse practitioner and physician documentation presented by the Respondent records numerous concerns about the Appellant's treatment and behaviors but fails to document that his needs cannot be met at Newfane. (Exhibit 4.) To the contrary, the physician's assessment/plan recorded in the last medical note, dated May 9, is:

[REDACTED] has had some effect, will schedule it while we titrate the [REDACTED] treatments... Continue to monitor, up-titrating his [REDACTED] and will consider other treatments in the future. (Exhibit 4, page 24.)

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); 42 CFR 483.15(e). The Respondent instead discharged the Appellant and has refused to consider him for readmission even though the Respondent and NFMCC both agree he continues to require long term residential health care.

Most importantly, in addition to failing to comply with 10 NYCRR 415.3(h)(1)(ii), (h)(1)(iv)&(h)(3) and 42 CFR 483.15(c)&(e), the Respondent has failed to meet its burden of proving an appropriate discharge plan. The Appellant has been a difficult resident, with psychiatric and behavioral issues that require careful supervision and management. The Respondent's awareness of these issues, however, is not new. According to the Respondent, the Appellant's behaviors had become difficult to manage

by [REDACTED] 2019. (1h0m.) Even with this history, the Respondent has made little attempt to develop a plan for transfer or discharge that addresses his care needs.

At the hearing the Respondent claimed that it attempted “numerous... at least a half a dozen” referrals to other facilities without success. It was able to name only three facilities: [REDACTED]

[REDACTED] It also blames the Appellant’s [REDACTED] for failing to take him in. (1h0-2m.) The Respondent produced no specific information about any of these alleged referrals or when they were made, and no documentation to substantiate these or any other discharge planning efforts. There is no evidence that a Preadmission Screening and Resident Review (PASRR) Level II for Mental Illness pursuant to 42 CFR Part 483.100 or an assessment pursuant to 10 NYCRR 400.11 has been conducted, let alone resulted in any determination that nursing home care such as is provided by the Respondent is an inappropriate level of care. *See* DOH Dear Administrator Letter (DAL), November 30, 2017; DAL NH 18-06, November 13, 2018.

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.” 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.

As the Respondent's own treating nurse practitioner documented in the progress notes on March 25, 2019, the Appellant's transfer to a general hospital "is not a long term solution." (Exhibit 4, page 10.) The Appellant is now stabilized and NFMCC is prepared to discharge him back to the Respondent's care. (Exhibits A-C; 1h16-18,30-31,42,45m.) If the Respondent rejects that plan, there is no plan.

The Respondent appears to be under the impression that it is now NFMCC's responsibility to develop and implement a long term care plan. The Respondent proposes that the Appellant stay at NFMCC until some other placement is found. (0h59m, 1h5m.) NFMCC is an inappropriate, costly and medically unnecessary solution that places the care management and planning burden on a hospital to which he does not require admission. Department and Federal regulations clearly intend that the discharge planning burden remain on the nursing home that undertook his residential care.

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. 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 and to then issue a new notice of discharge. In the meantime, the discharge appeal is granted and the Respondent is directed to readmit the Appellant.

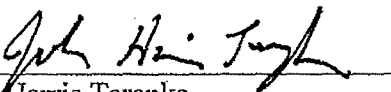
DECISION:

Respondent Newfane Rehab and Health Care Center 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
June 3, 2019



John Harris Terepka
Administrative Law Judge
Bureau of Adjudication