NEW YORK STATE OF OPPORTUNITY. 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 11, 2019

**CERTIFIED MAIL/RETURN RECEIPT**

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

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

Richard Basile, Esq.
Post Acute Partners
641 Lexington Avenue, 31st Floor
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Scott West, Administrator
Elderwood at Williamsville
200 Bassett Road
Williamsville, New York 14221

Caroline McDonough, Esq.
Center for Elder Law & Justice
438 Main Street
Buffalo, New York 14202

[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

[redacted],

Appellant,

from a determination by

**Elderwood at Williamsville,**

Respondent,

to discharge him from a residential health care facility.



**DECISION**

Hearing before: John Harris Terepka
Administrative Law Judge

Held at: Erie County Medical Center
462 Grider Street
Buffalo, New York
June 7, 2019

Parties: Elderwood at Williamsville
200 Bassett Road
Williamsville, New York 14221
By: Richard Basile, Esq.
Post Acute Partners
641 Lexington Avenue, 31st floor
New York 10022

[redacted], *guardian*
[redacted]
By: Caroline McDonough, Esq.
Center for Elder Law & Justice
438 Main Street
Buffalo, New York 14202

Also appearing: Erie County Medical Center
By: Regina A. Del Vecchio, Esq.

## JURISDICTION

Elderwood at Williamsville (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 Elderwood at Williamsville is a residential health care facility, specifically a nursing home within the meaning of PHL 2801.2, located in Williamsville, New York.

2. Appellant [redacted], age [redacted] was admitted as a resident on [redacted] 2019 for short term [redacted] care after hospitalization for [redacted] Prior to hospitalization he had lived in a group home for several years. His diagnoses include [redacted] (Exhibit 4, pages 1-10.)

3. On [redacted] 2019, the Respondent transferred the Appellant to Erie County Medical Center (ECMC) for evaluation after he exhibited [redacted] behaviors. (Exhibit B; Exhibit E, pages 1-11.)

4. Erie County Medical Center is a general hospital within the meaning of PHL 2801.10. ECMC evaluated the Appellant but did not admit him, determining that he does not require inpatient treatment at a general hospital. (Exhibit C; Exhibit E, page 16.) 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] 2019, the Respondent issued a notice of discharge to the Appellant that stated:

> If the resident remains in the facility the health or safety of other individuals in this facility is endangered. Explain: Resident with violent behaviors, history of hitting other residents. Resident is imminent danger to other residents & staff.

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

6. The Appellant requested this hearing by his [redacted] and legal guardian, [redacted], on or about May 24, 2019. (Exhibit E, pages 25-26.)

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(h)(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 Elderwood at Williamsville is necessary and that the discharge plan is appropriate?

## HEARING RECORD

| | |
|---|---|
| Respondent witnesses: | Scott West, administrator<br>Edward Metzger, nurse practitioner<br>Amanda Kapus, director of nursing<br>Steven Hugill, administrative assistant<br>Brent Whittall, RN<br>Margaret Mitchell, MD (unsworn, by telephone) |
| Respondent exhibits: | 1- 12 (Exhibit 12 is a thumb drive containing video) |
| Appellant witnesses: | Becky Del Prince, ECMC<br>Deborah Bernier, Terrace View NH<br>Alex Kirchmeyer, MSW |

[redacted], guardian
Sheila Kennedy, ECMC

Appellant exhibits: A-H

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

The hearing was held at ECMC, the general hospital to which the Respondent discharged the Appellant. The Appellant was not present at the hearing. A digital recording of the hearing was made. (I:1h28m; II:1h42m.)

## 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:
>
> ...
>
> (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(h)(2)(iii)(b).

## DISCUSSION

The Appellant first came to Elderwood at Williamsville in early [redacted] 2019 after being discharged from hospital care. He is [redacted] years old, with diagnoses including [redacted] and had been living in a [redacted] for many years. He was hospitalized because of his [redacted] problems, and a [redacted] and [redacted] were necessary to treat those medical issues. Upon discharge from acute hospital care he remained in need of [redacted] care and still had the [redacted] in place, and so was sent to Elderwood on [redacted] 2019 for short term rehabilitation and care for those conditions. (Exhibit 4, pages 1-23.)

The Respondent did not expect that the Appellant would be staying for long-term care. The expectation was that upon completing his short-term rehabilitative care for the [redacted] and with removal of the [redacted] in his [redacted], he would return to his [redacted]. (Exhibit 11, page 1.) The Respondent put arrangements in place to have the [redacted] removed in late [redacted] In early [redacted] however, the group home advised the Respondent that it would not accept the Appellant back because of his [redacted] and [redacted] behaviors. The Appellant's autism leads him to [redacted] of behavior over which he has [redacted].

The Respondent was initially able to manage the Appellant without incident. Beginning in [redacted] 2019, his behavior became more difficult to manage. There were several incidents of [redacted] and [redacted] behavior. (Exhibit 11.) He was sent to

ECMC for evaluation on [redacted] and again on [redacted] and returned both times. (Exhibit 4, pages 25-39.) On [redacted] 2019, he became difficult to control, attempted to [redacted] Elderwood staff, and damaged equipment at the nursing station. (Exhibit 12.) The Respondent had him transported to ECMC, where he was evaluated in its [redacted]). (Exhibit B.) ECMC determined within hours that he did not require hospital care and notified the Respondent that it was prepared to return him to Elderwood. (Exhibit C.) The Respondent refused to accept him back and instead issued the discharge notice. The Appellant remains at ECMC as a "social admit" because he does not require admission to a general hospital. (Exhibit E, page 16.)

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 ECMC both agree he continues to require long term residential health care.

When discharge is alleged to be necessary due to the endangerment of the health of other individuals in the facility, the resident's clinical record must include complete documentation made by a physician. 10 NYCRR 415.3(h)(1)(ii)(b); 42 CFR 483.15(c)(2)(ii)(B). The Appellant's treating physician at Elderwood, Dr. Margaret Mitchell, expressed the opinion on his April 3, 2019 admission that "Behavior has been exceedingly problematic. Needs much attention and a safe environment." (Exhibit 2, page 21.) Her MD progress note dated [redacted] 2019 subsequently recorded "I have

consulted with the facility staff/Unit manager regarding plan for this patient and overall medications and program of care is appropriate." (Exhibit 2, page 8.)

The Respondent argues that it admitted the Appellant to its [redacted] unit for the purposes of rehabilitative care after hospitalization for his [redacted] problems and, given the patient population it serves, is not prepared or equipped to provide continuing care for his [redacted] and related behavioral issues. In particular, the kinds of care appropriate for those issues, such as a day program and [redacted] follow up, are not readily available at Elderwood.

The Appellant may be a difficult and [redacted] resident, whose behaviors require careful supervision and management. The Respondent has failed, however, to establish that it does not have the resources and cannot be expected to provide the care and supervision he requires until a more appropriate placement can be found. Video of the [redacted] incident that precipitated this discharge shows careful, appropriate and caring supervision being provided by the Respondent for his difficult to manage behavior. (Exhibit 12.)

The evidence does suggest, now that the Appellant's post-hospital, rehabilitative care for the respiratory crisis has been completed, that Elderwood is not where he belongs. It is undisputed, however, that he still requires care in a residential health care facility or in a group home such as he was in for many years. The Respondent, which has the discharge planning responsibility, has not arranged a transfer to another such facility or program. It has failed to develop a discharge plan that addresses any of the Appellant's residential care needs.

The Respondent made some efforts to find placement in another group home, which his [redacted] and guardian, [redacted], wants for him, but an initial obstacle to finding a placement appropriate for his autism needs was that he had the [redacted] in place. (Exhibit 1, page 7.) The [redacted] was removed on [redacted]. (Exhibit E, pages 18, 22-24.) Since then, ECMC discharge planners have been making inquiries of other residential care facilities to find a long-term care placement for the Appellant, without success. (Exhibit E, pages 25-26.) All parties indicated ongoing efforts to obtain assistance from [redacted] the state agency that oversees care for persons with the Appellant's needs. (Exhibit E, pages 22-26.)

The Respondent may have found itself with an unexpected responsibility for this resident because the group home in which he lived for many years refuses to take him back. There is no regulatory support, however, for the view that having accepted and admitted him, the Respondent has no obligation to either continue providing residential care if he requires it after completing rehabilitation, or comply with the requirement of discharging him only with an appropriate discharge plan.

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.

The Appellant does not require hospitalization 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 proposes that the Appellant stay at ECMC until some other placement is found. ECMC's CPEP medical notes from earlier evaluations of the Appellant include the following:

> ... He has been discharge focused, requesting to return to Elderwood ASAP, where he feels safe and cared for....
>
> If it is felt that his care/behavior cannot safely be managed in his current living situation, referrals must be made from an outpatient setting toward an alternative supervised housing option. It is reported that he does have eligibility through the [redacted] system, and collaboration with his assigned MSC might therefore be helpful in terms of pursuing appropriate housing options. (April 29, 2019 assessment: Exhibit 4, page 32.)
>
> ... He does not appear to be at imminent risk of harm to himself or others at the present time. He is essentially keeping to himself in this very chaotic environment. An environment such as [redacted] is not appropriate for somebody with an [redacted], with [redacted], as he is likely to become more [redacted] and [redacted] and a behavioral treatment plan cannot be consistently reinforced in such a chaotic setting. It is more appropriate for him to return to his skilled nursing facility where such a plan can be consistently reinforced and where he feels safe and with familiar staff. Indeed he feels that his needs are better met at the Elderwood facility, where he feels safe and well cared for. (May 4, 2019 assessment: Exhibit 4, page 35.)

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 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 so until it meets its obligation to develop an appropriate discharge plan that will meet his care needs. ECMC has offered to refer the Respondent to a [redacted] who is willing to consult on this case. The Respondent's objection that a treating physician must be accredited by Elderwood to provide care for its residents is hardly a persuasive reason to reject such assistance when the Respondent also takes the position that it is not currently staffed to manage his treatment. (II:0h25m.)

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 Elderwood at Williamsville has failed to establish that the discharge of Appellant [redacted] 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 10, 2019

John Harris Terepka
Administrative Law Judge
Bureau of Adjudication