



# 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 30, 2019

## CERTIFIED MAIL/RETURN RECEIPT

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

Zandra McNamee, DNS  
Comprehensive Rehabilitation & Nursing  
147 Reist Street  
Williamsville, New York 14221

Caroline A. McDonough, Esq.  
Center for Elder Law & Justice  
438 Main Street, Suite 1200  
Buffalo, New York 14202

Regina A. Del Vecchio, Esq.  
Office of General Counsel  
Erie County Medical Center Corporation  
462 Grider Street  
Buffalo, New York 14215

**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

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In the Matter of an Appeal, pursuant to  
10 NYCRR 415.3, by

[REDACTED],

Appellant,

from a determination by

COMPREHENSIVE REHABILITATION & NURSING

to discharge her from a residential health care facility.

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DECISION

ORIGINAL

Before: Tina M. Champion  
Administrative Law Judge

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

Date: October 23, 2019

Parties:

[REDACTED]  
By: Caroline A. McDonough, Esq.  
Center for Elder Law & Justice  
438 Main Street, Suite 1200  
Buffalo, New York 14202

Comprehensive Rehabilitation & Nursing  
147 Reist Street  
Williamsville, New York 14221

By: no appearance

Interested Party:

Erie County Medical Center  
By: Regina A. Del Vecchio, Esq.  
Office of General Counsel  
Erie County Medical Center Corporation  
462 Grider Street  
Buffalo, New York 14215

## JURISDICTION

By notice dated [REDACTED] 2019, Comprehensive Rehabilitation & Nursing (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [REDACTED] (the Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) 415.3(h).

The hearing was held in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulations (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR.

Evidence was received and witnesses were examined. An audio recording of the proceeding was made.

## HEARING RECORD

ALJ Exhibits: I – Letter with Notice of Hearing and Discharge Notification (9/18/19)  
II – Letter with Rescheduling Notice (9/25/19)

Appellant Exhibits: 1 – Twin City Ambulance – Patient Care Report  
2 – Erie County Medical Center Patient Notes  
3 – Dear Administrator Letter  
4 – Patient Review Instrument  
5 – OPWDD Level II Referral Response  
6 – Erie County Medical Center Patient Note

Appellant Witnesses: [REDACTED], Resident  
Liz Rivera, Social Worker, Erie County Medical Center  
Ahmed Shah, M.D., Erie County Medical Center

### FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old female who was sent from the Facility to Erie County Medical Center (ECMC) by ambulance on [REDACTED], 2019 following a 911 call from the Facility due to a [REDACTED] episode by the Appellant. (Resident Ex. 1.)

2. The Appellant was noted by the responding EMTs to have reportedly [REDACTED] another resident and to have [REDACTED] on individuals at the Facility. The Appellant also self-reported to the EMTs that she wanted to [REDACTED] and that she had been [REDACTED] [REDACTED] other residents. The Appellant was calm during her transport to ECMC and did not demonstrate any violent behavior. (Resident Ex. 1.)

3. The Appellant was transported to ECMC with a "Discharge Notification" dated [REDACTED] [REDACTED] 2019, which stated transfer/discharge to "ECMC" and stated the reason as "[REDACTED] [REDACTED]." (ALJ Ex. 1.)

4. The Appellant was evaluated by a medical doctor at ECMC's emergency department who determined that "there [wa]s absolutely no objective evidence of [REDACTED] and "no evidence of any [REDACTED] mood or [REDACTED] symptoms that would warrant [REDACTED] [REDACTED] hospitalization." The medical doctor also noted that "it is evident that [the Appellant] uses [REDACTED] [REDACTED] as a rationalization for her behavior, to escape any uncomfortable consequences", and that the Appellant "is very clear about her motivation to find alternative living arrangements, partly because she has been given the impression that she is being evicted from her current residential arrangement." (Resident Ex. 2.)

5. The Facility, upon being contacted by ECMC on [REDACTED], 2019 with the results of Appellant's medical evaluation, refused to allow the Appellant to return. ECMC then admitted the Appellant to the hospital as a "social admission." (Resident Ex. 2; T. Shah.)

6. ECMC medical notes indicate that the Appellant has remained medically stable for discharge. (Resident Exs. 2 and 6.)

7. ECMC also referred the Appellant to the New York State Office for People with Developmental Disabilities (OPWDD) to determine if a Level II Assessment (for individuals requiring nursing facility level of care who have been identified as having suspected mental illness) is required and OPWDD determined that it is not required. (Resident Ex. 5.)

8. The Appellant timely appealed the Facility's discharge determination and proposed discharge location.

9. A hearing was initially scheduled for September 25, 2019 and was adjourned at the request of the Appellant. The Appellant has remained at ECMC during the pendency of the appeal.

### **ISSUES**

Has the Facility established that its determination to discharge the Appellant is correct and that its discharge plan is appropriate?

### **APPLICABLE LAW**

A residential health care facility, also referred to in the Department of Health Rules and Regulations as a nursing home, is a facility which provides regular nursing, medical, rehabilitative, and professional services to residents who do not require hospitalization. (PHL § 2801[2][3]; 10 NYCRR 415.2[k].)

A resident may only be discharged pursuant to specific provisions of the Department of Health Rules and Regulations. (10 NYCRR 415.3[h][1].)

Facilities are required to provide written notice of transfer or discharge that includes the following:

- (a) The reason for transfer or discharge;
- (b) The specific regulations that support, or the change in Federal or State law that requires, the action;
- (c) The effective date of transfer or discharge;
- (d) The location to which the resident will be transferred or discharged;
- (e) a statement that the resident has the right to appeal the action to the State Department of Health, which includes:
  - (1) an explanation of the individual's right to request an evidentiary hearing appealing the decision;
  - (2) the method by which an appeal may be obtained;
  - (3) in cases of an action based on a change in law, an explanation of the circumstances under which an appeal will be granted;
  - (4) an explanation that the resident may remain in the facility (except in cases of imminent danger) pending the appeal decision if the request for an appeal is made within 15 days of the date the resident received the notice of transfer/discharge;
  - (5) in cases of residents discharged/transferred due to imminent danger, a statement that the resident may return to the first available bed if he or she prevails at the hearing on appeal; and
  - (6) a statement that the resident may represent him or herself or use legal counsel, a relative, a friend, or other spokesman;
- (f) the name, address and telephone number of the State long term care ombudsman;
- (g) for nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act;
- (h) for nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

(10 NYCRR 415.3(h)(1)(iii)-(v).)

Facilities are also required to "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."

(10 NYCRR 415.3(h)(1)(vi).)

Under the hearing procedures at 10 NYCRR 415.3(h)(2)(iii)(b), the Facility bears the burden to prove a discharge is necessary and appropriate. Under SAPA § 306(1), a decision in an administrative proceeding must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact. It is less than a preponderance of evidence but more than mere surmise, conjecture or speculation, and it constitutes a rational basis for a decision. (Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3d Dept. 1984], appeal dismissed 63 N.Y.2d 649.)

#### **DISCUSSION**

The Facility failed to appear at the scheduled hearing in this matter. Counsel for the Appellant informed the ALJ at the outset of the hearing that she had received a voice message from the Facility's Director of Nursing, Zandra McNamee, the day prior to the hearing containing a statement that "something came up" and indicating uncertainty as to whether anyone from the Facility would be appearing at the hearing. The Department of Health's Bureau of Adjudication received no communication from the Facility since granting the Appellant's request for adjournment and rescheduling the hearing. The Facility was provided with adequate and appropriate notice of the rescheduled hearing date. (ALJ Ex. II.) The hearing in this matter proceeded as scheduled in the absence of the Facility and no evidence was offered into the record on behalf of the Facility. As such, the Facility has not met its burden to prove a discharge is necessary and appropriate pursuant to 10 NYCRR 415.3(h)(2)(iii)(b).

Furthermore, the evidence offered and entered into the record on behalf of the Appellant, although not necessary given the failure of the Facility to meet its burden of proof, demonstrates that the discharge was not necessary and was not appropriate. First, although the Appellant acted out inappropriately toward others at the Facility and stated that she may [REDACTED],

ECMC records introduced into evidence by the Appellant do not demonstrate that she is a danger to the safety and health of others or herself. They also do not demonstrate that the Appellant's needs cannot be met in the Facility. Accordingly, discharge is not warranted pursuant to 10 NYCRR 415.3(h)(1)(i).

Second, even if discharge was warranted, the "Discharge Notification" dated [REDACTED] 2019, which stated transfer/discharge to "ECMC," is insufficient in this matter as it does not contain all the required provisions pursuant to 10 NYCRR 415.3(h)(1)(v). (ALJ Ex. I.)

Finally, discharge to a hospital, an acute care facility, is not a discharge plan that addresses how the medical needs of the resident will be met after discharge as required pursuant to 10 NYCRR 415.3(h)(1)(vi). While the Facility was authorized to and understandably did send the Appellant to ECMC for medical evaluation following her outburst at the Facility on [REDACTED] 2019, the Facility has no authority to refuse to re-admit the Appellant after she was evaluated and cleared by ECMC to return.

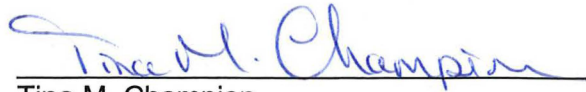
### **DECISION**

Comprehensive Rehabilitation & Nursing has not established that the Appellant's discharge was necessary and that the discharge plan was appropriate.

1. Comprehensive Rehabilitation & Nursing is directed to readmit the Appellant to the first available semi-private bed prior to admitting any other person to the Facility, pursuant to 10 NYCRR 415.3(h)(1)(vi).
2. This decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules.



DATED: Albany, New York  
October 29, 2019



Tina M. Champion  
Administrative Law Judge

TO: [REDACTED]  
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