

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2177361
Decision Date:	10/13/2021	Hearing Date:	10/08/2021
Hearing Officer:	Susan Burgess-Cox		

Appearance for Appellant:
Pro se

Appearance for Nursing Facility:
Robert Baker, Director of Nursing



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	Denied	Issue:	NH Discharge
Decision Date:	10/13/2021	Hearing Date:	10/08/2021
Nursing Facility's Rep.:	Director of Nursing	Appellant's Rep.:	Pro se
Hearing Location:	All Parties Appeared by Telephone		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a notice dated September 27, 2021, the nursing facility informed the appellant that she would be discharged to [REDACTED], [REDACTED] because the safety of the individuals in the facility would be endangered due to the appellant's clinical or behavioral status; and the health of the individuals in the facility would otherwise be endangered. (130 CMR 610.028; Exhibit 1). The appellant filed an appeal in a timely manner on September 28, 2021. (130 CMR 610.015(B); Exhibit 2). Notice of transfer or discharge from a nursing facility is valid grounds for appeal. (130 CMR 610.032).

Action Taken by the Nursing Facility

The nursing facility issued a notice of intent to discharge the appellant because the safety of the individuals in the facility would be endangered due to the appellant's clinical or behavioral status; and the health of the individuals in the facility would otherwise be endangered.

Issue

Whether the nursing facility was correct, pursuant to 130 CMR 610.028, in notifying the appellant of an intended discharge because the safety of the individuals in the facility would be endangered due to the appellant's clinical or behavioral status; and the health of the individuals in the facility would otherwise be endangered.

Summary of Evidence

All parties appeared by telephone. Documents from the nursing facility were incorporated into the hearing record as Exhibit 4. The facility's director of nursing appeared with a social worker from the facility. The appellant was admitted into the facility in [REDACTED] following a visit to the emergency department (ED) due to generalized weakness and failure to thrive. (Testimony; Exhibit 4). The appellant is paraplegic, has asthma, a history of opioid dependency and repeated falls. (Testimony; Exhibit 4). The appellant ambulates using a power wheelchair. (Testimony; Exhibit 4). Prior to the admission, the appellant received PCA services which were discontinued due to the sale of the home where she and her PCA resided and the relocation of her PCA. (Testimony; Exhibit 4). At the time of the discharge, the appellant did not have an address in the community. (Testimony; Exhibit 4).

In August 2021, the appellant was sent to the hospital from the nursing facility due to lethargy and a change in mental status. (Testimony; Exhibit 4). A room search prior to leaving for the hospital found: Gabapentin, Suboxone wrappers, ibuprofen, an empty bottle of Xanax and Furosemide. (Testimony; Exhibit 4). A room search in September 2021 found lighters and a small bag of an unknown brown substance. (Testimony; Exhibit 4). The small bag was confiscated and given to the [REDACTED] Police Department. The facility issued an expedited notice to discharge. (Testimony; Exhibit 4). The notice was sent to the appellant alone. The appellant noted at hearing that she did not provide the facility the name of a family member or other representative at the time of admission.

Records from the facility include a note from a physician stating there was no medical need for the appellant to remain in the current facility and it was safe and appropriate to discharge the appellant to a medical shelter. (Testimony; Exhibit 4). The director of nursing and social worker at the hearing noted that the shelter that the appellant would be discharged to provides medical and social services to residents. The director of nursing testified that the current facility has 58 residents in various states of sobriety and having individuals storing and using illegal substances in their room impacts the health and safety of other residents. The

director of nursing noted that the appellant is not current receiving any nursing interventions, physical or occupational therapy. (Testimony; Exhibit 4). The director of nursing testified that the shelter where the appellant is being discharged to is medically appropriate as the visiting nurse's association (VNA) and related organizations work with residents to provide necessary services for individuals in the community.

The appellant testified that she needs assistance with transfers and would benefit from receiving PCA services. The appellant testified that she considers the nursing facility her home and since she does not have a PCA in the community she thought it would be best to stay at the facility. The appellant acknowledged that she had a history of substance abuse and a few relapses over the years.

The appellant testified that she was with others at the facility who were smoking marijuana and consuming marijuana edibles. The appellant was provided a marijuana edible but was not sure what it was at the time as she had not had one before. The appellant testified that she did not know how the bag they found with what she believed was heroin got into her room. The appellant testified that it was not her bag. The appellant did not speak to the incident in August 2021 that led to a hospitalization. The appellant testified that she did not have any family and considered residents in the facility as her family. The appellant did not feel that it was safe or appropriate to discharge her as she would not have the same supports and services that she receives in the facility. The appellant did not dispute the fact that she no longer receives nursing or therapy services in the facility.

Findings of Fact

Based on a preponderance of the evidence, I find the following:

1. The appellant was admitted into the nursing facility in [REDACTED] following a visit to the ED due to generalized weakness and failure to thrive.
2. The appellant is paraplegic, has asthma, a history of opioid dependency and repeated falls.
3. The appellant ambulates using a power wheelchair.
4. Prior to the admission, the appellant received PCA services which were discontinued due to the sale of the home where she and her PCA resided and the relocation of her PCA.

5. At the time of the discharge, the appellant did not have an address.
6. The appellant did not provide the facility with the name of a family member or other representative at the time of admission.
7. In August 2021, the appellant was sent to the hospital from the nursing facility due to lethargy and a change in mental status.
8. A search of the appellant's room found: Gabapentin, Suboxone wrappers, ibuprofen, an empty bottle of Xanax and Furosemide.
9. A September 2021 room search found lighters and a bag of an unknown brown substance.
10. The small bag was confiscated and given to the Haverhill Police Department.
11. The facility issued an expedited notice to discharge the appellant to a medical shelter.
12. A physician from the facility agreed that the discharge to a medical shelter was safe and appropriate for the appellant.

Analysis and Conclusions of Law

The federal Nursing Home Reform Act (NHRA) of 1987 guarantees all residents the right to advance notice of, and the right to appeal, any transfer or discharge action initiated by a nursing facility. Massachusetts has enacted many regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge. Some of the relevant regulations can be found in both (1) the MassHealth Nursing Facility Manual regulations at 130 CMR 456.000 *et. seq.* and (2) the Fair Hearing Rules at 130 CMR 610.000 *et. seq.*

Pursuant to 130 CMR 610.028(A), a resident may be transferred or discharged from a nursing facility only when:

- (1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the nursing facility;
- (2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so that the resident no longer needs the services provided by the nursing facility;
- (3) the safety of individuals in the nursing facility is endangered;

- (4) the health of individuals in the nursing facility would otherwise be endangered;
- (5) the resident has failed, after reasonable and appropriate notice, to pay for (or failed to have Medicaid or Medicare pay for) a stay at the nursing facility; or
- (6) the nursing facility ceases to operate.

Under the regulations governing actions initiated by a nursing facility, when the facility transfers a resident under any of the circumstances specified in 130 CMR 610.028(A)(1) through (5), the resident's clinical record must be documented. (130 CMR 610.028(B)). The documentation must be made by:

- (1) the resident's physician when a transfer or discharge is necessary under 130 CMR 610.028(A)(1) or (2); and
- (2) a physician when the transfer or discharge is necessary under 130 CMR 610.028(A)(4).

Prior to discharge or transfer, the nursing facility must hand deliver to the resident and mail to a designated family member or legal representative a notice written in 12-point or larger type that contains, in a language the member understands, the following:

- (1) the action to be taken by the nursing facility;
- (2) the specific reason or reasons for the discharge or transfer;
- (3) the effective date of the discharge or transfer;
- (4) the location to which the resident is to be discharged or transferred;
- (5) a statement informing the resident of his or her right to request a hearing before the MassHealth agency including:
 - a) the address to send a request for a hearing;
 - b) the time frame for requesting a hearing as provided for under 130 CMR 610.029; and
 - c) the effect of requesting a hearing as provided for under 130 CMR 610.030;
- (6) the name, address, and telephone number of the local long-term-care ombudsman office;
- (7) for nursing facility residents with developmental disabilities, the 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 (42 U.S.C. § 6041 et seq.);
- (8) 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 (42 U.S.C. § 10801 et seq.);

- (9) a statement that all residents may seek legal assistance and that free legal assistance may be available through their local legal services office. The notice should contain the address of the nearest legal services office; and
- (10) the name of a person at the nursing facility who can answer any questions the resident has about the notice and who will be available to assist the resident in filing an appeal.

130 CMR 610.028(C).

The notice in this case was sufficient. The facility articulated a permitted basis for discharging the appellant, the notice contained all of the appropriate language and while a copy was not provided to a designated family member or representative, the appellant did not dispute the fact that the facility did not have a record of a designated family member or representative.

Mass. Gen. Laws ch. 111, §70E provides that “[a] resident, who requests a hearing pursuant to section 48 of chapter 118E, shall not be discharged or transferred from a nursing facility licensed under section 71 of this chapter, unless a referee determines that the nursing facility has provided sufficient preparation and orientation to the resident to ensure safe and orderly transfer or discharge from the facility to another safe and appropriate place.” Federal regulations require that a nursing facility provide sufficient preparation for a safe and orderly discharge. See 42 CFR 483.12(a)(7). Per Interpretive Guidelines §483.12(a)(7) in the Manual, “[s]ufficient preparation’ means the facility informs the resident where he or she is going and takes steps under its control to assure safe transportation. The facility should actively involve, to the extent possible, the resident and the resident’s family in selecting the new residence.”

Records and testimony presented by both parties show that the nursing facility staff has worked with the appellant to ensure a safe and orderly discharge. The records from the facility and testimony of all parties at hearing do not indicate the appellant’s need for nursing or therapy services or that the appellant would not be able to return to the community. Therefore, the decision made by the nursing facility was correct.

This appeal is denied.

Order for the Nursing Facility

Proceed with the discharge as set out in the notice dated September 21, 2021 following the 5-day stay from the date of this decision.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Implementation of this Decision

If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings at the address on the first page of this decision.

Susan Burgess-Cox
Hearing Officer
Board of Hearings

cc: The Oxford Rehab & Healthcare Center, ATTN: Administrator, 689 Main Street, Haverhill, MA 01830