

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Dismissed	Appeal Number:	2177778
Decision Date:	11/05/2021	Hearing Date:	10/26/2021
Hearing Officer:	Paul C. Moore	Record Closed:	11/01/2021

Appellant Representative:

Pro se (by telephone)

Nursing Facility Representatives:

Naomi Cairns, licensed social worker; Aneta Czartoryski, R.N, director of nursing; Kaye Ingalsbe, director of rehabilitation; Anne-Marie Ester, after-care coordinator; and Christine Zambello, resident ambassador (all from Highview of Northampton, and all by telephone)



*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:	Dismissed	Issue:	Expedited Nursing Facility Discharge
Decision Date:	11/05/2021	Hearing Date:	10/26/2021
Nursing Facility Reps.:	Director of Nursing et al.	Appellant Rep.:	Pro se
Hearing Location:	Board of Hearings (remote)		

Authority

This hearing was conducted pursuant to Massachusetts General Laws (“M.G.L.”) Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a Notice of Intent to Discharge Resident with Less than 30 Days’ Notice dated October 12, 2021 (“discharge notice”), the Highview of Northampton, a skilled nursing facility (“the facility” or “Highview”), notified the appellant that it sought to discharge her effective [REDACTED] to Friends of the Homeless, [REDACTED] because “the [appellant’s] health has improved sufficiently so that the [appellant] no longer needs the services provided by the facility” (130 Code of Massachusetts Regulations (CMR) 610.028; Exhibit 1). The appellant filed a timely appeal with the Board of Hearings (BOH) on October 13, 2021 (130 CMR 610.015(B); 130 CMR 456.703; Exhibit 2). Challenging an expedited notice of transfer or discharge initiated by a nursing facility is a valid ground for appeal to BOH (130 CMR 610.032(C)).

Action Taken by Nursing Facility

The nursing facility notified the appellant that it sought to discharge her because her health has improved sufficiently so that she no longer needs the services provided by the facility.

Issues

The appeal issues are whether: (1) the facility had valid grounds to discharge the appellant; (2) the discharge notice and patient record meet the regulatory requirements set forth in the Fair Hearing

Rules at 130 CMR 610.028 and 610.029; and (3) the facility has provided sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place.

Summary of Evidence

A. Documentary and Testimonial Evidence

Prior to hearing, the facility submitted a copy of some of the appellant's clinical records, including her admission record, physician progress notes, behavioral health progress notes, physical therapy progress notes, and nursing progress notes (Ex. 3).

Ms. Cairns, the facility social worker, testified that the facility issued the relevant expedited notice of discharge to the appellant because she is healthy enough to be discharged from the facility. She has completed physical and occupational therapy successfully, and can now perform her activities of daily living (ADLs) independently. Ms. Cairns noted that discharge planning for the appellant has been under way for quite some time, and that six different transitional living situations for persons in recovery from substance abuse were considered. Ms. Ester, the facility's after-care coordinator, testified that many of these settings were closed to new admissions due to Covid-19, and that the appellant did not wish to go to one particular setting. Ms. Czartoryski, the facility's director of nursing, testified that the appellant was admitted to Highview on [REDACTED] following an inpatient admission at [REDACTED], where she had undergone surgery for septic arthritis in her knees. She completed a course of antibiotics in early October, 2021. According to the appellant's admission record within Exhibit 3, she is [REDACTED], and her other medical diagnoses include opioid dependence, bacteremia, methicillin susceptible staphylococcus aureus (MSSA) infection, bipolar disorder, anxiety disorder, depressive disorder, asthma, and difficulty in walking (Ex. 3, pp. 2-3).

The discharge setting designated in the expedited discharge notice issued to the appellant is a homeless shelter in Springfield (Ex. 1).

The appellant testified that she is in recovery from substance abuse, and that she does not wish to go to a homeless shelter. She noted that she resided at homeless shelters in the past, and drug use took place there. She testified that she is afraid of relapsing if she returns to live at a homeless shelter. She agrees that she is healthy enough to be discharged from the facility. She noted that as of the morning of the hearing, October 26, 2021, she has been accepted at Phoenix House, a sober living house located in [REDACTED]. However, she is in the process of enrolling at a different methadone clinic closer to [REDACTED], so her move to Phoenix House is on hold until that occurs. She stated that if she is accepted to Phoenix House, she will no longer pursue an appeal of the discharge notice issued by Highview (Testimony).

At the close of the hearing, the hearing officer agreed to keep the record of this appeal open until Friday, October 29, 2021 for the appellant and the facility representative to provide him an update on the status of the appellant's contemplated admission to Phoenix House. In response to an e-mail

inquiry from the hearing officer on October 29, 2021 about the appellant's discharge, neither party responded (Ex. 5).

On November 1, 2021, the hearing officer received an update from Ms. Cairns, the facility social worker, by e-mail, stating:

I was out sick Friday yet was involved in phone calls regarding [the appellant's] discharge. She did leave facility at end of day, and was transferred by her father to Phoenix House program as far as my understanding goes.

(Ex. 6)¹

B. Content of the discharge notice/clinical record

The expedited discharge notice at issue in this matter contains: a specific statement of the reasons for the intended discharge, the location to which the appellant is to be discharged, the effective date of the intended discharge, the right of the appellant to request a fair hearing on the intended discharge, the address, telephone number and fax number of the BOH, the time frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (*to wit*, that the facility cannot discharge the appellant until five days after the hearing officer's decision is received), the name of the person at the facility who can answer any questions about the expedited discharge notice and about the right to file an appeal, the name and address of the local legal-services office, the name and address of the local long-term care ombudsman program, and the mailing addresses and telephone numbers of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals, respectively (Ex. 2).

Within Exhibit 3, the appellant's medical record from the facility, a progress note dated 10/20/21 by Anissa Newman, PA-C, states as follows:

[Appellant] seen today for acute rounding to eval appropriateness for discharge.

[Appellant] has been accepted to My Sister's House in [REDACTED] through BHN; however the BHN staff notified the SW here that they were concerned her medical needs were not being met based on complaints she relayed to them about leg swelling and inability to walk.

[Appellant] has been here since [REDACTED] following hospitalization for pyogenic arthritis R knee s/p arthroscopy and debridement/synovectomy and associated MSSA bacteremia. She completed abx earlier this month. Has been on PRN Dilaudid 4 mg. po q 6 h prn pain. Previous attempts to taper this have resulted in acting out and

¹ In response to a follow-up email from the hearing officer to the facility social worker on November 1, 2021, the social worker, on behalf of the facility, indicated the facility would not rescind its expedited notice of discharge (Ex. 7).

labile behaviors. Remains on Motrin. Is on agonist therapy with methadone for opiate use d/o.

[Appellant] was seen 8 days ago for RLE edema. Very minimal swelling was noted at that time and was attributed to fluid mobilization associated with increased ambulation. She has had no complaints since then. . .

[Appellant's] last ortho f/u was 10/09/21. She returned with recommendation to follow up 6 weeks but did not require any additional diagnostics and does not have any physical restrictions. She does use a single crutch at times when she ambulates although does not do this consistently and her gait has not been antalgic with or without the crutch.

[Appellant] reports that, during a telephone intake with BHN, she was asked if she could run down the stairs in the event of a fire because the only available room is on the 3rd floor and she told them she would be unable to do so. Per PT, [the appellant] has no restrictions, including for stairs. . . .

Assessment/Plan. . .

Completed PT/OT

Completed abx

Has no restrictions and is appropriate to reside on the 3rd floor without elevator access and stairs only.

Need to start tapering Dilaudid.

Edema has resolved. . .

(Ex. 3, pp. 15-16)

Findings of Fact

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

1. The appellant is under age 65 and was admitted to the facility on [REDACTED] (Testimony, Ex. 3).
2. The appellant was admitted to the facility from an acute care hospital for rehabilitation following a right knee arthroscopy and debridement/synovectomy and associated MSSA bacteremia (*Id.*).
3. The appellant's other diagnoses include opioid dependence, bipolar disorder, anxiety disorder, depressive disorder, asthma, and difficulty in walking (Ex. 3, pp. 2-3).
4. Through an expedited discharge notice issued October 12, 2021, Highview of Northampton,

a skilled nursing facility, notified the appellant that it sought to discharge her effective [REDACTED] to Friends of the Homeless, [REDACTED] because “the [appellant’s] health has improved sufficiently so that the [appellant] no longer needs the services provided by the facility” (Ex. 1).

5. The appellant timely requested a fair hearing on the expedited notice of discharge on October 13, 2021 (Ex. 2).
6. The appellant successfully completed physical and occupational therapy at the facility, as well as a course of antibiotics for her MSSA infection (Testimony, Ex. 3).
7. The appellant is able to complete her ADLs independently (Testimony, Ex. 3).
8. The discharge setting selected for the appellant by the facility was a homeless shelter in [REDACTED] (Testimony, Ex. 1).
9. The appellant is in recovery from opioid dependence disorder and feels she may relapse if she returns to a homeless shelter (Testimony).
10. As of Friday, October 29, 2021, the appellant was accepted for admission to a sober living house in [REDACTED], and discharged from Highview (Ex. 6).
11. The expedited discharge notice at issue in this matter contains: a specific statement of the reasons for the intended discharge, the location to which the appellant is to be discharged, the effective date of the intended discharge, the right of the appellant to request a fair hearing on the intended discharge, the address, telephone number and fax number of the BOH, the time frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (*to wit*, that the facility cannot discharge the appellant until 5 days after the hearing officer’s decision is received), the name of the person at the facility who can answer any questions about the discharge notice and about the right to file an appeal, the name and address of the local legal-services office, the name and address of the local long-term care ombudsman program, and the mailing addresses and telephone numbers of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals, respectively (Ex. 2).
12. The appellant’s medical record contains an explanation by the appellant’s physician assistant, Anissa Newman, PA-C, noting the reasons for the appellant’s intended discharge (Ex. 3, pp. 15-16).

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 initiated by a nursing facility. MassHealth has enacted regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in both (1) the Nursing Facility Manual regulations at 130 CMR 456.000 et seq., and (2) the Fair Hearing Rules at 130 CMR 610.000 et seq.

The regulations at 130 CMR 456.002 define a "discharge" as "the removal from a nursing facility to a noninstitutional setting of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual; this includes a nursing facility's failure to readmit following hospitalization or other medical leave of absence." Similarly, 130 CMR 610.004 defines a discharge as "the removal from a nursing facility of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual."

The Nursing Facility Manual regulations at 130 CMR 456.701 provide in relevant part:

Notice Requirements for Transfers and Discharges Initiated by a Nursing Facility

(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 the Division or Medicare pay for) a stay at the nursing facility; or
- (6) the nursing facility ceases to operate.

(B) When the facility transfers or discharges a resident under any of the circumstances specified in 130 CMR 456.701(A)(1) through (5), the resident's clinical record must contain documentation to explain the transfer or discharge. The documentation must be made by:

- (1) the resident's physician when a transfer or discharge is necessary under 130 CMR 456.701(A)(1) or (2); and**
- (2) a physician when the transfer or discharge is necessary under 130 CMR. 456.701(A)(3) or (4).**

(C) Before a nursing facility discharges or transfers any resident, 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 Division's Board of Hearings 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 456.702; and
 - (c) the effect of requesting a hearing as provided for under 130 CMR 456.704;
- (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.

(Emphasis added)

Further, the Nursing Facility Manual regulations at 130 CMR 456.702 set forth the requirements that must be met by a nursing facility when it issues an expedited notice of discharge, as follows:

- (B) Instead of the 30-day-notice requirement set forth in 130 CMR 456.702(A), the notice of discharge or transfer required under 130 CMR 456.701 must be made as soon as practicable before the discharge or transfer in any of the following circumstances, which are emergency discharges or emergency transfers.
 - (1) The health or safety of individuals in the nursing facility would be endangered and this is documented in the resident's record by a physician.
 - (2) The resident's health improves sufficiently to allow a more immediate transfer or discharge and the resident's attending physician documents this in the resident's record.**
 - (3) An immediate transfer or discharge is required by the resident's urgent

medical needs and this is documented in the medical record by the resident's attending physician.

(4) The resident has not resided in the nursing facility for 30 days immediately prior to receipt of the notice.

(C) When the transfer or discharge is the result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, the notice of transfer or discharge, including that which is required under 130 CMR 456.429, must comply with the requirements set forth in 130 CMR 456.701 and must be provided to the resident and an immediate family member or legal representative at the time the nursing facility determines that it will not readmit the resident.

(Emphasis added)

Here, the evidence reflects that the facility has sufficient grounds to discharge the appellant. Her health has improved sufficiently that she no longer needs the services of a skilled nursing facility. She has completed physical and occupational therapy, and is now independent with her ADLs.

Further, the expedited discharge notice issued by the facility to the appellant meets the regulatory requirements set forth at 130 CMR 456.701(C), above.²

The Fair Hearing Rules applicable in this proceeding, 130 CMR 610.051(B), "Adjustments Resolving Issues," state in pertinent part:

The MassHealth agency or the acting entity may make an adjustment in the matters at issue before or during an appeal period.³ If the parties' adjustment resolves one or more of the issues in dispute in favor of the appellant, the hearing officer, by written order, may dismiss the appeal in accordance with 130 CMR 610.035 as to all resolved issues, noting as the reason for such dismissal that the parties have reached agreement in favor of the appellant. BOH will not delay a fair hearing because a possible adjustment is under consideration, unless the appellant requests or agrees to such a delay.

The acting entity – Highview – has adjusted the matter at issue; the appellant's discharge has been completed, albeit to a different location than was planned. The parties have agreed on this new discharge location. The issue on appeal is therefore moot. For these reasons, the appeal is DISMISSED.

Order for Nursing Facility

² For the reasons stated *infra*, the hearing officer declines to determine whether a progress note by a physician assistant explaining the reasons for the appellant's intended discharge, instead of by the appellant's attending physician, meets the requirements of 130 CMR 456.701(B)(1) and 130 CMR 456.702(B)(2).

³ 130 CMR 610.004 defines "acting entity" as the MassHealth agency, a MassHealth managed care contractor, or a nursing facility responsible for making a determination that can be appealed.

None.

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.

Paul C. Moore
Hearing Officer
Board of Hearings

cc:

