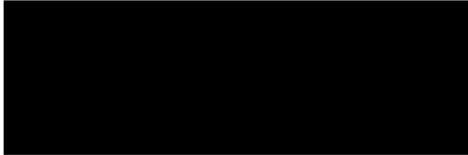


# Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2200051
<b>Decision Date:</b>	3/3/2022	<b>Hearing Date:</b>	02/18/2022
<b>Hearing Officer:</b>	Scott Bernard		

**Appearance for Appellant:**  
*Pro se via telephone*

**Appearance for the Nursing Facility:**  
Kathleen Stewart (Administrator) *via telephone*  
Akindele Majekodunmi, MD (Medical Director)  
*via telephone*  
Brian R. Hachey, Esq. *via 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

<b>Appeal Decision:</b>	Denied	<b>Issue:</b>	Nursing Facility Discharge
<b>Decision Date:</b>	3/3/2022	<b>Hearing Date:</b>	02/18/2022
<b>Nursing Facility's Rep.:</b>	Kathleen Stewart; Dr. Akindele Majekodunmi; Attorney Brian Hachey	<b>Appellant's Rep.:</b>	<i>Pro se</i>
<b>Hearing Location:</b>	Taunton MassHealth Enrollment Center		

## 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 December 7, 2021, the Nursing Facility informed the appellant of its intent to discharge her on January 7, 2022 because she had failed App after a reasonable and appropriate notice to pay for or fail to have Medicare or Medicaid pay for her stay at the facility. (See 130 CMR 610.028(A)(2); 610.029(B)(2); Exhibit (Ex.) 1; and Ex. 7). The appellant filed this appeal in a timely manner on January 3, 2022. (See 130 CMR 610.015(B) and Ex. 1). A discharge initiated by a nursing facility is a valid ground for appeal. (See 130 CMR 610.032).

## Action Taken by the Nursing Facility

The Nursing Facility initiated the appellant's discharge from the facility.

## Issue

The appeal issues are whether the Nursing Facility was correct, pursuant to 130 CMR 610.028 and 610.029, in determining that the appellant should be discharged from the facility.

## Summary of Evidence

The appellant is an individual under the age of 65 who was admitted to the nursing facility in August 2020. (Ex. 6, pp. 1-2). At that time the primary reason the appellant require skilled nursing facility level of care was because of an injury to her hip and adult failure to thrive. (Ex. 6, pp. 1-2). The nursing facility attorney stated that the appellant has not paid for nor secured a payer source for her stay. As of the date of the hearing, the appellant has a balance in excess of \$170,000. (Ex. 6, pp. 3-6).

For these reasons, the facility hand-delivered a letter entitled “30-Day notice of Intent to Discharge Resident” on December 7, 2021. (Ex. 7). In the notice, the facility informed the appellant that it sought to discharge her to a specified shelter on January 7, 2022 because “you have failed after a reasonable and appropriate notice, to pay for...or failed to have Medicare or Medicaid pay your stay at the nursing facility[.]” (Ex. 7, p. 2). The notice identified a person at the facility responsible for supervising her discharge. (Ex. 7, p. 2). The notice contained the contact information for the Long-Term Care Ombudsman Program, the Disability Law Center (for developmentally disabled individual), the Centers for Public Representation, and the Local Legal Service Office<sup>1</sup>. (Ex. 7, p. 3). The notice informed the appellant that she had the right to appeal and stated that if she wished to do so she must request a fair hearing within 30 days of receiving the notice and that she could not be discharged until 30 days after the appeal decision was rendered. (Ex. 7, p. 2). The notice identified the contact information for the MassHealth Board of Hearings. (Ex. 7, p. 4).

The nursing facility’s administrator stated that she is in charge of operating the facility, including the business operations of the facility. The administrator confirmed that the appellant has been a resident at the facility since August 2020 and that the appellant has not paid for her stay. The administrator stated that the appellant was admitted to the facility on a short-term screen, which meant that MassHealth paid for her first six months. Once the first six months of her stay concluded, the facility submitted a conversion to Long Term Care (LTC) to MassHealth. The administrator stated that MassHealth denied the conversion because the appellant had assets in excess of the asset limit. The appellant did not appeal the MassHealth determination. The appellant has not submitted another LTC application. The administrator stated that the appellant has informed the facility that she was not going to spend down the excess asset to repay the facility. The appellant has not submitted any private payment to pay for her stay. The appellant’s current balance as of February 1, 2022 was \$172,385.89. (Ex. 6, p. 3). The cost of the facility is \$456 per day. The appellant has what is called a semi-private room, which means she has one roommate. The administrator stated that the facility has a social services consultant who has worked with the appellant to find her housing outside the facility. The consultant has approached the appellant concerning rest homes and finding an apartment, but the appellant has declined to continue searching and has not provided a reason for doing so.

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<sup>1</sup> The Massachusetts Legal Assistance Corporation is not a legal services office, but a corporation established to fund civil legal aid organization in Massachusetts. (See <https://mlac.org/about-2/>). The address of MLAC is also not stated correctly as it is currently 18 Tremont Street, Suite 1010 Boston, MA 02108 and not 7 Winthrop Square, 2<sup>nd</sup> Floor, Boston, MA 02110-1245 as stated in the notice. The MLAC’s other contact information (phone number, fax number and email address) is correct, however. MLAC’s website does have contact information for local legal services also, and likely would provide this information if contacted by telephone.

The medical director for the facility stated that he is a physician licensed in Massachusetts, employed by a private medical group in the community but oversees all medical responsibilities at the facility, which include managing the work of attending nurses and nurse practitioners, as well as that of outside ancillary specialists such as psychiatrist, dentists, podiatrists and others. The medical director confirmed that the appellant was admitted to the facility in August 2020. The medical director stated that the appellant does not currently have a primary care physician in the community and that he has been the appellant's supervising clinician. The medical director stated that he has seen the appellant on multiple occasions including as recently as one week prior to the hearing. At that time, the medical director reassessed the appellant's clinical status. The medical director stated that he had an opportunity to review the appellant's medical records at the nursing facility. As a result, the medical director wrote a progress note concerning the appellant's current condition as of February 11, 2022. (Ex. 6, pp. 58-59).

The medical director stated that the appellant's admitting diagnosis was for left hip pain and failure to thrive. The medical director explained that failure to thrive is a diagnosis describing a person who is either below their expected weight level because of malnutrition or one or more issues with metabolism. The appellant was malnourished and underweight at the time of her admission. Since admission, the appellant's weight had steadily increased by 50 lbs. The medical director stated that the appellant does not have issues consuming food. As for the appellant's physical ability to move, she is independently ambulatory with the support of a cane. The appellant can perform the following activities of daily living without assistance: getting into and out of her bed, bathing, and toileting. The appellant is very strong and can sit up by herself. The appellant has good range of motion in all her extremities. The appellant is not currently taking medications that require a professional to administer them. The appellant was initially on narcotic pain medication to treat her hip pain. Although the appellant still reports feeling pain, she now treats that pain with over-the-counter medications. The medical director stated that the hip pain will continue as a chronic issue, although one that does not require further commitment at the facility. The appellant is also not receiving specialized care, such as occupational therapy or physical therapy. The appellant does not presently require skilled nursing level of care. The medical director stated that the appellant is at near optimal clinical health, although she does require the use of a walker. The appellant also has the ability to care for herself in most living environments, although she does require a first floor living space or an elevator for multilevel living structures. The medical director stated he did not have concerns about the appellant's safety in the community.

The appellant stated that she has done some housing search and called telephone numbers that have been given to her. The appellant stated that there are 5-7 year waiting lists for the public and subsidized housing she has sought. The appellant stated that she has called places where she would be required to room with 9 other people, or where she would have to share a kitchen. The appellant does not want to stay in a communal living situation because she was not a junky. The appellant stated that the COVID-19 outbreak has greatly dissuaded her from continuing to seeking outside housing at this time. The appellant stated that she continues to have a lot of pain. The appellant did confirm that she was able to do ADLs such as walking with the aid of her walker, showering, and toileting. The appellant stated she had difficulty bending down and picking things up from the floor even using her walker to stabilize herself. Additionally, the appellant stated that she has psoriasis and psoriatic arthritis, which intensify with stress. The appellant stated that she has had psoriasis and psoriatic arthritis since before she entered the facility and was being treated at Massachusetts

General Hospital for it prior to entering the facility. The appellant stated that once she entered the facility, she lost the doctors she had at MGH, and she does not currently have a PCP in the community. The appellant stated that she had no intention of entering long term care prior to August 2020 because she was always independent. In addition to her health issues, the appellant has had personal losses.

The appellant confirmed that she had assets in excess of the MassHealth asset limit. The appellant also stated that she believes that she was hand delivered the notice from the facility on December 7, 2021.

## **Findings of Fact**

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

1. The appellant is an individual under the age of 65 who was admitted to the nursing facility in August 2020. (Ex. 6, pp. 1-2; Testimony of the administrator; Testimony of the medical director).
2. At that time the primary reason the appellant require skilled nursing facility level of care was because of an injury to her hip and adult failure to thrive. (Ex. 6, pp. 1-2; Testimony of the administrator; Testimony of the medical director).
3. The appellant was admitted to the facility on a short-term screen, which meant that MassHealth paid for her first six months. (Testimony of the administrator).
4. Once the first six months of her stay concluded, the facility submitted a conversion to LTC to MassHealth. (Testimony of the administrator).
5. MassHealth denied the conversion because the appellant had assets in excess of the asset limit. (Testimony of the administrator; Testimony of the appellant).
6. The appellant did not appeal the MassHealth determination. (Testimony of the administrator).
7. The appellant has not submitted another LTC application. (Testimony of the administrator).
8. The appellant has informed the facility that she was not going to spend down the excess assets in order to repay the facility. (Testimony of the administrator).
9. The appellant has not submitted any private payment to pay for her stay. (Testimony of the administrator).
10. The appellant's current balance as of February 1, 2022 was \$172,385.89. (Ex. 6, p. 3; Testimony of the administrator).
11. The cost of the facility is \$456 per day. (Testimony of the administrator).

12. The appellant has what is called a semi-private room, which means that she has one roommate. (Testimony of the administrator).
13. The facility's social services consultant has worked with the appellant to find her housing outside the facility. The consultant has approached the appellant concerning rest homes and finding an apartment, but the appellant has declined to continue searching and has not provided a reason for doing so. (Testimony of the administrator).
14. The appellant does not currently have a primary care physician in the community and the medical director has been the appellant's supervising clinician since she entered the facility. (Testimony of the medical director).
15. The appellant has gained 50 pounds since entering the facility and no longer has a problem with nutrition. (Testimony of the medical director).
16. The appellant is independently ambulatory with the support of a cane. (Testimony of the medical director).
17. The appellant can perform the following activities of daily living without assistance: getting into and out of her bed, bathing, and toileting. (Testimony of the medical director).
18. The appellant is very strong and is able to sit up by herself and has good range of motion in all her extremities. (Testimony of the medical director).
19. The appellant is not currently taking medications that require a professional to administer them. (Testimony of the medical director).
20. Although the appellant still reports feeling pain, she now treats that pain with over-the-counter medications. (Testimony of the medical director).
21. The medical director stated that the hip pain will continue as a chronic issue, although one that does not require further commitment at the facility. (Testimony of the medical director).
22. The appellant is not receiving specialized care, such as occupational therapy or physical therapy. (Testimony of the medical director).
23. The appellant has the ability to care for herself in most living environments, although she does require a first floor living space or an elevator for multilevel living structures. (Testimony of the medical director).
24. The facility hand-delivered a letter entitled "30-Day notice of Intent to Discharge Resident" to the appellant on December 7, 2021. (Ex. 7).
25. In the notice, the facility informed the appellant that it sought to discharge her to a specified shelter on January 7, 2022 because "you have failed after a reasonable and appropriate notice, to pay for...or failed to have Medicare or Medicaid pay your stay at the nursing facility[.]" (Ex. 7, p. 2).

26. The notice identified a person at the facility responsible for supervising her discharge. (Ex. 7, p. 2).
27. The notice contained the contact information for the Long-Term Care Ombudsman Program, the Disability Law Center (for developmentally disabled individual), the Centers for Public Representation, and the Local Legal Service Office<sup>2</sup>. (Ex. 7, p. 3).
28. The notice informed the appellant that she had the right to appeal and stated that if she wished to do so she must request a fair hearing within 30 days of receiving the notice and that she could not be discharged until 30 days after the appeal decision was rendered. (Ex. 7, p. 2).
29. The notice identified the contact information for the MassHealth Board of Hearings. (Ex. 7, p. 4).

## Analysis and Conclusions of Law

The regulations concerning nursing home discharges are located at 130 CMR 610.028, 610.029 and 610.030. According to 130 CMR 610.028(A), a nursing facility resident may be transferred or discharged 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 MassHealth Agency or Medicare) a stay at the nursing facility;**
- or
- (6) the nursing facility ceases to operate (emphasis added).

According to 130 CMR 610.028(B), when the facility transfers or discharges 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.

The facility asserts that the appellant has failed, after reasonable and appropriate notice, to pay for or have MassHealth pay for her stay at the nursing facility. The facility submitted documentation that

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<sup>2</sup> The Massachusetts Legal Assistance Corporation is not a legal services office, but a corporation established to fund civil legal aid organization in Massachusetts. (See <https://mlac.org/about-2/>). The address of MLAC is also not stated correctly as it is currently 18 Tremont Street, Suite 1010 Boston, MA 02108 and not 7 Winthrop Square, 2<sup>nd</sup> Floor, Boston, MA 02110-1245 as stated in the notice. The MLAC's other contact information (phone number, fax number and email address) is correct, however. MLAC's website does have contact information for local legal services also, and likely would provide this information if contacted by telephone.

established that as of February 1, 2022, the appellant owed the facility \$172,385.89. The administrator for the facility testified that the facility worked with the appellant to apply for MassHealth LTC benefits, but that MassHealth denied the appellant's application because she was over assets. The administrator also stated that the appellant did not appeal that decision and has not submitted a subsequent LTC application. The appellant confirmed that she has assets in excess of the LTC asset limit. The administrator stated and the appellant confirmed that she has not offered to spend her assets to pay for her stay and has not otherwise submitted any payment for her stay at the facility. The facility's medical director testified that the appellant no longer requires nursing facility level of care. The facility submitted extensive progress notes for the appellant's stay at the facility.

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)).

Additionally, the notice must be made by the facility at least 30 days before the date the resident is to be discharged or transferred, except when the circumstances for an emergency discharge or emergency transfer are met. (130 CMR 610.029).



Further, 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.” Finally, federal regulations require that a nursing facility provide sufficient preparation for a safe and orderly discharge. (See 42 CFR 483.12(a)(7)).

The record shows that the facility complied with the notice requirements described in 130 CMR 610.028(C) and the time frame described in 130 CMR 610.029. The record further shows that the facility provided sufficient preparation and orientation to the appellant to ensure her safe and orderly discharge from the facility.

For the above stated reasons, the appeal is DENIED.

## **Order for the Nursing Facility**

The nursing facility may move forward with the appellant’s discharge from the facility but no earlier than 30 days from the date on 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.

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Scott Bernard  
Hearing Officer  
Board of Hearings

cc:

Saugus Rehab and Nursing, Attn: Administrator, 266 Lincoln Ave., Saugus, MA 01906

[REDACTED]