

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2200734
Decision Date:	3/22/2022	Hearing Date:	03/09/2022
Hearing Officer:	Susan Burgess-Cox		

Appearance for Appellant:



Appearance for Nursing Facility:

Mandy Shapiro, et. al.



*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:	Approved	Issue:	NH Discharge
Decision Date:	3/22/2022	Hearing Date:	03/09/2022
Nursing Facility's Rep.:	Mandy Shapiro et. al.	Appellant's Rep.:	
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 November 8, 2021, the nursing facility informed the appellant that he would be discharged to his parent's home because the health and safety of individual's in the facility would be endangered due to the appellant's clinical and behavioral status. (130 CMR 610.028; Exhibit 1). A request for hearing was sent to the Board of Hearings on December 1, 2021. (Exhibit 2). Records indicate that the Board of Hearings did not receive the request for hearing on that date. Records dated February 1, 2022 include the request for hearing, notice on appeal and facsimile cover sheet showing confirmation of a successfully sent request for hearing dated December 1, 2022. (Exhibit 2). The Board of Hearings accepted these records to indicate the filing of a timely appeal. (130 CMR 610.015(B); Exhibit 2).

Through a notice dated February 3, 2022, the Board of Hearings dismissed the appeal as the individual filing the appeal did not submit written authorization to represent the appellant at hearing or a copy of a legal document conveying legal authority to that individual. (Exhibit 3; 130 CMR 610.035).

On February 9, 2022, the individual filing the appeal submitted a copy of a decree and order of guardianship naming herself and her spouse as the appellant's legal guardians. (Exhibit 4). On February 14, 2022, the Board of Hearings scheduled a hearing for March 9, 2022. (Exhibit 5).

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 discharge to the appellant.

Issue

Whether the nursing facility was correct, pursuant to 130 CMR 610.028, in notifying the appellant that it intended to discharge him because the health and safety of individuals in the facility is endangered due to the appellant's clinical or behavioral status.

Summary of Evidence

All parties appeared by telephone and documents from the facility were incorporated into the hearing record as Exhibit 6. Representatives from the facility appeared together, the appellant was in a separate location within the facility and the appellant's legal guardians were in separate location. Records from the facility include clinical records from a physician made prior to the discharge.

The appellant was admitted into the facility from an acute care hospital due to an acquired brain injury with a loss of consciousness of an unspecified duration and subsequent encounter. (Testimony; Exhibit 6). The appellant has been in the facility for several years receiving treatment for a variety of conditions including: an altered mental status; dementia with behavioral disturbance; a history of traumatic brain injury; difficulty in walking; generalized muscle weakness; unspecified abnormalities of gait and mobility; weakness; repeated falls; gastro-esophageal reflux disease; seizures; lower back pain; and other specified disorders of bone density and structure of the left shoulder. (Testimony; Exhibit 6). The appellant also has a history of: tobacco use; alcohol dependence; cocaine abuse; opioid dependence; and other psychoactive substance abuse. (Testimony; Exhibit 6).

Notes from a treating physician state that the appellant gets into a lot of arguments and has aggressive behavior. (Exhibit 6 pages 48-49). The appellant is not safe to himself or others and the physician spoke to a nurse and said the appellant needs to be closely observed. (Exhibit 6 pages 48-49). A clinical assessment done within a week of issuing the notice of discharge states the appellant was cooperative but unremorseful; denied depression, anxiety and difficulty sleeping; and demonstrated impaired insight. (Exhibit 6 page 84). The notes also indicate verbal threats from the appellant have continued and while the appellant denied any urges to hurt or harm other residents, he did endorse an effort to provoke him. (Exhibit 6, page 84). Recommendations for medication increases were not approved by the appellant's family. (Exhibit 6 page 84). Notes regarding previous trials of a gradual reduction in medications (GDRs), reflect failures of such. (Exhibit 6 page 82-88).

Representatives from the facility referred to notes of aggressions, assaults, as well as emergency restraint and hospitalizations for psychiatric evaluation and possible treatment due to the appellant posing a risk of serious harm to himself or others. (Testimony; Exhibit 6 pages, 46-48, 52, 66 and 78). Representatives from the facility noted that the appellant has been approved for services through the MassHealth Acquired Brain Injury (ABI) waiver and is waiting placement in a group home that would have the appropriate level of care for the appellant and be funded through the waiver program. While the notice on appeal lists the home of the appellant's parents as the location for discharge, representatives from the facility noted that they have been working with the appellant's family to find an alternative facility for the appellant while he is waiting for placement into a group home. The representatives from the facility did find another facility that would admit the appellant. However, the appellant's guardians did not agree to a transfer to that facility without visiting the facility and deeming it appropriate themselves.

Although representatives from the facility worked to find an alternative placement for the appellant since the issuance of the notice on appeal, they still felt that the transfer to the parent's home was safe and appropriate. Representatives from the facility noted that records show the appellant as independent with all activities of daily living (ADLs). Testimony and records presented at hearing showed that the appellant requires a supervised setting. Neither party provided information on what level of supervision or care would be provided to the appellant when transferred into the community.

The appellant's mother testified that the facility has not been active in assisting the appellant with finding an alternative placement until the time of this discharge. The appellant's mother thought individuals at the facility were working to find the

appellant a more appropriate setting. The parties noted that the appellant has consulted with an attorney to challenge the current guardianship. The appellant's mother testified that she did not agree to a discharge to the recommended long-term care facility as she has not seen it and does not know if it is a good match for the appellant's needs. The appellant's father testified that a transfer to their home is not appropriate as there are others in the home with whom the appellant does not see eye-to-eye. The appellant's mother testified that she was told that the appellant would not be approved for placement in a group home under the ABI waiver if he was in the community. Therefore, she did not agree with a transfer to the community.

Findings of Fact

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

1. The appellant was admitted into the facility from an acute care hospital due to an acquired brain injury with a loss of consciousness of an unspecified duration and subsequent encounter.
2. The appellant has been in the facility for several years receiving treatment for a variety of conditions including: an altered mental status; dementia with behavioral disturbance; a history of traumatic brain injury; difficulty in walking; generalized muscle weakness; unspecified abnormalities of gait and mobility; weakness; repeated falls; gastro-esophageal reflux disease; seizures; lower back pain; and other specified disorders of bone density and structure of the left shoulder.
3. The appellant has a history of tobacco use; alcohol dependence; cocaine abuse; opioid dependence; and other psychoactive substance abuse.
4. The appellant makes verbal threats to others in the facility.
5. The appellant has been involved in physical altercations with others in the facility.
6. While in the facility, the appellant has had emergency restraint and hospitalizations for psychiatric treatment due to posing a risk of serious harm.
7. The appellant is not safe to himself or others.

8. The appellant needs to be closely monitored.
9. The appellant requires placement into a supervised setting.
10. Physicians in the facility have recommended increases in medication.
11. The appellant's guardians would not approve the recommendations.
12. The appellant has been approved for services through the MassHealth Acquired Brain Injury (ABI) waiver.
13. The appellant is awaiting placement into a group home from the facility.
14. The notice on appeal lists the residence of the appellant's guardians as the location for discharge.
15. The appellant has consulted with an attorney seeking to challenge the guardianship.
16. Since the issuance of the notice of discharge, representatives from the facility have worked to provide a transfer to another long-term care facility while the appellant waits for placement into a group home.
17. Neither party provided information on services or level of care that would be provided to the appellant when transferred into the community.

Analysis and Conclusions of Law

Pursuant to 130 CMR 610.028(A) which governs the rules for actions initiated by a nursing facility, 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.

In the present case, the facility indicated on the notice that the discharge was appropriate because the safety of individuals in the nursing facility were endangered. While this is an acceptable reason for discharge, the facility did not meet the regulatory requirements related to discharging a resident.

Pursuant 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 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). While the documents were provided by a physician since the discharge concerned the endangerment of the health and safety of other individuals, the discharge did not include a safe plan or notes from a physician noting the safety of the appellant's return to the community. Instead, the records presented clearly note the need for the appellant to be in a setting where he receives the appropriate level of care and supervision for his condition

Pursuant to 130 CMR 610.028(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 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.

While the notice does indicate a location for discharge, it does not indicate a plan for the appellant to receive services in the community. Pursuant to M.G.L. ch. 111, § 70E, 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.

While the representatives from the facility felt that it was safe and appropriate to discharge the appellant to his parent's home, the testimony of both parties and the records presented by the facility run contrary to that opinion for several reasons. First, the records presented do not include any orders or notes from a physician regarding the appellant's ability to function safely in the community. Instead, they note the danger of the appellant to himself and others and the need to have someone supervise his actions and control his medications. Second, the records do not indicate any services that would be provided in the community which runs contrary to those regarding the daily services and supervision provided to the appellant in the facility. Finally, the fact that the representatives from the facility were working to find an alternative location for the appellant rather than his parent's home indicates that the location listed on the notice is not safe and appropriate.

The appellant's guardians did not present a strong case to challenge the reason

for or location of the discharge. However, their testimony regarding their role in the matter as well as the appellant's consulting with an attorney regarding the guardianship calls into question the appropriateness of their home as a safe and appropriate location for the appellant. While the representatives from the facility had an alternative discharge location and plan at hearing, this was not the location or plan listed on the notice. Therefore, the appellant's guardians were not provided with sufficient notice of that plan.

This appeal is approved to ensure that the facility takes action in compliance with the law and regulations governing a nursing home discharge. The facility may issue a proper notice and take proper action at any time. However, since they failed to do so at this time, this appeal is approved.

The appellant should be aware that the facility appears to have adequate grounds to discharge. Simply making notice and planning errors does not make the reason for discharge incorrect. The appellant's guardians did not present adequate evidence to challenge the determination that the safety of the individuals in the nursing facility is endangered due to the clinical or behavioral status of the appellant. The records presented by the facility provide strong evidence of the grounds for discharge.

Order for Nursing Facility

Rescind the discharge notice issued on November 8, 2021.

Compliance with this Decision

If this nursing facility fails to comply with the above order, you should report this in writing to the Director of the Board of Hearings, Office of Medicaid, at the address on the first page 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.

Susan Burgess-Cox
Hearing Officer
Board of Hearings

cc:

Appellant Representatives: [REDACTED],

[REDACTED]

Respondent: Parsons Rehab and Health Care Center, Attn: Mandy Shaprio,
1350 Main Street, Worcester, MA 01603