

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	DENIED	Appeal Number:	2204415
Decision Date:	6/23/2022	Hearing Date:	06/17/2022
Hearing Officer:	Kenneth Brodzinski		

Appearance for Appellant:

Pro se

Appearance for Nursing Facility:

Mark Nugent, Administrator, Jessica
Prescott, Social Worker



*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:	SNF Discharge - EXPEDITED
Decision Date:	6/23/2022	Hearing Date:	06/17/2022
MassHealth's Rep.:	Mark Nugent	Appellant's Rep.:	Pro se
Hearing Location:	Taunton MEC		

Authority

This hearing was conducted pursuant to federal law and regulations at 42 U.S.C. §1396r and 42 CFR 483.10-483.206 and Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

The nursing facility issued a notice dated June 1, 2022 of its intent to discharge Appellant with less than 30-days notice on the grounds that Appellant is endangering individuals in the facility (Exhibit A). Appellant filed this appeal in a timely manner on June 9, 2022 (see 130 CMR 610.015(B)(5) and Exhibit A). Expedited discharge of a nursing-facility patient constitutes valid grounds for appeal (see 130 CMR 610.029(B); 42 CFR Ch. IV, 483.200 et seq.).

Since the request for the hearing was received by the Board of Hearings during the notice period described in 130 CMR 610.015(B)(5), the nursing facility must stay the planned discharge or transfer until 5 days after this decision is rendered. While the stay is in effect, the resident shall not be transferred or discharged from the nursing facility (see 130 CMR 610. 030(B)).

Action Taken by the Nursing Facility

The nursing facility issued notice dated September 11, 2019 of its intent to discharge Appellant with less than 30-days notice.

Issue

Whether or not the nursing facility can proceed to discharge Appellant under notice of June 1, 2022.

Summary of Evidence

The parties appeared by telephone.

The nursing facility submitted a copy of Appellant's clinical record (Exhibit B). Appellant submitted no documentation.

The nursing facility was represented by its administrator accompanied by a social worker who testified that the facility issued a notice of intent to discharge Appellant was less than 30-days notice on June 1, 2022. The notice served upon Appellant informs her that the facility intends to discharge her to 127 How Street, Haverhill, MA 21830. The administrator identified this location as medical shelter which has medical staff appropriate for Appellant's needs. The grounds for the discharge, as stated in the notice, are: *"The safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status"* (Exhibit A).

The administrator and social worker testified that Appellant has been smoking in her room and trying to give other residents her own medications such as Adderall. Additionally, a room search discovered drug paraphernalia in Appellant's bathroom as well as crushed white powder believed to be Adderall. The facility also believes that Appellant has been trying to hide illicit drugs and drug paraphernalia among the possessions of other residents.

The administrator testified that Appellant was admitted with a diagnosis of intestinal malabsorption. She came to the facility from the hospital with a PIC line that was meant to be used for the direct administration of TPN, a nutritional supplement. According to the administrator, Appellant was not compliant with taking the TPN and there were findings of powder residue in the area of the PIC line indicating that Appellant was improperly manipulating the PIC line for drug use. The social worker testified Appellant was sent to the hospital 7 to 8 times because she appeared to be under the influence of drugs.

The administrator further testified that on June 15, 2022 Appellant was discharged from the hospital back to their facility with the PIC line removed with no orders for continuing TPN.

The administrator noted that Appellant no longer requires or receives any skilled services. She is independent with all ADL's, ambulates freely inside the facility and is able to access the community independently. The administrator explained that Appellant would not be discharged until a bed opened at the medical shelter identified in the subject discharge notice.

Lastly, the administrator referenced a letter in the clinical record from the medical director of the facility, Shio-Ang Shih, MD, which supports the facility's testimony regarding Appellant's actions and the medical appropriateness of her intended discharge (Exhibit B, page 7).

Appellant appeared on her own behalf and while she referred to some of the allegations made against her as "hearsay" she did not specifically dispute any of the accusations. She also acknowledged that she had made "some mistakes", but promised to do better going forward if she were allowed to stay at the facility. Appellant also agreed with the description of her functional independence.

Appellant testified that she only has 6 inches of intestine and until recently required TPN for nutrition. She also testified that she takes Methadone. Appellant explained that she waited for 7 months to be placed at this facility because there are very few facilities that can administer both TPN and methadone. Appellant testified that she is originally from Worcester where she still has family. She only came to Haverhill because of the facility's ability to meet her specific needs. Appellant explained that she does not want to be discharged to a facility in the Haverhill area because she has no family or ties to this area. She stated that she would prefer to be closer to home.

Findings of Fact

By a preponderance of the evidence, the record supports the following findings:

1. The facility issued a notice of intent to discharge Appellant was less than 30-days notice on June 1, 2022.
2. The notice served upon Appellant informs her that the facility intends to discharge her to 127 How Street, Haverhill, MA 21830.
3. The grounds for the discharge, as stated in the notice, are: *"The safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status"* (Exhibit A).
4. 127 How Street, Haverhill, MA 21830 is a medical shelter which has medical staff appropriate for Appellants needs.
5. Appellant has been smoking in her room and has been trying to give other residents her own medications including Adderall.
6. A room search discovered drug paraphernalia in Appellant's bathroom as well as crushed white powder believed to be Adderall.
7. Appellant also takes Methadone.
8. Appellant has been trying to hide drugs and drug paraphernalia among the possessions of other residents.
9. Appellant was admitted to the facility with a diagnosis of intestinal malabsorption.
10. Appellant came to the facility from the hospital with a PIC line that was meant to be used for the direct administration of TPN, a nutritional supplement.
11. Appellant was not compliant with taking the TPN and there were findings of powder residue in the area of the PIC line indicating that Appellant was improperly manipulating the PIC line for drug use.
12. Appellant was sent from the facility to the hospital 7 to 8 times because she appeared to be under the influence of drugs.
13. On June 15, 2022 Appellant was discharged from the hospital back to the facility with the PIC line removed and no orders to continue TPN.
14. Appellant no longer requires or receives any skilled services.

15. Appellant is independent with all ADL's, ambulates freely inside the facility and is able to access the community independently.
16. Appellant has only 6 inches of intestine and until recently required TPN for nutrition.
17. Appellant would not be discharged until a bed opened at the medical shelter identified in the subject discharge notice.
18. A letter in the clinical record from the medical director of the facility, Shio-Ang Shih, MD, supports the facility's testimony regarding Appellant's actions and the medical appropriateness of her intended discharge (Exhibit B, page 7).

Analysis and Conclusions of Law

The issue on appeal is limited to whether the nursing facility is acting in compliance with federal and state law governing the discharge of nursing facility residents in its attempt to discharge Appellant.

Massachusetts's regulations at 130 CMR 610.028, which embody federal regulations at 42 CFR Ch. IV §483.12, require the following:

Notice Requirements Regarding Actions 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 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 10.028(A)(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 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 610.029: Time Frames for Notices Issued by Nursing Facilities

(A) The notice of discharge or transfer required under 130 CMR 610.028 must be made by the nursing facility at least 30 days before the date the resident is to be discharged or transferred, except as provided for under 130 CMR 610.029(B) and (C).

*(B) In lieu of the 30-day-notice requirement set forth in 130 CMR 610.029(A), the notice of discharge or transfer required under 130 CMR 610.028 must be made as soon as practicable before the discharge or transfer in any of the following circumstances, which are considered to be 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 lived in the nursing facility for 30 days immediately before receipt of the notice.

A careful review of the subject notice requirements reveals that it fully complies with the requirements of 130 CMR 610.028(A)-(C).

Through the subject notice, the nursing facility has asserted that the Appellant's violation of the smoking policy, attempts to provide other residence with her prescription medication and illicit drug use poses a danger to individuals in the facility which constitutes proper grounds for discharge (130 CMR 610.028(A)(3) and (4) and Exhibit A). This has been documented in the clinical record by a physician along with the medical appropriateness of the discharge to the identified location (Exhibit B, page 7).

"The burden of proof is on the appealing party to show that the order appealed from is invalid, and we have observed that this burden is heavy" (*Massachusetts Inst. of Tech. v. Department of Pub. Utils.*, 425 Mass. 856, 867, 684 N.E.2d 585 (1997)).

Appellant neither denied nor disproved any of the accusations made against her by the facility regarding her actions, her current medical condition or her current functional capabilities. On this record, there is no basis to find that the subject notice of intent to discharge with less than 30-days notice is invalid.

Appellant's request to be discharged to a location closer to her home in Worcester has been considered, but it is overridden by the legitimate safety concerns of her behavior, (especially sharing drugs with other residents and/ or placing drugs among their possessions) poses to the health, safety and lives of the other residents.

For the foregoing reasons, the appeal is DENIED.

Order for the Nursing Facility

You may proceed with discharge to 127 How Street, Haverhill, MA 21830 under notice of June 1, 2022.

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.

Kenneth Brodzinski
Hearing Officer
Board of Hearings

cc: Mark Nugent, Administrator, The Oxford, 689 Main Street Haverhill, MA 01830