

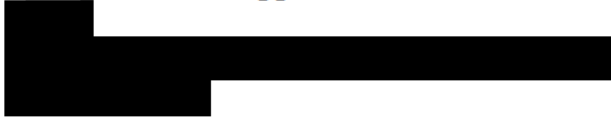
Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2208192
Decision Date:	11/14/2022	Hearing Date:	11/10/2022
Hearing Officer:	Casey Groff, Esq.		

Appearances for Appellant:



Appearances for Respondent:

Brentwood Rehabilitation Nursing Facility:

Carly Veiga, Administrator;

Samira Abdelmegid, Director of Nursing;

Kate Haselgard, LCSW;

Liz Fitzpatrick, Administrator in Training



*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:	Expedited Nursing Facility Discharge
Decision Date:	11/14/2022	Hearing Date:	11/10/2022
Nursing Facility Rep.:	Carly Veiga, Administrator; et. al.	Appellant's Rep.:	Case Worker
Hearing Location:	Board of Hearings (Remote)		

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 October 31, 2022, The Brentwood Rehabilitation & Nursing facility ("the nursing facility") issued an expedited notice to discharge Appellant from the facility to a local hotel on November 13, 2022. See Exhibit 1, p. 3 and 130 CMR 610.029(B). On November 2, 2022, Appellant submitted a timely a fair hearing request with the Board of Hearings to appeal the discharge notice. See 130 CMR 610.015(B)(4); Exhibit 2. An attempt to discharge a nursing facility resident is valid grounds for appeal. See 130 CMR 610.032(C).

Action Taken by Nursing Facility

The nursing facility sought to discharge Appellant in fewer than 30 days because it determined that (1) his health improved sufficiently so that he no longer required services provided by the facility and (2) the safety of the individuals in the nursing facility is endangered due to his clinical or behavioral status.

Issue

The appeal issues are whether the nursing facility properly notified Appellant that he would be discharged, pursuant to 130 CMR 456.701 and 130 CMR 610.028; whether the facility provided sufficient documentation for such discharge; and whether the intended discharge location is a safe and appropriate place for Appellant pursuant to M.G.L. Ch. 111, § 70E.

Summary of Evidence

Appearing on behalf of The Brentwood Rehabilitation & Nursing facility (“the facility”) was the Administrator, Administrator-in-training, social worker, and director of nursing (DON). Based on testimony and documentary submissions, the nursing facility presented the following evidence: Appellant, a MassHealth member under the age of 65, was admitted to the nursing facility following a hospitalization for alcohol abuse. His diagnoses upon admission include unspecified abdominal pain, chronic viral hepatitis C, alcohol use, diarrhea, hypertension, heart failure, adult failure to thrive, major depressive disorder, and anxiety disorder. See Exh. 3, p. 10.

The facility administrator testified that the nursing facility is a smoke-free facility. According to its “tobacco-free environment policy,” the facility prohibits anyone from smoking on the facility premises, consisting of the building and surrounding property. Upon admission, Appellant signed the acknowledgment of the no-smoking policy agreeing to comply with the rules therein. Id. at 3.

On October 11, 2022, the facility documented an instance whereby Appellant was found outside the facility, smoking cigarettes and “mumbling words.” Id. at 17. During the encounter, Appellant admitted to drinking “a few beers” earlier that day. Id. Pursuant to the progress note, the facility assisted Appellant back to his room, reeducated him on the no-smoking policy, and educated him on the risks of consuming alcoholic beverages. Id. at 17.

On October 31, 2022, in response to the smoking violation, the administrator provided Appellant with a 14-day expedited discharge notice. See Exh. 1 at 2-5. The notice informed Appellant that the facility would be discharging him to a nearby “Motel 6” on November 13, 2022 based on the reasons that (1) “Your health has improved sufficiently so that you no longer require the services provided by the facility” and (2) “The safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status.” Id. at 3. The corresponding progress note indicates that Appellant had been “re-educated multiple times on [smoking] policy [and] MD no longer requires this level of care.” See Exh. 3 at 12.

The administrator testified that Appellant smokes on the facility premises “all the time” and that the October 11th violation was one of many instances where Appellant has failed to comply with the no-smoking policy. She explained that Appellant carries smoking supplies on his person, which is also a violation of facility policy. When asked if these other instances had been documented in his clinical record, the facility explained that they had not been documented because they occur so frequently. The Administrator testified that she took a lengthy leave from

the facility, and upon her recent return, found that the facility had not been enforcing the no-smoking policy. Residents were routinely smoking outside and bringing lighters and smoking equipment into the facility without repercussion. The smoking activity has caused several mulch fires (not necessarily by Appellant), which were luckily extinguished before they spread. She is now trying to address this deficiency and noted that Appellant is not the only resident being targeted for his non-compliance.

The administrator also noted that the October 31st discharge notice was the second notice issued against Appellant in relation to the October 11th incident. An initial discharge notice was issued the day of the documented smoking violation, however, on October 21, 2022, the facility agreed to rescind the notice following an appeal with the Board of Hearings on the matter. See id. at 14-17.

For purposes of this appeal, the facility included with its submission, a letter dated October 21, 2022, signed by the facility's attending physician, stating that Appellant "doesn't require long term level of care and can be discharged to a hotel or motel." Id. at 6.

Appellant's progress notes indicate that the facility provides routine medication administrations and skin checks, which are often refused by Appellant. Id. at 12-15, 27, 32. The Administrator testified that Appellant has completed all rehabilitation therapies. Appellant has had a few hospitalizations during his admission due to his continued drinking. Because he is still drinking, they are unable to treat him for Hepatitis C. He performs his activities of daily living (ADLs) independently and declines ADL assistance when offered, such as assistance with washing.

The facility testified that the hotel is the only feasible option as Appellant refuses to go to a homeless shelter. Facility social services has explored other discharge options, such as a sober home or rest home. Many of these options require Appellant have social security income, which he has applied for, but not yet received.

In response, Appellant testified that he cannot be discharged to a hotel because he will end up homeless once his stay ends and cannot survive in such conditions. Due to a history of traumatic experiences, he refuses to go to a homeless shelter and would rather live in a tent in the woods, which he has done in the past. He has gotten Covid-19 twice while in the facility, which has left residual effects of pain and severe weakness. He cannot walk a few steps without getting winded. He relies on nursing staff to help administer medications, such as Ativan and trazadone. He experiences frequent incontinence and diarrhea which would be problematic at a shelter. He lost his job due to heart failure and cannot work. With respect to the physician letter stating Appellant can be discharged to a hotel, Appellant responded that he has not seen that physician more than twice during his admission, each visit lasting less than one minute. There is no one in the community he can live with, and he has no social supports. He would consider a sober home, except for the fact that once it ends, he will have no where to go. He is awaiting social security income so he can go to a rest home or somewhere more appropriate for his needs.

Appellant expressed his belief that he was being individually targeted by the administrator for his smoking behavior. He stated that everyone in the facility smokes; and since he was found to be in violation policy, he has been compliant. He turns his lighter into the front desk and he walks the 10 feet from the sidewalk where he has permission to smoke.

A case worker appearing on behalf of Appellant also testified and reiterated many of the concerns expressed by Appellant. The case worker explained he has been working with Appellant and social services to get him on social security income (SSI), which would provide more discharge location options such as a rest home. Prior to the hearing, the case worker has been exploring other programs as alternatives. Appellant still has many medical needs and conditions that require a discharge location that allow for greater medical oversight and supervision. would be able to manage his condition and medications if homeless or in a shelter.

Findings of Fact

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

1. Appellant, a MassHealth member under the age of 65, was admitted to the nursing facility following a hospitalization with diagnoses including abdominal pain, chronic viral hepatitis C, alcohol use, diarrhea, hypertension, heart failure, adult failure to thrive, major depressive disorder, and anxiety disorder.
2. The facility has a “tobacco-free environment policy” which anyone from smoking on the facility premises.
3. Upon admission, Appellant signed the acknowledgment of the no-smoking policy agreeing to comply with the rules therein.
4. On October 11, 2022, the facility documented an instance whereby Appellant was found outside the facility, smoking cigarettes and "mumbling words" and admitted to drinking “a few beers” earlier that day.
5. On October 31, 2022, in response to the smoking violation, the administrator provided Appellant with a 14-day expedited discharge notice.
6. The notice informed Appellant that the facility would be discharging him to a nearby “Motel 6” on November 13, 2022 based on the reasons that (1) “Your health has improved sufficiently so that you no longer require the services provided by the facility” and (2) “The safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status.”
7. The facility provided a letter dated October 21, 2022, signed by the facility’s attending physician, stating that Appellant “doesn’t require long term level of care and can be discharged to a hotel or motel.” Id. at 6.

8. Appellant's progress notes indicate that the facility provides routine medication administrations and skin checks, which are often refused by Appellant.
9. Appellant is independent with his activities of daily living.
10. Appellant refuses to go to a homeless shelter.
11. The facility social services department and Appellant's case worker have explored other discharge locations, such as rest homes or sober homes, but many of these programs require Appellant to have a source of income, which he does not have.
12. Appellant has applied for social security income, which he has not yet received.

Analysis and Conclusions of Law

The federal Nursing Home Reform Act (NHRA) of 1987 – now codified in 42 CFR Ch IV, subpart B, 483.12(a) - 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 mirror the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in the Nursing Facility Manual regulations at 130 CMR 456.000 et seq. and in the Fair Hearing Rules at 130 CMR 610.000 et seq.

According to these statutory and regulatory requirements, nursing facilities can *only* initiate a transfer or discharge of a resident when one of the following circumstances applies:

- (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.

See 130 CMR 610.028(A) (emphasis added); see also 130 CMR 456.701(A).

When the transfer or discharge is sought due to the circumstances specified in either (2) or (3) above, as it is here, the resident's clinical record must contain documentation by a physician to explain the transfer or discharge. See 130 CMR 610.028(B). The facility must also provide the resident with at least 30-days advance notice of the discharge, but may give less-than 30-days' notice in certain emergency conditions, including the following circumstances:

- (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.

See 130 CMR 610.029(B)

In the present case, the facility cited appropriate grounds to discharge Appellant in fewer than 30-days; specifically, on the bases that (1) Appellant's behavior endangers the health and safety of others in the facility, and (2) Appellant's health improved to allow for a more immediate transfer. See id.; see also 130 CMR 610.028(A). In support of the proposed discharge, the facility submitted a letter dated 10/21/22 from the attending physician stating that Appellant "doesn't require long term level of care and can be discharged to a hotel or motel." See Exh. 3 at 6. While the letter addressed Appellant's need for long-term care, it did not address whether he endangered others in the facility. Accordingly, the facility did not have the requisite clinical documentation to discharge Appellant on this basis. See 130 CMR §§ 610.028(B), 610.029(B)(1).

Where Appellant's clinical record did contain documentation indicating his health improved sufficiently for discharge, the question on appeal then becomes whether the facility complied with applicable statutory requirements set forth under M.G.L. c.111, §70E. This statute provides the following requirement:

*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.***

See M.G.L. c.111, §70E (emphasis added).

The facility proposes to discharge Appellant to a nearby hotel, where, according to testimony, the facility would pay for several nights stay. Appellant and his advocate persuasively noted that this would render Appellant homeless within a few days of being discharged. Due to his history of trauma, Appellant refuses to go to a homeless shelter and would rather remain homeless. Regardless of whether Appellant proceeds to a shelter or opts to remain homeless, the evidence suggests that either location would not be a safe and appropriate discharge location. While there is no evidence Appellant requires a skilled-nursing level of care, Appellant's advocate testified that he, nevertheless, has complex medical needs that require some level of medical oversight or supervision. The clinical record supports this testimony due to his myriad of diagnoses, medical conditions, and need for assistance with medication management. The clinical record documented cursory efforts to find more suitable discharge locations, such as a rest home or sober house; however, results of such efforts have been inconclusive. While Appellant does not have a right to remain at the facility without a skilled need (or if he endangers others in the facility and this is documented), the facility is required to first demonstrate it has engaged in sufficient discharge

planning to ensure Appellant is brought to a safe and appropriate location. As this evidence is lacking from the hearing record, the facility's proposed discharge is not authorized at this time.

For these reasons this appeal is APPROVED.

Order for Nursing Facility

Rescind the Notice of Intent to Discharge/Transfer Resident in Fewer than 30-days, dated 10/31/22. The facility may issue a new discharge notice at any time

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 this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. 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.

Casey Groff, Esq.
Hearing Officer
Board of Hearings

cc:

Respondent: The Brentwood Rehabilitation Facility,

[REDACTED]