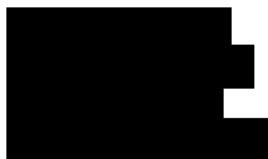


# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2300374
<b>Decision Date:</b>	3/7/2023	<b>Hearing Date:</b>	2/14/2023
<b>Hearing Officer:</b>	Cynthia Kopka	<b>Record Open to:</b>	3/3/2023

**Appearance for Appellant:**

Pro se

**Appearance for Respondent:**

Robert Fondi, administrator  
Kate Haselgard, contracted social worker  
Lindsay Madden, business office manager  
Leah Kirkpatrick, director of admissions



*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>	Approved	<b>Issue:</b>	Nursing facility discharge
<b>Decision Date:</b>	3/7/2023	<b>Hearing Date:</b>	2/14/2023
<b>Respondent's Rep.:</b>	Administrator et al.	<b>Appellant's Rep.:</b>	Pro se
<b>Hearing Location:</b>	Quincy (remote)	<b>Aid Pending:</b>	No

## Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

## Jurisdiction

By notice dated January 16, 2023, The Brentwood Rehabilitation & Nursing Center ("Respondent" or "the facility") informed Appellant of its intent to discharge Appellant from the facility on February 15, 2023. Exhibit 1. Appellant filed a timely appeal on January 17, 2023. Exhibit 2. 130 CMR 610.615. Challenging the discharge or transfer from a nursing facility is a valid basis for appeal. 130 CMR 610.032. The hearing record was held open through February 21, 2023 and extended through March 3, 2023. Exhibits 5, 7.

## Action Taken by Respondent

Respondent informed Appellant of its intent to discharge Appellant from the facility.

## Issue

The appeal issue is whether Respondent satisfied its statutory and regulatory requirements when it issued the notice of intent to discharge Appellant.

## Summary of Evidence

Respondent, a skilled nursing facility in Massachusetts, was represented by telephone by its administrator, director of admissions, business office manager, and social worker. Respondent's

representatives submitted documents in support of its position, Exhibits 4 and 6. Appellant appeared by telephone. A summary of testimony and supporting records follow.

Appellant admitted to the facility on [REDACTED] Exhibit 4 at 1. At the time of admission, Appellant was a MassHealth member and enrolled in Tufts Health Together Plan (Tufts), a MassHealth Accountable Care Organization (ACO). Tufts covered Appellant's stay at the facility at a skilled level of care from [REDACTED] through [REDACTED]. Exhibit 6 at 24.

Respondent's representatives testified that normally, an ACO will approve either a skilled or custodial stay at a nursing home for a maximum of 100 days. After, MassHealth will cover the remaining stay if eligibility criteria are met. Here, Tufts denied Appellant's request for a skilled or custodial stay after August 2, 2022, claiming that medical necessity for the stay was not established. *Id.* Thus, Tufts did not cover a full 100 days of Appellant's stay.

On October 13, 2022, Respondent's representatives submitted an SC-1 form<sup>1</sup> to MassHealth seeking MassHealth coverage for Appellant's stay beginning August 3, 2022. *Id.* at 27. The SC-1 form stated that Appellant was deemed clinically eligible for nursing facility services on a short-term basis. *Id.* Respondent's representatives testified that MassHealth, through an Aging Services Access Point ("ASAP")<sup>2</sup>, approved clinical eligibility for a custodial stay, and provided the MassHealth notice dated September 26, 2022. *Id.* at 28-29.

Respondent's representatives testified that had Tufts approved the 100 day custodial stay, Tufts' coverage would have ended on either October 12 or 13. As Appellant has been screened and approved eligible for a custodial stay, Appellant should be eligible for MassHealth to pay for the stay beginning October 13 or 14, 2022. Normally this is accomplished by MassHealth's managed care unit, who will remove the ACO code and bill MassHealth directly. Respondent's representatives testified that MassHealth's managed care unit informed Respondent that MassHealth will not code Appellant or begin paying for coverage because Tufts did not pay for a full 100 days.

By hand delivered letter dated January 16, 2023, Respondent informed Appellant of its intent to discharge her from the facility to a friend's address.<sup>3</sup> Exhibit 1. A copy of the notice was delivered to the ombudsman. The notice stated that Respondent sought to discharge Appellant on February 15, 2023 because Appellant failed, after reasonable and appropriate notice, to pay for (or have failed to have Medicare or Medicaid pay for) Appellant's stay at the nursing facility. *Id.* The notice identified the administrator as the person responsible for supervising the discharge and explained Appellant's appeal rights. The notice included contact information for a local long term care ombudsman, the disability law center, centers for public representation (including a disabled persons' protection commission) and a legal assistance corporation. *Id.*

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<sup>1</sup> Status Change for Members in a Nursing Facility or Chronic Disease and Rehabilitation Inpatient Hospital (Admission or Discharge of MassHealth Members).

<sup>2</sup> ASAPs are organizations acting as agents of MassHealth to perform clinical evaluations of MassHealth members to determine members' clinical eligibility for nursing facility services

<sup>3</sup> Appellant testified that her being discharged to a friend's address would be temporary at best. Her friend is doing Appellant a favor. The building is accessible and safe.

The parties do not dispute that Appellant qualified for MassHealth to pay for a custodial stay at the nursing facility. Exhibit 6 at 28-29. Both sides agree that Appellant belongs at the facility. Respondent's representatives testified that it only noticed Appellant's discharge to ensure that MassHealth's failure to pay for a qualified stay would be addressed appropriately. Respondent has not issued a private pay bill to Appellant and would find such a measure unfair in these circumstances. Respondent's representatives testified that Appellant is a model resident and president of the resident's council.

Respondent acknowledged that if Appellant missed the opportunity to appeal the denial of care from Tufts from August 3, 2022 to October 12 or 13, 2022, Respondent would accept that outcome and not consider there to be a failure to pay, provided MassHealth coverage began on October 13 or 14, 2022 as anticipated. Respondent's representatives testified that the failure to pay in this case is MassHealth's managed care unit refusing to remove the ACO from coding because the ACO did not pay for 100 days. Respondent's representatives provided emails with MassHealth Enrollment Operations attempting to terminate the ACO and bill MassHealth directly, with these attempts being denied because Appellant did not meet her 100<sup>th</sup> day of Tufts coverage. Exhibit 6 at 64-75.

Respondent and Appellant have planned to have Appellant voluntarily disenroll from Tufts in order for MassHealth to pay for the stay, which will be effective March 1, 2023.

Documents submitted by Respondent shows that on August 3, 2023, Respondent received a notice from Tufts denying the inpatient stay as not medically necessary. Exhibit 6 at 24-25. This notice states that a "denial letter related to the most recent denied dates of service listed above has been or will be sent separate from this notification between [REDACTED] to [REDACTED] and will include member appeal rights." *Id.* at 25. Appellant testified that she did not receive a denial notice from Tufts. On December 28, 2022, Respondent submitted a request to Tufts for a peer-to-peer review of the denial. Tufts denied this request on December 28, 2022 because the "request for a peer to peer occurred after the member has been discharged from inpatient setting. Please submit a provider payment dispute on the Tufts Health Plan Secure Provider website." *Id.* at 34. On January 16, 2023, Respondent submitted a request for claim review, claiming that the peer to peer was incorrectly denied because Appellant had not been discharged. *Id.* at 35.

## Findings of Fact

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

1. Appellant admitted to the facility on [REDACTED]. Exhibit 4 at 1.
2. Appellant is a MassHealth member and is enrolled in Tufts ACO.
3. Appellant's Tufts ACO plan approved Appellant's stay at the facility at a skilled level of care from [REDACTED] through [REDACTED]. Exhibit 6 at 24.
4. On August 3, 2022, Respondent was notified that Tufts would not approve a custodial stay

beginning August 3, 2022. Exhibit 6 at 41.

5. On September 26, 2022, a MassHealth ASAP approved Appellant for short term coverage through December 1, 2022. *Id.* at 28-29.
6. On October 13, 2022, Respondent submitted an SC-1 form to MassHealth seeking MassHealth coverage for Appellant's stay beginning August 3, 2022. The SC-1 form stated that Appellant was deemed clinically eligible for nursing facility services on a short-term basis. *Id.* at 27.
7. On October 31, 2022 MassHealth's Enrollment Operations unit notified Respondent that it would not code Appellant's SC-1 because Appellant "has not met their 100<sup>th</sup> day" with Tufts. *Id.* at 74.
8. Respondent made attempts to appeal Tufts denial on December 28, 2022 and January 16, 2023. *Id.* at 34, 35.
9. By hand delivered letter dated January 16, 2023, Respondent informed Appellant of its intent to discharge her from the facility to a friend's address. A copy of the notice was delivered to the ombudsman. Exhibit 1.
10. The notice stated that Respondent sought to discharge Appellant on February 15, 2023 because Appellant failed, after reasonable and appropriate notice, to pay for (or have failed to have Medicare or Medicaid pay for) Appellant's stay at the nursing facility. *Id.*
11. The notice identified the administrator as the person responsible for supervising the discharge and explained Appellant's appeal rights. The notice included contact information for a local long term care ombudsman, the disability law center, centers for public representation (including a disabled persons' protection commission) and a legal assistance corporation. *Id.*
12. Appellant timely appealed the notice of discharge on January 17, 2023. Exhibit 2.
13. Respondent has not issued a private pay bill to Appellant.

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

Per 130 CMR 456.701(A) and 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 pay for) a stay at the nursing facility; or
- (6) the nursing facility ceases to operate.

When the facility transfers or discharges a resident, the resident's clinical record must contain documentation to explain the transfer or discharge. 130 CMR 456.701(B); 130 CMR 610.028(B).

Prior to discharge or transfer, the nursing facility must hand deliver to the resident and mail to a designated family member or legal representative (if the resident has made such a person known to the facility), 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).

Pursuant to 130 CMR 610.029(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) when the discharge is being made on an emergency basis. *See also* 130 CMR 456.702(A).

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 483.15(c)(7).

Here, Respondent notified Appellant of its intent to discharge her from the facility, claiming that Appellant has failed, after reasonable and appropriate notice, to pay for (or failed to have the MassHealth pay for) the stay. The facts presented demonstrate that MassHealth’s ACO paid for the stay through August 3, 2022. The denial of coverage beyond August 3, 2022 was an appealable action, though Appellant testified that she did not receive the denial notice and therefore did not appeal it. Though the failure to appeal Tufts’ denial could constitute grounds for discharge for failure to pay, Respondent did not provide notice to Appellant that she owed the facility private payment for the uncovered dates because it did not give Appellant a bill. Therefore, Appellant has not yet received reasonable and appropriate notice of her outstanding obligation. As Respondent’s proffered basis for the discharge is not ripe, this appeal is approved.

The parties are cooperating and have made efforts to secure MassHealth payment for the stay at the facility, including obtaining a clinical eligibility approval from MassHealth’s ASAP.<sup>4</sup> The question of whether Appellant qualifies for MassHealth to cover her stay should be adjudicated to the extent actionable, as the Tufts reviewer and MassHealth’s own ASAP appear to disagree as to Appellant’s clinical eligibility. Unfortunately, that is not the issue presented in this appeal. The parties are urged to continue pursue the appeal process through Tufts and MassHealth on the issue of eligibility and payment.

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<sup>4</sup> Respondent offered a compelling argument that Appellant qualifies for MassHealth direct coverage from either October 13 or 14, 2022 (when the MCO’s coverage of 100 days would have expired) through December 1, 2022. Appellant is a MassHealth member and was deemed clinically eligible by a MassHealth ASAP.

## **Order for Respondent**

Rescind the January 16, 2023 notice of discharge.

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

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Cynthia Kopka  
Hearing Officer  
Board of Hearings

cc:

General Counsel's Office –Sharon Boyle

Lindsay Madden, Business Office Manager/HR Liaison, The Brentwood Rehabilitation & Healthcare Center, 56 Liberty Street, Danvers, MA 01923

Robert Fondi, Administrator, The Brentwood Rehabilitation & Healthcare Center, 56 Liberty Street, Danvers, MA 01923