

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2305832
Decision Date:	08/03/2023	Hearing Date:	07/27/2023
Hearing Officer:	Scott Bernard		

Appearance for Appellant:
Pro se via telephone

Appearance for Respondent:
Samantha White, Social Worker
Paula Gouveia, Director of Nursing Services
Joseph Hannan, Substance Use Clinician
Sarah Weber, After Care Coordinator
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

Appeal Decision:	Approved	Issue:	Expedited Nursing Facility Discharge
Decision Date:	08/03/2023	Hearing Date:	07/27/2023
Respondent's Rep.:	Samantha White; Paula Gouveia	Appellant's Rep.:	<i>Pro se</i>
Hearing Location:	Quincy Harbor South		

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 July 18, 2023, the respondent nursing facility informed the appellant of its intent to discharge him with less than 30 days' notice. (See 130 CMR 610.028(A)(2); 610.029(B)(2) and Exhibit (Ex.) 1). The appellant filed this appeal in a timely manner, also on July 18, 2023. (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 Respondent

The respondent initiated the appellant's discharge from the facility with less than 30 days' notice.

Issue

The appeal issues are whether the respondent was correct, pursuant to 130 CMR 610.028 and 610.029, in determining that the appellant should be discharged from the facility with less than 30 days' notice and whether the facility has met all the requirements for discharge required by law.

Summary of Evidence

Prior to the hearing, the facility submitted a statement from its medical director, who wrote the following:

[The appellant] was admitted to [the nursing facility] on June 12, 2023, from [the hospital] s/p left tibia fracture and right forearm fracture. [The appellant] is also diagnosed with opiate use disorder, PTSD, anxiety, depression, and unspecified psychosis. [The appellant] has struggled to adjust to the nursing home since admission and has exhibited behaviors that place [him], other residents, and staff members at risk.

On 6/14/23, [the appellant] created an environmental disruption by yelling and swearing at staff due to desire for pain medication that were not scheduled to be administered at the time. [Ex. 3, p. 49].¹ [The appellant] was challenged with regulating his emotions and remained an environmental disruption for an extended period.

On 6/15/23, [the appellant] was observed “dropping” a pill into the sweatshirt pocket of a second resident. [Ex. 3, p. 47]. After being confronted, the second resident produced a pain pill [the appellant] had diverted to him. [Id.]. [The appellant] was informed next incident of diversion would result in discharge from the facility.

On 6/19/23, [the appellant] presented with increased lethargy and was observed “hunched over” in wheelchair and slow to respond to stimuli. [Ex. 3, p. 48]. [The appellant] was administered two (2) doses of Narcan, with effect and sent to ER for evaluation. [Id.].

On 6/20/23, [the appellant] returned from ER w/diagnosis of altered mental status, caused by medications, and pneumonia. [Ex. 3, p. 45]. Director of Nursing, Social Worker, and Substance Use Clinician met with [the appellant] on this day. [Id.]. At this time, it was learned [the appellant] has been insufflating prescription medication, most notably benzodiazepines. [Id.]. [The appellant] was given a final notice for violating substance use policies and was placed on a no harm contract. [Id.]. [The appellant] signed an agreement to the tenets of no harm contract including no leave of absences, supervised visits, attendance at all substance use related groups/activities, and to engage with therapy. [Id.].

On 6/29/23, [the appellant] was complaining of shortness of breath at 4AM, 72% O₂ on room air, and was sent to ER. [Ex. 3, p. 47]. [The appellant] also experienced large

¹ Where, as here, a fact in this statement is supported in the clinical record, a citation to that part of the record is included through a reference in brackets.

volume vomitus at this time. [Id.]. [The appellant] returned from ER on this day with diagnosis of exacerbation to COPD and pneumonia.

On [REDACTED], [the appellant] continued to present with intermittent lethargy and an order to hold gabapentin, Xanax, and Lyrica was placed. [Ex. 3, p. 40].

On [REDACTED], Narcotics were held on this day due to increase lethargy. [Ex. 3, p. 39].

On [REDACTED], [the appellant] presented in bed w/O2 saturation of 67 on room air. [Ex. 3, p. 38]. [The appellant] presented with constricted pupils, ashen skin tone, slow to respond to physical stimuli. [Id.]. EMS was called and [the appellant] was administered two (2) doses of Narcan, with effect and was taken to ER for evaluation. [Id.].

On [REDACTED], [the appellant] returned from ER and continued to present with increased lethargy, with constricted pupils. [Ex. 3, p. 37]. [The appellant] admitted on this day he was in possession of fentanyl. [Id.]. [The police were] summoned and [the appellant] voluntarily gave [the police] a plastic bag containing suspected Fentanyl. [Id.].

On [REDACTED], Additional fentanyl was found in [the appellant]'s room and [the appellant] was given a 14-day notice to discharge due to placing himself, other residents, and staff at risk. [Ex. 3, p. 35].

On [REDACTED], [the appellant] presented with signs/symptoms of opiate overdose. Narcan was administered, [the appellant] became responsive, threatened to punch staff member for administering Narcan, and was sent to ER for evaluation.

On [REDACTED], [the appellant] returned to the facility from ER with a diagnosis of opiate overdose. [The appellant] had admitted to insufflating fentanyl in the facility. [The appellant] was placed on a 1:1 on this day and will be monitored 24/7 to ensure safety for all.

In sum, [the appellant] is not appropriate to be a resident at [the nursing facility]. Since admission, [the appellant] has exhibited aggressive and threatening behavior towards staff and residents while also experiencing numerous opiate overdoses necessitating the administration of Narcan on numerous occasions. Moreover, [the appellant] has admitted to having fentanyl and crack cocaine delivered to the facility at which time [the appellant] admitted to having distributed said illicit substance to other residents. As of this writing, [the appellant] continues to receive 24/7 supervision to maintain safety for all.

It is my professional opinion that [the appellant] does not warrant nursing home level care at this time and could safely discharge to the community with supports...(Ex. 3,

pp. 8-9).

At the hearing the facility's Director of Nursing Services stated the following. On [REDACTED], the appellant was admitted to the nursing facility from a hospital. The appellant had been beaten with a baseball bat and his left tibia and right forearm were thereby fractured. The Director of Nursing Services stated that since entering the facility the appellant has overdosed, been found with illicit substances on his person, and distributed illicit substances to other residents in recovery. The Director of Nursing Services alleged that last episode has led to three residents leaving the facility because they have relapsed. The Director of Nursing Services stated that the appellant has also threatened staff and been disruptive to other residents. The Director of Nursing Services has worked with the facility's substance counselor to get the appellant to attend group therapy, but the appellant has not shown interest. The Director of Nursing Services stated that the appellant is actually a risk to the other residents at the facility and other staff. The appellant's physical injuries have healed. The appellant was screened for physical therapy but is not yet cleared to receive therapy.

The Social Worker stated that the discharge address listed in discharge notice was the appellant's mother's address. In terms of preparing the appellant for discharge, the facility has sent referrals to medical shelters and substance use treatment hospitals, but the appellant does not meet the entry requirements for either.

The appellant stated that the discharge address is that of his mother, and that he cannot go back there. The appellant stated that he was not living at that address prior to his injury. The appellant stated that he cannot walk, and he only started walker therapy the day prior to the hearing. The appellant stated that he was seriously injured and asserted that his whole left leg was shattered after he was hit seven times. The appellant stated that the nursing facility was trying in every way possible to portray him poorly. The appellant stated that prior to entering the facility he had been receiving his 70 mg of methadone split in two daily doses of 40 mg and 30 mg. The facility would give him the entire dose of 70 mg all at once, which was why he would become lethargic and then be given Narcan. The appellant stated that when he entered the facility, he had been receiving 30 mg of oxycodone every three hours, which the facility reduced. The appellant confirmed that he did seek drugs as a way of self-medicating because he was in pain. The appellant stated that the facility has provided no assistance with arranging care if he is discharged, and he did not know what he would do if that occurred. The appellant stated that he wants to walk and become self-sufficient but is not close to being ready to be discharged.

The appellant also stated that he was not a menace. The allegations concerning his giving drug to other residents was completely false and he did not know of any residents who had been discharged during his time at the facility.

Findings of Fact

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

1. The appellant was admitted to the nursing facility on [REDACTED], from the hospital after a left tibia fracture and right forearm fracture. (Ex. 3, p. 8; Testimony of the Director of Nursing Services; Testimony of the appellant).
2. On [REDACTED], the appellant presented with increased lethargy and was observed “hunched over” in wheelchair and slow to respond to stimuli. (Ex. 3, pp. 8, 48).
3. The appellant was administered two doses of Narcan, with effect and sent to emergency room for evaluation. (Ex. 3, pp. 8, 48).
4. The appellant returned from ER on [REDACTED], with a diagnosis of altered mental status, caused by medications, and pneumonia. (Ex. 3, pp. 8, 45).
5. On [REDACTED], the appellant presented in bed with oxygen saturation of 67 on room air, constricted pupils, and ashen skin tone, and was slow to respond to physical stimuli. (Ex. 3, pp. 8, 38).
6. EMS was called and the appellant was administered two (doses of Narcan, with effect and was taken to ER for evaluation. (Ex. 3, pp. 8-9, 38).
7. The appellant] returned from the ER on the same date, continuing to present with increased lethargy and constricted pupils and admitted that he was in possession of fentanyl. (Ex. 3, pp. 9, 37).
8. Through a notice dated [REDACTED], the respondent nursing facility informed the appellant of its intent to discharge him with less than 30 days’ notice. (Ex. 1).
9. The notice listed the appellant’s mother’s address as the place of discharge. (Ex. 1; Testimony of the Social Worker; Testimony of the appellant).
10. The appellant would not be welcome at the place of discharge. (Testimony of the appellant).
11. On [REDACTED], the appellant presented with the signs and symptoms of opiate overdose, Narcan was administered, the appellant became responsive, threatened to punch a staff member for administering Narcan, and was sent to the ER for evaluation. (Ex. 3, p. 9).
12. On [REDACTED], the appellant returned to the facility from the ER with a diagnosis of opiate overdose. (Ex. 3, p. 9).
13. The appellant had admitted to insufflating fentanyl in the facility and was placed on a 1:1 24/7 monitoring. (Ex. 3, p. 9).
14. In terms of preparing the appellant for discharge, the facility has sent referrals to medical

shelters and substance use treatment hospitals, but the appellant does not meet the entry requirements for either. (Testimony of the Social Worker).

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 Nursing Facility Agency or Medicare) a stay at the Nursing Facility; or
- (6) the Nursing Facility ceases to operate. (Emphasis added).

When the facility discharges a resident under any of the circumstance specified in (1)-(5), above, the resident's clinical record must be documented. (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 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 Nursing Facility 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. (Emphasis added). (130 CMR 610.028(C)).

Generally, a nursing facility must notify the resident of discharge at least 30 days before the date the resident is to be discharged or transferred, except under certain circumstances. (130 CMR 610.029(A)). In *lieu* of the 30-day-notice requirement, the notice of discharge or transfer required must be made as soon as practicable before the discharge or transfer when 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. (130 CMR 610.029(B)(1)).

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)).

A preponderance of the evidence does support the decision to discharge the appellant from the facility. In addition to the testimony of the Director of Nursing Services and the Social Worker, as well as the written statement of the facility’s medical director, the clinical record sufficiently documents that the safety of individuals at the facility are endangered by the appellant’s behaviors. Furthermore, it appears that the written notice given to the appellant in all ways meets the regulatory requirements for discharge notices and supports giving notice of less than 30 days.

The facility, however, has not presented very much information concerning the preparation and orientation given to the appellant to prepare him for discharge. The facility’s social worker stated that she has contacted other facilities but that the appellant is not eligible to enter those facilities. Furthermore, the place chosen as the place of discharge was identified as the appellant’s mother’s address. The appellant testified that he would not be welcome at that address. The record

therefore does not evince that the facility has provided sufficient preparation for the appellant's safe and orderly discharge.

For the above stated reasons, the appeal is APPROVED.

Order for Respondent

Rescind the [REDACTED] notice. Do not discharge the appellant under this notice.

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 the 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.

Scott Bernard
Hearing Officer
Board of Hearings

cc:

[REDACTED]