

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2307482
Decision Date:	09/26/2023	Hearing Date:	9/12/2023
Hearing Officer:	Cynthia Kopka	Record Open to:	9/19/2023

Appearance for Appellant:

Pro se

Appearance for Respondent:

Jennifer Young, LSWA
Tina Nkrumah, after care coordinator
Lynn Wilson, director of social services
Phil Johnson, administrator
Dorcas Awojulu, director of nursing



*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:	Nursing facility discharge
Decision Date:	09/26/2023	Hearing Date:	9/12/2023
Respondent's Rep.:	Social worker et al.	Appellant's Rep.:	Pro se
Hearing Location:	Quincy (remote)	Aid Pending:	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 August 2, 2023, Worcester Rehabilitation & Health Care Center ("Respondent" or "the facility") informed Appellant of its intent to discharge Appellant from the facility on September 2, 2023. Exhibit 1. Appellant filed a timely appeal on August 25, 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 September 19, 2023 for the submission of additional evidence. Exhibit 5.

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 nursing, director of social services, after care coordinator, and social worker. Respondent's representatives submitted documents in support of its position, Exhibit 4. Appellant appeared by telephone and submitted a letter. Exhibit 2. A summary of testimony and supporting records follow.

By hand delivered letter dated August 2, 2023, Respondent informed Appellant of its intent to discharge her from the facility to a shelter. Exhibit 1. A copy of the notice was hand delivered to Appellant and mailed to a family member out of state. The notice stated that Respondent sought to discharge Appellant on [REDACTED], 2023 because Appellant's health has improved sufficiently so the resident no longer needs the services provided by the facility. *Id.* The notice identified a person responsible for supervising the discharge and explained Appellant's appeal rights, including identifying a social worker to assist with filing the appeal. *Id.* at 2. 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 local legal service office. *Id.*

Appellant admitted to the facility in [REDACTED] 2023. Exhibit 4 at 3. At the time, Appellant had sustained multiple pelvic fractures and required physical therapy (PT) and occupational therapy (OT). Appellant was also seen by the substance abuse counselor. By [REDACTED] 2023, Appellant had been discharged from PT and OT and was independent in her activities of daily living (ADLs). *Id.* at 13-17. Appellant was granted leaves of absence (LOAs) from the facility. Appellant had received a rolling walker for assistance with ambulation. On September 11, 2023, Appellant's physician at the facility, Dr. [REDACTED] issued a phone order stating that Appellant is safe to discharge back to the community and no longer requires a skilled level of care at the long term care (LTC) setting. *Id.* at 2.

Respondent's representatives explained that the shelter to which it proposed to discharge Appellant is a local [REDACTED] ([REDACTED] shelter, considered a "wet" shelter that will not discharge a resident if they use illicit substances. The shelter keeps beds available for its residents provided the resident returns in time each day. Case managers are available at the shelter. Respondent's representatives asserted that Appellant has been at this shelter before, but Appellant disputes this.

Respondent's representatives testified that they have assisted Appellant in securing alternative housing by providing to her applications to sober homes and referring her to programs. Appellant is currently on a waiting list for a sober home and will be able to wait for placement at the shelter with the support of a case manager. *Id.* at 36-43. The social services notes indicate that the department has been working with Appellant regarding discharge and placement since June 21, 2023. *Id.* at 42. Respondent's representatives stated that transportation to the shelter, located in the same city as the facility, could be done by car or PT-1 form issued by MassHealth.

Appellant testified that she is scared to go to a shelter. Appellant has post-traumatic stress disorder (PTSD) after having been assaulted. The shelter will be triggering for Appellant. Appellant's primary care physician in the community agrees that Appellant should not be discharged to a shelter.

Appellant testified that she has secured assistance through ATR, which offers funding to put towards a program or other necessities such as clothing. Appellant plans to use the funds to get into a sober home. Appellant has no family in the area. Her minor child lives with his other parent. Appellant was not able to care for her child after she was assaulted.

Respondent argued that Appellant was admitted to the facility for purposes of rehabilitating her fractures, and not for substance abuse or PTSD. Respondent provides psychiatric care and substance abuse support as needed for its residents, but these issues are not primary focus of care. Appellant is no longer screened eligible for long term care by MassHealth, though Respondent did not include a MassHealth clinical denial in its submission.

The hearing record was held open through September 15, 2023 for Appellant to submit a note from her PCP in support of her position. Respondent was given through September 19, 2023 to provide a response. Exhibit 5.

Appellant submitted a letter from her community physician dated September 13, 2023. Exhibit 6. This letter states that Appellant

is suffering from severe Opioid Use Disorder in early remission, severe Post Traumatic Stress Disorder, Attention Deficit Disorder, Major Depressive Disorder. Because of these disabling conditions, ensuring a safe discharge plan for [Appellant] is essential. She is at extremely high risk of relapse, and death as a result, if she is discharged to the street or shelter where there is rampant substance use. She also needs ongoing treatment for her mental health needs as if they are not regularly supported with intensive therapy she will also be at risk of relapse. While she is inpatient still, she can continue working on her chronic health needs (such as potentially undergoing treatment for her hepatitis C, having ophthalmology follow up to better understand the blindness in her left eye, and undergoing restorative dental work), as well as her routine health needs such as updating labs and reassessing her medication list. For someone with her active mental health burden, these tasks will be nearly impossible to accomplish from a shelter or street placement. Please ensure that there is a safe, sustainable discharge for [Appellant] as this is critical to her well-being and safety.

Id. at 1.

On September 19, 2023, Respondent submitted a response, reiterating that Appellant has healed

from her pelvic fractures and no longer requires the skilled services of the facility. Respondent wrote that Appellant has been more than the typical amount of time of residency at the shelter than insurance would usually allow, and that she will not be granted any more time because she does not meet a skilled need. Exhibit 7 at 1. Respondent wrote that if Appellant resides at the facility longer than MassHealth coverage, she will owe \$604 per day beginning September 28, 2023. *Id.* at 5-6. Respondent wrote that Appellant has been given multiple applications for various programs and sober houses and has only returned one completed application. *Id.* at 2.

Regarding the shelter, Respondent wrote that it is run by [REDACTED] which specializes in substance abuse and homelessness. The shelter provides case management services, housing assistance, and a nearby clinic for medical care. *Id.* Respondent also argued that Appellant is able to go out on leaves of absence where her sobriety is jeopardized. *Id.* at 2-3. Respondent argued that the threat of relapse is not a skilled need to be addressed at the facility.

Findings of Fact

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

1. Appellant admitted to the facility in June 2023 with multiple pelvic fractures. Exhibit 4 at 3.
2. By hand delivered letter dated August 2, 2023, Respondent informed Appellant of its intent to discharge her from the facility to a shelter. A copy of the notice was mailed to Appellant's parent out of state. Exhibit 1.
3. The notice stated that Respondent sought to discharge Appellant on September 2, 2023 because Appellant's health has improved sufficiently and she no longer needs the services provided by the facility. *Id.*
4. The notice identified the person responsible for supervising the discharge and the social worker who can assist with the appeal, 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 local legal service office. *Id.*
5. Appellant timely appealed the notice of discharge on August 25, 2023. Exhibit 2.
6. On September 11, 2023, Appellant's physician at the facility, Dr. [REDACTED] issued a phone order stating that Appellant is safe to discharge back to the community and no longer requires a skilled level of care at the long term care (LTC) setting. Exhibit 4 at 2.
7. By [REDACTED] 2023, Appellant had been discharged from PT and OT. *Id.* at 13-17.

8. Appellant is able to go on leaves of absence from the facility.
9. Since June 21, 2023, social workers and after care coordinators have assisted Appellant in finding housing or another placement. *Id.* at 36-43.
10. On September 13, 2023, Appellant's community physician outside wrote that due to Appellant's diagnoses including opioid use disorder and PTSD, she is a high risk of relapse and death if she discharges to a shelter. Exhibit 6 at 1.

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).

In this matter, Respondent has met many of its obligations in issuing a discharge notice. The notice itself meets the form as required by regulations and cites an appropriate reason for discharge. The physician at the facility signed off on the discharge, albeit at the last moment prior to hearing and not when the notice issued. Respondent's employees have worked with Appellant to obtain housing or placement after her discharge, including putting in referrals and applications.

However, the shelter to which Appellant would discharge is not a safe or appropriate place for discharge given the circumstances identified by Appellant's community physician. The fact that this is a "wet" shelter as described by Respondent, where Appellant could be exposed to drug use, is particularly worrisome.

This appeal is approved.

Order for Respondent

Rescind the August 2, 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 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.

Cynthia Kopka
Hearing Officer
Board of Hearings

cc:

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