

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	DENIED	Appeal Number:	2309143
Decision Date:	10/19/2023	Hearing Date:	10/06/2023
Hearing Officer:	Kenneth Brodzinski	Record Open to:	10/11/2023

Appearance for Appellant:

Pro se

Appearance for SNF:

Mark Nugent, Administrator with Sarah
Webber and Wendy Fox, RN



*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 – Less than 30 Days
Decision Date:	10/19/2023	Hearing Date:	10/06/2023
SNF's Rep.:	Mark Nugent	Appellant's Rep.:	Pro se
Hearing Location:	Springfield		

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

On [REDACTED] 2023, the [REDACTED] ("the facility" or "the [REDACTED]") issued Appellant a written Notice of Intent to Discharge With Less Than 30-Days' Notice (Exhibit A). Appellant filed this appeal in a timely manner on October 2, 2023 (see 130 CMR 610.015(B)(5) and Exhibit A). An 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 five (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 [REDACTED] 2023 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 [REDACTED], 2023.

Summary of Evidence

Both parties appeared by telephone. Prior to hearing, the facility submitted Appellant's clinical record (Exhibit B). Post hearing, the facility filed a one-page, typed letter from Appellant's physician at the facility (Exhibit C). Appellant made no filings other than her Fair Hearing Request (Exhibit A)

The facility's administrator testified that Appellant has a long and consistent history of being verbally and physically aggressive with other residents. He testified that, on the first day that Appellant entered the facility, she struck someone in the elevator. She also recently struck another patient. According to the administrator, Appellant never expresses remorse for her actions and has made no indication that she is ever going to change her behavior. The administrator testified that the staff no longer believes that they can protect other residents from Appellant.

The administrator testified that Appellant is independent with all activities of daily living ("ADLs") and she self-ambulates using a wheelchair.

Upon questioning by the hearing officer as to what brought Appellant to the facility, the administrator testified that Appellant had previously been in a facility in [REDACTED] subsequent to some toe amputations. The facility in [REDACTED] experienced similar behavioral problems and substance abuse issues which they were not equipped to handle. The administrator testified that his facility is equipped to handle substance abuse and agreed to take Appellant.

Upon additional questioning, the administrator testified that the discharge address listed on the subject notice is Appellant's last known address. The facility intends to discharge her there or to a shelter if Appellant's last known address is no longer available. The administrator testified that he is aware that Appellant does not have family who would be willing to help her. The discharge plan is to supply Appellant with her medications and needed prescriptions along with any orders for follow-up services.

The administrator referred to the clinical record identifying various recorded incidents of Appellant being aggressive or verbally abusive with other residents as well as the need to provide Appellant with multiple room changes due to Appellant's inability to get along with her roommates (Exhibit B).

When questioned whether a physician has verified that the intended discharge would be safe and medically appropriate, the administrator referenced a supporting letter in the clinical record (Exhibit B, page 19). The hearing officer noted that this letter was drafted by a nurse practitioner and not by a physician. The facility administrator indicated that he could obtain a letter from the facility's physician supporting the appropriateness and safety of the discharge. The record was left open until the close of business on October 11, 2023 for the facility to submit such a letter.

Appellant appeared on her own behalf and testified that everything the facility administrator stated was untrue. Appellant testified that, on the first day she arrived at the facility, she was assaulted in the elevator and only acted in self-defense. Appellant testified that she has been repeatedly harassed by people in the facility with "mental problems." Appellant testified that the staff of the facility "never believe me" and always take the side of the other residents. Appellant stated that the staff never wants to listen to what she has to say and she has no one in the facility to help her. Lastly, Appellant explained that, because she has experienced considerable domestic violence throughout her life, she is going to react physically if she is physically assaulted.

Post-hearing, the facility timely filed a one-page, typed letter from the facility's medical director. The letter states that Appellant had been transferred to the [REDACTED] from another facility due to a history of opioid dependence and being prescribed suboxone. During Appellant's stay at the [REDACTED], *"she has put all residents at risk due to her behavior. Appellant has displayed threatening behavior and has made other residents uncomfortable. [Appellant] ambulates around the facility using a wheelchair. It is my professional opinion that [Appellant] does not warrant nursing home level of care at this time and could safely discharge to a shelter"* (Exhibit C).

A review of the clinical record reveals the following:

5/5/2023 – verbal altercation with roommate during which Appellant made abusive remarks to roommate and Appellant stated she would not alter her behavior. Decision made to transfer Appellant to a new room (Exhibit B, page 20).

6/7/2023 – verbal dispute with new roommate (Exhibit B, page 22).

6/15/2023 – renewed interpersonal conflict with new roommate – new roommate moved to another room (Exhibit B, page 23).

7/1/2023 – Appellant yelling at roommate due to a dispute over TV volume and usable space issues (Exhibit B, page 24).

7/4/2023 – Appellant made verbal outburst to a second resident during movie night (Exhibit B,

page 30).

8/1/2023 – Appellant said to be unable to get along with roommate – agreed to go for psychiatric evaluation (Exhibit B, page 25).

9/2/2023 – Nurse overhears Appellant engaging another patient with raised voices while waiting in line for a cigarette (Exhibit B, page 27).

9/13/2023 – nurse discussed Appellant having issues with another resident. Appellant claimed other resident says mean things to her (Exhibit B, page 28).

9/19/2023 – Appellant denies striking another resident in the back with her fist after Appellant's wheelchair made contact with another resident's wheelchairs (Exhibit B, page 30).

9/21/2023 - Appellant met with staff about interpersonal conflicts – Appellant denied any responsibility (Exhibit B, page 31).

9/29/2023 - Social Services - Substance Abuse Counselor made the following entry:

"This writer spoke to [Appellant] about comments made to another resident on this day. [Appellant] was present in yesterday's AA recovery group meeting when a second resident shared her story. [Appellant] utilized said history to verbal [sic] attack second resident on this day. [Appellant] stated, "why don't you back to the streets, smoke crack, have another stroke, and maybe you will die this time". After this writer spoke to [Appellant] for the first time, she re-approached second resident again and reinforced her prior comments. ·

Since arrival, [Appellant] has been unable/unwilling to get along with other residents. This writer has personally spoken to [Appellant] numerous times about threatening/being hurtful to other residents. This writer has sectioned [Appellant] to the hospital after threatening another resident and herself. [Appellant] has had interpersonal conflict with all her roommates resulting in a plethora of room changes, [Appellant] is a danger to the safety of other residents and has a long and storied history of making mean and cruel remarks along with veiled and subtle threats against others. [Appellant] is a risk to others and her antisocial behaviors have placed her at risk for harm as well. [Appellant] was given an expedited notice of discharge on this day. [Appellant] will be discharged to last known address or a shelter of her choice."

(Exhibit B, page 32).

Findings of Fact

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

1. Appellant has been a resident of the [REDACTED] (the facility or the [REDACTED]) since [REDACTED] 2023 (Exhibit B, page 5).
2. Appellant had previously been in a facility in Lowell subsequent to some toe amputations.
3. The facility in Lowell experienced behavioral problems and substance abuse issues with Appellant which they were not equipped to handle. T
4. The [REDACTED] is equipped to handle patients with substance abuse issues and agreed to take Appellant.
5. The first day Appellant entered the facility, she struck someone in the elevator.
6. Since arriving at the facility, Appellant has been physically aggressive and verbally abusive with other residents and has required multiple room changes due to Appellant's inability to get along with her roommates.
7. Appellant has shown little-to-no remorse for her aggression/abuse and has often stated that she will not change her behavior.
8. On September 29, 2023, the [REDACTED] issued Appellant a written Notice of Intent to Discharge With Less Than 30-Days' Notice (Exhibit A).
9. The stated reason for the discharge is: "The safety of the individuals in the facility is endangered due to your clinical or behavioral status" (Exhibit A).
10. The discharge address listed on the subject notice is Appellant's last known address.
11. The facility intends to discharge Appellant to her last known address or to a shelter if Appellant's last known address is no longer available.
12. The facility will discharge Appellant with her medications and needed prescriptions along with any orders for follow-up services.
13. Appellant does not have family who would be willing to help her.

14. Appellant is currently independent with all activities of daily living (ADLs) and she self-ambulates using a wheelchair.
15. A one-page, typed letter from the facility's medical director who serves as Appellant's treating physician states that Appellant had been transferred to the [REDACTED] from another facility due to a history of opioid dependence and being prescribed suboxone. During Appellant's stay at the [REDACTED], *"she has put all residents at risk due to her behavior. Appellant has displayed threatening behavior and has made other residents uncomfortable. [Appellant] ambulates around the facility using a wheelchair. It is my professional opinion that [Appellant] does not warrant nursing home level of care at this time and could safely discharge to a shelter"* (Exhibit C).
16. The clinical record documents, *inter alia*, the following:
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(Exhibit B, page 32).

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 with less than 30 days' notice.

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.

Appellant did not dispute the adequacy of the notice itself. After review, the subject notice complies with the requirements of 130 CMR 610.028(A)-(C).

The clinical record supports the professional opinions of the facility staff, including Appellant's treating physician, the facility administrator, and Appellant's substance abuse counselor, that Appellant has repeatedly engaged in physically and verbally abusive behavior towards other residents. While some of these behaviors may not be so severe as to pose a significant threat to the average healthy person residing in the community, notice is taken that the residents of a skilled nursing facility are generally more physically and emotionally frail given their advanced age and/or compromised health conditions. Other residents should not have to live in a restricted environment where their physical and emotional wellbeing is threatened by another. This record supports the facility's determination that Appellant's unremorseful behavior, which she refuses to moderate, endangers the health and safety of others in the facility.

At hearing, Appellant blanketly denied all the allegations made against her. She offered no supporting documentation or corroborative evidence of any kind. Appellant also did not challenge the location of her intended discharge – whether to her last known address or a shelter. These locations have been deemed satisfactory by Appellant's treating physician who also averred that Appellant no longer requires skilled nursing level of care and can be safely discharged pursuant to the subject notice.

This record provides no basis in fact or law to prevent the noticed discharge from proceeding. For the foregoing reasons, the appeal is DENIED.

Order for the Nursing Facility

You may proceed with discharge under notice of September 29, 2023, but not before five (5) days have passed since this decision is rendered.

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: [REDACTED], Administrator, [REDACTED]