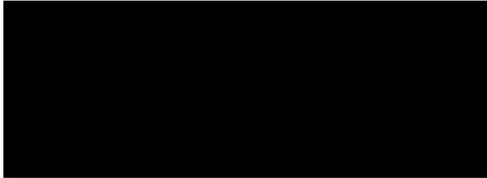


Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2309560
Decision Date:	10/26/2023	Hearing Date:	10/24/2023
Hearing Officer:	Radha Tilva		

Appearance for Appellant:
Pro se

Appearance for Respondent:
Chris Gillissen, Administrator
Sonia Dupuis, Social Worker



*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 Home Discharge
Decision Date:	10/26/2023	Hearing Date:	10/24/2023
Respondent's Rep.:	Chris Gillison, Sonia Dupuis	Appellant's Rep.:	Pro se
Hearing Location:	Quincy Harbor South	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 September 18, 2023, [REDACTED] ("Respondent" or "the facility") informed appellant of its intent to discharge appellant from the facility on [REDACTED] to [REDACTED] (Exhibit 1). Appellant filed a timely appeal on October 11, 2023 (Exhibit 2 and 130 CMR 610.615). Challenging the discharge or transfer from a nursing facility is a valid basis for appeal (130 CMR 610.032).

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 appellant the notice of intent to discharge.

Summary of Evidence

Respondent, a skilled nursing facility licensed in Massachusetts, was represented by telephone by its administrator and social worker. Appellant appeared by telephone. A summary of testimony and supporting records follow.

By letter dated September 18, 2023, respondent informed appellant of its intent to discharge appellant from the facility to a homeless shelter (Exhibit 1). A copy of the notice was not provided to a representative on appellant's behalf, but the facility stated that appellant had no other representative's or family members (Exhibit 1 and testimony). The notice stated that respondent sought to discharge appellant on [REDACTED] to a homeless shelter because "the safety of the individuals in the facility is endangered. You have violated the smoking policy multiple times by purchasing and providing smoking materials to monitor smoking resident creating a safety risk to both residents and to the facility" (*Id*). The notice identified the administrator as the person responsible for supervising the discharge and explained appellant's appeal rights (Exhibit 1). 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 (Exhibit 4, p. 2).

Appellant was admitted to the nursing facility on [REDACTED] 2023, from an acute care hospital with diagnoses which included, but is not limited to, injury of cauda equina, chronic obstructive pulmonary disease, spinal stenosis, low back pain, chronic pain syndrome, sciatica, seizures, and difficulty walking (Exhibit 4, p. 11). When appellant first arrived, he was in a wheelchair and mostly immobile, but has since recovered and is now walking with the use of a cane/walker. Respondent's representatives testified that it issued the discharge notice to appellant because appellant violated the smoking policy of the nursing facility. The appellant did not dispute that he violated the policy when he purchased cigarettes for other residents who were not independent smokers. The appellant testified that he has not purchased anymore Respondent's representatives further testified that appellant goes off the property nearly daily and is independent when doing so. The appellant did not dispute that and stated that he does go to a coffee shop or a store.

The nursing facility submitted a note from Dr. [REDACTED], signed September 19, 2023, which stated the following:

"[Appellant] was treated in our facility and made a great progress in his rehabilitation, PT, psychiatric care. At this time he is walking very well and uses cane [sic] occasionally for support. He is also able to leave premises [sic] and walk to the nearest store. At this time he is ready to be discharged into the community and [live] independently."

(Exhibit 4, p. 42). The administrator stated that appellant has not had a seizure at their facility since arriving in February.

With respect to discharge planning the nursing facility stated that they have been working together to find another nursing home (per appellant's request) that can take appellant, but they have not been able to find one due to his methadone treatment and history of his behaviors. Sober homes are also not a possibility as he has been sober for over a year now. The social worker stated that the services at the homeless shelter do meet his needs as they have counseling support and substance abuse disorder support. The representative stated, however, that no bed was available at the shelter when she called. The administrator explained that shelters require a daily phone call to determine whether a bed is available and the nursing facility would not discharge unless they knew a bed was made available to him as that is a requirement for safe discharge. The nursing facility is working with a housing coordinator, but it takes time and he cannot afford most places. The administrator testified that they would assist appellant in finding a day program and would help ensure that his methadone treatment is transferred as well as his other medications.

Appellant testified that he does not believe that a shelter is a safe and appropriate discharge as he would be kicked out of the shelter in the morning with no housing and forced to be on the streets. The appellant testified that he is a fall risk and has been in and out of nursing facilities six times in the past year due to falling so many times. The appellant further testified that he fell twice within the past few weeks. Moreover, appellant stated that he presently does not own a cane or walker of his own and uses one from the nursing facility. The appellant agreed that he does not need to be in a nursing facility and is trying to work with DMH so that he can get placed in a group home.

Findings of Fact

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

1. On September 18, 2023, respondent informed appellant of its intent to discharge him from the facility on [REDACTED], to a homeless shelter.
2. The homeless shelter had no available beds the date the social worker called.
3. The appellant no longer needs skilled level of care.
4. The appellant uses a walker and cane to get around the nursing facility and leaves nearly daily to go to the store or the coffee shop.
 - a. The appellant is a fall risk.
5. The appellant has violated the smoking policy at the nursing facility by buying and providing smoking paraphernalia for the residents.

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) a stay at the nursing facility; or
- (6) the nursing facility ceases to operate.

Additionally, if the facility discharges a resident under 130 CMR 610.028(A)(3) and (4), the resident's clinical record must be documented by a physician. 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, G.L. c. 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**” (Emphasis added). Finally, federal regulations require that a nursing facility provide sufficient preparation for a safe and orderly discharge (*See* 42 CFR 483.12(a)(7)).

Respondent has failed to present sufficient evidence to show that it has complied with the regulations which requires a safe and orderly transfer or discharge to another safe and appropriate place. It is undisputed that the shelter that the nursing facility listed as the place of discharge had no bed available on the day of the hearing. Without ensuring that there is space available for the appellant prior to issuing the discharge notice the requirements under the regulations have not been met. Accordingly, this appeal is APPROVED.

Order for Respondent

Rescind notice of intent to discharge dated September 18, 2023.

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.

Radha Tilva
Hearing Officer
Board of Hearings

CC: [REDACTED]