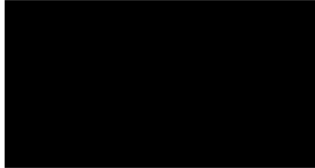


Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2311795
Decision Date:	12/15/2023	Hearing Date:	12/13/2023
Hearing Officer:	Marc Tonaszuck		

Appearance for Appellant:

Pro se

Appearances for Skilled Nursing Facility:

[REDACTED] Administrator; [REDACTED]
Aftercare Supervisor; [REDACTED] Director of
Nursing; [REDACTED] Assistant Director of
Nursing; [REDACTED] 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:	12/15/2023	Hearing Date:	12/13/2023
Skilled Nursing Facility Reps.:	██████████ Administrator; ██████████ ██████████ Aftercare Supervisor; ██████████ ██████████ Director of Nursing; ██████████ ██████████ Assistant Director of Nursing; ██████████ Social Worker	Appellant's Rep.:	Pro se
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

The appellant received a 30-Day Notice of Intent to Discharge with 30-Day Notice ("discharge notice") dated ██████████. The notice states that ██████████ ("the skilled nursing facility" or "the facility") seeks to discharge the appellant to "██████████" on ██████████. The notice indicates the reason for the discharge is that "the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility" (Exhibit 1). The appellant filed this timely appeal on 11/20/2023 (130 CMR 610.015(B); and Exhibit 2). Discharge of a Nursing Facility patient is valid grounds for appeal (130 CMR 610.028; 42 CFR Ch IV §483.200 et seq.).

Action Taken by the Nursing Facility

The skilled nursing facility intends to discharge the appellant from the facility.

Issue

Is the planned discharge correct pursuant to 130 CMR 610.028 and 610.029?

Summary of Evidence

██████████, Administrator; ██████████, Aftercare Supervisor; ██████████, Director of Nursing; ██████████, Assistant Director of Nursing; and ██████████, Social Worker from the skilled nursing facility appeared at the hearing and testified telephonically. Prior to the hearing, the facility submitted the appellant's clinical record from the facility into evidence (Exhibit 4).

The facility representatives testified that the appellant was admitted to the facility in early 2023 with symptoms that included stroke-like symptoms and left sided weakness. She received physical and occupational therapy that ended in March 2023. She ambulates independently and requires no assistance with activities of daily living (ADLs). They testified that the appellant is receiving no services in the facility that she cannot receive in the community. She sets up her own transportation to daily methadone appointments and is independent with her medications. She has scheduled her own appointments for endoscopies and with GI specialists. Additionally, the appellant has cancelled all lab appointments, refused to attend an MRI appointment, cancelled a GI appointment, and cancelled an Ear Nose and Throat specialist appointment. Her physician has documented that the appellant no longer requires skilled nursing facility level of care in the appellant's clinical record (Exhibit 4, p. 7).

The administrator testified that there is no definite discharge plan in place. The location to which the facility seeks to discharge the appellant is a homeless shelter. The administrator testified that he would work with the appellant to make sure there would be a safe and orderly transfer or discharge from the facility to another safe and appropriate place. He testified that because the appellant is safe to live in the community and no longer needs skilled nursing level of care, her needs can be met in the homeless shelter.

The appellant appeared at the fair hearing and testified telephonically that she does make her own doctor's appointments and she arranges her own transportation. She listed a number of health problems, both past and present, including back pain, thyroid cancer and "over 40 fractures." She reports that she needs assistance from the certified nursing assistants when she walks. The appellant states she cannot live in a homeless shelter because she "cannot do places with a lot of people." She has upcoming medical appointments scheduled because of "a mass that started growing on her right hip." Prior to her admission to the facility, the appellant lived with her mother in the community; however, since then her mother sold her home and moved

in with one of the appellant's siblings. The appellant said she could live with her father. She concluded that she does not want to live in a homeless shelter. The appellant became emotional and left the hearing prior to the close of the proceedings.

Findings of Fact

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

1. Appellant was admitted to the facility in early 2023 with symptoms that included stroke-like symptoms and left sided weakness. She received physical and occupational therapy that ended in March 2023.
2. The appellant received a 30-Day Notice of Intent to Discharge with 30-Day Notice ("discharge notice") dated [REDACTED]. The notice states that The facility seeks to discharge the appellant to "[REDACTED]" on [REDACTED]. The notice indicates the reason for the discharge is that "the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility."
3. The [REDACTED] address is homeless shelter.
4. According to the appellant's clinical record, she no longer needs physical or occupational therapy, she is able to ambulate independently, and she is independent with her activities of daily living. In addition, she is able to manage her medications, transportation and doctors' appointments.
5. The appellant's facility physician, Dr. XXX, documented in her clinical record that she no longer requires nursing home level of care and that she can safely be discharged to the community.
6. There is no written discharge plan submitted by the facility.

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

Regulations at 130 CMR 610.028 address notice requirements regarding actions initiated by a nursing facility, as follows:

- (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 MassHealth agency 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 610.028(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 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.

Regulations at 130 CMR 610.029 Time Frames for Notices Issued by Nursing Facilities, state, in pertinent part:

(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.

(Emphasis added.)

Also relevant to this appeal, an amendment to G.L. c. 111, §70E, which went into effect in November of 2008, states as follows:

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.

The facility's discharge notice is dated [REDACTED] and it informs the appellant that the facility seeks to discharge her to a homeless shelter on [REDACTED]¹. The regulations above require that a discharge notice "must be made by the nursing facility at least 30 days before the date the resident is to be discharged." The [REDACTED] discharge notice was made 28 days before the discharge date of [REDACTED]. Accordingly, the discharge notice is defective, and the facility will not be permitted to discharge the appellant pursuant to the [REDACTED] notice.

Moreover, the facility has presented no evidence that there is a discharge plan in place that complies with the above statute. The discharge location is to a homeless shelter. This, in itself, is not necessarily an unsafe discharge location, especially for a resident who no longer requires nursing services, occupation therapy, physical therapy, or assistance with ADLs. However, the appellant testified credibly that she continues to have health problems that require on-going care. The facility representatives acknowledged that there "is no definite discharge plan" in place and the administrator testified that he would assist the appellant with her discharge to the homeless shelter.

The above statute prohibits a discharge "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." There is no evidence, either documentary or testimonial, that shows the appellant was provided with community resources available to her at the homeless shelter. Without a discharge plan in place, the facility may not discharge the appellant pursuant to the 11/09/2023 notice.

This appeal is therefore approved.

Order for the Nursing Facility

Rescind the discharge notice dated 11/09/2023.

Implementation of this Decision

¹ The first page of the discharge notice states, "You have the right to appeal the nursing facility's plan to discharge you if you disagree with the nursing facility's action. To appeal, you must request a fair hearing with the Office of Medicaid's Board of Hearings within 14 days of receiving this notice. If you request a hearing, you cannot be discharged until five days after the appeal decision is rendered." This information is not a correct statement of the regulations. The appellant has 30 days to appeal the discharge notice (see 130 CMR 610.015(B)(3)) and the facility cannot discharge the appellant until 30 days after an adverse decision from the Board of Hearings (see 130 CMR 610.030(A)).

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.

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.

Marc Tonaszuck
Hearing Officer
Board of Hearings

cc: Attn: [REDACTED]