

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2311818
Decision Date:	12/14/2023	Hearing Date:	12/11/2023
Hearing Officer:	Rebecca Brochstein		

Appearances for Appellant:



Appearances for Nursing Facility:

Jody Sousa, Director of Social Services
Nancy Lafleur, Director of Nursing
Ana Thompson, Social Worker
Jason Gold, Administrator



Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street
Quincy, MA 02171

APPEAL DECISION

Appeal Decision:	Approved	Issue:	Nursing home discharge
Decision Date:	12/14/2023	Hearing Date:	12/11/2023
Nursing Facility's Reps.:	Jody Sousa Nancy Lafleur Ana Thompson Jason Gold	Appellant's Reps.:	[REDACTED]
Hearing Location:	Worcester MassHealth Enrollment Center (Telephonic)		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapters 118E and 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

By a notice dated [REDACTED] 2023, [REDACTED] ("the nursing facility") notified the appellant of its intent to transfer or discharge him from the facility (Exhibit 1). The appellant filed a timely appeal on the same date (Exhibit 2; 130 CMR 610.615). Notification of intent to transfer or discharge an individual from a nursing facility is a valid basis for appeal (130 CMR 610.032).

Action Taken by the Nursing Facility

The nursing facility informed the appellant of its intent to transfer or discharge him.

Issue

The issue is whether the facility is justified in seeking to transfer or discharge the appellant, and whether it followed proper procedures in doing so.

Summary of Evidence

The nursing facility was represented by the administrator, director of social services, director of nursing, and a social worker. They testified that the appellant has had multiple admissions to the facility and was most recently admitted in [REDACTED]. His diagnoses include diabetes mellitus, acute kidney failure, cerebral infarction, acute gastritis, and gastrointestinal hemorrhage. See Exhibit 8 at 2.

On [REDACTED] 2023, the facility issued a 30-Day Notice of Intent to Transfer, alleging that the safety of individuals in the facility is endangered due to the appellant's clinical or behavioral status. The notice does not list a specific transfer location, instead stating that the location is "to be determined." See Exhibit 1. The facility representatives testified that the appellant has a history of problematic behaviors, including screaming at staff, shaking his bedrails, and gesturing as if to strike or throw things at people. They stated that three specific incidents gave rise to the notice of intent to transfer: First, they testified that the appellant was shining a flashlight in the face of his roommate in the middle of the night, causing fear and distress to the roommate and necessitating a room change. They noted the former roommate continues to express fear and anxiety about the appellant's presence in the facility and has had to be medicated to help him sleep through the night. Second, the facility's representatives testified that the appellant threw his breakfast tray across the room in anger, an incident that was observed by one of the nurses. Third, they stated that the appellant, angry that he had been served fewer muffins than his roommate at a meal, threw a muffin at the roommate and struck him in the foot.

The facility's representatives indicated that based on the appellant's preferences, the plan is to discharge him home rather than transfer him to another facility. They stated that he is able to ambulate and transfer independently when engaged in physical therapy, but that he otherwise does not want to get out of bed. They stated that he has been referred to an elder services agency and would be able to receive physical therapy, occupational therapy, and nursing services if he were to be discharged home. They noted that he still has a catheter and that voiding trials have so far been unsuccessful, but there are plans to try again. However, the facility representatives testified, the appellant and his wife have been trained in catheter care and the appellant has demonstrated that he can manage it independently at home.

The nursing facility's representatives testified that they issued a separate 30-day notice of intent to discharge the appellant home on the basis that his health had improved sufficiently that he does not require nursing facility services any longer.¹ However, they indicated that they do not wish to rescind the current notice because they believe transfer or discharge is also warranted based on the appellant's behavior.

The appellant and his wife appeared at the hearing telephonically. The appellant testified that the incidents that the facility representatives described did not happen and that their testimony is "all

¹ The appellant filed a separate appeal of that notice, and a hearing is scheduled for December 20, 2023.

lies.” He maintained that he attends church regularly and would not engage in such behavior. The appellant stated that the facility owes him an apology and should allow him to go back to his original unit and participate in facility activities once again. The appellant’s wife stated that the appellant is not physically able to live at home, as he is “wobbly” and incontinent and has many other health issues. She stated that she is in her late 70s and has her own health issues, and that she would be unable to manage his care on her own.

The appellant’s wife submitted numerous documents in preparation for the hearing, including interdisciplinary progress notes that she had annotated as well as letters explaining the appellant’s position relative to the allegations made by the nursing facility. The wife read one of the letters into the record. See Exhibits 4-7.

Findings of Fact

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

1. The appellant was admitted to the nursing facility in [REDACTED].
2. The appellant’s diagnoses include diabetes mellitus, acute kidney failure, cerebral infarction, acute gastritis, and gastrointestinal hemorrhage.
3. On [REDACTED] 2023, the facility issued a 30-Day Notice of Intent to Transfer on the basis that the safety of individuals in the facility is endangered due to the appellant’s clinical or behavioral status. The notice states that the transfer location is “to be determined.”
4. The facility reports a history of problematic behaviors, including screaming at staff, shaking his bedrails, and gesturing as if to strike or throw things at people. The action to transfer him stemmed from specific episodes in which he allegedly shone a flashlight into the face of his roommate during the night; threw a food tray across the room; and threw a muffin at his roommate.
5. The facility issued a subsequent notice of intent to discharge the appellant due to improved health. The appellant filed a timely appeal of that notice, and a hearing is scheduled for December 20, 2023.

Analysis and Conclusions of Law

The requirements for a nursing facility-initiated transfer or discharge are set forth at 130 CMR 456.429, 456.701 through 456.704, and 610.028 through 610.030. The regulation permits transfer or discharge only when one of the following circumstances is met: (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 MassHealth or Medicare pay for) a stay at the nursing facility; or (6) the nursing facility ceases to operate.

Under 130 CMR 610.028(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, if the resident has made such a person known to the facility, a notice written in 12-point or larger type that contains the following, in a language the member understands:

- (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.

The nursing facility here has moved to transfer or discharge the appellant because, pursuant to part (4) above, it determined that the safety of individuals in the nursing facility is endangered by his continued presence. Specifically, the facility points to several episodes of aggressive behavior directed at other residents and facility staff.

Regardless of whether the appellant's behavior would justify discharge or transfer, the facility may not effectuate a discharge at this time because it has not fully complied with the requirements of 130 CMR 610.028. Among other things, that section provides that the notice of intent to discharge or transfer must include "the location to which the resident is to be discharged or transferred." There is no dispute here that the notice the facility delivered to the appellant states that the location is "to be determined." As this plainly violates the regulatory provision set forth above, the facility is barred from discharging or transferring the appellant at this time.

This appeal is approved.²

Order for the Nursing Home

Rescind the notice of intent to transfer or discharge dated November 14, 2023.

Implementation of this Decision

If this decision is not implemented within 30 days after the date hereon, you should contact your MassHealth Enrollment Center. If you experience further 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.

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.

Rebecca Brochstein
Hearing Officer
Board of Hearings

² As noted earlier, the facility issued a subsequent notice of intent to transfer, which the appellant has also appealed. This decision does not bear on the outcome of that appeal.

CC:

