

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2313342
<b>Decision Date:</b>	1/5/2024	<b>Hearing Date:</b>	01/03/2024
<b>Hearing Officer:</b>	Alexandra Shube		

**Appearance for Appellant:**

*Via telephone:*

Pro se



**Appearance for Nursing Facility:**

*Via telephone:*

Greg Tormey, Administrator  
Ryan Murphy, Vice President  
Tracey Collins, Case Manager  
Brandi Nelson, Business Office Manager  
Sarah Currans, 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

<b>Appeal Decision:</b>	Approved	<b>Issue:</b>	Nursing Facility Discharge
<b>Decision Date:</b>	1/5/2024	<b>Hearing Date:</b>	01/03/2024
<b>Nursing Facility's Rep.:</b>	Greg Tormey, et al.	<b>Appellant's Rep.:</b>	Daughter-in-Law; Pro se
<b>Hearing Location:</b>	Quincy Harbor South, Remote	<b>Aid Pending:</b>	No

### Authority

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

### Jurisdiction

Through a notice dated November 27, 2023, the skilled nursing facility, Care One at Essex Park in [REDACTED] ("the facility"), informed the appellant of the facility's intent to discharge her to a homeless shelter on December 26, 2023<sup>1</sup> because she failed, after reasonable and appropriate notice, to pay for (or has failed to have Medicaid or Medicare pay for) services rendered at the facility (see 130 CMR 610.028 and Exhibit 1). The appellant filed this appeal in a timely manner on December 14, 2023 (see 130 CMR 610.015(B) and Exhibit 2). Challenging a notice of transfer or discharge initiated by a nursing facility is a valid ground for appeal to the Board of Hearings (130 CMR 610.032(C)).

### Action Taken by Nursing Facility

The facility informed the appellant of its intention to discharge her due to her failure to pay for her stay at the facility.

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<sup>1</sup> The notice originally listed December 20, 2023 as the discharge date, but it was confirmed both prior to hearing by the Board of Hearings and in testimony at hearing that the discharge date is December 26, 2023.

## Issue

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

## Summary of Evidence

The appellant appeared at hearing via telephone along with her daughter-in-law. The nursing facility appeared at hearing via telephone and was represented by its administrator, case manager, business office manager, director of nursing, and vice president.

The facility testified as follows: the appellant was admitted on [REDACTED] 2023 and her stay was covered by Medicare through September 9, 2023. After her Medicare coverage ended, she was covered by MassHealth short-term care through October 9, 2023. Her MassHealth coverage ended on October 10, 2023 because she failed to complete the annual renewal in time. The facility's business office assisted her in completing a new MassHealth application, which was denied. Based on her finances, the appellant was only eligible for MassHealth Senior Buy-in, which does not cover long-term care. The facility met with the appellant and her family multiple times to discuss MassHealth coverage, establishing a payor source, and finding housing. It informed her that failure to pay would result in discharge from the facility. The facility provided a statement dated December 28, 2023 showing that outstanding balance owed to the facility for room and board from October 10, 2023 through December 31, 2023 was \$36,935.

The facility testified that the appellant did not have any skilled care needs necessitating long-term care at the facility. She is independent with activities of daily living (ADLs). She gets herself washed and dressed daily and goes into the community with her family. The facility currently provides her medication, but medication management could be set up with a local pharmacy to provide blister packs once she is in the community. Physical therapy discharge notes from August 2023 indicate that the appellant can ambulate independently with her walker at least 100 feet. She is supervised for transfers in and out of the car. The appellant is independent with her wheelchair.

According to the notice under appeal, the proposed discharge location is a homeless shelter in [REDACTED]. The facility did not know if the shelter is handicapped accessible. The family declined the shelter placement and were supposed to find a hotel for the appellant. The facility has made referrals to other buildings, but without a payor source no other facility will accept her. The facility also suggested a nearby hotel as an option for the appellant. It costs about \$100 per night, is handicapped accessible, and close to both the methadone clinic and the appellant's family.

The appellant acknowledged that she has not paid and does not have MassHealth long-term care coverage. While it is unclear if anything has changed to affect her eligibility, the appellant stated she was going to try to apply for MassHealth benefits again. The appellant's daughter-in-law testified that proposed discharge location is 50 miles from her hometown and family in [REDACTED].<sup>2</sup> The appellant wants to be in her hometown and closer to her family. The daughter-in-law lives in public housing, which does not allow other people to live with her. The appellant is awaiting an emergency public housing placement, but in the meantime, she has nowhere else to live.

The appellant's daughter-in-law testified that the proposed shelter would not be safe for the appellant because she is not ambulatory as stated by the facility. Currently, she cannot walk the 50 feet from the facility to the car. At Thanksgiving time, her mobility was touch and go, but she was able to leave the facility and go home with her family for the holiday; however, by Christmas, her mobility was limited enough that she could not go home for the holiday. She could not even walk from her room to the front door of the facility to greet her family. Additionally, the appellant is a methadone patient and the daughter-in-law picks her up from the facility once per week and takes her to the methadone clinic where she gets a six-day supply to bring back to the facility. If she is at the shelter proposed by the facility, that would be very difficult for both the daughter-in-law and the appellant to maintain. She needs to be able to safely get her medication. The daughter-in-law did not think the appellant could live safely by herself in a hotel room. She has complex medical needs, her legs are swollen and it looks like cellulitis. Additionally, \$100 per night at the hotel would be too expensive for the appellant.

The facility responded that the hotel's daily rate is less expensive than that of the facility. Additionally, people are safely discharged from the facility in wheelchairs all the time. The appellant's needs, including treating potential cellulitis and obtaining her medications and methadone, can all be met in the community. There is no clinical reason for the appellant to be in a long-term care facility.

## Findings of Fact

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

1. The appellant currently resides in the nursing facility, but has no payor source and has made no payments since October 10, 2023 (Testimony and Exhibit 4).
2. On November 27, 2023, the facility issued a 30-Day Notice of Intent to Discharge because the appellant has failed, after reasonable and appropriate notice, to pay for (or has failed to have Medicaid or Medicare pay for) services rendered at the facility (Testimony and Exhibit 1).

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<sup>2</sup> Based on Google Maps, the daughter-in-law's home is 36-40 miles away from the proposed discharge location depending on the route taken.

3. The proposed discharge location is a homeless shelter about 40 miles from her hometown and family (Testimony and Exhibit 1).
4. The appellant is independent with her ADLs and independent at a wheelchair level (Testimony and Exhibit 4).
5. The outstanding balance owed to the facility for room and board from October 10, 2023 through December 31, 2023 is \$36,935 (Testimony and Exhibit 4).
6. The appellant applied for MassHealth benefits and was not eligible for coverage other than the Senior Buy-in, which does not provide long-term care benefits (Testimony and Exhibit 4).
7. The facility has met with the family and the appellant to work on discharge planning, but the appellant refused the proposed shelter (Testimony and Exhibit 4).

## 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 mirror the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in the Nursing Facility Manual regulations at 130 CMR 456.000 et seq. and in the Fair Hearing Rules at 130 CMR 610.000 et seq.

For the purposes of this decision, the definitions found in 130 CMR 456.002 apply:<sup>3</sup>

“Nursing facility” - a Medicare skilled nursing facility or Medicaid nursing facility licensed by the Department of Public Health to operate in Massachusetts, or a distinct Medicaid- or Medicare-certified unit within a facility.

“Discharge” - the removal from a nursing facility to a noninstitutional setting of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual; this includes a nursing facility's failure to readmit following hospitalization or other medical leave of absence.

“Transfer” — movement of a resident from:

- (1) a Medicaid- or Medicare-certified bed to a noncertified bed;
- (2) a Medicaid-certified bed to a Medicare-certified bed;

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<sup>3</sup> The regulatory language in the MassHealth Nursing Facility Manual has near-identical regulatory counterparts within the Commonwealth's Fair Hearing Rules under 130 CMR 610.000 et seq., as well as federal regulations found under 42 CFR 483.000 et seq.

- (3) a Medicare-certified bed to a Medicaid-certified bed;
- (4) one nursing facility to another nursing facility; or
- (5) a nursing facility to a hospital, or any other institutional setting.

A nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, resulting in the resident being moved to another institutional setting is also a transfer. Movement of a resident within the same facility from one certified bed to another bed with the same certification is not a transfer.

Based on the above definitions, the facility is attempting to discharge the appellant from the nursing facility to a noninstitutional setting (a homeless shelter in the community) via its notice dated November 27, 2023.

The guidelines that apply in a determination of whether appellant can be so discharged are found in 130 CMR 456.701 and 130 CMR 610.028. This section of the regulations lists the only circumstances and conditions that allow for transfer or discharge of a resident from a nursing facility and the requirements of the relevant notice -- if these requirements are not met, the facility must permit the resident to remain in the facility.

130 CMR 610.028 sets forth the notice requirements for transfers and discharges initiated by a nursing facility, and provides in part 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 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 456.701(A)(1) through (5), **the resident's clinical record must contain documentation to explain the transfer or discharge.** The documentation must be made by:

- (1) the resident's physician when a transfer or discharge is necessary under 130 CMR 456.701(A)(1) or (2); and

(2) a physician when the transfer or discharge is necessary under 130 CMR 456.701(A)(3) or(4).

Emphasis added (130 CMR 456.701(A) and (B)).

In this case, according to the notice under appeal, the facility is seeking to discharge the appellant to a shelter for failing to pay for her stay at the facility. The facility has worked with the appellant and her family on trying to apply for MassHealth benefits and discussed needing to establish a payor source. The appellant applied for MassHealth long-term care coverage, but did not qualify. She was deemed eligible for Senior Buy-In, which does not provide long-term care benefits. The facility credibly testified that the appellant does not have a payor source and has not made any payments since her MassHealth coverage terminated on October 10, 2023. The facility provided statements addressed to the appellant showing that the appellant's outstanding balance owed to the facility for room and board from October 10, 2023 through December 31, 2023 is \$36,935. That amount is increasing daily. The efforts of the facility constitute reasonable and appropriate notice of the appellant's failure to pay the facility.

Through its testimony and documentation, the facility has sufficiently demonstrated that the appellant has failed to pay for her stay at the facility. In her own testimony, the appellant acknowledged that she has not paid and does not have MassHealth long-term care coverage. While it is unclear if anything has changed to affect her eligibility, the appellant stated she was going to try to apply for MassHealth benefits again.

In addition to the MassHealth-related regulations discussed above, the nursing facility also has an obligation to comply with all other applicable state laws, including M.G.L. c.111, §70E, which went into effect in November of 2008. The key paragraph of that statute provides 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 has proposed a transfer to a homeless shelter that is 40 miles from her family and community. The record shows that the appellant is independent with her ADLs and supervised for transfers in and out of cars. Her needs, including treating potential cellulitis and obtaining her medications and methadone, can all be met in the community. Physical therapy discharge notes from August 2023 indicated that she was ambulatory for at least 100 feet with a walker; however, her family credibly testified that she is not ambulatory and is reliant on her wheelchair. The appellant is independent at wheelchair level and has no skilled care needs, but the facility did not know if the proposed discharge location was handicapped accessible. The appellant does not have a right to remain in the nursing facility without paying and she clearly owes the nursing facility

money, but given the appellant's limited mobility and reliance on her wheelchair, the facility has not shown that the proposed discharge location in the November 27, 2023 notice under appeal is safe and appropriate.<sup>4</sup>

For these reasons, the appellant's appeal is approved.

## **Order for Nursing Facility**

Rescind the 30-Day Notice of Intent to Discharge Resident dated November 27, 2023.

## **Implementation of this Decision**

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.

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Alexandra Shube  
Hearing Officer  
Board of Hearings

cc: Care One at Essex Park, Attn: Greg Tormey, Administrator, [REDACTED], [REDACTED], MA  
[REDACTED]

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<sup>4</sup> At hearing, the facility discussed other possible discharge locations, including a local motel that is handicapped accessible, in the appellant's preferred community, and close to her family and current methadone clinic. There is nothing in this decision prohibiting the facility from issuing a new 30-Day Notice of Intent to Discharge listing a safe and appropriate discharge location; however, the discharge location proposed in the notice under appeal is not safe or appropriate given the appellant's mobility issues.