

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2401477
Decision Date:	2/15/2024	Hearing Date:	2/14/2024
Hearing Officer:	Cynthia Kopka		

Appearance for Appellant:



Appearance for Respondent:

Mark Blake, Administrator
Amy Reale, Business Office Manager



*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 facility – 30 day discharge
Decision Date:	2/15/2024	Hearing Date:	2/14/2024
Respondent's Rep.:	Administrator, Business Office Manager	Appellant's Rep.:	Attorney and guardians
Hearing Location:	Taunton (remote)	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 January 11, 2024, Devereux Skilled Nursing & Rehab Center ("Respondent" or "the facility") informed Appellant of its intent to discharge Appellant from the facility on February 11, 2024. Exhibit 1. Appellant filed a timely appeal on January 11, 2024. Exhibit 2. 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 the notice of intent to discharge Appellant.

Summary of Evidence

Respondent, a skilled nursing facility licensed in Massachusetts, was represented by its business office manager and administrator. Appellant was represented by her attorney and guardians and submitted documents in support, Exhibits 4 and 5. Both parties submitted documents for an earlier-scheduled hearing, Appeal No. 2312538. Of those documents submitted for the earlier appeal, only those documents relevant to the present appeal were included in this hearing record. See Exhibit 6. A summary of testimony and documentary evidence follows.

By hand-delivered letter dated January 11, 2024, Respondent informed Appellant of its intent to discharge Appellant from the facility to her guardians' home. Exhibit 1. A copy of the notice was provided to Appellant's guardians. The notice stated that Respondent sought to discharge Appellant on February 11, 2024 because Appellant "the resident has failed after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. Nonpayment applies if the resident does not submit the necessary paperwork for payment or if the claim is denied, the resident refused to pay for their stay." *Id.* The notice identified a social worker as the person responsible for supervising the discharge and explained Appellant's appeal rights. 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 local legal service offices. *Id.*

Respondent's representatives testified that Appellant admitted to the facility and filed an application for MassHealth benefits in [REDACTED]. A Medicaid specialist assisted Appellant with her application. During the pendency of the application, Respondent billed Appellant an estimated patient paid amount (PPA) for each month of admission.

Approximately one year after admission, Appellant was approved for MassHealth long term care coverage with a benefit start date in [REDACTED]. Per MassHealth's notice, Appellant owed a patient paid amount of \$5,839.72 beginning September 1, 2022. Exhibit 5 at 10-11. Appellant's PPA has changed periodically through notices from MassHealth. Appellant had fair hearing rights on each of these notices. See Exhibit 6 at 52-67. Respondents testified that Appellant's attorney and representatives had made sporadic payments and agreements to sign over life insurance policies, but ultimately have not paid the full balance due. Respondent's representatives took issue with the fact that Appellant was paying other bills out of her income, such as the prepaid funeral and attorney's fees.

Documents submitted for Appeal No. 2312538 include bills reflecting Appellant's patient liability and payments rendered. As of January 10, 2024, Appellant's outstanding balance after an \$11,000 payment made on December 6, 2023 was \$49,241.48. Exhibit 6 at 45. Appellant's exhibits do not contain evidence of payment after December 6, 2023, and Appellant's attorney conceded that a no payment had been made after December 2023. See Exhibit 5 at 14.

Regarding discharge planning, Respondent's representatives testified that Appellant is not capable

of discussion, and asserted that Appellant's family has not been responsive to discussions of discharging Appellant home. Respondent is prepared to retain the services needed for Appellant to discharge to the community, including an ambulance to transfer her, durable medical equipment (DME) needed for her care, and hospice services. Respondent was not able to testify if the house was accessible for Appellant's needs, but argued that it can be made accessible. Respondent argued that attempts to discuss discharge planning would be contained in social services notes submitted for the earlier hearing. However, upon review of the documents submitted for the earlier appeal, only one note seems to reference discharge planning. This is a note dated November 2023 stating that the social worker would be available for planning. Exhibit 6 at 112.¹

Appellant's attorney argued that Appellant does not owe a patient paid amount prior to September 2023, citing 42 CFR 483.15. Appellant's attorney argued that federal law prohibits a nursing facility from collecting a PPA prior to Medicaid approval. Appellant's attorney argued that despite this, he and Appellant's guardians made voluntary payments to the facility in good faith. Appellant's attorney asserts that Appellant only owes the PPA from September 2023 through February 2024. Respondent asserted that Appellant has not paid for the months that they admit to owing, such as January and February 2024. Appellant's attorney did not dispute that Appellant has not made payments for later months. Appellant's attorney argued that but not for the delay in MassHealth approval, the bill would have been paid.

Appellant's attorney argued that Appellant does not have contractual liability to pay the facility, though Appellant's attorney did not dispute that Appellant resides in the facility and is receiving care. Appellant's attorney argued that even if the appeal is denied, Appellant is now transitioning, on advance hospice, and may not survive the 30 day stay that would be in place upon a hearing decision.

Appellant's attorney set forth arguments as to why Appellant prioritized paying other bills and obligations, such as the prepaid funeral contract, guardian fees, and legal fees over paying the facility's bill. Appellant's attorney emphasized how important it was for him to have done research on federal law for these appeals. Appellant's attorney did not dispute that there was an outstanding debt to the facility but argued that it was not clear who owed the debt. Appellant's attorney argued that it was a matter of contract and that there was "not enough paper on the contract and not enough liability under contract by guarantors to pay for this."

Regarding discharge to the home, Appellant's guardians signed an affidavit stating it is unsafe for Appellant to move home. Exhibit 5 at 3. Appellant's attorney argued that it is moot due to Appellant's physical condition. Appellant is on accelerated hospice and refusing food and liquid.

¹ No other relevant social worker notes were found in the review of the file submitted for the earlier appeal, but it should be noted that the documents submitted by the facility were numerous and not paginated. Respondent's representatives did not cite to any note, document, or page when specifically asked about discharged planning at this hearing.

Appellant cannot go home because she is terminal. Respondent's representatives argued that patients receive hospice care at home every day.

Findings of Fact

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

1. Appellant admitted to the facility and filed an application for MassHealth benefits in [REDACTED]. A Medicaid specialist assisted Appellant with her application.
2. Appellant was approved for MassHealth long term care coverage effective [REDACTED]. Appellant was notified that she owed \$5,839.72 beginning September 1, 2022. Exhibit 5 at 10-11.
3. Appellant's PPA has changed periodically through notices from MassHealth. Appellant had fair hearing rights on each of these notices. See Exhibit 6 at 52-67.
4. As of January 10, 2024, Appellant's outstanding balance after an \$11,000 payment made on December 6, 2023 was \$49,241.48. *Id.* at 45.
5. By hand-delivered letter dated January 11, 2024, Respondent informed Appellant of its intent to discharge Appellant from the facility to her guardian's home. A copy of the notice was provided to Appellant's guardians. Exhibit 1.
6. The notice stated that Respondent sought to discharge Appellant on [REDACTED] because Appellant "the resident has failed after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. Nonpayment applies if the resident does not submit the necessary paperwork for payment or if the claim is denied, the resident refused to pay for their stay." *Id.*
7. The notice identified a social worker as the person responsible for supervising the discharge and explained Appellant's appeal rights. 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 local legal service offices. *Id.*
8. Appellant filed a timely appeal on January 11, 2024. Exhibit 2.
9. A social worker note dated November 2023 indicated that the social worker would be available for discharge planning. Exhibit 6 at 112.

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

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, Mass. Gen. Laws ch. 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.” Finally, federal regulations require that a nursing facility “**provide and document sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.** This orientation must be provided in a form and manner that the resident can understand.” 42 CFR 483.15(c)(7) (emphasis added).

Appellant challenges the nursing facility’s action in discharging for failure to pay. The undisputed evidence shows that Appellant has failed to pay the PPA in its entirety. Appellant’s attorney argued that federal law prohibits the nursing facility from collecting a PPA for the months of September 2022 to September 2023, citing 42 CFR § 483.15. There is no such prohibition contained in this regulation. Appellant’s own evidence includes the September 22, 2023 notice informing Appellant that her patient liability is \$5,839.72 beginning September 1, 2022. Exhibit 5 at 10-11.

Despite Appellant’s failure to pay the PPA and unconvincing arguments that no contractual liability exists between Appellant and the facility, no documented discharge plan was provided for this appeal. The records submitted for Appeal No. 2312538 only appeared to contain one note referencing a social worker’s availability to discuss discharge planning. Even if Respondent’s

assertion that Appellant's guardians have declined to participate in discharge planning, there needs to be written documentation of the efforts to coordinate the discharge.

As there has not been sufficient preparation and orientation for discharge of Appellant, this appeal is approved.

Order for Respondent

Rescind the January 11, 2024 notice of discharge.

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.

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.

Cynthia Kopka
Hearing Officer
Board of Hearings

cc:

Devereux Skilled Nursing & Rehab Center, Attn: Administrator, 39 Lafayette Street,
Marblehead, MA 01945

