

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2402325
Decision Date:	4/8/2024	Hearing Date:	03/11/2024
Hearing Officer:	Marc Tonaszuck	Record Open to:	03/29/2024

Appearances for Appellant:



**Appearances for Windsor Skilled Nursing and
Rehabilitation Facility:**

Scott Brewer, Administrator; Elizabeth Belinski,
Director of Social Work



*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:	Denied	Issue:	Nursing Home Discharge
Decision Date:	4/8/2024	Hearing Date:	03/11/2024
Windsor Skilled Nursing and Rehabilitation Reps.:	Scott Brewer, Administrator; Elizabeth Belinski, Director of Social Work	Appellant's Rep.:	Pro se
Hearing Location:	Springfield MassHealth Enrollment Center	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

Through a Notice of Intent to Discharge Resident ("discharge notice" or "notice") dated 01/18/2024, Windsor Skilled Nursing and Rehabilitation ("the nursing facility" or "the facility") notified the appellant of its intent to discharge her to [REDACTED] on [REDACTED]. The nursing facility indicated that the discharge is necessary because the appellant's conduct endangers the safety of the individuals in the facility (130 CMR 610.029; Exhibit 1). An appeal was filed in a timely manner on the appellant's behalf on 02/15/2024 (130 CMR 610.015(B); Exhibit 2). Notice of intent to transfer or discharge a nursing home resident is valid grounds for appeal (130 CMR 610.032).

A fair hearing was held on 03/11/2024. All parties attended telephonically. At the fair hearing, the facility requested an opportunity to supplement the hearing record during a record open period. The request was granted and the record remained open in this matter until 03/18/2024 for the

facility's submission and until 03/29/2024 for the appellant's response (Exhibits 5 - 8).¹

Action Taken by the Nursing Facility

The skilled nursing facility intends to discharge the appellant from the facility to [REDACTED]
[REDACTED]

Issue

Has the nursing facility complied with relevant statutes and regulations in its planned discharge of the appellant?

Summary of Evidence

The appellant and the representatives from the nursing facility participated in the fair hearing by telephone. The nursing facility was represented by Scott Brewer, the facility administrator and Elizabeth Belinski, Director of Social Work. The appellant appeared pro se and was assisted by [REDACTED]
[REDACTED].

The nursing facility submitted a packet of documents prior to the hearing (Exhibits 4 and 6). The record contains a copy of the discharge notice dated 01/18/2204 from the nursing facility to the appellant informing her of its intent to transfer her to the [REDACTED]
[REDACTED]. The packet provided by the nursing facility contains the appellant's clinical record (Exhibits 2 and 4).

The representatives from the nursing facility testified that the appellant was admitted to the facility in [REDACTED] for short-term rehabilitation. During her stay, she has repeatedly violated the facility's policies, including the smoking and drug policies. The facility representatives testified that the appellant's behavior endangers her and others in the facility. The facility issued the discharge notice on 01/18/2024, seeking to discharge her on [REDACTED].

The appellant's physician, Dr. Arena, documented the clinical record the following:

While at [the facility, the appellant] was independent with her ADLs. She left the facility almost daily. During her initial stay she was being prescribed Methadone, and gabapentin as per hospital discharge. Despite being provided these medications by the facility, she

¹ The hearing record was originally set to close on 03/25/2024; however, the appellant provided documentation that she was hospitalized during that time and that she required additional time to make her submission. Her request was granted and the deadline for her submission was extended until 03/29/2024. Both parties made submissions during the record open period.

was obtaining prescriptions from outside providers/sources as well. On 10/24/23, she was found unresponsive on the floor of her room. EMS administered Narcan and she became more responsive. It was later learned that she filled a prescription for #90 methadone 10 mg tabs at [REDACTED] on that day (10/24/23). She also filled a prescription for #90 gabapentin (600 mg) on 10/20/23. She was admitted to Cape Cod Hospital for a syncope work up. She was treated for pneumonia and AFib. She returned to the facility on [REDACTED]. On 11/12/23 she was again found to have altered mental status. She felt shaky and had multiple falls. Multiple pills were found in her possession including dilaudid, methadone and hydroxyzine. She admitted to taking extra narcotics. She was again sent to the ER. Her methadone was tapered and she was sent to Adcare in Worcester to detox from opiates.

She was transferred from Adcare back to the facility on [REDACTED]. At this time, all controlled substances prescribed at the facility were discontinued. She left the facility on [REDACTED]. Upon her return, staff found her to be lethargic at times and "nodding." She was sent to the ER for medical clearance. She required transfer to the ER another three times for Methadone & polysubstance abuse. In addition, she frequently asks medical providers for methadone, gabapentin and klonopin prescriptions while having an outside prescriber as well, verified by pharmacy and prescription drug monitoring program (PDMP) review. Multiple residents reported her as being "high as a kite and lethargic" again prompting ER visits. During this time period, a resident also reported to nursing staff that [the appellant] was offering illegal substances to others in the facility.

[The appellant] has repeatedly violated the facility's policy regarding illegal drug use and possession and has demonstrated behaviors that pose significant risk to herself and other residents within our community. She has been found on multiple occasions to be in possession of, and using illegal substances, and/or prescribed controlled substances from multiple providers on the premises which is in violation of the facility's policy. This has been confirmed by pharmacy and PDMP review. Pills have been found unsecured in her coat pockets, Burger King bag, and cell phone case. She has not been forthcoming about obtaining controlled substances and has repeated denied taking despite positive toxicology screens. Her actions have necessitated repeated emergent medical interventions underscoring the imminent danger her actions pose to her well-being. Despite our comprehensive support and repeated warnings, [the appellant] continues to engage in these activities. She had reportedly gone as far as offering these substances to another resident. This behavior not only contravenes the facility's strict no drug policy, but also endangers the health and safety of all individuals under [the facility's] care.

(Exhibit 6.)

The facility representatives testified that the plan is for a discharge to a homeless shelter. The appellant is independent of all activities of daily living, she has no occupational or physical therapy

needs, and she requires no nursing care. Since she has no specialized medical needs, the appellant can access community services in the shelter.

The appellant appeared at the fair hearing and she testified that she has made mistakes, but that she “owned up to it.” She is currently working with “everyone” to obtain housing. In her response to the facility’s submission, the appellant provided updated notes from the clinical record. The notes document that she is independent with activities of daily living and she is able to check herself out of the facility for several hours to attend to legal obligations (Exhibit 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] for short-term rehabilitation (Testimony; Exhibit 4).
2. The appellant is independent with her activities of daily living. She ambulates with a walker (Testimony; Exhibit 4).
3. The appellant has no occupational or physical therapy needs. She also has no skilled nursing needs (Testimony; Exhibit 4).
4. The appellant is able to take leaves of absence from the facility for several hours at a time to attend to her needs in the community (Testimony; Exhibits 4 and 6).
5. On 10/24/23 the appellant was found unresponsive on the floor of her room. EMS administered Narcan and she became more responsive. It was later learned that she filled a prescription for #90 methadone 10 mg tabs at [REDACTED] on that day (10/24/23). She also filled a prescription for #90 gabapentin (600 mg) on 10/20/23. She was admitted to Cape Cod Hospital for a syncope work up. She was treated for pneumonia and AFib. (Testimony; Exhibits 4 and 6).
6. On 11/12/23 the appellant was again found to have altered mental status. She felt shaky and had multiple falls. Multiple pills were found in her possession including dilaudid, methadone, and hydroxyzine. She admitted to taking extra narcotics. She was again sent to the ER. Her methadone was tapered, and she was sent to Adcare in Worcester to detox from opiates (Testimony; Exhibits 4 and 6).
7. The was transferred from Adcare back to the facility on [REDACTED]. At this time all controlled substance prescribed at the facility were discontinued (Testimony; Exhibits 4 and 6).

8. The appellant left the facility on [REDACTED] on a leave of absence. Upon her return the same day, staff found her to be lethargic at times and "nodding." She was sent to the ER for medical clearance. She required transfer to the ER another 3 times for Methadone & polysubstance abuse. (Testimony; Exhibits 4 and 6).
9. The appellant frequently asks medical providers for methadone, gabapentin and klonopin prescriptions while having an outside prescriber as well, verified by pharmacy and PDMP review. (Testimony; Exhibits 4 and 6).
10. A resident of the facility reported to nursing staff that [the appellant] was offering illegal substances to others in the facility (Testimony; Exhibits 4 and 6).
11. Through a Notice of Intent to Discharge Resident dated 01/18/2024, Windsor Skilled Nursing and Rehabilitation notified the appellant of its intent to discharge her to [REDACTED] on [REDACTED] (Testimony; Exhibit 4).
12. The reason for the proposed discharge is that the facility determined the appellant's conduct endangers the safety of the individuals in the facility (Testimony; Exhibits 1 and 4).
13. The intended discharge location is homeless shelter where the appellant can access services in the community (Testimony; Exhibit 4).
14. In support of the proposed discharge, the nursing facility representatives cited to a physician letter in the appellant's clinical record, signed by the appellant's physician, Dr. Arena, documenting that the appellant's care can be managed in the community setting (Testimony; Exhibit 4).
15. The appellant appealed the discharge notice on 02/15/2024 (Testimony; Exhibit 2).
16. On 03/11/2024, a fair hearing was held before the Board of Hearings (Testimony; Exhibit 3).
17. The hearing record remained open until 03/29/2024 upon request by both parties to submit additional documentation (Exhibits 5 – 8).

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.

The Fair Hearing Rules at 130 CMR 610.004 define a “transfer” as

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;
- (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.

Movement of a resident within the same facility from one certified bed to another bed with the same certification does not constitute a transfer.

The same regulation defines “discharge” as the removal from a nursing facility of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual. A “discharge” is defined in the same regulation as “the removal from a nursing facility of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual.”

MassHealth regulations at 130 CMR 456.701 provide in relevant part:

Notice Requirements for Transfers and Discharges Initiated by a Nursing Facility

(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 C.M.R. 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 (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 Division's Board of Hearings 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 456.702; and
 - (c) the effect of requesting a hearing as provided for under 130 CMR 456.704;
- (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.

(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.

Through a notice dated [REDACTED], the nursing facility seeks to discharge the appellant to a homeless shelter on [REDACTED]. The basis of the notice is that the discharge is necessary because the appellant's conduct endangers the safety of the individuals in the facility. The basis of the proposed discharge is substantiated by the letter from the appellant's physician which states the appellant engaged in multiple infractions of the facility's policies, including smoking and drug policies. The appellant admitted to the conduct. The appellant's failure to comply with the facility's safety policies clearly supports the reason for the discharge.

The appellant's clinical record and a letter from the physician states that the appellant no longer requires skilled nursing level of care, that she no longer requires physical or occupational therapy, she is independent with ADLs, and he is able to ambulate independently with an assistive device. In addition, she has no specialized medical needs. Therefore, the reason for the appellant's discharge is substantiated by the hearing record.

The Notice of Intent to Discharge the appellant meets the regulatory requirements set forth above. Additionally, the nursing facility has provided evidence that appellant's clinical record was appropriately documented.

The proposed discharge location is to a homeless shelter, where the appellant's care will be managed in the community. The appellant has not shown that the discharge plan or the discharge location are unsafe or inappropriate. Ideally, the appellant may find that another community setting may be more appropriate where her needs may be better met; however, the nursing facility has met its burden of providing the appellant with the appropriate notice and documenting his clinical record properly. Additionally, because the appellant is independent with ADLs and has no skilled nursing needs, the discharge plan meets the above statutory requirements. Thus, the nursing facility may discharge the appellant pursuant to the [REDACTED] discharge notice. Accordingly this appeal is denied.

Order for the Nursing Facility

Proceed with discharging the appellant as planned pursuant to regulations.

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: Skilled Nursing Home Representative: Scott Brewer, Administrator, Windsor Skilled Nursing and Rehabilitation, 265 N. Main Street, South Yarmouth, MA 02664