

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: Denied in part;
Approved in part

Appeal Number: 2402901

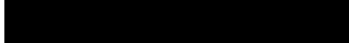
Decision Date: 3/13/2024

Hearing Date: 03/04/2024

Hearing Officer: Thomas Doyle

Record Open to:

Appearance for Appellant:



Appearance for Respondent:

Jennifer Young, Social Worker

Lynn Wilson, Director Social Services

Ernestina Nkrumah, Aftercare Coordinator

Ann Kalenga, Floor Manager of Appellant's
Floor

Nicole Coiteux, Rehab Director

Interpreter:



*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 in part; Approved in part	Issue:	Nursing Home Discharge – Less Than 30 Days' Notice
Decision Date:	3/13/2024	Hearing Date:	03/04/2024
Respondent's Rep.:	Jennifer Young	Appellant's Rep.:	
Hearing Location:	Remote (phone)	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 dated February 22, 2024, Worcester Rehabilitation and Health Care Center (hereinafter "respondent" or "facility") issued a Notice of Intent to Discharge Resident with Less than 30 Days' Notice (Expedited Appeal) to appellant because the safety of the individuals in the facility is endangered due to the clinical or behavioral status of the resident and appellant's health has improved sufficiently so he no longer needs the services provided by the facility. (130 CMR 456.701 (A) (B); 130 CMR 610.028(A) and (B); Ex. 1). Appellant filed this appeal in a timely manner on February 26, 2024. (130 CMR 610.015(F); Ex. 2). Notice of transfer or discharge from a nursing facility is valid grounds for appeal. (130 CMR 456.703; 130 CMR 610.032(C)).

Action Taken by Respondent

The nursing facility issued a notice of intent to discharge the appellant with less than 30 days' notice.

Issue

The appeal issue is whether the facility satisfied its statutory and regulatory requirements pursuant to 130 CMR 456.701 (A), (B), when it issued appellant the less than 30-days' notice of intent to discharge.

Summary of Evidence

The nursing facility was represented telephonically at the hearing by a Social Worker, its Social Services Director, its After Care Coordinator, the floor manager on appellants assigned floor and its Rehabilitation Director. Appellant and his appeal representative also appeared by phone. All were sworn. Appellant is a male in his late [REDACTED] (Testimony; Ex. 4, p. 4). The appellant was admitted to the facility in [REDACTED]. (Ex. 4, p. 3). On February 22, 2024, the facility issued to appellant a less than 30-Days' Notice of Intent to Discharge Resident. (Ex. 1). Appellant timely appealed on February 26, 2024. (Ex. 2).

Appellant does not have a primary care physician (PCP). (Ex. 4, p.24). Appellant's physician is listed as the medical director of the facility. (Ex. 4, pp. 4-87). Appellant is independent with his Activities of Daily Living (ADL's). (Ex. 4, pp. 3, 91, 93). Appellant admitted to the facility social worker that he knew the facility's smoking policy. (Ex. 4, p. 9). In June 2019, appellant admitted to putting vodka into a water bottle and was drinking from it. (Ex. 4, p. 81). Appellant admitted he was caught with a bottle of alcohol and caught smoking. (Appellant Testimony). In December 2019, appellant was being pushed in his wheelchair by another resident. Appellant was educated on the safety risks of having another resident push him in his wheelchair. (Ex. 4, p. 19). In October 2021, appellant was smoking marijuana in a smoking area. He was educated on not smoking marijuana in a smoking area. (Ex. 4, p. 53). In September 2023, appellant left the facility without following procedure. (Ex. 4, p. 34-35). In October 2023, appellant was verbally aggressive toward another resident of the facility and by yelling and calling the other resident a "faggot." (Ex. 4, p. 32). In October 2023, appellant had a positive toxicology screen for cocaine. Appellant had a lighter and cigarettes on him when he entered the building. When approached, appellant became defensive and hostile. He called a staff member a "faggot." (Ex. 4, p. 9). In December 2023, at the lobby door to the facility, a 375 ml bottle of Bourbon was found on appellant. (Ex. 4, p. 8). On February 5, 2024, facility security attempted to stop appellant from continuously lighting a cigarette and smoking on the patio. When confronted by security, appellant tells them to "fuck off." (Ex. 4, p. 7). On February 8, 2024, appellant was seen taking a lighter out of his pocket and light a cigarette. When he was confronted, he told the attendant to "fuck off." (Ex. 4, p. 7). On February 9, 2024, appellant was confronted by the smoking attendant for going out to smoke with his own items that appellant had on his person. Appellant called the attendant a "little faggot." Appellant threatened the smoking attendant that he was going to follow him and slash his tires. Appellant admits he called the smoking attendant a "faggot." (Ex 4, p. 6). A "No Harm Agreement" is a warning to a resident of the facility. (Testimony). Appellant has been given

multiple “No Harm Agreements.” (Ex. 4, p. 6). Appellant is consistently not following facility protocol regarding contraband and becomes abusive when confronted and intimidates the staff. (Ex. 4, p. 6). Lowell Transitional Living Center accepts patients into their shelter if a patient can manage their own medical equipment. The facility confirmed with appellant’s floor nurse that appellant can manage his own BiPAP machine. (Ex. 4, p. 5). Appellant reported he does not need physical therapy (PT). (Ex. 4, p. 92).

Appellant was represented by an Ombudsman. After testimony by the facility social worker, the Ombudsman was asked if she had any questions for the social worker. She replied not at this time. She was then asked if she had any testimony she wanted to give. She replied I do not.

Appellant testified on his own behalf. He admitted getting caught with a bottle of alcohol on his person and he admitted he was caught smoking.

Findings of Fact

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

1. Appellant is a male in his late [REDACTED] (Testimony; Ex. 4, p. 4).
2. The appellant was admitted to the facility in [REDACTED] (Ex. 4, p. 3)
3. On February 22, 2024, the facility issued to appellant a less than 30-Days’ Notice of Intent to Discharge Resident. (Ex. 1).
4. Appellant timely appealed on February 26, 2024. (Ex. 2).
5. Appellant does not have a primary care physician (PCP). (Ex. 4, p.24). Appellant’s physician is listed as the medical director of the facility. (Ex. 4, pp. 4-87).
6. Appellant is independent with his Activities of Daily Living (ADL’s). (Ex. 4, pp. 3, 91, 93).
7. Appellant admitted to the facility social worker that he knew the facility’s smoking policy. (Ex. 4, p. 9).
8. In June 2019, appellant admitted to putting vodka into a water bottle and was drinking from it. (Ex. 4, p. 81). Appellant admitted he was caught with a bottle of alcohol and caught smoking. (Appellant Testimony).
9. In December 2019, appellant was being pushed in his wheelchair by another resident.

Appellant was educated on the safety risks of having another resident push him in his wheelchair. (Ex. 4, p. 19).

10. In October 2021, appellant was smoking marijuana in smoking area. He was educated on smoking marijuana in a smoking area. (Ex. 4, p. 53).
11. In September 2023, appellant left the facility without following procedure. (Ex. 4, p. 34-35).
12. In October 2023, appellant was verbally aggressive toward another resident of the facility and by yelling and calling the other resident a "faggot." (Ex. 4, p. 32).
13. In October 2023, appellant had a positive toxicology screen for cocaine. Appellant had a lighter and cigarettes on him when he entered the building. When approached, appellant became defensive and hostile. He called a staff member a "faggot." (Ex. 4, p. 9).
14. In December 2023, at the lobby door to the facility, a 375 ml bottle of Bourbon was found on appellant. (Ex. 4, p. 8).
15. On February 5, 2024, facility security attempted to stop appellant from continuously lighting a cigarette and smoking on the patio. When confronted by security, appellant tells them to "fuck off." (Ex. 4, p. 7).
16. On February 8, 2024, appellant was seen taking a lighter out of his pocket and light a cigarette. When he was confronted, he told the attendant to "fuck off." (Ex. 4, p. 7).
17. On February 9, 2024, appellant was confronted by the smoking attendant for going out to smoke with his own items that appellant had on his person. Appellant called the attendant a "little faggot." Appellant threatened the smoking attendant that he was going to follow him and slash his tires. Appellant admits he called the smoking attendant a "faggot." (Ex 4, p. 6).
18. A No Harm Agreement is a warning to a resident of the facility. (Testimony). Appellant has been given multiple No Harm Agreements. (Ex. 4, p. 6).
19. Appellant is consistently not following facility protocol regarding contraband and becomes abusive when confronted and intimidates the staff. (Ex. 4, p. 6).
20. Lowell Transitional Living Center is accepting patients into their shelter if patient can manage their own medical equipment. Appellant can manage his own BiPAP machine. (Ex. 4, p. 5).
21. Appellant reported he does not need physical therapy (PT). (Ex. 4, p. 92).

Analysis and Conclusions of Law

456.701: 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 MassHealth 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 (4), 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 or PCP when a transfer or discharge is necessary under 130 CMR 456.701(A)(1) or (2); and
 - (2) a physician or PCP when the transfer or discharge is necessary under 130 CMR 456.701(A)(3) or (4).

The issue on appeal is whether the facility was correct in issuing the less than 30 days' notice of intent to discharge because the safety of individuals in the facility is endangered due to the clinical or behavior status of the resident and the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility.

Safety of the Individuals in the Facility:

Appellant admitted he knows the smoking policy of the facility. Appellant does not follow the facility smoking policy and there are multiple incidents in the record showing his disregard for smoking rules. (Ex. 4). The appellant's disregard for the facility's smoking policy is all the more dangerous due to the fact that it is a reasonable assumption that multiple residents in the facility would have mobility issues and a potential fire from unauthorized possession of smoking materials could be tragic. The appellant has shown no intention of following the facility's smoking policy. In one incident, when appellant was confronted by facility staff regarding his ignoring the smoking policy, he became belligerent and told staff to "fuck off". In one incident, he called a staff member a "faggot" and threatened the smoking attendant that he was going to follow him and slash his

tires. The record supports appellant is abusive when confronted about the smoking policy and intimidates the facility staff.

The appellant's nursing facility record supports that the health and safety of individuals in the nursing facility is endangered by the appellant's actions and thus the facility has met the requirements of 130 CMR 610.028(A) and 130 CMR 456.701 (A) and (B). This part of the appeal is denied.

Appellant's Health Has Improved Sufficiently So He No Longer Needs the Services Provided by the Facility:

While the record supports that appellant's health has improved enough that he can return to the community, appellant does not have his own primary care physician. The regulation is clear that the "the resident's clinical record must contain documentation to explain the transfer or discharge from the resident's physician or PCP when a transfer or discharge is necessary under 130 CMR 456.701(A)(1) or (2)." This requirement cannot be met as appellant does not have his own physician. This part of the appeal is APPROVED.

Consideration must also be given to whether the nursing facility has met the requirements of G.L. c. 111, § 70E, and 42 CFR 483.12(a)(7) in providing sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place. The Federal Centers for Medicare and Medicaid defines "sufficient preparation" within the meaning of 42 CFR 483.12(a)(7) to mean that the facility informs the resident where he or she is going and takes steps under its control to assure safe transportation; the facility should actively involve, to the extent possible, the resident and the resident's family in selecting the new residence. Centennial Healthcare Investment Corp. v. Commissioner of the Division of Medical Assistance, 61 Mass. App. Ct. 320, (2004).

The nursing facility has met its burden of providing sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place. The nursing facility intends to discharge the appellant to the Lowell Transitional Living Center. (Ex. 1). The facility contacted the Lowell Transitional Living Center to be sure the Center is accepting patients into their shelter. The facility was told that the patient needed to be able to manage their own medical equipment. The facility confirmed with appellant's floor nurse that appellant can manage his own BiPAP machine. (Ex. 4, p. 5).

I therefore determine that the place to which the nursing facility intends to discharge the appellant is safe and appropriate based on the appellant's facility record. The facility involved the appellant, to the extent possible, in discharge planning.

The nursing facility's notice of discharge dated February 22, 2024 meets the requirements of 130 CMR 456.071 (A) (B), 130 CMR 610.029, in part and MGL Chapter 111, section 70E. The

appeal is DENIED in part and APPROVED in part.

Order for Respondent

Proceed with the discharge as set forth in the notice dated February 22, 2022, following 30 days from the date 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 G.L. c. 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 you experience 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.

Thomas Doyle
Hearing Officer
Board of Hearings

CC:

[REDACTED]

Worcester Rehabilitation and Health Center, 119 Providence St, Worcester MA 01604