

Office of Medicaid

BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: Denied

Appeal Number: 2410712

Decision Date: 8/20/2024

Hearing Date: 07/30/2024

Hearing Officer: Emily Sabo

Appearance for Appellant:

Pro se

Appearances for Nursing Facility:

Norma Mullins, Administrator, Parsons Hill Rehab; Krystal Gagnon, Director of Social Services, Parsons Hill Rehab



*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 Facility Discharge— Endangering the Safety of Others
Decision Date:	8/20/2024	Hearing Date:	07/30/2024
Nursing Facility's Reps.:	Norma Mullins; Krystal Gagnon	Appellant's Rep.:	Pro se
Hearing Location:	Taunton MassHealth Enrollment Center (Telephone)	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

On June 24, 2024, the nursing facility issued a 30-day notice that the Appellant would be discharged to a homeless shelter because the safety of individuals in the facility would be endangered and the health of individuals in the nursing facility would be otherwise endangered due to the Appellant's behavior. *See* 130 CMR 610.028 and Exhibit 1. The Appellant filed this appeal in a timely manner on July 10, 2024. *See* 130 CMR 610.015(B) and Exhibit 1. Notice of transfer or discharge from a nursing facility is valid grounds for appeal. 130 CMR 610.032.

Action Taken by Nursing Facility

The nursing facility issued a 30-day notice of discharge to the appellant.

Issues

Whether the nursing facility sufficiently proved, pursuant to 130 CMR 610.028, that the Appellant's behavior endangers the safety or health of individuals in the facility, and whether the facility followed appropriate procedures in seeking to discharge the appellant.

Summary of Evidence

Documentary and Testimonial Evidence

The hearing was held by telephone. The nursing facility was represented by its administrator and its director of social services. Based on testimony and documentary evidence submitted into the record, the following information was provided:

The Appellant was admitted to the nursing facility from a hospital for short-term rehabilitation on [REDACTED] 2023. Exhibit 4 at 13. The Appellant presented at the hospital with knee pain and tested positive for Covid. Prior to his hospitalization, the Appellant was homeless. The Appellant is an adult in his early 50s with a medical history of substance use disorders. The records provided indicate that the Appellant has a substance use history of alcohol, heroin, fentanyl, oxycodone, crack, cocaine, hallucinogens, prescription pills, and marijuana. *Id.* at 21. The Appellant and the nursing facility agreed that the Appellant is independent for his activities of daily living.

The nursing facility representatives testified that the Appellant has been placed on six no-harm agreements in his time at the facility. The record indicates that these include:

- [REDACTED] 2023: Appellant found with cannabis vape
- [REDACTED] 2023: Appellant found with pint of alcohol
- [REDACTED] 2023: Appellant found with cannabis vape
- [REDACTED] 2023: Appellant found with nip of alcohol and vapes
- [REDACTED] 2024: Appellant found with two pints of alcohol

Id. The Appellant did not dispute these incidents.

The incident that led to the Appellant's sixth no-harm agreement occurred on [REDACTED] 2024. The nursing facility testified that the Appellant was found visibly intoxicated and unresponsive on the smoking patio, and he was transferred to the hospital. The nursing facility testified that the hospital's notes indicate that the Appellant had "pinpoint pupils," and that the Appellant's daughter picked the Appellant up and they left the emergency room before the Appellant was seen by a doctor. The Appellant testified that he was not intoxicated on [REDACTED] 2024, and that he had only taken his prescribed oxycodone. The Appellant testified that he did not sign the [REDACTED] 2024, no-harm agreement because he did not agree with it and contrasted that with his agreeing to sign the earlier no-harm agreements. *Id.* at 161. The agreement states that until [REDACTED] 2024, the Appellant will not have visitors or be able to take leaves of absence from the facility and will

not go in other resident's rooms or have other residents visit his room. *Id.* It states that the Appellant's room and items/deliveries will be searched as needed and that the Appellant will attend substance use disorder group counseling. *Id.*

The nursing facility reported that there was another incident, which occurred during the night of [REDACTED] 2024. The facility's security camera recorded an individual outside the facility, going to what was reported to be the Appellant's room and passing supplies through the window. The facility included security photos in the record, and a driver's license of a person who previously visited the Appellant and signed into the facility's guest log. The Appellant agreed that this person is his daughter's boyfriend but disagreed that he had passed the Appellant supplies through his room window.

The nursing facility also pointed to other incidents in which the Appellant swore at staff, smoked in his room in violation of facility policy, and stated that "rules were made to be broken." The nursing facility testified that the Appellant does not require skilled medical care and had remained at the facility due to his being on a waiting list for housing. On June 24, 2024, the facility issued the Appellant a 30-day discharge notice. The proposed discharge location is a shelter in the community. The record indicates that the facility set up appointments for the Appellant in the community with a primary care physician. *Id.* at 37-40. It also indicates that it gave the Appellant a housing application, but the Appellant declined to complete it. *Id.* at 38.

The Appellant testified that he is depressed because his long-term girlfriend died of heart disease and that he is trying to better himself. The Appellant testified that the facility has been treating him like a prisoner and that it is wrong that he could not go out or have visitors, and that it has been isolating. The Appellant testified that he feels he already knows he has issues with addiction and alcohol, and that group counseling does not help him. He testified that he is well liked by the staff and other patients.

Content of the Discharge Notice and Clinical Record

The discharge notice at issue in this matter contains the action to be taken by the nursing facility, a specific statement of the reasons for the intended discharge, the location to which the Appellant is to be discharged, the effective date of the intended discharge, the right of the Appellant to request a fair hearing on the intended discharge, the address, telephone number and fax number of the Board of Hearings, the time frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (that the facility cannot discharge the Appellant until 30 days after the hearing officer's decision is received), the name of the person at the facility who can answer any questions about the discharge notice and about the right to file an appeal, the name and address of the local legal-services office, the name and address of the local long-term care ombudsman program, and the mailing addresses and telephone numbers of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals. Exhibits 1 & 2.

Exhibit 4 contains the Appellant's medical record from the facility. The facility's physician stated that the Appellant was medically cleared to be released, and that the Appellant is endangering the health and safety of the other patients at the facility. Exhibit 4 at 48-51.

Findings of Fact

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

1. The Appellant is an adult in his early 50s. Exhibit 4.
2. The Appellant is independent for his activities of daily living. Testimony, Exhibit 4.
3. The Appellant was admitted to the nursing facility from a hospital for short-term rehabilitation on [REDACTED] 2023. Testimony, Exhibit 4.
4. The Appellant has a prior history of substance use disorders. Testimony, Exhibit 4.
5. Between November 8, 2023, and January 26, 2024, the Appellant was placed on five no-harm agreements related to his having marijuana vapes and alcohol at the facility. Testimony, Exhibit 4.
6. On [REDACTED] 2024, facility staff found the Appellant unresponsive on the smoking patio and the Appellant appeared to be intoxicated. The Appellant was transferred to the hospital. Testimony, Exhibit 4.
7. During the evening of [REDACTED] 2024, the facility's security camera recorded the Appellant's daughter's boyfriend outside the facility passing supplies through the Appellant's window. Testimony, Exhibit 4.
8. The facility's physician stated that the Appellant was medically cleared to be released and that the Appellant is endangering the health and safety of the other patients at the facility. Testimony, Exhibit 4.
9. On June 24, 2024, the facility issued the Appellant a 30-day discharge notice. Exhibit 1.
10. The facility set up set up appointments for the Appellant in the community with a primary care physician and gave the Appellant housing applications. Exhibit 4.
11. The discharge notice contains the action to be taken by the nursing facility, a specific statement of the reasons for the intended discharge, the location to which the Appellant is to be discharged, the effective date of the intended discharge, the right of the Appellant to

request a fair hearing on the intended discharge, the address, telephone number and fax number of the Board of Hearings, the time frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (that the facility cannot discharge the Appellant until 30 days after the hearing officer's decision is received), the name of the person at the facility who can answer any questions about the discharge notice and about the right to file an appeal, the name and address of the local legal-services office, the name and address of the local long-term care ombudsman program, and the mailing addresses and telephone numbers of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals. Exhibits 1 & 2.

12. The facility's physician documented in the medical record that the Appellant was medically cleared to be released, and that the Appellant is endangering the health and safety of the other patients at the facility. Exhibit 4 at 48-51.

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.

Per 130 CMR 456.701(B) and 130 CMR 610.028(B),

(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).

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).

Massachusetts General Laws c. 111, §70E states, in relevant part:

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.

MGL c. 111, §70E.

Federal regulations provide for “**Orientation for transfer or discharge**. A facility must 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). Federal regulations also provide that when

the facility anticipates discharge a resident must have a discharge summary that includes but is not limited to . . . A post-discharge plan of care that is developed with the participation of the resident and, with the resident’s consent, the resident representative(s), which will assist the resident to adjust to his or her new living environment. The post-discharge plan of care must indicate where the individual plans to reside, any arrangements that have been made for the resident’s follow up care and any post-discharge medical and non-medical services.

42 CFR 483.21(c)(2)(iv).

Here, the facility has alleged that the Appellant has endangered the safety of individuals in the nursing facility, and that the health of individuals in the nursing facility would be endangered should he continue to live there. Exhibit 1. The facility’s physician stated his discharge is necessary. 130 CMR 456.701(B)(2); 130 CMR 610.028(B)(2). The record supports this, with documented evidence that the Appellant has failed to follow the facility’s smoking and substance abuse policies, which could put the health and safety of the other patients at risk. I find that the facility has

provided sufficient orientation and preparation to ensure a safe and orderly discharge, by setting up appointments with a primary care physician and trying to connect the Appellant with available housing resources. I also find that the discharge notice satisfied the regulatory requirements. 130 CMR 456.701(C) and 130 CMR 610.028(C).

Therefore, the appeal is denied.

Order for Respondent Nursing Facility

Proceed with the discharge as set forth in the notice dated June 24, 2024, after the 30-day stay (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 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 decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. 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.

Emily T. Sabo, Esq.
Hearing Officer
Board of Hearings

CC: [REDACTED]