

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

[REDACTED]

Appeal Decision: APPROVED

Appeal Number: 2501254

Decision Date: 2/3/2025

Hearing Date: 01/24/2025

Hearing Officer: Kenneth Brodzinski

Appearance for Appellant:

Pro se

Appearance for Skilled Nursing Facility:

[REDACTED]

*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:	Expedited Nursing Home Discharge
Decision Date:	2/3/2025	Hearing Date:	01/24/2025
SNF's Rep.:	██████████	Appellant's Rep.:	Pro se
Hearing Location:	Charlestown MEC		

Authority

This hearing was conducted pursuant to federal law and regulations at 42 U.S.C. §1396r and 42 CFR 483.10-483.206 and Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

The nursing facility issued a notice dated January 17, 2025, of its intent to discharge Appellant with less than 30-days' notice on the grounds that Appellant's health has improved so that she no longer requires the services provided by the facility and that Appellant's behavior is endangering individuals in the facility (Exhibit A). Appellant filed for this appeal in a timely manner on January 21, 2025 (see 130 CMR 610.015(B)(5) and Exhibit A). Expedited discharge of a nursing-facility patient constitutes valid grounds for appeal (see 130 CMR 610.029(B); 42 CFR Ch. IV, 483.200 et seq.).

Since the request for the hearing was received by the Board of Hearings during the notice period described in 130 CMR 610.015(B)(5), the nursing facility must stay the planned discharge or transfer until 5 days after this decision is rendered. While the stay is in effect, the resident shall not be transferred or discharged from the nursing facility (see 130 CMR 610. 030(B)).

Action Taken by the Nursing Facility

The nursing facility issued notice dated January 17, 2025 of its intent to discharge Appellant with less than 30-days' notice.

Issue

Whether or not the nursing facility can proceed to discharge Appellant under notice date January 17, 2025.

Summary of Evidence

The parties appeared by telephone. Prior to hearing, the facility filed a packet of documentation including copies of the full discharge notice and Appellant's clinical record (collectively, Exhibit B).

The nursing facility representatives testified that the facility issued a notice of intent to discharge Appellant was less than 30-days' notice on [REDACTED] (Exhibit A). The notice was served upon Appellant and informs her that the facility intends to discharge her to [REDACTED]. The grounds for the discharge, as stated in the notice, are: *"The resident's health has improved sufficiently so that the resident no longer requires the services provided by the facility"* and *"The safety of the individuals in the facility is endangered due to the clinical or behavioral status of the resident with multiple substance related incidents"*.

The facility representatives testified that Appellant was admitted to their facility on [REDACTED] with an infection of a surgical site on Appellant's ankle. Appellant was treated with antibiotics which ended on October 22, 2024 once the infection was cleared. Appellant was receiving physical therapy which was discontinued once the ankle became weightbearing. According to the facility representatives, Appellant's physician has signed off on the discharge (Exhibit B, page 1) and discharge planning is in place (Exhibit B, pages 18-19).

The facility representatives further testified that Appellant violated the facility's "No Harm Agreement" on three separate occasions by [REDACTED]. Upon questioning by the hearing officer, the facility representatives stated that the three violations are documented at pages 18, 25 and 52 of their submission (Exhibit B) and pertain to dates: [REDACTED] respectively.

The hearing officer initiated a discussion with the facility representatives about the physical clarity of the notice. The hearing officer highlighted regulations concerning notice requirements noting the specificity that is encompassed in those regulations, including but not limited to the minimum font size that must be used in the notice. The hearing officer expressed concerns about the fax copy of the Discharge notice in his possession noting that the font appeared too small and that several pages were illegible. In response, the facility representatives asserted that the notice is drafted in Times New Roman in 12 point (the minimum is 12 point) and that their copy is fully legible. The facility representatives stated that

they would email a clear copy to the hearing officer after the hearing, which they did (Exhibit C).

Appellant appeared on her own behalf and admitted she did [REDACTED] but denied doing it three times. She stated that the facility merely found a [REDACTED] on the other two occasions. Appellant testified that [REDACTED] is “all over the place” and many residents are using it.

Appellant also testified that she had surgery on her ankle in February. She acknowledged receiving physical therapy while at the facility but denied that the ankle was now fully weightbearing. She also testified that the physical therapy only ended the day prior to the hearing. Appellant testified that she just wants to remain in the facility long enough to complete physical therapy so her ankle can be fully weightbearing when she is discharged. Appellant is worried about going to a shelter with her ankle not being completely healed and having it be exposed to the winter elements.

Findings of Fact

By a preponderance of the evidence, this record supports the following findings:

1. Appellant resides in a skilled nursing facility.
2. The facility served Appellant with a notice of intent to discharge Appellant with less than 30-days’ notice on [REDACTED] (Exhibit A).
3. The notice was served upon Appellant and informs her that the facility intends to discharge her to [REDACTED]
4. The grounds for the discharge, as stated in the notice, are: *“The resident’s health has improved sufficiently so that the resident no longer requires the services provided by the facility”* and *“The safety of the individuals in the facility is endangered due to the clinical or behavioral status of the resident with multiple substance related incidents”*.
5. Appellant was admitted to their facility on [REDACTED] with an infection of a surgical site on her ankle.
6. Appellant was treated with antibiotics which ended on October 22, 2024 once the infection was cleared.

7. Appellant was receiving physical therapy which was discontinued once the ankle became weightbearing.
8. Appellant's physician has signed off on the discharge (Exhibit B, page 1).
9. Appellant violated the facility's "No Harm Agreement" on three separate occasions by being found in possession of a [REDACTED] on two occasions and a nicotine vape pen on one occasion (Exhibit B, pages 18, 25 and 52).
10. Appellant admitted that she did [REDACTED] once at the facility.

Analysis and Conclusions of Law

The issue on appeal is limited to whether the nursing facility is acting in compliance with federal and state law governing the discharge of nursing facility residents in its attempt to discharge Appellant.

Massachusetts's regulations at 130 CMR 610.028, which embody federal regulations at 42 CFR Ch. IV §483.12, require the following:

Notice Requirements Regarding Actions 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 610.028(A)(1) through (5), the resident's clinical record must be documented. The documentation must be made by:

(1) the resident's physician when a transfer or discharge is necessary under 130 CMR 610.028(A)(1) or (2); and

(2) a physician when the transfer or discharge is necessary under 130 CMR 10.028(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 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 610.029: Time Frames for Notices Issued by Nursing Facilities

(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).

*(B) In lieu of the 30-day-notice requirement set forth in 130 CMR 610.029(A), the notice of discharge or transfer required under 130 CMR 610.028 must be made as soon as practicable before the discharge or transfer in any of the following circumstances, which are considered to be emergency discharges or **emergency transfers**.*

(1) The health or safety of individuals in the nursing facility would be endangered and this is documented in the resident's record by a physician.

(2) The resident's health improves sufficiently to allow a more immediate transfer or discharge and the resident's attending physician documents this in the resident's record.

(3) An immediate transfer or discharge is required by the resident's urgent medical needs and this is documented in the medical record by the resident's attending physician.

(4) The resident has not lived in the nursing facility for 30 days immediately before receipt of the notice.

The facility has stated two proper grounds for the expedited discharge but has only substantiated one. The record supports a finding that Appellant's health has improved sufficiently and no longer requires the services of the facility. This was substantiated by the physician's letter (Exhibit B, page1).

The record does not support a finding that the safety of individuals in the nursing facility is endangered. Documentation shows that facility staff found a [REDACTED] in Appellant's room on two occasions, not three. The third occasion involved Appellant being in possession of a nicotine vape pen. Using a vape pen is not going to cause a fire. Using a lit [REDACTED] can. But

merely finding a [REDACTED] in a room is not the same as finding that a resident has been smoking inside the facility. Documentation did not indicate that Appellant was found smoking in her room or elsewhere inside the facility. Nor did documentation provide information about a reasonable belief that Appellant had been smoking inside her room, such as staff reporting that they smelled smoke upon entering her room. While Appellant admitted to [REDACTED] on one occasion, it was not clear whether she was inside or outside of the facility. Smoking [REDACTED] is certainly illegal, but the issue here is whether Appellant's behavior is endangering other residents. This record does not support such a finding because it fails to establish that Appellant was smoking inside the facility.

A review of the subject notice reveals that it complies with all of the requirements of 130 CMR 610.028(A)-(C) except one. While the facility's post-hearing submission did confirm that the notice met the minimum font size and did reveal a far more legible copy than that which was faxed to the Board, one entire page of the notice still remained almost completely illegible (Exhibit C, page 4). As explained to the facility during the hearing, state and federal regulations governing notice requirements are very detailed and specific. Notice recipients are often in a reduced and even frail physical and/or mental state. The notices, therefore, must be clear, direct and contain all the information required by law and in the form required by law. No part of an intent to discharge notice that a facility serves on a resident can be physically unclear or illegible. For this limited, but important, reason the notice of [REDACTED] fails.

In addition to the regulations discussed above, the nursing facility has an obligation to comply with M.G.L. c.111, §70E. The key paragraph of this statute, which is directly relevant to discharge appeals, reads 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.

At hearing, the facility was questioned whether a discharge plan was in place. In response, the facility said it was and cited pages 18 and 19 of their submission (Exhibit B). These pages, however, do not provide the hearing officer (referee) with sufficient information to conclude "*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.*" At page 19 of Exhibit B, a note states that staff met with Appellant to discuss discharge planning. The note indicates that referrals have been made to several unspecified treatment programs and the "plan" is for Appellant to go to the shelter if she cannot get into any of the programs. The note concludes with the statement: "*Social services will follow, monitor for changes/concerns, assist with discharge planning*". This information is simply too scant and void of detail and specifics for a hearing officer to reasonably conclude that the requirements of the above-cited statute have been

met.

For the foregoing reasons, the appeal is APPROVED.

Order for the Nursing Facility

The facility may not proceed with discharge under notice of January 17, 2024.

The facility is free to issue a new notice as soon as it believes it can be in full compliance with all federal and state requirements regarding notice and discharge.

Implementation of this Decision

If Appellant experiences problems with the implementation of this decision, she should report this in writing to the Director of the Board of Hearings at the address on the first page of this decision.

Kenneth Brodzinski
Hearing Officer
Board of Hearings

cc:

[REDACTED]