

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**

<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	1800679
<b>Decision Date:</b>	3/6/18	<b>Hearing Date:</b>	01/29/2018
<b>Hearing Officer:</b>	Patricia Mullen	<b>Record Open to:</b>	01/30/2018

**Appellant Representatives:**

**Nursing Representatives:**

Joanna Lovely, Administrator; Shannon O'Neill, Social Worker



*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

<b>Appeal Decision:</b>	Denied	<b>Issue:</b>	Nursing facility discharge
<b>Decision Date:</b>	3/6/18	<b>Hearing Date:</b>	01/29/2018
<b>Nursing Facility Reps.:</b>		<b>Appellant Reps.:</b>	
<b>Hearing Location:</b>	Taunton MassHealth Enrollment Center		

## 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 December 11, 2017, the nursing facility informed the appellant of its intent to discharge him from the facility to his guardian's residence on January 10, 2018. (Exhibit 1; 130 CMR 610.028). The appellant filed this appeal in a timely manner on January 5, 2018. (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 Nursing Facility

The nursing facility informed the appellant of its intent to discharge him from the facility to his guardian's residence.

## Issue

The appeal issue is whether the facility satisfied its statutory and regulatory requirements pursuant to 130 CMR 610.028 when it issued the appellant the notice of intent to discharge.



## Summary of Evidence

The appellant was represented at the hearing by his guardian and a friend. The nursing facility was represented telephonically by its administrator and Social Worker. By notice dated December 11, 2017, the nursing facility informed the appellant that it intended to discharge him to his guardian's address on January 10, 2018 because the safety of individuals in the facility is endangered due to the clinical and behavioral status of the appellant, including destruction of property and use of illicit drugs requiring police intervention. (Exhibit 1). The nursing facility representative testified that the appellant is 69 years old and has a diagnosis of polysubstance abuse. The appellant was admitted to the nursing facility on March 27, 2017 from Cape Cod Hospital and was homeless prior to his hospitalization. (Testimony, exhibit 5, p. 58). The nursing facility representative stated that the appellant was having balance issue due to his alcohol abuse and received physical therapy services at the facility. The nursing facility representative stated that the appellant is receiving no skilled care at this time and is independent with his activities of daily living (ADLs). The nursing facility representative stated that the appellant was approved for MassHealth based on short term care screenings for 3-6 month periods.

The nursing facility representative stated that the appellant is an independent smoker but does not follow the nursing facility guidelines with regard to supervised smoking in designated areas. Residents are not allowed to have lighters, matches, or smoking materials in their room especially due to the danger it presents with so many residents on oxygen. (Testimony). The nursing facility representative testified that on December 22, 2017, the appellant was found asleep in his room with a lit cigarette and he struck a nurse who approached him which lead to police involvement. The nursing facility representative noted further that the screen in the appellant's room was cut open and on various occasions, nurses could smell marijuana in his room. The nursing facility representative stated that the appellant refused all substance abuse services offered to him and told the facility that he would not stop drinking and reported that he would continue to smoke marijuana because he did not have a problem with it. (Exhibit 8). The nursing facility representative stated that on March 30, 2017, August 29, 2017, October 10, 2018 and December 24, 2017, the appellant was offered education and support services such as an addiction counselor, alcoholics anonymous, and therapy, but all were refused. The nursing facility representative stated that after numerous occasions where the appellant did not follow the facility's smoking policy, after finding marijuana in the appellant's room and evidence that he was smoking marijuana in his room, and after the destruction to property in the room, the facility issued the notice of discharge.

Based on nursing progress notes, on August 29, 2017, it was reported that the appellant was giving out cigarettes to residents despite several educational discussions; on September 14, 2017 it was reported that the appellant continued to give out cigarettes and was non-compliant with the facility's smoking policy; on October 12, 2107, it was reported that the appellant seemed to be under the influence and he admitted he had a beer with his niece that morning; a plan of care meeting between the appellant and his guardian and the nursing facility was scheduled for October 18, 2017 to discuss the appellant's discharge preferences; on November 5, 2017, the appellant returned to the facility after being out and smelled of alcohol, he noted he had 2 beers, the nurses



held his medications; on December 3, 2017, a nurse smelled marijuana in the appellant's room and found marijuana and rolling papers in the room; on that same date, the appellant was found with another resident's missing shoes; on December 8, 2017, the appellant was found in his room with what appeared to be marijuana; on that same date, the cut screen was discovered and local police became involved. (Exhibit 5, pp. 8-10). After the notice of discharge issued, the nursing progress notes report that the appellant was found asleep with a cigarette on the floor and the room smelling of smoke on December 22, 2017 at which time the appellant also assaulted a nurse; also on December 22, 2017, the appellant's room was searched and an ash tray, two lighters, and cigarette butts were found; on January 8, 2018, two broken cigarettes were found in the appellant's room. (Exhibit 5, pp. 5-8). Based on social services notes in the record, the appellant was educated about the smoking policy which he was not following on July 20, 2017; on December 14, 2017 and December 28, 2017, the appellant indicated that he would not stop drinking or using marijuana; discharge planning began with the appellant's guardian on December 11, 2017; on December 29, 2017 and again on January 2, 2018 the appellant's guardian was given a list of local nursing facilities and the offer to fax any needed documentation to such facilities; the appellant's guardian indicated that the appellant might go to live with one of his sisters out of state. (Exhibit 5, pp. 61-66).

The nursing facility representative stated that the facility has engaged in discharge planning with the appellant's guardian. The nursing facility has given the guardian resources to explore other facilities. (Testimony). The nursing facility representative stated that the appellant is medically cleared to live in the community. The nursing facility administrator noted that the guardian has been given the names of local nursing facilities, rest homes, and shelters and what processes are involved for the appellant's discharge to one of these residences. The nursing facility administrator noted that the appellant has been involved with local shelters before. The nursing facility representative advised the appellant's guardian to look into senior housing and the Housing Assistance Cooperative. The nursing facility representative noted that the appellant's guardian has not provided the facility with a list of places she'd like to explore. The nursing facility administrator testified that the nursing facility is not the best setting for the appellant and the facility has to protect the remaining population which the appellant is endangering with his drug use and smoking.

The appellant's guardian testified that the appellant is estranged from his wife and daughters and when he went into the hospital an attorney contacted her about being his guardian. The appellant's guardian stated that one of the appellant's daughters is somewhat helpful but isn't taking any action. The appellant's guardian contacted the ombudsman and legal services, but they did not help her. (Testimony). The guardian stated that she has called many skilled nursing facilities and was told they do not have available beds. The appellant's guardian believes the appellant will die in a shelter because he needs care and medications. The appellant's guardian stated that when she told the appellant about the discharge he said that he didn't think the nursing facility would go that far. The appellant's guardian stated that the appellant was homeless prior to his nursing facility admission. He would live off and on with friends in their apartments. (Testimony). The appellant's guardian noted that the appellant wants to remain living on the Cape.

The record was left open for one day to give the nursing facility the opportunity to submit physician documentation regarding discharge, the appellant's medication list, the SOCRATES document with regard to alcohol use, and any long term care information. (Exhibit 7). Within the record open period, the nursing facility submitted the notice of approval for MassHealth Standard for nursing facility residents dated July 27, 2017, a list of the appellant's medications which include Trazodone, oxycodone, vitamins and folic acid, melatonin, lactulose, Salopas, gabapentin, olanzapine, and Tramadol, and the SOCRATES document. (Exhibit 8). On the SOCRATES document, the appellant noted that he does not want to make changes in his drinking and does not believe drinking will make his problems worse; he also noted that he has a long history of alcohol and drug abuse but now he only has one drink when he goes out with his guardian and no longer has a problem; he noted that he wants to smoke marijuana and has no problem with it. (Exhibit 8). The nursing facility also submitted a letter from Dr. Paul Cochrane. (Exhibit 9). Dr. Cochrane wrote that he is the attending physician for the appellant and the appellant is medically cleared for discharge as he does not require long term nursing home level of care. (Exhibit 9). Dr. Cochrane wrote further that the appellant's prescription for oxycodone was discontinued. (Exhibit 9).

## Findings of Fact

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

1. The appellant is 69 years old and has a diagnosis of polysubstance abuse; he was admitted to the nursing facility on March 27, 2017 from Cape Cod Hospital and was homeless prior to his hospitalization.
2. At the time of admission, the appellant was having balance issue due to his alcohol abuse and received physical therapy services at the facility; the appellant is receiving no skilled care at this time and is independent with his ADLs; he is able to leave the facility to smoke independently and leaves with his guardian and friends for day outings.
3. The nursing facility representative stated that the appellant was approved for MassHealth based on short term care screenings for 3-6 month periods.
4. The appellant does not follow the nursing facility guidelines with regard to supervised smoking in designated areas.
5. Residents of the facility are not allowed to have lighters, matches, or smoking materials in their room.
6. The appellant has had cigarettes, marijuana, and lighters in his room and has smoked in his room.
7. On December 22, 2017, the appellant was found asleep in his room with a lit cigarette and he struck a nurse who approached him which led to police involvement.



8. The appellant cut a screen in the window in his nursing facility room.
9. On December 3, 2017, a nurse found marijuana in the appellant's room; the same happened on December 8, 2017.
10. The appellant refused all substance abuse services offered to him and told the facility that he would not stop drinking and reported that he would continue to smoke marijuana because he did not have a problem with it.
11. On March 30, 2017, August 29, 2017, October 10, 2018 and December 24, 2017, the appellant was offered education and support services such as an addiction counselor, alcoholics anonymous, and therapy; he refused all.
12. On August 29, 2017, a nurse reported that the appellant was giving out cigarettes to residents despite several educational discussions.
13. On September 14, 2017 a nurse reported that the appellant continued to give out cigarettes and was non-compliant with the facility's smoking policy.
14. On October 12, 2017, a nurse reported that the appellant seemed to be under the influence and he admitted he had a beer with his niece that morning.
15. A plan of care meeting between the appellant and his guardian and the nursing facility was scheduled for October 18, 2017 to discuss the appellant's discharge preferences.
16. On November 5, 2017, the appellant returned to the facility after being out and smelled of alcohol, he noted he had 2 beers; the nurses held his medications.
17. On December 3, 2017, a nurse smelled marijuana in the appellant's room and found marijuana and rolling papers; on that same date, the appellant was found with another resident's missing shoes.
18. On December 8, 2017, the appellant was found in his room with what appeared to be marijuana; on that same date, the cut screen was discovered and local police became involved.
19. On December 22, 2017, an ash tray, two lighters, and cigarette butts were found in the appellant's room.
20. On January 8, 2018, two broken cigarettes were found in the appellant's room.
21. The appellant was educated about the smoking policy which he was not following on July 20, 2017; on December 14, 2017 and December 28, 2017, the appellant indicated that he would

not stop drinking or using marijuana.

22. Discharge planning began with the appellant's guardian on December 11, 2017.
23. On December 29, 2017 and again on January 2, 2018 the appellant's guardian was given a list of local nursing facilities and the offer to fax any needed documentation to such facilities; the appellant's guardian indicated that the appellant might go to live with one of his sisters out of state.
24. The nursing facility has given the appellant's guardian resources to explore other facilities including a list of local nursing facilities, rest homes, and shelters and what processes are involved for the appellant's discharge to one of these residences; the nursing facility also advised the appellant's guardian to look into senior housing and the Housing Assistance Cooperative.
25. The appellant is approved for MassHealth Standard for nursing facility residents.
26. Dr. Cochrane, the appellant's attending physician, noted that the appellant is medically cleared for discharge as he does not require long term nursing home level of care; the appellant's prescription for oxycodone has been discontinued.

## **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 many 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) a stay at the nursing facility; or
- (6) the nursing facility ceases to operate.



130 CMR 610.028(A); 456.701(A).

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 610.028(A)(4).

130 CMR 610.028(B).

Prior to discharge or transfer, 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 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).

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.” Federal regulations require that a nursing facility provide sufficient preparation for a safe and orderly discharge. See 42 CFR 483.12(a)(7). Per Interpretive Guidelines §483.12(a)(7) in the Manual, “[s]ufficient preparation’ means 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.”

The nursing facility intends to discharge the appellant because it claims the safety of individuals in the nursing facility is endangered by his actions. The nursing facility has provided support for this claim in the hearing record. The appellant does not follow the nursing facility guidelines with regard to supervised smoking in designated areas. The appellant has had cigarettes, marijuana, and lighters in his room and has smoked in his room. The appellant was found asleep in his room with a lit cigarette and he struck a nurse who approached him which led to police involvement. The appellant’s disregard for the facility’s smoking policy is all the more dangerous due to the fact that multiple residents in the facility are on oxygen and smoking materials create a fire hazard. The fact that the appellant struck a nurse, destroyed property in his room, gave out cigarettes to residents, has been intoxicated in the facility, and stole another resident’s shoes also indicates that he is a danger to other residents. The appellant refused all substance abuse services offered to him and told the facility that he would not stop drinking and would continue to smoke marijuana. He showed no intention of following the facility’s smoking policy. The appellant’s nursing facility record supports that the safety of individuals in the nursing facility is endangered by his actions and thus the nursing facility has met the requirements of 130 CMR 610.028(A).

Furthermore, 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. Records and testimony presented show that the nursing facility staff has worked with the appellant’s guardian to ensure a safe and orderly discharge. While the appellant may object to the location of discharge, his representative failed to present evidence on how this would impact the appellant’s care.

After many attempts to work with the guardian to find suitable placement for the appellant, the facility informed the appellant that he would be discharged to his guardian’s residence, or, as noted at the hearing, to a shelter. I determine that the place to which the nursing facility intends to discharge the appellant is safe and appropriate based on the appellant’s nursing facility record. The appellant is receiving no skilled services at this time and is custodial care only. The

appellant's attending physician noted that the appellant is medically cleared for discharge and does not require long term nursing home level of care. The nursing facility involved the appellant and his guardian, to the extent possible, in discharge planning and the fact that the appellant hasn't found a place he wants to live does not negate this fact and is out of the control of the nursing facility. The nursing facility's notice of discharge dated December 11, 2017 meets the requirements of 130 CMR 610.028 and MGL Chapter 111, section 70E. The appeal is denied.

## **Order for the Nursing Facility**

Proceed with the discharge as set forth in the notice dated December 11, 2017 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 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.

---

Patricia Mullen  
Hearing Officer  
Board of Hearings

cc: