

**Office of Medicaid
BOARD OF HEARINGS**

Appeal Decision: Approved

Appeal Number: 1818021

Decision Date: 9/28/18

Hearing Date: 09/24/2018

Hearing Officer: Marc Tonaszuck

Appearance for Appellant:

Appearance for Skilled Nursing Facility:



*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:	Nursing Home Discharge/Transfer
Decision Date:	9/28/18	Hearing Date:	09/24/2018
Nursing Facility's Reps.:		Appellant's Rep.:	
Hearing Location:	Springfield 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

By a notice dated 08/31/2018, Governor's Center ("facility") informed the appellant of its intent to transfer him from the facility (130 CMR 610.028; Exhibit 1). The appellant filed a timely appeal on 09/10/2018 (130 CMR 610.615; Exhibit 2). Notification of intent to transfer an individual from a nursing facility is a valid basis for appeal (130 CMR 610.032).

Action Taken by the Nursing Facility

The facility informed the appellant of its intention to transfer him from the facility.

Issue

The appeal issue is whether the facility has satisfied the requirements of regulation 130 CMR 610.028 and other regulations and Massachusetts statutes when it issued the appellant notice of intent to transfer.

Summary of Evidence

The facility, a skilled nursing facility, licensed in Massachusetts, was represented by its administrator and the director of nursing. The facility submitted one page of progress notes documented by the social worker from the dates 08/23/2018 to 09/05/2018 (Exhibit 4). The appellant is 68 years of age and was admitted to the facility on or about 12/28/2017 from an acute hospital setting. Prior to that, he lived in the community. He was admitted to the facility on after being discharged from Baystate Medical Center. The facility seeks to discharge the appellant because his presence in the facility endangers the safety of individuals in the nursing facility. Specifically, the facility representative stated that the appellant sent a nude photograph of himself to a 21 year old relative of his electronically through a social media account.

According to the facility representatives, the police were called, and they confiscated the appellant's telephone and began an investigation. The family member did not pursue charges and the matter concluded without criminal charges. The appellant's telephone was returned to him. The director of nursing asserted that she feared the appellant would approach others in the facility, including other residents who may have minor children visiting, with inappropriate photographs. She argued that the appellant's inappropriate behavior was a danger to the safety of others in the facility. She also cited to the appellant's clinical record and stated that the appellant has a "pattern" of suicidal attention-getting behavior, which has resulted in him being sent to the hospital three times.

The appellant admitted that he sent the photograph accidentally to his niece; he stated he meant to send it to an ex-wife. He apologized and stated that it would not happen again. The appellant argued that this behavior did not affect the other residents or staff of the facility. He also said he was depressed and "stressed." The appellant concluded that he runs a canteen (snack bar) at the Forum house five days a week.

Findings of Fact

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

1. Governor's Center ("facility") is a skilled nursing facility, licensed in Massachusetts (Testimony).
2. The appellant is 68 years of age who suffers from depression.
3. The appellant was admitted to the facility in December 2017 after discharge from a hospital. Prior his hospitalization, the appellant lived in the community (Testimony).
4. On 08/31/2018, the facility issued to the appellant a 30-Day Notice of Intent to Transfer Notice. The notice states that the facility seeks to discharge the appellant

on 09/30/2018 because the safety of the individuals in the nursing facility is endangered (Testimony; Exhibit 1).

5. The appellant filed the timely request for a fair hearing on 09/10/2018 (Exhibits 2 and 4).
6. The appellant electronically sent a nude picture of himself to a 21-year old family member (Testimony).
7. The appellant did not intend to send the picture to his family member, rather to an ex-wife (Testimony; Exhibit 9).
8. The appellant apologized for the behavior and stated he would not do it again (Testimony).
9. The facility seeks to discharge the appellant to the Samaritan Inn, 7 Free Street, Westfield, MA (Testimony; Exhibit 1).

Analysis and Conclusions of Law

Regulation 130 CMR 610.028(A) states 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 MassHealth Agency or Medicare) pay for a stay at the nursing facility; or
- (6) the nursing facility ceases to operate.

Regulation 130 CMR 610.028(B) states 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) a physician when the transfer or discharge is necessary under 130 CMR

610.028(A)(4).

(Emphasis added.)

Regulation 130 CMR 610.028(C) states 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 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.

An amendment to G.L. c. 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.” In addition, federal regulations require that a nursing facility provide sufficient preparation for a safe and orderly discharge (See 42 CFR 483.12(a)(7)).

I conclude that the facility's notice meets the above requirements; however the reason for the planned discharge is not supported by the documentation or the testimonial evidence. The facility stated that it planned to transfer¹ the resident to a homeless shelter because "the safety of individuals in the nursing facility is endangered." In support of the discharge, the facility stated that the appellant electronically sent a nude picture of himself to another adult. The appellant acknowledged his behavior, said it would not happen again, and stated it would not happen again.

The facility has not demonstrated that the appellant's behavior, which was not criminally prosecuted, endangers the other nursing home residents, visitors or staff. There is no evidence that pornographic images were being viewed in public or shown to anybody in the nursing facility. Therefore, the record does not show the nexus between the appellant's conduct and the safety of others in the facility. Additionally, the documentation provided by the facility does not support the reason for the discharge. The clinical record submitted by the facility shows social worker notes that address the appellant's suicidal statements and the corresponding care he received at the hospital. There is nothing in the notes that directly addresses the appellant's conduct which forms the basis of the facility's planned discharge.

Furthermore, at hearing, the facility did not address the discharge plan to the shelter that is listed on the 30-Day Notice. Nor did the facility representatives provide information about how the appellant, someone who was presumably screened to be clinically eligible for nursing home level of care, could be cared for in the community setting. For all of the above reasons, the appellant has met his burden of proof to show by a preponderance of the evidence that the planned discharge is not supported by the material facts in the record or the regulations. This appeal is approved.

Order for the Nursing Facility

Rescind Notice of Intent to Transfer dated 08/31/2018.

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.

¹ The facility's notice is entitled "30-Day Notice of Intent to Transfer Resident"; however, based on the definition of terms in the regulations and the information provided at the fair hearing it is clear that the facility seeks to *discharge* the resident, not transfer him (see 130 CMR 610.004, which 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.")

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.

Marc Tonaszuck
Hearing Officer
Board of Hearings