

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**

|                         |                      |                       |            |
|-------------------------|----------------------|-----------------------|------------|
| <b>Appeal Decision:</b> | APPROVED             | <b>Appeal Number:</b> | 1402367    |
| <b>Decision Date:</b>   | 5/30/14              | <b>Hearing Date:</b>  | 03/21/2014 |
| <b>Hearing Officer:</b> | Christopher S. Taffe | <b>Record Closed:</b> | 04/21/2014 |

**Appearances for Appellant:**

**Nursing Facility Representatives:**  
Deborah Putman, Administrator &  
Mary Ann Bettencourt, Director of Social  
Services (both in person)



*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>   | APPROVED                             | <b>Issue:</b>          | Nursing Facility Discharge |
| <b>Decision Date:</b>     | 5/30/14                              | <b>Hearing Date:</b>   | 03/21/2014                 |
| <b>N. Facility Reps.:</b> | D. Putnam & M. Bettencourt           | <b>Appellant Rep.:</b> | Sister                     |
| <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 “30-Day Notice of Intent to Discharge Resident” dated February 21, 2014, the skilled nursing facility, Blackstone Home (“Blackstone”) informed Appellant of the facility’s intent to discharge to her sister’s residential address on March 24, 2014 because “*You do not meet clinical eligibility criteria set forth by MassHealth to approve payment for skilled nursing facility services.*” See 130 CMR 610.028; 130 CMR 456.701; and Exhibit 1. An appeal was timely filed on Appellant’s behalf with the Board of Hearings on February 24, 2014. See 130 CMR 610.015(B); 130 CMR 456.703; and Exhibit 1. Challenging a notice of transfer or discharge initiated by a nursing facility is a valid ground for an appeal to the Board of Hearings. See 130 CMR 610.032(C).

## Action Taken by Nursing Facility

The nursing facility notified Appellant that it sought to discharge her to her sister’s residence.

## Issue

The appeal issues are whether, pursuant to the governing state and federal regulations including but not limited to 130 CMR 610.028 and 130 CMR 456.701, there is sufficient evidence in the record to conclude the following: (1) that there are permissible reasons to support the facility's discharge action; (2) that the nursing facility has given Appellant reasonable and appropriate notice of this failure, and (3) that the nursing facility can appropriately discharge Appellant to the location on the notice in question.

## Summary of Evidence

Appellant was represented at hearing by her sister and health care proxy who testified via telephone. Blackstone was represented at hearing by Ms. Putnam, an Administrator at the nursing facility and Ms. Bettencourt, the individual in charge of Social Services at the facility, both of whom appeared in person.

Blackstone is a skilled nursing facility licensed by the Commonwealth of Massachusetts with 32 beds, all of which are Medicare-certified and Medicaid-certified. Prior to the hearing date, on March 17, 2014, Blackstone submitted to the Board of Hearings a total of approximately 107 pages in a series of six faxes, which have been collectively marked as Exhibit 3.

The February 21, 2014 discharge notice lists the following as the reason for the discharge: *"You do not meet clinical eligibility criteria set forth by MassHealth to approve payment for skilled nursing facility services."* At hearing, the facility was asked to clarify whether they were seeking discharge based on (1) failure to pay, (2) the lack of a need for skilled nursing services or (3) some combination of both. The facility indicated that it was seeking discharge due to the failure to pay. The parties gave testimony indicating how the payment issue was related to the clinical need; this is because MassHealth was not available as a payor because there was some earlier clinical determination that Appellant was not clinically eligible for financial assistance on a long-term basis. MassHealth benefits had been approved on a short-term basis. Appellant had been admitted to the facility in September 2013 and her Medicare benefit had paid for her stay through October 15, 2013. She was admitted for rehabilitation after receiving treatment for leg ulcers and generalized weakness; she also has mental health issues including depression, anxiety and difficulties with concentration and focusing. MassHealth assistance had been approved for a short-term basis, through February 16, 2014, and had assisted with payment for Appellant's admission from October through February 16, 2014. There is no copy of the notice denying clinical eligibility as of mid-February 2014 in the record, but that fact was not disputed at hearing.

Exhibit 3 contains a financial statement from the facility's billing department, dated March 17, 2014, showing that Appellant owes an "Estimated Patient Paid Amount" of \$2,087.17 for each of the six months from September 2013<sup>1</sup> through February 2014, as well as 12 days of room and board

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<sup>1</sup> Upon review, it is very unclear how Appellant has a Patient Paid Amount or "PPA" obligation for the month of September 2013, as the testimony suggests that she did not have MassHealth coverage for Long-Term Care benefits

for February 2014 (totaling \$3,600) and the first 17 days of March (totaling \$4,760). The billing statement also shows three payments of \$2,087.17 each in the last two months of 2013, leaving a final balance due as of March 17<sup>th</sup> of \$14,381.51.

As the regulation mentions “reasonable and appropriate notice” on discharge attempts related to failure to pay, the nursing facility was asked whether it had previously billed Appellant prior to this March 17<sup>th</sup> notice or prior to the February 21, 2014 discharge notice. The nursing facility indicated that it had given prior and regular billing statements to Appellant and/or her sister. Such other statements were not included as part of Exhibit 3, and the Appellant’s sister did not indicate any awareness or receipt of the bills. At the end of the hearing, the record was left open to allow the nursing facility to document the earlier bills and the nursing facility agreed to send in such materials to the Hearing Officer.

Subsequently, no response was submitted by the nursing facility during the month after the hearing, nor was there any report as to why the materials were not submitted or whether an extension was needed.

The materials submitted with the discharge notice, found in Exhibit 1, contain a February 21, 2014 notice addressed to Appellant from the Director of Social Services. This document, on nursing facility letterhead, indicated in part that ***“YOU MUST REQUEST A FAIR HEARING... WITHIN 14 DAYS OF RECEIVING THIS NOTICE. IF YOU REQUEST A HEARING, YOU CANNOT BE TRANSFERRED UNTIL FIVE DAYS AFTER YOU RECEIVE THE DECISION OF THE HEARING OFFICER.”*** (Bolded and CAPS emphasis in original in Exhibit 1).

The discharge notice and the February 21, 2014 correspondence both indicated that Appellant would be discharged to her sister’s residence in Medfield. The address listed on the notice of discharge does not give the current street name of the sister’s current residence. The sister indicated at hearing that she could not take Appellant into her home, nor could she care for her sister, who has required heavy level of assistance, particularly with mental health issues, since the 1980s.

The paperwork in Exhibit 3 indicates that the nursing facility has, since late 2013, been trying to work with Appellant and local elder services (including Tri-Valley Elder Services) to find places for discharge in the community, including shelters, elder housing, and subsidized public housing opportunities, including Section 8 apartments. The facility has also documented a plan including referrals for visiting nurses and physician follow-up, home health aide services, Personal Care Attendant services, home-delivered meals, and lifeline services to be received once Appellant returns to the community.

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during that month of September 2013, as her Medicare benefit was used to cover her stay during that period. There are also no copies of any MassHealth notices announcing or confirming the start date of any MassHealth benefits of PPA obligations in the record in Exhibit 3. A Patient Paid Amount is an obligation created with, and which runs concurrently with, eligibility for MassHealth Standard Long-Term Care benefits obtained through 130 CMR 515.000 thru 130 CMR 522.000

## Findings of Fact

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

1. Appellant was institutionalized and admitted to Blackstone in September of 2013. (Testimony and Exhibit 3)
2. Appellant's Medicare benefits could no longer be used to pay for her nursing facility stay after October 15, 2013. (Testimony and Exhibit 3)
3. Appellant was approved for MassHealth Standard Long-Term Care benefits for a period of time, including the period between October 16, 2013 and February 16, 2014. (Testimony and Exhibit 3)
  - a. The nursing facility estimated that Appellant had a monthly Patient Paid Amount obligation of \$2,087.17. (Testimony and Exhibit 3)
  - b. There is no copy of any MassHealth approval notice in the record, confirming the PPA or the start date of any PPA obligation. (Testimony and Exhibit 3)
4. On February 21, 2014, Blackstone submitted a 30-Day Notice of Intent to Discharge Resident to Appellant, stating that it would discharge Appellant to her sister's residence on March 24, 2014 due to reasons related to non-payment and lack of clinical eligibility for continued MassHealth benefits beyond February 16, 2014. (Testimony and Exhibit 1)
  - a. The notice does not correctly list the current and full address of Appellant's sister. (Testimony and Exhibit 3)
  - b. The nursing facility produced a billing statement dated March 17, 2014 at hearing. (Exhibit 3).
    - i. The billing statement indicated that Appellant had a PPA for the month of September 2013, which was a month when Appellant had a Medicare benefit covering her stay. (Testimony and Exhibit 3)
    - ii. The nursing facility indicated that it had given prior billing statements before issuing the February 21, 2014 discharge notice. (Testimony and Exhibit 3)
    - iii. There is no evidence of earlier billing statements in the record. The nursing facility was given an opportunity during the hearing process to produce copies of earlier billing documentation but failed to do so during the post-hearing period. (Testimony)
5. The February 21, 2014 discharge notice was served with a letter, addressed to Appellant on letterhead of the facility, which informed Appellant that ***"YOU MUST REQUEST A FAIR***

***HEARING...WITHIN 14 DAYS OF RECEIVING THIS NOTICE. IF YOU REQUEST A HEARING, YOU CANNOT BE TRANSFERRED UNTIL FIVE DAYS AFTER YOU RECEIVE THE DECISION OF THE HEARING OFFICER.***” (Exhibit 1, emphasis in original)

6. Appellant filed a request for a Fair Hearing with the Board of Hearings on February 24, 2014. (Exhibit 1)

## **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 initiated by a nursing facility. MassHealth has enacted regulations that follow and implement the federal requirements concerning a resident’s right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in both (1) the Nursing Facility Manual regulations at 130 CMR 456.000 et seq., and (2) the Fair Hearing Rules at 130 CMR 610.000 et seq.

For the purposes of this decision, the definitions found in 130 CMR 456.002 apply:<sup>2</sup>

*“Nursing facility” - a Medicare skilled nursing facility or Medicaid nursing facility licensed by the Department of Public Health to operate in Massachusetts, or a distinct Medicaid- or Medicare-certified unit within a facility.*

*“Discharge” - the removal from a nursing facility to a noninstitutional setting of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual; this includes a nursing facility’s failure to readmit following hospitalization or other medical leave of absence.*

*“Transfer” — movement of a resident from:*

- (1) a Medicaid- or Medicare-certified bed to a noncertified bed;*
- (2) a Medicaid-certified bed to a Medicare-certified bed;*
- (3) a Medicare-certified bed to a Medicaid-certified bed;*
- (4) one nursing facility to another nursing facility; or*
- (5) a nursing facility to a hospital, or any other institutional setting.*

*A nursing facility’s failure to readmit a resident following hospitalization or other medical leave of absence, resulting in the resident being moved to another institutional setting is also a transfer. Movement of a resident within the same facility from one certified bed to another*

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<sup>2</sup> The regulatory language in the MassHealth Nursing Facility Manual at 130 CMR 456.400 has identical (or near-identical) regulatory counterparts which can be found within the Commonwealth’s Fair Hearing Rules at 130 CMR 610.000 as well as corresponding federal government regulations. As to this part of the regulatory law, the regulations in 130 CMR 610.028 and 42 CFR 483.12(a)(2) are identical to that found in 130 CMR 456.002. The remainder of this appeal decision will hereafter make all further regulatory references only to the MassHealth Nursing Facility Manual regulations in 130 CMR 456.000, unless otherwise noted or required.

*bed with the same certification is not a transfer.*

Based on the above definition, Blackstone is attempting to discharge Appellant to her sister's residence in the community via its notice dated February 21, 2014. See Exhibit 1 and 130 CMR 456.002.

The guidelines that apply in a determination of whether or not Appellant can be so discharged are found in 130 CMR 456.701 of the MassHealth Nursing Facility Manual. This section of the regulations strictly and specifically lists the only circumstances and conditions that allow for transfer or discharge of a resident from a nursing facility as well as the specific requirements of the relevant notice -- if these requirements are not met, the facility must permit the resident to remain in the facility.

The regulation at 130 CMR 456.701(A) and (B) reads as follows:

**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 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 456.701(A)(1) through (5), the resident's clinical record must contain documentation to explain the transfer or discharge....***

***(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's Board of Hearings 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 456.702; and*
  - (c) the effect of requesting a hearing as provided for under 130 CMR 456.704;*

456.702: Time Frames for Notices Issued by Nursing Facilities

(A) The notice of discharge or transfer required under 130 CMR 456.701(C) must be made by the nursing facility at least 30 days prior to the date the resident is to be discharged or transferred, except as provided for under 130 CMR 456.702(B).

(B) Instead of the 30-day-notice requirement set forth in 130 CMR 456.702(A), the notice of discharge or transfer required under 130 CMR 456.701 must be made as soon as practicable before the discharge or transfer in **any of the following circumstances, which are 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 resided in the nursing facility for 30 days immediately prior to receipt of the notice....

456.703: Time Frames for Submission of Requests for Fair Hearings

(A) Appeals of discharges and transfers will be handled by the Division's Board of Hearings (BOH).

(B) *Time Limitation on the Right of Appeal.* The date of request for a fair hearing is the date on which BOH receives such a request in writing. BOH must receive the request for a fair hearing within the following time limits:

(1) **30 days** after a resident receives written notice of a discharge or transfer pursuant to 130 CMR 456.702(A); or

(2) **14 days after a resident receives written notice of an emergency discharge or emergency transfer pursuant to 130 CMR 456.702(B);...**

456.704: Stay of a Transfer or Discharge from a Nursing Facility Pending Appeal

(A) If a request for a hearing regarding a discharge or transfer from a nursing facility is received by the Board of Hearings during the notice period described in 130 CMR 456.703(B)(1), **the nursing facility must stay the planned discharge or transfer until 30 days after the decision is rendered.** While this stay is in effect, the resident must not be transferred or discharged from the nursing facility.

(B) If a hearing is requested, in accordance with 130 CMR 456.703(B)(2), and the request is received prior to the discharge or transfer, then the nursing facility must stay the planned transfer or discharge until five days after the hearing decision.

(Emphasis added.)

In addition to the MassHealth-related regulations discussed above, the nursing facility also has an obligation to comply with all other applicable state laws, including M.G.L. c.111, §70E, which went into effect in November of 2008. The key paragraph of that statute, which is directly relevant to these types of 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.*

In reviewing the record, there are on the surface at least two grounds on which to approve the Appellant's appeal. The first is strictly procedural, in that the Appellant received a notice which stated, incorrectly under the law, that she had 14 days to appeal and that the nursing facility could potentially discharge her within five days after an adverse decision from the Board of Hearings. The nursing facility's intention to give this information is likely an attempt to comply with 130 CMR 456.701(C)(5); however the actual timeframes given on that notice are legally incorrect. This is not an emergency discharge, as the nursing facility clarified at hearing that its grounds were solely about non-payment. Non-payment is not an "emergency discharge" under 130 CMR 456.702(B). Therefore, the Appellant had 30 days (not 14) to request a Fair Hearing per 130 CMR 456.703(B)(1), and the nursing facility could not discharge within five days after a potentially adverse-to-Appellant appeal decision per 130 CMR 456.704(B) but instead would have had to hold the discharge for 30 days per 130 CMR 456.704(A). Because the notice is technically flawed, the discharge attempt cannot be upheld.

Furthermore, 130 CMR 456.701(A)(5) requires that the nursing facility, when discharging on grounds of failure to pay, must give reasonable and appropriate notice of non-payment prior to issuing the discharge notice. The law implies that there should be an opportunity to pay, yet the nursing facility produced evidence at hearing of any billing statements dated before the discharge notice. In a discharge for non-payment, this would be the type of evidence to be produced to the Board of Hearings. See also Exhibit 2 (suggesting "records detailing the non-payment charges and efforts to collect"). In addition, the one invoice submitted seems somewhat flawed, as there is no explanation why the member has a PPA for the month of September 2013, as there is no indication or evidence in the record that Appellant's eligibility for MassHealth Standard Long-Term Care benefits began in September 2013.<sup>3</sup> Furthermore, the facility was given an opportunity by the Hearing Officer to submit the bills and potentially correct the deficiency on this issue, but the facility failed to respond during the Record Open period.<sup>4</sup> This is not to say that Appellant doesn't owe the facility any money – the record indicates that she almost certainly has incurred a big financial obligation which is due to the facility – but there is improper evidence to support the nursing facility's current discharge notice on these grounds at the current time.

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<sup>3</sup> Even if the Appellant was a MassHealth recipient while in the community in the September 2013, one does not have a PPA until one is approved for MassHealth Standard Long-Term Care benefits. Again a copy of any LTC approval notice, which the nursing facility would receive from MassHealth per 130 CMR 516.007)(C), announcing the PPA and the start date of any PPA obligation, would be appropriate to include in the record. Why it was not submitted in the record for a discharge attempt on non-payment is puzzling.

<sup>4</sup> If the nursing facility did not want to continue with this appeal, and/or if the facility (or parties) had no need for the hearing, then given notice of this change in position to the Board of Hearings would have been courteous and appreciated. It also would have made the decision process quicker and saved time and resources for the Commonwealth as well as the parties.

The facility appeared to do a better and more sincere job with its discharge planning, as the record indicates that they worked with Appellant to present her opportunities to get back to the community. Nevertheless, there are still some concerns about the notice, as it listed an address and residence which Appellant is not entitled to reside at, so there is no basis to suggest that the Appellant can be discharged to her sister. There is no indication that Appellant resided at her sister's prior to her nursing facility institutionalization (thus raising questions about whether it is a safe and appropriate place of residence), nor is her sister a legal guardian or other individual required by law to look after or care for the Appellant.

Based on the above analysis, I conclude that this appeal must be APPROVED in Appellant's favor. The nursing facility and the Appellant may of course continue to mutually work together on finding a new residence for the Appellant, or take whatever appropriate future action is necessary to create an appropriate solution for the two parties.

## **Order for Nursing Facility**

Rescind the February 21, 2014 notice of intent to discharge and do NOT discharge Appellant pursuant to that notice.

## **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.

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Christopher S. Taffe  
Hearing Officer  
Board of Hearings

cc: Appeal Representative