

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**

<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	1410160
<b>Decision Date:</b>	10/27/14	<b>Hearing Date:</b>	10/07/2014
<b>Hearing Officer:</b>	Paul C. Moore		

**Appearance for Appellant:**

**Nursing Facility Representatives:**



*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 – Failure to Pay
<b>Decision Date:</b>	10/27/14	<b>Hearing Date:</b>	10/07/2014
<b>Nursing Facility Reps.:</b>		<b>Appellant Rep.:</b>	
<b>Hearing Location:</b>	Quincy Harbor South Tower		

## Authority

This hearing was conducted pursuant to Massachusetts General Laws (“G.L.”) Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

## Jurisdiction

Through a Notice of Intent to Discharge Resident dated August 27, 2014, the nursing facility, the Bostonian Nursing Care and Rehabilitation Center (“the Bostonian” or “the facility”), informed appellant of the facility’s intent to transfer her to her son’s home because *“You have failed, after reasonable and appropriate notice, to pay for (or have failed to have Medicare or Medicaid pay for) your stay at the nursing facility, your current outstanding balance as of 10/1/14 is \$18,160.00”* (130 Code of Massachusetts Regulations (CMR) 610.028; 130 CMR 456.701; Ex. 1). The appellant filed a timely appeal with the Board of Hearings on September 15, 2014 (130 CMR 610.015(B); 130 CMR 456.703; Ex. 2). Challenging a notice of transfer or discharge initiated by a nursing facility is a valid ground for appeal to the Board of Hearings (130 CMR 610.032(C)).

## Action Taken by Nursing Facility

The nursing facility notified the appellant that it sought to discharge her due to the fact that she failed to pay for, or failed to have Medicare or Medicaid pay for, her stay at the nursing facility.

## Issues

The appeal issues are, pursuant to the governing state and federal regulations which include but are not limited to 130 CMR 610.028, 130 CMR 456.701, and G.L. c. 111, §70E, whether appellant's discharge is appropriate because she has not paid for her stay at the nursing facility and whether the nursing facility has provided sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place.

## Summary of Evidence

The appellant's son, who is her attorney-in-fact and health care proxy, attended the hearing. The Bostonian was represented at the hearing by its administrator and its business officer manager.

The Bostonian is a skilled nursing facility licensed by the Massachusetts Department of Public Health, located in the Dorchester section of Boston. The Bostonian submitted a packet of documents prior to the hearing, which was marked as Exhibit 5. The packet contained copies of a notice dated August 27, 2014 from the Bostonian to the appellant informing her of its intent to discharge her to her son's home address on September 26, 2014; various parts of the clinical record of the appellant, including her most recent care plan; physician's notes, nursing progress notes and social service progress notes for the last six months; and a statement of her account at the Bostonian, including payments made on appellant's behalf to date by her son, and how these payments were applied (*i.e.*, to room and board, to patient paid amount or "PPA," etc.).

The clinical record reflects that the appellant is an 84 year-old with diagnoses of diabetes mellitus with neuropathy, Alzheimer's dementia, coronary artery disease, hypertension, depression and gout. She was admitted to the Bostonian on October 15, 2013. Currently, the appellant is totally dependent for all activities of daily living (ADLs) (Testimony). She transfers and repositions herself with the assistance of two individuals, and uses a wheelchair (Ex. 5; Testimony). Sometimes the facility uses a Hoyer lift to transfer the appellant (Testimony). The appellant cannot make her needs known (Testimony).

The Bostonian business office manager testified that the appellant was originally deemed eligible for MassHealth effective February 1, 2014. An individual named Brandy, from Healthcare Financial, handled the MassHealth application on the appellant's behalf, according to the business office manager. The business office manager testified that Brandy called her at some point in June, 2014 to inform her that a subsequent MassHealth determination revised the appellant's eligibility start date to March 14, 2014, due to alleged financial misrepresentation on the appellant's MassHealth application. The business office manager submitted into evidence a notice from MassHealth to the appellant dated June 2, 2014, reflecting an eligibility start date of March 14, 2014 with a monthly PPA of \$1,985.20, which was marked as Exhibit 6.<sup>1</sup> Thus, according to the business office manager, there is a "gap" in the appellant's coverage spanning the period February

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<sup>1</sup>The MassHealth notice dated June 2, 2014 (Ex. 6) states that, "for the time period 2/1/14 to 3/13/14, you were ineligible for MassHealth due to a period of ineligibility because of a transfer of assets."

1, 2014 through March 13, 2014. The business office manager testified that the appellant's son told her he was going to try to obtain a loan to pay the balance owed to the facility for that period of time. The business officer manager testified that the facility now directly receives the appellant's Social Security check, which they apply toward payment of the appellant's monthly PPA (Testimony).

The business officer manager testified that a subsequent notice from MassHealth, dated June 18, 2014, indicated that MassHealth had adjusted the appellant's PPA downward from \$1,985.20 to \$1,434.20 per month "because of a change in [appellant's] circumstances." (Testimony, Ex. 6A). The appellant's son does not dispute the PPA amount (Testimony).

The facility's administrator testified that from October 15, 2013 through October 28, 2013, Medicare paid for the appellant's stay at the Bostonian. In addition, the administrator testified that the appellant was paying privately for her stay there from October 29, 2013 through February 1, 2014 (Testimony).

The business office manager testified that the balance owed by the appellant to the Bostonian for the time period February 1, 2014 through March 13, 2014 is \$13,940.00. In addition, the appellant initially owed the PPA of \$1,434.20 for the months of March through September, 2014, as reflected in the notice of intent to discharge the appellant (Exs. 1 and 9). However, the business office manager testified that the appellant did write two checks to cover the September and October, 2014 PPA amounts, respectively, in the amounts of \$1,434.20 each, following the issuance of the notice of intent to discharge the appellant.<sup>2</sup> Thus, the appellant now only owes the PPA amounts for June, July and August, 2014 (Ex. 9). In total, the appellant owes the facility for private payments in the amount of \$13,940.00, plus three months of unpaid PPA amounts (\$1,434.20 times three, or \$4,302.60) (Testimony).

In response to the testimony of the nursing facility representatives, the appellant's son testified that he tried to obtain a loan through Metro Credit Union, but was turned down because he owes money to various creditors, one of whom has garnished his paycheck. He testified that he shares one bank account with the appellant at Bank of America. He further testified that at one time, he did loan his daughter (the appellant's granddaughter) "a couple of hundred" from the appellant's bank account to help his daughter pay her rent, and that since then, "he has made up for that" (Testimony). He testified that his mother owned a two-family home in Dorchester, which is where the appellant's son also lives. He now owns it outright. He intends to try to rent out the unoccupied unit at that address, but the home needs improvements first, such as a new roof. He testified he hopes to apply for a loan again within the next month (Testimony).

The facility's administrator testified that he had negotiations with the appellant's son about the possibility of the appellant's son paying \$600.00 a month toward the balance owed, but the administrator did not believe that was a reasonable amount to pay given the large balance owed

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<sup>2</sup>The record reflects that the appellant made one payment to the Bostonian on September 11, 2014 (check number 6764) and another payment to the Bostonian on October 3, 2014 (check number 6765) to cover the monthly PPA amounts owed (Exs. 5 and 7).

(Testimony). At the hearing, the administrator offered to stay the notice of intent to discharge the appellant if the appellant's son can pay the balance owed over six months, or \$2,750.00 per month, in addition to the monthly PPA amount. Then, the balance owed would be paid off by March, 2015, according to the administrator (Testimony). However, the appellant's son testified that he did not think he could commit to that large a payment monthly payment amount (Testimony).

The facility's administrator stated that it would be difficult to discharge the appellant to her son's home, but that it can be done. The administrator testified that the Bostonian can assist the appellant's son to arrange home care for the appellant, including nursing services, therapy services (if indicated), and the presence of a Personal Care Attendant (PCA) around the clock, if necessary. The administrator testified that it would be very difficult for the appellant's son to care for the appellant at his home (Testimony). The appellant's son works every day, and no one else is at the home during the day (Testimony). The appellant's son testified he visits the appellant almost every day at the Bostonian, and that in order for him to leave the appellant at the end of each visit, he has to tell her he is going home to take care of a family dog who died thirty years ago (Testimony).

The notice of intent to discharge the appellant in this matter was hand-delivered to the appellant, with a copy to the appellant's son (Testimony, Ex. 5). The Bostonian administrator testified that the entire contents of the notice were explained to the appellant (Testimony). The notice sets forth: (1) the grounds for the planned discharge; (2) the appellant's right to request a hearing with the Board of Hearings (BOH) within thirty days; (3) the address of the BOH; (4) the name of the person at the facility who is responsible for supervising the appellant's discharge; (5) the name and address of the Commonwealth's long-term care ombudsman; (6) the names of the state agencies that advocate for the protection of persons with developmental disabilities and for persons who are mentally ill, respectively; and (7) the name and address of the local legal services office. The appellant's original signature appears on the notice of intent to discharge (Ex. 5).

The appellant's clinical record contains documentation explaining the planned discharge by the Bostonian social worker. Specifically, on September 12, 2014, the social worker documented:

This writer spoke to [appellant's son] on 8/29/14 regarding the 30 day notice that was given to him and [appellant] in regards to non-payment. [Appellant's son] explained to this writer on that day he was planning on "getting a loan" and was going to do "everything" that he could to "pay off the remaining balance."

(Ex. 5) (Quotations in original)

## **Findings of Fact**

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

1. The appellant, an 84 year-old female, was admitted to the Bostonian skilled nursing facility on October 15, 2013 with diagnoses of Alzheimer's dementia, depression, coronary artery disease,

and hypertension, among other diagnoses (Testimony, Ex. 5)

2. The appellant is dependent for all her ADLs, is wheelchair-bound, and cannot make her needs known (Testimony, Ex. 5).
3. The appellant initially had Medicare coverage for her stay at the facility, and then paid privately until February 1, 2014 (Testimony).
4. MassHealth initially notified the appellant that she was eligible for long-term care benefits beginning February 1, 2014, but then revised its eligibility determination to begin the appellant's MassHealth coverage on March 14, 2014, with a monthly Patient Paid Amount (PPA) of \$1,434.20 (Testimony, Exs. 6 and 6A).
5. The MassHealth eligibility determination of June 2, 2014 for the appellant states that "for the time period 02/01/2014 to 03/13/2014, you were ineligible for MassHealth due to a period of ineligibility because of a transfer of assets" (Ex. 6).
6. The appellant's son is her health care proxy and her attorney-in-fact. The appellant lived in the community with her son prior to her admission to the Bostonian (Testimony, Ex. 3).
7. For the period of time February 1, 2014 through March 13, 2014, when she was ineligible for MassHealth, the appellant owes \$13,940.00 to the Bostonian (Testimony, Ex. 9).
8. The appellant also owes the Bostonian her PPA for three months, June, July and August, 2014, or \$4,302.60, for which the facility billed the appellant's son (Testimony, Ex. 9).
9. Through a Thirty-Day Notice of Intent to Discharge Resident dated 8/27/2014, the Bostonian informed the appellant of the facility's intent to discharge her to 57 Stratton Street, Dorchester on September 26, 2014 because she "[had] failed, after reasonable and appropriate notice, to pay for, (or [had] failed to have Medicare or Medicaid pay for) [her] stay at the nursing facility, [her] current outstanding balance as of 10/1/2014 is \$18,160.00" (Exs. 1, 5).
10. The appellant timely appealed the Thirty-Day Notice of Intent to Discharge Resident to the Board of Hearings on September 15, 2014 (Ex. 2).
11. At hearing, the Bostonian acknowledged that since the date of the Thirty-Day Notice, the appellant's son has paid two months of PPAs that were in arrears, but the appellant still owes the facility more than \$16,000.00 (Testimony).
12. The appellant's son tried to secure a loan to pay off the debt the appellant owes to the Bostonian, but could not obtain one due to credit problems (Testimony).
13. The appellant does not dispute the monthly PPA amount, nor does she dispute the existence of the debt owed to the facility (Testimony).

14. The Thirty-Day Notice to the appellant reasonably and appropriately apprised the appellant of her failure to pay for her stay at the Bostonian (Exs. 1, 5).
15. The Thirty-Day Notice to the appellant apprises the appellant of her right to request a hearing with the Board of Hearings (BOH), includes the BOH address, includes the time frame for filing an appeal, and apprises the appellant of various advocates she can retain to represent her interests, including a legal services attorney, the Long-Term Care Ombudsman's Office, and the Disabled Persons Protection Commission. The Thirty-Day Notice also apprises the appellant of the individual at the Bostonian who can answer any questions she has about the Thirty-Day Notice (Ex. 5).
16. The appellant's clinical record contains documentation by the Bostonian social worker explaining why she is to be discharged (Ex. 5).

## 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.

MassHealth regulations at 130 CMR 456.701 provide in relevant part:

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 Medicare or Medicaid 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.** The documentation must be made by:

- (1) the resident's physician when a transfer or discharge is necessary under 130 CMR 456.701(A)(1) or (2); and
- (2) a physician when the transfer or discharge is necessary under 130 CMR 456.701(A)(3) or (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'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;
- (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.

(Emphasis added).

As a threshold matter, the evidence is clear that the appellant has failed, after reasonable and



appropriate notice, to pay for her stay at the nursing facility, as set forth at 130 CMR 456.701(A)(5). Within Exhibit 5, there are at least two statements addressed to the appellant's son at his mailing address reflecting the balance owed on appellant's behalf, the first dated August 27, 2014 and the second dated October 1, 2014. In addition, it is clear from the testimony of the parties at hearing that the appellant's son has been apprised verbally on multiple occasions what is owed by the appellant. Moreover, the appellant's son did not dispute that this debt exists. Collectively, this constitutes the "reasonable and appropriate notice" contemplated by the regulation. Finally, the facility social worker documented in the appellant's clinical record the reason for her planned discharge, which comports with regulatory requirements.

Further, I find that the contents of the notice of intent to discharge the appellant issued by the facility on August 27, 2014 comply with all of the regulatory criteria listed at 130 CMR 456.701(C).

Finally, I must decide is whether the nursing facility notice meets the requirements of all other applicable federal and state regulatory requirements, in addition to the MassHealth-related regulations discussed above, including G.L. c. 111, §70E, which went into effect in November of 2008. The key paragraph of that statute, which is directly relevant to this appeal, 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.***

(Emphasis added).

The appellant is an 84 year-old patient with multiple serious medical conditions, including advanced Alzheimer's dementia, diabetes mellitus, and coronary artery disease. The facility's administrator testified that she cannot perform any ADLs without assistance, cannot ambulate or transfer without assistance, cannot toilet herself without assistance and cannot make her needs known. In addition, the appellant's son testified she is not oriented to time and place.

The statutory requirement noted above states that the appellant must have "sufficient preparation and orientation to ensure a safe and orderly transfer to another safe and appropriate place." Although the administrator did explain the notice of intent to discharge the appellant to her in person, that does not necessarily mean the appellant has received "sufficient preparation and orientation" to ensure a safe and orderly discharge. Due to her cognitive deficits, it is unlikely she has been prepared for, or oriented to, anything.<sup>3</sup>

Further, the record strongly suggests that the appellant's previous place of residence, shared with

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<sup>3</sup>However, in this instance, the facility can provide sufficient preparation and orientation to the appellant to ensure a safe and orderly discharge to another safe and appropriate place by working with the appellant's son.

her son, is not a “safe and appropriate place.” Because the appellant is wheelchair-bound, she would be at risk for falls and injuries. In addition, there is currently no one home at the Dorchester address during the day. Without someone to assist her to carry out her ADLs, the appellant is unlikely to do well in a home environment. While the Bostonian has offered to try to put such services in place, currently there are no such services in place. Therefore, at present, I conclude that the Dorchester address is not a safe and appropriate place to which the appellant may lawfully be discharged.

Thus, based on the above facts and regulations, this appeal is APPROVED.<sup>4</sup>

## **Order for Nursing Facility**

Rescind the Thirty-Day Notice of Intent to Discharge Resident issued August 27, 2014. Do not discharge the appellant until a safe and appropriate place to discharge the appellant is located, and if one is found, issue a new notice to the appellant.

## **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.

## **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.

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Paul C. Moore  
Hearing Officer  
Board of Hearings

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<sup>4</sup>The parties are urged to reconvene negotiations concerning a reasonable payment plan to which the appellant's son may adhere. The facility has a strong legal basis on which to issue another notice of intent to discharge the appellant for failure to pay. Nothing in this decision precludes the facility from issuing a new notice of intent to discharge the appellant **if** the appellant can be discharged to a safe and appropriate setting, such as another nursing facility.

Copy to: