

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	APPROVED	<b>Appeal Number:</b>	2176423
<b>Decision Date:</b>	9/15/2021	<b>Hearing Date:</b>	09/03/2021
<b>Hearing Officer:</b>	Christopher Taffe	<b>Record Closed:</b>	09/07/2021

**Appearances for Appellant:**



**Appearances for**


**Nursing Facility/Respondent:**

Juliana Muehter, Dir. of Social Services,  
James Alexandre, NP, and  
Tim Churchill, Administrator,  
all on behalf of Vero Health and Rehabilitation  
of Watertown  
(all by telephone)



*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>	Expedited Nursing Home Discharge
<b>Decision Date:</b>	9/15/2021	<b>Hearing Date:</b>	09/03/2021
<b>Facility's Reps.:</b>	J. Muehter, J. Alexandre, & T. Churchill	<b>Appellant's Rep.:</b>	
<b>Hearing Location:</b>	HarborSouth Tower, Quincy		

## 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 titled as a *"Notice of Intent to Discharge Resident with Less than 30 Days Notice"* dated August 20, 2021, the Respondent, Vero Health and Rehabilitation of Watertown (hereafter "Vero") informed the Appellant (the nursing facility resident) that Vero wished to discharge Appellant to her home apartment in Lowell, Mass. on August 24, 2021 because the resident's health had improved sufficiently to allow a more immediate discharge. See Exhibit 1. Appellant filed a timely request with the Board of Hearings for a Fair Hearing on August 23, 2021. See Exhibit 1; 130 CMR 610.015(B). The Board of Hearings has jurisdiction over appeals involving expedited nursing facility discharges per 130 CMR 610.032.

As discussed in greater detail within the Summary, the record was left open per 130 CMR 610.081 until September 13, 2021 to allow the nursing facility time to submit needed written material for the appeal record. See Exhibit 3. Vero timely submitted documentation on September 7, 2021. See Exhibit 4.

## Action Taken by Nursing Facility

Vero issued an expedited discharge notice to the Appellant.

## Issue

Does the discharge notice and medical record comply with all legal requirements in order to support the proposed discharge action and, if so, should the Appellant be discharged?

## Summary of Evidence

Appellant is a [REDACTED] female who has spent much of the 2021 calendar year being medically institutionalized and spending time at both the Vero facility and various acute care hospitals, including the Tufts Medical Center hospital (Tufts) and Lowell General Hospital (LGH). Specifically, she was initially admitted to Tufts in [REDACTED] for treatment of an infection. After some rehabilitation time, she subsequently returned to the community and then presented to LGH in [REDACTED] with issues related to back or spinal pain. She was admitted to Vero on [REDACTED] and then had a 12-hour long spinal surgery at Tufts in late July, 2021, before being most recently readmitted to Vero on [REDACTED]. Vero is a skilled nursing facility licensed by the state's Department of Public Health with 163 beds, all of which are dual certified for both Medicare and MassHealth.

In addition to the spinal issues, the Appellant testified that she [REDACTED]. Records in Exhibit 4 show additional medical history, conditions and diagnoses that include COPD, a history of cocaine and heroin use, coronary artery disease involving angina, and colitis.

The nursing facility representatives present at hearing testified that they believed Appellant was ready for discharge back to her home in the community, mainly because Appellant had completed her prescribed treatment of antibiotics via IV post-surgery in late August 2021. Thus, Appellant was in stable condition, independent with activities of daily living, and no longer had any need for a skilled medical service due to the end of the course of IV treatment. Appellant disagreed that it was safe to leave because she claims she never got the physical and occupational therapy that she needed post-surgery while at Vero, and because her surgical doctor (at Tufts) wanted her to be without a wheelchair. Appellant currently uses a wheelchair but is able to do certain activities, like transferring herself so she can independently complete the activity of toileting.

The facility was asked whether Appellant's physician at Vero had documented in the resident's medical record that Appellant was safe and able to be discharged to a community setting. The facility representatives indicated that they had nurses, who operated under the oversight of the facility's doctor (Dr. Asif Merchant), and that together the providers had arrived at and agreed at that same conclusion, and the nurse present at hearing indicated that the resident was independent and stable.

The record was left open to allow Vero time to submit relevant portions of the resident's medical and admission record into the appeal file.<sup>1</sup> The 88 pages of records submitted contain no notes or

---

<sup>1</sup> As discussed at hearing and further detailed in Exhibit 3, the Board of Hearings' scheduling notice usually contains a set of instructive paragraphs for the nursing facility to help prepare the necessary written material for the appeal

correspondence MD notes from Dr. Merchant or any other doctor speaking to Appellant's ability to return to the community. The only record signed by Dr. Merchant is the initial history and physical examination dated [REDACTED], prior to her surgery. The only other doctors whose names or records appear in the submission include (1) physicians and providers from Tufts, including Appellant's spinal surgeon Dr. Rogerson, as well as (2) a Dr. Tsai from VOHRA Wound Physicians for services she rendered at Vero in August 2021 which occurred after the date of the discharge notice.

As to the proposed place of discharge, the Appellant and her daughter indicated that Appellant had lost her apartment in [REDACTED], as it was rented and subsidized by Section 8, and she lost it at some point after her medical institutionalization period began in February of 2021. All of her belongings had been taken out of the living unit and put in storage. The facility indicated that they were not aware of this prior to the Fair Hearing. The Social Service note of August 20, 2021 (the same date of the discharge notice) appears to be the only Social Service note since the July 29, 2021 readmission date.<sup>2</sup> Appellant stated at hearing that she did not want to go to a shelter and the nursing facility indicated that she could be provided with services; the social services note indicated visiting nurses, home care services, and in-home therapies as possibilities.

## Findings of Fact

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

1. Through a "*Notice of Intent to Discharge Resident with Less than 30 Days Notice*" dated August 20, 2021, Vero informed the Appellant that Vero wished to discharge her to her home apartment on August 24, 2021 because the resident's health had improved sufficiently to allow a more immediate discharge. (Testimony and Exhibit 1)
2. Appellant timely appealed this expedited discharge notice to the Board of Hearings. (Exhibit 1)
3. Appellant no longer has her apartment. (Testimony)
4. There is limited evidence of discharge planning, with the most substantive note in the submitted medical record being limited to the August 20, 2021 date of the actual discharge notice. (Exhibit 4)

---

record in the case of a nursing facility-initiated transfer or discharge action. In this matter, the September 1, 2021 scheduling notice faxed to the parties did not contain that instruction and no materials were prepared or submitted prior to hearing. See Exhibit 2. Shortly after conclusion of the hearing, the Hearing Officer faxed the missing instruction to the facility so the facility could make such a submission. See Exhibit 3. The facility was allowed until September 13, 2021 to submit the materials and the materials were received from the facility via two separate faxes, totaling 88 pages, on September 7, 2021.

<sup>2</sup> The note also indicated some level of noncooperation by the Appellant about the subject, in that she stated she "did not want to have this conversation" and that the resident began to "roll away" in her wheelchair from the Social Service worker that she did not want the notice.

5. The only note from Appellant's doctor at the nursing facility, Dr. Merchant, within the submitted medical record is a progress note dated [REDACTED], matching the initial date of admission to Vero. (Exhibit 4)

6. Since the June 9, 2021 date of that progress note by Dr. Merchant, the Appellant has been transferred to Tufts Medical Center for a back surgery in [REDACTED], and she was later readmitted back to Vero post-surgery on [REDACTED]. She has been a resident at Vero since [REDACTED]. (Testimony and Exhibit 4)

## 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. In this Commonwealth, the MassHealth agency 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>3</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.*

Based on the above information, Vero is attempting to discharge Appellant to a community setting via the appealable notice in question. See Exhibit 1 and 130 CMR 456.002.

Some regulatory guidelines that speak to whether and how the 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 and strict requirements of the relevant notice and supplementary paperwork. If these requirements are not satisfied, the facility must permit the resident to remain in the facility. 130 CMR 456.701

---

<sup>3</sup> The regulatory language in the MassHealth Nursing Facility Manual at 130 CMR 456 has regulations which are identical (or near-identical and substantively equivalent) to counterpart regulations be found within the Commonwealth's Fair Hearing Rules at 130 CMR 610.000 as well as corresponding federal government regulations. As an example, the regulations in 130 CMR 610.028 and 42 CFR 483.12(a)(2) are identical to that found in 130 CMR 456.402. Because there is identical or near-identical regulatory language, the remainder of this decision will hereafter only contain cites to the MassHealth Nursing Facility Manual regulations unless noted.

through 130 CMR 456.704 read in relevant part 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. 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. s. 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. s. 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.

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...

(**Bolded** 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. One key paragraph of that statute, which is highly 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.***

(Emphasis added.)

With the above laws in mind, I come to the following conclusions:

In this appeal, after review of Exhibit 4, I find no medical documentation from the resident's physician at the facility which specifically talks about any improved health or course of treatment for the resident, and how she can be appropriately served in the community or a non-medical institution setting. It may be true that Appellant's health has improved since her [REDACTED] re-admission, but the law requires such medical improvement to be properly documented before any discharge made on that basis. Instead the only documentation from the doctor responsible for Appellant's care at Vero, Dr. Merchant, is from a progress note dated [REDACTED], over 6 weeks prior to Appellant's surgery and readmission. I thus cannot conclude that the nursing facility has complied with the law and their expedited discharge action cannot be upheld. The appeal of this discharge is thus APPROVED in favor of the nursing facility resident. Appellant may not be discharged per the August 20, 2021 notice.

Although it is not necessary to engage in further analysis, I will note that the nursing facility's proposed plan of discharge also may not have complied with M.G.L. c.111, 70A. This is because the proposed expedited discharge location (Appellant's former apartment) is literally no longer open to Appellant. In other words, even if the nursing facility's record contained the appropriate documentation from the facility physician above, this additional issue may have provided a separate alternative basis to support a ruling in Appellant's favor. State regulations require a specific place of discharge. See 130 CMR 456.701(C)(4). Further, the M.G.L. statute quoted above requires the nursing facility to have engaged in "*sufficient preparation and orientation*" concerning such discharge. Typically this requires greater evidence in the facility's admission and medical record for the resident which would demonstrate the facility's attempts to make sure appropriate services will be in place at the eventual place of discharge, wherever that eventual place of discharge in the community may be. In this case, it is noted that there were no progress notes or social service notes mentioning any discharge planning until the day of the expedited notice, with no circumstances suggesting why the absence of such efforts could be understandable at that time. The nursing facility should be mindful of this should there be a need for a future discharge notice or attempt for this resident or other residents.

Similarly, the Appellant should also be aware that she too bears some responsibility for her own well-being and should participate and cooperate with any discharge planning on a good faith basis. The resident's willingness to participate in discharge planning is often a factor<sup>4</sup> in assessing whether the nursing facility has met its requirement of showing sufficient preparation, orientation, and effort in future discharge plans. This is particularly true if the Appellant wants to have some input as to where she goes if and when she is discharged in the future. This is even more important when the resident is someone who may not be in a nursing facility on a long-term or permanent basis. Appellant and her family should realize that, when the timing is right, even if she no longer has a personal residence in the community, the Appellant may have to go to an appropriate alternative place in the community, such as a shelter, even if it is not her preferred type of living arrangement.

That said, the law requires that the current appeal before the Board of Hearings be APPROVED in favor of the nursing facility resident. She may not be discharged under this notice.

## **Order for Nursing Facility**

Do **NOT** discharge Appellant per the August 20, 2021 notice. The nursing facility should also make sure that the copy of this decision mailed and addressed to Appellant at the facility address is delivered to the resident.

## **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.

---

<sup>4</sup> The events described in footnote 2, *supra*, do not evidence such good faith by the resident.

## Implementation of this Decision

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

---

Christopher Taffe  
Hearing Officer  
Board of Hearings

cc:

[REDACTED]

[REDACTED]