

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



eAppeal Decision: Denied

Appeal Number: 2177323

Decision Date: 10/13/2021

Hearing Date: 10/01/2021

Hearing Officer: Radha Tilva

Record Open to: 10/06/2021

Appearance for Appellant:

Pro se

Appearance for Nursing Facility:

Naomi Cairns, LSW, Director of Social Services

Dr. Joshua Minz, Medical Director

Dr. Catherine Coty, Physical Therapist

Kay Ingalsby, OT, Director of Rehab.

Kelly Fisher, Substance Counselor

Annette Czartoryski, Director of Nursing

Danielle Fusco, Administrator

Lisa James, Clinical Nurse of Athena

Jacob Korzec, Director of Physical Plant



*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:	Denied	Issue:	Nursing Home Discharge
Decision Date:	10/13/2021	Hearing Date:	10/01/2021
MassHealth's Rep.:		Appellant's Rep.:	Pro se
Hearing Location:	Quincy Harbor South		

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 September 20, 2021 Highview of Northhampton (the “nursing facility”) notified appellant of their intent to discharge the resident to Motel 6 on October 20, 2021 (see 130 CMR 610.028, 610.029, 456.429, 456.701, and Exhibit). Appellant filed a timely appeal with the Board of Hearings on September 23, 2021 (see 130 CMR 610.0159(B)(3), 456.703(B), and Exhibit 2). The nursing facility issued another Notice of Intent to Discharge with Less Than 30 Days’ Notice notice on September 22, 2021 (Exhibit 3). Appellant timely appealed that notice with the Board of Hearings on September 23, 2021 (see 130 CMR 610.0159(B)(3), 456.703(B), and Exhibit 2). The Board of Hearing issued a scheduling notice on September 27, 2021 and a hearing was held on October 1, 2021 (Exhibit 4). The hearing record remained open for appellant to submit supporting documentation which was due by October 6, 2021. Appellant submitted the documentation on October 6, 2021 and the record closed on that date (Exhibits 7-9).

Action Taken by Nursing Facility

Through notices dated September 20, 2021 and September 22, 2021 the Nursing Facility issued a Notice of Intent to Discharge the resident and an Expedited Notice of Intent to Discharge the resident to a Motel 6.

Issue

The appeal issue is whether the nursing facility, pursuant to 130 CMR 610.028, 610.029, 456.701, and 456.702, can proceed to discharge the appellant to a motel.

Summary of Evidence

The appellant and a number of representatives from the nursing facility appeared by telephone for the hearing. Present for the nursing facility was Naomi Cairns, Dr. Joshua Minz, Dr. Catherine Coty, Kay Ingalsby, Kelly Fisher, Annette Czartoryski, Danielle Fusco, Lisa James, and Jacob Korzec.

The notices at issue include a Notice of Intent to Discharge the Resident and an Expedited Notice of Intent to Discharge the Resident, issued, respectively, on September 20, 2021 and September 22, 2021 (Exhibits 1 and 2). The notices cite the following as reasons for discharge: the resident's health has improved sufficiently such that the resident no longer needs the services provided by the facility; the resident has failed, after reasonable and appropriate notice, to pay for a stay at the facility; the safety of the individual in the facility is endangered due to the clinical and behavioral status of the resident; and the health of the individuals in the facility would be otherwise endangered (Exhibits 1 and 2). Both notices seek to discharge the appellant to a Motel 6 (*Id.*).

At the outset of the hearing the appellant requested an extension to obtain legal counsel. The appellant stated that upon receiving the discharge notice he was sick for about a week and when he tried to contact the numbers for legal counsel provided in the notice(s) he was unsuccessful at securing their representation. The appellant also stated that he tried to contact the Board of Hearings to obtain the extension, but the person he spoke to stated that he could make the request to the Hearing Officer. The Hearing Officer explained that same day or day before reschedule requests are permissible if good cause exists and as the matter is time sensitive the hearing would proceed (see 130 CMR 610.048(2)). In addition, it was also explained that at the end of the hearing the appellant could make any requests, including record open or reconvene requests.

The nursing facility stated the following: appellant was brought to the nursing facility on a short-term basis. It was then determined by ASAP that he no longer needed services at the same level of care. This was explained to the appellant by the nursing facility and the facility proceeded to attempt discharge planning with the appellant. The Director of Social Services stated that appellant did attempt to appeal the screening, however, did so prior to the actual screening determination, dated August 24, 2021, being issued.

With respect to nonpayment the nursing facility representative testified that appellant was provided with a bill on September 20, 2021 for \$18,748.00 (Exhibit 6, p. 124). Dr. Minz, the Medical Director of the facility testified that the resident arrived from short-term rehabilitation in July 2021 for increased bilateral lower extremity neuropathy. The physical examination findings upon his arrival evidenced that he was in a wheelchair, but was otherwise normal (Exhibit 6, pp. 40-41). The assessment and plan was to treat his weakness and chronic pain (*Id.*). The medical record evidenced that he had been in and out of hospitals and rehab stays over the past year and he was most recently

living in a motel (Exhibit 6, p. 42). The Director of Rehabilitation stated that upon admission in July 2021 he was evaluated by occupational therapy and determined to be modified independent with transfers and minimal assist with all activities of daily living (Exhibit 6, pp. 91-122). She also stated that in September, when he was discharged from physical therapy, he was independent in all activities of daily living (*Id.*). The Medical Director stated that he evaluated appellant on September 22, 2021 due to nursing concerns for altered mental status and, upon evaluation, appellant was stable, fully capable in the wheelchair, and safe for discharge from therapy (Exhibit 6, p. 4).

A nursing discharge note dated September 20, 2021 states that appellant has a history of bipolar disorder, hypertension, DVT/PE, opioid dependence, and chronic pain (Exhibit 6, p. 8). The note further describes that since admission appellant has continued to complain of pain with pain medications adjusted and though he uses a wheelchair he is able to transfer independently and perform all activities of daily living (ADLs) (*Id.*). The plan for discharge states that appellant no longer needs skilled nursing facility level of care, the patient would do well with outpatient therapy, and that appellant is appropriate for discharge to a shelter or motel (Exhibit 6, p. 9).

The nursing facility had Lisa James, an R.N. and Clinical Specialist testify to the following regarding appellant's behavior: she has received many complaints concerning appellant's behavior. He has brought illicit drugs into the building and has shared with other residents at the facility. He has disrupted residents and kept them awake at night, he has threatened staff, and they have had police in the building thirty to forty times concerning his behavior. The police have been unable to physically remove him and have been unable to physically search his body for illicit substances. The facility has worked very hard and has offered to pay for a hotel for a week. There have been numerous complaints that residents are unable to sleep because of his verbally aggressive and abusive behavior towards staff. In addition, his behavior since entering the facility has become progressively worse. He is under 1 on 1 supervision and he is not cooperative. The team in the room has done everything possible to assist him for a safe discharge.

The nursing facility representatives explained that appellant has been informed about the fact that the facility does not allow illicit substances and has signed a consent upon admission agreeing to the facilities rules. He has also been educated multiple times. The representative further testified that there has been paraphernalia found in appellant's room on his bed while he has been sitting in the wheelchair in the middle of the night and unconscious. Another representative, the Director of Nursing, testified that they have called 911 on multiple occasions when he has been impaired and he has refused to go to the emergency room for evaluation. In addition, the nursing facility representative testified that the appellant has on one occasion gone to the emergency department on his own and the admitting diagnosis was heroin withdrawal. The toxicology screen at that visit came back positive for heroin as well as other illicit substances which were not provided to him by the nursing facility (nursing facility representative). The facility stated that the documents for that emergency visit were not provided into evidence as they were from a third party.

The Director of Rehabilitation stated that there were multiple different options given for adaptive equipment upon his discharge from occupational therapy, but he denied the use of them. He was picked up on PT and he tried the leg brace, however, because it does not fit properly and his right lower extremity does not fully extend, as described in his PT discharge note, the wheelchair is his

baseline for functional mobility (Exhibit 6, p. 97). The nursing facility representative stated he is in his wheelchair all day long and even attempts to sleep in his wheelchair. Only on a few occasions has he spent a day or two in bed (nursing facility testimony). In addition, the nursing facility argued that there is ample evidence by residents and security that they are aware of illicit substances which he keeps on his person as he knows that security cannot search people directly. With respect to the full care plan the nursing facility representative stated that a copy of the care plan was provided at the care plan meeting, however, the meeting happened a day after it was scheduled as appellant did not make it aware he wanted to participate. The Activities Director went through it with him extensively on the day of the meeting (Exhibit 6, p. 64).

With respect to discharge planning the nursing facility stated that in addition to their plan to discharge him to a motel they have also spoken to him about discharge to a shelter. The facility has offered to pay for a week of his stay at the motel because appellant has stated that he does not have the finances to pay for the motel stay. The nursing facility has further stated that Social Services has helped appellant apply for housing through the Boston Housing Authority, but he was denied because of his criminal record. The nursing facility has helped him with appealing that denial. In addition, the nursing facility has applied to about 12 or 13 different rehabilitation centers on behalf of appellant. The nursing facility has also provided extensive information on social services programs for appellant to look at (Exhibit 6, p. 60).

Included in the nursing home's submission were a number of statements from security, staff, and other patients at the facility (Exhibit 6, pp. 150 –186). On September 23, 2021 appellant's one on one stated that she witnessed him snort a substance and was impaired (Exhibit 6, p. 152). On September 22, 2021 he was impaired and slurring his speech (Exhibit 6, p. 153). On September 21, 2021 security reported that he appeared to be under the influence of narcotics (Exhibit 6, p. 155). On September 20, 2021 security reported that the CNA and nurse came up to the reception desk after finding a syringe in appellant's room (Exhibit 6, p. 156). On September 19, 2021 security reported that appellant's behavior was escalating and getting more volatile and threatening; his verbal outburst is triggering the whole unit (Exhibit 6, p. 158). On September 18, 2021 appellant went on a verbal abuse tirade toward the nurse and security making threats (Exhibit 6, p. 159). On September 17, 2021 appellant was slurring speech and appeared disoriented, EMS was called and determined he did not need to go to the hospital (Exhibit 6, p. 160). On August 22, 2021 security reported that appellant started a fight, was erratic and making threats, and tried to slam the door on the guard (Exhibit 6, p. 166). The notes from staff and other residents that follow depict similar accounts.

The appellant testified that the nursing facility originally wanted appellant to go to a homeless shelter, however, appellant has two letters from his physicians stating that it is unsafe for him to go to a shelter. The appellant stated that the staff assists him with dressing from the waist down and they assist him with a shower on a daily basis. The appellant stated that he requested the nurse's notes from the facility to reflect this and has not yet been provided with a copy. The appellant stated that his primary care physician wrote a letter which states that he cannot go to a homeless shelter and that he requires housing as he is in a wheelchair and has a complex medical history, he cannot sit long, and he has bipolar disorder and PTSD. The doctor further stated that he needs to remain in the facility for his safety and his well-being. The appellant read another note from Dr.

Zachary of Massachusetts General Hospital written in June 2021 into the record. The letter states that appellant is wheelchair bound in the wake of a complex infection of his lumbar spine, has chronic pain, and his condition is precarious. The appellant stated that the doctor further wrote that the lack of his recovery is due to unstable housing and a homeless shelter would be an inappropriate place to discharge the appellant.

The appellant spoke about another appeal for a discharge which was denied, but that notice is not a part of this record and it is unclear as to what he is referring to. The appellant testified that he is not a threat to the facility. He currently has a case which he filed with DPH and an open investigation in reference to his complaints of physical and mental abuse and discrimination at the nursing facility. The appellant reiterated that the case is complex and that he would like to have more time to prepare and would also like representation. When asked whether the appellant brought in illicit substances he responded that even those in criminal court are provided with the opportunity to face those that accused them and here he hasn't been presented with that information. Therefore, it is hard for him to plead his innocence. The appellant stated that from his admission in July 2021 to September 21, 2021 there has been nothing but suspicion against the appellant. The facility has violated his rights without him being involved in the discharge or care plan. The appellant stated that he still has not been given a copy of his care plan and when he was eventually brought in to discuss his care plan he was told that he should learn to speak proper English. The appellant testified that this was witnessed by the Activities Director.

The appellant testified the events that were discussed in the progress notes from September 21, 2021 that were untrue (Exhibit 6, p. 49). The events state that another resident asked the CNA to go into appellant's room to check on him (*Id.*). Appellant was found in his room in his wheelchair so obtunded that he was almost falling out of it (*Id.*). The bed had an insulin needle, glass tube, paper package with powder in it and some kind of stamp on it which was collected by security (*Id.*). Appellant asked the CNA to get him into the bed of another resident and the CNA refused. Eventually he was able to get himself into the other resident's room to sleep with her, however, he was checked multiple times to make sure he was still breathing (*Id.*). The appellant testified that the woman they wrote told the CNA to go into the room did not tell the CNA to go and he has a statement from her to prove that. In addition, the appellant stated that he does not occupy his room alone. The appellant stated that the facility should have called EMS and the police to give the items they found to them. In addition, the appellant stated that if they found him so intoxicated and they feel like he is a danger to others why would they let him get into the bed with another resident and then not supervise him.

The appellant testified that all of this started when he started to speak up about his rights. The appellant brought up another story pertaining to "dirty urine" where he also believed that the facility violated his HIPAA rights. The appellant testified that he had a terrible accident 6 years ago where he fell and slipped and developed an infection in his spine. He has tried to do outpatient therapy while living at a friend's house. He feels that with COVID his condition has regressed and he can no longer use a walker as a result. In addition, his family has stairs in their family home so he cannot live there. A hotel is the only place that is handicap accessible. The appellant stated that he has called many agencies looking for help. His pain started to increase during that time he was living in the community and he ended up in the emergency room. He was then referred to this

nursing facility from the emergency room (appellant testimony).

The appellant stated that he is disputing the accusations of the criminal acts as well as the timeline of the bill that was provided. In addition, the appellant disputes that he is not completely independent with his ADL's as the nursing notes would show that he requires assistance with bathing and dressing. The appellant stated that these are serious allegations against him and he is only fighting for his health care. The appellant also testified that he is disabled and has children, the tattoos and gang affiliation that are referenced in the record have to do with his past.

The record was left open until October 6, 2021 at the conclusion of the hearing for appellant to submit additional documentation. Information was received on October 6, 2021 and the record closed on that date. The documentation was submitted in three parts (Exhibits 7-9). In addition to reemphasizing his need for a continuance of the hearing date the appellant defended many of the incidents reported in the progress notes (see Exhibit 7). The appellant also included correspondence from the Department of Public Health confirming that he did file a complaint against the nursing facility for DPH to investigate (Exhibit 7, p. 17). Appellant also submitted hand-written letters complaining about the fact that his rights were violated because he cannot have private visits and the facility is searching his deliveries, mail, and packages (see Exhibit 7). Part two of the next submission also included appellant's grievances as well as complaints against the nursing facility to DPH (see Exhibit 8). The last submission by appellant included a letter from appellant which reiterated that he cannot shower or dress himself (Exhibit 9). In addition, the letter further states that therapy and acute rehabilitation are appellant's best chance at walking again (Id.). Appellant also included in the submission physical therapy notes which support that he wants to be able to walk again and is cooperative in physical therapy. An occupational therapy note, dated July 21, 2021, notes that appellant was given a shoe horn, dressing stick, reacher, sock aid and long handed sponge to increase his independence with dressing and bathing (Exhibit 9, p. 34). Two letters from the physicians were included, but both were illegible and blacked out (Exhibit 9, pp. 6-7). Appellant also included a text message from another resident to him for the purpose of demonstrating that the staff tried to coerce his friend into telling on appellant for a drug/smoking violation (Exhibit 9, p. 53).

Findings of Fact

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

1. Appellant is a male who lived in the community prior to his arrival at the nursing facility in July 2021.
2. The appellant arrived to the nursing facility in July 2021 for short-term rehabilitation for increased bilateral lower extremity neuropathy.
3. Upon admission to the nursing facility he was determined to be modified independent with transfers and minimal assist with all activities of daily living.

4. In September 2021 both the Medical Director at the nursing facility and the Director of Rehabilitation deemed that appellant was stable, independent with activities of daily living, and safe for discharge from therapy.
5. On September 20, 2021 the nursing facility notified appellant of their intent to discharge him to a Motel 6 on October 20, 2021.
 - a. The notice cites that the resident's health has improved sufficiently such that the resident no longer needs the services provided by the facility and that the resident has failed, after reasonable and appropriate notice, to pay for a stay at the facility.
6. On September 22, 2021 the nursing facility issued an emergency discharge with less than 30 days' notice.
 - a. The discharge location on this notice was also a Motel 6.
 - b. The notice cites that the safety and health of individual(s) at the facility is or would otherwise be endangered.
7. The appellant timely appealed the notices on September 23, 2021.
8. The nursing facility has reason to believe that appellant has brought in illicit drugs to the building and shared with other residents at the facility.
9. The resident has been verbally aggressive and has threatened staff and security.
10. He has been under 1 on 1 supervision and the nursing facility finds that he is uncooperative.
11. The facility found drug paraphernalia on appellant's bed while he was asleep on his wheelchair in the middle of the night.
12. The wheelchair is appellant's baseline for functional mobility according to the nursing facility.
13. The nursing facility has looked into rehabilitation centers and subsidized housing through the Boston Housing Authority as alternative places for discharge.
14. Appellant has filed a complaint with the Department of Public Health against the nursing facility for physical and mental abuse and discrimination.
15. Appellant does not feel involved in the care plan or discharge plan.
16. Appellant contests the events discussed on the September 21, 2021 progress note where drug paraphernalia was found in his room.
17. Appellant also disputes that he is independent with his ADL's and states that he requires assistance with bathing and dressing.

Analysis and Conclusions of Law

With respect to appellant's repeated requests for the matter to be rescheduled the regulations at 130 CMR 610.048(A)(2) and (D) make clear that it is within the Board of Hearings discretion as to when matters can be rescheduled, and only then, when good cause is demonstrated. While time may be allowed to obtain legal counsel in certain situations the proceeding scheduled for October 1, 2021 is time sensitive. The regulations are clear as to the time frames of when an emergency discharge needs to be scheduled, heard, and adjudicated. The fact that appellant was unable to obtain legal counsel should not penalize the facility. As it is within the hearing officer's purview to reconvene the hearing at his or her discretion, based on the above analysis the request to reconvene is denied.

The appeal issue is whether the nursing facility is in compliance with state and federal laws and regulations in its attempt to transfer appellant to a different nursing facility. The following regulations govern the requirements of a nursing facility seeking to transfer a resident:

Regulation 130 CMR 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.

(D) A nursing facility's failure to readmit a resident following a medical leave of absence shall be deemed a transfer or discharge (depending on the resident's circumstances). The nursing facility must issue notice to the resident and an immediate family member or legal representative in accordance with 130 CMR 456.701(A) through (C), 456.702(C), 610.028, and 610.029.

Regulation 130 CMR 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.

(C) When the transfer or discharge is the result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, the notice of transfer or discharge, including that which is required under 130 CMR 456.429, must comply with the requirements set forth in 130 CMR 456.701 and must be provided to the resident and an immediate family member or legal representative at the time the nursing facility determines that it will not readmit the resident.

(Emphasis Added).

The regulations above must be read in conjunction with the MassHealth Fair Hearing Rules at Section 610.028, 610.029, and 610.030.¹ In this matter, the nursing facility initiated an emergency

¹ 130 CMR 610.028: Notice Requirements Regarding Actions 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 MassHealth agency 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 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).
- (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;

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- (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.
- (D) As provided in 130 CMR 456.429, a nursing facility's failure to readmit a resident following a medical leave of absence will be deemed a transfer or discharge (depending on the resident's circumstances). Upon determining that it will not readmit the resident, the nursing facility must issue notice to the resident and an immediate family member or legal representative in accordance with 130 CMR 456.701(A) through (C), 456.702, and 610.028 through 610.030.

130 CMR 610.029: Time Frames for Notices Issued by Nursing Facilities

- (A) The notice of discharge or transfer required under 130 CMR 610.028 must be made by the nursing facility at least 30 days before the date the resident is to be discharged or transferred, except as provided for under 130 CMR 610.029(B) and (C).
- (B) In lieu of the 30-day-notice requirement set forth in 130 CMR 610.029(A), the notice of discharge or transfer required under 130 CMR 610.028 must be made as soon as practicable before the discharge or transfer in any of the following circumstances, which are considered to be 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 lived in the nursing facility for 30 days immediately before receipt of the notice.
- (C) When the transfer or discharge is the result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, the notice of transfer or

discharge. The facts demonstrate that the facility hand delivered the notice(s) to appellant and both notices comply with requirements set forth above at 130 CMR 456.701(C). The notice cites permissible reasons for the discharge pursuant to 130 CMR 456.701(A)(3) and 130 CMR 610.028(A)(3) and permissible reasons for an emergency discharge pursuant to 130 CMR 610.029(B)(1) and 130 CMR 456.702(B)(1). As the basis for the discharge is merited on the basis of appellant being a danger to the safety of other individuals in the facility as well as the fact that the health of others in the facility would be endangered the analysis stops and does not go into whether appellant has failed to pay for his stay as well as appellant's clinical eligibility of his nursing home stay.

The nursing facility has asserted that the "safety and health of individuals in the nursing facility is endangered," which is proper grounds for a transfer or discharge (130 CMR 456.701(A)(3) and (4) and 130 CMR 610.028(A)(3) and (4). Pursuant to regulation 130 CMR 610.028(B), the endangerment of the safety of individuals in the nursing facility must be documented in the clinical record. Moreover, 130 CMR 456.701(B)(2) imposes an additional requirement that a physician document the reason for the transfer or discharge. The physician's progress note from the medical director of the nursing facility, dated September 22, 2021, adequately documents the that the appellant is stable and safe for discharge. In addition, the clinical record corroborates the numerous instances in which the appellant has made inappropriate comments to staff. The testimony from the representatives about the possibility of appellant taking drugs and using them in the facility is persuasive and corroborated by the record. Moreover, the fact that some of the

discharge, including that which is required under 130 CMR 456.429, must comply with the requirements set forth in 130 CMR 456.701, and must be provided to the resident and an immediate family member or legal representative at the time the nursing facility determines that it will not readmit the resident.

(D) Appeals of discharges and transfers listed in 130 CMR 610.029(B) and (C) will be handled under the expedited appeals process described in 130 CMR 610.015(E) and (F).

130 CMR 610.030: 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 610.015(B)(3), 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 610.015(B)(4), and the request is received before the discharge or transfer, then the nursing facility must stay the planned transfer or discharge until five days after the hearing decision.

(C) If the request for a hearing, in accordance with 130 CMR 610.015(B)(4), is received within the applicable time frame but after the transfer, the nursing facility must, upon receipt of the appeal decision favorable to the resident, promptly readmit the resident to the next available bed in the facility.

(D) In the case of a transfer or discharge that is the result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, if the request for a hearing is received within the applicable time period, in accordance with 130 CMR 610.015(B)(5), the nursing facility must, upon receipt of the appeal decision favorable to the resident, promptly readmit the resident to the next available bed.

drugs may have been disseminated to other residents in the facility also supports the fact that the health and safety of other residents at the nursing facility is endangered. Based on the above, the nursing facility has shown sufficient documentation and credible evidence to support the discharge action because the safety of individuals in the nursing facility is endangered.

Pursuant to M.G.L. c.111, §70E, 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.² The nursing facility has provided sufficient preparation and orientation to ensure a safe and orderly discharge from the facility to a motel and has even offered to pay for a one week stay. The appellant can obtain any therapy, physical or occupational, outside in the community. In addition, appellant can utilize equipment to help him complete his ADL's or can apply for other programs that exist for those in the community that require assistance with their ADL's such as a personal care attendant or home health aide. There is no indication that discharge to a motel will not allow for a safe and orderly discharge. The nursing facility has satisfied its obligation with respect to the discharge planning regulations.

There are two notices at issue here a discharge under 130 CMR 456.702(A) and an emergency discharge under 130 CMR 456.702(B). Consequently, appellant had 14 days after receiving the written notice of emergency discharge to appeal the discharge to the Board of Hearings (130 CMR 456.703(B)(2)). Therefore, the stay of a transfer/discharge from the nursing facility pending appeal correctly falls under 130 CMR 457.704(B) and the nursing facility must stay the planned discharge until five days after the hearing decision.

The appeal is DENIED.

Order for MassHealth

Proceed with the planned discharge after a 5-day period from the date of this hearing decision during which appellant must not be transferred or discharged from the nursing facility.

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

² See also, 42 U.S.C. §483.12(a)(7).

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.

Radha Tilva
Hearing Officer
Board of Hearings

cc:

[REDACTED]