

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2179493
Decision Date:	12/24/2021	Hearing Date:	12/22/2021
Hearing Officer:	Christine Therrien		

Appearance for Appellant:
Pro se

Appearance for Nursing Facility:
Naomi Cairns, Dir. Of Social Services; Jacob Korzec, Dir. Of Physical Plant; Mark Korin, Social Work intern; Chris Laptin, Dir. Of Rehabilitation; Kelly Corrao-Fisher, Substance Counselor; Annemarie Ester, After Care Coordinator; Aneta Czartoryski, Dir. Of Nursing



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	Approved	Issue:	Nursing Facility Expedited Discharge
Decision Date:	12/24/2021	Hearing Date:	12/22/2021
Nursing Facility's Rep.:	Naomi Cairns, Dir. Of Social Services; Jacob Korzec, Dir. Of Physical Plant; Mark Korin, Social Work intern; Chris Lapten, Dir. Of Rehabilitation; Kelly Corrao-Fisher, Substance Counselor; Annemarie Ester, After Care Coordinator; Aneta Czartoryski, Dir. Of Nursing	Appellant's Rep.:	Pro se
Hearing Location:	All parties appeared by phone		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

The appellant received a Notice of Intent to Discharge Resident with Less than 30 Days' Notice (Expedited Appeal) dated 12/14/21. The notice stated that Highview of Northampton ("the skilled nursing facility" or "the facility") seeks to discharge the appellant to 8 Susan St. E. Longmeadow, MA 01116 on 12/28/21. The notice indicates the reason for the discharge is that "the safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status" and "the health of the individual in the facility would otherwise be endangered" (Exhibit 1). The appellant filed this timely appeal on 12/17/21 (130 CMR 610.015(B); and Exhibit 2). Discharge of a Nursing Facility patient is valid grounds for appeal (130 CMR 610.029; 42 CFR Ch IV §483.200 et seq.).

Action Taken by Nursing Facility

The skilled nursing facility intends to discharge the appellant from the facility.

Issue

Is the planned discharge correct pursuant to 130 CMR 610.029?

Summary of Evidence

The appellant received a “Notice of Intent to Discharge Resident with Less than 30 Days’ Notice” 12/14/21 (Exhibit 1). The Director of Social Services submitted the appellant’s clinical record from the facility into evidence (Exhibit 4). The Director of Social Services testified that the appellant was admitted to the facility in [REDACTED]. The Director of Social Services testified that the appellant was admitted to the facility for the administration of IV antibiotics and was to stay until the course of the antibiotics was finished. The Director of Social Services testified that the appellant’s antibiotics will be finished on 12/27/21. The Director of Social Services testified that on 12/13/21 the appellant’s room smelled of smoke and the appellant refused to turn out his pockets when asked, and a vape pen was found in the appellant’s possession which puts the appellant and others at risk (Exhibit 4, p.85). The Director of Physical Plant testified that all personal items are taken upon admission to the facility. The Director of Nursing testified the appellant has an appointment with Infectious Disease on 12/23/21. The Director of Social Services testified that the appellant’s prior home address was cited as the discharge location and she did not know until after issuing the discharge notice that this is an address to which the appellant cannot return. The After-Care Coordinator testified that she put in applications for two substance use disorder programs on 12/11/21 (Exhibit 4, p.46). The Director of Social Services testified that they would discharge the appellant to a homeless shelter. It was suggested that the facility rescind the notice and reissue a new discharge notice with the updated discharge location the facility declined to do so, and the After Care Coordinator stated she did not think it mattered what location was listed.

The appellant's testified that he was not smoking and appealed the discharge because he disagrees with the “charges.” The appellant testified that he did not turn out his pockets because he felt it was a violation of his rights. The appellant testified that he informed the facility on 12/11/21 that he wants to go to a substance abuse rehabilitation program (Exhibit 4, p. 46). The appellant testified that he cannot return to his previous home and hopes that after the rehabilitation program he can return.

Findings of Fact

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

1. The appellant received a “Notice of Intent to Discharge Resident with Less than 30 Days’ Notice” 12/14/21 (Exhibit 1).

2. The appellant's clinical record from the facility into evidence (Exhibit 4).
3. The appellant was admitted to the facility in [REDACTED].
4. The appellant was admitted to the facility for the administration of IV antibiotics and was to stay until the course of the antibiotics was finished.
5. The appellant's antibiotics will be finished on 12/27/21.
6. The appellant has an appointment with Infection Disease on 12/23/21.
7. On 12/13/21 the appellant's room smelled of smoke and the appellant refused to turn out his pockets when asked, and a vape pen was found in the appellant's possession (Exhibit 4, p.85).
8. All personal items are taken upon admission to the facility.
9. The appellant's prior home address was cited as the discharge location.
10. The appellant's prior home address is an address to which the appellant cannot return.
11. On 12/11/21, applications for two substance use disorder programs were submitted (Exhibit 4, p.46).
12. The facility will discharge the appellant to a homeless shelter since he cannot return home.
13. The facility chose not to rescind the discharge notice and reissue a new discharge notice with the updated discharge location.
14. The appellant testified that he informed the facility on 12/11/21 that he wants to go to a substance abuse rehabilitation program (Exhibit 4, p. 46).

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 456.402 apply:¹

¹ The regulatory language in the MassHealth Nursing Facility Manual has identical (or near-identical) regulatory counterparts within the Commonwealth's Fair Hearing Rules under 130 CMR 610.000 et seq., as well as federal regulations found under 42 CFR 483.000 et seq. As to this part of the regulatory law, the regulations in 130 CMR

“Nursing facility” - an institution or a distinct part of an institution that meets the provider-eligibility and certification requirements of 130 CMR 456.404 or 456.405. For requirements related to the transfer and discharge of residents, the term nursing facility also includes a nursing facility participating in Medicare, whether or not it participates in MassHealth.

“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 bed with the same certification is not a transfer.

The appellant is challenging the nursing facility’s attempt to discharge him to a homeless shelter in a community setting via its notice dated 12/14/21 (Exhibits 1 and 130 CMR 456.402).

The guidelines that apply in a determination of whether 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 and the requirements of the relevant notice – if these requirements are not met, the facility must permit the resident to remain in the facility.

The relevant portions of the regulation at 130 CMR 456.701 read 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

610.028 and 42 CFR 483.12(a)(2) are identical to that found in 130 CMR 456.402. This appeal decision will hereafter make all further regulatory references only to the MassHealth Nursing Facility Manual regulations in 130 CMR 456.000, unless other regulatory references is noted and appropriate.

- 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 ...

(Emphasis added.)

The facility is seeking a discharge based upon the grounds that the safety of the individuals in the nursing facility is endangered due to the appellant's clinical or behavioral status. The 12/14/21 "Notice of Intent to Discharge Resident with Less than 30 Days' Notice" found in Exhibit 1 asserts the circumstances identified at 130 CMR 456.701(C)(2) but does not comply with the notice requirements set forth in 130 CMR 456.701(C) because it does not identify the location where the appellant will be discharged. The discharge location listed in the notice is not a place the appellant can go, and the facility cannot change the location during the hearing.

The nursing facility has not met the requirements of all other applicable federal and state regulatory requirements in addition to the MassHealth-related regulations discussed above, including MGL 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.)

Therefore, appellant did not receive adequate and actual notice of the planned discharge under 130 CMR 456.701 and the nursing facility has not met its burden to show compliance with MGL c.111,

§70E. The discharge fails on its face without any further determination as to the merits of the reason for discharge.

Based on the record and the above analysis, the nursing facility does not have valid grounds to discharge the appellant per its notice dated 12/14/21. The appeal is therefore APPROVED.

Order for Nursing Facility

Rescind Notice of Intent to discharge.

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 this nursing facility fails to comply with the above order, you should report this in writing to the Director of the Board of Hearings, at the address on the first page of this decision.

Christine Therrien
Hearing Officer
Board of Hearings

cc: Naomi Cairns, Highview of Northampton, 222 River Road, Leeds, MA 01053