

# Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2179495
<b>Decision Date:</b>	12/24/2021	<b>Hearing Date:</b>	12/22/2021
<b>Hearing Officer:</b>	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

<b>Appeal Decision:</b>	Approved	<b>Issue:</b>	Nursing Facility – expedited discharge
<b>Decision Date:</b>	12/24/2021	<b>Hearing Date:</b>	12/22/2021
<b>Nursing Facility’s Rep.:</b>	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	<b>Appellant’s Rep.:</b>	Pro se
<b>Hearing Location:</b>	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 755 Worthington St., Springfield, MA 01105 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 after a surgical leg amputation. The Director of Social Services testified that a cut straw containing white powder residue was found in the appellant's wallet, the appellant received food from outside the facility that contained heroin and crack cocaine, and the appellant's room smelled of smoke which puts the appellant and others at risk (Exhibit 4, p.72, 74, 76). The Director of Social Services has a concern that the appellant will relapse in the facility. The Director of Physical Plant testified that he thought the food with the baggies of drugs in it was either a set up or not meant for the appellant and those drugs were not the appellant's typical drugs. The Director of Social Service testified that the police were called when the substances were discovered in the food, but no arrests were made. The Director of Physical Plant also testified that the straw found in the appellant's wallet may have been old. The Director of Rehabilitation testified that the appellant's discharge note states he is independent with his prosthesis, able to walk 300 ft without an assistive device, and able to climb two stairs, which was the PT goal set for the appellant (Exhibit 4, pp. 68-70). The Director of Nursing testified the appellant is fully healed from surgery and he is independent with all activities of daily living (ADLs). The Director of Social Services testified that the appellant can be discharged to a homeless shelter, which does not have any stairs for entry. The After-Care Coordinator testified that a bed was found for the appellant at a sober house, but the appellant refused to go there. The After-Care coordinator has gotten the appellant on waitlists for the housing authority and the appellant is in the Money Follows the Person (MFP) program.

The appellant's testified that he does not know anything about the drugs in the food that was delivered to him and the straw in his wallet was old. The appellant testified that he was not smoking in his room and that he has roommates. The appellant testified that he is trying to stay drug free, and he thought that the urine sample he provides each week was a drug test. The appellant testified that he would like to go to a sober house. The appellant testified that he was unwilling to go to the available bed at the sober house because he was not fully healed at the time, but now he is ready to go there. The appellant testified that he is afraid that going to a shelter will not help him stay drug free.

The Director of Social Services and the After-Care Coordinator testified that they are willing to stay the appellant's discharge, but the appellant has to agree to take the first available bed that is not at a shelter

and refrain from any activity that violates the facility policies. The Director of Social Services requested a decision in lieu of rescinding the discharge notice.

## **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 was entered into evidence (Exhibit 4).
3. The appellant was admitted to the facility in [REDACTED]. The Director of Social Services testified that the appellant was admitted to the facility after a surgical leg amputation.
4. A cut straw containing white powder residue was found in the appellant’s wallet, the appellant received food from outside the facility that contained heroin and crack cocaine, and the appellant’s room smelled of smoke (Exhibit 4, p.72, 74, 76).
5. The police were called when the substances were found in the food, no arrests were made.
6. The appellant’s discharge note states he is independent with his prosthesis, able to walk 300 ft without an assistive device, and able to climb two stairs, which was the PT goal set for the appellant (Exhibit 4, pp. 68-70).
7. The appellant is fully healed from surgery and he is independent with all activities of daily living (ADLs).
8. A bed was found for the appellant at a sober house, but the appellant refused to go there.
9. The appellant is on waitlists for the housing authority and he is in the MFP program.
10. The appellant testified that he willing to go to an available bed at a sober house.
11. The Director of Social Services and the After-Care Coordinator are willing to stay the appellant’s discharge.
12. The appellant agreed to take the first available bed that is not at a shelter and refrain from any activity that violates the facility policies.
13. The Director of Social Services would not rescind the discharge notice.

## **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.<sup>1</sup>

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 have the Division or Medicare pay for) a stay at the nursing facility; or
- (6) the nursing facility ceases to operate.

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<sup>1</sup> "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 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 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.

(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 to issue a discharge notice 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) and complies with the notice requirements set forth in 130 CMR 456.701(C). Therefore, appellant received adequate and actual notice of the planned discharge.

The first issue is whether the appellant's discharge is appropriate because the safety of individuals in the nursing facility is endangered. The appellant's alleged conduct could potentially harm himself and the other residents, but each of these incidents is circumstantial. The appellant was one of three people in a room that smelled of smoke, the appellant had a straw in his wallet that could have been there for months, the appellant's receipt of food containing hidden substances was testified to as probably not being for the appellant. While the nursing facility has a duty to protect all the residents stringing together several incidents that tenuously link the appellant to current substance use is not enough to discharge the appellant.

The second issue is whether the nursing facility has 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.)

The PT notes indicates the appellant is independent with all his ADLs and ambulatory without assistive devices. Per 130 CMR 456.701(B)(1), the PT discharge notes are not signed by the appellant's physician, and alternatively, there is not a physician's discharge note in the clinical records provided. While the appellant's the clinical record shows he can function outside a clinical setting the nursing facility has not met its burden to show compliance with MGL c.111, §70E.

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.<sup>2</sup>

## **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.

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Christine Therrien  
Hearing Officer  
Board of Hearings

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

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<sup>2</sup> The nursing facility and the appellant verbally agreed at the hearing that the discharge would be stayed while the facility found the appellant a non-shelter discharge location which the appellant would accept.