

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2206678
Decision Date:	9/26/2022	Hearing Date:	9/23/2022
Hearing Officer:	Thomas J. Goode		

Appearance for Appellant:

Pro se

Appearance for Nursing Facility:

Mark Forest, Administrator
Stephanie Kay, Director of Social Services
Jennifer Young, Social Worker (in training)
Dr. Ken Haggard, Substance Abuse Counselor



*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:	Expedited Nursing Facility- Initiated Discharge
Decision Date:	9/26/2022	Hearing Date:	09/23/2022
Nursing Facility's Reps.:	Mark Forest, Administrator, et.al.	Appellant's Rep.:	Pro se
Hearing Location:	(Remote)		

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 1, 2022, the nursing facility issued a Notice of Intent to Discharge Resident With Less Than 30 Days' Notice (Expedited Appeal), to an emergency shelter for the specific reason: "the safety of the individuals in the facility is endangered due to the clinical or behavioral status of the resident" (130 CMR 456.702(B) 130 CMR 610.029(B); Exhibit 1). Appellant filed this appeal in a timely manner on September 7, 2022 (130 CMR 610.015(F); Exhibit 2).¹ Nursing facility residents have the right to request an appeal of any nursing facility-initiated transfer or discharge (130 CMR 456.703. 610.032(C)).

¹ 130 CMR 610.015(F) Expedited Appeals for Discharges and Transfers from a Nursing Facility Under 130 CMR 610.029(B) or (C). A resident may request an expedited appeal when a nursing facility notifies a resident of a discharge or transfer under the time frames of 130 CMR 610.029(B) or (C). When such a request is made, BOH will schedule a hearing as soon as possible, but no later than seven days from the date BOH receives the request. The hearing officer must render a final decision as soon as possible, but no later than seven days from the date of the hearing. These time limits may be extended pursuant to 130 CMR 610.015(D). Appeal requests made under 130 CMR 610.015(F) automatically waive the requirement for ten-day advance notice of the scheduled hearing date under 130 CMR 610.046(A).

Action Taken by the Nursing Facility

The nursing facility issued a Notice of Intent to Discharge Resident With Less Than 30 Days' Notice (Expedited Appeal) to an emergency shelter for the specific reason: "the safety of the individuals in the facility is endangered due to the clinical or behavioral status of the resident."

Issue

The appeal issue is whether the nursing facility was correct, pursuant to 130 CMR 456.702(B), 130 CMR 610.029(B), in notifying Appellant of its intent to discharge her with less than 30 Days' notice to an emergency shelter because "the safety of the individuals in the facility is endangered due to the clinical or behavioral status of the resident."

Summary of Evidence

The nursing facility was represented by the facility administrator, social services director, and a physician. Through a notice dated September 1, 2022, the nursing facility issued a Notice of Intent to Discharge Resident With Less Than 30 Days' Notice (Expedited Appeal), to an emergency shelter for the specific reason: "the safety of the individuals in the facility is endangered due to the clinical or behavioral status of the resident" (Exhibit 1). Appellant is [REDACTED] years old and was admitted to the nursing facility on [REDACTED] with a diagnosis of surgical amputation of the left lower extremity. Appellant received physical and occupational therapy during her stay. The administrator testified that Appellant was issued the notice of discharge because there have been several incidents in which Appellant was found to have drug paraphernalia, cigarettes, lighters, cocaine, and a crack pipe in her possession. The administrator testified that on admission to the facility, Appellant signed an agreement that her room could be entered and searched at any time (Exhibit 4, p. 23). Appellant was also furnished with the facility's smoking policy on admission which informed her that all smoking materials must be managed by staff. On August 24, 2022, Appellant received a warning stating that on August 23, 2022, she caused safety concerns by possessing a crack pipe, cigarettes, and a lighter in her room, and that a similar incident would result in discharge from the facility (Id., p. 24). The administrator pointed to nursing progress notes documenting incidents between July 26, 2022, and September 1, 2022 (Exhibit 1, p. 21). The notes record discovery of cigarettes and lighters in Appellant's room, a white powder substance in Appellant's drawer which she purportedly admitted was cocaine, a crack pipe, and an incident where she was purportedly observed smoking from a pipe (Exhibit 4, p. 21). The administrator stated that the notes were recorded by social services and nursing staff. The administrator testified that Appellant's violation of the facility's smoking policy and use and possession of illicit drugs in the facility resulted in the decision to issue the September 1, 2022 notice of discharge informing Appellant that she would be discharged on September 2, 2022 to an emergency shelter. The administrator testified that a physician did not document in Appellant's record that the health or safety of individuals in the nursing facility is endangered by Appellant, although he feels the violations warrant the discharge. The administrator stated that in his opinion the discharge plan is safe and appropriate for Appellant, but a better plan would be to discharge Appellant to her son's home. The social services

director added that nursing visits could be arranged for Appellant at the emergency shelter.

Appellant acknowledged that she has violated the smoking policy and has been caught using illicit drugs in the facility. She testified that she bought drugs from another resident who has since been discharged from the facility. Appellant stated that she is an addict, and that the facility does not provide adequate therapy to help her deal with her addiction which she wants to overcome. Appellant stated that she is confined to a wheelchair while she awaits a prosthetic for her left leg. Appellant stated that she can independently complete her activities of daily living such as dressing, and toileting. Appellant stated that she has been homeless but will not return to the emergency shelter where she has stayed in the past, and where she alleges she contracted an infection that resulted in the amputation of her left leg below the knee. Appellant stated that she has since been compliant with the smoking policy and gets along with other residents and staff.

Dr. Haggard identified himself as a substance abuse counselor, and testified that the facility was offering AA meetings on each floor, but due to low participation the approach was changed to one-on-one meetings. Dr. Haggard stated that Appellant has violated the nursing facility's smoking policies numerous times.

Findings of Fact

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

1. Through a notice dated September 1, 2022, the nursing facility issued a Notice of Intent to Discharge Resident With Less Than 30 Days' Notice (Expedited Appeal), to an emergency shelter for the specific reason: "the safety of the individuals in the facility is endangered due to the clinical or behavioral status of the resident."
2. Appellant is [REDACTED] years old and was admitted to the nursing facility on [REDACTED], with a diagnosis of surgical amputation of the left lower extremity. Appellant received physical and occupational therapy during her stay.
3. The facility issued the notice of discharge because there have been several incidents in which Appellant was found to have drug paraphernalia, cigarettes, lighters, cocaine, and a crack pipe in her possession.
4. Appellant signed an agreement that her room could be entered and searched at any time.
5. Appellant was furnished with the facility's smoking policy on admission which informed her that all smoking materials must be managed by staff.
6. On August 24, 2022, Appellant received a warning stating that on August 23, 2022, she caused safety concerns by possessing a crack pipe, cigarettes, and a lighter in her room, and that a similar incident would result in discharge from the facility.

7. Nursing progress notes document incidents between July 26, 2022, and September 1, 2022 recording discovery of cigarettes and lighters in Appellant's room, a white powder substance in Appellant's drawer which she purportedly admitted was cocaine, a crack pipe, and an incident where she was purportedly observed smoking from a pipe.
8. The progress notes were recorded by social services and nursing staff.
9. A physician did not document in Appellant's record that the health or safety of individuals in the nursing facility is endangered by Appellant.

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 action initiated by a nursing facility. Massachusetts has enacted regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant regulations may be found in both (1) the MassHealth Nursing Facility Manual regulations at 130 CMR 456.000 et seq., and (2) the Fair Hearing Rules at 130 CMR 610.000 et seq.²

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

² The regulatory language in the MassHealth Nursing Facility Manual, found in 130 CMR 456.000 et seq. has regulations which are identical (or nearly identical) to counterpart regulations found within the Commonwealth's Fair Hearing Rules at 130 CMR 610.001 et seq. as well as corresponding federal government regulations. Because of such commonality, the remainder of regulation references in this Fair Hearing decision will only refer to the MassHealth Nursing Facility Manual regulations in 130 CMR 456.000 unless otherwise noted and required for clarification.

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.

(130 CMR 456.701(C))

Further, the notice requirements set forth in 130 CMR 456.701(A) state that 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) (emphasis added); or
- (6) the nursing facility ceases to operate.

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).

(130 CMR 456.701(B))

130 CMR 456.702: Time Frames for Notices Issued by Nursing Facilities: ³

(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.

(emphasis added)

(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

³ See also 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. (emphasis added)

(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, including that which is required under 130 CMR 456.429: *Medical Leave of Absence: Failure to Readmit*, must comply with the requirements set forth in 130 CMR 456.701: *Notice Requirements for Transfers and Discharges Initiated by a Nursing Facility*, and must be provided to the resident and an immediate family member or legal representative, if such person is known to the nursing facility, 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) are handled under the expedited appeals process described in 130 CMR 610.015(F).

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.

130 CMR 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.

(C) If the request for a hearing 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 as described in 130 CMR 456.703(B)(3), the nursing facility must, upon receipt of the appeal decision favorable to the resident, promptly readmit the resident to the next available bed.

The nursing facility must also comply with all other applicable state laws, including M.G.L. c.111, §70E. The key paragraph of this statute, which is directly relevant to any type of appeal involving a nursing facility-initiated transfer or discharge, reads:

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.⁴

⁴ See also 42 USC 1396r(c)(2)(C) which requires that a nursing facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

On September 1, 2022, the nursing facility issued a Notice of Intent to Discharge Resident With Less Than 30 Days' Notice (Expedited Appeal), to an emergency shelter for the specific reason: "the safety of the individuals in the facility is endangered due to the clinical or behavioral status of the resident." The notice, which is treated as an emergency transfer, triggers specific regulatory timeframes and requirements outlined above. A nursing facility resident can only be discharged for specific reasons also outlined above. The regulations require that when initiating a discharge with less than 30-days' notice because the health or safety of individuals in the nursing facility would be endangered, **it must be documented in the resident's record by a physician.** Appellant's record submitted into evidence does not include documentation by a physician that the health or safety of individuals in the nursing facility would be endangered if Appellant is not discharged (Exhibit 4). As the documentation submitted in support of the September 1, 2022 expedited discharge notice fails regulatory requirements, no further analysis is required.⁵

Appellant's appeal is APPROVED in accordance with the order below.

Order for the Nursing Facility

Do not discharge Appellant pursuant to the September 1, 2022 discharge notice.

Compliance with 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, Office of Medicaid, at the address on the first page of this decision.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Thomas J. Goode
Hearing Officer
Board of Hearings

cc: Mark Forest, Administrator, Worcester Rehab and Health Care Center, 119 Providence Street, Worcester, MA 01604

⁵ Although the documentation submitted in support of the September 1 2022 notice does not meet regulatory requirements, the nursing facility is not precluded from issuing new notice that complies with the regulations.