

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2300533
Decision Date:	1/31/2023	Hearing Date:	01/26/2023
Hearing Officer:	Susan Burgess-Cox		

Appearance for Appellant:



Appearance for Nursing Facility:

Nancy Zraizaa, Erica Colon, & Maria Casey



*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:	NH Discharge
Decision Date:	1/31/2023	Hearing Date:	01/26/2023
Nursing Facility's Reps.:	Nancy Zraizaa; Erica Colon; & Maria Casey	Appellant's Rep.:	██████
Hearing Location:	All Parties Appeared by Telephone		

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 ████████ 2023, the nursing facility informed the appellant that he would not be readmitted to their facility following his release from the hospital because the safety of individuals in the facility is endangered by the appellant. (130 CMR 610.028; Exhibit 1). The appellant filed this appeal in a timely manner on January 20, 2022. (130 CMR 610.015(B); Exhibit 2). Nursing facility residents have the right to request an appeal of any nursing facility-initiated transfer or discharge. (130 CMR 610.032(C)).

Action Taken by the Nursing Facility

The nursing facility issued a notice of intent not to readmit the appellant following hospitalization.

Issue

Whether the nursing facility was correct, pursuant to 130 CMR 456.429, 456.701, 610.028 and 610.029, in notifying the appellant of its' intent not to readmit following his release from the hospital as the safety of individuals in the facility would be endangered by the appellant being at the facility.

Summary of Evidence

All parties appeared by telephone. On [REDACTED] 2023, the nursing facility informed the appellant that he would not be readmitted to their facility following his release from the Good Samaritan Medical Center because the safety of individuals in the facility is endangered by the appellant.

On [REDACTED], 2022, the appellant was involved in an altercation with another patient. No official records of the incident were presented by either party. The parties presented conflicting testimony and evidence regarding the incident. The appellant's representative provided a copy of a police dispatch log that included a broad overview of the incident from a third party who was not present at the facility. (Exhibit 4). Notes from the call log indicate that no crime had been committed and no charges were filed. (Exhibit 4). Representatives from the facility noted that the individual involved in the incident was pressing charges.

The facts that were not in dispute included an altercation occurring, both parties having equipment that could cause injury to the other and following the call to the police, the appellant was brought to the Good Samaritan Medical Center for a psychiatric evaluation and potential treatment under Section 12 of Chapter 123 of the Massachusetts General Laws. The appellant is currently in the same acute inpatient facility. The parties from the facility noted that the appellant was cleared psychiatrically and able to be discharged from the hospital as of the date of the hearing.

While representatives from the facility acknowledged that the appellant was able to be discharged from the hospital, the notice on appeal does not list an effective date of discharge or transfer from the Guardian Center or a location where the appellant would be transferred or discharged following his release from the Good Samaritan Medical Center if not readmitted to the Guardian Center. The parties present for the facility felt that the acute inpatient facility was an appropriate location for discharge. The representatives from the facility presented testimony noting the role of hospital staff alone in any discharge planning from the acute inpatient facility. Representatives from the nursing facility stated that one plan could be to discharge the appellant from the hospital to the community, possibly

to a shelter or to another type of facility, and another could involve the appellant being sent to a different long-term care facility. None of that was stated in the notice on appeal or appear as a plan established as of the hearing date. No clinical records were presented to demonstrate that it was safe or appropriate for the appellant to receive services in the community or at another facility.

The notice of discharge was sent to the appellant alone. The representatives from the facility acknowledged having the name and address of the appellant's representative as an immediate family member or legal representative. However, the representatives from the facility felt that the appellant had the ability to make decisions on his own so they were not required to provide a copy of the notice of the intent not to readmit to an immediate family member or legal representative.

As noted above, the facility did not provide any clinical records for the hearing. The individual appearing on behalf of the facility stated that they did not receive notice of the hearing. While the parties initially stated that they did not receive notice of the hearing, they agreed to move forward and provided testimony and arguments for the hearing record. The appellant's representative also agreed to move forward with the hearing with the possibility of keeping the record open should either party the need to review clinical records or other documents presented at hearing.

At one point the parties present for the facility asked for a brief recess to consult with one another. The parties returned to the hearing asking the Board of Hearings to continue the hearing to another date so they could consult with their corporate office and counsel. This request was denied as the hearing had already progressed with all parties agreeing to move forward prior to this request; those present for the facility appeared prepared for the hearing; testimony had been presented by both sides; and the facility was the party who issued the notice on appeal so had access to information and records regarding the reason for the discharge. Additionally, there was an agreement that the record could be held open if the hearing officer determined it was necessary. The parties present for the facility failed to provide a meaningful basis for granting a continuance. Instead, it appeared to be another way to continue with the decision on appeal.

The notice of intent not to readmit does not list contact information for a local legal services office or nearest legal services office. The legal services office listed on the discharge form issued to an individual in Brockton, Massachusetts was the Massachusetts Legal Assistance Corporation, located in Boston, Massachusetts. The Massachusetts Legal Assistance Corporation is an organization that serves as the largest funding source for civil legal aid organizations in Massachusetts, not a local legal services office that provides direct assistance or representation.

The request for hearing form included with the notice of discharge indicates the appellant can file an appeal by mailing or faxing the request for hearing form to the Board of Hearings, Division of Medical Assistance, 2 Boylston Street, Boston, MA 02116. The fax number on the form is (617) 210-5820 and one telephone number listed for questions is (617) 210-5800. In 2010, the Board of Hearings relocated their office to 100 Hancock Street, Quincy MA and changed the fax number to (617) 847-1204 and local telephone number to (617) 847-1200. It was not clear how the appellant was able to file a timely appeal to the Board of Hearings.

The parties from the facility felt that the notice was sufficient and complied with all regulatory requirements as it was a form that they found online. As noted above, the parties from the facility acknowledged that the appellant is in an acute inpatient hospital that does not provide long-term care services and they had no other transfer or discharge plan.

The appellant's representative provided testimony regarding the incident in question and information she received from the local police department. No one at the hearing noted witnessing the event in question or being able to call a witness other than the appellant or the other resident. The appellant's representative did note the appellant wanting to observe the hearing but after several attempts to contact the appellant failed, the representative agreed to move forward without the appellant.

The appellant's representative testified that the facility has been trying to discharge the appellant since [REDACTED] 2022. The appellant's representative testified that she was told that individuals from the facility are entering the appellant's room daily making disparaging remarks. The appellant's representative testified that she filed a complaint with a state agency to report these incidents. The appellant's representative testified that it would not be safe or appropriate to discharge the appellant into the community. The appellant's representative requested that the appellant be readmitted to the current facility while individuals worked to find an alternative placement. The appellant's representative stated that she did not need time to review clinical records before the Board of Hearings issued a hearing decision. Therefore, the record closed at the conclusion of the hearing.

Findings of Fact

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

1. On [REDACTED], 2022, the appellant was involved in an altercation with another patient at the Guardian Center.
2. The parties involved in the altercation had equipment that could cause injury to the other.
3. Following a call to the police from someone at the facility, the appellant was brought to the Good Samaritan Medical Center for a psychiatric evaluation and potential treatment under Section 12 of Chapter 123 of the Massachusetts General Law.
4. None of the parties at hearing witnessed the altercation.
5. On [REDACTED] 2023, the nursing facility informed the appellant that he would not be readmitted to their facility following his release from the Good Samaritan Medical Center because the safety of individuals in the facility is endangered by the appellant.
6. The Good Samaritan Medical Center is an acute inpatient facility.
7. The Good Samaritan Medical Center does not provide long-term care.
8. As of the date of the hearing, the appellant was still admitted to the Good Samaritan Medical Center.
9. As of the date of the notice, the appellant was able to be discharged from the hospital and return to the nursing facility.
10. The notice of intent not to readmit was sent to the appellant alone.
11. The notice does not list the effective date of a transfer or discharge.
12. The notice does not list a location where the appellant would be transferred or discharged to following his release from the Good Samaritan Medical Center.
13. The parties present for the facility felt that the acute inpatient facility was an appropriate location for discharge.
14. No clinical records were presented before or at the hearing.
15. Representative from the nursing facility are not actively engaged in discharge

planning for the appellant.

16. The appellant is in Brockton, Massachusetts.
17. The notice of intent not to readmit provides contact information for the Massachusetts Legal Assistance Corporation, an organization that serves as the largest funding source for civil legal aid organizations in Massachusetts, not a local legal services office that provides direct assistance or representation.
18. The request for hearing form states the appellant can file an appeal by mailing or faxing the request for hearing form to the Board of Hearings, Division of Medical Assistance, 2 Boylston Street, Boston, MA 02116. The fax number on the form is (617) 210-5820 and one telephone number listed for questions is (617) 210-5800.
19. In 2010, the Board of Hearings relocated their office to 100 Hancock Street, Quincy MA and changed the fax number to (617) 847-1204 and local telephone number to (617) 847-1200.

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 some of 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.¹

In this case, the nursing facility issued a notice of intent not to readmit the appellant following hospitalization or other medical leave of absence. When a nursing facility is notified that the resident is ready to return to the facility, the nursing facility must readmit the resident following a medical leave of absence. (130 CMR 456.429). Neither party disputed the fact that the appellant in this case was ready to return to the facility.

¹ The regulatory language in the MassHealth Nursing Facility Manual, found in 130 CMR 456.400 et seq. has regulations which are identical (or near-identical) to counterpart regulations be found within the Commonwealth's Fair Hearing Rules at 130 CMR 610.000 et. seq. as well as corresponding federal government regulations. Because of such commonality, the remainder of regulatory references in this decision will only refer to the MassHealth Nursing Facility Manual regulations in 130 CMR 456.400 unless otherwise noted and required for clarification.

If a nursing facility does not allow the resident to be readmitted following hospitalization or other medical leave of absence, the nursing facility's failure to readmit the resident is deemed a transfer or discharge. (130 CMR 456.429(A)). The nursing facility must provide the resident and an immediate family member or legal representative with a notice explaining its decision not to readmit the resident. (130 CMR 456.429(A)). The notice 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 such determination is made. (130 CMR 456.429(A)).

The notice requirements set forth in 130 CMR 456.701 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; or
- (6) the nursing facility ceases to operate. (130 CMR 456.701(A)).

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)).

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. (130 CMR 456.701(C)).

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. (130 CMR 456.704(D)).

In this case, in their attempt to not to readmit the appellant, the nursing facility

violated most of the regulatory requirements that serve to protect and provide due process to patients who are an extremely vulnerable population. First, the facility failed to send a copy of the notice to a designated family member or legal representative. Representatives from the facility acknowledged having contact information for the appellant's sister as a designated family member. However, they did not feel it was necessary to comply with the regulatory requirement of sending a notice to a designated family member or legal representative as the appellant appeared to be able to make decisions on his own. This assumption was made for a patient who was sent directly from the facility to the hospital for a psychiatric evaluation. It is difficult to understand why anyone would believe that an individual being sent for a psychiatric evaluation would not require any representation or assistance with the discharge or transfer process.

Second, the nursing facility did not make any clinical records available for the hearing. While the representatives from the facility stated that this error was due to a failure to receive notice of the hearing, their failure to provide records alone is not grounds for approving this appeal. It is just one of several regulatory violations that occurred in this case so noted in this decision.

Third, the notice itself contained several flaws including: not providing the effective date of the discharge or transfer; not listing a location to which the appellant was to be discharged or transferred; providing contact information for the Board of Hearings from at least 12 years ago; and providing the name and address of the organization that serves as the largest funding source for civil legal aid organizations in Massachusetts rather than the name and address of a local legal services organization that provides direct services to individuals.

In addition to being obligated to comply with all of the notice requirements that ensure individuals from such a vulnerable population are provided due process, a nursing facility has an obligation to comply with all other applicable state laws, including M.G.L. c.111, §70E, which went into effect in November of 2008. The key paragraph of that statute, which is directly relevant to any type of appeal involving a transfer or discharge, 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.

The representatives from the facility did not provide any testimony or evidence to demonstrate that they have provided the appellant with sufficient preparation and orientation to ensure a safe and orderly transfer or discharge to another safe and appropriate place. In fact, the parties from the facility acknowledged that they did not have a discharge or transfer plan in place. The representatives from the facility stated more than once that they were not directly involved in any discharge planning as the appellant was in the hospital, not in their facility.

This appeal is approved to ensure that the facility acts in compliance with the laws and regulations governing a nursing home transfer and discharge. As noted above, these laws and regulations are in place to ensure individuals are provided with the necessary rights and protections to ensure a safe transfer or discharge to another safe and appropriate place.

The appellant's representative should be aware that the facility may have adequate grounds to discharge. Simply making notice and planning errors does not make the reason for the discharge incorrect. As noted above, neither party presented sufficient evidence to determine whether the actions of the appellant would impact the safety of the individuals in the facility. The purpose of approving this appeal is to ensure that any discharge is safe and appropriate.

Order for Nursing Facility

Rescind the notice issued on [REDACTED] 2023 and readmit the appellant to the next available bed in the facility in compliance with 130 CMR 456.425(B), 130 CMR 456.428, and 130 456.704(D).

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.

Susan Burgess-Cox
Hearing Officer
Board of Hearings

CC:


Respondent: The Guardian Center, Attn: Administrator, 888 N. Main Street,
Brockton, MA 02301