Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

[redacted]

Appeal Decision:	Approved	**Appeal Number:**	2300909
Decision Date:	2/14/2023	**Hearing Date:**	02/09/2023
Hearing Officer:	Susan Burgess-Cox		

Appearance for Appellant:
[redacted]

Appearance for Nursing Facility:
Robert Fondi, Administrator

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:**	NF Discharge
Decision Date:	2/14/2023	**Hearing Date:**	02/09/2023
Nursing Facilitie's Rep.:	Robert Fondi, NF Administrator	**Appellant's Rep.:**	Sister
Hearing Location:	All Parties Appeared by Telephone	**Aid Pending:**	No

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 February 3, 2023, the nursing facility informed the appellant that he would not be readmitted to their facility following his release from the hospital because the health and safety of individuals in the facility are endangered by the appellant. (130 CMR 610.028; Exhibit 1). The appellant filed this appeal in a timely manner on February 3, 2023. (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 health and 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] the appellant was discharged from the Brentwood Rehabilitation and Healthcare facility (herein referred to as "the nursing facility") to the Emergency Department (ED) of Salem Hospital following an incident involving another resident. (Testimony; Exhibit 4). Records presented by the nursing facility indicate that individuals witnessed the appellant yelling at another resident, running toward the resident and then putting his hands on the resident. (Exhibit 4). Medical records indicate that the incident caused redness to the neck of the other resident. (Exhibit 4). Records show that following the incident, the other resident did not have a hematoma or fracture. (Exhibit 4). A supervisor at the nursing facility was able to separate the appellant and the other resident. (Testimony; Exhibit 4). The appellant was sent to the ED for an evaluation and a police report was filed. (Testimony; Exhibit 4). No official police report was clearly noted to be provided by the parties at hearing.

On February 3, 2023, the nursing facility informed the appellant that he would not be readmitted following his release from Salem Hospital because the safety and health of individuals in the nursing facility are endangered by the appellant. The appellant was still at the inpatient facility as of the day of the hearing.

The appellant has been residing in the nursing facility since at least 2018. (Testimony; Exhibit 4). The appellant has primary diagnoses of schizoaffective disorder and bipolar disorder. (Testimony; Exhibit 4). The appellant has secondary diagnoses of: anxiety disorder; seborrheic dermatitis; unspecified constipation; unspecified Vitamin D deficiency; gastro-esophageal reflux disease (GERD); hypertension; anemia; fatigue; seasonal allergies; nicotine dependence; restlessness and agitation; suicidal ideations; and dementia (Testimony; Exhibit 4)..

Upon an initial evaluation at the hospital, the appellant was deemed to be at his baseline. (Testimony; Exhibit 4). Therefore, the hospital admission was not for psychiatric evaluation and potential treatment under Section 12 of Chapter 123 of the Massachusetts General Laws. (Testimony; Exhibit 4). A physician noted that the appellant's behavior is dangerous to other residents who are deconditioning and frail. (Testimony; Exhibit 4). The physician noted that the appellant is not an appropriate patient for the facility as he poses a risk to the health and safety of other residents and staff. (Testimony; Exhibit 4). Representatives from the facility testified that other incidents occurred in 2021. However, the parties did not provide testimony or evidence regarding any consequences or discharge notices

resulting from those incidents.

A certified nurse practitioner (CNP) from psychiatry at the hospital performed an evaluation and determined that the appellant did not meet the criteria for treatment under Section 12 and had limited mitigating benefits to acute hospitalization noting that the appellant would most appropriately benefit to returning to his known long-term care nursing facility. (Exhibit 4). The CNP did not have an issue with the ED physician clearing the appellant medically. (Testimony; Exhibit 4). However, the CNP noted that the appellant should not have been cleared in less than an hour without a more thorough evaluation. (Exhibit 4). Notes from the facility indicate that the appellant is at the nursing facility for long-term placement. (Exhibit 4).

The notice on appeal does not list an effective date of discharge or transfer from Brentwood Rehabilitation and Healthcare Center ("Brentwood"), The parties present for the facility felt that the acute inpatient facility was an appropriate location for discharge from their facility. The representatives from the facility did not dispute the fact that the hospital does not provide long-term care. The representatives from the facility acknowledged that they are not engaged in any discharge planning for the appellant from their facility. The representatives from the facility testified that the hospital should be implementing discharge planning as the appellant is no longer at their facility and the hospital has more resources available to engage in discharge planning. Representatives from the facility stated that they have an obligation to protect the health and safety of other patients and did not feel that they had any obligation to plan a safe and appropriate discharge for the appellant. The representatives from the facility acknowledged that the appellant needed specialized care and did not indicate that it would be safe or appropriate for the appellant to return to the community.

The notice of intent to discharge 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 Danvers, 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 parties from the facility felt that the notice was sufficient and complied with all regulatory requirements. 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 have no other transfer or discharge plan even while acknowledging that the appellant requires a specialized level of care.

The appellant's representative provided testimony regarding the incident in question based upon a discussion with the appellant. The accounting on the report by the ED physician and the appellant's sister is similar. Both state that the appellant had a fight with another resident that resulted in the appellant punching the other resident due to the resident headbutting the appellant. (Testimony; Exhibit 4). The psychiatric CNP at the hospital notes that the accounting provided by the ED physician was not done correctly or thoroughly without collecting data from the witnesses who saw the incident. (Exhibit 4). Additionally, the psychiatric CNP felt that the accounting was not accurate based solely on what the appellant said as he was incapacitated. (Exhibit 4).

The appellant's sister testified that the appellant was recently moved to a new room that caused some anxiety and agitation. The appellant's sister was not sure if the incident was a related to this change. The appellant's sister testified that she was shocked to hear about the incident as she felt that the appellant had a good relationship with the staff and residents at the facility. The appellant's sister was concerned that the incident could have been related to some mismanagement of medications or lack of supervision. The appellant's sister acknowledged that there were incidents in the past, as noted by representatives from the facility, However, she felt those incidents were handled appropriately and issues were resolved prior to having to contact the police or discharging the appellant to the hospital for further evaluation.

Findings of Fact

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

1. The appellant has been residing in the nursing facility since at least 2018.

2. The appellant has primary diagnoses of schizoaffective disorder and bipolar disorder.

3. The appellant has secondary diagnose of: anxiety disorder; seborrheic dermatitis; unspecified constipation; unspecified Vitamin D deficiency; gastro-esophageal reflux disease (GERD); hypertension; anemia; fatigue; seasonal allergies; nicotine dependence; restlessness and agitation; suicidal ideations; and dementia.

4. The appellant was recently moved to a new room in the nursing facility.

5. On February 1, 2023, the appellant was involved in an altercation with another patient at the nursing facility.

6. The police were called to address the incident.

7. No official report was indicated as included in records provided at hearing.

8. The appellant put his hands on the other resident causing redness to the neck of the other resident.

9. The other resident did not have a hematoma or fracture.

10. Following the incident, the appellant was discharged to the Emergency Department of an area hospital to undergo a psychiatric evaluation.

11. An initial evaluation at the hospital found the appellant at his baseline.

12. Physicians in the Emergency Department and a certified nurse practitioner (CNP) from psychiatry determined that the appellant did not meet the admission or treatment requirements for psychiatric care under Section 12 of the Massachusetts General Laws.

13. The CNP determined that the appellant would most appropriately benefit from returning to his known long-term care nursing facility.

14. On February 3, 2023, the nursing facility issued a notice informing the appellant that he would not be readmitted following his release from Salem Hospital because the safety and health of individuals in the nursing facility are endangered by the appellant.

15. The notice does not list an effective date of transfer or discharge from the nursing facility.

16. None of the staff from the nursing facility are engaged in transfer or discharge planning for the appellant.

17. No location for discharge or transfer is listed on the notice.

18. It is not safe or appropriate for the appellant to return to the community.

19. The notice of intent to discharge does not list contact information for a local legal services office or nearest legal services office.

20. The legal services office listed on the discharge form issued to an individual in Danvers, Massachusetts was the Massachusetts Legal Assistance

Corporation, located in Boston, Massachusetts.

21. 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.

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.

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

[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.

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 several of the regulatory requirements that serve to protect and provide due process to an extremely vulnerable population. First, the notice did not provide the effective date of the discharge or transfer. Second the notice did not list a location to which the appellant was to be discharged or transferred. Third, it provided 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. The representatives from the facility stated more than once that the hospital had more resources to assist the appellant in finding a safe and appropriate location. Therefore, they felt that they should not play a role in any planning for their patient.

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. The parties presented conflicting testimony regarding the incident at issue. No copy of a police report was clearly noted at hearing to provide a fair and accurate accounting of the incident at issue. 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 February 3, 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, the appellant and/or representative 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:

[redacted]

Respondent: The Brentwood Rehab Healthcare Center, Attn: Administrator, 56 Liberty Street, Danvers, MA 01923