

**Office of Medicaid  
BOARD OF HEARINGS**

Appellant Name and Address:



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2301558
<b>Decision Date:</b>	4/13/2023	<b>Hearing Date:</b>	03/23/2023
<b>Hearing Officer:</b>	Scott Bernard	<b>Record Open to:</b>	03/27/2023

**Appearance for Appellant:**  
*Pro se via telephone*

**Appearance for Nursing Facility:**  
Natasha Malila, Administrator  
Evelyn Foleke, Social Worker  
Malik Simpson, Director 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 Discharge
<b>Decision Date:</b>	4/13/2023	<b>Hearing Date:</b>	03/23/2023
<b>Nursing Facility Rep.:</b>	Natasha Malila; Evelyn Foleke; Malik Simpson	<b>Appellant's Rep.:</b>	<i>Pro se</i>
<b>Hearing Location:</b>	Charlestown MassHealth Enrollment Center		

## 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 January 31, 2023, the nursing facility informed the appellant of its intent to discharge her by [REDACTED], 2023 because “[t]he safety and health of the individuals in the nursing facility would otherwise be endangered due to the clinical or behavioral status of the individual.” (See 130 CMR 610.028(A)(3); 610.029(A) and Exhibit (Ex.) 5). The appellant filed this appeal in a timely manner on February 26, 2023. (See 130 CMR 610.015(B) and Ex. 1). A discharge initiated by a nursing facility creates a valid ground for appeal. (See 130 CMR 610.032).

The record remained open after the hearing to allow the nursing facility to submit a complete copy of the discharge notice and to allow the appellant to submit a further written statement. These were both submitted by March 27, 2023, at which time the record closed.

## Action Taken by the Nursing Facility

The nursing facility notified the appellant of its intent to discharge her by [REDACTED], 2023 because the safety and health of the individuals in the facility would otherwise be endangered to the appellant's clinical or behavioral status.

## Issue

The appeal issue is whether the nursing facility acted correctly, pursuant to 130 CMR 610.028, in initiating a discharge against the appellant.

## Summary of Evidence

The nursing facility administrator stated that the facility issued the 30-day notice based on several concerns. She stated that the appellant had been using her wheelchair to block access to the door to her room and neighboring rooms. The appellant has also made it difficult for others to access the shared bathroom. This has prevented the nursing team from assisting other individuals in that area of the facility. The appellant also had prevented another resident, who was male, from using the short hallway outside her room because she asserted the hallway was not a male hallway. The administrator stated that the facility does not designate the hallways as male or female. The appellant has fought with members of the physical therapy department while they were helping her roommate use the bathroom. The facility had to threaten to call 911 when the appellant would not move from the door. Only at this point did the appellant get out of the way and the team was able to assist the appellant's roommate.

The appellant, for her part, denied that she ever blocked entrance to either the rooms in her hallway or to the bathroom. The appellant disputed the nursing facility's characterization of the male individual and her response to him. The appellant stated that this individual was not another patient at the facility but a certified nursing assistance working for the facility. She stated that he has both stolen from patients and exposed himself. The appellant stated that he assaulted her and that she filed a police report against him. The appellant also criticized the way the facility handled her medications and treatment. For instance, they would give her less of certain of her medications than prescribed by her doctors and too many daily blood sugar tests. The facility's director of nursing stated that there was very little communication between the appellant's medical team and the facility's medical team.

At the request of both parties, the record was left open until March 27, 2023. The appellant wanted to resubmit documentation she attempted to submit to the Board of Hearings prior to the hearing. The facility wished to submit a full copy of the notice under appeal, a copy of which was not in the record as yet. The appellant did submit her documentation. (Ex. 6). The facility submitted a copy of the notice under appeal. (Ex. 5). Both were submitted by March 27, 2023, and therefore the record closed as of that date.

The discharged notice was dated January 31, 2023. (Ex. 5, p. 2). The notice stated that facility was going to discharge the appellant to a specified named homeless shelter on [REDACTED] 2023. (Ex. 5, p. 2). The notice stated that the reason the facility was discharging the appellant was because "[t]he safety and health of the individuals in the nursing facility would otherwise be endangered due to the clinical or behavioral status of the resident." (Ex. 5, p. 2). The notice lists the contact information for the local Long-Term Care Ombudsman Program, the Disability Law Center (for disabled individuals), the Center for Public Representation (for mentally ill individuals), and the local Legal Services Office, which was Northeast Legal Aid. (Ex. 5, p. 3). The notice contains a statement of the appellant's rights regarding transfer or discharge, including the fact she had 30 days to appeal. (Ex. 5, p. 4). The notice contains a Request for Fair Hearing form, which has the contact information for the Board of Hearings. (Ex. 5, p.

5). The notice appears to be in 12-point font. (Ex. 5).

## Findings of Fact

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

1. Through a notice dated January 31, 2023, the nursing facility informed the appellant that she was going to be discharged to a specified named homeless shelter on [REDACTED] 2023. (Ex. 5, p. 2).
2. The notice states that the reason the appellant was being discharged was because “[t]he safety and health of the individuals in the nursing facility would otherwise be endangered due to the clinical or behavioral status of the resident.” (Ex. 5, p. 2).
3. The notice lists the contact information for the local Long-Term Care Ombudsman Program, the Disability Law Center (for disabled individuals), the Center for Public Representation (for mentally ill individuals), and the local Legal Services Office, which was Northeast Legal Aid. (Ex. 5, p. 3).
4. The notice contains a statement of the appellant’s rights regarding transfer or discharge, including the fact the appellant has 30 days to submit an appeal. (Ex. 5, p. 4).
5. The notice contains a Request for Fair Hearing form, which has the contact information for the Board of Hearings. (Ex. 5, p. 5).
6. The notice appears to be in 12-point font. (Ex. 5).
7. The appellant appealed the notice on February 26, 2023. (Ex. 1).

## Analysis and Conclusions of Law

The regulations concerning nursing home discharges are located at 130 CMR 610.028, 610.029 and 610.030. According to 130 CMR 610.028(A), a Nursing Facility resident may be transferred or discharged 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 Nursing Facility Agency or Medicare) a stay at the Nursing Facility; or
- (6) the Nursing Facility ceases to operate. (Emphasis added).

When the facility discharges a resident under any of the circumstance specified in (1)-(5), above, the resident's clinical record must be documented. (130 CMR 610.028(B)). The documentation must be made by "a physician when the transfer or discharge is necessary under 130 CMR 610.028(A)(3) or (4).". (130 CMR 610.028(B)(1)).

Prior to discharge or transfer, 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 Nursing Facility agency 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 610.029; and
  - (c) the effect of requesting a hearing as provided for under 130 CMR 610.030;
- (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. § 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. § 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 610.028(C)).

The nursing facility must notify the resident of discharge at least 30 days before the date the resident is to be discharged or transferred, except under certain circumstances neither applicable nor asserted in this appeal. (130 CMR 610.029(A)).

Further, Mass. Gen. Laws ch. 111, §70E provides that "[a] resident, who requests a hearing pursuant to section 48 of chapter 118E, shall not be discharged or transferred from a the 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). Finally, federal regulations require that a Nursing Facility provide sufficient preparation for a safe and

orderly discharge. (See 42 CFR 483.12(a)(7)).

The record shows that the discharge is deficient for two reasons. First, while the notice does include much that is required under the regulations it does not include 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. Secondly, and more importantly, the record does not evince evidence the nursing facility provided any preparation and orientation to the appellant to ensure her safe and orderly transfer or discharge from the facility to another safe and appropriate place. It is also not entirely clear from the record that the named homeless shelter would be either a safe or appropriate place to discharge the appellant. Therefore, the appellant should not be discharged at this time.

For the above stated reasons, the appeal is APPROVED.

## **Order for the Nursing Facility**

Rescind the January 31, 2023 notice. Do not discharge the appellant under this notice.

## **Implementation of this Decision**

If the 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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Scott Bernard  
Hearing Officer  
Board of Hearings

cc:

