

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



**Appeal Decision:** Dismissed in Part;  
Approved in Part

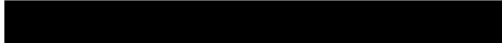
**Appeal Number:** 2301709

**Decision Date:** 4/4/2023

**Hearing Date:** 03/29/2023

**Hearing Officer:** Susan Burgess-Cox

**Appearance for Appellant:**



**Appearance for Nursing Facility:**

Laurie Kelly et. al.



*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>	Dismissed in Part; Approved in Part	<b>Issue:</b>	NF Discharge
<b>Decision Date:</b>	4/4/2023	<b>Hearing Date:</b>	03/29/2023
<b>Nursing Facility's Rep.:</b>	Laurie Kelly et. al.	<b>Appellant's Rep.:</b>	Niece, Alt. HCP
<b>Hearing Location:</b>	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 February 27, 2023, the nursing facility informed the appellant that she would be discharged to a non-institutional setting as her health has improved sufficiently so she no longer needs the services provided by the facility. (Exhibit 1A). The notice does not list a specific location for the discharge.

Through a notice dated March 2, 2023, the nursing facility informed the appellant that she would be discharged to a non-institutional setting based upon a determination that her health has improved and the safety of the individuals in the facility was endangered due to the appellant's clinical or behavioral status. (Exhibit 1B). The notice listed an address that the parties identified at hearing as a motel in Winchendon, Massachusetts.

The appellant filed an appeal on March 3, 2023 giving the Board of Hearings jurisdiction over issues raised in both notices. As the applicable law and parties are common to both notices, they are consolidated into this one decision. (130 CMR 610.073).

The Board of Hearings scheduled a hearing for March 13, 2023 as the notice issued on March 2, 2023 was based on two of the five circumstances that allow for an emergency discharge and expedited appeal. (130 CMR 610.029(B)). The first was a determination that the appellant's health was improving sufficiently to allow a more immediate transfer or discharge and the second was a determination that the health or safety of individuals in the facility would be endangered. (130 CMR 610.029(B)). Under the expedited appeal process for discharges and transfers from a nursing facility, when a member files a request for hearing, the Board of Hearings will schedule a hearing as soon as possible, but no later than seven days from the date the Board of Hearings receives the request. (130 CMR 610.015(F)). The Board of Hearings scheduled a hearing for March 13, 2023, the Monday following the seventh day after receipt of the request for hearing.

At March 13<sup>th</sup> hearing session, the parties representing the facility agreed to rescind two notices of discharge served upon the appellant within 30 days of the filing of the appeal. (Testimony; Exhibit 4). Based upon testimony of both parties regarding the dates listed on each notice as well as documents presented by the parties for the appeal, a form was filled out stating that the appellant agreed to withdraw the appeal because "the nursing facility agreed to rescind the notices issued on February 29, 2023 and March 2, 2023". (Exhibit 4). The record reflects that all parties present at the March 13<sup>th</sup> hearing session approved the terms of this agreement and representatives from the facility specifically stated that they agreed to rescind two notices. (Testimony; Exhibit 4).

At the March 13<sup>th</sup> hearing session, both the appellant and the representatives from the facility repeatedly cited a notice with a discharge date of March 29, 2023. The hearing officer made a scrivener's error in drafting the agreement made by the parties at hearing by not referring to a calendar or accurately reflecting testimony of the parties with a form that reflects a discharge notice of February 29, 2023 rather than a discharge date of March 29, 2023 or notice date of February 27, 2023. Black's Law Dictionary defines a "scrivener's error" as a synonym for clerical error. A clerical error is one resulting from a minor mistake or inadvertence, especially in writing or copying something on the record and not from judicial reasoning or determination. (Black's Law Dictionary). A reliance on this scrivener's error rather than the judicial reasoning or determination utilized at hearing resulted in representatives from the facility planning to proceed with the 30-day notice to discharge issued on February 27, 2023. (Testimony; Exhibit 8). The Board of Hearings was notified of this decision. Based upon the egregious actions of the facility to try and implement a discharge following the initial hearing session and agreement to rescind two discharge notices, the hearing reconvened to ensure the appellant's right to due process.

At the beginning of the March 29, 2023 hearing session, representatives from the facility confirmed rescission of the March 2, 2023 notice and agreed that this hearing session would address issues specifically related to the notice dated February 27, 2023. While these statements could simply be acknowledged and not specifically incorporated into this hearing decision, the egregious actions of the facility appear to require the Board of Hearings to specifically note the agreement made on March 13, 2023 where the facility rescinded the discharge notice dated March 2, 2023 and dismiss that part of the appeal as the Board of Hearings was informed of this adjustment on two separate occasions and the rescission of the notice dated March 2, 2023 resolves all of the issues in dispute between the parties regarding that notice. (130 CMR 610.035(A)(8)).

From this point forward, this decision will only address issues presented in the notice dated February 27, 2023.

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 notices of discharge to the appellant.

## **Issue**

Whether the nursing facility was correct, pursuant to 130 CMR 610.028, in notifying the appellant that it intended to discharge her because her health has improved sufficiently so she no longer needs the services provided by the facility.

## **Summary of Evidence**

On both hearing dates, all parties appeared by telephone. The appellant and representatives from the facility were in the same office on both dates. At the hearing session on March 13, 2023, the facility had two representatives present. At the hearing session on March 29, 2023, the facility had three different representatives present. The appellant and the same appeal representative were present at both hearing sessions. The representatives present for the facility at the hearing session on March 29<sup>th</sup> acknowledged that the representatives from the hearing session on March 13<sup>th</sup> were not present but did not provide any reason for the change in representation. Representatives present at the March 29<sup>th</sup> session testified that those present on March 13<sup>th</sup> said that they did not agree to rescind two discharge notices. The record from the March 13<sup>th</sup> hearing session clearly

provides testimony regarding the rescission of the two discharge notices at issue. The parties present at the hearing session on March 29<sup>th</sup> did not provide any testimony or evidence to clearly support the post-hearing hearsay statements of the representatives present at the March 13<sup>th</sup> hearing session.

On March 22, 2023, the facility presented documents that were incorporated into the hearing record as Exhibit 8. No documents were submitted prior to or at the March 13<sup>th</sup> hearing session. The documents presented on March 22<sup>nd</sup> were not copied to the appellant or her representative. The representatives at the facility stated that they could not provide copies of records presented to the Board of Hearings to the appellant's representative unless the appellant signed a form allowing them to share the records. The representatives from the facility acknowledged that they did not require such action for the submission of documents to the Board of Hearings. It was determined that the record could be held open for the appellant and her representative to review and respond to the records presented, if necessary.

The February 27, 2023 notice submitted by the appellant to the Board of Hearings does not list a location for the discharge. (Exhibit 1B). The documents submitted by the facility to the Board of Hearings on March 22, 2023, contain a notice dated February 27, 2023 with a handwritten location for discharge. (Exhibit 8). The location is a motel in Winchendon, Massachusetts. (Exhibit 8). Copies of the notice submitted by the appellant and the facility show that the notice was sent to the appellant alone. (Exhibit 8). At hearing, the representatives for the facility acknowledged that they had the names and contact information for several of the appellant's family members. (Exhibit 8). Admission records presented by the facility show the appellant's representative as one of five contacts provided to the facility. (Exhibit 8). The appellant's representative is listed as a niece and alternative health care proxy. (Exhibit 8). The representatives from the facility did not feel required to provide a copy of the notice to another party as they determined that the appellant could make decisions on her own.

The request for hearing form submitted by the appellant lists an address for the Board of Hearings at a location in Boston, Massachusetts. (Exhibit 2). The Board of Hearings moved from the location in Boston to an address in Quincy in 2010. A subsequent, unsigned request for hearing form submitted by the facility for the March 29<sup>th</sup> hearing session provides the correct address for the Board of Hearings. As noted above, the form with the Quincy address was not the form utilized by the appellant in filing this request for hearing.

Documents presented by the facility include an admission record, nursing progress notes, social service interim progress notes, and a physical therapy discharge summary. (Exhibit 8). Admission records and progress notes list the following

diagnoses: opioid abuse; myocardial infarction; diabetes; chronic pain; schizoaffective disorder; bipolar disorder; acquired absence of left leg below the knee; major depressive disorder; hypertension; iron deficiency; anemias; and uncomplicated difficulty walking. (Exhibit 8).

Records from the facility contain a letter from a licensed social worker dated March 10, 2023. (Exhibit 8). This letter notes the appellant's ability to perform activities of daily living, a history of residing in the location for discharge and a statement referring to an order from a nurse practitioner who agreed with a discharge plan. (Exhibit 8). The documents presented to the Board of Hearing do not contain an order from a nurse practitioner, the name of a nurse practitioner or even note that the individual was treating the appellant.

A letter dated March 22, 2023 from a different licensed social worker notes several of the same facts and opinions as the letter dated March 10, 2023. (Exhibit 8). The March 22<sup>nd</sup> letter also states that the appellant has adamantly refused to engage in any discharge planning. The appellant will not allow staff to call her primary care physician for a follow-up appointment; make a referral to the Visiting Nurses Association (VNA); or contact the personal care management (PCM) agency that she has worked with in the past. (Exhibit 8). The letter states that the facility's after care coordinator reached out to the PCM agency. (Exhibit 8). The PCM agency reported that the appellant's services ended due to the length of time that she has been away from home. (Exhibit 8). The appellant was aware of this fact and the PCM agency was going to contact the appellant to complete a new evaluation. At the March 29<sup>th</sup> hearing session, the appellant testified that she has scheduled an evaluation for PCA services.

The letter states that the facility is confident that the appellant can be safely discharged to her prior residence in the motel with VNA and PCA services. As of the date of the hearing, no definitive plan was in place. The representatives from the facility stated that they have proposed the idea of the appellant moving to a rest home but the appellant did not agree with that recommendation. At the hearing, the appellant and her representative agreed to discuss the possibility of discharge to a rest home.

The appellant's representative acknowledged that the appellant can be difficult to work with. The appellant's representative was concerned about the appellant's well-being upon discharge and whether the location and plan for discharge was safe and appropriate. The appellant's representative was willing to work with the appellant and representatives from the facility to create a safe and appropriate discharge plan.

The appellant did not dispute the fact that she is able to perform activities of daily

living independently or with minimal assistance. The appellant may require some assistance with mobility as she has a below the knee amputation of her left leg. The appellant did not dispute the fact that she no longer receives any nursing interventions other than assistance with medications. The appellant did not dispute the fact that she has a history of living in the community while receiving PCA services. The appellant and her representative acknowledged the appellant's past residence in the motel. The appellant's representative did not feel that the room where the appellant would be returning to was safe or appropriate at this time due to the number of stairs and the appellant's limited mobility. The appellant's representative felt that the option of a rest home may be more appropriate noting that this has not been discussed with her in the past. Despite records reflecting a history of defiance, at hearing, with the appeal representative present, the appellant appeared open to discussing discharge options.

## **Findings of Fact**

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

1. The appellant is currently a patient in a long-term care facility.
2. On February 27, 2023, the nursing facility issued a notice to discharge the appellant
3. At a hearing session on March 13, 2023, two representatives present for the facility agreed to rescind a notice with a discharge date of March 29, 2023.
4. The parties from the facility moved to take action on the notice with a discharge date of March 29, 2023 due to a scrivener's error on the withdrawal form drafted by the hearing officer listing a notice date of February 29, 2023 rather than February 27, 2023.
5. The hearing reconvened on March 29, 2023 to address the actions of the facility.
6. Three different individuals from the facility came to the hearing session on March 29, 2023.
7. The two representatives who entered into the agreement to rescind the notice dated February 27, 2023 were not present at the March 29<sup>th</sup> hearing session.

8. The nursing facility did not present documents from a physician prior to or at the hearing session on March 13, 2023.
9. The nursing facility presented documents to the Board of Hearings on March 22, 2023.
10. The appellant did not receive copies of these documents prior to or at either hearing session.
11. The nursing facility refused to provide copies of records presented to the Board of Hearings to the appellant's representative without the appellant signing a form to allow the release of the records.
12. The records presented to the Board of Hearings are not documented by a physician.
13. The discharge notice dated February 27, 2023 does not list a location for discharge.
14. On March 22, 2023, the facility submitted documents to the Board of Hearings that included a discharge notice dated February 27, 2023 with a handwritten discharge location.
15. The appellant did not receive a copy of this revised notice.
16. The appellant's admission records list five individuals as contacts for the appellant.
17. The facility did not provide a copy of the discharge notice to a representative for the appellant.
18. The appellant's admission records list the following diagnoses: opioid abuse; myocardial infarction; diabetes; chronic pain; schizoaffective disorder; bipolar disorder; acquired absence of left leg below knee; major depressive disorder; hypertension; iron deficiency; anemias; and uncomplicated difficulty walking.
19. The request for hearing form submitted by the appellant lists an address for the Board of Hearings at a location in Boston, Massachusetts.
20. The Board of Hearings moved from the location in Boston to an address in Quincy more than 12 years ago.



21. A subsequent, unsigned request for hearing form submitted by the facility with documents to be incorporated into the hearing record, provides the correct address for the Board of Hearings.
22. Records from the facility contain a letter from a licensed social worker dated March 10, 2023.
23. The appellant is able to perform activities of daily living independently or with minimal assistance.
24. The appellant does not receive regular nursing interventions in the facility other than assistance with medications.
25. The appellant has an above the knee amputation.
26. The appellant was residing in the location listed on the discharge form prior to admission.
27. The location is a motel.
28. The appellant categorized herself as homeless.
29. The appellant had PCA services prior to her admission.
30. The PCA services ended due to the length of the admission.
31. The Personal Care Management agency agreed to perform a new evaluation.

## **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 many regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge. Some of the relevant regulations can 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.*

Pursuant to 130 CMR 610.028(A) which governs the rules for actions initiated by a nursing facility, 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 Medicaid or Medicare pay for) a stay at the nursing facility; or
- (6) the nursing facility ceases to operate.

In the present case, the facility indicated on the notice that the discharge was appropriate because her health has improved sufficiently so she no longer needs the services provided by the facility. While this is an acceptable reason for discharge, the facility did not meet the regulatory notice requirements or procedures for a discharge.

Pursuant to 130 CMR 610.028(B), when the facility transfers or discharges a resident under any of the circumstances specified in 130 CMR 610.028(A)(1) through (5), the resident's clinical record must be documented. The documentation must be made by (1) the resident's physician when a transfer or discharge is necessary under 130 CMR 610.028(A)(1) or (2); and (2) a physician when the transfer or discharge is necessary under 130 CMR 610.028(A)(4). At the initial hearing session, no documents were provided by the facility. At the second hearing session, the records presented contain nursing progress notes and social service progress notes.

While the facility provided a letter from a social worker noting an order to discharge the appellant from a nurse practitioner, the order was not in the documents presented by the facility. Additionally, the letter from the social worker did not provide the name of the nurse practitioner or note that this individual was treating the appellant. The regulations governing physician services distinguish services provided by a nurse practitioner from those of a physician. (130 CMR 433.000). Therefore, even if the documentation noted in the letter was provided, the fact that the discharge order was from a nurse practitioner does not meet the regulatory requirements as being those provided by the individual's physician.

Pursuant to 130 CMR 610.028(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 MassHealth 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.

In this case, in their attempt to discharge the appellant, the nursing facility violated several of the regulatory requirements that serve to protect and provide due process to patients from 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 five family members including a

health care proxy and two alternative health care proxies, one who appeared at hearing. The representatives from the facility did not feel required to provide a copy of the notice to another party as they determined that the appellant could make decisions on her own. This assumption was made for a patient who has several mental health diagnoses including schizoaffective disorder and bipolar disorder. Additionally, the representatives from the facility provided testimony and evidence regarding difficulties they have encountered in trying to work with the appellant. It is difficult to understand why the facility did not think that someone with the appellant's physical, behavioral and mental health issues would not require any representation or assistance with the discharge or transfer process. The regulations contain provisions such as this to protect the rights of this vulnerable population. If the designated family member does not appear or the appellant chooses to proceed on her own, that is her decision, not that of the facility.

Second, the nursing facility did not make any clinical records available for the first hearing session. The records provided for the second hearing session were not those of the appellant's physician and were not provided to the appellant or her representative, denying the appellant the right to sufficiently prepare for the hearing. This 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 listing a location to which the appellant was to be discharged or transferred and providing contact information for the Board of Hearings from at least 12 years ago. While the facility attempted to correct these errors during the hearing process, the record did not reflect receipt of this amended notice to the appellant or her representative.

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.

Federal regulations also require that a nursing facility provide and document sufficient preparation and orientation to ensure a safe and orderly discharge. (42 CFR 483.15(c)(7)). This orientation must be provided in a form and manner that the resident can understand. Federal regulations at 42 CFR 483.21(c)(1) speak to the discharge planning process. These regulations require the facility to involve the resident and resident representative in the development of the discharge plan. (130 CMR 483.21(c)(1)(v)). In this case, it would likely benefit all parties to involve the appellant's representative in the development of the discharge plan. Federal guidelines also state that the planning must ensure the discharge destination "meets the resident's health and safety needs". (State Operations Manual, Appendix PP). Testimony and evidence presented at hearing do not indicate that the location discussed at hearing would meet the appellant's health and safety needs. Even if the amended notice was accepted for this appeal, it does not indicate a plan for the appellant to receive services in the community and the appellant and her representative indicated that the location was not safe or appropriate for the appellant at this time.

While the representatives from the facility proposed a possible plan for services in a rest home at hearing, this was not the location or plan listed on the notice. Therefore, the appellant's representative did not have notice of such a plan to have the ability to present a case regarding its appropriateness. However, should the facility issue a new notice with an adequate plan and location, the preference of the appellant for the location would not factor into a discharge plan unless she can demonstrate that the location is not safe or appropriate.

This appeal is approved to ensure that the facility takes action in compliance with the law and regulations governing a nursing home discharge. The facility may issue a proper notice and take proper action at any time.

The appellant should be aware that the facility appears to have adequate grounds to discharge. Simply making notice and planning errors does not make the reason for discharge incorrect. The appellant's representative did not present adequate evidence to challenge the determination that the appellant's health has improved sufficiently so she no longer needs services provided by the facility.

## **Order for Nursing Facility**

Rescind the discharge notice issued on February 27, 2023.

## **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.

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Susan Burgess-Cox  
Hearing Officer  
Board of Hearings

cc:

Respondent: Worcester Rehab & Health Care Center, Attn: Jennifer Young, 119  
Providence Street, Worcester, MA 01604

Appellant's Representative: [REDACTED]  
[REDACTED]