

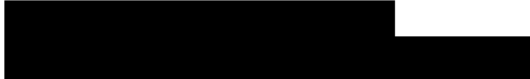
# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2302480
<b>Decision Date:</b>	5/11/2023	<b>Hearing Date:</b>	05/04/2023
<b>Hearing Officer:</b>	Christopher Jones		

**Appearance for Appellant:**




**Appearance for Skilled Nursing Facility:**  
Christen Papile and Amy Castiglioni



*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>	NF Discharge
<b>Decision Date:</b>	5/11/2023	<b>Hearing Date:</b>	05/04/2023
<b>Nursing Facility's Reps.:</b>	Christen Papile; Amy Castiglioni	<b>Appellant's Rep.:</b>	
<b>Hearing Location:</b>	Remote	<b>Aid Pending:</b>	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 30 Day Notice of Intent to Discharge dated March 20, 2023, the respondent-nursing facility informed the appellant that he would be discharged to his niece's apartment in Rhode Island on April 19, 2023 because the "safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status." (Exhibit 2.) The appellant filed this timely appeal on March 28, 2023. (Exhibit 2; 130 CMR 610.015(B).) Nursing facility residents have the right to appeal any nursing facility-initiated transfer or discharge. (130 CMR 610.032(C).)

## Action Taken by the Respondent

The nursing facility seeks to discharge the appellant to his niece's home in another state because the "safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status." (Exhibit 2.)

## Issue

The appeal issues are whether: (1) the facility has valid grounds to discharge the appellant; (2) the discharge notice and patient record meet the regulatory requirements; and (3) the facility has provided sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place pursuant to MGL Ch. 111, § 70E.

## Summary of Evidence

The appellant was admitted on hospice to the nursing facility about a year before this discharge notice, and the respondent-nursing facility has been attempting to transfer him to another nursing facility since July 2022. The appellant has a diagnosis of end-stage renal disease, schizophrenia, and dementia due to Alzheimer's.

On February 24, 2023, a nursing note states the appellant was heard being loud toward his roommate because he felt the TV was too loud. The note documents that the appellant hit his roommate on the knuckles with a back scratcher.<sup>1</sup> The event was not seen by staff, but the appellant's roommate had "red marks on his right arm." The appellant's behavioral dysregulation appears to have worsened between this event and the notice to discharge. Four days before the notice to discharge, the appellant became belligerent and pushed a nursing assistant. The police were called, and the facility attempted to have the appellant involuntarily committed. However, he was returned to the facility the same day. The decision to discharge is not noted in the nursing notes, and it is only noted in the social work notes that "30 day intent to d/c issued to guardian via email." The social work notes indicate that the appellant's guardian and advocate were called, but it does not note what was discussed. (Exhibit 4, pp. 8-13.) There are two nursing notes from the day of the discharge notice, which generally describe the appellant as alert to person but confused and forgetful at his baseline. The appellant refused heparin, but no complaints regarding his behavior are noted. (Exhibit 4, p. 10.)

The respondent's representatives testified that he was being discharged because he punched another resident in the face and had multiple physical altercations with other residents and staff. They argued that, despite his Alzheimer's, he is still high functioning and that he is mostly independent with all of his activities of daily living ("ADLs") and does not have any clinical nursing needs. They felt that it is the communal setting of the nursing facility that is aggravating his behavior because he is perfectly calm in a one-on-one setting with a care companion who visits him regularly. They argued that he would be better off in the community, attending an adult day program, but with family that would be able to otherwise supervise him 24-hours per day. He also requires dialysis three times per week.

The appellant's guardian is his niece. She testified that she agreed to take on the role because her mother, the appellant's sister, was recently diagnosed with cancer and undergoing her own medical difficulties. She testified that she lives in a one-bedroom apartment up a flight of stairs. She testified that the appellant often trips going up a curb and would definitely have difficulty going up a flight of stairs. Also, he requires 24-hour supervision, which is why he is in a nursing facility. He used to live in an assisted-living facility, but he was deemed to require too much assistance for there because he eloped. Even at the nursing facility he often wears an anklet to keep track of him.

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<sup>1</sup> The clinical record is only partially legible. The reporter of this fact may have been the appellant's roommate or may have been admitted by the appellant. (See Exhibit 4, pp. 9-13.)

The respondent's representatives argued that they have discharged similar patients to similar situations where a patient could live with family, attend day programs, and receive in-home services. They also argued that the appellant's guardian has been unresponsive to telephone calls, and that she should not be surprised by the discharge notice since they were trying to transfer the appellant since July 2022. The appellant's guardian pointed out that she only became temporary guardian in September and did not become permanent guardian until March 2023. Furthermore, she hired a social worker to help her advocate and coordinate on her uncle's behalf. The facility is in contact with her social worker, and the guardian is very responsive to emails. However, she cannot always answer the phone or return lengthy phone calls during the workday because she has to work herself. She also testified that she had never been in a meeting where they discussed discharge planning or communicated with her about moving to other facilities. The guardian's attorney argued that nothing about this discharge plan was appropriate or safe for the appellant. The appellant's Medicaid is through MassHealth, and there is no guarantee it would be approved in another state. Similarly, the guardian's authority only exists in Massachusetts, therefore the appellant would again be without legal competency if discharged to another state. The appellant's guardian testified she could not take custody of the appellant because of her living situation and she did not want custody of the appellant.

The appellant's physician at the nursing facility wrote a letter on April 21, 2023 stating: "I follow [the appellant] for his medical care. He does not require skilled clinical care at a skilled nursing facility and would be able to reside in the community followed with continued psychiatric oversight." An identical letter was sent from a psychiatric nurse practitioner, except that they followed the appellant "for his psychiatric care." (Exhibit 7.) It is unclear to whom these letters were sent, or whether they were included in the appellant's clinical record.

## **Findings of Fact**

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

1. The appellant has resided in the facility for just over a year, and when he was first admitted he was on hospice care. The facility has been attempting to transfer him to another facility since July 2022. (Testimony by the respondent's representatives.)
2. The appellant has diagnoses of end-stage renal disease, schizophrenia, and dementia due to Alzheimer's. He is generally independent with ADLs, but he requires 24-hour supervision. (Exhibit 4, p. 6; testimony by the respondent's representatives.)
3. On February 24, 2023, a nursing note states the appellant was heard being loud toward his roommate because he felt the TV was too loud. The appellant was documented to have hit his roommate leaving red marks on his arm. The appellant's behavioral dysregulation worsened between this event and the notice to discharge. There was another incident in which the appellant pushed a nursing assistant. The police were called, and the facility attempted to have the appellant involuntarily committed. However, he was returned to the facility the same day. (Exhibit 4, pp. 8-13.)

4. Nothing in the nursing or social work note specifically identifies the reason the member was being discharged. On or around March 16, the appellant became aggressive and pushed a nursing assistant. The facility attempted to have him involuntarily admitted to a psychiatric hospital, but he was returned the same day to the facility. There is nothing in the clinical record indicating that he appellant would be discharged until the notice of discharge was issued. (Exhibit 4, pp. 8, 10-11.)
5. The nursing facility's discharge plan is to send the appellant to a family member in another state. At the time this plan was created, the family member had not been consulted, nor had any investigation been performed into whether her home could accommodate the appellant. (Testimony by the respondent's representatives.)

## **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 initiated by a nursing facility. MassHealth has enacted regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found both at 130 CMR 456.000 and 130 CMR 610.000.

A "discharge" is "the removal from a nursing facility to a noninstitutional setting of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual." (130 CMR 456.002; see also 130 CMR 610.004.)

The requirements for a nursing facility discharge or transfer are:

(A) 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 MassHealth agency or Medicare pay for) a stay at the nursing facility; or

(6) the nursing facility ceases to operate.

(B) 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).**

(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 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;

(130 CMR 610.028(A)-(C) (emphasis added); see also 130 CMR 456.701(A).)

A nursing-facility resident who requests a hearing to dispute their discharge "pursuant to section 48 of chapter 118E, shall not be discharged or transferred from a nursing facility ... 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."<sup>2</sup> (MGL Ch. 111, § 70E.)

It does appear that the nursing facility may need to transfer the appellant for his own welfare because they are unable to provide him with appropriate care given his deteriorating mental and behavioral conditions. This deterioration appears to have also made the appellant a danger to others at the facility. However, there is no documentation in the clinical record identifying the basis for the appellant's discharge. The expectation that the appellant should be discharged only exists in a social work note indicating that the discharge notice had been emailed to the appellant's guardian. Therefore, the facility has failed to document the reasons for the discharge in the clinical record, let alone have that documentation be substantiated by a physician.

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<sup>2</sup> The term "referee" in the statute refers to a Board of Hearings hearing officer.

Furthermore, I remain unconvinced that the facility provided any preparation or orientation to the resident or his guardian to ensure a safe and orderly discharge. The facility testified that the appellant's clinical needs could be easily handled in the community, so long as the appellant's guardian could, within 30 days, (1) obtain authority to manage the appellant's affairs in another jurisdiction, (2) transfer his medical coverage to another state's Medicaid agency, (3) identify and arrange community supports, (4) rearrange her entire living situation to take in a high-needs roommate, and (5) be willing to provide overnight supervision to an individual who is a known wander-risk. The appellant's guardian was not willing to undertake this responsibility, and I have no authority to require her to do so. Therefore, the facility's plan is unconvincing. The respondent has not "provided sufficient preparation and orientation to the resident to ensure safe and orderly transfer or discharge from the facility" and it has not identified "another safe and appropriate place."

For these reasons, this appeal is APPROVED.

## **Order for the Nursing Facility**

Rescind the March 20, 2023 discharge notice. Do not discharge the appellant under this discharge notice.

## **Implementation of this Decision**

If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings 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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Christopher Jones  
Hearing Officer  
Board of Hearings

[REDACTED]