Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

[redacted]

Appeal Decision:	Approved	**Appeal Number:**	2307575
Decision Date:	9/11/2023	**Hearing Date:**	09/01/2023
Hearing Officer:	Scott Bernard		

Appearance for Appellant:
[redacted]

Appearance for Respondent:
Scott Nickerson (Administrator) *via* telephone
Tina Viera, RN (Director of Nursing) *via* telephone
Susan E. Durivage, LSW (Director of Social Services) *via* telephone

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:**	Expedited Nursing Home Discharge
Decision Date:	9/11/2023	**Hearing Date:**	09/01/2023
Respondent's Rep.:	Scott Nickerson; Tina Viera, RN; Susan E. Durivage, LSW	**Appellant's Rep.:**	[redacted]
Hearing Location:	Quincy Harbor South		

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 August 15, 2023, the respondent nursing facility informed the appellant with less than 30 days' notice of its intent to not readmit him from the hospital. (See 130 CMR 610.028(A)(2); 610.029(B)(2) and Exhibit (Ex.) 1). The appellant filed this appeal in a timely manner on August 28, 2023. (See 130 CMR 610.015(B) and Ex. 1). A discharge initiated by a nursing facility is a valid ground for appeal. (See 130 CMR 610.032).

Action Taken by Respondent

The respondent initiated the appellant's discharge from the facility with less than 30 days' notice.

Issue

The appeal issues are whether the respondent was correct, pursuant to 130 CMR 610.028 and 610.029, in determining that the appellant should be discharged from the facility with less than 30 days' notice and whether the facility has met all the requirements for discharge required by law.

Summary of Evidence

The Director of Nursing testified first for the nursing facility. From mid-July until [redacted] 2023, the appellant had been the cause several incidents in the facility. The facility has sent the appellant to the local hospital for psychiatric evaluation on four different occasions. The Director of Nursing stated that the facility was not able to readmit the appellant because it is not able to maintain his and other patients' safety. The appellant has demonstrated aggressive and impulsive behaviors. The Director of Nursing recalled one incident where the appellant approached another resident and pushed her to the ground. At a different time, the appellant came after a staff member with a nail clipper. The Director of Nursing stated that these incidents were not the result of provocation by the other parties. On the final occasion before his last admission to the hospital on [redacted], the appellant attacked a staff member with a chair. The Director of Nursing stated that the police had difficulty subduing the appellant on that occasion. The Director of Nursing stated that the appellant has also acted in a sexually inappropriate manner, grabbing female residents and staff members in inappropriate places.

The Director of Nursing stated that at this time the nursing facility could not manage the appellant's behaviors and ensure the safety of the appellant and other residents. The appellant required more supervision than the facility was able to provide at this time. The Administrator added that the nursing facility had placed the appellant on one to one supervision but that his behaviors continued. The Director of Nursing stated that the facility has attempted to find a placement for the appellant at a different facility but currently there were no facilities accepting applicants with the severity of the appellant's geriatric and psychiatric needs. The Director of Nursing stated that the hospital the appellant is in was also trying to find a placement for the appellant. The Director of Nursing and the Administrator admitted that the appellant does need some form of institutional care and that going back into the community is not feasible for him. In answer to a question from the hearing officer, the Director of Nursing stated the appellant was admitted to the facility on [redacted] 2023.

The appellant's health care proxy stated that he did not dispute that the appellant is misbehaving, and that the facility can discharge the appellant with less than 30 days' notice if his behaviors are severe enough. The appellant has dementia, however, which will not get better or go away. Continuing to send him in the hospital is something that has not worked. Additionally, the appellant no longer has a home in the community to which he can return. The health care proxy stated that he objected to the facility's discharging the appellant with no plan in place to make sure he gets the care he needs. The health care proxy stated that since entering the facility, the appellant has not seen his physician in the community. Additionally, the facility's physician has not communicated with the health care proxy concerning the appellant's care. The health care proxy stated that he lives in New Jersey, and only physically travels to Massachusetts every two to three months. The health care proxy stated that it really does appear as though the facility cannot properly care for the appellant's behaviors, particularly his aggressiveness. The health care proxy stated that there had to be some facility that could care for the appellant and his behaviors.

At the request of the hearing officer, after the hearing, the nursing facility submitted the full copy of the August 15, 2023 "Notice of Intent Not to Readmit Resident Following Hospitalization or Other Medical Leave of Absence from the Facility with Less than 30 Days' Notice (Expedited Appeal)", an incident report form and progress notes for [redacted] through [redacted] 2023.(Ex. 6). The notice contains the incorrect address, telephone, and fax numbers for the Board of Hearings, as well as listing the Massachusetts Legal Assistance Corporation as the local legal services office. (See Ex. 6, pp. 3, 5). The authorship of the incident report, which documents the occasion when the appellant pushed another resident to the ground, is unclear. (Ex. 6, pp. 6-8). The Progress Notes appear to be authored by social workers and nurses at the facility. (Ex. 6, pp. 9-23).

Findings of Fact

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

1. The appellant was admitted to the facility on [redacted] 2023. (Testimony of the Director of Nursing).

2. The appellant was involved in several incidents of inappropriate and sometimes violent behavior against other residents and staff in July and August. (Testimony of the Director of Nursing).

3. The facility has sent the appellant to the local hospital for psychiatric evaluation on four different occasions as a result of this behavior. (Testimony of the Director of Nursing).

4. The last occasion was on or around [redacted] 2023, and the appellant is still at that hospital. (Testimony of the Director of Nursing).

5. Through a notice dated August 15, 2023, the respondent nursing facility informed the appellant with less than 30 days' notice of its intent to not readmit him from the hospital. (Ex. 1; Ex. 5, pp. 2-5).

6. The nursing facility has contacted other facilities in order to transfer the appellant but has not been able to secure a placement elsewhere. (Testimony of the Director of Nursing).

7. Due to his medical condition, the appellant is not able to return to the community and requires nursing home level of care. (Testimony of the Director of Nursing).

Analysis and Conclusions of Law

When a nursing facility is notified that a resident is ready to return to the facility after a hospitalization or medical leave of absence, the nursing facility must readmit the resident. (130 CMR 456.429(A)). If the 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 will be deemed a transfer or discharge. (Id.). The nursing facility must then provide the

resident and an immediate family member or legal representative with a notice explaining its decision not to readmit the resident. (Id.). 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. (Id.).

According to 130 CMR 456.701 and 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 456.701(B); 610.028(B)). When the facility is discharging the resident alleging the safety of individuals at the facility is endangered, the documentation must be made by a physician, but need not be made by the resident's physician. (130 CMR 456.701(B)(2); 610.028(B)(2)).

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 456.701(C); 610.028(C)).

Generally, a 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. (130 CMR 610.029(A)). In *lieu* of the 30-day-notice requirement, the notice of discharge or transfer required must be made as soon as practicable before the discharge or transfer when the health or safety of individuals in the nursing facility would be endangered and this is documented in the resident's record by a physician. (130 CMR 456.702(B)(1); 610.029(B)(1)).

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 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 sufficient preparation for a safe and orderly discharge. (See 42 CFR 483.12(a)(7)).

The respondent facility has not sufficiently documented their discharge. The regulations require that when the facility is discharging the resident because the health or safety of individuals in the nursing home are endangered, this must be documented by a physician in the resident's record. While the nursing facility did credibly document the appellant's behavior, it was not evident to this hearing officer that any of the documentation was made or even endorsed by a physician.

The respondent facility has also not shown that it has sufficiently prepared the appellant or his health care proxy for his safe and orderly discharge from the facility. The record shows that the appellant is not medically able to live in the community and requires nursing home level of care. The representatives of the facility stated that they have made efforts to secure placement at another nursing facility better able to treat the appellant's condition, but have not been able to find another location to send the appellant. What this means is that effectively leaving it to the

hospital where the appellant or the health care proxy to take care of the matter. The hospital is no doubt a safe place, but there is no evidence that it is an appropriate place for the appellant, who requires nursing home level of care.

For the above stated reasons, the appeal is APPROVED.

Order for Respondent

Rescind the August 15, 2023 notice and do not discharge the appellant under this 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.

Scott Bernard
Hearing Officer
Board of Hearings

cc:

The Tremont Rehab & Skilled Care Center, Attn: Administrator, 605 Main Street, Wareham, MA 08251