

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2310527
Decision Date:	11/09/2023	Hearing Date:	11/06/2023
Hearing Officer:	Patrick Grogan	Record Open to:	N/A

Appearance for Appellant:

Pro se

Appearance for MassHealth:

Lynn Wilson, Jennifer Young, Dorcas Awojulu, Ernestina Nkrumah, Jessica Coffman, all from Worcester Rehabilitation & Health Care Center (WRHCC)

Interpreter:

N/A



*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:	Denied	Issue:	Nursing Home Expedited Discharge
Decision Date:	11/09/2023	Hearing Date:	11/06/2023
MassHealth's Rep.:	Lynn Wilson, Jennifer Young, Dorcas Awojulu, Ernestina Nkrumah, Jessica Coffman, all from Worcester Rehabilitation & Health Care Center (WRHCC)	Appellant's Rep.:	Pro se
Hearing Location:	Remote (Tel)	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 October 23, 2023, Worcester Rehabilitation & Health Care Center (hereinafter "the nursing facility") issued a Notice of Intent to Discharge Resident With Less Than 30 Days' Notice (Expedited Appeal), to [REDACTED], [REDACTED], MA (hereinafter "shelter") for the specific reasons: "the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;" and "the safety of the individuals in the facility is endangered due to clinical or behavioral status of the resident;" and "multiple substance-related incidents at facility and multiple instances of leaving the facility without permission from MD and also without oxygen"(130 CMR 456.702(B); 130 CMR 610.029(B); Exhibit 1). The Appellant filed this appeal in a timely manner on October 27, 2023. (130 CMR

610.015(F); Exhibit 2¹). Notice of transfer or discharge from a nursing facility is valid grounds for appeal. (130 CMR 456.703; 130 CMR 610.032(C)).

Action Taken by MassHealth

The nursing facility issued a Notice of Intent to Discharge Resident With Less Than 30 Days' Notice (Expedited Appeal) for the specific reasons: "the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;" and "the safety of the individuals in the facility is endangered due to clinical or behavioral status of the resident;" and "multiple substance-related incidents at facility and multiple instances of leaving the facility without permission from MD and also without oxygen"(130 CMR 456.702(B); 130 CMR 610.029(B); Exhibit 1)

Issue

The appeal issue is whether the nursing facility was correct, pursuant to 130 CMR 456.702(B); 130 CMR 610.029(B), in notifying the Appellant of its intent to discharge her with less than 30 days' notice to a shelter because: "the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;" and "the safety of the individuals in the facility is endangered due to clinical or behavioral status of the resident;" and "multiple substance-related incidents at facility and multiple instances of leaving the facility without permission from MD and also without oxygen"(130 CMR 456.702(B); 130 CMR 610.029(B); Exhibit 1)

Summary of Evidence

The nursing facility was represented telephonically at the hearing by its director of social services, a social worker, the director of nursing, a representative from aftercare, and the floor nurse manager for the 5th floor, who testified as follows: On October 23, 2023, the Appellant was given a less than 30 day-notice to discharge because "the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;" and "the safety of the individuals in the facility is endangered due to clinical or behavioral status of the resident;" and "multiple substance-related incidents at facility and multiple instances of leaving the facility without permission from MD and also without oxygen"(130 CMR 456.702(B); 130 CMR 610.029(B);

¹ 130 CMR 610.015(F) Expedited Appeals for Discharges and Transfers from a Nursing Facility Under 130 CMR 610.029(B) or (C). A resident may request an expedited appeal when a nursing facility notifies a resident of a discharge or transfer under the time frames of 130 CMR 610.029(B) or (C). When such a request is made, BOH will schedule a hearing as soon as possible, but no later than seven days from the date BOH receives the request. The hearing officer must render a final decision as soon as possible, but no later than seven days from the date of the hearing. These time limits may be extended pursuant to 130 CMR 610.015(D). Appeal requests made under 130 CMR 610.015(F) automatically waive the requirement for ten-day advance notice of the scheduled hearing date under 130 CMR 610.046(A).

Exhibit 1)

Regarding the first reason for the nursing facility's intent to discharge the Appellant with less than 30 days' notice to the shelter because "the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility," the nursing facility presented information that the Appellant admitted with a primary diagnosis of acute respiratory failure with hypoxia. (Testimony, Exhibit 4, pg. 3) Secondary diagnoses include lower back pain as well as dependence on opioids. (Exhibit 4, pg. 3). The Appellant has refused to be weaned off of her oxygen supply. (Testimony, Exhibit 4, pg. 3). The nursing facility's physician's letter indicates that the Appellant has been observed on multiple occasions to ambulate without the aid of oxygen or a walker. (Exhibit 4, pg. 3). The nursing facility's physician's letter indicates that the Appellant no longer requires oxygen to be administered, however the Appellant continued to fight the nursing facility's attempts to remove the oxygen. (Exhibit 4, pg. 3, Exhibit 4, pgs. 62-83) The nursing facility's physician's letter indicates that the Appellant does not require help with Activities of Daily Life. (Exhibit 4, pg.3) The nursing facility's physician's letter further noted that although the facility had offered to cover her stay at a hotel for 2 days in the original 30-Day Discharge Notice, the Appellant had agreed to discharge to the shelter and thus the Expedited Discharge Notice reflected the change of location for discharge. (Exhibit 1, Exhibit 4A, pgs. 31-35, Exhibit 4, pg. 3)

Regarding the second reason for the nursing facility's intent to discharge the Appellant with less than 30 days' notice to the shelter because "the safety of the individuals in the facility is endangered due to clinical or behavioral status of the resident," the nursing facility testified that there was a pattern of incidents that occurred that impacted the safety of individuals. (Testimony) There have been multiple incidents involving smoking within the nursing facility, which is prohibited. (Testimony, Exhibit 4, Exhibit 4A). Specifically, on September 9, 2023, workers within the nursing facility noted the smell of smoke within the room in which the Appellant had been. (Exhibit 4A, pg. 11) The Appellant refused to consent to a search, however, a search was conducted, and no contraband was recovered despite the smell of smoking. (Exhibit 4A, pg. 11). The Appellant was reminded that she had signed and agreed to the policy prohibiting smoking within the nursing facility. (Exhibit 4A, pg. 11). The Appellant stated she did not remember signing the policy, however if she had, she had done so "under the influence." (Exhibit 4A, pg. 11) Shortly after this incident on September 14, 2023, the Appellant was presented with a no harm agreement following the report of her smoking in the bathroom, and the Appellant signed the agreement without incident. (Exhibit 4A, pg. 25)

The Appellant was then observed to follow the smoking prohibition on October 16, 2023 and October 17, 2023, self-ambulating to the smoking area without her oxygen tank. (Exhibit 4, pg. 67) On October 22, 2023, the Appellant left the nursing facility without communication with facility staff, and without her oxygen after smoking in the appropriate smoking area. (Exhibit 4, pg. 65) However, on October 30, 2023, the Appellant was observed smoking within her room while wearing her oxygen on her face. (Exhibit 4, pg. 64) The Appellant admitted that she had missed her smoking break. (Exhibit 4, pg. 64). An argument ensued with the Appellant refusing to

relinquish her oxygen, despite the potential harm of smoking while wearing her oxygen on her face. (Exhibit 4, pg. 65). On November 3, 2023, representatives of the nursing facility, again, advised the Appellant of the dangers of her smoking with her oxygen. (Exhibit 4A, pg. 18). The Appellant stated she was afraid to smoke outside without her oxygen, despite observations of her doing so multiple times in the previous weeks. (Exhibit 4A, pg. 18 Exhibit 4, pgs.64-67)

Regarding the third reason for the nursing facility's intent to discharge the Appellant with less than 30 days' notice to the shelter in the Expedited Discharge Notice because "multiple substance-related incidents at facility and multiple instances of leaving the facility without permission from MD and also without oxygen," the representatives of the nursing facility conceded that this was not an independent reason for an expedited discharge, but the underlying conduct supported the safety concerns the Appellant posed to the residents of the facility. (Testimony) Specifically, there were medication-related incidents that were noted involving dilaudid and klonopin, as well as multiple separate safety incidents involving the Appellant, medical staff, the police, and even rising to the level of requiring emergency medical intervention. (Testimony)

Regarding medication, in the morning of August 2, 2023, the Appellant removed dilaudid from the medicine cart, and did not return the dilaudid to the cart for approximately 45 minutes. (Testimony, Exhibit 4A, pg 15.) The nurse was unable ascertain whether the Appellant had taken any dilaudid as she had been prescribed. (Exhibit 4A, pg. 15). Throughout the same day, August 2, 2023, the Appellant was observed repeatedly displaying agitation and being verbally abusive, swearing at staff, and repeatedly asking for medications. (Exhibit 4A, pg. 15) Later that day, it was noted that the nursing facility, along with the police, spoke with the Appellant regarding the removal of medication from the medication cart. (Exhibit 4A, pg.27)

A separate medication-related incident involving a different prescribed pain medication occurred on September 23, 2023. (Exhibit 4A, pg. 23). The Appellant was observed to remove klonopin from the medication cup and attempted to hide it away. (Exhibit 4A, pg. 23). When the medication nurse confronted the Appellant, she indicated that she wanted to save the medication for later. (Exhibit 4A, pg. 23)

One safety incident involved the Appellant making statements on September 18, 2023 that she would self-harm if the doctor she had called would not increase her klonopin. (Exhibit 4A, pg. 24) In response to questions about her statement about self-harm, the Appellant stated that she just wanted her medication. (Exhibit 4A, pg. 24) Notations dated September 28, 2023 involved the Appellant making statement that she would self-harm if she did not receive additional medication. (Exhibit 4A, pg. 6) The Appellant stated it was a misunderstanding by her outside primary care physician, whom she stated she had contacted because of her concern regarding receiving her medication crushed as a result of the observations of the Appellant attempting to secret medication and hoard it. (Exhibit 4A, pg.23) The Appellant denied any statements of self-harm. (Exhibit 4A, pg. 23)

On October 10, 2023, the Appellant was once again observed trying to hide klonopin. (Exhibit 4A, pg. 3). When the medication nurse was administering the Appellant's medication in the morning, the Appellant was observed to have dropped a klonopin pill on the bed. (Exhibit 4A, pg. 3) While the medication nurse was helping the Appellant locate the fallen pill, the Appellant was observed spitting out a klonopin pill and attempting to hide it under a blanket on the bed. (Exhibit 4A, pg. 3) The Appellant stated the pill fell out of her mouth and then was observed taking both retrieved klonopin pills orally. (Exhibit 4A, pg. 3) Shortly thereafter, the Appellant called for help locating a different medication she stated she had dropped (seroquel). While helping to search for the missing seroquel, the nurse found a separate, dry klonopin pill located on the floor where the Appellant had been standing earlier. (Exhibit 4A, pg.3) When asked about this pill, the Appellant stated it was the pill, covered in saliva, which she had spit out prior, despite the pill being observed to be dry. (Exhibit 4A, pg. 3) The Appellant once again acted agitated and verbally inappropriate with staff (Exhibit 4A, pg. 3).

Shortly after this incident, on October 15, 2023, the Appellant was observed to be on the floor in her room, lethargic and slow. (Exhibit 4A, pg. 2). The Appellant denied she had fallen. (Exhibit 4A, pg.2) The nursing facility contacted emergency medical response, and the Appellant was administered Narcan. (Exhibit 4A, pg.2) Shortly after the administration of the Narcan, the Appellant declined transport to a hospital. (Exhibit 4A, pg. 2). The nursing facility representatives noted the concern that had the Appellant been smoking, once again, near an oxygen tank, while suffering from the conditions that required administration of Narcan, such an incident would present significant dangers of serious harm, not only to the Appellant, but to all the residents in the nursing facility. (Testimony)

The Appellant repeatedly stated, within the progress notes as well as within her testimony, that she required oxygen and was very upset that it had been taken away. (Testimony, Exhibit 4, pgs. 30-48, Exhibit 4, pgs. 62-67, Exhibit 4A, pgs. 2-28) Regarding the specific incidents about which the representatives from the nursing facility had testified, the Appellant complained about not receiving her medications as prescribed. (Testimony). The Appellant repeatedly strayed from the issue of the appeal, the expedited discharge notice, to complain about various issues within the nursing facility, including conflict with staff and other residents. (Testimony) The Appellant testified about one incident in which the Appellant stated she had hurt her knee. (Testimony) She stated that she was still waiting for the results of a CAT scan of her knee, despite an x-ray having been taken. (Testimony) During the Hearing, a representative of the nursing facility attempted to show the Appellant the x-ray of her knee that had been taken, however, the Appellant stated that she needed a CAT scan due to an x-ray being unable to diagnose soft-tissue damage. (Testimony).

Regarding the medication issues, the Appellant testified that the dilaudid was prescribed to her and she was entitled to take the medication that she had been prescribed to her from the medication cart. (Testimony) Regarding the attempts to conceal medication, the Appellant denied any attempts to hide medication and stated that she has dropped medication in the past and was unable to find the medication. (Testimony). Regarding the smoking issues, specifically smoking

while wearing oxygen on her face, that Appellant stated that she did not realize that could be dangerous. (Testimony). Despite her multiple complaints regarding the services and the nursing facility she presented through testimony, and documented within the submissions, the Appellant stated she wishes to remain at the facility and work with them. (Testimony, Exhibit 4, 4A)

Findings of Fact

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

1. The Appellant was admitted to the nursing facility in July of 2023. (Testimony, Exhibit 4, pg. 4-29, Exhibit 4, pgs. 30-48)
2. On October 23, 2023, the nursing facility issued to the Appellant a Notice of Intent to Discharge with Less than 30 Days' Notice. (Testimony, Exhibit 1).
3. The Appellant timely appealed on October 27, 2023. (Exhibit 2).
4. In the morning of August 2, 2023, the Appellant removed dilaudid from the medicine cart, and did not return the dilaudid to the cart for approximately 45 minutes. (Testimony, Exhibit 4A, pg. 15) The nurse was unable ascertain whether the Appellant had taken any dilaudid as she had been prescribed. (Exhibit 4A, pg. 15).
5. There have been multiple incidents involving the Appellant smoking within the nursing facility, which is prohibited. (Testimony, Exhibit 4).
6. On September 9, 2023, workers within the nursing facility noted the smell of smoke within the room in which the Appellant had been. (Exhibit 4A, pg. 11) The Appellant refused to consent to a search, however, a search was conducted, and no contraband was recovered despite the smell of smoking. (Exhibit 4A, pg. 11).
7. The Appellant was reminded that she had signed and agreed to the policy prohibiting smoking within the facility. (Exhibit 4A, pg. 11). The Appellant stated she did not remember signing the policy, however if she had, she had done so "under the influence." (Exhibit 4A, pg. 11)
8. Shortly after this incident on September 14, 2023, the Appellant was presented with a no harm agreement following the report of her smoking in the bathroom, and the Appellant signed the agreement without incident. (Exhibit 4A, pg. 25)
9. On September 18, 2023, the Appellant stated she would self-harm if the doctor she had called would not increase her klonopin. (Exhibit 4A, pg. 24) In response to questions about

her statement about self-harm, the Appellant stated that she just wanted her medication. (Exhibit 4A, pg. 24)

10. A separate medication-related incident involving a different prescribed pain medication occurred on September 23, 2023. (Exhibit 4A, pg. 23). The Appellant was observed to remove klonopin from the medication cup and attempted to hide it away. (Exhibit 4A, pg. 23). When the medication nurse confronted the Appellant, she indicated that she wanted to save the medication for later. (Exhibit 4A, pg. 23)
11. Notations dated September 28, 2023 involved the Appellant making statement that she would self-harm if she did not receive additional medication. (Exhibit 4A, pg. 6) The Appellant stated it was a misunderstanding by her outside primary care physician, whom she stated she had contacted because of her concern regarding receiving her medication crushed as a result of the observations of the Appellant attempting to secret medication and hoard it. (Exhibit 4A, pg.23) The Appellant denied any statements of self-harm. (Exhibit 4A, pg. 23)
12. On October 10, 2023, the Appellant was once again observed trying to hide klonopin. (Exhibit 4A, pg. 3). When the medication nurse was administering the Appellant's medication in the morning, the Appellant was observed to have dropped a klonopin pill on the bed. (Exhibit 4A, pg. 3) While the medication nurse was helping the Appellant locate the fallen pill, the Appellant was observed spitting out a klonopin pill and attempting to hide it under a blanket on the bed. (Exhibit 4A, pg. 3) The Appellant stated the pill fell out of her mouth and then was observed taking both retrieved klonopin pills orally. (Exhibit 4A, pg. 3) Shortly thereafter, the Appellant called for help locating a different medication she stated she had dropped (seroquel). While helping to search for the missing seroquel, the nurse found a separate, dry klonopin pill located on the floor where the Appellant had been standing earlier. (Exhibit 4A, pg.3) When asked about this pill, the Appellant stated it was the pill, covered in saliva which she had spit out prior, despite the pill being observed to be dry. (Exhibit 4A, pg. 3) The Appellant once again acted agitated and verbally inappropriate with staff (Exhibit 4A, pg. 3).
13. On October 15, 2023, the Appellant was observed to be on the floor in her room, lethargic and slow. (Exhibit 4A, pg. 2). The Appellant denied she had fallen. (Exhibit 4A, pg.2) The nursing facility contacted emergency medical response, and the Appellant was administered Narcan. (Exhibit 4A, pg.2) Shortly after the administration of the Narcan, the Appellant declined transport to a hospital. (Exhibit 4A, pg. 2). The nursing facility representatives noted the concern had the Appellant been smoking, once again, near an oxygen tank, which suffering from the conditions that required administration of Narcan, and the dangers such an incident would pose not only for the Appellant, but to all the residents in the facility. (Testimony)
14. The Appellant was then observed to follow the smoking prohibition on October 16, 2023 and October 17, 2023, self-ambulating to the smoking area without her oxygen tank. (Exhibit 4,

pg. 67)

15. On October 22, 2023, the Appellant left the facility without communication with nursing facility staff, and without her oxygen after smoking in the appropriate smoking area outside the facility. (Exhibit 4, pg. 65)
16. On October 30, 2023, the Appellant was observed smoking within her room while wearing her oxygen on her face. (Exhibit 4, pg. 64) The Appellant admitted that she had missed her smoking break. (Exhibit 4, pg. 64). An argument ensued with the Appellant refusing to relinquish her oxygen, despite the potential harm of smoking while wearing her oxygen on her face. (Exhibit 4, pg. 65).
17. On November 3, 2023, representatives of the nursing facility, again, advised the Appellant of the dangers of her smoking with her oxygen. (Exhibit 4A, pg. 18). The Appellant stated she was afraid to smoke outside without her oxygen, despite observations of her doing so multiple times in the previous weeks. (Exhibit 4A, pg. 18 Exhibit 4, pgs.64-67)
8. The Notice of Intent to Discharge the Appellant with Less than 30 Days' Notice indicates that the Appellant will be discharged to a shelter. (Testimony; Exhibit 1).
9. The nursing facility's discharge plans for the Appellant include discharge to a homeless shelter, and the specific shelter was chosen due to its medical component to address the Appellant's medical needs. (Testimony).

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 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.²

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

² The regulatory language in the MassHealth Nursing Facility Manual, found in 130 CMR 456.000 et seq. has regulations which are identical (or nearly identical) to counterpart regulations found within the Commonwealth's Fair Hearing Rules at 130 CMR 610.001 et seq. as well as corresponding federal government regulations. Because of such commonality, the remainder of regulation references in this Fair Hearing decision will only refer to the MassHealth Nursing Facility Manual regulations in 130 CMR 456.000 unless otherwise noted and required for clarification.

notice written in 12-point or larger type that contains, in a language the member understands, the following, as codified within 130 CMR 456.701(C):

- (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.

Further, the notice requirements set forth in 130 CMR 456.701(A) 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 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.

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. Pursuant to 130 CMR 456.701(B), 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 456.702: Time Frames for Notices Issued by Nursing Facilities:³

³ See also 130 CMR 610.029: Time Frames for Notices Issued by Nursing Facilities

(A) The notice of discharge or transfer required under 130 CMR 610.028 must be made by the nursing facility at least 30 days before the date the resident is to be discharged or transferred, except as provided for under 130 CMR 610.029(B) and (C).

(B) In lieu of the 30-day-notice requirement set forth in 130 CMR 610.029(A), the notice of discharge or transfer required under 130 CMR 610.028 must be made as soon as practicable before the discharge or transfer in any of the following circumstances, which are considered to be emergency discharges or emergency transfers.

- (1) 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. (emphasis added)
- (2) The resident's health improves sufficiently to allow a more immediate transfer or discharge and the resident's attending physician documents this in the resident's record.
- (3) An immediate transfer or discharge is required by the resident's urgent medical needs and this is documented in the medical record by the resident's attending physician.
- (4) The resident has not lived in the nursing facility for 30 days immediately before receipt of the notice.

(C) When the transfer or discharge is the result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, the notice of transfer or discharge, including that which is required under 130 CMR 456.429: *Medical Leave of Absence: Failure to Readmit*, must comply with the requirements set forth in 130 CMR 456.701: *Notice Requirements for Transfers and Discharges Initiated by a Nursing Facility*, and must be provided to the resident and an immediate family member or legal representative, if such person is known to the nursing facility, at the time the nursing facility determines that it will not readmit the resident.

(D) Appeals of discharges and transfers listed in 130 CMR 610.029(B) and (C) are handled under the expedited appeals process described in 130 CMR 610.015(F).

(A) The notice of discharge or transfer required under 130 CMR 456.701(C) must be made by the nursing facility at least 30 days prior to the date the resident is to be discharged or transferred, except as provided for under 130 CMR 456.702(B).

(B) Instead of the 30-day-notice requirement set forth in 130 CMR 456.702(A), the notice of discharge or transfer required under 130 CMR 456.701 must be made as soon as practicable before the discharge or transfer in any of the following circumstances, which are emergency discharges or emergency transfers.

(1) 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.

(2) The resident's health improves sufficiently to allow a more immediate transfer or discharge and the resident's attending physician documents this in the resident's record.

(3) An immediate transfer or discharge is required by the resident's urgent medical needs and this is documented in the medical record by the resident's attending physician.

(4) The resident has not resided in the nursing facility for 30 days immediately prior to receipt of the notice.

(C) When the transfer or discharge is the result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, the notice of transfer or discharge, including that which is required under 130 CMR 456.429, 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 the nursing facility determines that it will not readmit the resident.

130 CMR 456.704: Stay of a Transfer or Discharge from a Nursing Facility Pending Appeal

(A) If a request for a hearing regarding a discharge or transfer from a nursing facility is received by the Board of Hearings during the notice period described in 130 CMR 456.703(B)(1), the nursing facility must stay the planned discharge or transfer until 30 days after the decision is rendered. While this stay is in effect, the resident must not be transferred or discharged from the nursing facility.

(B) If a hearing is requested, in accordance with 130 CMR 456.703(B)(2), and the request is received prior to the discharge or transfer, then the nursing facility must stay the planned transfer or discharge until five days after the hearing decision.

(C) If the request for a hearing is received within the applicable time frame but after the transfer, the nursing facility must, upon receipt of the appeal decision favorable to the resident, promptly readmit the resident to the next available bed in the facility.

(D) 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.

The nursing facility must also comply with all other applicable state laws, including M.G.L. c.111, §70E. The key paragraph of this statute, which is directly relevant to any type of appeal involving a nursing facility-initiated 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.⁴

In the present case, the nursing facility issued a Notice of Intent to Discharge Resident With Less Than 30 Days' Notice (Expedited Appeal), to a homeless shelter for the specific reasons: "the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;" and "the safety of the individuals in the facility is endangered due to clinical or behavioral status of the resident;" and "multiple substance-related incidents at facility and multiple instances of leaving the facility without permission from MD and also without oxygen"(130 CMR 456.702(B); 130 CMR 610.029(B); Exhibit 1). The Notice meets the regulatory requirements as outlined supra. (Exhibit 1) The Notice, which is treated as an emergency transfer, triggers specific regulatory timeframes and requirements outlined above. A nursing facility resident can only be discharged for specific reasons also outlined above. Here, the Appellant's clinical record was documented by a physician. (Exhibit 4, p. 3, Exhibit 4, Exhibit 4A). However, no specific information regarding the discharge is included from the Appellant's outside primary care physician, rather the documentation is from the treating physician within the facility. Pursuant to 130 CMR 456.701(B)(1), the documentation must be made by the resident's physician when a transfer or discharge is necessary under 130 CMR 456.701(A)(1). While the record supports the nursing facility's physician's opinion that the Appellant no longer requires treatment by the facility, it is not supported in this record with evidence from the Appellant's primary care

⁴ See also 42 USC 1396r(c)(2)(C) which requires that a nursing facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

physician.

However, most concerning are the safety issues raised by the Appellant's behavior. While any one of the incidents, alone, is concerning, the totality of the incidents provides a basis, documented by staff observations and notations along with a letter by the nursing facility's physician, for the facility's Notice of Expedited Discharge. (Exhibit 4, Exhibit 4A, Exhibit 4, pg. 3) Removing medication from the medication cart can adversely affect the health and safety of not only the Appellant but other residents of the nursing facility as well. (Exhibit 4A, pg. 15, 27) Secreting and hoarding medication can adversely affect the health and safety of not only the Appellant, but other residents of the nursing facility as well. (Exhibit 4A, pg. 7, Exhibit 4A, pg. 3). This is particularly concerning when shortly after observations of attempted secreted and hoarding of medications, the Appellant was administered Narcan. (Exhibit 4A, pg. 2) Smoking, while wearing oxygen, can adversely affect the health and safety of not only the Appellant, but the other nursing facility residents as well. (Exhibit 4, pg. 64) As the nursing facility noted during the hearing, succumbing to the conditions of being lethargic and slow to an extent requiring the administration of Narcan, coupled with smoking while wearing oxygen, could prove devastating for the Appellant as well as the nursing facility's residents and staff. (Testimony) Additionally, the chosen discharge location is a suitably safe and appropriate location that specifically has a medical component to address the Appellant's needs. (Testimony, Exhibit 4A, pg. 21) Also, the nursing facility has discussed discharge plans multiple times with the Appellant in order to ensure sufficient preparation and orientation (Exhibit 4, Exhibit 4A) Accordingly, where the nursing facility has followed the proper procedures for an expedited discharge, and has supported the Expedited Discharge Notice with exhibits, including documentation by a physician who has treated the Appellant while she has resided at the facility, this Appeal is DENIED.

Order for Nursing Facility

The nursing facility may proceed with notice of discharge to a safe and appropriate place with all suitable services in place. Per 130 CMR 456.704(A) and 130 CMR 610.030(A), such discharge may not take place any earlier than 30 days from the date of this decision.

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.

Patrick Grogan
Hearing Officer
Board of Hearings

cc:

[REDACTED]