

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2311158
Decision Date:	12/28/2023	Hearing Date:	12/12/2023
Hearing Officer:	Patrick Grogan	Record Open to:	N/A

Appearance for Appellant:

Pro se

Appearance for MassHealth:

Ann Marie Ester, Social Services Director;
Christopher Laptew, Rehabilitation Director;
Rean Enriquez, Administrator; Anne Nadeau,
Director of Nursing Services

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:	Approved	Issue:	NH Discharge
Decision Date:	12/28/2023	Hearing Date:	12/12/2023
MassHealth's Rep.:	Ann Marie Ester, Social Services Director; Christopher Laptew, Rehabilitation Director; Rean Enriquez, Administrator; Anne Nadeau, Director of Nursing Services	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 27, 2023, [REDACTED] (hereinafter "the nursing facility" or "facility") issued to the appellant a Nursing Home Transfer or Discharge Notice to [REDACTED] (hereinafter "shelter") for the specific reasons: "your health has improved sufficiently so that you no longer need the services provided by this facility."¹ (130 CMR 456.701; 130 CMR 610.029(B); Exhibit 1). The Appellant filed this appeal in a timely manner on November 8, 2023. (130 CMR 610.015(F); Exhibit 2). Notice of transfer or discharge from a nursing facility is valid grounds for appeal. (130 CMR 456.703; 130 CMR 610.032(C)).

¹ The Notice states : "Your health has improved sufficiently so that you no longer need the services provided by this facility. The safety of other individuals in this facility is endangered due to the status of the" as the grounds for discharge. Upon inquiry, the facility stated the grounds for seeking a discharge of the Appellant was solely ""your health has improved sufficiently so that you no longer need the services provided by this facility." (Testimony, see Exhibit 1)

Action Taken by MassHealth

The nursing facility issued to the appellant a Nursing Home Transfer or Discharge Notice to [REDACTED] (*hereinafter "shelter"*) for the specific reasons: "your health has improved sufficiently so that you no longer need the services provided by this facility;" (130 CMR 456.701; 130 CMR 610.029(B); Exhibit 1)

Issue

The appeal issue is whether the nursing facility was correct, pursuant to 130 CMR 456.701; in notifying the Appellant of its intent to discharge to a shelter because: "your health has improved sufficiently so that you no longer need the services provided by this facility"(130 CMR 456.701; Exhibit 1)

Summary of Evidence

The nursing facility was represented telephonically at the hearing by its Social Services Director; its Rehabilitation Director; its Administrator; and its Director of Nursing Services, who testified as follows: On October 27, 2023, the Appellant was given a Nursing Home Transfer or Discharge Notice for the specific reason: "your health has improved sufficiently so that you no longer need the services provided by this facility." (130 CMR 456.701; 130 CMR 610.029(B); Exhibit 1).

Regarding the reason for the nursing facility's intent to discharge the Appellant to the shelter because "your health has improved sufficiently so that you no longer need the services provided by this facility;" the nursing facility presented evidence of the Appellant's medical history: "PMH Includes bilateral feet frostbite with amputation [REDACTED], esophageal stenosis, opioid dependency." (Exhibit 5, pg.71) The nursing facility stated that the Appellant's condition had improved such that the Appellant no longer required skilled nursing care. (Testimony) The nursing facility elaborated that the Appellant did not require physical assistance" Pt ambulating with no AD and trials with SPC up to 250' per trial on unit. Re-ed on benefits of rollator, Manual passive stretching to increase DF ROM." (Exhibit 5, pgs. 50) Additionally, the facility stated that the Appellant had been offered two beds through Behavioral Health Network (BHN) but had declined. (Testimony, Exhibit 5, pgs. 12-18, 19-21) The facility stated that the Appellant had initially stated that he wished to be discharged to BHN when he was discharged. (Testimony)

Inquiry posed to the nursing facility attempting to elicit evidentiary support within the submitted Administrative Record revealed that Exhibit 5 as submitted was incomplete. (Testimony). The facility faxed the evidence to the EDMC in Taunton, however significant

portions of the transmittal were cut off. (Testimony, Exhibit 5) The facility requested the option of rescanning and faxing the entirety of the submitted Exhibit 5. (Testimony) The Appellant was asked about his position regarding the facility's request to cure the deficiency of the submitted exhibit 5, and the Appellant responded he would prefer that the hearing be continued to a new date so that the facility may submit a complete copy of the record. (Testimony). The request to supplement the submitted Exhibit 5, post-hearing, was taken under advisement and the hearing continued.²

In response to inquiry posed, the facility attempted to reference portions of Exhibit 5, purporting to be the Appellant's physician's determination that the Appellant's health sufficiently improved so that he no longer requires the services of the facility. The facility referenced Exhibit 5, pg. 71-73, which does not include evidence of who documented the Appellant's condition. (Exhibit 5, pgs. 71-73). The facility stated that the information was from the Appellant's physician's office. (Testimony). In response to the question of whose name appeared at the bottom of the purported submission by the Appellant's physician's office, had the proffered exhibit been complete, the facility responded that it was signed by a nurse practitioner not the Appellant's physician. (Testimony)

The Appellant admitted that he did decline the two beds offered to him, specifically because he was attempting to receive services in accordance with an MFP Waiver. (Testimony). The Appellant stated he was concerned that accepting one of the offered beds could result in denial of services through an MFP waiver. (Testimony) The facility responded that the Appellant had been informed that there was no guarantee that he would receive an MFP waiver, and the Appellant agreed that the facility had so informed him. (Testimony). The Appellant stated he would take any bed, however he had reservation about being discharged to a shelter. (Testimony). The Appellant stated his history of opioid dependency would be challenging residing within the shelter. (Testimony)

The Appellant further stated that he has a wound on his posterior, which he cannot see without the aid of a mirror. (Testimony) The Appellant voiced concern regarding maintaining and dressing the wound in the shelter setting. (Testimony) The facility stated that they had attempted to establish visiting nurse services. (Testimony). The visiting nurse agency they utilize will service a shelter, however, they could not establish the services until the Appellant had a discharge date. (Testimony) The Appellant responded that he was not provided information regarding future visiting nurse services. (Testimony)

Findings of Fact

² The request is denied. For reasons discussed infra, the submitted evidence by the facility, had it been transmitted completely, still fails to support its attempt to discharge the Appellant in accordance with the Regulations.

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

1. On October 27, 2023, the Appellant was given a Nursing Home Transfer or Discharge Notice for the specific reason: “your health has improved sufficiently so that you no longer need the services provided by this facility.” (130 CMR 456.701); Exhibit 1).
2. The nursing facility presented evidence of the Appellant’s medical history: “PMH Includes bilateral feet frostbite with amputation [REDACTED] esophageal stenosis, opioid dependency.” (Exhibit 5, pg.71)
3. The nursing facility stated that the facility believed that Appellant’s condition had improved such that the Appellant no longer required skilled nursing care. (Testimony) The nursing facility elaborated that the Appellant did not require physical assistance” Pt ambulating with no AD and trials with SPC up to 250' per trial on unit. Re-ed on benefits of rollator, Manual passive stretching to increase DF ROM.” (Exhibit 5, pgs. 50) The facility stated that the Appellant had been offered two beds through Behavioral Health Network (BHN) but had declined. (Testimony, Exhibit 5, pgs. 12-18, 19-21)
4. The facility stated that the Appellant had been offered two beds through Behavioral Health Network (BHN) but had declined. (Testimony, Exhibit 5, pgs. 12-18, 19-21)
5. The submitted Administrative Record revealed that Exhibit 5 as submitted was incomplete. (Exhibit 5)
6. As submitted and incorporated into the Administrative Record, Exhibit 5, pg. 71-73, does not include evidence of who documented the Appellant’s condition. (Exhibit 5, pgs. 71-73). The facility stated that the information was from the Appellant’s physician’s office. (Testimony).
7. In response to the question of whose name appeared at the bottom of the purported submission by the Appellant’s physician’s office, had the proffered exhibit been complete, the facility responded that it was signed by a nurse practitioner not the Appellant’s physician. (Testimony)
8. The Appellant admitted that he did decline the two beds offered to him, specifically because he was attempting to received services in accordance with an MFP Waiver. (Testimony).
9. The Appellant stated his history of opioid dependency would be challenging residing within the shelter. (Testimony)
10. The Appellant further stated that he has a wound on his posterior, which he cannot see without the aid of a mirror. (Testimony) The Appellant voiced concern regarding maintaining

and dressing the wound in the shelter setting. (Testimony)

11. The facility stated that they had attempted to establish visiting nurse services. (Testimony). The visiting nurse agency they utilize will service a shelter, however, they could not establish the services until the Appellant had a discharge date. (Testimony)
12. The Appellant responded that he was not provided information regarding visiting nurse services. (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.³

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, 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

³ 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.

- 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:⁴

(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

⁴ 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).

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.⁵

In the present case, the nursing facility issued to the appellant a Nursing Home Transfer or Discharge to [REDACTED] (*hereinafter "shelter"*) for the specific reasons: "your health has improved sufficiently so that you no longer need the services provided by this facility." (130 CMR 456.702(B); 130 CMR 610.029(B); Exhibit 1). The Notice meets the regulatory requirements as outlined *supra*⁶. (Exhibit 1) The Notice 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 not documented by a physician. (Exhibit 5, p. 71-73) Pursuant to 130 CMR 456.701(B)(1), the documentation must be made by the resident's physician when a transfer or discharge is sought under 130 CMR 456.701(A)(2). Were the submission complete, based upon the testimony of the facility, the documentation was made by a nurse practitioner, not the Appellant's physician. This record does not support that the Appellant's physician documented an opinion that the Appellant no longer requires treatment by the facility. Additionally, the testimony of the Appellant regarding the care of his posterior wound is concerning and belies the facility's position that he no longer requires the services of the facility. The facility's position that the Appellant does not require care at the facility is further belied by the testimony that visiting nursing services for the Appellant at the place of attempted discharge, the shelter, cannot be put into place until the Appellant is discharged. Moreover, the testimony of the Appellant that he was not informed of visiting nurse services in the shelter calls into question the facility's required preparation of the Appellant for discharge pursuant to MGL c.111, §70E "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."

Accordingly, where the Administrative Record submitted is bereft of any documentation specifically authored by the Appellant's physician supporting the facility's attempt to discharge the Appellant, the attempt to discharge runs afoul of 130 CMR 456.701(B)(1). Additionally, MGL c.111, §70E requires "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." Here, the Appellant was not informed of the efforts of the facility to obtain a visiting nurse. The Appellant was concerned regarding treatment of the wound in the shelter, and had not been provided information related to services the facility

⁵ 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.

⁶ Although the Notice merges two separate grounds for discharge, the Notice clearly the specific grounds as restated through testimony at the hearing. Accordingly, I find that the Notice for this Appellant is sufficient.

was attempting to put in place. (Testimony). The Appellant's testimony reveals that the Appellant did not receive sufficient preparation and orientation to ensure the safe and orderly transfer of the Appellant, specifically with treatment of his wound by a visiting nurse. The Appellant has demonstrated that the attempt to discharge runs afoul of MGL c.111, §70E as well. Accordingly, this appeal is APPROVED.

Order for Nursing Facility

Rescind the October 27, 2023 discharge notice.

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:

