

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2312226
<b>Decision Date:</b>	01/04/2024	<b>Hearing Date:</b>	12/20/2023
<b>Hearing Officer:</b>	Cynthia Kopka	<b>Record Open to:</b>	12/27/2023

**Appearance for Appellant:**



**Appearance for Respondent:**

Jody Sousa, Director of Social Services  
Nancy Lafleur, Director of Nursing  
Jason Gold, Administrator  
Candace Mitchell, WHJ Consulting Services



*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>	Nursing facility discharge, 30 day
<b>Decision Date:</b>	01/04/2024	<b>Hearing Date:</b>	12/20/2023
<b>Respondent's Rep.:</b>	DOSS, DON, Administrator, consultant	<b>Appellant's Rep.:</b>	Spouse/POA
<b>Hearing Location:</b>	Quincy (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

By notice dated [REDACTED], [REDACTED] ("Respondent" or "the facility") informed Appellant of its intent to discharge Appellant from the facility on [REDACTED]. Exhibit 1. Appellant filed a timely appeal on November 24, 2023. Exhibit 2. 130 CMR 610.615. Challenging the discharge or transfer from a nursing facility is a valid basis for appeal. 130 CMR 610.032. The hearing record was held open through December 27, 2023.

### Action Taken by MassHealth

Respondent informed Appellant of its intent to discharge Appellant from the facility.

### Issue

The appeal issue is whether Respondent satisfied its statutory and regulatory requirements when it issued the notice of intent to discharge Appellant.

### Summary of Evidence

Respondent, a skilled nursing facility in Massachusetts, was represented by telephone by its director of social services, director of nursing, administrator, and consultant. Respondent's representatives submitted documents in support of its position, Exhibit 4. During the hearing, Respondent submitted additional documents, Exhibit 6. Appellant appeared by telephone with his spouse and submitted documents in support, collectively Exhibit 5. A summary of testimony and supporting records follow.

By hand delivered letter dated [REDACTED], Respondent informed Appellant of its intent to discharge him from the facility to his home. Exhibit 1. A copy of the notice was hand delivered to Appellant and mailed to his spouse. The notice stated that Respondent sought to discharge Appellant on [REDACTED], because Appellant's health has improved sufficiently so the resident no longer needs the services provided by the facility. *Id.* The notice identified a person responsible for supervising the discharge and explained Appellant's appeal rights, including identifying a social worker to assist with filing the appeal. *Id.* at 2. The notice included contact information for a local long term care ombudsman, the disability law center, centers for public representation (including a disabled persons' protection commission) and a local legal service office. *Id.*

Appellant's second admission to the facility was in [REDACTED] after hospitalization for coffee ground emesis, acute renal failure superimposed on chronic kidney disease, gastrointestinal (GI) bleed, urinary tract infection (UTI), constipation, severe malnutrition, and esophagitis. Exhibit 4 at 189. Appellant's other medical history includes type 2 diabetes, stroke, hypertension, and insomnia. *Id.* at 190. The goal of Appellant's admission was short-term rehabilitation and return home. The facility's representative testified that staff has addressed the barriers identified by Appellant and his spouse to Appellant's returning home. Appellant had previously had a Foley catheter in place, but this was removed on December 14, 2023. Appellant is doing well with daily voiding trials, and does not need to have the catheter replaced if output is less than 400 ml. Prior to its removal, Appellant and his spouse were educated on how to manage the Foley catheter. Exhibit 4 at 282, 284, 287. Regarding physical therapy (PT) and occupational therapy (OT), Appellant is ambulating 150 feet with his walker and his transfers are "contact guard" (light touching, tactile cueing) as of December 7, 2023. *Id.* at 297, 303. Toilet transfers and clothing assistance are also contact guard status, with Appellant sometimes refusing assistance saying that he can do it himself. Appellant has difficulty sleeping but declines to take sleep medication. Exhibit 6 at 20.

The director of social services testified that she has been working with Appellant and his spouse on discharge goals, including visiting nurse and PT and OT in the home. These are services that will be referred to a nursing agency in the community and the turn-around time is one day. Respondent has not put in the referral yet, awaiting a discharge date. The director of social services also made a referral to Coastline Elder Services, the area aging service access point (ASAP) for home care services, including personal care attendant (PCA), homemaker, and meals on wheels. Appellant

and his spouse have declined to meet with the Coastline representative. Exhibit 4 at 281.

The facility's representatives testified that Appellant's primary physician at the facility is [REDACTED] and he also sees [REDACTED]. The facility provided notes from MD and NP visits. *Id.* at 198-280. According to these notes, Appellant was physically examined by [REDACTED] and [REDACTED] 2023. *Id.* at 219-222, 235-238, 258-262. The [REDACTED] 2023 visit note makes no mention of discharge, but is a review of Appellant's medication list. *Id.* at 258.

The MD order for discharge was issued in the middle of hearing, December 20, 2023 at 9:30 AM. Exhibit 6. It was a physician's telephone order "electronically noted" by unit manager [REDACTED], not identified as an MD or NP. Exhibit 6 at 21. [REDACTED] did not sign the order. The order stated that Appellant may be discharged home with meds and services and is "information only." *Id.*

Appellant testified that he fell on December 18, 2023 and it took an hour before anyone came to help him. Appellant's ribs hurt and he cannot breathe. It took 15 hours to get an x-ray, which came back negative for fracture. Appellant could not reach his call button when he fell. Appellant's spouse testified that Appellant was trying to transfer from the bed to his wheelchair to urinate. Appellant was not determined to require PT or OT related to this fall. See Exhibit 6. Appellant and his spouse testified that Appellant ambulates with the wheelchair and does not ambulate to the bathroom with the walker. Appellant is wobbly.

Regarding the Foley catheter, Appellant's spouse testified that the facility offered training, but she had not been trained, having left her visit before the training occurred. Since the Foley catheter was removed, Appellant has been urinating every half hour. Appellant has an upcoming visit to his kidney doctor to evaluate his progress without the catheter.

If Appellant falls at home, Appellant's spouse cannot pick him up. Appellant's spouse cannot monitor his urine flow at home. Appellant will not be able to transfer from his bed to his wheelchair because there are no bed rails on his bed. Appellant needs to improve his strength, as he is very wobbly while using his walker. Appellant's wheelchair will not fit in the home. Appellant is not able to sleep, which increases his anger and agitation. Appellant refuses his anxiety medications, preferring herbal medications. Appellant's spouse is not able to care for Appellant in the home. Appellant's spouse visits Appellant every day, as the nursing facility is close to home. Appellant's spouse would not be able to visit Appellant as frequently if he was at another facility. Appellant's spouse helps the CNAs with caring for Appellant, including changing his bedsheets soiled due to illness.

Regarding the Coastline referral, Appellant's spouse told the representative that she cannot meet with Coastline yet due to the appeal issue. Appellant's spouse received a briefing from Coastline and did not refuse services, but needed to know the appeal outcome first.

The hearing record was held open through December 27, 2023 to allow Appellant and his spouse to review and respond to the materials submitted on the day of hearing. Appellant's spouse submitted a written response and note from Appellant's urologist. Exhibit 7.

## Findings of Fact

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

1. Appellant admitted to the facility in [REDACTED] after hospitalization for coffee ground emesis, acute renal failure superimposed on chronic kidney disease, GI bleed, UTI, constipation, severe malnutrition, and esophagitis. Appellant's other relevant medical history includes type 2 diabetes, stroke, hypertension, and insomnia. Exhibit 4 at 1, 189-190.
2. By hand delivered letter dated [REDACTED], Respondent informed Appellant of its intent to discharge him from the facility to his home. A copy of the notice was hand delivered to Appellant and mailed to his spouse. Exhibit 1.
3. The notice stated that Respondent sought to discharge Appellant on [REDACTED] because Appellant's health has improved sufficiently so the resident no longer needs the services provided by the facility. *Id.*
4. The notice identified a person responsible for supervising the discharge and explained Appellant's appeal rights, including identifying a social worker to assist with filing the appeal. *Id.* at 2. The notice included contact information for a local long term care ombudsman, the disability law center, centers for public representation (including a disabled persons' protection commission) and a local legal service office. *Id.*
5. Appellant timely appealed the notice of discharge on November 24, 2023. Exhibit 2.
6. Appellant's primary physician at the facility is [REDACTED]. Doctor's notes show that [REDACTED] has physically examined Appellant on [REDACTED], [REDACTED] and [REDACTED] 2023. *Id.* at 219-222, 235-238, 258-262.
7. On [REDACTED], an unsigned physician's telephone order "electronically noted" by the unit manager stated that Appellant may be discharged home with meds and services and was information only. Exhibit 6 at 21.
8. The [REDACTED] 2023 visit note by [REDACTED] not refer to discharge, but is a review of Appellant's medication list. Exhibit 4 at 258-262.

## 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 some of 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.*

Per 130 CMR 456.701(A) 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 MassHealth Agency 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, the resident's clinical record must contain documentation to explain the transfer or discharge. 130 CMR 456.701(B); 130 CMR 610.028(B). For discharges subject to 130 CMR 456.701(A)(2) and 130 CMR 610.028(A)(2), the documentation explaining the discharge must be made by **the resident's physician or PCP**. 130 CMR 456.701(B)(1).

Prior to discharge or transfer, the nursing facility must hand deliver to the resident and mail to a designated family member or legal representative (if the resident has made such a person known to the facility), a notice written in 12-point or larger type that contains, in a language the member understands, the following:

- (1) the action to be taken by the nursing facility;
- (2) the specific reason or reasons for the discharge or transfer;
- (3) the effective date of the discharge or transfer;
- (4) the location to which the resident is to be discharged or transferred;
- (5) a statement informing the resident of his or her right to request a hearing before the MassHealth agency including:
  - (a) the address to send a request for a hearing;
  - (b) the time frame for requesting a hearing as provided for under 130 CMR

- 610.029; and
- (c) the effect of requesting a hearing as provided for under 130 CMR 610.030;
- (6) the name, address, and telephone number of the local long-term-care ombudsman office;
- (7) for nursing facility residents with developmental disabilities, the address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. § 6041 et seq.);
- (8) for nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act (42 U.S.C. § 10801 et seq.);
- (9) a statement that all residents may seek legal assistance and that free legal assistance may be available through their local legal services office. The notice should contain the address of the nearest legal services office; and
- (10) the name of a person at the nursing facility who can answer any questions the resident has about the notice and who will be available to assist the resident in filing an appeal.

130 CMR 610.028(C).

Pursuant to 130 CMR 610.029(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) when the discharge is being made on an emergency basis. *See also* 130 CMR 456.702(A).

Further, 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.” Finally, federal regulations require that a nursing facility provide sufficient preparation for a safe and orderly discharge. *See* 42 CFR 483.15(c)(7).

The appeal issue is whether Respondent met its obligations when issuing the notice of discharge to Appellant. In many respects, Respondent has met the regulatory requirements. The notice itself meets the form as required by regulations and cites an appropriate reason for discharge. Respondent’s documented satisfactory efforts in planning discharge with Appellant and his spouse.

However, the physician order for discharge contained in Respondent's submission is not sufficient to meet the requirements of 130 CMR 456.701(B)(1). The order, which must be issued by Appellant's physician, was done over the phone during the hearing and "electronically noted" by a unit manager. The regulation also requires that Appellant's physician explain the reason for discharge, and the discharge order does not explain how Appellant's health has improved or that Appellant no longer needs the services provided by the facility. Finally, even if the physician's order dated [REDACTED] 2023 contained more information, it would not be sufficient or compelling because there is no indication that [REDACTED] had examined Appellant since [REDACTED] 2023.

Respondent has failed to meet its obligations under the regulations in noticing Appellant's discharge. Accordingly, this appeal is approved.

Appellant and his spouse should carefully note that the reason for this appeal is due to the errors made by the facility in noticing the discharge. Though their testimony that Appellant is not well enough to return home is understandable, the specific reasons provided are not necessarily compelling to win the appeal because these concerns can be addressed with the discharge planning process through elder services and skilled home care. For instance, if Appellant cannot transfer out of his home bed without rails, he may qualify for coverage or rental of a hospital bed or mechanical lift. Appellant's spouse's concern about lifting Appellant if he falls may be addressed with PCA hours and an emergency call button. Appellant's spouse is not expected to lift Appellant if she is unable. A PCA may also assist Appellant with transfers to and from the bed and toilet and with ambulation in the home if he is wobbly. It should be noted that individuals who live alone are discharged home with these supports. In all, these concerns are valid but may not succeed in a future appeal. Appellant and his spouse are strongly encouraged to participate in the planning process for discharge and cooperate with facility staff to address these concerns.

## **Order for Respondent**

Rescind the November 20, 2023 notice of discharge.

## **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.

## **Implementation of this Decision**



If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. 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.

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Cynthia Kopka  
Hearing Officer  
Board of Hearings

cc:

[REDACTED]

[REDACTED]

General Counsel's Office –Sharon Boyle