

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2402127
Decision Date:	03/15/2024	Hearing Date:	02/26/2024
Hearing Officer:	Thomas Doyle		

Appearance for Appellant:



Appearances for Respondent:

Jennifer Young, Social Worker
Nicole Coiteux, Rehab Director
Ernestina Nkrumah, After Care
Lyne Wilson, Dir. Social Services
Dorcas Awojulu, Dir. Of Nursing



*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:	Nursing Home; 30 Day Notice of Discharge
Decision Date:	03/15/2024	Hearing Date:	02/26/2024
Respondent's Reps.:	Jennifer Young, Nicole Coiteux, Ernestina Nkrumah, Lynn Wilson, Dorcas Awojulu	Appellant's Rep.:	Sharon Melia
Hearing Location:	Remote (phone)		

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 January 16, 2023 (*sic*), [REDACTED] (hereinafter, "respondent" or "facility") issued a 30-Day Notice of Intent to Discharge Resident to appellant to [REDACTED] because appellant's "health has improved sufficiently so the [appellant] no longer needs the services provided by the facility" and "the [appellant] has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare of (*sic*) Medicaid) a stay at the facility." (130 CMR 456.701 (A) (B); 130 CMR 610.028(A) and (B); Ex. 1). Appellant filed this appeal in a timely manner on February 9, 2024. (130 CMR 610.015(F); Ex. 2). 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 Respondent

The facility issued 30-Day notice of intent to discharge the appellant.

Issue

The appeal issue is whether the facility satisfied its statutory and regulatory requirements pursuant to 130 CMR 456.701(A) and (B), when it issued appellant a 30-day notice of intent to discharge.

Summary of Evidence

The nursing facility was represented telephonically at the hearing by a Social Worker, its Social Services Director, the After Care Coordinator, the Director of Nursing and its Rehabilitation Director. Appellant and her appeal representative also appeared by phone. All were sworn. Appellant is a female in her late [REDACTED]. (Ex. 3). The appellant was admitted to the facility on July 28, 2023. (Ex. 4, pp. 27-52). The facility's medical director wrote in a letter that appellant was admitted to the facility on [REDACTED], a date which has yet to occur. (Ex. 4, p. 3). In her testimony, the facility social worker, when referencing the letter from the medical director, stated, "I put the date wrong." (Testimony).¹ Due to the social worker's testimony, it is a reasonable assumption that the doctor did not write the letter in evidence. (Ex. 4, p. 3). On [REDACTED] (*sic*), the facility issued appellant a 30 Day Notice of Intent to Discharge Resident. (Ex. 1). This date is [REDACTED] before the hearing date of February 26, 2024. (Ex. 3). Appellant timely appealed on February 9, 2024. (Ex. 2).

The social worker testified that the facility called the [REDACTED], the place of discharge listed on the [REDACTED] notice, and was informed there was a "big" waitlist at that location. She stated the facility "suggested" to appellant she go to the [REDACTED] because the facility has become familiar with the [REDACTED], and if appellant went there before 6pm the Center has emergency beds. The facility intends to discharge appellant to the [REDACTED]. (Testimony).

The appeal representative testified she believed the notice was defective because the facility was not discharging appellant to the location specified on the discharge notice. She stated the facility should name a definite discharge location and issue a new notice.

Findings of Fact

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

1. Appellant is a female in her late [REDACTED] (Ex. 3).
2. Appellant was admitted to the facility on [REDACTED]. (Ex. 4, pp. 27-52).

¹ It is reasonable to conclude the social worker wrote the letter signed by the doctor.

3. In a letter signed by the facility medical director, it was written that appellant was admitted to the facility on [REDACTED]. (Ex. 4, p. 3).
4. The facility social worker wrote the letter signed by the facility medical director. (Testimony; Ex. 4, p. 3).
4. On [REDACTED], the facility issued appellant a 30-Day Notice of Intent to Discharge Resident. (Ex. 1).
6. The location on the notice to which the resident is to be discharged is [REDACTED] known as [REDACTED]. (Testimony).
7. The facility called [REDACTED] before designating on the notice to discharge that the [REDACTED] was the intended discharge location and was informed there was a long waiting list. (Testimony).
7. The facility does not intend to discharge appellant to the [REDACTED] (Testimony).
8. The facility suggested to appellant she go to the [REDACTED] and if she arrived there before 6pm, she could get an emergency bed. (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 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):

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.

- (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.

(emphasis added)

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

The notice provided to appellant is defective. The notice provides a street address to which appellant will be discharged without identifying the shelter at that address. At hearing, testimony revealed the name of the shelter to be the [REDACTED]. However, the facility social worker testified that before [REDACTED] was designated on the notice as the place to which the facility sought to discharge appellant, the facility called [REDACTED] and was told there was a long wait list. The facility social worker further testified that they suggested to appellant she go to [REDACTED] and the facility was, in fact, going to discharge appellant to the [REDACTED]. The regulations are clear, "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):

...

(4) the location to which the resident is to be discharged or transferred;

I conclude when the facility designated the place of discharge to be "[REDACTED]"

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.

██████████ on the notice of discharge, the facility knew appellant was not going to that location. The facility witness had called ██████████ before drafting and serving the discharge notice, and had learned there was a long waiting list at that shelter. (Testimony). Also, the facility social worker testified they suggested to appellant she go to the ██████████. The only reason to suggest another discharge location is if the original discharge location was unavailable to appellant.⁵

Because I find that the facility did not satisfy the requirements of 130 CMR 456.701(C)(4), I need not reach the following other issues: whether appellant's health has improved sufficiently; whether appellant has failed to pay for her stay; and whether the nursing facility has met the requirements of MGL Chapter 111, Section 70E and 42 CFR 483.15(c)(7) in providing sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place.

Because the nursing facility's notice of discharge dated ██████████ (*sic*) does not meet the requirements of 130 CMR 456.701(C)(4), in that the facility did not provide the location to which the resident is to be discharged or transferred, the appeal is approved.

Order for Respondent

Rescind the notice of discharge dated January 16, 2023 (*sic*).

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.

⁵ Of further concern with the notice to discharge is the date, January 16, 2023, a full 13 months before appellant's hearing on February 26, 2024. This incorrect date evinces a sloppiness of the respondent in providing appellant with appropriate notice.

Thomas Doyle
Hearing Officer
Board of Hearings

CC:

[REDACTED]

[REDACTED]