

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**

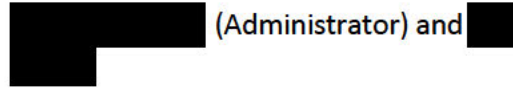


<b>Appeal Decision:</b>	DENIED	<b>Appeal Number:</b>	2404552
<b>Decision Date:</b>	5/14/2024	<b>Hearing Date:</b>	04/18/2024
<b>Hearing Officer:</b>	Kenneth Brodzinski	<b>Record Open to:</b>	04/26/2024

**Appearances for Appellant:**



**Appearances for the SNF Facility:**



(Administrator) and



*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 Transfer
Decision Date:	5/14/2024	Hearing Date:	04/18/2024
SNF Facility Rep.:	[REDACTED]	Appellant's Reps.:	[REDACTED]
Hearing Location:	Springfield MEC		

### Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

### Jurisdiction

Through a 30-Day Notice of Intent to Discharge Appellant dated February 20, 2024, the skilled nursing facility, [REDACTED] ("the facility") informed Appellant of its intent to discharge her to another skilled nursing facility located in [REDACTED] Massachusetts for failing to pay, after reasonable and appropriate notice, for a stay at the facility (130 CMR 610.028; 130 CMR 456.701; and Exhibit A). An appeal was timely filed on March 22, 2024 (130 CMR 610.015(B); 130 CMR 456.703; and Exhibit A). Challenging a notice of intent to discharge from a skilled nursing facility constitutes valid grounds for appeal (130 CMR 610.032(C)).

A hearing, originally scheduled for April 8, 2024 was rescheduled on Appellant's request and heard on April 18, 2024 (Exhibit B). At the conclusion of the hearing, the record was left open until April 26, 2024 for the exchange and review of additional evidence.

## Action Taken by the Nursing Facility

The nursing facility notified Appellant that it seeks to discharge her to another skilled nursing facility due to Appellant's failure to pay, after reasonable and appropriate notice, for a stay at the facility.

## Issue

The appeal issue is whether or not the nursing facility can discharge Appellant under the notice of February 20, 2024 pursuant to the controlling state and federal regulations including, but not limited to, 130 CMR 610.028 and 130 CMR 456.701.

## Summary of Evidence

The parties appeared virtually by video conference. At the time of hearing, the facility submitted a packet of documents including copies of Appellant's clinical records and billing statements (Exhibit C); Appellant filed a packet of documents including, *inter alia*, letters from Appellant's medical providers (Exhibit D) and a Memorandum of Law (Exhibit E). At the conclusion of the hearing, the record was left open to allow the parties to exchange and review additional documentation: Facility's post-hearing submission (Exhibit F); Appellant's post hearing submission (Exhibit G).

The facility representatives testified that Appellant was admitted on [REDACTED] 2022. During her stay at the facility, Appellant applied for and was approved for MassHealth Long-Term Care Benefits with a monthly Patient Paid Amount of \$1,920.53. The facility representatives testified that Appellant has made only two sporadic and partial payments towards her accumulated PPAs. According to the facility, as of the date of the hearing, Appellant's arrearage totals \$9,546.65 with another \$1,920.53 coming due on May 1, 2024 and each month she remains in the facility henceforth.

The facility representatives testified that the facility has provided Appellant with monthly bills on an ongoing basis (billing statements, Exhibit C). Despite questioning Appellant directly about the arrearage, she has given the facility no indication that she intends to pay her outstanding debt.

The facility representatives testified that Appellant wishes to be transferred to a facility in or very close to [REDACTED] in order to be closer to her medical providers. According to the facility, its staff have made multiple attempts to place Appellant within or near [REDACTED] but she was either denied placement or Appellant refused placement. The facility representatives testified that facilities rejected Appellant because she either did not have MassHealth approval at the time or Appellant had placed very unique demands for care on the facilities which they were unwilling

to provide. At other times, Appellant provided no reason for rejecting a placement.

Pursuant to the subject notice of intent to transfer, the facility intends to transfer Appellant to [REDACTED] located in [REDACTED] Massachusetts which is considerably closer to [REDACTED] than the facility's location in [REDACTED] Massachusetts. The facility representatives testified that [REDACTED] has accepted Appellant as a resident patient and is anticipating her arrival.

Appellant appeared on her own behalf accompanied by two attorneys (collectively, Appellant). Appellant did not challenge the sufficiency of the 30-day notice of intent to transfer. Appellant opposes the transfer, however, on the grounds that the facility has not prepared a written discharge summary and discharge plan to ensure a safe and appropriate discharge from the facility. Additionally, Appellant maintains that the intended discharge location in Ayer Massachusetts is not appropriate to meet her medical needs. Appellant referenced two letters from her treating medical providers (Exhibit D) asserting they support her position that she requires placement in a skilled nursing facility located in or very close to [REDACTED] in order to access her medical providers who are needed to treat her specific conditions and that multiple transfers to different facilities would be detrimental to Appellant.

One of the two physician letters was drafted by [REDACTED] who describes Appellant's medical condition as follows:

*[Appellant's] situation and symptoms have not changed since her admission to a skilled nursing facility. She continues to have symptoms from her [REDACTED] brain injury. This is a residual and permanent condition, after multiple cavernous malformations with hemorrhages treated with brain surgeries in 2000 and 2001, and she also has several other cavernous malformations that were not removed. As a result of her brain injury, she has vestibular dysfunction with poor balance and dizziness. She has persistent severe neuropathic pain, most profound in the occipital region with occipital neuralgia severely affecting her sleep. It takes her hours to find a tolerable pillow set-up and positioning that is not causing severe pain, so that she can sleep for couple hours at a time. The dizziness and her [REDACTED] pain and ulnar neuropathic pain make trying to find the right set-up and position more difficult and the process in turn worsen these symptoms of dizziness, [REDACTED] pain and ulnar neuropathy. She also has [REDACTED] as a result of her brain injury with [REDACTED] from [REDACTED] [REDACTED] for which she had to be treated in the ICU in the past, and which requires strict fluid intake monitoring. She also has hot flashes and nausea as a result of [REDACTED] changes. In addition, she has severe [REDACTED] syndrome. For her [REDACTED] she needs to get her feet into hot water about every 2 or 3 hours, although she should do it more than that. As the evening and night wears on and she becomes more tired, her dizziness, disequilibrium, balance, depth perception, nausea, coordination worsens as well. She has chronic pain and sensory loss from [REDACTED] and*

*additional dizziness/vertigo secondary to acoustic neuroma. She has a history of orthostasis and low blood pressure related to her brain injury, and in combination with the required restriction in her fluid intake [REDACTED] she has several recurrent episodes of dizziness and at times syncope. All of these conditions are severe and debilitating and in combination severely impact her daily ability to function. It would be best for [Appellant] to remain in a facility that could attend to her unique needs which sometimes require more skilled care. She is unsafe and unable to live and care for herself at home. She needs care for pain management as well as monitoring fluid intake with [REDACTED] and care for [REDACTED]. She requires nursing care for monitoring of vitals due to orthostasis. She needs assistance for setting up of pillows and positioning for sleep. She requires assistance for ADLs in the setting of her pain and dizziness and poor balance.*

(Exhibit D).

In her Legal Memorandum, Appellant maintains that the facility's current attempt to transfer Appellant to [REDACTED] violates a number of state and federal regulations, including 130 CMR 456.701(C); 940 CMR 4.09(6); 940 CMR 4.09(7); M.G.L. c. 111, §70E; 130 CMR 456.704; 940 CMR 4.09; 130 CMR 456.701; 130 CMR 456.411(B); 42 U.S.C. §1396r(c)(2)(C); and 42 C.F.R. 483.12(7).<sup>1</sup>

Appellant next asserts that she is entitled to a reasonable accommodation under the Americans with Disabilities Act. As stated in her memorandum: "Federal regulations governing nursing facilities require these facilities to provide reasonable accommodations to residents with disabilities. See 42 C.F.R. § 483.10(e)(3) ("The resident has a right to be treated with respect

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<sup>1</sup> 130 CMR 456.701(C) – Appellant cites this regulation in her memorandum at page 3 "Massachusetts nursing facilities are required to discuss the planned discharge or transfer with the resident and their legal representative or next of kin". This regulation contains no such requirement.

130 CMR 456.701 – 704 concern notice requirements, time frames and the stay pending appeal. They do not concern discharge planning as asserted by Appellant numerous times in her memorandum.

130 CMR 456.411(B) not applicable as it concerns discharges arising when the nursing facility is notified by MassHealth or its agent that the member no longer meets the conditions for payment criteria under 130 CMR 456.408(A). That is not the case here.

940 CMR 4.09; 940 CMR 4.09(6); and 940 CMR 4.09(7); concern those acts which will constitute unfair and deceptive business practices under MGL 93A section 2 which is not at issue in this appeal and over which this Board has no adjudicatory authority.

42 U.S.C. § 1395i-3(c)(2)(A)(ii) (Medicare); 42 U.S.C. § 1396r(c)(2)(A)(ii) (Medicaid) Appellant cites this regulation in her memorandum at page 2 - not applicable as it pertains to discharges to the community arising from the improvement in the members health so that he/she no longer requires skilled nursing services – which is not the case here.

and dignity, including ...The right to reside and receive services in the facility with reasonable accommodation of resident needs and preferences except when to do so would endanger the health or safety of the resident or other residents.”). Additionally, Title III of the Americans with Disabilities Act and its implementing regulations require that places of public accommodation, including nursing facilities, provide “reasonable modifications to policies, practices, and procedures” for individuals with disabilities, unless the facility can demonstrate that doing so would “fundamentally alter the nature” of its services. See 42 U.S.C. § 12182(b)(2)(a); 28 C.F.R. § 36.302” (Exhibit E, Appellant’s Memorandum at page 4). According to Appellant, moving her only once to a facility in [REDACTED] is a reasonable accommodation especially given the fact that Appellant “is paying her Patient Paid Amount (PPA) ongoing” (Id).

The facility’s post-hearing submission includes a written, but unsigned statement purported to be from a Social Worker who works at the facility. The submission also contains copies of Appellant’s social service progress notes. According to an email message from the Administrator which accompanied the submission, copies of social service progress notes document 32 attempts by the facility to contact 44 facilities without success at placing Appellant in a facility in or near [REDACTED]. Additionally, page 12 of the medical records from [REDACTED] notes Appellant’s past rejection of facilities located in [REDACTED] (Exhibit F).

Appellant’s post-hearing response objects to the submission of the unsigned letter on the grounds that it is unsigned and bears no indicia of authenticity. Appellant’s post-hearing response also asserts that the two letters from Appellant’s physicians attest that moves to multiple facilities would “likely place [Appellant’s] health and life at risk” (Exhibit G).

## Findings of Fact

Based on a preponderance of the evidence, this record supports the following findings:

1. Appellant was admitted to the facility on [REDACTED] 2022.
2. During her stay at the facility, Appellant applied for and was approved for MassHealth Long-Term Care Benefits with a monthly Patient Paid Amount of \$1,920.53.
3. Appellant has made only two sporadic and partial payments towards her accumulated PPAs.
4. As of the date of the hearing, Appellant’s arrearage totaled \$9,546.65 with another \$1,920.53 coming due on May 1, 2024 and each month thereafter that she remains in the facility.
5. The facility has provided Appellant with monthly bills on an ongoing basis (billing statements, Exhibit C).

6. Appellant has given the facility no indication that she intends to pay her outstanding debt.
7. Pursuant to the subject notice of intent to transfer, the facility intends to transfer Appellant to [REDACTED] located in [REDACTED] Massachusetts.
8. [REDACTED] has accepted Appellant as a resident patient and is anticipating her arrival.
9. Appellant wishes to be transferred to a facility in or very close to [REDACTED] in order to be closer to her medical providers.
10. The facility has made multiple attempts to place Appellant within or near [REDACTED] but Appellant was either denied placement or Appellant refused placement.
11. Facilities in or near [REDACTED] rejected Appellant because she either did not have MassHealth approval at the time or Appellant had placed very unique demands for care on the facilities which they were unwilling to provide.
12. The facility made 32 attempts to contact 44 facilities without success at placing Appellant in a facility in or near [REDACTED]
13. Appellant's medical condition and symptoms have not changed since her admission to a skilled nursing facility (Exhibit D, letter, [REDACTED])
14. Appellant continues to have symptoms from her [REDACTED] brain injury. This is a residual and permanent condition, after multiple cavernous malformations with hemorrhages treated with brain surgeries in 2000 and 2001, and she also has several other cavernous malformations that were not removed. As a result of her brain injury, she has vestibular dysfunction with poor balance and dizziness. She has persistent severe neuropathic pain, most profound in the occipital region with occipital neuralgia severely affecting her sleep. It takes her hours to find a tolerable pillow set-up and positioning that is not causing severe pain, so that she can sleep for couple hours at a time. The dizziness and her [REDACTED] and ulnar neuropathic pain make trying to find the right set-up and position more difficult and the process in turn worsen these symptoms of dizziness, [REDACTED] pain and ulnar neuropathy. She also has [REDACTED] as a result of her brain injury with [REDACTED] from [REDACTED] [REDACTED] for which she had to be treated in the ICU in the past, and which requires strict fluid intake monitoring. She also has hot flashes and nausea as a result of [REDACTED] changes. In addition, she has severe [REDACTED] syndrome. For her [REDACTED] she needs to get her feet into hot water about

every 2 or 3 hours, although she should do it more than that. As the evening and night wears on and she becomes more tired, her dizziness, disequilibrium, balance, depth perception, nausea, coordination worsens as well. She has chronic pain and sensory loss from [REDACTED] and additional dizziness/vertigo secondary to acoustic neuroma. She has a history of orthostasis and low blood pressure related to her brain injury, and in combination with the required restriction in her fluid intake (due to [REDACTED]) she has several recurrent episodes of dizziness and at times syncope. All of these conditions are severe and debilitating and in combination severely impact her daily ability to function. It would be best for [Appellant] to remain in a facility that could attend to her unique needs which sometimes require more skilled care. She is unsafe and unable to live and care for herself at home (Exhibit D, letter, [REDACTED]).

15. Appellant needs care for pain management as well as monitoring fluid intake with [REDACTED] and care for [REDACTED]. She requires nursing care for monitoring of vitals due to orthostasis. She needs assistance for setting up of pillows and positioning for sleep. She requires assistance for ADLs in the setting of her pain and dizziness and poor balance (Exhibit D, letter, [REDACTED]).
16. The subject transfer involves Appellant moving from one skilled nursing facility to another skilled nursing facility.
17. The facility in [REDACTED] MA can meet Appellant's care needs.
18. The facility in [REDACTED] MA is significantly closer to [REDACTED] than Appellant's current facility in [REDACTED] MA.
19. The facility has provided sufficient preparation and orientation to the resident and can ensure a safe and orderly transfer from the facility to the skilled facility in [REDACTED].

## Analysis and Conclusions of Law

The issue on appeal is limited to whether the nursing facility is acting in compliance with federal and state law governing the discharge/transfer of nursing facility residents in its attempt to transfer Appellant pursuant to the subject notice dated February 20, 2024.

Massachusetts's regulations at 130 CMR 610.028, which embody federal regulations at 42 CFR Ch. IV §483.12, require the following:

### Notice Requirements Regarding Actions Initiated by a Nursing Facility

(A) 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.*

The nursing facility has set forth proper and adequate grounds to discharge Appellant in that it has demonstrated that Appellant does owe for services rendered to her and that the facility has notified her of the amount owed (130 CMR 600.028(A)(5)). While MassHealth now covers Appellant's long term care costs, the accumulated PPA's remain outstanding. By the record close date, Appellant has expressed no intention to pay the arrearage.

Careful review of the subject notice of February 20, 2024 reveals that it meets the notice requirements set forth at 130 CMR 610.028.

In addition to the MassHealth-related regulations discussed above, the nursing facility has an obligation to comply with all other applicable state laws, including M.G.L. c.111, §70E. The key paragraph of that statute, which is directly relevant to this appeal, reads as follows (emphasis supplied):

*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.<sup>2</sup>*

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<sup>2</sup> Appellant correctly cites to: 42 U.S.C. §1396r(c)(2)(C): A nursing facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility and 42 C.F.R. 483.12(7): orientation for transfer or discharge: A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. While the language in both of these regulations is similar to the requirement set forth in M.G.L. c.111, §70E, the state statute differs from the federal regulation in one important regard. The state statute requires that a referee make a finding before the discharge or transfer can

A discharge concerns the removal of a member from a skilled nursing facility to a lesser setting, such as a rest home or back to the community which is not the case here. The subject action concerns a transfer from one skilled nursing facility to another skilled nursing facility, not a discharge to a lesser setting or the community. Preparation and orientation involving a transfer from one skilled nursing facility to another is typically minimal as one set of equally qualified professionals is merely taking over for another. The fact that Appellant and her legal representatives have been notified of the facility, its location and the intended date of transfer, and Appellant has not raised any specific needs or concerns about the adequacy of the [REDACTED] facility other than its proximity to [REDACTED] the record supports a finding that the requirements of M.G.L. c.111, §70E have been met.

A transfer from one professional facility to another is typically straight forward insofar as it does not involve the uncertainty and complexity which often arises from accessing and coordinating community care. This is especially true where the care needs are consistent with typical services furnished by all skilled nursing facilities which is the case here.

While Appellant's medical conditions may be complex, her skilled care needs, as described in the letters by her own physicians, are not. The more comprehensive of the two letters was drafted by [REDACTED] who summarized Appellant's care needs as follows: "[Appellant] *needs care for pain management as well as monitoring fluid intake with [REDACTED] and care for [REDACTED]. She requires nursing care for monitoring of vitals due to orthostasis. She needs assistance for setting up of pillows and positioning for sleep. She requires assistance for ADLs in the setting of her pain and dizziness and poor balance*" (Exhibit D). Assistance with ADL's, pain management, caring for [REDACTED] (essentially keeping affected hands and/or feet warm and warming them upon attacks) monitoring fluid intake, monitoring vitals and repositioning assistance are all routine services provided by skilled nursing facilities. There is nothing in this record to indicate that the facility in [REDACTED] is in anyway not equipped to meet Appellant's skilled care needs. Moreover, Appellant has neither evidenced nor asserted that the facility in [REDACTED] is not capable of meeting her care needs.

The record shows that the facility has made considerable efforts to locate a placement for Appellant either in or very near to [REDACTED] (Social Service Notes, Exhibit F and testimony). Efforts have not been successful due to a combination of a lack of availability of female beds, at times Appellant's lack of a payer source, and Appellant's rejection of facilities. I find no basis to conclude that the facility has failed to make reasonable efforts to locate a suitable placement for Appellant in or very near to [REDACTED]. Additionally, despite wanting to be placed in or near [REDACTED] since first being placed in [REDACTED] in January 2022, during the hearing Appellant's counsel said they and Appellant had been looking for such a placement only for the past two

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proceed.



months prior to the hearing. On this record, I am persuaded that over the past two years, the inability to obtain a placement in or very near to [REDACTED] is due more to Appellant (by rejecting available locations and not securing a payment source, i.e., failing to timely file and facilitate a MassHealth Long term Care application) than to any shortfall on the part of the facility.

This record also fails to adequately support Appellant's contention that anything but placement in or very near to [REDACTED] would constitute an unsafe transfer. The main concern raised by Appellant and her providers is that Appellant needs to be close to her medical providers in [REDACTED]. Appellant's primary care doctor, [REDACTED] wrote: *[Appellant] has had immense difficulty scheduling transportation from Western Massachusetts to [REDACTED] for important appointments.*

Appellant is currently in [REDACTED] which is [REDACTED] miles from [REDACTED]. The facility could only locate one placement for Appellant, in [REDACTED] which is [REDACTED] miles from [REDACTED] making [REDACTED] miles closer to [REDACTED] than Appellant's current facility in [REDACTED]. This constitutes an obvious and significant improvement and is consistent with the need to have Appellant residing closer to her medical providers. Yet, Appellant maintains that being nearly 58 miles closer to [REDACTED] is not good enough and she must be in or very near to [REDACTED].

In her post-hearing submission, Appellant asserts the two letters from Appellant's physicians attest that transfers to multiple facilities would "likely place [Appellant's] health and life at risk" (Exhibit G). This is not so. The letter from Appellant's primary care physician, [REDACTED] MD states:

*Moving [Appellant] incrementally is detrimental as well, as she needs to be close to [REDACTED]. It is essential for [Appellant's] treatment that she be located close to her medical team in [REDACTED]. Having her be close to [REDACTED] would assist with care coordination. She also has family in [REDACTED] who provide her with emotional support. She has expressed her desire to be in [REDACTED] and I agree that being near to not only myself as her primary care provider but also to her specialists will help her manage her symptoms.*

[REDACTED] states:

*. . . . it is detrimental to her health and safety to move facilities multiple times, interrupting her continuity of care, and plan of care, which is complicated and detailed.*

Neither of these statements support Appellant's contention that moving Appellant more than once would likely place Appellant's health and life at risk. Appellant's primary care doctor asserts that multiple moves would be detrimental "as she needs to be close to [REDACTED]. Such a statement provides no clinical basis for why or how one additional move, which places Appellant much closer to [REDACTED] would be detrimental or to what extent it would be detrimental. [REDACTED] statement similarly lacks specificity as to the degree and nature of any detriment as well as to what she

means by “multiple”, moves which could be as few as two or many more. Either of these letters could have plainly stated that it would be dangerous and unsafe to move Appellant more than once. Neither of these letters come close to such an assertion.

On this record, it is clear that Appellant has an unpaid arrearage with the facility that she has no intention of paying. This constitutes adequate grounds for discharge. Appellant has not disputed the sufficiency of the technical requirements of the notice and service thereof. The remaining issue is whether it would be unsafe to move Appellant to another skilled nursing facility that can competently meet her care needs and is [REDACTED] miles closer to her medical providers in [REDACTED] than her current facility. On this record I find no reasonable basis to conclude that such a move would be unsafe or anything less than orderly. Given the amount of effort Appellant’s current facility in [REDACTED] has already made trying to locate a facility for her in or near [REDACTED] there is no reasonable basis to conclude that the facility will not effectuate an orderly transfer to the skilled nursing facility in [REDACTED]

Lastly, Appellant’s reliance on the American’s With Disabilities Act is misplaced insofar it concerns reasonable accommodations to be made by a facility to its residents. The Act does not govern the transfer of a skilled nursing facility resident to another skilled nursing facility.

For the foregoing reasons, the appeal is DENIED.

## **Order for the Nursing Facility**

Proceed with intent to discharge pursuant to notice of February 20, 2024; however, Appellant may not be transferred prior to thirty days from the date 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.

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Kenneth Brodzinski  
Hearing Officer  
Board of Hearings

CC:

[REDACTED]

[REDACTED]