Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

[redacted]

Appeal Decision:	Denied	**Appeal Number:**	2409819
Decision Date:	07/02/2024	**Hearing Date:**	6/28/2024
Hearing Officer:	Cynthia Kopka		

Appearances for Appellant:

[redacted]

Appearances for Respondent:

Miatta Edi-Osagie, Administrator; Susan Castaneda, substance use disorder counselor; Joseph Fernandez, after care coordinator; Sarah Grant, director of nurses; Seetha Kandimalla, business office manager; Catherine Palmer, director of rehabilitation

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:**	Expedited nursing facility discharge
Decision Date:	07/02/2024	**Hearing Date:**	6/28/2024
Respondent's Reps.:	Administrator et al.	**Appellant's Reps.:**	[redacted]
Hearing Location:	Taunton (remote)	**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

By notice dated [redacted] ("Respondent" or "the facility") informed Appellant of its intent to discharge Appellant from the facility [redacted]. Exhibit 1. Appellant filed a timely appeal on June 24, 2024. 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.

Action Taken by Respondent

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, was represented by telephone by: the administrator, substance use disorder (SUD) counselor, after care coordinator, director of nurses, business office manager, and director of rehabilitation. Respondent submitted records in support, Exhibit 4. Appellant and his representative[1] appeared by telephone and submitted a record in support, Exhibit 5. A summary of testimony and documents follows.

By hand-delivered letter dated [redacted], Respondent informed Appellant of its intent to discharge him from the facility to a shelter on [redacted]. Exhibit 1. The notice stated that Respondent sought to discharge Appellant for two reasons:

- The resident's health has improved sufficiently so the resident no longer needs the services provided by the facility.
- The safety of the individuals in the facility is endangered due to the clinical and behavioral status of the resident.

Id. The notice explained Appellant's appeal rights and identified an employee responsible for supervising the discharge. *Id*. The notice included a sheet that provided contact information for the long-term care ombudsman, the disability law center, center for public representation, and a local legal assistance office. *Id*. A copy of the notice was not provided to another party because Appellant is his own responsible party. Appellant confirmed this.

Appellant admitted to the facility in early [redacted] with diagnoses including history of seizure disorder, chronic anemia secondary to alcoholic liver disease, and hepatic encephalopathy. The administrator testified that Appellant was admitted after a hospital stay for altered mental status and confusion, with physical therapy (PT) and occupational therapy (OT) as appropriate. Exhibit 4 at 14. Appellant has completed these rehabilitations and has improved significantly. Appellant ambulates independently with a rolling walker.

Respondent's representatives testified that in addition to Appellant's health having improved, Appellant was being discharged for safety reasons. On June 14, 2024, Appellant returned from a leave of absence to the facility under the influence of what appeared to be alcohol or another intoxicating substance, with altered mental status and concerning behaviors. Appellant was verbally abusive to staff. Exhibit 4 at 33. The abusive behavior continued for subsequent days. On June 19, 2024, Appellant acted intoxicated again, prompting a room search which revealed paraphernalia and empty alcohol bottles. At this time, Appellant was physically aggressive towards staff, inappropriately touched staff members, and exposed his genitalia to staff members. *Id*. at 3, 32. The police responded to the incident and filed a report regarding disorderly conduct. *Id*.

[1] Appellant's representative was described in the record and at hearing as his health care proxy (HCP), ex-girlfriend, and friend. The record does not include HCP paperwork. Appellant requested that his representative participate at hearing and asked that a copy of the decision be forwarded to her.

According to the social service note, Appellant's representative was notified by phone at the time of the incident and referenced Appellant getting himself "kicked out." *Id*. The social service note indicated that emergency discharge was initiated, and Appellant was restricted to the facility pending safe disposition arrangements. *Id*.

On June 19, 2024, Appellant's physician noted that Appellant was medically stable and had been leaving the facility without permission and bringing in illicit substances. The physician wrote that Appellant is a risk for other residents and staff members and that an emergency discharge is planned. *Id*. at 42. On June 21, 2024, social services confirmed that the shelter had availability. *Id*. at 32. On [redacted], staff served Appellant with the discharge notice. *Id*. at 31-32. The social services note states that social services will continue to monitor the situation, providing continued discharge planning and coordinating with the receiving facility or community resources as needed. A note dated June 24, 2024 indicated that Appellant denied receiving the discharge notice and a no harm agreement, so additional copies were provided at the time and a social worker faxed the discharge appeal for Appellant. *Id*. at 31. Respondent's substance use disorder (SUD) counselor testified that that, when the notice of discharge was given to Appellant, he was given the specific details about the discharge and expressed understanding. The director of rehabilitation testified that Appellant is not currently receiving any therapies that would need coordination in the community, and the SUD counselor testified that Appellant has not been attending groups or utilizing SUD treatment in the facility, which is his right. The SUD counselor would provide substance abuse resources for Appellant in the community.

Respondent's after care coordinator testified that the shelter is accessible and in close proximity to a community health center. This shelter was selected because of the medical component, which can allow for the continuation of any necessary clinical services. Appellant will be transported to the shelter by a MassHealth PT-1 prescription for transportation. Though there was a physician order for PT due to a stress fracture, the director of rehab testified that the recommended course of treatment by the PT was rest. Appellant continues to be able to ambulate with this walker.

The facility's records show that discharge planning conferences have also been held on April 30, 2024 and June 10, 2024. *Id*. at 33-34. Staff had explored discharge with Appellant as early as April 8, 2024. *Id*. at 36. The records indicate that Appellant was not cooperative. *Id*. at 33, 36.

Records show that Appellant frequently leaves the facility to run errands or for extended weekend stays with his representative. *Id*. at 3, 4, 33. Specifically, a social service note dated April 30, 2024 reported that Appellant has been signing himself out of the facility on weekends to spend time with his representative. Upon returning to the facility, both parties appeared intoxicated. A social worker and SUD counselor met with Appellant about these concerns, informing him that continuing to leave the premises to engage in alcohol use was a breach of protocol that would result in involuntary discharge. *Id*. at 34.

The clinical team emphasized that if the resident exits the facility again and returns

> appearing intoxicated, the nurse will need to assess him and notify the facility doctor. He may then be sent to the hospital for a comprehensive substance use assessment and medical evaluation. The SW and SUD counselor thoroughly reviewed the facility's safety rules and guidelines around substance use, sign-out procedures, and upholding an environment conducive to recovery. Despite being his designated HCP, the resident was advised that this friend/ex-girlfriend's enabling behavior of accompanying him during these alcohol-involved outings is contradictory to supporting his treatment goals. The resident was encouraged to discuss these issues with his HCP and reconsider that relationship dynamic if it perpetuates substance misuse patterns. Alternatives for assigning a more appropriate HCP were offered.

Id.

Appellant's representative testified that when Appellant first admitted to the facility, he was lethargic and out of it. He has improved but requires assistance with medications for his ailments and failing liver. Appellant's representative argued that it is wrong to discharge Appellant to a shelter without discussing it with her first to see if she could resolve the issue. Appellant's representative has been his representative since the first day Appellant admitted. Appellant's representative testified that the administrator of the facility was impossible to reach and would not cooperate to help find Appellant another placement. Appellant's representative argued that the care provided at the facility was subpar and Appellant should have been transferred to another facility. Appellant's representative argued that staff did not assist her in finding Appellant new placement and are now just dumping Appellant in a shelter.

Appellant argued that the physician who signed off on the discharge had not examined him since January. However, records show medical examinations on May 28, 2024 and April 30, 2024. *Id*. at 42-43. The records show that more frequent examinations wereperformed by nurses and nurse practitioners. *Id*. at 44-73. Appellant argued that he was not given discharge planning for the shelter, as he had to look up the address to discover that it was a homeless shelter. There was nothing discussed about how to get him there or get his belongings there, he was just given the paperwork. Appellant argued that he continues to need PT, and his representative argued that Appellant needs assistance with medication administration. Regarding the incident that led to discharge, Appellant admitted to bringing alcohol into the facility and that the other incidents occurred. Appellant argued that he was upset when he was awakened for the room search. Appellant acknowledged that he was wrong. Appellant's representative argued that this was a first offense.

Appellant has ongoing medical needs. Appellant had a tooth extraction without pain medications. *Id*. at 10. In late April 2024, Appellant had a fall. *Id*. at 4, 12. Appellant testified that he fractured his pelvis. Appellant saw his orthopedic provider on May 28, 2024. Exhibit 5. The doctor instructed Appellant to bear weight as tolerated and prescribed routine PT twice a week for six weeks. *Id*. The director of rehab testified that Appellant was screened for PT, but a stress fracture heals with time

and rest. Appellant continues to be independent with mobility with his rollator. Appellant testified that he is in pain and cannot take pain medications.

Appellant argued that Respondent's notes make numerous references to him as being no risk to himself or others, such as a June 3, 2024 behavioral health note. *Id*. at 76. Appellant's representative is not able to take him in, as she has a second-floor apartment. Appellant is estranged from family members. Appellant's representative argued that there are other residents who pose more of a threat to the safety of residents and staff, such as a hoarder.

Findings of Fact

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

1. By hand-delivered letter dated [redacted], Respondent informed Appellant of its intent to discharge him from the facility to a medical shelter on [redacted]. Exhibit 1.

2. The notice stated that Respondent sought to discharge Appellant for two reasons:

   - The resident's health has improved sufficiently so the resident no longer needs the services provided by the facility.
   - The safety of the individuals in the facility is endangered due to the clinical and behavioral status of the resident.

   Id.

3. The notice explained Appellant's appeal rights and identified an employee as the person responsible for supervising the discharge. The notice included a sheet that provided contact information for the state long-term care ombudsman, the disability law center, and legal assistance offices. *Id*.

4. Appellant filed a timely request for an expedited hearing on June 24, 2024. Exhibit 2.

5. Appellant admitted to the facility in early [redacted] with diagnoses including history of seizure disorder, chronic anemia secondary to alcoholic liver disease, and hepatic encephalopathy. He admitted after a hospital stay for altered mental status and confusion, with PT and OT as appropriate. Exhibit 4 at 14.

6. Appellant ambulates independently with a rolling walker.

7. On April 30, 2024, a social services note stated that Appellant returned to the facility intoxicated after a leave of absence with his representative. Appellant was counseled that

such continued behavior would be a breach that would result in involuntary discharge. Appellant was counseled about his concerning relationship with his representative. Exhibit 4 at 34.

8. On June 14, 2024, Appellant returned to the facility after a leave of absence under the influence of what appeared to be alcohol or another intoxicating substance, with altered mental status and concerning behaviors. Appellant was verbally abusive to staff. Exhibit 4 at 33.

9. On June 19, 2024, Appellant acted intoxicated again, prompting a room search which revealed paraphernalia and empty alcohol bottles. At this time, Appellant was physically aggressive towards staff, inappropriately touched staff members, and exposed his genitalia to staff members, requiring police intervention. *Id*. at 3, 32.

10. On June 19, 2024, Appellant's physician noted that Appellant was medically stable and had been leaving the facility without permission and bringing in illicit substances. The physician wrote that Appellant is a risk for other residents and staff members and that an emergency discharge is planned. *Id*. at 42.

11. On June 21, 2024, social services confirmed that the shelter could accept residents. *Id*. at 32.

12. Respondent's after care coordinator testified that the shelter is handicap accessible and transportation would be arranged for discharge.

13. The shelter is in close proximity to a community health center.

14. Appellant is able to take leaves of absence from the facility. *Id*. at 3, 4, 33.

15. Regarding Appellant's fractured pelvis, on May 28, 2024, Appellant's orthopedic provider instructed Appellant to bear weight as tolerated and prescribed routine PT twice a week for six weeks. Exhibit 5.

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). If the discharge is necessary because the resident's health has improved, the documentation explaining the discharge must be made by **the resident's physician or PCP**. 130 CMR 456.701(B)(1), 130 CMR 610.028(B)(1). If the discharge is necessary because the safety of individuals in the nursing facility is endangered, the documentation explaining the discharge must be made by a physician or PCP. 130 CMR 456.701(B)(2), 130 CMR 610.028(B)(2)

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).

The notice of discharge or transfer must be made by the nursing facility at least 30 days before the date the resident is to be discharged or transferred except in certain circumstances identified in 130 CMR 610.029 (*see also* 130 CMR 456.702(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.
(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).

Per 130 CMR 610.032(C), a nursing facility resident has the right to request an appeal of any nursing-facility initiated transfer or discharge. A nursing facility resident must appeal a written notice of an emergency discharge pursuant to 130 CMR 610.029(B) within 14 days. 130 CMR 610.015(B)(5).

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 and document sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility**. This orientation must be provided in a form and manner that the resident can understand." 42 CFR 483.15(c)(7) (emphasis added).

In this matter, Respondent initiated an emergency discharge following the June 19 incident. The notice at issue is sufficient and cites permissible reasons for the discharge pursuant to 130 CMR 456.701(A)(2) & (3) and 130 CMR 610.028(A)(2) & (3), and permissible reasons for an emergency discharge pursuant to 130 CMR 610.029(B)(1) & (2) and 130 CMR 456.702(B)(1) & (2). Appellant's physician signed off on the discharge on both of the cited grounds. Respondent's testimony and records shows satisfactory planning to arrange for discharge to the shelter, such as confirming availability, having a plan for transportation, and ensuring that the facility is accessible to Appellant. The records show that Respondent's staff had also attempted to engage in discharge planning with Appellant on previous occasions.

Regarding health improvement, Appellant and his representative argued that Appellant continues to require ongoing PT and assistance with medication administration. Appellant and his representative also disputed parts of the record, arguing that Appellant did not receive some examinations that were noted. Appellant and his representative argued that there are more dangerous residents in the facility than Appellant. Assistance with medication administration and PT are available in a non-institutionalized setting and would not alone justify a continued need for skilled nursing care.

Regarding safety, Appellant did not dispute the incidents leading to the plan for discharge. However, the argument that it was a first offense is contradicted by the record, as Appellant had received a warning in April 2024 for intoxication. However, even if the June 19 incident was a first offense, the seriousness of what occurred is more than sufficient justification for Respondent to discharge Appellant in order to protect its staff and residents. Appellant's and his representative's flippant attitude about the incident was alarming given the serious allegations.

Appellant's representative argued that she should have been notified as his health care representative of the discharge and that the administrator should have worked with her to find a more suitable placement for Appellant. The record did not show that Appellant's representative was his designee, and Appellant confirmed that he was his own responsible party. Additionally, there are references in the record indicating that staff had concerns about Appellant's representative protecting Appellant's interests. Appellant argued that he did not receive discharge planning. Appellant's representative argued that it was wrong to discharge Appellant to a shelter.

In all, Respondent's testimony was more credible than Appellant's and was supported by records. Appellant has not presented evidence showing that Respondent violated its obligations when issuing the discharge. Accordingly, this appeal is denied. Respondent may go forward with the discharge after the stay as set forth in 130 CMR 456.704(B).[2]

Order for Respondent

Proceed with the discharge as set forth in the notice dated [redacted] after a five-day stay 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.

[2] Earlier versions of 130 CMR 456.704(B) and 130 CMR 610.030(B) allowed for a five-day stay after a hearing decision for discharges issued on an emergency basis. The current revisions of 130 CMR 456.704(B) and 130 CMR 610.030(B) do not appear to contain the correct reference to the regulation for an emergency discharge, presumably due to a scrivener's error.

Cynthia Kopka
Hearing Officer
Board of Hearings

cc: Respondent: [redacted]

[redacted]