

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2413821
<b>Decision Date:</b>	10/18/2024	<b>Hearing Date:</b>	09/26/2024
<b>Hearing Officer:</b>	Thomas Doyle	<b>Record Open to:</b>	

**Appearance for Appellant:**  
Pro se

**Appearance for Respondent:**  
Nadan Azarm, Administrator  
Lacey Ackerman, Director of Social Services  
Donique Whittaker, Nursing Supervisor

**Interpreter:**



*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>	Denied	<b>Issue:</b>	Nursing Facility Discharge – Improved Health
<b>Decision Date:</b>	10/18/2024	<b>Hearing Date:</b>	09/26/2024
<b>Respondent's Rep.:</b>	Nadan Azarm Lacey Ackerman Donique Whittaker	<b>Appellant's Rep.:</b>	Pro se
<b>Hearing Location:</b>	Remote (phone)	<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

Through a Notice dated September 5, 2024, [REDACTED] (hereinafter "respondent" or "facility") issued a 30-Day Notice of Intent to Discharge Resident to Extended Stay, 52 4<sup>th</sup> Ave., Waltham MA 02451 because appellant's "health has improved sufficiently so the resident no longer needs the services provided by the facility." (130 CMR 456.701 (A) (2); 130 CMR 610.028(A) (2); Ex. 1). Appellant filed this appeal in a timely manner on September 9, 2024. (130 CMR 610.015(B); 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), (B), when it issued appellant a 30-day notice of intent to discharge.

## Summary of Evidence

The facility was represented telephonically at the hearing by its Director of Social Services (DSS), Nursing Supervisor (NS) and its Administrator. Appellant, pro se, appeared by phone. All were sworn. Appellant is a female in her mid-40's. (Ex. 4, p. 1). Appellant was admitted to the facility on [REDACTED], 2023. (Ex. 4, p. 1).

The DSS stated appellant is very independent and does not require the facility's care at this time. She stated appellant leaves the facility for significant periods of time throughout the day and generally cares for herself. The DSS stated appellant does not generally engage with social services and appellant insists she can do things independently. (Testimony).

The NS testified appellant has wounds on her feet which have improved. There is 1 wound on the right foot and 2 wounds on the left foot. She stated there is evidence appellant is able to care for the wounds on her own. (Testimony; Ex. 4, p. 9). The NS noted in the record where appellant is non-compliant with wearing shoes and admitted to walking barefoot outside. (Testimony; Ex. 4, p. 11, 12). Evidence also shows appellant has refused wound care from others and cared for her wounds herself. (Ex. 4, p. 9). The documentary evidence shows appellant is highly mobile and comes and goes from the facility. (Ex. 4, pp. 106-114).

The Administrator testified and said a doctor has done an assessment on appellant and concluded appellant does not need care at the facility. (Testimony). The doctor's note, written by [REDACTED], M.D., is in evidence and it states appellant "does not need nursing facility level of care and can be managed in the community." (Ex. 4, p. 51). The Administrator stated the doctor is a facility doctor who is there 2 times a week and oversees the care of appellant. The DSS stated appellant told them 2 days before the hearing, and after the facility had drafted the notice of discharge, that she has her own primary care physician (PCP). The DSS stated appellant requested that she, the DSS, not to speak to appellant's doctor. (Testimony). The facility records in evidence do not list a PCP for appellant. (Ex. 4, p. 2).

Appellant named her PCP and stated the facility has provided 3 rides to her PCP since she has been staying there. Appellant stated she told a person in the office about her PCP. She stated she is afraid if she becomes homeless, she will start drinking again, however, evidence shows appellant is drinking in the facility. (Ex. 4, p. 8). She stated she has children she has been away from for a while. She stated she has 2 adult daughters in their mid and late 20's that live in [REDACTED]. She stated she gets \$400 a month and is waiting on Social Security.

The Administrator, the DSS and the NS were asked if they had any knowledge of the facility providing transportation for appellant to her PCP's office. They all denied knowledge of that occurring. (Testimony). The facility representatives were asked to confirm the reason for

discharge were “the move is necessary for your own welfare and your needs cannot be met within the facility” (Box 1, Ex. 1) and “your health has improved sufficiently so that you no longer require services provided by the facility.” (Box 2, Ex. 1). The DSS stated appellant checked off Box 1 when she was given the notice of intent to discharge. Appellant confirmed she is the one who checked off Box 1 on the form. (Appellant Testimony). The facility confirmed the only reason for discharge is that appellant’s health has improved, as stated in Box 2 of the Notice of Intent to Discharge Form. (Testimony; Ex. 1). Regarding the discharge process, the DSS spoke to appellant along with the facility Administrator and the VP of Operations. The discharge date and location were explained to appellant as were her appeal rights. The DSS wrote she would continue to work with appellant on her discharge plan and the Ombudsman was notified via fax and a phone. (Ex. 4, pp. 3-4). On September 9, 2024, a DMH case worker and a facility social worker met with appellant. The DMH worker plans to provide appellant with applications for CHAMP and Section 8. The social worker will continue to support and coordinate appellant’s discharge. (Ex. 4, p. 3).

## Findings of Fact

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

1. Appellant is a female in her mid-40’s who was admitted to the facility on [REDACTED], 2023. (Ex. 4, p. 1).
2. Appellant is very independent and does not require the facility’s care at this time. Appellant leaves the facility for significant periods of time throughout the day and generally cares for herself. Appellant does not generally engage with social services and appellant insists she can do things independently. (Testimony; Ex. 4, pp. 106-114).
3. Appellant has wounds on her feet which have improved and appellant is able to care for the wounds on her own. (Testimony; Ex. 4, p. 9).
4. Appellant is non-compliant with wearing shoes and admitted to walking barefoot outside. (Testimony; Ex. 4, p. 11, 12).
5. Appellant is highly mobile and comes and goes from the facility. (Ex. 4, pp. 106-114).
6. Appellant does not need nursing facility level of care and can be managed in the community. (Ex. 4, p. 51).
7. Appellant, and not the facility, checked the first box on the Notice of Intent to Discharge. (Testimony).

8. The facility was not told that appellant had a PCP until 2 days before the hearing and after the notice to discharge was served on appellant and appellant told the facility not to contact her PCP. (Testimony). The facility's records show no PCP for appellant. (Ex. 4, p. 2).

9. The discharge date and location were explained to appellant by the facility DSS, who worked with appellant on her discharge plan. The Ombudsman was notified via fax and a phone. (Ex. 4, pp. 3-4).

10. A DMH case worker and a facility social worker met with appellant. The DMH worker plans to provide appellant with applications for CHAMP and Section 8. The social worker will continue to support and coordinate appellant's discharge. (Ex. 4, p. 3).

## 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.<sup>1</sup>

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:

- (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;

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<sup>1</sup> The regulatory language in the MassHealth Nursing Facility Manual, found in 130 CMR 456.000 et seq. has regulations which are nearly identical to counterpart regulations found within the Commonwealth's Fair Hearing Rules at 130 CMR 610.001 et seq. and 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.

- (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.

(130 CMR 456.701(C)).

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.

(See, 130 CMR 610.028(A); 130 CMR 456.701(A)). (emphasis added).

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. 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 456.701(B)).

130 CMR 456.702: Time Frames for Notices Issued by Nursing Facilities:<sup>2</sup>

(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.

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<sup>2</sup> 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).

- (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.<sup>3</sup>

In the present case, through a Notice dated September 5, 2024, the nursing facility issued a 30 Day Notice of Intent to Discharge Resident for the specific reason: “your health has improved sufficiently so that you no longer require the services provided by this facility.” (130 CMR 456.701, 130 CMR 610.029(B); Ex. 1). The Notice meets the regulatory requirements as outlined in 130 CMR 456.701(C). (Ex. 1)) The Notice, being deemed regulatorily sufficient, triggers specific regulatory timeframes and requirements to support the reasoning for the issuance of the Notice as outlined above. A nursing facility resident can only be discharged for specific reasons also outlined above. (Ex. 1).

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 the appellant’s physician. Here, the appellant’s clinical record is not documented by the appellant’s physician. (Ex. 4). Pursuant to 130 CMR 456.701(B)(1), the documentation must be made by the resident's physician when a transfer or discharge is sought under 130 CMR 456.701(A)(2). However, credible testimony was provided by the facility that they were unaware appellant had a PCP until 2 days before the hearing, which was after appellant was served with the 30 Day Notice of Intent to Discharge. Also, I find credible the testimony from the facility that appellant requested the facility not speak to her doctor and that appellant said she would manage contacting her doctor herself. These facts are bolstered by evidence that shows a listing of care providers associated with appellant and appellant’s doctor is not listed. (Ex. 4, p. 2). I find that the facility’s notice does comport with the strict requirements for Notice for a discharge based upon sufficient improvement of the appellant’s condition so that the appellant no longer requires the services provided by the facility, as encapsulated within the Regulations. The nursing facility’s physician did document the appellant’s progress, noting “appellant does not need nursing facility level of care and can be managed in the community.” (Ex. 4, p. 51). The record supports the facility’s doctor’s conclusion. Appellant leaves the facility for significant periods of time throughout the day and generally cares for herself. Appellant does not generally engage with social services and appellant insists she can do things independently.

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<sup>3</sup> 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.

(Testimony; Ex. 4, pp. 106-114). Appellant has wounds on her feet which have improved and appellant is able to care for the wounds on her own. (Testimony; Ex. 4, p. 9). Appellant is highly mobile and comes and goes from the facility. (Ex. 4, pp. 106-114). The evidence also shows appellant is unconcerned about the wounds on her feet as she is non-compliant with wearing shoes and admitted to walking barefoot outside. (Testimony; Ex. 4, p. 11, 12).

I therefore find that the nursing facility sufficiently demonstrated that the appellant's health has improved sufficiently so as not to require skilled nursing care as required by 130 CMR 610.028(2).

The second issue is whether the nursing facility has met the requirements of 42 CFR 483.15(c) and MGL Chapter 111, Section 70E in providing sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place. "The Federal Centers for Medicare and Medicaid, during the times relevant here known as the Health Care Finance Administration, is the Federal agency charged with administering the Medicaid program and promulgating regulations. Sufficient preparation means, according to HCFA,<sup>4</sup> that the facility informs the resident where he or she is going and takes steps under its control to assure safe transportation; the facility should actively involve, to the extent possible, the resident and the resident's family in selecting the new residence." Centennial Healthcare Investment Corp. v. Commissioner of the Division of Medical Assistance, 61 Mass. App. Ct. 1124, n. 5, 2004 (Appeals Court Rule 1:28). Here, the facility informed appellant where she is going via the written September 5, 2024 notice. On that same day, the DSS spoke to appellant along with the facility Administrator and the VP of Operations. The discharge date and location were explained to appellant as were her appeal rights. The DSS wrote she would continue to work with appellant on her discharge plan and the Ombudsman was notified via fax and a phone. (Ex. 4, pp. 3-4). On September 9, 2024, a DMH case worker and a facility social worker met with appellant. The DMH worker plans to provide appellant with applications for CHAMP and Section 8. The social worker will continue to support and coordinate appellant's discharge. (Ex. 4, p. 3).

I find the record supports the facility provided sufficient preparation and involved appellant regarding the place of discharge. The facility properly complied with this federal regulation.

For the aforementioned reasons , the appeal is denied.

## **Order for Skilled Nursing Facility**

None, except that the appellant may not be discharged until 30 days after the issuance of this decision.

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<sup>4</sup> The Health Care Finance Administration is now known as the Centers for Medicare and Medicaid Services.

## 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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Thomas Doyle  
Hearing Officer  
Board of Hearings

cc: Appellant Representative: [REDACTED]  
[REDACTED]

Respondent: [REDACTED]  
[REDACTED]

02472, 617-924-1130