

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2414793
Decision Date:	10/15/2024	Hearing Date:	10/08/2024
Hearing Officer:	Thomas J. Goode		

Appearance for Appellant:



Nursing Facility Representatives:

Lesley King, Director of Nursing
Stephen Calvin, Administrator
Christine Faulkner, Unit Manager, LPN



*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:	130 CMR 456.429
Decision Date:	10/15/2024	Hearing Date:	10/08/2024
Nursing Facility's Reps.:	Lesley King, Director of Nursing, et al.	Appellant's Rep.:	Daughter/HCP
Hearing Location:	Remote		

Authority

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

Jurisdiction

On September 12, 2024, [REDACTED] Rehabilitation and Nursing Center “the nursing facility” issued a “Notice of Intent to Transfer or Discharge Resident With Expedited Appeal” informing Appellant that the nursing facility seeks to transfer/discharge you to Lahey Clinic on September 12, 2024. The notice states “[t]he transfer or discharge is necessary for the resident’s welfare and cannot be met in the facility (sic).” The nursing facility also informed Appellant’s representative by email that Appellant will not be readmitted to the nursing facility following a period of hospitalization (130 CMR 610.028, 610.029, 456.429, 456.701, 456.702 and Exhibit 1). Appellant filed a timely appeal at the Board of Hearings on September 26, 2024 (130 CMR 610.029(C), 456.703(B)(4) and Exhibit 2).¹ A notice of intent to transfer or discharge a nursing facility resident and/or to not readmit resident following hospitalization or other medical leave of absence from the facility with less than 30 days’ notice is valid grounds for appeal (130 CMR 610.015(F)).²

¹ See also 130 CMR 610.015(B)(6): the Board of Hearings must receive a request for a fair hearing within the following time limits: 14 days after a resident receives written notice of a transfer or discharge that is the result of a nursing facility’s failure to readmit the resident following hospitalization or other medical leave of absence; and 130 CMR 456.705(B) allowing a resident to request an expedited appeal under 130 CMR 610.029(B) or (C) when a nursing facility notifies a resident of a discharge or transfer under the time frames in 130 CMR 456.702(B) or (C).

² (F) Expedited Appeals for Discharges and Transfers from a Nursing Facility Under 130 CMR 610.029(B) or (C). A resident may request an expedited appeal when a nursing facility notifies a resident of a discharge or transfer under

Action Taken by the Nursing Facility

████████ Rehabilitation and Nursing Center “the nursing facility” issued a “Notice of Intent to Transfer or Discharge Resident With Expedited Appeal” informing Appellant that the nursing facility seeks to transfer/discharge you to Lahey Clinic on September 12, 2024. The notice states “[t]he transfer or discharge is necessary for the resident’s welfare and cannot be met in the facility (sic).” The nursing facility also informed Appellant’s representative by email that Appellant will not be readmitted to the nursing facility following a period of hospitalization.

Issue

The appeal issue is whether ██████████ Rehabilitation and Nursing Center “the nursing facility” correctly notified Appellant, pursuant to 130 CMR 456.429, that she will not be readmitted to the nursing facility following a period of hospitalization.

Summary of Evidence

The nursing facility was represented by the Director of Nursing, the facility administrator, and a unit manager. The nursing facility testified that Appellant was admitted to the nursing facility on July 14, 2022. On September 12, 2024, Appellant’s daughter, who is also the activated health care proxy, called 911 and had Appellant transferred to the hospital. On September 14, 2024, the nursing facility issued “Notice of Intent to Transfer or Discharge Resident with Expedited Appeal,” which states the transfer or discharge is “necessary for the resident’s welfare and cannot be met in the facility (sic)” (Exhibit 1, p. 8). The nursing facility representatives testified that Appellant was transferred to Lahey Clinic by emergency services called by Appellant’s daughter due to arm pain and redness. Dr. Merchant, the attending physician, attempted to assess Appellant and was refused by Appellant’s daughter who proceeded with the transfer to the hospital (Exhibit 1, p. 14). The facility representatives testified that because of Appellant’s daughter’s interference, numerous complaints and police reports, staff members feel they are not able to provide adequate care to Appellant, and therefore Appellant will not be readmitted to the facility from the hospital. Appellant’s daughter was notified by email that Appellant will not be readmitted to the facility, and that the discharge is necessary for Appellant’s welfare as her needs cannot be met at the facility. Copies of the email were sent by U.S. Mail to Appellant’s daughter the next day. The email advised Appellant’s daughter to pick up Appellant’s belongings Monday through Friday 9-5 p.m. (Exhibit 1, p. 4). The facility also

the time frames of 130 CMR 610.029(B) or (C). When such a request is made, BOH will schedule a hearing as soon as possible, but no later than seven days from the date BOH receives the request. The hearing officer must render a final decision as soon as possible, but no later than seven days from the date of the hearing. These time limits may be extended pursuant to 130 CMR 610.015(D). Appeal requests made under 130 CMR 610.015(F) automatically waive the requirement for ten-day advance notice of the scheduled hearing date under 130 CMR 610.046(A).

mailed a copy of the Bed Hold Policy which states that Medicaid recipients whose hospitalization or therapeutic leave exceeds the bed hold period under the state plan (up to 20 days) will be readmitted to the facility immediately upon the first available bed in appropriate accommodations if the resident: 1. Requires the services provided by the facility, 2. is eligible for Medicaid nursing facility services (Exhibit 1, p. 7). The facility administrator testified that the facility is not responsible for discharge planning because Appellant was transferred to the hospital by her daughter, not the facility. The facility representatives testified that emailing Appellant's daughter and notifying her of the Bed Hold Policy is sufficient notice of the facility's intent to not readmit Appellant. The facility testified that the nursing facility has been in contact with the hospital, which informed the facility that Appellant's daughter is not allowing other placements.

Appellant's daughter testified that she had Appellant transferred to the hospital by emergency services because the facility provided inadequate care. Appellant's daughter stated that Appellant is ready to be readmitted to the facility from the hospital, but the facility has refused admission. She added that Appellant is ■ years old, diagnosed with dementia and other conditions, is both Medicare and Medicaid eligible, and has no other nursing facility placement options. Appellant's daughter stated that she has filed 3 complaints with the Department of Public Health alleging inadequate care. She stated that the facility filed police reports claiming she was harassing the facility. Appellant's daughter testified that she filed multiple police reports because Appellant's items were stolen. Appellant's daughter stated that her mother has the right to be cared for by the Appellant as a Medicare and MassHealth recipient, and that the facility cannot retaliate against her by refusing to readmit her to the facility. Appellant's daughter also claimed that the facility is withholding medical test results from her.

Findings of Fact

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

1. Appellant is ■ years old and diagnosed with dementia and other conditions (Exhibit 1, p. 14).
2. Appellant was admitted to the nursing facility on July 14, 2022.
3. On September 12, 2024, Appellant's daughter, who is also the activated health care proxy, called 911 and transferred Appellant to the hospital.
4. On September 14, 2024, the nursing facility issued "Notice of Intent to Transfer or Discharge Resident with Expedited Appeal," to Lahey Clinic, which states the transfer or discharge is "necessary for the resident's welfare and cannot be met in the facility (sic)."

5. The nursing facility notified Appellant's daughter by email that Appellant will not be readmitted to the facility, and the discharge is necessary for Appellant's welfare as her needs cannot be met at the facility. The email advised Appellant's daughter to pick up Appellant's belongings Monday through Friday 9-5 p.m. (Exhibit 1, p. 4).
6. Appellant was transferred to Lahey Clinic by emergency services called by Appellant's daughter due to arm pain and redness. [REDACTED] the attending physician, attempted to assess Appellant and was refused by Appellant's daughter who proceeded with the transfer to the hospital.
7. The facility mailed to Appellant's daughter a copy of the Bed Hold Policy which states that Medicaid recipients whose hospitalization or therapeutic leave exceeds the bed hold period under the state plan (up to 20 days) will be readmitted to the facility immediately upon the first available bed in appropriate accommodations if the resident: 1. Requires the services provided by the facility, 2. is eligible for Medicaid nursing facility services.
8. Appellant is Medicare and Medicaid eligible and requires nursing facility services.
9. Appellant is ready to be readmitted to the facility from the hospital, and the facility has refused readmission.

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. The Commonwealth of 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.³ The following regulations, below with relevant emphasis added, govern when a nursing facility issues a notice of its intent to not readmit a resident after a medical leave of absence:

³ 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.

130 CMR 456.425: Medical Leave of Absence (MLOA): Introduction

(A) MassHealth pays a nursing facility to reserve a bed for up to 20 consecutive days for a member who is on a medical leave of absence from the nursing facility, if all the conditions of 130 CMR 456.426 and 456.427 are met.

(B) In accordance with federal law, nursing facilities must establish and follow a written policy regarding their bed-hold periods, which must be consistent with the MassHealth bed-hold policy.

(C) Following a medical leave of absence of 20 days or fewer, the nursing facility must allow the member to return to the nursing facility and resume residence unless the member no longer requires the services provided by the nursing facility.

(D) When a member's hospitalization exceeds 20 days or does not meet the requirements of 130 CMR 456.426, the nursing facility must immediately readmit the member to the facility, to the next available bed in a semiprivate room, unless the member no longer requires the services provided by the nursing facility.⁴

⁴ 130 CMR 456.426: Medical Leave of Absence: Conditions of Payment

(A) When a member is transferred from a nursing facility to a hospital, the nursing facility must

- (1) provide the member and the member's authorized or legal representative with notice of the facility's bed-hold policy, including the member's right to return and resume residence in the facility;
- (2) provide the member and the member's authorized or legal representative with notice of the transfer that complies with the requirements set forth in 130 CMR 456.701 and 456.702;
- (3) document the date and time of the transfer in the member's record;
- (4) automatically reserve the same bed and room occupied by the member at the time the absence began for the member until the close of business on the second working day of the member's hospital stay;
- (5) contact the admitting hospital and obtain the estimated length of stay by the close of business on the second working day of the member's hospital stay and document the estimated length of stay in the member's medical record;
- (6) if the estimated length of stay is 20 consecutive days or fewer, reserve the same bed and room occupied by the member at the time the absence began for the balance of the actual length of stay not to exceed 20 consecutive days from the date of admission to the hospital;
- (7) ensure that for each day that a bed is reserved the bed is not occupied; and
- (8) if the hospital advises the nursing facility that the estimated length of stay exceeds 20 consecutive days, the nursing facility cannot bill MassHealth for a medical leave of absence from the date of such notification by the hospital. (B) Notwithstanding 130 CMR 456.426(A), MassHealth does not pay a nursing facility for reserving a bed for a member
 - (1) after the second working day of the member's stay if the nursing facility has failed to obtain the estimate of the length of stay from the hospital;
 - (2) if the member has notified the nursing facility in writing that the member does not wish to return to the facility;
 - (3) for any consecutive medical leave of absence day in excess of the 20 days from the date of transfer from the nursing facility;
 - (4) the day on which a member is transferred back to a nursing facility or is discharged from the hospital

130 CMR 456.428: Medical Leave of Absence: Readmission

Members who have been authorized for payment of nursing facility services who are admitted to a hospital from a nursing facility may be readmitted to the same facility without a new authorization except when a hospitalization exceeds six months. When a hospitalization exceeds six months, the nursing facility must request a new authorization for nursing facility services before readmitting the member pursuant to 130 CMR 456.407.

130 CMR 456.429: Medical Leave of Absence: Failure to Readmit:

(A) When a nursing facility is notified that the member is ready to return to the facility, the nursing facility must readmit the member following a medical leave of absence. If the nursing facility does not allow the member to be readmitted following hospitalization or other medical leave of absence, the nursing facility's failure to readmit the member is deemed a transfer or discharge. If the nursing facility does not readmit, it must provide the member and the member's authorized or legal representative with a notice explaining its decision not to readmit the member at the time such determination is made. The notice must comply with the requirements set forth in 130 CMR 456.701.⁵

(B) A nursing facility that fails to readmit a member who requires nursing facility services

to a non-institutional setting; and

(5) for any MLOA in cases where the member is transferred from a nursing facility to a hospital and transferred back to the nursing facility on the same calendar day.

(C) When a member is transferred from one inpatient hospital to another inpatient hospital during the medical leave of absence, the nursing facility must continue to reserve for the member the same bed and room occupied by the member at the time the absence began for up to the 20th day of the member's absence from the nursing facility as long as the member continues to require a medical leave of absence and the conditions in 130 CMR 456.426(A) are met. A transfer from one hospital to another continues the 20-day period initiated on the first day the member originally was transferred from the nursing facility for the original medical leave of absence and does not initiate another 20-day period.

⁵ See also 42 CFR §483.15 (e)(1) *Permitting residents to return to facility*. A facility must establish and follow a written policy on permitting residents to return to the facility after they are hospitalized or placed on therapeutic leave. The policy must provide for the following.

(i) A resident, whose hospitalization or therapeutic leave exceeds the bed-hold period under the State plan, returns to the facility to their previous room if available or immediately upon the first availability of a bed in a semi-private room if the resident:

(A) Requires the services provided by the facility; and

(B) Is eligible for Medicare skilled nursing facility services or Medicaid nursing facility services.

(ii) If the facility that determines that a resident who was transferred with an expectation of returning to the facility cannot return to the facility, the facility must comply with the requirements of paragraph (c) as they apply to discharges.

or otherwise violates these provisions may be subject to overpayment or sanction action under 130 CMR 450.000: *Administrative and Billing Regulations*.

Regulation 130 CMR 456.701: Notice Requirements for Transfers and Discharges 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.

(B) 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).

(C) 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;

(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)

(D) A nursing facility's failure to readmit a resident following a medical leave of absence shall be deemed a transfer or discharge (depending on the resident's circumstances). The nursing facility must issue notice to the resident and an immediate family member or legal representative in accordance with 130 CMR 456.701(A) through (C), 456.702(C), 610.028, and 610.029.

Regulation 130 CMR 456.702: Time Frames for Notices Issued by Nursing Facilities:

(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) In lieu 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(C) must be made as soon as practicable before the discharge or transfer in any of the following circumstances.

(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 or PCP.

(2) The resident's health improves sufficiently to allow a more immediate transfer or discharge and the resident's attending physician or PCP 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 or PCP.

(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 authorized or legal representative at the time the nursing facility determines that it will not readmit the resident.

On September 12, 2024, the nursing facility issued a "Notice of Intent to Transfer or Discharge Resident With Expedited Appeal" informing Appellant that the nursing facility seeks to transfer/discharge you to Lahey Clinic on September 12, 2024. The notice states "[t]he transfer or discharge is necessary for the resident's welfare and cannot be met in the facility (sic)." The nursing facility also informed Appellant's representative by email that Appellant will not be readmitted to the nursing facility following a period of hospitalization (Exhibit 1, p. 4). There is no dispute that Appellant's daughter initiated the transfer from the nursing facility to the hospital on September 12, 2024. The regulatory definition of Medical Leave of Absence is not limited to nursing facility-initiated transfers or discharges to a hospital. Appellant's daughter initiated the transfer, and Appellant was admitted to the hospital and remains at the same hospital. Therefore, Appellant is on medical leave of absence from the facility. The nursing facility issued notice of its intent to transfer Appellant to the hospital citing the resident's welfare because her needs cannot be met by the facility and informed her of the bed hold policy. The transfer notice to the hospital is irrelevant as the transfer was not initiated by the facility and has already occurred. The issue here falls squarely on the nursing facility's decision to not readmit Appellant following a medical leave of absence from the facility without issuing adequate notice. A nursing facility can choose to not readmit a patient following a medical leave of absence; however, as clearly stated at 130 CMR 456.429(A), when a nursing facility is notified that the member is ready to return to the facility after a medical leave of absence from the facility, the nursing facility must readmit the member. If the nursing facility does not readmit, it must provide the member and the member's authorized or legal representative with a notice explaining its decision to not readmit the member at the time such determination is made. The notice must comply with the requirements set forth in 130 CMR 456.701.

Here, the nursing facility issued notice of discharge to the hospital. The "Notice" to not readmit is limited to an email addendum sent to Appellant's daughter informing her that Appellant will not be readmitted to the facility because her needs cannot be met at the facility. The failure to readmit must be treated as a discharge or transfer that requires separate and distinct notice informing Appellant of the decision to not readmit and must meet requirements under 130 CMR 456.701 including identifying the location to which Appellant will be discharged or transferred under 130 CMR 456.701(C)(4) upon release from the hospital. In alleging that Appellant's needs

cannot be met by the facility, Appellant's physician is also required to document in the resident's clinical record the reasons for the discharge or transfer (130 CMR 456.701(A)(1)).⁶ In addition, the nursing facility must meet requirements of MGL Chapter 111, Section 70E in providing sufficient preparation and orientation to Appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place.⁷ The nursing facility's purported "Notice" emailed to Appellant's representative to inform her that Appellant will not be readmitted to the facility does not meet the requirements of 130 CMR 456.429, 456.701, 456.702, and MGL Chapter 111, section 70E. Therefore, the appeal is APPROVED, and the nursing facility must, upon receipt of this appeal decision that is favorable to Appellant, promptly readmit Appellant to the next available bed (130 CMR 456.425(D)).

Order for the Nursing Facility

Promptly readmit Appellant to the first available bed at the nursing facility.

Compliance with this Decision

If the nursing facility fails to comply with the above order, you should report this in writing to the Director of the Board of Hearings, at the address on the first page of this decision.

⁶ See also 42 CFR 483.15(c)(2) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (c)(1)(i)(A) through (F) of this section, the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider.

(i) Documentation in the resident's medical record must include:

(A) The basis for the transfer per paragraph (c)(1)(i) of this section.

(B) In the case of paragraph (c)(1)(i)(A) of this section, the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s).

(ii) The documentation required by paragraph (c)(2)(i) of this section must be made by—

(A) The resident's physician when transfer or discharge is necessary under paragraph (c)(1)(A) or (B) of this section; and

(B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) of this section.

⁷ 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.

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.

Thomas J. Goode
Hearing Officer
Board of Hearings

cc:

Respondent: Winchester Rehab & Nursing Center, Attn: Administrator, 223 Swanton Street,
Winchester, MA 01890