

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2415712
Decision Date:	1/3/2025	Hearing Date:	12/17/2024
Hearing Officer:	Emily T. Sabo, Esq.		

Appearance for Appellant:

Appearances for Watertown Rehab & Nursing
Facility:

LaDan Azarm, Administrator; Amber DuBois,
Business Office Manager

Pro se



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	Approved	Issue:	Nursing Facility Discharge; Failure to Pay; Improved Health
Decision Date:	1/3/2025	Hearing Date:	12/17/2024
Watertown Rehab's Reps.:	Administrator; Business Office Manager	Appellant's Rep.:	Pro se
Hearing Location:	Quincy Harbor South (Telephone)	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

Through a notice dated September 16, 2024, Watertown Rehab and Nursing Facility, a skilled nursing facility, notified the Appellant of its plan to discharge her to 23 [REDACTED] MA¹ on or after October 16, 2024, because it determined that her health had improved sufficiently so she no longer required the services provided by the facility and that she had failed, after reasonable and appropriate notice, to pay for her stay at the facility. Exhibit 1. The Appellant filed this appeal in a timely manner on October 11, 2024. 130 CMR 610.015(B)(3) and Exhibit 1. The discharge of a nursing home resident is valid grounds for appeal. 130 CMR 610.032(C).

Action Taken by Watertown Rehab and Nursing Facility

Watertown Rehab and Nursing Facility (facility) notified the Appellant of its intent to discharge her because it determined that her health had improved sufficiently so she no longer required the

¹ The listed discharge location is the address of a chain hotel.

services provided by the facility and that she had failed, after reasonable and appropriate notice, to pay for her stay at the facility. Exhibit 1; *see also* 130 CMR 610.028(A)(2), (A)(5).

Issue

The appeal issue is whether the Respondent facility satisfied its statutory and regulatory requirements when it issued the notice of intent to discharge the Appellant.

Summary of Evidence

Documentary and Testimonial Evidence

Prior to hearing, the facility submitted records including the Appellant's progress notes and activity report. The records did not include any charges or bills for the Appellant's stay at the facility or a discharge/transfer plan. Exhibit 5.²

The hearing was held by telephone. The Appellant verified her identity. The facility was represented by its administrator and business office manager.

The facility's representative testified that the Appellant does not need nursing facility services as the Appellant is medically stable and is independent with her activities of daily living. The facility's representative testified that the Appellant is non-compliant with medication and blood work. The facility's representative testified that all patients in the facility are under the care of the facility's physician, Dr. [REDACTED], and pointed to a December 10, 2024 note by Dr. [REDACTED] stating:

Discussed with multiple care team members and patient is currently independent with all aspects of her care and does not have any medical necessity to be in a skilled nursing facility and previously the social worker is working on discharge planning options. The patient's cooperation with regards to discharge planning has been somewhat limited and patient also has a history of noncompliant (*sic*) with the facility discharge planning, paperwork, intermittently has accusatory and aggressive behavior towards the staff members which are documented by nursing notes during her skilled nursing facility stay. She also has long documented history of med noncompliance Medically stable for discharge planning per facility protocol.

Exhibit 5 at 12.

The facility's representative testified that the Appellant leaves the facility at 7:30 AM and does not return until later in the afternoon. The facility's representative testified that the Appellant has

² At the hearing, the Appellant testified that she did not receive a copy of this information from the facility.

been aggressive and accusatory with staff and other patients. The facility's representative testified that the Appellant is a MassHealth Standard member. The facility's representative testified that the Appellant's MassHealth nursing facility coverage ended July 31, 2024. The facility's representative testified that the Appellant has not provided the facility with any information to complete a Long-Term Care conversion application on the Appellant's behalf. When asked by the hearing officer, the facility's representative testified that the facility has not presented the Appellant with a bill because the facility is still hoping to complete a MassHealth Long-Term Care conversion. The hearing officer asked if the facility had discussed with the Appellant her privately paying the facility for her stay, and the facility representative stated that they had not calculated the Appellant's private pay rate but estimated that the cost of her stay for [REDACTED] 2024 was approximately \$45,000, and for [REDACTED] to [REDACTED] 2024 was approximately \$72,000.³

The Appellant testified that she had not been personally examined by Dr. [REDACTED], and he is not her physician. The Appellant testified that she does not require assistance with activities of daily living. The Appellant stated that she was insulted by the facility's characterization of her as aggressive and accusatory, and that their comments were slanderous. The Appellant testified that she is not hostile and that she has been kind to the facility's staff, including giving various staff members pastries, candy, and money. The Appellant also testified that she has received commendations from the city of [REDACTED]

The Appellant testified that she had been admitted to the facility on [REDACTED] 2024, from Massachusetts General Hospital. The Appellant testified that she was sent to the facility for rehabilitation of her rotator cuff, through physical and occupational therapy. The Appellant testified that she had earlier appealed the denial of physical and occupational therapy to Medicare and won, but that the facility has not provided the therapeutic services. The Appellant testified that she also has other health conditions and is unable to climb steps. The Appellant testified that she was the victim of an assault and battery, which is being investigated by the [REDACTED] Department.

The Appellant testified that she had not received any bills from the facility. The Appellant testified that she had confirmed with MassHealth that her coverage is current. The Appellant testified that she was not at the facility for long-term care services.

By progress note dated August 31, 2024, the Appellant's clinical record states: "[Appellant] continues to benefit from 24/7 care supportive setting." Exhibit 5 at 20.

Content of the Discharge Notice

The discharge notice at issue in this matter contains the action to be taken by the nursing facility, a

³ In an activity note dated December 10, 2024 by the facility, it indicates that the Appellant owes \$38,741.15. Exhibit 5 at 5.

specific statement of the reasons for the intended discharge, the location to which the Appellant is to be discharged, the effective date of the intended discharge, the right of the Appellant to request a fair hearing on the intended discharge, the address, telephone number and fax number of the Board of Hearings, the time frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (that the facility cannot discharge the Appellant until 30 days after the hearing officer's decision is received), that the social service department can answer any questions about the discharge notice and about the right to file an appeal. Exhibit 1.

The discharge notice states that a copy was sent to the local long-term-care Ombudsman Program but does not include the specific name, address, and telephone number of the local long-term-care ombudsman office. The discharge notice in the record does not include a statement that all residents may seek legal assistance and that free legal assistance may be available through their local legal services office and the address of the nearest legal services office. Exhibit 1. The discharge notice in the record does not include 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.*) or 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.*). Exhibit 1.

Findings of Fact

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

1. The Appellant was admitted to the facility on [REDACTED], 2024. Testimony.
2. The Appellant is a MassHealth Standard member. Testimony and Exhibit 4.
3. The Appellant is independent with her activities of daily living. Testimony.
4. By note dated August 31, 2024, the Appellant's clinical record states: "[Appellant] continues to benefit from 24/7 care supportive setting." Exhibit 5 at 20.
5. On September 16, 2024, the facility issued the Appellant a 30-day notice of intent to discharge. Exhibit 1.
6. The discharge notice checks that the reasons for the discharge are, "[y]our health has improved sufficiently such that you no longer require the services provided by the facility" and "[y]ou have failed, after reasonable and appropriate notice, to pay for (or have failed to have Medicare or Medicaid pay for) your stay at the nursing facility." Exhibit 1.

7. The discharge notice does not include the specific name, address, and telephone number of the local long-term-care ombudsman office. The discharge notice does not include a statement that all residents may seek legal assistance and that free legal assistance may be available through their local legal services office and the address of the nearest legal services office. Exhibit 1.
8. The discharge notice does not include 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.*) or 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.*). Exhibit 1.
9. The Appellant timely appealed the discharge notice to the Board of Hearings on October 11, 2024. Exhibit 2.
10. At the time of the hearing, the facility has not provided the Appellant with a bill for her stay at the facility. Testimony.

Analysis and Conclusions of Law

The federal Nursing Home Reform Act (NHRA) of 1987 guarantees all residents the right to advance notice of, and the right to appeal, any transfer or discharge action initiated by a nursing facility. Massachusetts has enacted regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge, and 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.*

610.028: Notice Requirements Regarding Actions Initiated by a Nursing Facility⁴

- (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 MassHealth agency or Medicare pay for) a stay at the nursing facility; or

⁴ See also 130 CMR 456.701.

- (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 610.028(A)(1) through (5), the resident's clinical record must be documented. The documentation must be made by
 - (1) the resident's physician when a transfer or discharge is necessary under 130 CMR 610.028(A)(1) or (2); and
 - (2) a physician when the transfer or discharge is necessary under 130 CMR 610.028(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, if the resident has made such a person known to the facility, a notice written in 12-point or larger type that contains the following, in a language the member understands:
 - (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(A), (B), (C).

Pursuant to 130 CMR 610.029(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) when the discharge is being made on an emergency basis. *See also* 130 CMR 456.702(A).

Massachusetts General Laws (MGL) c. 111, §70E states in relevant part:

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.**

MGL c. 111, §70E (emphasis added)

Federal regulations provide for “**Orientation for transfer or discharge.** A facility must 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). Federal regulations also provide that when

the facility anticipates discharge a resident must have a discharge summary that includes but is not limited to . . . A post-discharge plan of care that is developed with the participation of the resident and, with the resident’s consent, the resident representative(s), which will assist the resident to adjust to his or her new living environment. The post-discharge plan of care must indicate where the individual plans to reside, any arrangements that have been made for the resident’s follow up care and any post-discharge medical and non-medical services.

42 CFR 483.21(c)(2)(iv).

940 CMR 4.09 provides that :

It shall be an unfair or deceptive act or practice, in violation of MGL c. 93A, § 2 for a licensee or administrator . . .

(6) to fail to discuss the planned discharge or transfer from the facility with the resident and his/her legal representative or next of kin.

(7) to fail to consult the resident and his/her family or legal representative in choosing another facility, and to take all reasonable steps to implement the resident’s choice of such facility.

940 CMR 4.09(6), (7).

Here, the facility has alleged that the Appellant’s health has improved sufficiently such that she no

longer requires the facility's services and that she has failed, after reasonable and appropriate notice, to pay for (or have failed to have Medicare or Medicaid pay for) her stay at the nursing facility. 130 CMR 456.701(A)(2), (A)(5); 130 CMR 610.028(A)(2), (A)(5). If proven, these circumstances would be acceptable reasons for a discharge. Regardless, in the present case, the facility did not meet the regulatory notice requirements or procedures for a discharge.

As quoted above, when a facility seeks to discharge a resident because their health has improved sufficiently so that they no longer need the services provided by the nursing facility, 130 CMR 610.028(B)(1) requires that the facility provide clinical documentation from the "resident's physician." 130 CMR 610.628(B). The progress note by Dr. [REDACTED] cited by the facility is dated December 10, 2024, which is nearly two months after the September 16, 2024 discharge notice. Exhibit 1, Exhibit 5 at 12. I also note that the clinical record submitted includes a note dated less than three weeks before the discharge notice that states that the Appellant "continues to benefit from 24/7 care supportive setting." Exhibit 5 at 20. A note from September 30, 2024 states that, "Her caseworker from [REDACTED] extended her clinical care for 90 more days." *Id.* at 5. Therefore, I find that, under the regulations, the facility has not established a valid ground for discharge under 130 CMR 610.028(A)(2).

The September 16, 2024 discharge notice also states that the reason for the discharge is that the Appellant has "failed, after reasonable and appropriate notice, to pay for (or have failed to have Medicare or Medicaid pay for) [her] stay at the nursing facility." Exhibit 1 at 1. As the facility did not present the Appellant with a bill for her stay at the facility and did not discuss private pay options if the Appellant did not wish to complete a long-term care conversion, I find that the facility has failed to give the Appellant "reasonable and appropriate notice." 130 CMR 610.028(A)(5). I also note that based on the facility activity report submitted as part of the clinical record, it appears that the facility only spoke with the Appellant about completing a long-term care conversion on September 19, 23, and 30, which is after they had issued the September 16, 2024 discharge notice. Exhibit 5 at 5-6. I also note that the September 30, 2024 activity report states that, "Her caseworker from [REDACTED] extended her clinical care for 90 more days." *Id.* at 5. Accordingly, I find that the facility did not provide the Appellant with reasonable and appropriate notice that she has failed to pay for her stay at the facility and the facility has not established a valid ground for discharge under 130 CMR 610.028(A)(5).

I also find that the discharge notice does not include the specific name, address, and telephone number of the local long-term-care ombudsman office or include a statement that all residents may seek legal assistance and that free legal assistance may be available through their local legal services office and the address of the nearest legal services office. *Compare* Exhibit 1 *with* 130 CMR 610.028(C). The discharge notice in the record does not include 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.*) or 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.). *Compare Exhibit 1 with 130 CMR 610.028(C).*

This appeal is APPROVED to ensure that the facility acts in compliance with the law and regulations governing a nursing home discharge.⁵ The facility may issue a proper notice and take proper action at any time. The Appellant, however, should be aware that the facility appears to have adequate grounds to discharge, if she has not paid for her stay at the facility.

Order for Watertown Rehab and Nursing Facility

Rescind the discharge notice issued on September 16, 2024, and do not discharge the appellant to 23 [REDACTED], [REDACTED], MA under this notice.

Compliance with this Decision

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

⁵ Furthermore, federal regulations also require that a nursing facility provide and document sufficient preparation and orientation to ensure a safe and orderly discharge. 42 CFR 483.15(c)(7). This orientation must be provided in a form and manner that the resident can understand. Federal regulations at 42 CFR 483.21(c)(1) speak to the discharge planning process. These regulations require the facility to involve the resident and resident representative in the development of the discharge plan. 130 CMR 483.21(c)(1)(v). The facility did not provide any evidence that this discharge planning had taken place.

Emily T. Sabo, Esq.
Hearing Officer
Board of Hearings

cc: Respondent: Watertown Rehab & Nursing, Attn: Administrator, 59 Coolidge Hill Road,
Watertown, MA 02472