

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2417843
Decision Date:	01/02/2025	Hearing Date:	12/09/2024
Hearing Officer:	Thomas Doyle	Record Open to:	N/A

Appearance for Appellant:



Appearance for Respondent:

, Administrator
 Social Worker



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

APPEAL DECISION

Appeal Decision:	Denied	Issue:	Nursing Facility Discharge – Improved Health
Decision Date:	01/02/2025	Hearing Date:	12/09/2024
Respondent's Rep.:	[REDACTED]	Appellant's Rep.:	Pro se
Hearing Location:	Remote (phone)	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 November 6, 2024, [REDACTED] (hereinafter "respondent" or "facility") issued a 30-Day Notice of Intent to Discharge Resident to [REDACTED] 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 November 14, 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.¹

Issue

¹ The copy of the notice in evidence (Ex. 1) has the number "30" hidden by a folded page corner. The Administrator testified that it is a 30-day notice.

The appeal issue is whether the facility satisfied its statutory and regulatory requirements pursuant to 130 CMR 456.701 (A) and (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 Administrator and a social worker. Appellant, pro se, appeared by phone. All were sworn. Appellant is a male in his [REDACTED] who was admitted to the facility on [REDACTED]. (Ex. 4, p. 270).

The Administrator testified on behalf of the facility and referenced the documentary record contained at Exhibit 4. Appellant has demonstrated the ability to self-administer his medications when leaving the facility on November 19, 2024 and in meetings with facility staff. (Testimony; Ex. 4, p. 37, 258). The Administrator highlighted physician notes which stated that appellant has a history of ADHD, chronic pain, opioid dependency, anxiety, migraine, viral hepatitis, deep vein thrombosis, pulmonary embolism and osteoarthritis. The physician wrote that appellant has made progress and is ready to be discharged to the community, he no longer needs skilled care, and is self-sufficient in all ADLs. The doctor also wrote that appellant's needs can be met in the community. (Ex. 4, pp, 21, 24). When I asked the Administrator whether the doctor who authored the notes was appellant's personal physician or a facility doctor, he stated that the doctor was the facility physician. (Testimony). When I asked the Administrator whether he was aware of appellant having a personal physician, he stated, "I am not aware of that." (Testimony). On November 6, 2024, the Administrator also wrote in the record that appellant has no current primary care provider but a "PCP appoint to be scheduled." (Ex. 4, p. 259).

The Administrator highlighted nursing notes contained in the record that updated appellant's condition. On October 19 and 23, 2024, appellant was alert and oriented and ambulates on a steady gait. On October 30, 2024, appellant was noted to be independent with ambulation and ADL's. (Testimony; Ex. 4, p. 44). On November 13, 2024, there was a functional ability test performed on appellant. It was shown appellant was independent for eating, oral and toileting hygiene, showering/bathing himself, upper and lower body dressing, putting on and taking off footwear and personal hygiene. (Ex. 4, p. 138).

The Administrator highlighted the discharge planning contained in the record. He highlighted social worker notes where appellant was reminded on June 17, 2024 of a meeting with DMH. Appellant became irritated and said he thought the meeting was on another day. Appellant was reminded that he was given written notice of the hearing date. The social worker reminded appellant after he expressed frustration that, "no one does anything for me" and that it was an important meeting because services that could be available to him but DMH needed his approval. Appellant did not appear at the meeting. The meeting was rescheduled as a Zoom meeting on July

15, 2024 to discuss discharge options with DMH. Appellant's uncle attended the meeting by telephone. (Testimony; Ex. 4, p. 255). On July 26, 2024, a facility social worker assisted appellant with a phone call to [REDACTED] for questions about appellants upcoming housing. On August 26, 2024, a facility social worker assisted appellant with a DMH meeting. Appellant, his uncle, a DMH representative and a facility social worker were present. (Ex. 4, p. 254). On September 12, 2024, a facility social worker assisted appellant with a phone call to DMH and appellant's uncle for a follow-up to previous meeting. (Ex. 4, p. 253). On the original date of discharge of November 6, 2024, a PT-1 was to be scheduled for appellant by the facility for transportation on December 7, 2024 to [REDACTED], which is appellant's previous SUD treatment center. Appellant stated to the Administrator that his psychiatric services were conducted through [REDACTED] and he prefers to "set up with them himself." (Ex. 4, p. 259).

On November 4, 2024, a facility social worker submitted documents to [REDACTED] to determine whether appellant was appropriate for their facility. (Ex. 4, p. 256). On November 6, 2024, the Administrator spoke to appellant's DMH case worker, who said appellant declined PACT services and Open Sky services that were available to appellant after discharge. (Ex. 259). On November 21, 2024, a facility social worker spoke to appellant to obtain his signature for two-way communication authorization with DMH to facilitate housing assistance where appellant had applied; appellant declined to sign the forms. (Ex. 4, p. 257). On November 29, 2024, a facility social worker spoke to [REDACTED]. Neither facility had a male bed available. (Ex. 4, p. 256-257). On December 5, 2024, a facility social worker and the Administrator spoke with appellant regarding discharge planning for potential apartments and whether appellant planned on allocating any funds towards housing because some housing requires a deposit. The social worker and Administrator would assist appellant and provide information needed by appellant. (Ex. 4, p. 264). Also on December 5, 2024, the Administrator reached out to DMH regarding placement options and was given a phone number to a rooming house. The Administrator spoke with the manager and was told to call back the next week as they may have availability. This option was presented to appellant. Appellant wanted to visit the rooming house. Also on December 5, 2024, a facility social worker filled out a new intake form for appellant for [REDACTED] for primary care and psych/med management services. A Suboxone program was set up through Sevida Health. (Ex. 4, p. 264).

The facility presented evidence in the form of an Absentee Register showing appellant was independently mobile and left the facility for several reasons in the weeks before the hearing. (Ex. 4, pp. 265-269). In response to appellant testimony, the Administrator stated the facility would be paying for the first 3 days of appellant's stay at the [REDACTED]. (Testimony).

Appellant testified on his own behalf. He did not have any questions for the Administrator. He stated that he is on SSI and could not afford a fourth day at the [REDACTED]. He stated he has been two years sober and he has never tried this hard before and is doing a lot better. (Testimony).

Findings of Fact

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

1. Appellant is a male in his [REDACTED] who was admitted to the facility on May 19, 2023. (Ex. 4, p. 270).
2. Appellant has a history of ADHD, chronic pain, opioid dependency, anxiety, migraine, viral hepatitis, deep vein thrombosis, pulmonary embolism and osteoarthritis. (Ex. 4, pp. 21, 24).
3. Appellant has demonstrated ability to self-administer his medications. (Testimony; Ex. 4, p. 37, 258).
4. Appellant no longer needs skilled care and is self-sufficient in all ADLs and his needs can be met in the community. (Ex. 4, pp. 21, 24, 138).
5. Appellant does not have his own primary care physician. (Testimony; Ex. 4, p. 259).
6. The facility conducted lengthy discharge planning with included appellant and appellant's uncle. (Ex. 4 pp. 253-257, 259, 264).
7. Appellant is mobile and comes and goes from the facility. (Ex. 4, pp. 265-269).
8. The facility would be paying for appellant's first three days of his stay at the [REDACTED] (Testimony).
9. Appellant did not appear for a meeting with DMH in July 2024 after receiving written and oral notice of the meeting. Appellant declined PACT and Open Sky services made available to him through DMH. Appellant declined to sign forms for two-way communication authorization with DMH to facilitate housing assistance. (Ex. 4, pp. 255, 259).
10. Appellant told the facility Administrator that he would set up any psychiatric services he may need himself with [REDACTED] (Ex. 4, p. 259).

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.²

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.

(130 CMR 456.701(C)).

² 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.

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:³

³ 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.

(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.

(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

(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).

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.⁴

In the present case, through a Notice dated November 6, 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). I find 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

⁴ 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.

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 appellant's physician. Here, appellant's clinical record is not documented by the appellant's physician because appellant does not have a primary care physician of his own. (Ex. 4). However, 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 appellant's progress, noting "appellant has made progress and is ready to be discharged to the community, he no longer needs skilled care and is self-sufficient in all ADL's and appellant's needs can be met in the community." (Ex. 4, p. 21, 24). The record supports the facility's doctor's conclusion. Appellant ambulates with a steady gait and is independent with ADLs, as noted by a functional ability test administered to appellant in November 2024. Appellant is mobile and comes and goes from the facility. (Ex. 4, pp. 265-269).

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,⁵ 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 he is going via the written November 6, 2024, notice. I find the record supports the facility provided sufficient preparation to appellant regarding his discharge. The facility worked with appellant, his uncle and DMH to ensure an orderly transition to new housing. Multiple calls to different agencies were made by the nursing home searching for adequate housing for appellant. The Administrator testified that the facility is paying for the first three days of appellant's stay at the discharge location.

I find the record supports the facility provided sufficient preparation and involved appellant

⁵ The Health Care Finance Administration is now known as the Centers for Medicare and Medicaid Services.

regarding the place of discharge. The facility properly complied with this federal regulation.

For the aforementioned reasons, the appeal is denied.

Order for Respondent

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

Thomas Doyle
Hearing Officer
Board of Hearings

CC: [REDACTED]