

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**

<b>Appeal Decision:</b>	DENIED	<b>Appeal Number:</b>	1209222
<b>Decision Date:</b>	6/21/12	<b>Hearing Date:</b>	06/01/2012
<b>Hearing Officer:</b>	Christopher S. Taffe	<b>Record Open to:</b>	06/06/2012

**Appearance for Appellant:**

**MassHealth Representative:**



*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 – Need for Skilled Nursing Services
<b>Decision Date:</b>	6/21/12	<b>Hearing Date:</b>	06/01/2012
<b>Nursing Facility Reps.:</b>		<b>Appellant Rep.:</b>	Appellant, pro se
<b>Hearing Location:</b>	HarborSouth Tower, Quincy		

## Authority

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

## Jurisdiction

Through a 30-day Notice of Discharge dated April 2, 2012, the nursing facility, Eastpointe Rehabilitation & Skilled Care Center (“Eastpointe”), informed Appellant of the facility’s intent to discharge him to a residential address because “*The discharge is appropriate because the resident’s health has improved sufficiently and the resident no longer needs the services provided by the nursing facility.*” See 130 C.M.R. 610.028; 130 C.M.R. 456.701; and Exhibit 1. An appeal was timely filed on Appellant’s behalf with the Board of Hearings on April 26, 2012. See 130 C.M.R. 610.015(B); 130 C.M.R. 456.703; and Exhibit 1. Challenging a notice of transfer or discharge initiated by a nursing facility is a valid ground for appeal to the Board of Hearings. See 130 C.M.R. 610.032(C).

## Action Taken by Nursing Facility

The nursing facility notified the appellant that it sought to discharge him due to the fact that the appellant’s health had improved sufficiently so that the appellant no longer needs the services provided by the nursing facility.

## Issue

The appeal issues are, pursuant to the governing state and federal regulations which include but are not limited to 130 C.M.R. 610.028, 130 C.M.R. 456.701, and G.L. c.111, §70E, whether: (1) appellant's discharge is appropriate because appellant's health has improved sufficiently so that appellant no longer needs the services provided by the nursing facility, and (2) the nursing facility has provided sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place.

## Summary of Evidence

Appellant appeared at hearing telephonically. Eastpointe was represented by Mr. Gillis and Ms. Buser who are, respectively, the facility's Administrator and Director of Social Services.

Eastpointe is a skilled nursing facility properly licensed by the Commonwealth of Massachusetts with 195 beds, all of which are Medicare-certified and Medicaid-certified. Eastpointe submitted at hearing one packet, which was marked as Exhibit 3. The packet contained copies of: a notice dated October 31, 2011 from MassHealth to the appellant denying clinical eligibility for payment of nursing facility services; the Board of Hearings decision for the appellant's December 12, 2011 hearing for the appellant's appeal of the October 31, 2011 notice; appellant's notice of discharge from Eastpointe dated April 2, 2012; and some of appellant's medical records dated through May 29, 2012.<sup>1</sup> (testimony).

Appellant, who is a 55 year-old male, was admitted to Eastpointe on July 21, 2011 after completing a hospital stay at Cambridge Health Alliance. At the time of hospitalization, the appellant was diagnosed with and was being treated for: atrial fibrillation, hyperlipidemia, recurrent chest pains, hepatitis C, depression, anxiety, migraines, potential melena, and diarrhea. Prior to admission to Eastpointe, the appellant was approved for short-term nursing facility services for a 60-day period, with coverage provided by Appellant's Medicare and/or MassHealth (Exhibit 3).

Eastpointe attempted to discharge the appellant because his health had improved sufficiently on October 31, 2011. Upon the appellant's refusal to leave the nursing facility, Eastpointe asked the Aging Services Access Point (ASAP) to conduct a clinical evaluation as to Appellant's potential MassHealth eligibility for a nursing facility stay. ASAP concluded that the appellant was not clinically eligible to stay at a nursing facility because the appellant did not require either skilled

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<sup>1</sup> The papers in Exhibit 3 which Eastpointe submitted to Board of Hearings were not numbered for reference. The Board of Hearings sent a Notice of Appeal to Eastpointe prior to hearing which not only scheduled the hearing time, but which requested that the facility number all pages of documentation that were required to be submitted into the record (Exhibit 2). The facility representatives were advised at hearing, and are reminded here, that the facility should follow this important instruction and **number pages on all of the copies** (e.g. its own copy, its submission to the Hearing Officer, and any copy prepared for an appellant) as it saves an immense amount of time at hearing when there is an effort to (literally) get the parties on the same page. **This facility has been warned about this oversight before by this Hearing Officer. Future failure to comply with this basic pre-hearing order may result in unnecessary delays of appeal issues related to discharge/transfer actions brought by this nursing facility.**

nursing services or a combination of general nursing services and assistance with activities of daily living. (Exhibit 3).

The appellant exercised his right to appeal the clinical determination of October 31, 2011, and on December 12, 2011 the Board of Hearings conducted a fair hearing as to whether MassHealth correctly determined that appellant was not clinically eligible for payment of nursing facility services. Officer Brochstein of the Board of Hearings issued a final decision on February 28, 2012 and the appeal was denied (Exhibit 3).

On April 2, 2012, Eastpointe issued a discharge notice to appellant to be effected on May 3, 2012. The Nursing Home Reform Act (NHRA) of 1987 guarantees all residents the right to appeal any discharge initiated by a nursing facility, and appellant exercised this right with the present appeal.

Mr. Gillis testified at hearing that the discharge is based on the previous agency clinical determination of December 2011 and the more recent assessment made by appellant's physician that the appellant's health had not changed and still does not require the level of care provided by a nursing facility. (testimony). Exhibit 3 contains physician progress notes for the appellant. On May 29, 2012, Dr. Victor Saldanha, who is listed as Appellant's attending physician at the facility, reported that, *"In my opinion, [the appellant] remains medically stable and does not require the current level of services at Eastpointe Nursing Home. The services he needs can be adequately provided outside of the nursing home, and in the community."*

Exhibit 3 also contains a report of examinations conducted by Dr. Thomas Riser, the appellant's own cardiologist, from September 13, 2011 and April 30, 2012. The April 30, 2012 report discusses appellant's continued complaints of palpitations, fatigue, dizzy spells, and edema, and the appellant's longstanding atrial fibrillation. (Exhibit 3). Exhibit 3 also contains physician progress notes that detail one of the more recent medical changes is a broken tooth suffered by appellant. On May 23, 2012, the appellant requested to see a dentist for a broken lower molar. On May 26, 2012, Dr. Saldanha reported that a dental appointment was made at Massachusetts General Hospital for June 15, 2012, but that the appellant did not require an increase or change in his dose of narcotics for pain. Dr. Saldanha further reported on May 29, 2012 that the appellant declined an earlier emergency visit to a walk-in dental clinic and chose instead to take a course of antibiotics first. (Exhibit 3).

The hearing officer asked the appellant whether he experienced any changes in health since his hearing last December, or whether any of the appellant's existing conditions have gotten worse. The appellant testified that none of his conditions have gotten better, and that he has experienced more pains in his neck and back, daily migraines, significant lightheadedness, tingling in his hands and feet, and more heart palpitations. (testimony). The appellant testified that the nursing facility would not let the appellant see his doctors in the community. Then, in response to the question of why he would prefer to stay in a nursing facility and not seek treatment for these conditions from his own physicians while residing back in the community, the appellant testified that at times he is too dizzy to get out of bed. (testimony).

The discharge notice lists a residential address in Waltham, Massachusetts as the appellant's discharge location. (Exhibit 1). The appellant testified at hearing that the address is for his cousin's home, where the appellant lived before his hospitalization and subsequent transfer to Eastpointe. When asked why he would not be able to go there, appellant further testified that the building is currently being renovated, and that the appellant's cousin is currently living with his girlfriend at a different address. (testimony). The appellant did not present evidence or documentation of the building's renovations.

Mr. Gillis responded that Eastpointe put thought into the discharge location, and pointed out the fact that the discharge location is handwritten while the rest of the discharge notice is typed, showing that it was the last change made to the notice and done after meeting with the appellant. (testimony). Specifically, Mr. Gillis testified that he and Ms. Buser met with the appellant on April 1, 2012 and informed him that they would be serving the appellant a discharge notice on April 2, 2012. He testified that the three discussed appellant's discharge location options and the fact that Eastpointe would discharge the appellant to a shelter if there was no alternative location. (testimony). Ms. Buser testified that the appellant identified the addresses of two cousins as possible discharge locations. She testified that after reviewing these options on April 1, 2012 and asking the appellant to contact his cousins, the appellant said on April 2, 2012 that he did not want to be discharged to a shelter and absolutely stated his preference for the cousin's residential address in Waltham listed on the form. (testimony; Exhibit 1). Mr. Gillis added that the appellant specifically stated that the residence in Waltham was being renovated on April 2, 2012, but he never indicated that it would pose any problem (testimony).

During the hearing, the appellant claimed to be experiencing a dizzy spell. Proceedings were temporarily suspended while the appellant received nursing care and was transported by wheelchair to a conference room to complete the hearing. (testimony, Exhibit 6). During this time, the appellant's friend Mr. Joe DiVittorio (whose phone appellant was using) updated the hearing officer on the appellant's physical well-being. Mr. DiVittorio also offered general supporting statements about the appellant's position regarding his health care mistreatment by the facility, and that in his opinion, the appellant should be found "clinically and financially eligible" to remain at Eastpointe (testimony).

When the hearing resumed, a nurse from the facility reported that Appellant was in no acute distress. Appellant indicated to the Hearing Officer that he would probably have to go to the hospital when the hearing was done.<sup>2</sup> It was discussed that appellant did not have access to all copies of the documents and medical records included in Eastpointe's Exhibit 3 submission, partly because Eastpointe was prepared to give Appellant the information in person at hearing, as Appellant's appearance by telephone was a last-minute change. The record was left open until June 6, 2012 to allow appellant time to review copies of all materials contained in Exhibit 3 and to respond (Exhibit 4). The appellant was invited to submit a written response to the hearing officer in support of his position after review of Exhibit 3, and the appellant filed a letter that was marked as

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<sup>2</sup> The appellant's health seemed improved by the end of the hearing when he was given the time to make a written submission.

Exhibit 5. The appellant's letter includes a description of the appellant's health concerns and medical needs that is consistent with his testimony at hearing. Additionally, the appellant's letter alleges misconduct on behalf of the nursing facility, including falsified medical reports, neglect, mishandling of paperwork, medical malpractice, and abuse (Exhibit 5).

The hearing officer also requested that Eastpointe file during the record open period documentation related to appellant's clinical episode on the hearing date. Eastpointe submitted statements by Nurses Donna Marie Cecchini and Danielle McClay that were marked as Exhibit 6. Both statements describe the appellant's report of dizziness on the hearing date, but state that the appellant's vital signs remained normal and that he eventually refused hospitalization (Exhibit 6). Exhibit 6 also included a report by Donna Marie Cecchini, dated June 5, 2012, which describes the appellant's hospitalization at Whidden Memorial Hospital a few days after the hearing date, after a nurse found the appellant outside to be exhibiting signs of intoxication on June 4, 2012. The hospital did not draw the appellant's blood alcohol level and returned him to Eastpointe without any new orders or recommendations to change his plan of care (Exhibit 6). Per the testimony from both parties given at hearing, this was the only hospitalization Appellant has had since his prior hearing date.

As to the issue of possible representation, Appellant's hearing request listed Attorney Robert Sable, (of Greater Boston Legal Services on Friend Street in Boston) as a "Resident Representative" (Exhibit 1). The May 10, 2012 Notice of Appeal from the Board of Hearings was copied and sent to Attorney Sable (Exhibit 2). Prior to the hearing, the Board of Hearings received no communication from Attorney Sable or anyone in his office about his representation of Appellant. At the very beginning of the hearing, Appellant initially asked for a postponement because his attorney was not there. When asked when he had last spoken directly with Attorney Sable, Appellant indicated it was a few weeks and that he was not sure if he would be attending. Attorney Sable did not appear at the hearing, nor did Attorney Sable or anyone from his office contact the Board of Hearings post-hearing. Appellant's Record Open submission also made no mention of any further representation by Attorney Sable or anyone else.

## **Findings of Fact**

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

1. Appellant, a 55 year-old male, was admitted to Eastpointe Rehabilitation and Skilled Care Center on July 21, 2011, after completing a hospital stay at Cambridge Health Alliance.
2. The appellant's health conditions upon admission to the facility include atrial fibrillation, hyperlipidemia, recurrent chest pains, heart palpitations, hepatitis C, depression, anxiety, daily migraines, pains in his neck and back, reoccurring dizziness and tingling in his hands and feet.
3. The first 60 days of the appellant's stay at the nursing facility were covered by Medicare or MassHealth, who approved appellant for short-term nursing facility services prior to his admission to Eastpointe.

4. An Aging Services Access Point (ASAP) subsequently conducted a clinical evaluation on behalf of MassHealth and determined on October 31, 2011 that the appellant did not satisfy the requirements of clinical eligibility to stay in a nursing facility because the appellant did not require skilled nursing services or a combination of general nursing services and assistance with activities of daily living.
5. The appellant subsequently appealed that determination with the Board of Hearings, and, after a hearing held on December 12, 2011 a final decision denying that appeal was issued on February 28, 2012 by Officer Brochstein of the Board of Hearings.
6. Through a 30-day Notice of Discharge dated April 2, 2012, Eastpointe informed Appellant of the facility's intent to discharge him to a residential address because "*the resident's health has improved sufficiently so that the resident no longer needs the services provided by the nursing facility.*"
7. The appellant's attending physician while staying at Eastpointe is Dr. Victor Saldahna.
8. The appellant's health conditions have not gotten worse or changed significantly since his clinical evaluation by ASAP in October of 2011. As of June 4, 2012, the appellant is medically stable and does not require skilled nursing services.
9. Eastpointe worked with the appellant to select a safe and appropriate discharge location of his choice before serving him with a notice of discharge on April 2, 2012.
10. During the appellant's fair hearing with the Board of Hearings on June 1, 2012, the proceedings were temporarily suspended while the appellant received nursing assistance in response to his report of dizziness. His vital signs throughout this episode remained normal, and he was able to return telephonically and complete the hearing.
11. On June 4, 2012, the appellant was hospitalized for intoxication, and returned to Eastpointe in stable condition and with no alterations to his treatment plan. This is the appellant's only hospitalization since his last hearing date of December 12, 2011.

## **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 initiated by a nursing facility. MassHealth has enacted regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in both (1) the Nursing Facility Manual regulations at 130 C.M.R. 456.000 et seq., and (2) the Fair Hearing Rules at 130 C.M.R. 610.000 et seq.

For the purposes of this decision, the definitions found in 130 C.M.R. 456.402 apply:<sup>3</sup>

*“Nursing facility” - an institution or a distinct part of an institution that meets the provider-eligibility and certification requirements of 130 C.M.R. 456.404 or 456.405. For requirements related to the transfer and discharge of residents, the term nursing facility also includes a nursing facility participating in Medicare, whether or not it participates in MassHealth.*

*“Discharge” - the removal from a nursing facility to a noninstitutional setting of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual; this includes a nursing facility’s failure to readmit following hospitalization or other medical leave of absence.*

*“Transfer” — movement of a resident from:*

- (1) a Medicaid- or Medicare-certified bed to a noncertified bed;*
- (2) a Medicaid-certified bed to a Medicare-certified bed;*
- (3) a Medicare-certified bed to a Medicaid-certified bed;*
- (4) one nursing facility to another nursing facility; or*
- (5) a nursing facility to a hospital, or any other institutional setting.*

*A nursing facility’s failure to readmit a resident following hospitalization or other medical leave of absence, resulting in the resident being moved to another institutional setting is also a transfer. Movement of a resident within the same facility from one certified bed to another bed with the same certification is not a transfer.*

Based on the above definitions, in this case, the appellant is challenging the nursing facility Eastpointe’s attempt to discharge him to a residence in a community setting via its notice dated April 2, 2012. See Exhibits 1 & 3 and 130 C.M.R. 456.402.

The guidelines that apply in a determination of whether or not Appellant can be so discharged are found in 130 C.M.R. 456.701 of the MassHealth Nursing Facility Manual. This section of the regulations strictly and specifically lists the only circumstances and conditions that allow for transfer or discharge of a resident from a nursing facility and the requirements of the relevant notice – if these requirements are not met, the facility must permit the resident to remain in the facility.

The relevant portions of the regulation at 130 C.M.R. 456.701 read as follows:

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<sup>3</sup> The regulatory language in the MassHealth Nursing Facility Manual has identical (or near-identical) regulatory counterparts within the Commonwealth’s Fair Hearing Rules under 130 C.M.R. 610.000 et seq., as well as federal regulations found under 42 CFR 483.000 et seq. As to this part of the regulatory law, the regulations in 130 C.M.R. 610.028 and 42 CFR 483.12(a)(2) are identical to that found in 130 C.M.R. 456.402. This appeal decision will hereafter make all further regulatory references only to the MassHealth Nursing Facility Manual regulations in 130 C.M.R. 456.000, unless other regulatory references is noted and appropriate.



**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 C.M.R. 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 C.M.R. 456.701(A)(1) or (2); and**
  - (2) a physician when the transfer or discharge is necessary under 130 C.M.R. 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 ...
- (Emphasis added.)

In the present case, Eastpointe has chosen to issue a discharge notice based upon the grounds that the appellant's health has improved sufficiently so that the appellant no longer needs the services provided by the nursing facility. The April 2, 2012 "Notice of Discharge/Transfer" found in Exhibit 1 asserts the circumstances identified at 130 C.M.R. 456.701(C)(2) and complies with the notice requirements set forth in 130 C.M.R. 456.701(C). Therefore, appellant received adequate and actual notice of the planned discharge.

The first issue is whether the appellant's discharge is appropriate because his health has improved sufficiently so that the appellant no longer needs the services provided by the nursing facility. As a starting point, the Board of Hearings had already determined that Appellant did not meet the clinical standard for a nursing facility stay with its appeal decision from February 2012, which reviewed an ASAP decision from October 2011. There have been no hospitalizations or significant

health changes since that time period. The recent medical report contained in the record is dated May 29, 2012. It includes a note from Dr. Victor Saldanha, who is listed as the appellant's "Attending Physician" at the facility. The note describes the appellant as "medically stable" and states that he does not require the level of services provided by a skilled nursing facility, and that instead the appellant's needs could be provided for outside in the community. See Exhibit 3. The appellant described his current health concerns and medical needs at hearing, and he further elaborated upon these concerns and needs in the letter filed during the record open period. These include palpitations, fatigue, dizzy spells, atrial fibrillation, pains in his neck and back, daily migraines, tingling in his hands and feet, and heart palpitations. Most significantly, there is nothing in the record that indicates any changes or deterioration in Appellant's health which has not been previously addressed by the earlier appeal over the appellant's clinical ineligibility.

I find nothing substantial or credible in the evidence offered by testimony, which could counter the current position of Eastpointe and the earlier appeal findings by the Board of Hearings, that Appellant's medical needs could be safely addressed in the community. Other than the tooth problem, there are no significant new medical issues, and Appellant has no evidence of any hospitalization over the past few months, aside from the short one post-hearing which did not appear to be serious.

The second issue is whether the nursing facility has met the requirements of all other applicable federal and state regulatory requirements in addition to the MassHealth-related regulations discussed above, including G.L. c.111, §70E, which went into effect in November of 2008. The key paragraph of that statute, which is directly relevant to this appeal, 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.***

(Emphasis added.)

In this case, Exhibit 1 lists the appellant's cousin's residence in Waltham as the appellant's discharge location. Based on the credible testimony of Mr. Gillis and Ms. Buser, the nursing facility has met its burden of providing sufficient preparation and orientation to the resident to ensure safe and orderly discharge from Eastpointe, and thus has complied with G.L. c.111, §70E. The record suggests that the nursing facility actively involved the appellant in selecting the discharge location when the representatives met with the appellant and discussed possible discharge locations on April 1, 2012 after informing him that he would be served a discharge notice the following day. The nursing facility explained to the appellant that Eastpointe could arrange to discharge the appellant to a shelter if he did not have an alternative location, and gave the appellant an opportunity to contact his cousins to determine the most appropriate discharge location before completing the notice on April 2, 2012. The appellant submitted no relevant, reliable evidence to prove that the Waltham residence listed on the "Notice of Discharge/Transfer" would not be a safe and appropriate place for his discharge. Therefore, the

nursing facility's notice of discharge dated April 2, 2012 meets the requirements of G.L. c.111, §70E.

Based on the record and the above analysis, I therefore conclude that the nursing facility has valid grounds to discharge the appellant per its notice dated April 2, 2012. The appeal is thus DENIED.

## **Order for Nursing Facility**

The nursing facility may proceed with the notice of discharge. Pursuant to 130 C.M.R. 610.030(A) and 130 C.M.R. 456.704(A), the appellant may not be discharged any earlier than 30 days from the date of this decision.

## **Implementation of this Decision**

If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings 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.

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Christopher S. Taffe  
Hearing Officer  
Board of Hearings

cc: