

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2177544
Decision Date:	10/13/2021	Hearing Date:	10/8/2021
Hearing Officer:	Cynthia Kopka		

Appearance for Appellant:
Pro se

Appearance for Respondent:
Robert Baker, Director of Nursing Services
Samantha White, Social Services
Suzanne Salley, Assistant DON
Joseph Hannon, substance abuse clinician



*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:	Expedited nursing facility discharge
Decision Date:	10/13/2021	Hearing Date:	10/8/2021
Respondent's Rep.:	Robert Baker, Samantha White, Suzanne Salley, Joseph Hannon	Appellant's Rep.:	Pro se
Hearing Location:	Springfield (remote)		

Authority

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

Jurisdiction

By notice dated September 21, 2019, The Oxford Rehab & Healthcare Center ("Respondent" or "the facility") informed Appellant of its intent to discharge him from the facility to a shelter on October 5, 2021. Exhibit 1. Appellant filed a timely appeal on October 4, 2021. Exhibit 2. 130 CMR 610.615. Challenging the discharge or transfer from a nursing facility is a valid basis for appeal. 130 CMR 610.032.

Action Taken by Respondent

Respondent informed Appellant of its intent to discharge him from the facility to the shelter.

Issue

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

Summary of Evidence

Respondent, a skilled nursing facility, was represented by telephone by its director of nursing and other professionals. Appellant appeared by telephone.

By hand-delivered letter dated September 21, 2021, Respondent informed Appellant of its intent to discharge him from the facility to the shelter on October 5, 2021. Exhibit 1. A copy of the notice was not delivered to a family member or representative because Appellant did not designate a representative, which Appellant confirmed. The notice stated that Respondent sought to discharge Appellant because “[t]he safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status,” and “[t]he health of individuals in the nursing facility would otherwise be endangered.” *Id.* The notice explained Appellant’s appeal rights and identified the administrator as the person responsible for supervising the discharge and available for questions. *Id.* The notice included a sheet that provided contact information for the state long term care ombudsman, the disability law center, and legal assistance offices. *Id.*

The facility’s representatives submitted documents in support of its position, Exhibit 4, and testified as follows. Appellant admitted to the facility on [REDACTED] with diagnoses including above-the-knee amputation, infection of right knee prosthesis, and opioid dependence. Appellant completed a course of antibiotics at the facility and received physical therapy (PT), occupational therapy (OT), and substance abuse counseling. On September 20, 2021, an incident occurred where Appellant refused to go to PT. Appellant appeared pale with dark circles, was agitated, and reported that he had not been eating and was vomiting. Appellant was anxious and had fallen out of bed. Exhibit 4 at 3. Appellant was sent to the emergency room and the hospital performed a toxicity screen, which came back positive for cocaine, fentanyl, and marijuana. *Id.* at 3, 5. The facility determined, given its population with many patients having substance abuse disorders, that Appellant’s behavior ingesting illicit substances put the health and safety of other residents at risk of relapse.

The facility’s director of nursing services testified that the shelter where Appellant would be discharged is handicap accessible and has changing availability on a day to day basis. Appellant is currently using a facility-issued wheelchair to ambulate. Appellant would receive a prescribed wheelchair prior to being discharged. The shelter allows visiting nursing and support services, so Appellant could receive PT and/or OT at the shelter if needed, or on an outpatient basis. Appellant would be provided referrals to these services as well as information for substance abuse treatment in the community upon discharge. The facility had not yet had the discharge meeting with Appellant due to the appeal having been filed, but will have the meeting 24-48 hours prior to discharge. The discharge will not occur unless and until the shelter has a bed available for Appellant. Appellant’s physician wrote that Appellant can be safely discharged to the shelter and does not have a medical need to remain at the facility. *Id.* at 26.

The facility provided a copy of its intoxication protocol, Exhibit 5, which is provided to staff. The facility stated that it does not provide a copy of this policy to residents upon admission, but makes its expectations clear to residents. The facility has zero tolerance of substance abuse.

Appellant acknowledged that the incident occurred and apologized for it. He testified that he deeply regrets consuming drugs and wants to continue to get help. Appellant admitted that there was no excuse and that he is responsible, and now has his eyes open. Appellant has rededicated himself to substance abuse counseling in the facility and cooperated fully with the facility's investigation. The facility agreed that Appellant was not suspected of anything beyond ingesting the substance and was not responsible for bringing the drugs into the facility. The facility acknowledged Appellant's cooperation but reiterated that it must keep the health and safety of all residents in mind. Appellant testified that he would continue to cooperate with the facility and believed his assistance could help prevent future incidents. Appellant testified that he was not aware of the zero-tolerance policy but admitted that it was common sense.

Appellant is newly amputated and still getting used to his prosthetic. He continues to receive PT and OT five days a week. Appellant testified that he needs to remain in the facility for both his sobriety and to receive continued therapy. Appellant pleaded for another chance.

Findings of Fact

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

1. By hand-delivered letter dated September 21, 2021, Respondent informed Appellant of its intent to discharge him from the facility to the shelter on October 5, 2021. Exhibit 1.
2. The notice stated that Respondent sought to discharge Appellant because "[t]he safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status," and "[t]he health of individuals in the nursing facility would otherwise be endangered." *Id.*
3. The notice explained Appellant's appeal rights and identified the administrator as the person responsible for supervising the discharge and available for questions. *Id.* The notice included a sheet that provided contact information for the state long term care ombudsman, the disability law center, and legal assistance offices. *Id.*
4. Appellant filed a timely request for an expedited hearing on October 4, 2021. Exhibit 2.
5. Appellant admitted to the facility on [REDACTED] with diagnoses including above-the-knee amputation, infection of right knee prosthesis, and opioid dependence. Appellant completed a course of antibiotics at the facility and received PT, OT, and substance abuse counseling.
6. On September 20, 2021, Appellant refused to go to PT. Appellant appeared pale with dark circles, was agitated, and reported that he had not been eating and was vomiting. Appellant was anxious and had fallen out of bed. Appellant was sent to the emergency room and the hospital performed a toxicity screen, which came back positive for cocaine, fentanyl, and marijuana. Exhibit 4 at 3, 5.
7. Appellant's physician wrote that Appellant can be safely discharged to the shelter and does

not have a medical need to remain at the facility. *Id.* at 26.

8. The shelter is handicap accessible and bed availability would be confirmed prior to discharge.
9. The facility plans to have a meeting with Appellant 24-48 hours prior to discharge to provide referrals to outside services and phone numbers for substance abuse counseling. The facility will also arrange for a prescription for a wheelchair for Appellant to use in the community.

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.*

Per 130 CMR 456.701(A) and 130 CMR 610.028(A), a nursing facility resident may be transferred or discharged¹ 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) a stay at the nursing facility; or
- (6) the nursing facility ceases to operate.

Additionally, if the facility discharges a resident under 130 CMR 456.701(A)(3) or (4), the resident's clinical record must contain documentation by a physician to explain the discharge. 130 CMR 456.701(B); *see also* 130 CMR 610.028(B).

Prior to discharge or transfer, 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, 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;

¹ The definitions of "discharge" and "transfer" may be found at 130 CMR 456.402.

- (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(C).

The notice of discharge or transfer must be made by the nursing facility at least 30 days before the date the resident is to be discharged or transferred except in certain circumstances:

- (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.
 - (2) The resident's health improves sufficiently to allow a more immediate transfer or discharge and the resident's attending physician documents this in the resident's record.
 - (3) An immediate transfer or discharge is required by the resident's urgent medical needs and this is documented in the medical record by the resident's attending physician.

- (4) The resident has not lived in the nursing facility for 30 days immediately before receipt of the notice.
- (C) When the transfer or discharge is the result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, the notice of transfer or discharge, including that which is required under 130 CMR 456.429, 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.
- (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).

130 CMR 610.029; *see also* 130 CMR 456.702(B) and (C).

Per 130 CMR 610.032(C), a nursing facility resident has the right to request an appeal of any nursing-facility initiated transfer or discharge. A nursing facility resident must appeal a written notice of an emergency discharge pursuant to 130 CMR 610.029(B) within 14 days. 130 CMR 610.015(B)(4).² If the request for a hearing, in accordance with 130 CMR 610.015(B)(4), is received within the applicable time frame but after the transfer, the transfer is not stayed but the nursing facility must, upon receipt of an appeal decision favorable to the resident, promptly readmit the resident to the next available bed in the facility. 130 CMR 610.030(C).

Finally, Mass. Gen. Laws ch. 111, §70E provides that “[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.” Finally, federal regulations require that a nursing facility provide sufficient preparation for a safe and orderly discharge. See 42 CFR 483.12(a)(7).

In this matter, Respondent initiated an emergency discharge following September 20, 2021 incident. Here, there is no dispute over the sufficiency of the notice or its issuance. The notice cites permissible reasons for the discharge pursuant to 130 CMR 456.701(A)(3) and (4) and 130 CMR 610.028(A)(3) and (4) and a permissible reason for an emergency discharge pursuant to 130 CMR 610.029(B)(1) and 130 CMR 456.702(B)(1). Appellant's physician provided a letter in support of the discharge.

The evidence supports Respondent's position that Appellant's discharge was necessary for the health and safety of individuals at the nursing facility, given Appellant's use of illegal drugs in a facility that provides, *inter alia*, substance abuse counseling to residents. Appellant admitted to the incident, expressing remorse and sincerity. The facility was well prepared in answering questions about the discharge plan and established on the record that Appellant's discharge

² A nursing facility resident's appeal of a discharge pursuant to 130 CMR 610.029(B) is handled under the expedited appeal process described in 130 CMR 610.015(F).

would be done safely with the resources Appellant would require in the community.

Though Appellant's remorse was genuine and sympathetic, the issue at hand is simply whether the facility followed the required regulations when issuing the discharge notice. It has. Accordingly, this appeal is denied.

Order for Respondent

Proceed with the discharge as set forth in the notice dated September 21, 2021 after the five day stay (from the date of this decision). 130 CMR 456.704(B).

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.

Implementation of 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, at the address on the first page of this decision.

Cynthia Kopka
Hearing Officer
Board of Hearings

Cc: The Oxford Rehab & Healthcare Center, Attn: Administrator, 689 Main Street, Haverhill,
MA 01830