

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2178890
Decision Date:	12/08/2021	Hearing Date:	12/02/2021
Hearing Officer:	Paul Moore		

Appellant Representative:

Pro se, by telephone

Nursing Facility Representatives:

Bob Baker, R.N., Director of Nursing;
Samantha White, Licensed Social Worker, the
Oxford Rehabilitation and Nursing Center
(both by telephone)



*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:	Expedited Nursing Facility Discharge
Decision Date:	12/08/2021	Hearing Date:	12/02/2021
Nursing Facility Reps.:	Director of Nursing et al.	Appellant Rep.:	Pro se
Hearing Location:	Remote		

Authority

This hearing was conducted pursuant to Massachusetts General Laws (“M.G.L.”) Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a Notice of Intent to Discharge Resident with Less than 30 Days’ Notice dated November 23, 2021 (“discharge notice”), The Oxford Rehabilitation and Health Care Center (“the Oxford” or “the facility”) notified the appellant that it sought to discharge him effective December 7, 2021 to [REDACTED] because “the safety of the individuals in the nursing facility is endangered due to [his] clinical or behavioral status” (130 Code of Massachusetts Regulations (CMR) 610.028; Exhibit 1). The appellant filed a timely appeal with the Board of Hearings (BOH) on November 23, 2021 (130 CMR 610.015(B); 130 CMR 456.703; Exhibit 2). Challenging an expedited notice of transfer or discharge initiated by a nursing facility is a valid ground for appeal to BOH (130 CMR 610.032(C)).

Action Taken by Nursing Facility

The nursing facility notified the appellant that it sought to discharge him on an expedited basis because the safety of the individuals in the nursing facility is endangered.

Issues

The appeal issues are whether: (1) the facility has valid grounds to discharge the appellant; (2) the discharge notice and patient record meet the regulatory requirements set forth in the Fair Hearing Rules at 130 CMR 610.028 and 610.029; and (3) the 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

A. Testimony and Documentary Evidence

Prior to hearing, the facility submitted a copy of some of the appellant's clinical records, including his admission record, progress notes, and a recertification and updated plan of treatment (Ex. 4). The facility's director of nursing, Mr. Baker, testified by telephone that the appellant, who is under age 65, was issued an expedited notice of discharge based on his unauthorized use of alcohol in the facility on three recent occasions, *to wit*, November 22, 2021, September 2, 2021, and August 31, 2021. On the most recent occasion, November 22, 2021, the appellant exhibited aggression and the police were called, according to Mr. Baker. The appellant was sent to Holy Family Hospital in Haverhill on the night of November 22-23, 2021, and his serum alcohol level was measured at 262 mg./dl. (Testimony). A copy of this lab value was also submitted into evidence by the facility, which the hearing officer marked as exhibit 5B.¹ Similarly, a serum alcohol level for the appellant was collected by [REDACTED] on August 31, 2021, the result of which 236 mg./dl. (Ex. 5A).

Mr. Baker noted that the appellant has no current physician's order authorizing the use of alcohol, and that other residents of the Oxford are in recent recovery from alcohol and other substance abuse. He added that by using alcohol without permission, the appellant is endangering his own safety, as well as that of other residents (Testimony).

The appellant was admitted to the Oxford in [REDACTED], following a stay at Whittier Rehabilitation Hospital ("Whittier"). He was admitted to the Oxford for rehabilitation, and continues to receive physical and occupational therapy at the facility. He ambulates via wheelchair and rollator. Mr. Baker testified that the appellant can perform his activities of daily living (ADLs) independently. The appellant's medical diagnoses include alcoholic cirrhosis of the liver with ascites, encephalopathy, type 2 diabetes, acute kidney failure, a history of seizures, essential hypertension, unspecified viral hepatitis B, obesity, generalized muscle weakness, and thrombocytopenia (Testimony, Ex. 4, p. 3).

The discharge location selected by the facility is [REDACTED], a homeless shelter located at [REDACTED] (Ex. 1). The facility's social worker, Ms. White, testified that the appellant

¹ A normal serum alcohol level, per the range provided in lab result from Holy Family Hospital, is less than 10 mg./dl. (Ex. 5).

can receive services from a visiting nurse, as well as from a physical therapist and occupational therapist, at the shelter. She noted, however, that such services would need to occur either prior to 7 am, when the shelter asks residents to leave for the day, or after 5 pm, when the residents are allowed to return to the shelter (Testimony).

The appellant testified that he would like to leave the Oxford and live in an apartment in the community, but he is not ready to leave the Oxford immediately because he has no place to go. He acknowledged using alcohol without authorization at the facility on two occasions, and apologized. He stated that he obtained the alcohol from another facility resident on both occasions. He noted on the second occasion, November 22, 2021, he drank “fireball,” took his sleep medication, and woke up in the hospital. He stated he did not recall exhibiting aggressive behavior on that occasion (Testimony).

Mr. Baker responded that on November 22, 2021 at 11:45 pm, the appellant was observed to be behaving unusually, including throwing items in his room, and the police were called. The facility located a tumbler containing a brown-colored liquid in the appellant’s room on that occasion (Testimony).

The appellant testified that can perform most of his ADLs on his own, but he cannot put on his own socks and needs assistance to toilet himself. He stated that he suffered a stroke several years ago, which affects his ability to care for himself. He testified that he is on various waitlists for subsidized housing in a number of cities and towns. Ms. White, the facility social worker, testified that the appellant has been accepted for placement in a group home setting through the Moving Forward Plan (MFP) waiver through MassHealth, but there is a waitlist of about one year (Testimony).

The appellant testified that he does not have leave-of-absence privileges at the facility, and lost such privileges after he was caught consuming alcohol in August, 2021. He sees a licensed mental health counselor at the Oxford. He cannot identify all of his prescribed medications (Testimony).

Mr. Baker indicated that the appellant would receive medication education and teaching upon leaving the facility. The appellant is prescribed hydrocodone/acetaminophen (Norco) for pain, which he receives on a scheduled basis three times a day. Mr. Baker added that it is dangerous for the appellant to mix narcotics and alcohol (Testimony).

The appellant currently receives physical therapy and occupational therapy three times a week, for 15- to 25-minute sessions (Testimony, Ex. 4, p. 22).

The appellant testified that he used to live at his mother’s home in Haverhill, and that he was her caretaker. She passed away several years ago. The house was subsequently torn down. In 2018, the appellant was diagnosed with double pneumonia, had a stroke and was admitted to Whittier (Testimony).

Recertifications and updated plans of treatment for the certification periods November 14, 2021 through December 13, 2021 (physical therapy) and November 13, 2021 through December 12,

2021 (occupational therapy), respectively, reflect that the appellant continues to progress, but has additional goals to be met (Ex. 4, pp. 22-32).

B. Content of the discharge notice/patient record

The expedited discharge notice at issue in this matter contains: a 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 and fax number of the BOH, the time frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (*to wit*, that the facility cannot discharge the appellant until 5 days after the hearing officer's decision is received), the name of the person at the facility who can answer any questions about the discharge notice and about the right to file an appeal, the name and address of the local legal-services office, the name and address of the local long-term care ombudsman office, and the mailing address of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals, respectively (Exs. 1 & 2).

The patient record for the appellant (Ex. 4, p. 7) contains a copy of a December 2, 2021 letter from the facility's medical director, Shiao-Ang Shih, M.D., which states as follows:

[The appellant] . . . got admitted to The Oxford. . . on March 27, 2018, from Whittier. . . due to Alcoholic Cirrhosis of Liver and Encephalopathy. [The appellant] is continent of bowel and bladder. [The appellant] makes his needs known and completes his activities of daily living independently. [The appellant] is compliant with his medications and can be taught to take his medications independently.

On two occasions, [the appellant] consumed alcohol during his stay at The Oxford. On August 31, 2021, [the appellant] had a change in his gait, two falls in the span of fifteen minutes, had difficulty understanding instructions, screaming and cursing. [The appellant's] water cup smelt (*sic*) of peppermint schnapps. During a room search on August 31, 2021, three bottles of Melatonin, a half and full bott (*sic*) were found, bottle of medication as well as a brown color liquid was found on his nightstand. During [the appellant's] hospital stay, the (*sic*) performed a toxicology report. [The appellant's] blood alcohol content level was .236. On [REDACTED] 2021, [the appellant] was sent to the hospital due to question of alcohol intoxication. During [the appellant's] hospital stay, a toxicology report was completed. [The appellant's] blood alcohol content was .262.

[The appellant] ambulates around the facility using his wheelchair.

It is my professional opinion that there is not a medical need for [the appellant] to remain a resident at the Oxford. [The appellant] is capable and safe to discharge to a shelter.

(Ex. 4, p. 7)

Findings of Fact

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

1. The appellant is under age 65, and has resided at the Oxford since March, 2018 (Testimony).
2. The appellant's medical diagnoses include alcoholic cirrhosis of the liver with ascites, encephalopathy, type 2 diabetes, acute kidney failure, a history of seizures, essential hypertension, unspecified viral hepatitis B, obesity, generalized muscle weakness, and thrombocytopenia (Testimony, Ex. 4, p. 3).
3. Through a Notice of Intent to Discharge Resident with Less than 30 Days' Notice dated November 23, 2021, the Oxford notified the appellant that it sought to discharge him effective [REDACTED] to [REDACTED] because "the safety of the individuals in the nursing facility is endangered due to [his] clinical or behavioral status" (Exhibit 1).
4. The appellant requested a fair hearing on this discharge notice in a timely manner (Ex. 2).
5. On August 31, 2021, at the Oxford, the appellant had a change in his gait, two falls in the span of fifteen minutes, had difficulty understanding instructions, and was screaming and cursing, and alcohol was found in his room (Ex. 4).
6. On that occasion, the appellant went to [REDACTED], and a serum alcohol level was collected, the result of which 236 mg./dl. (Ex. 4, Ex. 5A).
7. A normal serum alcohol level is less than 10 mg./dl. (Ex. 5).
8. On November 22, 2021 at 11:45 pm, at the Oxford, the appellant was observed to be behaving unusually, including throwing items in his room, and the police were called. The facility located a tumbler containing a brown-colored liquid in the appellant's room on that occasion (Testimony).
9. The appellant was sent to [REDACTED] on the night of November 22-23, 2021, and his serum alcohol level was measured at 262 mg./dl. (Testimony).
10. The appellant admitted to using alcohol at the Oxford on [REDACTED] and [REDACTED] (Testimony).
11. There is no physician's order for the appellant to consume alcohol (Testimony, Ex. 4).

12. The appellant was admitted to the Oxford for rehabilitation, and he continues to receive physical and occupational therapy at the facility (Testimony, Ex. 4, pp. 22-32).
13. The appellant has additional goals to be met in physical therapy and occupational therapy (Ex. 4, pp. 22-32).
14. The appellant needs assistance with some of his ADLs, including toileting and putting on his socks (Testimony).
15. The appellant cannot identify all of his prescribed medications (Testimony).
16. In the expedited discharge notice, the Oxford selected a homeless shelter, [REDACTED], as the location to which the appellant is to be discharged (Ex. 1).
17. Clients of [REDACTED] must leave the facility by 7 am each day, and may not return to the shelter before 5 pm each day (Testimony).
18. The expedited discharge notice at issue in this matter contains: a 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 and fax number of the BOH, the time frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (*to wit*, that the facility cannot discharge the appellant until 5 days after the hearing officer's decision is received), the name of the person at the facility who can answer any questions about the discharge notice and about the right to file an appeal, the name and address of the local legal-services office, the name and address of the local long-term care ombudsman office, and the mailing address of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals, respectively (Exs. 1 & 2).
19. There is no physician's progress note in the appellant's medical record explaining that he is being discharged because he presents a danger to the safety of the individuals in the facility (Ex. 4).

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 CMR 456.000 et seq., and (2) the Fair Hearing Rules at 130 CMR 610.000 et seq.

The regulations at 130 CMR 456.002 define a "discharge" as "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.” Similarly, the Fair Hearing Rules at 130 CMR 610.004 define a discharge as “the removal from a nursing facility of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual.”

The Nursing Facility Manual regulations at 130 CMR 456.701 provide in relevant part:

Notice Requirements for Transfers and Discharges Initiated by a Nursing Facility

(A) A resident may be transferred or discharged from a nursing facility only when:

(1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the nursing facility;

(2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so that the resident no longer needs the services provided by the nursing facility;

(3) the safety of individuals in the nursing facility is endangered;

(4) the health of individuals in the nursing facility would otherwise be endangered;

(5) the resident has failed, after reasonable and appropriate notice, to pay for (or failed to have the Division or Medicare pay for) a stay at the nursing facility; or

(6) the nursing facility ceases to operate.

(B) When the facility transfers or discharges a resident under any of the circumstances specified in 130 CMR 456.701(A)(1) through (5), the resident's clinical record must contain documentation to explain the transfer or discharge. The documentation must be made by:

(1) the resident's physician when a transfer or discharge is necessary under 130 CMR 456.701(A)(1) or (2); and

(2) a physician when the transfer or discharge is necessary under 130 CMR 456.701(A)(3) or (4).

(C) Before a nursing facility discharges or transfers any resident, the nursing facility must hand deliver to the resident and mail to a designated family member or legal representative a notice written in 12-point or larger type that contains, in a language the member understands, the following:

(1) the action to be taken by the nursing facility;

(2) the specific reason or reasons for the discharge or transfer;

(3) the effective date of the discharge or transfer;

(4) the location to which the resident is to be discharged or transferred;

(5) a statement informing the resident of his or her right to request a hearing before the Division's Board of Hearings including:

(a) the address to send a request for a hearing;

(b) the time frame for requesting a hearing as provided for under 130 CMR 456.702; and

(c) the effect of requesting a hearing as provided for under 130 CMR 456.704;

- (6) the name, address, and telephone number of the local long-term-care ombudsman office;
- (7) for nursing-facility residents with developmental disabilities, the address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. § 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.

(Emphasis added)

Further, the Nursing Facility Manual regulations at 130 CMR 456.702 set forth the requirements that must be met by a nursing facility when it issues an expedited notice of discharge, as follows:

(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.

(Emphasis added)

Based on the evidence in the record, I agree that the facility has valid grounds to discharge the appellant. His behavior presents a potential danger to other residents at the facility. The appellant acknowledges using alcohol twice at the facility, which was not authorized by a physician and is potentially lethal when mixed with prescription medication. In connection with his alcohol use, the appellant exhibited aggressive behavior, such as screaming and throwing objects in his room. Such conduct is incompatible with the kind of therapeutic environment needed by nursing facility residents.

I also find that the expedited discharge notice issued by the facility to the appellant meets the regulatory requirements set forth at 130 CMR 456.701(C).

However, the appellant's clinical record in evidence does *not* contain documentation by a physician containing the reasons for his intended discharge. Correspondence from the medical director at the facility reflects that there is no medical need for the appellant to remain at the facility, and that he may safely discharge to a shelter. Physician documentation that the appellant presents a danger to other residents is notably absent. Such documentation is *required* by 130 CMR 456.701(B)(2) and 130 CMR 456.702(B)(1), above.

Also relevant to this appeal, an amendment to M.G.L. c. 111, §70E, which went into effect in November of 2008, states 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)

As stated above, the next inquiry is whether the appellant has been provided sufficient preparation and orientation to ensure a safe and orderly discharge to another safe and appropriate place. The evidence shows that the appellant is still engaged in physical therapy and occupational therapy at the facility, and has further goals to be met. Moreover, he cannot identify all his medications. The facility argues that the appellant, if discharged to the homeless shelter, would receive patient teaching to enable him to identify his medications. The facility also argues that the appellant may receive physical therapy, occupational therapy and visits from a nurse while at the shelter. However, the shelter requires clients to leave the facility from 7 am to 5 pm each day. In these circumstances, there would be little opportunity for the appellant to receive meaningful physical therapy and occupational therapy in a structured setting. Thus, a homeless shelter may

not be a safe and appropriate discharge location for the appellant.

Based on the record and the above analysis, this appeal is APPROVED.

Order for Nursing Facility

Rescind discharge notice of November 23, 2021. Do not discharge the appellant under this discharge notice.

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.

Paul C. Moore
Hearing Officer
Board of Hearings

cc: Administrator, The Oxford Rehabilitation and Nursing Care Center, 689 Main Street,
Haverhill, MA 01830