

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	DENIED	Appeal Number:	2179404
Decision Date:	12/28/2021	Hearing Date:	12/22/2021
Hearing Officer:	Christopher Taffe		

Appearance for Appellant:



Appearances for Nursing Facility:

Robert Baker, Director of Nursing; and
Samantha White, Director of Social
Services, on behalf of The Oxford
Rehabilitation and Health Care Center
(both appearing by phone)



*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 – Safety of Others
Decision Date:	12/28/2021	Hearing Date:	12/22/2021
MassHealth's Rep.:	R. Baker & S. White	Appellant's Rep.:	
Hearing Location:	Taunton MassHealth Enrollment Center	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 titled “*Notice of Intent to Discharge Resident with Less than 30 Days’ Notice (Expedited Appeal)*” dated December 9, 2021, the Respondent, The Oxford Rehabilitation and Health Care Center (hereafter “Oxford”) informed the Appellant (the nursing facility resident) that Oxford sought to discharge Appellant to a shelter at 127 How Street in Haverhill, Mass. on December 23, 2021 because “*the safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status*”. See Exhibit 1. Appellant filed a timely request with the Board of Hearings for a Fair Hearing on December 21, 2021. See Exhibit 1; 130 CMR 610.015(B). The Board of Hearings has jurisdiction over appeals involving expedited nursing facility discharges per 130 CMR 610.032. Per 130 CMR 610.015(B)(4) and 130 CMR 610.030, the nursing facility must stay the planned discharge and not proceed prior to five days after the date of the hearing decision.

Action Taken by Nursing Facility

Oxford issued an expedited discharge notice to the Appellant.

Issue

Does the discharge notice and medical record comply with all legal requirements to support the proposed discharge action and, if so, should the Appellant be discharged?

Summary of Evidence

Appellant is a [REDACTED] male individual who was admitted to Oxford on [REDACTED] after spending time at the Brigham & Women's Hospital since [REDACTED] related to an orthopedic issue involving a prosthetic and/or complications involving the right hip area. Appellant had a right leg infection at that time and a staph infection. Prior to his hospital admission, Appellant was a homeless individual. Oxford is a skilled nursing facility licensed by the state's Department of Public Health with 129 beds, all of which are dual certified for both Medicare and MassHealth.

Appellant appeared by phone on his behalf at hearing as did the Director of Nursing and Director of Social Services at the facility.

Appellant's diagnoses at admission primarily included pain in the right hip area, as he had both of his hips replaced approximately two years ago, but the right side has always been more problematic since then with infection issues. Appellant also has a history of substance abuse. See Exhibit 3, pages 5-12. Oxford has a SUDS program for treating patients and residents with substance abuse problems. Appellant was admitted with a plan to have physical therapy and occupational therapy while at the facility and to also leave daily to receive regular methadone treatments. Appellant was "discharged" and completed from his physical therapy services at the facility on October 30, 2021 and his occupational therapy services were similarly finished on December 7, 2021. See Exhibit 3, pages 13-17. Appellant is on MassHealth had a clinical screening approving him for short-term admission status which was set to expire on May 13, 2022. See Exhibit 3, page 5. Appellant uses a wheelchair to assist with mobility while at the Oxford.

Oxford testified that the events of December 9, 2021 are what led to the discharge notice. On the morning of that day, Appellant was found in the elevator in a slumped state and was thought to be under the influence. He did not respond appropriately to questions or commands. The Appellant then went to a conference room where he met with a nurse, the Director of Nursing (Mr. Baker), and the facility's "SUD" (Substance Use) counselor. At that time Appellant admitted that he had received 30 pills of klonopin¹ from a friend who had come to visit him. At no time during his nursing facility admission at the Oxford had Appellant ever been prescribed klonopin, which is a prescription drug. During the meeting, Oxford testified and the progress notes in Exhibit 3 consistently reflect that Appellant admitted to giving the drug to at least one specific resident. Oxford also, in investigating and talking to other residents of the facility, indicated that there were other residents who had been offered the drug by the Appellant. A December 21, 2021 letter from Dr. Elmi of the nursing facility contained this summary and indicated that the doctor believed the Appellant had reached his full potential with skilled services at the Oxford due to the completion of

¹ Klonopin was described at hearing as a drug that is typically classified as a benzodiazepine. Such drugs are commonly used for treating anxiety, as well as other conditions such as seizures or insomnia.

physical and occupational therapy. See Exhibit 3, page 29. Both the doctor's letter and the testimony from the Director of Nursing indicated that Appellant's behavior of attempt to disburse or share prescription medications (narcotics) and was believed to be dangerous to other residents, particularly those who were trying to keep their sobriety and were in the nursing facility's substance abuse program.

The Oxford representatives stated that, at the shelter where Appellant's proposed discharge would be, the Appellant could make arrangements and receive visiting nurse services if needed, but the Director of Nursing believed the Appellant may not medically qualify for such a need at the present time. Exhibit 3 contains other notes on discharge planning during the resident's stay, including a comment on October 12, 2021 that Appellant was planning on discharging to a friend's home when was able to do so safely. Also, on October 22, 2021 the Appellant discussed discharge with facility representatives stating that he had a plan, saying "I am taking care off it. Don't worry about it. You don't need to know." Appellant later said on that date that he was looking to set up a surgery for his hip at the hospital and that he may be discharged or transferred there. Appellant provided testimony at hearing how he had a medical appointment set for later during the hearing day with which he hoped to discuss with his surgeon the next step and possible dates for his hip surgery.

At one point in the Fair Hearing, Appellant testified that he had tried or wanted to withdraw those statements where he admitted the use of the drug. Later on, during the Fair Hearing, the Appellant denied ever making the statements about using the drug in the first place during the December 9, 2021 conference with the three individuals from Oxford. Appellant testified that if he was drowsy or confused on December 9, 2021, it may have been related to changes in medications, or just being on a different set of medications at that time.

Findings of Fact

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

1. Through a notice titled "Notice of Intent to Discharge Resident with Less than 30 Days' Notice (Expedited Appeal)" dated December 9, 2021, the Oxford informed Appellant that Oxford sought to discharge him to a shelter at 127 How Street in Haverhill, Mass. on December 23, 2021 because "the safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status". (Exhibit 1)
2. Appellant timely appealed this expedited discharge notice to the Board of Hearings. (Exhibit 1)
3. Prior to his hospitalization and nursing facility admission in the late summer and early fall of 2021, Appellant was a homeless individual. (Testimony and Exhibit 3)
4. Appellant was admitted to Oxford after a hospitalization with the primary plan and need of receiving physical and occupational therapy services on his right hip. (Testimony and Exhibit 3)

5. Appellant completed his course of physical therapy in October of 2021 and his course of occupational therapy on December 7, 2021. (Testimony and Exhibit 3)
6. On the morning of December 9, 2021, Appellant was found in a dazed condition in the elevator and a conference was soon after held between Appellant, the Director of Nursing, a nurse, and the SUDS personnel from the facility. (Testimony and Exhibit 3)
7. During the conference, Appellant admitted having received klonopin from a friend outside the facility and from offering it to at least one other resident. (Testimony and exhibit 3)
 - a. Appellant was not prescribed klonopin at any time by the facility during his stay at Oxford. (Testimony and Exhibit 3)
 - b. The facility's investigation that day revealed that other nursing facility residents stated that they had been offered medication from the Appellant. (Testimony)
8. On December 21, 2021 Dr. Elmi of Oxford wrote a letter stating Appellant had reached his full potential with skilled services at the Oxford due to the completion of physical and occupational therapy and that Appellant's continued presence at the facility would represent a danger to other residents. (Testimony and Exhibit 3)

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. In this Commonwealth, the MassHealth agency 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.

For the purposes of this decision, the definitions found in 130 CMR 456.002 apply²:

"Nursing facility" – a Medicare skilled nursing facility or Medicaid nursing facility licensed by the Department of Public Health to operate in Massachusetts, or a distinct Medicaid- or Medicare-certified unit within a facility.

"Discharge" – the removal from a nursing facility to a noninstitutional setting of an individual who

² The regulatory language in the MassHealth Nursing Facility Manual at 130 CMR 456 has regulations which are identical (or near identical and substantively equivalent) to counterpart regulations be found within the Commonwealth's Fair Hearing Rules at 130 CMR 610.000 as well as corresponding federal government regulations. As an example, the regulations in 130 CMR 610.028 and 42 CFR 483.12(a)(2) are identical to that found in 130 CMR 456.402. Because there is identical or near-identical regulatory language, the remainder of this decision will hereafter only contain cites to the MassHealth Nursing Facility Manual regulations in 130 CMR 456 unless otherwise noted.

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.

Based on the above information, Oxford is attempting to discharge Appellant to a community setting via the appealable notice in question. See Exhibit 1 and 130 CMR 456.002.

Some regulatory guidelines that speak to whether and how the Appellant can be so discharged are found in 130 CMR 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 as well as the specific and strict requirements of the relevant notice and supplementary paperwork. If these requirements are not satisfied, the facility must permit the resident to remain in the facility. 130 CMR 456.701 through 130 CMR 456.704 read in relevant part as follows:

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 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. 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.*

456.702: Time Frames for Notices Issued by Nursing Facilities

(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. ...*

456.703: Time Frames for Submission of Requests for Fair Hearings

(A) Appeals of discharges and transfers will be handled by the Division's Board of Hearings (BOH).

(B) Time Limitation on the Right of Appeal. The date of request for a fair hearing is the date on which BOH receives such a request in writing. BOH must receive the request for a fair hearing within the following time limits:

(1) 30 days after a resident receives written notice of a discharge or transfer pursuant to 130 CMR 456.702(A); or

(2) 14 days after a resident receives written notice of an emergency discharge or emergency transfer pursuant to 130 CMR 456.702(B);...

456.704: Stay of a Transfer or Discharge from a Nursing Facility Pending 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...**

(Bolded emphasis added.)

In addition to the MassHealth-related regulations discussed above, the nursing facility also has an obligation to comply with all other applicable state laws, including M.G.L. c.111, §70E. One key paragraph of that statute, which is highly relevant to these types of appeals, 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.***

(Bolded emphasis added.)

With the above laws in mind, I come to the following conclusions:

I find the nursing facility's statement of the events of December 9, 2021 to more credible than that of the Appellant. In support of such finding, it is noted that the nursing facility has contemporaneous progress notes drafted that date detailing the incident and Appellant's admission. At the Fair Hearing, Appellant also made slightly conflicting statements as to whether he ever made the admission of using klonopin that day. Regardless of whether or not he was offered it from other people, using a drug like klonopin without proper prescription is unsafe behavior alone. The contention that Appellant also offered it to multiple other residents of the nursing facility, including the many who may have been there for treatment related to their own respective substance abuse problems, further supports a finding that Appellant was creating an unsafe situation. To believe Appellant's story that he eventually settled on at hearing – that he never admitted to having

klonopin to the facility in the first place - would require the factfinder to find that the nursing facility not only created multiple pieces of untrue medical record paperwork, but that the facility was also willing to go so far as to falsely identify a patient who had received the drug in support of its allegation. See Exhibit 3, page 25. Based on the totality of the record and the presentation of testimony, I find the preponderance of evidence shows that Appellant engaged in unsafe behavior and that the safety risk associated with such behavior could adversely affect the safety or health of others in the facility. There are sufficient grounds to discharge under 130 CMR 456.702(B).

Furthermore, the record submitted by the nursing facility is sufficiently documented, especially with the letter from the physician of the facility which not only summarizes the completion of therapy treatment, but which also comments directly on the safety risk to others. There is thus sufficient compliance with 130 CMR 450.701(B)(2) and the notice of discharge also looks proper and compliant with the other regulatory requirements. See 130 CMR 456.701.

Lastly, there is evidence of discharge planning in Exhibit 3, and the testimony and record show no evidence indicating that it would be clinically inappropriate to discharge Appellant to a shelter. There is thus compliance with M.G.L. c.111, §70E.

For these reasons I conclude that the discharge action by Oxford is proper and supported by the record, and that Appellant's appeal must be DENIED.

Order for Nursing Facility

Oxford may proceed with preparing and arranging for the discharge of Appellant to the shelter identified in the December 9, 2021 discharge notice. Per 130 CMR 456.704(B), no such discharge may take place any earlier than 5 days from the date of this decision unless the Appellant consents to an earlier time frame.

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.

Christopher Taffe
Hearing Officer
Board of Hearings

cc: Robert Baker
Director of Nursing Services
Oxford Rehabilitation and Health Care Center
689 Main Street
Haverhill, MA 01830