

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2202418
Decision Date:	5/2/22	Hearing Date:	04/25/2022
Hearing Officer:	Paul C. Moore		

Appellant Representative:

Pro se, by telephone

Nursing Facility Representatives:

Mark Nugent, administrator; Samantha White, director of social services; Susanne Braid, R.N., director of nursing (all from The Oxford Rehabilitation and Nursing Care Center, and all 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:	Denied	Issue:	Expedited Nursing Facility Discharge
Decision Date:	5/2/22	Hearing Date:	04/25/2022
Nursing Facility Reprs.:	Administrator et al.	Appellant Rep.:	Pro se
Hearing Location:	Board of Hearings (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 March 17, 2022 (“expedited discharge notice”), The Oxford Rehabilitation and Nursing Care Center (“The Oxford” or “the facility”) notified the appellant that it sought to discharge him effective March 31, 2022 [REDACTED] because “[his] health has improved sufficiently so that [he] no longer require[s] the services provided by the facility” and “the safety of the individuals in the nursing facility is endangered due to [the appellant’s] 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 March 20, 2022 (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 he no longer requires the services provided by the facility, and 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 on an expedited basis; (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, plan of care, social service progress notes, physical therapy plan of treatment, and order summary report, which the hearing officer marked collectively as Exhibit 4. The facility's director of nursing, Ms. Braid, testified by telephone that the facility issued an expedited notice of discharge to the appellant on March 17, 2022 due to concerns about his emotional outbursts, aggressive and violent behavior (including throwing objects), and threats to facility staff. Ms. Braid stated that there have been multiple such incidents, including two in which the facility called the police, and another in which the facility called a "code orange" at the facility.¹ The social services director documented in the record that on one occasion, February 22, 2022, a certified nursing assistant (CNA) became fearful of the appellant when he threatened to throw a cup of coffee at the CNA, reportedly after she refused to heat up the coffee in a microwave because the coffee was in a Styrofoam cup (Exh. 4, p. 17). On another occasion, March 16, 2022, when the appellant was informed that he was being relocated to a different room at the facility, he allegedly threw puzzle pieces on the corridor floor, and was observed banging his cane on a bedroom wall (*Id.*, p. 23). On a third occasion, March 22, 2022, the facility documented that the police were called when the appellant had a verbal altercation with another resident when waiting to be let outside for a smoking break (*Id.*, p. 13). The social worker who documented this incident also indicated that subsequently "[the appellant] was able to de-escalate and engaged. . . in a calm fashion" (*Id.*).

A nursing progress note dated December 29, 2021 states in relevant part:

[The appellant] yelling at resident in 112C because this resident was in the middle of the hallway and did not move quick enough. Also [the appellant] seemed agitated today complaining about resident 104A family using the bathroom and being near his room. .

..

(Exh. 4, p. 22)

Ms. Braid testified that the appellant, who is [REDACTED] [REDACTED] years old, was admitted to the facility

¹ Ms. Braid explained that a "code orange" is called when a resident becomes violent.

in [REDACTED] from an acute care hospital, where he had been treated for arthritis and joint pain. His medical diagnoses include arthritis due to a bacterial infection in his right shoulder, unspecified joint pain, opioid dependence, major depressive disorder, generalized anxiety disorder, essential hypertension, muscle weakness, and difficulty in walking (Exh. 4, pp. 9-10). Following each of the appellant's anger outbursts, an in-house counselor and outside psychotherapist have both met with the appellant to provide support and redirection, according to Ms. Braid (Testimony).

The appellant was receiving physical therapy and occupational therapy at the facility, but he has met his goals in both areas.² He ambulates using a cane or walker. He is independent with his activities of daily living (ADLs), according to Ms. Braid. MassHealth has been paying for the appellant's stay at the facility (Testimony).

The discharge location designated on the notice of discharge is a homeless shelter in [REDACTED]. According to the facility social worker, Ms. White, the appellant would also consider moving to a sober living facility in the area, and she has assisted him to get his name on waitlists at such facilities (Testimony).

The appellant testified that he did not throw a puzzle at anyone, and simply dropped it out of frustration when he was relocated to a different room. He acknowledged that he told a facility nurse she "sucked" when she deferred his request for Tramadol.³ He stated that he needs surgical replacement of both hips. He asserted that he can only walk thirty feet with his cane or walker, and cannot cook his own meals. He had bacterial infections in both hips. He has not used opiates for eleven years (Testimony).

He acknowledged that he is loud at times, but he denied ever threatening other residents. Mr. Nugent, the facility administrator, testified that one of the appellant's roommates confided that he was afraid of the appellant. Since his admission to the facility, the appellant has been relocated to three different rooms, for various reasons (Testimony).

At the time he was hospitalized in 2021, he lived in an apartment in [REDACTED]. He no longer has that apartment. With regard to his anger outbursts, he stated that "cannot stop being who [he is]," but he does discuss his anger with his substance abuse counselor. He also attends 12-step meetings held at the facility (Testimony).

He would prefer to live in a sober living house instead of going to a homeless shelter. He does not believe he will be able to care for himself at a homeless shelter, because he has difficulty navigating stairs, among other reasons. He does not currently have family members that he can stay with (Testimony).

He can identify his prescribed medications, which are Tramadol, Motrin, Zoloft and Trazodone (the

² No physical therapy discharge summary is contained in the portion of the medical record submitted by the facility. The patient record reflects that the appellant completed occupational therapy on February 7, 2022 (Exh. 4).

³ This incident is documented in a social service progress note dated November 19, 2021 (Exh. 4, p. 21).

latter as needed). He agreed that he can shower and dress independently (Testimony).

B. Content of the expedited 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 rendered), 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 (Exhs. 1 & 2).

The patient record submitted into evidence (Exhibit 4) contains a statement of the reasons for the appellant's intended expedited discharge, written by Dr. Elmi, the facility's medical director, which states in relevant part:

[The appellant] got admitted to [The Oxford] on [REDACTED] from MetroWest Hospital due to arthritis and joint pain. [The appellant] ambulates around the facility using his cane. [The appellant] is independent with all his [ADLs].

On over five occasions, [the appellant] has had verbal and physical outburst (*sic*) which have caused other residents and staff to be in fear for their safety. [The appellant] has held his cane in the air in an aggressive manor (*sic*). [The appellant] has thrown objects in anger during his stay at The Oxford.

In my professional opinion, [the appellant] is putting other residents and staff at risk at The Oxford. In my professional opinion, there is no medical need for [the appellant] to remain a resident at The Oxford. [The appellant] is capable and safe to discharge to the community.

(Exh. 4, p. 11)

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 November, 2021 (Testimony, Exh. 4).
2. His medical diagnoses include arthritis due to a bacterial infection in his right shoulder,

unspecified joint pain, opioid dependence, major depressive disorder, generalized anxiety disorder, essential hypertension, muscle weakness, and difficulty in walking (Exh. 4, pp. 9-10).

3. Through an expedited discharge notice issued March 17, 2022, the Oxford notified the appellant that it sought to discharge him effective [REDACTED] [REDACTED] because “[his] health has improved sufficiently so that [he] no longer require[s] the services provided by the facility” and “the safety of the individuals in the nursing facility is endangered due to [the appellant’s] clinical or behavioral status” (Exhibit 1).
4. The appellant filed a timely appeal of this notice with the BOH on March 30, 2022 (Exh. 2).
5. The facility has concerns about the appellant’s emotional outbursts, aggressive and violent behavior (including throwing objects), and threats to facility staff (Testimony, Exh. 4).
6. The facility social services director documented in the record that on one occasion, February 22, 2022, a CNA became fearful of the appellant when he threatened to throw a cup of coffee at the CNA, reportedly after she refused to heat up the coffee in a microwave because the coffee was in a Styrofoam cup (Exh. 4, p. 17).
7. On another occasion, March 16, 2022, when the appellant was informed that he was being relocated to a different room at the facility, he allegedly threw puzzle pieces on the corridor floor, and was observed banging his cane on a bedroom wall (*Id.*, p. 23).
8. On a third occasion, March 22, 2022, the facility documented that the police were called when the appellant had a verbal altercation with another resident when waiting to be let outside for a smoking break (*Id.*, p. 13).
9. A nursing progress note dated December 29, 2021 states in relevant part: “[The appellant] yelling at resident in 112C because this resident was in the middle of the hallway and did not move quick enough. Also [the appellant] seemed agitated today complaining about resident 104A family using the bathroom and being near his room. . . .” (Exh. 4, p. 22).
10. The appellant told a facility nurse she “sucked” when she deferred his request for Tramadol (Exh. 4, p. 21).
11. Since his admission to the facility, the appellant has been relocated to three different rooms, for various reasons (Testimony).
12. One of the appellant’s roommates at the nursing facility complained that he was afraid of the appellant (Testimony).
13. Following each of the appellant’s anger outbursts, an in-house counselor and outside

psychotherapist have both met with the appellant to provide support and redirection (Testimony).

14. The appellant is independent with his ADLs (Testimony).
15. The appellant uses a cane or walker to ambulate (Testimony).
16. The appellant was receiving physical therapy and occupational therapy at the facility, but he has met his goals in both areas (Testimony, Exh. 4).
17. The discharge location designated on the notice of discharge is a homeless shelter in [REDACTED] (Testimony).
18. The appellant does not believe he will be able to care for himself properly at a homeless shelter, because he has difficulty navigating stairs, among other reasons (Testimony).
19. The appellant would prefer to move to a sober living home, and is on waitlists for such housing (Testimony).
20. The appellant can identify his prescribed medications, which are Tramadol, Motrin, Zolofl and Trazodone (the latter as needed) (Testimony).
21. 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 rendered), 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 (Exhs. 1 & 2).
22. The appellant's patient record contains a statement of the reasons for the appellant's intended expedited discharge, written by Dr. Elmi, the facility's medical director, which states in relevant part: "[The appellant] got admitted to [The Oxford] on November 8, 2021 from MetroWest Hospital due to arthritis and joint pain. [The appellant] ambulates around the facility using his cane. [The appellant] is independent with all his [ADLs]. On over five occasions, [the appellant] has had verbal and physical outburst (*sic*) which have caused other residents and staff to be in fear for their safety. [The appellant] has held his cane in the air in an aggressive manor (*sic*). [The appellant] has thrown objects in anger during his stay at The Oxford. In my professional opinion, [the appellant] is putting other

residents and staff at risk at The Oxford. In my professional opinion, there is no medical need for [the appellant] to remain a resident at The Oxford. [The appellant] is capable and safe to discharge to the community” (Exh. 4, p. 11).

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; this includes a nursing facility’s failure to readmit following hospitalization or other medical leave of absence.” Similarly, 130 CMR 610.004 defines 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 sufficient grounds to discharge the appellant. The appellant's health has improved to the extent that he is independent with his ADLs, and he has completed physical therapy and occupational therapy. The appellant still uses an assistive device (a cane) to walk, but he no longer requires skilled nursing facility services.

The second grounds for the appellant's discharge, that the safety of the individuals in the nursing facility is endangered due to the appellant's clinical or behavioral status, is also supported by evidence in the record. Multiple progress notes reflect that the appellant has openly exhibited anger and made threats to facility staff, and has clashed with other residents. At least one resident expressed his fear of the appellant to the facility administrator, and police have been called to the facility on at least two occasions after outbursts by the appellant. Such behavior does not contribute to the type of therapeutic environment that should be present in a nursing facility.

I also find that the discharge notice issued by the facility to the appellant meets the regulatory requirements set forth at 130 CMR 456.701(C) and 130 CMR 456.702(B).

In addition, the appellant's patient record is documented by the facility's physician as to the reasons for the appellant's intended expedited discharge, as required at 130 CMR 456.702(B)(1) and (2).

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)

Based on the evidence in the record, I find that the facility has sufficiently prepared the appellant for his possible discharge to a homeless shelter, and has also assisted him to get on waitlists to move into sober living homes when space is available.

For all of these reasons, the appeal is DENIED.

Order for Nursing Facility

Proceed with the appellant's discharge, but no earlier than five (5) days from the date 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.

Implementation of this Decision

If you experience problems with the implementation of this decision, you should report this in writing to the Acting Director of the Board of Hearings at the address on the first page of this decision.

Paul C. Moore
Hearing Officer
Board of Hearings

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