

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2207126
<b>Decision Date:</b>	10/4/2022	<b>Hearing Date:</b>	09/30/2022
<b>Hearing Officer:</b>	Casey Groff, Esq.		

**Appearance for Appellant:**  
*Pro se*

**Appearance for Nursing Facility:**  
Mark Nugent, Administrator, The Oxford  
Rehabilitation & Health Care Center  
Samantha White, LSW, The Oxford,  
Rehabilitation & Health Care Center



*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>	Expedited Nursing Home Discharge
<b>Decision Date:</b>	10/4/2022	<b>Hearing Date:</b>	09/30/2022
<b>Nursing Facility's Rep.:</b>	Mark Nugent; Samantha White	<b>Appellant's Rep.:</b>	<i>Pro se</i>
<b>Hearing Location:</b>	Board of Hearings (Remote)		

## Authority

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

## Jurisdiction

Through an Expedited Nursing Facility Discharge Notice dated September 22, 2022, The Oxford Rehabilitation & Health Care Center ("the nursing facility") informed Appellant that it sought to discharge her from the facility to a homeless shelter. See Exhibit 1; 130 CMR 610.029(B). Appellant filed a timely appeal on September 23, 2022. See Exhibit 1; 130 CMR 610.015(B)(4). An attempt to discharge a nursing facility resident is valid grounds for appeal. See 130 CMR 610.032(C).

## Action Taken by Nursing Facility

The nursing facility sought to discharge Appellant in fewer than 30 days because it determined that the safety of the individuals in the nursing facility is endangered due to Appellant's clinical or behavioral status.

## Issue

The appeal issues are whether the nursing facility properly notified Appellant that she would be discharged, pursuant to 130 CMR 456.701 and 130 CMR 610.028, and whether the intended discharge location is a safe and appropriate place for Appellant pursuant to M.G.L. Ch. 111, § 70E.

## Summary of Evidence

At the hearing, the Nursing Facility was represented by its administrator and social worker. Based on testimony and documentary evidence submitted into the record, the nursing facility provided the following information:

Admission records indicate Appellant, a MassHealth member under the age of 65, was admitted to The Oxford Rehabilitation & Health Care Center (“the nursing facility”) from an acute care hospital with a primary diagnosis of interstitial pulmonary lung disease. See Exh. 3, p. 11. Additional diagnoses include chronic respiratory failure with hypoxia, chronic obstructive pulmonary disease (COPD), pulmonary hypertension, post-traumatic stress disorder, opioid use disorder, anxiety, depression, chronic pain, and dysphasia. Id. at 9, 12, 15.

According to the administrator, Appellant was transferred to the facility approximately five months ago, following a long hospitalization. The purpose of the admission was primarily to receive occupational therapy (OT) and physical therapy (PT) for strength training. Appellant has not attended these therapies since July, she ambulates freely around the facility with a cane, and does not require any skilled need. According to documentation submitted by the facility, Appellant was discharged from PT on or around June 23, 2022 based on the reason that she achieved the highest practical level. Id. at 11. Additionally, records show that Appellant was discharged from OT services on or around June 1, 2022 due to being “non-compliant with plan of treatment.”<sup>1</sup> Id. at 13. Despite her non-compliance, the occupational therapist reported that Appellant had a good prognosis with consistent staff follow-through and was independent or moderately independent with most activities of daily living (ADLs). Id. at 14.

The Administrator explained that it seeks to discharge Appellant primarily because of the safety risk she poses to the other residents of the facility. Appellant has a history of opioid dependence and goes to a methadone clinic daily. She repeatedly engages in suspicious behaviors, which have been observed both within the facility and in and around the methadone clinic. Based on the suspicious activity, the facility has conducted several rooms searches, pursuant to protocol, from which they found contraband in Appellant’s possession. The administrator testified that the facility has a high number of residents with a history of addiction and that participate in substance abuse programs. Maintaining the safety of those resident’s in recovery is extremely important.

Referring to the facility record, the Administrator explained that on July 28, 2022, the facility had security search Appellant’s room after it received a report of suspected contraband possession. During that search, the facility found Appellant to be in possession of a vape and cigarette, which are in violation of the facility’s smoking policy. See id. at 37. Pursuant to the room search, the facility presented Appellant with a final warning notice on July 29, 2022, advising her that she created an unsafe environment by failing to comply with facility smoking policy, and as such, she would be discharged in the event of a subsequent infraction. Id. at 8, 35-36.

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<sup>1</sup> The report indicated that Appellant refused to participate in OT services, was non-compliant with plan of care, and refused to be assessed for shower level ADLs, stating she has been completing showers on her own and stating that she just wants PT services.” Id. at 14.

The clinical record further showed that following the final warning notice, Appellant continued to exhibit episodes of inappropriate behavior and suspected medication diversion. See id. at 30-43. According to social service progress notes, examples of the suspicious behavior included intrusiveness with other residents care needs, being verbally abusive to residents and staff, lurking behavior around the nurses station, hoarding affects belonging to the facility, making hurtful comments to other residents, and receiving in-room visits from other residents who were unwilling and/or unable to explain the nature of said visits. Id. at 31-40. Progress notes also referred to Appellant's resistance to care, including refusing to wear her oxygen, cancelling medical appointments, and non-compliance with her plan of care. Id. In response to these behaviors, the facility sought to implement interventions including increased security presence around her room along with increased observation by staff. Id. at 33.

On or around September 14, 2022, social services received an allegation that Appellant appeared to be receiving contraband at the methadone clinic parking lot. Id. at 29. Based on the reported information, the facility obtained an order to search Appellant's room. No contraband was found during the search; however, Appellant was in possession of alcohol prep pads which were returned to nursing. Id. at 28.

On September 21, 2022, another resident reported that Appellant appeared to be receiving contraband while at the methadone clinic. Id. at 24-27. When confronted, Appellant responded that "it was only a phone number." Id. Pursuant to the complaint, security searched Appellant's room and found numerous items appearing to be drug paraphernalia, including a large black funnel with white powder residue, six unused inhalers, a cigarette, lighter, rolling papers, a butter knife, a large metal refillable vaporizer, 24 nicatrol inhaler cartridges, and a nicotrol vape. Id.

On September 22, 2022, the facility social worker and administrator met with Appellant and presented her with a 14-day expedited discharge notice. Id. at 24-26. The notice, which is titled "Notice of Intent to Discharge With Less Than 30 days' Notice" informed Appellant that she would be discharged to a specified address on October 6, 2022 because "the safety of individuals in the nursing facility is endangered due to your clinical or behavioral status." Exh 1, p. 3. At hearing, the facility explained that the discharge address specified in the notice is a nearby homeless shelter known to the facility. When asked if any arrangements had been made, the social worker explained that availability in the shelter is based on the daily occupancy, and as such, she would call the morning of the planned discharge to ensure there is a bed for Appellant. The administrator explained that if Appellant had a family member or friend whom she preferred to stay with, the facility would discharge her to a different location at her choosing.

Finally, the facility submitted a letter dated September 30, 2022 signed by Shiao-Ang Shih, M.D., Medical Director of the nursing facility. In the letter, Dr. Shih opined that Appellant does not have a medical need to remain a resident in the facility, noting that she had been discharged from PT and OT after meeting her goals, is medically stable, is independent with all ADLs, and is capable of being discharged to the community. Further, the physician acknowledged that Appellant had been found in possession of contraband on several occasions and "is putting herself and everyone in the nursing facility at risk." See Exh. 4, p. 2.

Appellant appeared at the hearing, via telephone, and testified that she cannot be discharged from the nursing facility. She explained that she is homeless and has nowhere to go. She does not have any family or friends she can stay with. Due to her COPD, she needs to have oxygen 24/7 and needs to go to a place

where she could be able to use her oxygen. Appellant testified that she has not fully recovered, she still needs rehabilitation, and cannot walk far without her oxygen. She has upcoming medical appointments and new medications that she will not be able to navigate if discharged.

With respect to the items found, Appellant explained that the items had been in her backpack since she came to the facility. The facility never conducted an initial search of her property when she arrived and never checked the contents of her bag. Although she admittedly had the items in her backpack, such as a cigarette lighter, she did not receive them during her admission. Appellant denied that the “white residue” in the funnel was drug related. Rather, she argued, it was from little creamers she used to pour into the funnel for drinking purposes.

In response, the facility administrator explained that there is no reason why Appellant cannot be discharged to the community, which is indicated by the physician letter. In addition, because she is a MassHealth member, the facility can set her up with support services, including home care, delivering medications and oxygen, and setting up transportation for medical appointments. Although the facility provides substance abuse treatment, it is provided as a secondary treatment to a resident’s more pressing medical issues that require a skilled need. Here, Appellant has no skilled need to stay at the facility and her behavior is jeopardizing the other residents in their recovery efforts.

## **Findings of Fact**

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

1. Appellant, a MassHealth member under the age of 65, was admitted to the nursing facility from an acute care hospital with a primary diagnosis of interstitial pulmonary lung disease.
2. Additional diagnoses include chronic respiratory failure with hypoxia, COPD, pulmonary hypertension, post-traumatic stress disorder, opioid use disorder, anxiety, depression, chronic pain, and dysphasia.
3. Appellant was transferred to the facility approximately five months ago, following a long hospitalization to receive rehabilitation in the form of OT and PT to regain her strength.
4. Appellant was discharged from PT on or around June 23, 2022 based on the reason that she achieved the highest practical level.
5. Appellant was discharged from OT services on or around June 1, 2022 due to being “non-compliant with plan of treatment” and at that time, the occupational therapist found that Appellant had a good prognosis with consistent staff follow-through and was independent or moderately independent with her ADLs.
6. Appellant ambulates freely around the facility with a cane and does not require any skilled nursing need.
7. Appellant has a history of opioid dependence and goes to a methadone clinic daily.
8. On numerous occasions, Appellant has been observed to engage in suspicious activity at the methadone clinic, indicative of drug diversion and/or receiving contraband.

9. On July 28, 2022, after receiving a complaint of suspicious activity, the facility found Appellant to be in possession of a vape and cigarette, which are in violation of the facility's smoking policy.
10. Pursuant to the room search, the facility issued Appellant with a final warning notice on July 29, 2022, advising her that she created an unsafe environment by failing to comply with facility smoking policy, and as such, she would be discharged in the event of another infraction.
11. On September 21, 2022, after receiving another complaint, security at the facility searched Appellant's room and found numerous items appearing to be drug paraphernalia, including a large black funnel with white powder residue, six unused inhalers, a cigarette, lighter, rolling papers, a butter knife, a large metal refillable vaporizer, 24 nicotrol inhaler cartridges, and a nicotrol vape.
12. On September 22, 2022, the facility social worker and administrator met with Appellant and presented her with a 14-day expedited discharge notice.
13. The notice informed Appellant that she would be discharged to a homeless shelter on October 6, 2022 because "the safety of individuals in the nursing facility is endangered due to your clinical or behavioral status."
14. Appellant requires oxygen due to her medical condition and this can be delivered to her in the community.
15. Appellant's clinical record includes a letter, dated 9/30/22, signed by the nursing facility medical doctor, which explains that Appellant's conduct poses a safety risk to other residents, and that she is capable of being discharged to 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 initiated by a nursing facility. MassHealth has enacted regulations that mirror the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in the Nursing Facility Manual regulations at 130 CMR 456.000 et seq. and in the Fair Hearing Rules at 130 CMR 610.000 et seq.

MassHealth regulations at 130 CMR 610.028 set forth the requirements that a nursing facility must meet to initiate a transfer or discharge, and provides in part as follows:

- (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.

See 130 CMR 610.028(A) (emphasis added); see also 130 CMR 456.701(A).

When the transfer or discharge is sought due to the circumstances specified in (3) above, as it is here, the resident's clinical record must contain documentation by a physician to explain the transfer or discharge. See 130 CMR 610.028(B); 130 CMR 456.701(B). The facility must also typically provide 30-days' notice, but it may give less than 30-days' notice where 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." 130 CMR 610.029(B)(1).

Furthermore, the nursing facility must demonstrate that it has complied with the requirements under M.G.L. c.111, §70E, which states the following:

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.***

Based on the applicable laws and regulations, Appellant failed to demonstrate that the facility inappropriately sought to discharge her through its September 22, 2022 discharge notice. The facility cited proper grounds for discharging a resident under 130 CMR 610.028(A)(3); specifically, that it considers Appellant's behavior to endanger the safety and health of other individuals in the nursing facility. The evidence indicates that on two occasions, Appellant was found to be in possession of contraband, including items that violated the facility's smoking policy and which were indicative of drug paraphernalia. Additionally, the facility documented Appellant's numerous behavioral issues, including verbally abusing staff and other residents, engaging in suspicious transactional activity while at the methadone clinic, and receiving visits from other resident's without explanation. Both the Administrator and facility physician opined that Appellant's behavior puts other residents - many of whom suffer from substance abuse problems themselves - at higher risk for relapse. See Exh. 4. The grounds for the intended discharge have been documented in Appellant's clinical record as required under 130 CMR §§ 610.028(B); 610.029(B)(1), above.

In addition, the facility demonstrated that it met the requirements of G.L. c.111, § 70E, above, by discharging Appellant to a nearby homeless shelter. The facility and its physician indicated that Appellant is independent with her ADLs, has met all goals to complete OT and PT services, and does not require a skilled level of care. As noted in the physician letter, Appellant does not have a medical need to remain a resident in the facility and "is capable and safe to discharge to the

community.” Exh. 4. While Appellant expressed concerns about the discharge location and her ability to get to medical appointments, such concerns may be adequately addressed with the support services available upon discharge. Ultimately, there is no evidence that the facility failed to ensure a safe and orderly discharge of Appellant to a safe and appropriate location. See G.L. c.111, § 70E

Based on the foregoing, the appeal is DENIED.

## **Order for Nursing Facility**

Continue with the discharge plan as stated in the 9/22/22 notice. Discharge Appellant no sooner than five days from the date of this decision pursuant to 130 CMR 610.030(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.

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Casey Groff, Esq.  
Hearing Officer  
Board of Hearings

cc:

Respondent: Mark Nugent, Administrator, The Oxford Rehabilitation & Health Care Center, 689 Main Street, Haverhill, MA 01830