

**STATE OF WASHINGTON
HEALTH CARE AUTHORITY
BOARD OF APPEALS**

In Re:)	Docket No. 09-2016-HCA-05234
)	
[APPELLANT])	ORDER ON STAY REQUEST
)	
Appellant)	Medical Assistance Transfer

I. NATURE OF ACTION, PROCEDURAL HISTORY, & RELEVANT FACTS

1. [FACILITY] [FACILITY] or Respondent) began proceedings to discharge [APPELLANT] (Appellant), a resident at [FACILITY]. The Appellant asked for a hearing to dispute this action.
2. Administrative Law Judge (ALJ) Jeffrey Manson of the Office of Administrative Hearings (OAH) in Seattle held a hearing. The Health Care Authority (HCA) Board of Appeals (BOA) has not yet received the hearing file from the OAH and thus the undersigned does not have many additional details about the hearing.
3. According to the Appellant, the OAH mailed an *Initial Order* to the parties on [DATE]. It appears that the ALJ may have ruled in favor of the Respondent, but with significant caveats.
4. On [DATE], the Appellant timely¹ filed a request for review with the HCA BOA.

Her request states:

[FACILITY] has not and is not providing me with a safe and orderly discharge. [FACILITY] has not provided a written discharge plan for me. They plan to discharge me prior to the 21 days I have to appeal this decision. The discharge is not safe.

Initial hearing decision was mailed on [DATE] and received on [DATE]. Paperwork indicated that I have 21 days from mail date to appeal.

On the morning of [DATE], [FACILITY] Admin., [NAME 1] and social worker, [NAME 2] came to my room while I was on the phone holding for the nurse at the neurosurgeon's office. While I was on hold I told [NAME 1] that I wanted the ombudsman, Anne, present for any meeting. He told me I was being served with

¹ Pursuant to WAC 182-526-0580, the HCA BOA must receive a written request for review or a request for extension of the filing deadline within 21 days following the date on which the *Initial Order* was issued.

an eviction notice. [NAME 2] said they were going to leave the paperwork. They left the papers on my bed. Paperwork was:

- 1) Hotel booking for 5 nights starting [DATE]. (see attachment 1)
- 2) Description and phone number for Everett Gospel Mission shelter for women and children. Address/phone for referral center. (see attachment 2)

No information regarding discharge care/plan was provided. I have MS and my condition fluctuates daily. A safe discharge is essential to my well being. I receive blood draws, therapy and lab work on an ongoing basis to manage my multiple medical issues.

My [FACILITY] primary physician, [NAME 3] communicates with my gastroenterology physician, [NAME 4] weekly to manage my care. [NAME 4] sent a letter to Judge Manson regarding his concerns about my discharge. (see attachment 3)

In the judge's conclusions of law, he noted that "...the Respondent is still legally required to ensure a safe and orderly discharge and could be held legally responsible for an unsafe discharge through separate legal action... Extreme care is strongly advised." He also noted "the Respondent still has a legal obligation to have a discharge plan developed under WAC 388-97-0080."

At this point the initial order is not final yet (WAC 388-02-0525 per ombuds) but [FACILITY] plans to discharge me in a manner that is not safe and orderly. I have no other discharge information other than hotel/shelter papers given to me on [DATE]. Nothing else. How can they discharge me within 24 hours with no additional information.

On [DATE], I am contacting my doctors, DSHS and also requesting legal assistance so additional information will be provided to supplement this petition for review of Initial Decision.

During this appeal process:

I want [FACILITY] to make finding senior housing for me a priority. It is their responsibility to provide me with a safe and orderly discharge. Their goal should still be finding me an independent living apartment with assistance from COPES as written on progress reports.

Attached to the Appellant's petition for review are three documents, including: (1) confirmation from Travelodge in Edmonds for a five-day stay beginning on [DATE]; (2) Information about the Everett Gospel Mission Shelter for Women and Children and the Noel House Referral Center; and (3) a letter, dated [DATE], from [NAME 5] to ALJ Manson about the Appellant's medical problems.

5. The HCA BOA considered the Appellant's petition for review as both an appeal

and a request for a stay of the Respondent's actions following issuance of the *Initial Order*.

6. Later on [DATE], the Appellant submitted an amended petition for review. It is identical to the first one, except that it also includes the following statement on the petition for review form in a handwritten box with three asterisks: "Amendment – I am requesting a stay of initial decision under the Board of Appeals makes their decision."

7. [FACILITY] has not yet responded to the Appellant's petition for review or request for a stay. However, the stay request is being processed in advance of a response given the time-sensitive nature of this matter.

II. CONCLUSIONS OF LAW

1. **General Authority.** The Appellant's petition for review of the *Initial Order* was timely filed and is otherwise proper.² The ALJ had jurisdiction to hear and decide the Appellant's challenge to the Respondent's action to transfer or discharge the Appellant.

Chapter 388-97 WAC implements RCW 70.129.110 and RCW 74.42.450.³ The authority to promulgate rules related to medical assistance transfers and discharges is granted to DSHS and, by extension, HCA in RCW 74.42.620 and RCW 41.05.021(1)(m)(iv).⁴ The authority to conduct hearings in these matters is granted in RCW 70.129.170, RCW 74.42.450(5)(b) and (6), and WAC 388-97-0140. Administrative hearings conducted pursuant to program laws and subsequent administrative review of the ALJs' *Initial Orders*, are subject to the statutes and regulations found at Chapter 34.05 RCW, Chapter 10-08 WAC, and Chapter 182-526 WAC.⁵ Authority exists for the Review Judge to consider a stay of the *Initial Order*.⁶

2. The HCA is now the designated single state agency for administering the Washington State Medicaid program,⁷ including nursing facility services and transfers or

² WAC 182-526-0560 through WAC 182-526-0580.

³ See also RCW 70.129.005 and RCW 70.129.110.

⁴ See also RCW 74.09.010 note; RCW 74.09.520(1)(d) (defining the term "medical assistance" to include "nursing facility services") and RCW 74.09.530(1)(a).

⁵ See also 74.09.741(6) and (10).

⁶ RCW 34.05.467

⁷ RCW 74.09.530(1)(a). See also 42 USC § 1396a(a)(5); 42 CFR § 431.10; RCW 41.05.021(1)(m)(iv); and RCW

discharges.⁸ The federal Centers for Medicare and Medicaid Services generally mandate that HCA, as the single state Medicaid agency, retain final decision-making authority over all Medicaid matters.⁹ The HCA may collaborate with other state agencies and other entities to carry out its duties.¹⁰ The undersigned was designated by Dorothy F. Teeter, HCA Director, to enter the final administrative order in this matter.

3. It is well settled that an ALJ's or a Review Judge's authority to render a decision in an administrative hearing is limited to that which is specifically provided for in the authorizing statute(s) or Washington Administrative Code (WAC) provision(s).¹¹ "The power of an administrative tribunal to fashion a remedy is strictly limited by statute."¹²

4. WAC 182-526-0310 allows a stay of an *Initial Order* to be granted in the discretion of the Review Judge. However, no standard of review is articulated in this WAC provision. Washington's Rules of Appellate Procedure do set out a standard at RAP 8.1(b)(3). The judicial officer is directed to consider whether the party seeking a stay has a debatable issue on the merits of the appeal. The judicial officer must then compare the injury that would be

74.09.010 note (stating

Agency transfer -- 2011 1st sp.s. c 15: "(1) All powers, duties, and functions of the department of social and health services pertaining to the medical assistance program and the medicaid purchasing administration are transferred to the health care authority to the extent necessary to carry out the purposes of this act. All references to the secretary or the department of social and health services in the Revised Code of Washington shall be construed to mean the director or the health care authority when referring to the functions transferred in this section....

(4) All rules and all pending business before the department of social and health services pertaining to the powers, functions, and duties transferred shall be continued and acted upon by the health care authority...").

⁸ See RCW 74.09.520(1)(d). See also WAC 388-97-0140 (stating the requirements a facility must fulfill when transferring or discharging "...*any* resident, *regardless of payor status*...") and directing that all appeals of such matters be conducted under Chapter 388-526 WAC or Chapter 182-526 WAC, both of which refer to HCA administrative hearing procedural rules).

⁹ 42 C.F.R. § 431.10 and the Washington Medicaid State Plan at <http://www.hca.wa.gov/medicaid/medicaidsp/Pages/index.aspx>.

¹⁰ RCW 74.09.080(1) and RCW 74.09.530(1)(d). See also RCW 41.05.021(m)(iii) (authorizing the HCA Director to enter into agreements with DSHS for administration of the Title XIX (Medicaid) and Title XXI (CHIP) medical programs); RCW 43.20A.865 (directing the DSHS Secretary to enter into agreements with the HCA Director to administer and divide responsibilities related to the Medicaid program); and RCW 74.09.741(4) and (5) (giving an applicant or recipient the option of filing a hearing request with either the Department or HCA, and describing an appellant's right to a consolidated adjudicative proceeding when more than one agency has rendered a decision).

¹¹ *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998), and *Taylor v. Morris*, 88 Wn.2d 586, 588 (1977). See also WAC 182-526-0216.

¹² *Id.* at 558.

suffered by the moving party if the stay is not granted against the injury to the non-moving party if the stay is granted. It is undisputed that the moving party has a debatable issue in this case.

5. There are potential harms to the moving party if the stay is not granted. According to the Appellant, no planning has taken place to provide proper orientation and ensure the Appellant's safe and orderly discharge.¹³

6. There may also be potential harms to the non-moving party if the stay is granted. The Appellant will continue to incur costs owed to the Respondent as long as she remains at [FACILITY].

7. When balancing the potential harms to each party, the undersigned must conclude that the Appellant's interest in maintaining her current residence and level of care outweigh the Respondent's pecuniary interests at this time.¹⁴ As such, the Appellant's request to stay the *Initial Order* is granted.

8. Independent of or in addition to application of RAP 8.3, the undersigned also concludes that the stay request should be granted pending the HCA BOA's *Review Decision and Final Order*. This is because RCW 42.42.450(6) prohibits discharge of a nursing home resident without the resident's consent until at least thirty days after a final order is entered upholding the decision to discharge the resident.¹⁵ A "final order" is defined in WAC 182-526-0010 as "[a]n order that is the final HCA decision." This may occur 21 days after an *Initial Order* is issued if neither party requests review of the *Initial Order*, or—if a party requests review—the HCA BOA issues the final order.¹⁶ A final order has not yet been issued by the HCA BOA in this matter and thus discharge is inappropriate at this time.

¹³ 42 C.F.R. § 483.12(a)(7); RCW 70.129.110(6); and WAC 388-97-0120(3)(a). See also WAC 388-97-0080(2) (requiring the nursing home to prepare a detailed, written discharge plan).

¹⁴ WAC 182-526-0310 and RAP 8.3.

¹⁵ See also WAC 388-97-0140(2) (noting that transfer or discharge must be suspended pending the outcome of a hearing). But see WAC 182-526-0010; WAC 182-526-0525; WAC 182-526-0595(3)(b); and WAC 182-526-0600 (indicating that there is no hearing outcome until an initial order becomes a final order or the HCA BOA issues a final order following a petition for review).

¹⁶ WAC 182-526-0525; WAC 182-526-0595(3)(b); and WAC 182-526-0600.

9. Nothing in this *Order on Stay Request* should be construed as indicating that the *Review Decision and Final Order* has been decided. The question of whether the Respondent properly discharged the Appellant is determined by different legal authorities.

III. DECISION AND ORDER

1. The Appellant's request for a stay is **granted**.

2. [FACILITY] ([FACILITY]) may not discharge or transfer the Appellant until either: (1) she voluntarily transfers or discharges, or (2) 30 days after a *Review Decision and Final Order* is issued if it is in favor of the Respondent, whichever occurs first.

3. The Respondent must also comply with the requirements of 42 C.F.R. § 483.12(a)(7); RCW 70.129.110(6); WAC 388-97-0080(2); and WAC 388-97-0120(3)(a) to ensure the Appellant's safe and orderly transfer or discharge.

Mailed on the 19TH day of December 2016

DIAMANTA TORNATORE
Review Judge/Board of Appeals

Copies have been sent to: [APPELLANT], Appellant Facility
[FACILITY], Respondent
Paul Ivers, Long-Term Care Ombudsman
Christi Pederson, Program Administrator, MS: 45600
Julie Cope, Program Administrator, MS: 45600
Evelyn Cantrell, Appeals Administrator, MS: 45504
Jeff Manson, ALJ, [CITY] OAH