

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

Docket No. 2010-5406 OB

Case No. [REDACTED]

[REDACTED]
Appellant

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon the Appellant's request for a hearing.

After due notice, a hearing was held on [REDACTED] on behalf of the Appellant.

The Appellant was not present. [REDACTED], represented the Department.

ISSUE

Did the Department properly determine that the Appellant did not require the services of a nursing facility?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. The Appellant is a Medicaid beneficiary.
2. The Appellant was admitted to the [REDACTED] nursing facility ([REDACTED]) on [REDACTED], and resided there at the time of preadmission screen (PASARR) and this hearing. (Exhibit A, p 11).
3. The Appellant is a [REDACTED] man. His current AXIS I diagnosis is Schizophrenia, Paranoid Type, 295.30; AXIS II None; AXIS III neuropathy lower extremities, 4 toes amputated right foot, 3 toes amputated left foot; AXIS V GAF: 40. (Exhibit A, p 11).

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4. The Appellant's current guardian is [REDACTED] representative at hearing. (Exhibit D).
5. The Appellant has received services from the Community Mental Health organization (CMH). (Exhibit C, p 33).
6. The CMH, in this case the [REDACTED], conducts Pre-Admission Screening and Annual Resident Reviews (PASARR). The [REDACTED] contracts with [REDACTED] to perform PASARR.
7. On [REDACTED], the CMH [REDACTED] OBRA team conducted an Annual Resident Review (PASARR) for the Appellant. (Exhibit A).
8. On [REDACTED], the Department issued a determination that the Appellant does not require nursing facility services but may need other mental health services. (Exhibit B).
9. On [REDACTED], the CMH [REDACTED] provided notice to Appellant's guardian, [REDACTED] that the Appellant does not require nursing facility services but needs other specialized mental health services. (Exhibit C).
10. The Appellant does not meet the Michigan Medicaid Nursing Facility Level of Care Determination tool criteria and thus is not eligible for nursing facility services. (Exhibits A, H).
11. On [REDACTED], the Department received the Appellant's request for an Administrative Hearing. (Exhibit D).

CONCLUSIONS OF LAW

The Medical Assistance Program is established pursuant to Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). It is administered in accordance with state statute, the Social Welfare Act, the Administrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

Department policy related to preadmission screening was developed to comply with the federal Omnibus Budget Reconciliation Act of 1987 (OBRA). This Nursing Home Reform Act mandated a Preadmission Screening and Annual Resident Review (PASARR).

The intent of PASARR is to require "preadmission screening and annual review of the need for admitting or retaining individuals with mental illness (MI) or mental retardation

(MR) in nursing facilities (NF) that are certified for Medicaid [and, if so, whether they needed specialized services for their MI or MR]. Also included was a requirement...that States institute an appeals system for individuals who may be transferred or discharged from...Medicaid NF's or who wish to dispute a PASARR determination. **The purpose of the statutory provisions is to prevent the placement of individuals with MI or MR in a nursing facility unless their medical needs clearly indicate that they require the level of care provided by a nursing facility.**" (Federal Register, November 30, 1999, pages 56450-56451). (Bold emphasis added by ALJ).

The Michigan Department of Community Health is the state mental health authority, mental retardation authority and Medicaid agency. The Director of the Department has assigned the responsibility of making PASARR determinations to the Department's Office of Specialized Nursing Home/OBRA Programs.

Federal law requires that the state mental health or mental retardation authorities conduct PASARR reviews.

Specifically CFR 483.106 provides in pertinent part:

Basic Rule-

(a) Requirement. The State PASARR program must require—

(1) Preadmission screening of all individuals with mental illness or mental retardation who apply as new admissions to Medicaid NFs on or after January 1, 1989;

(2) Initial review, by April 1, 1990, of all current residents with mental retardation or mental illness who entered Medicaid NFs prior to January 1, 1989; and

(3) At least annual review, as of April 1, 1990, of all residents with mental illness or mental retardation, regardless of whether they were first screened under the preadmission screening or annual resident review requirements.

(c) Purpose. The preadmission screening and annual resident review process must result in determinations based on a physical and mental evaluation of each individual with

mental illness or mental retardation, that are described in §§ 483.112 and 483.114.

(d) Responsibility for evaluations and determinations. The PASARR determinations of whether an individual requires the level of services provided by a NF and whether specialized services are needed-

(1) For individuals with mental illness, must be made by the State mental health authority and be based on an independent physical and mental evaluation performed by a person or entity other than the State mental health authority; and

(2) For individuals with mental retardation, must be made by the State mental retardation or developmental disabilities authority.

(e) Delegation of responsibility—

(1) The State mental health and mental retardation authorities may delegate by subcontract or otherwise the evaluation and determination functions for which they are responsible to another entity only if-

(i) The State mental health and mental retardation authorities retain ultimate control and responsibility for the performance of their statutory obligations;

(ii) The two determinations as to the need for NF services and for specialized services are made, based on a consistent analysis of the data; and

(iii) The entity to which the delegation is made is not a NF or an entity that has a direct or indirect affiliation or relationship with a NF.

§ 483.128 PASARR evaluation criteria.

(a) Level I: Identification of individuals with MI or MR. The State's PASARR program must identify all individuals who are suspected of having MI or MR as defined in § 483.102. This identification function is termed Level I. Level II is the function of evaluating and determining whether NF services and specialized services are needed. The State's performance of the Level I identification function must provide at least, in the case of first time identifications, for

the issuance of written notice to the individual or resident and his or his legal representative that the individual or resident is suspected of having MI or MR and is being referred to the State mental health or mental retardation authority for Level II screening.

* * * * *

(e) The State's PASARR program must use at least the evaluative criteria of § 483.130 (if one or both determinations can easily be made categorically as described in § 483.130) or of §§ 483.132 and 483.134 or § 483.136 (or, in the case of individuals with both MI and MR, §§ 483.132, 483.134 and 483.136 if a more extensive individualized evaluation is required).

§ 483.132 Evaluating the need for NF services and NF level of care (PASARR/NF).

(a) Basic rule. For each applicant for admission to a NF and each NF resident who has MI or MR, the evaluator must assess whether—

(1) The individual's total needs are such that his or his needs can be met in an appropriate community setting;

(2) The individual's total needs are such that they can be met only on an inpatient basis, which may include the option of placement in a home and community-based services waiver program, but for which the inpatient care would be required;

(3) If inpatient care is appropriate and desired, the NF is an appropriate institutional setting for meeting those needs in accordance with § 483.126; or

(4) If the inpatient care is appropriate and desired but the NF is not the appropriate setting for meeting the individual's needs in accordance with § 483.126, another setting such as an ICF/MR (including small, community-based facilities), an IMD providing services to individuals aged 65 or older, or a psychiatric hospital is an appropriate institutional setting for meeting those needs.

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(b) Determining appropriate placement. In determining appropriate placement, the evaluator must prioritize the physical and mental needs of the individual being evaluated, taking into account the severity of each condition.

(c) Data. At a minimum, the data relied on to make a determination must include:

- (1) Evaluation of physical status (for example, diagnoses, date of onset, medical history, and prognosis);
- (2) Evaluation of mental status (for example, diagnoses, date of onset, medical history, likelihood that the individual may be a danger to himself/herself or others); and
- (3) Functional assessment (activities of daily living).

(d) Based on the data compiled in § 483.132 and, as appropriate, in §§ 483.134 and 483.136, the State mental health or mental retardation authority must determine whether an NF level of services is needed.

Federal Law and Department policy require that an Annual Resident Review (ARR) evaluation be performed for an individual residing in a nursing facility. PASARR may be a two-step/level process. If the Level I screen indicates an individual may be mentally ill or mentally retarded, a Level II screen must be performed by the CMH to determine the need for nursing facility services, specialized services, and/or mental health services. *DCH Medicaid Provider Manual, Nursing Facility Coverages, Section 7 PASARR Process, 7.0, 7.1, 7.2, January 1, 2010, Pages 22 – 24.* The DCH Office of Specialized Nursing Home/OBRA Programs then makes determinations required by federal law, including whether the individual (Appellant) requires nursing home services.

On [REDACTED], the CMH [REDACTED] OBRA team conducted an Annual Resident Review (PASARR) for the Appellant. (Exhibit A). On [REDACTED], the Department issued a determination that the Appellant does not require nursing facility services but may need other mental health services. (Exhibit B). On [REDACTED], the CMH [REDACTED] provided notice to Appellant's guardian, [REDACTED] that the Appellant does not require nursing facility services but needs other specialized mental health services. (Exhibit C). The Appellant, through his guardian, appealed the Department's decision. The question at hearing is whether the Appellant requires a nursing facility level of care.

[REDACTED],
said the Appellant does not require nursing facility level of care but may require other mental health services. [REDACTED] testified that she utilized the OBRA Level II assessment findings, the nursing facility Minimum Data Set (MDS) assessment and the

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Michigan Medicaid Nursing Facility Level of Care Determination tool to reach the determination. (Exhibits A, G and H).

The evidence in this case establishes that the ARR was performed in accordance to federal regulations and the review resulted in a determination that the recipient did not require nursing facility level of services but may require other mental health/developmental disabilities services. (Exhibits A and B).

§42 CFR 483.108 Relationship of PASARR to other Medicaid processes.

(b) In making their determinations, however, the State mental health and mental retardation authorities must not use criteria relating to the need for NF care or specialized services that are inconsistent with this regulation and any supplementary criteria adopted by the State Medicaid agency under its approved State plan.

The State Medicaid agency has adopted the Michigan Medicaid Nursing Facility Level of Care Determination tool as “consistent” criteria for all its long-term services, including nursing facility, MI Choice and PACE services. The tool’s seven door criteria must be met by all nursing facility participants in order to receive Medicaid reimbursement. (*DCH Medicaid Provider Manual, Nursing Facility Coverages, January 1, 2010, Pages 7 – 10 or LOC*). In addition:

The Department presented evidence and testimony that the Appellant did not meet the Michigan Medicaid Nursing Facility Level of Care criteria for any of the seven doors and was thus not eligible for nursing facility services. (Exhibits A, G, and H).

In particular the evidence, as applied to the tool, demonstrated:

Door 1 Activities of Daily Living – Department representative Duckworth testified that based on the Level II assessment and the MDS assessment the Appellant was independent in his activities of daily living. (Exhibits A, G, and H).

The evidence presented demonstrated the Appellant does not meet nursing facility eligibility under Door 1.

Door 2 Cognitive Performance - Department representative Duckworth testified that based on the documentation she reviewed it was noted that Appellant had some confusion at time and he makes poor judgments at times. For these

reasons the Department representative indicated Appellant did not qualify for nursing facility level of care, he could live in a less restrictive community setting, but recommended the setting have some type of supervision available, perhaps an adult foster care setting. The evidence presented demonstrated the Appellant does not meet nursing facility eligibility under Door 2.

Appellant's guardian/representative agreed that Appellant did not meet a nursing facility level of care but expressed concern that the Appellant's mental health needs be met in a community setting and he would need a setting that would guard against wandering. Appellant's guardian/representative explained that Appellant lived in three different adult foster care homes but walked away from all three, and on one occasion lost his toes to frostbite because it was winter when he was wandering without being found. The Appellant's guardian/representative expressed concern about the difficulty of obtaining a community placement for the Appellant in ██████████, especially to meet his mental health needs and wandering proclivity.

This Administrative Law Judge allowed some discussion about the nursing home to community transition process but the federal law and regulation as well as the state law and policy bind the Department. The federal law and state policy prohibits Medicaid from paying for nursing facility placement for those people that may have a mental health need but do not have a level of physical need that can only be met in a nursing facility. In other words, Medicaid cannot pay for nursing facility care for a person whose mental health and physical health needs can be met with assistance in community settings.


The Department provided sufficient evidence that it properly conducted the ARR and LOC assessments and properly determined that the Appellant did not meet federal and state criteria for nursing facility services.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly determined the Appellant did not require nursing facility services.

IT IS THEREFORE ORDERED that:

The Department's decision is **AFFIRMED**.


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IT IS FURTHER ORDERED that:

The Department shall immediately terminate Medicaid reimbursement to the Nursing Facility for services provided to the Appellant effective the date of this DECISION and ORDER.

Lisa K. Gigliotti
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:



Date Mailed: 1/27/2010

***** NOTICE *****

The State Office of Administrative Hearings and Rules may order a rehearing on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. The State Office of Administrative Hearings and Rules will not order a rehearing on the Department's motion where the final decision or rehearing cannot be implemented within 90 days of the filing of the original request. The Appellant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt of the rehearing decision.