



GRETCHEN WHITMER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS  
DIRECTOR

[REDACTED], MI [REDACTED]

Date Mailed: July 8, 2022  
MOAHR Docket No.: 22-002216  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**ADMINISTRATIVE LAW JUDGE: Robert J. Meade**

**DECISION AND ORDER**

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

After due notice, a hearing was held on June 30, 2022. Andrea and David Barbarich, Petitioner's parents, and durable power of attorney, appeared and testified on Petitioner's behalf. Robert Sims, Supports Coordinator, appeared as a witness for Petitioner. Kathleen Faber, OBRA Appeals Coordinator, appeared and testified on behalf of Respondent, Michigan Department of Health and Human Services (Respondent, MDHHS or Department). Ivy Whitsett, hospital Social Worker, appeared as a witness for the Department.

**ISSUE**

Did the Department properly determine that the Petitioner does not qualify for the level of services provided by a nursing facility but requires specialized mental health/developmental disabilities services?

**FINDINGS OF FACT**

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

1. Petitioner is a 47-year-old Medicaid beneficiary, who is diagnosed with autism spectrum disorder; moderate dementia with behavioral disturbance; possible major front temporal neurocognitive disorder, and mild intellectual development disorder. (Exhibit A, p 1; Exhibit D; Testimony).
2. Petitioner's parents serve as his durable power of attorney. (Exhibit D; Testimony).
3. On November 10, 2021, Petitioner was admitted to a nursing facility (NF) secondary to an altered mental status and agitation. Prior to

hospitalization, Petitioner was a resident of St. James Nursing Center since April 2021. (Exhibit A, p 3; Testimony).

4. On May 2, 2022, the Detroit-Wayne Community Mental Health OBRA Team completed a Level II OBRA screening of Petitioner. (Exhibit A, pp 1-23). The OBRA screening included a psychological assessment, a medical history review and examination, a psychiatric assessment, and a sensory/motor development assessment. (*Id.*) The OBRA team concluded that Petitioner did not require a NF level of care:

Assessments reviewed and all evaluators are in agreement with the recommendation for a specialized AFC placement with monitoring and safeguards in place to address any elopement risk. This is the second OBRA assessment that has been completed for Mr. Barbarich in the past few months. A re-evaluation was completed by a new team to assure all updated information was included in the assessment process. The recommendation remains No Nursing Home/Specialized Mental Health Services. The evaluators do not feel that a nursing home can meet Mr. Barbarich's health, safety, or mental health needs. The behavioral issues described confirmed that Mr. Barbarich's needs could not be met in a nursing home. He has failed in two past nursing home placements. Mr. Barbarich is recommended for a setting that is experienced in the treatment of autism and that can manage his agitation and aggression. He is felt to require professional staff that are certified in applied behavior analysis (ABA) for autism as well as certified direct care staff and assistant behavior analyst staff. Door alarms at the AFC home could be considered, wander guards, as well as one to one staffing. (Exhibit A, p 21; Testimony).

5. On May 2, 2022, after further review by the MDHHS OBRA Appeals Coordinator, the Department issued a determination that the Petitioner did not require the services of a nursing facility but did require specialized mental health/developmental disabilities services. (Exhibit B; Testimony).
6. On May 12, 2022, the OBRA Team provided notice to Petitioner's parents of the Department's determination. (Exhibit C; Testimony).
7. On May 19, 2022, the Michigan Office of Administrative Hearings and Rules (MOAHR) received Petitioner's request for 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).

Federal law requires that the state authorities conduct PASARR reviews. (See CFR 483.106, 483.128). The PASARR requirements in Michigan are found in the Medicaid Provider Manual, which provides, in pertinent part:

### **SECTION 8 – PASARR PROCESS**

Pre-admission Screening/Annual Resident Review (PASARR) in Michigan is a two-level screening and evaluation process. The Level I screening and Level II evaluation procedures and forms are the same for Pre-admission Screening (PAS) and Annual Resident Review (ARR). The forms may be obtained from the MDHHS website.

The PASARR process must be completed:

- Prior to admission to a nursing facility;

- Promptly after a significant change in a resident's physical or mental condition; and
- Not less than annually.

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#### **8.4 LEVEL II EVALUATION COMPLETION**

Individuals who are identified at the Level I screening as having a mental illness or intellectual/developmental disability or a related condition, and who do not meet exemption criteria outlined previously, must be referred to the local CMHSP for a Level II evaluation. Level II evaluations are conducted by mental health professionals through the local CMHSP under contract with MDHHS. The evaluation involves an interview with the individual, review of medical records, and consultation with nursing facility and/or hospital staff. The mental health professional must conduct the Level II evaluation in accordance with the MDHHS OBRA Operations Manual. A copy of this manual may be requested from the MDHHS OBRA Office or the local CMHSP.

When a Level II Evaluation is required, it must be completed prior to nursing facility admission.

When a Level II evaluation is indicated for an Annual Resident Review (ARR), the nursing facility must notify the local CMHSP of the need for the Level II evaluation at least 30 days prior to the due date of the ARR by sending them a new DCH-3877 (Level I screening form). For example, if the initial Level II evaluation was completed on April 15, 2004, the ARR is due April 15, 2005, and the facility must notify the local CMHSP that a new Level II is due by March 15, 2005. The local CMHSP is responsible for timely completion of Level II evaluations and for providing facilities with written documentation of PASARR determinations in a timely manner.

Once completed, the CMHSP forwards all documentation of the Level II evaluation to MDHHS. Based on this documentation, MDHHS determines whether the individual requires nursing facility services or can be served in an alternate setting. MDHHS also determines whether specialized services or other mental health services are

needed to treat the individual's mental illness, intellectual/developmental disability or a related condition.

The MDHHS decision regarding the need for nursing facility services and the need for specialized services is forwarded to the referring CMHSP. It is the responsibility of the CMHSP to explain the evaluation and determination to the individual and his legal representative. The CMHSP must provide a copy of the evaluation and the MDHHS determination letter to the individual and his legal representative and explain the appeal rights to the individual and their legal representative. This information must also be adapted to the cultural background, language, ethnic origin and means of communication of the individual being evaluated.

The local CMHSP notifies the attending physician, nursing facility, and discharging hospital of the results of the evaluation and the MDHHS determination in writing within five (5) days of the review. A copy of this notification must be retained in the individual's record. (Refer to the Distribution of PASARR Documentation subsection of this chapter for additional information.)

If the facility does not receive a written determination as follow-up to a verbal determination within 30 days of an admission, the facility must send a written reminder to the CMHSP and the MDHHS OBRA Office within 45 days of the admission. (Refer to the Directory Appendix for contact information.)

The nursing facility is responsible for verifying that required PAS and ARR processes are completed and documented in the resident's record. The nursing facility medical record must include the determinations of the level of care, the need for specialized services, the original DCH-3877 and DCH-3878 forms, and the Level II evaluation report and supporting documents.

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## **8.7 APPEALS OF PASARR DETERMINATIONS**

Individuals adversely affected by PASARR determinations may appeal the determination or another person may appeal the determination on their behalf. Examples may include the determination that the individual no longer requires

specialized services when they have received those services in the past and wish to continue. An individual may decline nursing facility admission or specialized services without appeal.

Information regarding the MDHHS administrative hearing (appeal) process is available on the MDHHS website. (Refer to the Directory Appendix for website information.)

*Medicaid Provider Manual  
Nursing Facility – Coverages Chapter  
January 1, 2022, pp 17, 21-24*

Federal Law and Department policy require Pre-Admission Screening of applicants for admission to nursing facilities and Annual Resident Review. In Michigan, PASARR is a two-step/level process that must be completed prior to admission to a nursing facility, promptly after a significant change in a resident's physical or mental condition, and not less than annually. If the Level I screening indicates an individual may be mentally ill, a Level II evaluation must be performed by the CMH to determine the need for nursing facility services, specialized services, and/or mental health services.

Here, the Department's OBRA Appeals Coordinator testified that on November 10, 2021, Petitioner was admitted to a nursing facility (NF) secondary to an altered mental status and agitation. The Department's OBRA Appeals Coordinator noted that prior to hospitalization, Petitioner was a resident of St. James Nursing Center since April 2021. The Department's OBRA Appeals Coordinator indicated that on May 2, 2022, the Detroit-Wayne Community Mental Health OBRA Team completed a Level II OBRA evaluation of Petitioner, which concluded that Petitioner did not require a NF level of care. The Department's OBRA Appeals Coordinator testified that on May 2, 2022, after her further review, the Department issued a determination that the Petitioner did not require the services of a nursing facility but did require specialized mental health/developmental disabilities services.

The Department's OBRA Appeals Coordinator explained that while there were some issues with a prior Level II evaluation, and the current screening, relating to Petitioner's head injury being the cause of his difficulties, she still agreed with the overall conclusion of the evaluation. The Department's OBRA Appeals Coordinator indicated that she started working with Petitioner's family in February 2022 to brainstorm about post hospital opportunities for Petitioner given his needs for a secure setting due to elopement issues. The Department's OBRA Appeals Coordinator testified that Petitioner has improved by leaps and bounds since going into the hospital as he is now reading the newspaper, interacting with staff, and has been very redirectable.

The Department's OBRA Appeals Coordinator testified that her concern with a secured unit in a NF dementia unit and the negative affect it would have on Petitioner, as it has had in the past. The Department's OBRA Appeals Coordinator pointed out that when Petitioner left the last NF's dementia unit he was in bad shape and did not recognize his

parents. The Department's OBRA Appeals Coordinator indicated that Petitioner's sensory issues because of his autism make it very difficult for him to be in a dementia unit, where there are a lot of people in your space, loud noises, yelling and screaming, people touching you, and people wandering into your room. The Department's OBRA Appeals Coordinator indicated that the risk is that if Petitioner hurts someone in such a setting as a reaction due to his autism, he will likely end up in a state hospital. The Department's OBRA Appeals Coordinator testified that she and the team are determined to find someplace appropriate for Petitioner given his elopement issues. The Department's OBRA Appeals Coordinator indicated that she had recently spoken to Hope Network about finding a placement for Petitioner, as well as Medilodge. The Department's OBRA Appeals Coordinator pointed out that passive restraints, such as a wander guard, can be used in a specialized AFC home provided they are prescribed by a psychologist.

The hospital's social worker testified that when Petitioner first arrived, he was doing a lot of crab walking, sliding on the floor like a snake, and would not talk. The hospital's social worker indicated that they determined that Petitioner did not like to be pulled or touched, but they found that they could redirect him verbally. The hospital's Social Worker noted that as they learned more about Petitioner, he began to interact and start to communicate more. The hospital's Social Worker testified that Petitioner will now play games in his room, read, and staff will take him to the coffee shop and the market in the hospital, which he really enjoys. The hospital's Social Worker noted that Petitioner does not try to run off during these outings even though he is very aware of the world around him again.

Petitioner's mother testified that Petitioner is an eloper and he eloped twice in the last group home he lived in over a period of only eleven (11) months. Petitioner's mother indicated that Petitioner twice eloped from the home and walked all the way to their house (about 19 miles), and once eloped in winter without a coat or shoes and ended up with frostbite. Petitioner's mother indicated that another time he was found lying on the side of the road sleeping. Petitioner's mother testified that it appears Petitioner is falling through the cracks, and they need to find a place where he will be safe and secure. Petitioner's mother testified that Petitioner's doctor has indicated that Petitioner does have dementia, so that needs to be taken into consideration.

Petitioner's father testified that he is worried what would happen to Petitioner if he went into an alternative housing situation, declined, and then had to go to a nursing home. Petitioner's father noted that when Petitioner lived with them in 2019, he did not know who they were.

In response, the Department's OBRA Appeals Coordinator testified that Petitioner's autism must be the primary diagnosis in these reviews per federal law. The Department's OBRA Appeals Coordinator explained that if dementia is the primary diagnosis, Petitioner will end up in a dementia unit in a NF and not get the help he needs for his autism. The Department's OBRA Appeals Coordinator indicated that there have been some significant medication changes since Petitioner has been in the hospital, and that has made a big difference in his behaviors. The Department's OBRA

Appeals Coordinator noted that the last NF Petitioner was in did not have the best reputation, so it is not surprising that he declined there. The Department's OBRA Appeals Coordinator testified that if Petitioner went to a specialized AFC home and declined, they would work as fast as possible to get him placed elsewhere. The Department's OBRA Appeals Coordinator also noted that if they ultimately cannot find a placement for Petitioner, the Level II evaluation can be redone.

The evidence in this case establishes that the OBRA evaluation was thoroughly performed, and the review properly resulted in a determination that Petitioner does not require nursing facility level of services but does require specialized mental health/developmental disabilities services. The Department is required by law and policy to ensure that beneficiaries reside in the least restrictive setting possible, and the OBRA evaluation here accomplishes that goal. As indicated above, the OBRA team determined that specialized AFC placement with monitoring and safeguards in place to address Petitioner's elopement risk was the best fit for Petitioner and the undersigned agrees with that determination after a thorough review of the record.

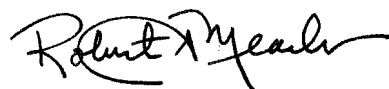
A dementia unit in a NF cannot meet Petitioner's health, safety, or mental health needs, and the noises and disturbances in such a unit would actually be very detrimental to Petitioner given his autism. A specialized AFC home that is experienced in the treatment of autism, and that can manage Petitioner's elopement, agitation, and aggression issues would be a much better fit. Ideally, such a home would have professional staff certified in ABA for autism as well as 1:1 care for Petitioner to ensure his safety. Door alarms and wander guards could also be considered if prescribed by a psychologist. Petitioner has improved so much since being admitted to the hospital, due to the stellar staff and medication adjustments, that this would be the right time to find him a proper placement in the community. And, if no such placement can be found, the Level II evaluation can always be repeated. However, based on the information available at the time of the evaluation, the Department's decision was proper and should be upheld.

### **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 Petitioner did not require nursing facility services but does require specialized mental health/developmental disabilities services.

**IT IS THEREFORE ORDERED** that:

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

A handwritten signature in black ink, appearing to read "Robert J. Meade". The signature is written in a cursive style with a large, stylized initial "R".

RM/tem

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**Robert J. Meade**  
Administrative Law Judge

**NOTICE OF APPEAL:** A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Office of Administrative Hearings and Rules  
Reconsideration/Rehearing Request  
P.O. Box 30763  
Lansing, Michigan 48909-8139

**Via Electronic Mail:**

**DHHS Dept Rep**

Laurie Ehrhardt  
MDHHS – BPHASA  
320 South Walnut, 5th Floor  
Lansing, MI 48933  
EhrhardtL@michigan.gov

**DHHS Dept Contact**

Belinda Hawks  
MDHHS – BPHASA  
320 South Walnut, 5<sup>th</sup> Floor  
Lansing, MI 48933  
MDHHS-BHDDA-Hearing-Notices@michigan.gov

**Via First Class Mail:**

**Authorized Hearing Rep**

[REDACTED]  
[REDACTED]  
[REDACTED], MI [REDACTED]

**Petitioner**

[REDACTED]  
[REDACTED]  
[REDACTED], MI [REDACTED]