



GRETCHEN WHITMER
GOVERNOR

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

MARLON I. BROWN, DPA
ACTING DIRECTOR

[REDACTED]
MI [REDACTED]

Date Mailed: September 6, 2023
MOAHR Docket No.: 23-003777
Agency No.:
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER

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

After due notice, a telephone hearing was held on August 30, 2022. [REDACTED], Petitioner’s mother/legal guardian, appeared and testified on Petitioner’s behalf. [REDACTED], Licensed Social Worker at Neuro Behavioral Hospital, also testified as a witness for Petitioner. Kathleen Faber, OBRA Appeals Coordinator, appeared and testified on behalf of Respondent, the Michigan Department of Health and Human Services (MDHHS or Department).

During the hearing, Petitioner’s request for hearing was admitted into the record as Exhibit #1. The Department also submitted six proposed exhibits, but they were not admitted because they had not been sent to Petitioner’s representative prior to the hearing.

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 [REDACTED] Medicaid beneficiary who has been diagnosed with, among other conditions, dementia; a cerebral vascular accident (CVA); bipolar disorder; anxiety disorder; and cognitive impairments. (Testimony of Petitioner’s representative; Testimony of Department’s representative).

2. His mother serves as his legal guardian. (Testimony of Petitioner's representative; Testimony of Department's representative).
3. In [REDACTED] 2023, Petitioner was admitted to a nursing facility. (Testimony of Petitioner's representative).
4. In the nursing facility, Petitioner did not reside in the locked dementia unit as planned; the facility did not do a drug screen when he was observed sniffing a white powdery substance; and he was not restricted from a cell phone as planned. (Testimony of Petitioner's representative; Testimony of Department's representative).
5. Genesee Health System also completed a Level II OBRA screening of Petitioner during which it concluded that the nursing facility did not appear to be able to meet Petitioner's specialized mental health needs or keep him or his fellow residents safe, and that a nursing facility was therefore not recommended. (Testimony of Department's representative).
6. On or about June 9, 2023, after 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. (Testimony of Department's representative).
7. The Department also provided Petitioner's guardian notice of that decision. (Testimony of Department's representative).
8. On July 11, 2023, the Michigan Office of Administrative Hearings and Rules (MOAHR) received the request for hearing filed in this matter. (Exhibit #1).

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.

Federal law also requires that the state authorities conduct Preadmission Screening and Annual Resident Review (PASARR) reviews for applicants and residents of nursing facilities. See 42 CFR 483.106; 42 CFR 483.128).

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.

The PASARR requirements in Michigan are found in the Medicaid Provider Manual, which provides in 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.

The PASARR process is not required in the following situations:

- When an individual is admitted to and resides in a hospital swing bed. However, the PASARR process must be completed prior to admission if the individual transfers to a nursing facility.
- When an individual is readmitted to a nursing facility after a hospital stay. If the Annual Resident Review date occurs during a period of hospitalization, the screening must be completed within 30 days of admission or readmission to the nursing facility.
- For an individual transferring from one nursing facility to another, with or without an intervening hospital stay, unless a Level I screen has not been performed previously. If a Level I screening or Level II evaluation has been completed, the screening evaluation should accompany the beneficiary to the receiving nursing facility.
- For an individual returning to the nursing facility from therapeutic leave, unless the resident's condition has changed. Therapeutic leave does not change the due

date for Annual Resident Review. Advance planning may be necessary to ensure timeliness of review.

- A beneficiary receiving Medicaid hospice services (Benefit Plan ID of Hospice) entering a nursing facility for the five-day hospice respite benefit. A Level I screening must be completed if the beneficiary enters the facility for a length of time beyond the five-day respite period.

The purpose of the Level I screening is to identify individuals who may have a mental illness, intellectual/developmental disability or a related condition. If the patient is on psychotropic or antidepressant medications for purposes of pain control/symptom relief for end of life, note that information on the DCH-3877. This allows the Community Mental Health Services Program (CMHSP) to better evaluate the need for Level II screening. If the patient is on any of the above mentioned psychotropic medication groups for a related mental illness, the CMHSP will determine the need for Level II screening.

- An individual assessed by adult protective services, requiring protective services, may be granted provisional admission to a nursing facility pending further assessment due to this emergent situation. Placement in a nursing facility is not to exceed seven (7) days.

* * *

8.2 LEVEL II EVALUATION

The purpose of the Level II evaluation is to assess individuals who are identified as having a mental illness, intellectual/developmental disability or a related condition to determine the need for nursing facility services, specialized services, and/or mental health services. All individuals identified by Level I screening as possibly having a mental illness, intellectual/developmental disability or a related condition (a "yes" response to any question on the Level I screening form, DCH-3877) must receive a Level II evaluation unless it is documented that they meet one of the exemption criteria outlined in the next subsection, or the MDHHS/CMHSP finds that the individual does not meet the

criteria for a serious mental illness under the PASARR provisions. The CMHSP is responsible for providing the nursing facility and the individual and/or legal representative with written documentation that the individual does not meet the PASARR criteria for a serious mental illness. If the individual is seeking admission to a nursing facility, the Level II evaluation, when indicated, must be completed prior to admission.

* * *

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.

* * *

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.)

*MPM, April 1, 2023 version
Nursing Facility – Coverages Chapter
Pages 17, 20-24*

Here, the Department's OBRA Appeals Coordinator testified that, pursuant to the above policies, the Genesee Health System completed a Level II screening of Petitioner during which it concluded that the nursing facility did not appear to be able to meet Petitioner's specialized mental health needs or keep him or his fellow residents safe, and that a nursing facility was not recommended; with the Department later concurring with that decision.

She also testified that she did not complete the review for the Department and was "on the fence" about it, but that she understood it.

She furthered testified that, in her view, Petitioner needs a more secure setting and a higher level of care than what an Adult Foster Care (AFC) home typically may be able to provide. She believes that the parties need to get together for a proper referral for Petitioner.

The Department's OBRA Appeals Coordinator also testified that Petitioner was supposed to be in a locked dementia unit at his nursing facility, but that did not occur, possibly due to staffing issues that are common throughout the state of Michigan. Similarly, she agreed that the facility had not always restricted Petitioner from phones or conducted drug screens when appropriate, which appears to have allowed a negative influence in his life to contact him and provide drugs.

Petitioner's guardian testified Kith Haven was a recommend nursing facility, and that Petitioner was placed there with a plan for him to be in the locked dementia unit and restricted from his phone, neither of which happened.

She also testified that the issues Petitioner had while staying at Kith Haven were caused by Petitioner not taking his medications and being able to contact, and receive drugs, from a woman in his life who he is obsessed with; has taken advantage of him; and who is a significant negative influence.

She further testified that Petitioner is currently in a psychiatric ward and doing well, but that he cannot stay there.

The Licensed Social Worker from the hospital where Petitioner is currently staying testified that the OBRA determination is very limited and wrong in her opinion, and that Petitioner needs nursing facility services. She also testified that things did not work at Kith Haven previously because the facility was not doing what it was supposed to do.

Given the above testimony and evidence, the undersigned Administrative Law Judge finds that the Department erred, and its determination that the Petitioner did not require the services of a nursing facility but did require specialized mental health/developmental disabilities services, must be reversed.

That determination was based on findings that a nursing facility did not appear to be able to meet Petitioner's specialized mental health needs or keep him or his fellow residents safe.

However, it is undisputed in this case that any issues Petitioner had during his nursing facility stay were during times the nursing facility was not following the plan of care. For example, even the Department's representative agreed that Petitioner was not residing in the locked dementia unit or being restricted from his phone as planned, and that the facility improperly failed to conduct a drug screen in at least one instance when it was called for.

Moreover, the Department's representative, while testifying that she understood the decision in this case, also did not defend it or even opine that it was correct, instead just testifying that she is "on the fence".

The Licensed Social Worker from the hospital where Petitioner is currently staying also credibly opined that Petitioner needs nursing facility services and that his needs can be safely met in one, if the facility does what it is supposed to do.

Accordingly, given that lack of defense by the Department and the clear questions remaining regarding whether Petitioner's needs could be safely met, for both Petitioner and other residents, in a nursing facility if the appropriate plan of care is followed, the undersigned Administrative Law Judge finds that the decision at issue in this case must be reversed and a reassessment conducted.

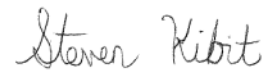
DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department improperly 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 **REVERSED**, and it must initiate a reassessment of Petitioner's Level II PASARR evaluation.

SK/sj



Steven Kibit
Administrative Law Judge

NOTICE OF APPEAL: Petitioner 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

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, to their last-known addresses in the manner specified below, this 6th day of September 2023.

S. James

S. James
**Michigan Office of Administrative
Hearings and Rules**

Via Electronic Mail:

DHHS Department Contact
Belinda Hawks
MDHHS
Lansing, MI 48913
Hawksb@michigan.gov
**MDHHS-BHDDA-Hearing-
Notices@michigan.gov**

DHHS Department Contact
Phillip Kurdunowicz
Amanda Lopez
MDHHS-BCCHPS
333 S Grand Ave
Lansing, MI 48933
KurdunowiczP@michigan.gov
LopezA24@michigan.gov

DHHS Department Representative
Kathleen Faber
MS, LPC OBRA Appeals Coordinator
MDHHS – BPHASA
Lansing, MI 48913
FaberK1@michigan.gov

DHHS Department Representative
Laurie Ehrhardt
MDHHS – BPHASA
Lansing, MI 48913
EhrhardtL@michigan.gov

Via First Class Mail:

Petitioner

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

Authorized Hearing Representative

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