



GRETCHEN WHITMER
GOVERNOR

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

MARLON BROWN
DIRECTOR

Date Mailed: March 7, 2025
MOAHR Docket No.: 24-013099
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER

This matter is before the Michigan Office of Administrative Hearings and Rules (MOAHR) and the undersigned Administrative Law Judge (ALJ) pursuant to MCL 400.9 and upon a request for a hearing filed on behalf of Petitioner [REDACTED] (Petitioner).

After due notice, and following an adjournment granted at Petitioner's request, a telephone hearing was held on February 13, 2025. [REDACTED] Petitioner's mother and legal guardian, appeared and testified on Petitioner's behalf. April Higgins, Medicaid Fair Hearings Officer, appeared and testified on behalf of Respondent Community Mental Health for Central Michigan (CMHCM or Respondent). Katherine Squire, Chief Financial Officer; and Renee Raushi, Chief Operating Officer, testified as witnesses for Respondent.

During the hearing, Petitioner submitted an evidence packet that was admitted into the record without objection as Exhibit #1, pages 1-77. Respondent also submitted an evidence packet that was admitted into the record without objection as Exhibit A, pages 1-94.

ISSUE

Did Respondent properly deny Petitioner's request for Home and Community-Based Services (HCBS) at an Adult Foster Care (AFC) home with video surveillance cameras in common areas?

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] year-old Medicaid beneficiary with a legal guardian. (Exhibit A, pages 16-17, 21).

2. Her diagnoses include autism spectrum disorder; an intellectual disability; attention-deficit/hyperactivity disorder, combine presentation; obsessive-compulsive disorder; constipation; and microcephaly. (Exhibit #1, page 52; Exhibit A, page 16).
3. Due to her mental and physical impairments, Petitioner has been approved for services through Respondent, a Community Mental Health Services Program (CMHSP) affiliated with Mid-State Health Network (MSHN), a Prepaid Inpatient Health Plan (PIHP) approved by the Michigan Department of Health and Human Services (MDHHS) to provide covered Medicaid services. (Exhibit A, page 31; Testimony of Respondent's representative).
4. Services through Respondent have included targeted case management and respite care services. (Exhibit A, pages 36-37)
5. By April of 2024, Petitioner, who currently lives in a private residence with her parents and siblings, was seeking placement and HCBS at an Adult Foster Care (AFC) home. (Exhibit A, pages 17, 21-23, 29).
6. Specifically, Petitioner's guardian requested that Petitioner be moved into [REDACTED] Rehabilitation [REDACTED] and receive comprehensive community supports services at a per diem rate. (Exhibit A, page 17; Testimony of Respondent's representative).
7. [REDACTED] has six video surveillance cameras in its common areas. (Exhibit A, page 17).
8. There are no video cameras in personal spaces such as bathrooms or bedrooms. (Exhibit A, page 17).
9. The video cameras are not actively monitored, and they are only to be used for review when necessary. (Testimony of Petitioner's representative).
10. Deer Run agreed to accept Petitioner as a resident. (Exhibit #1, page 60; Testimony of Petitioner's representative).
11. Respondent also determined that requested per diem comprehensive community supports services were medically necessary for Petitioner. (Exhibit A, page Testimony of Respondent's representative).
12. At the time of Petitioner's request, Respondent had two other clients living and receiving services at Deer Run. (Exhibit #1, page 43; Exhibit A, page 93; Testimony of Chief Operating Officer).
13. However, there was no general approval for [REDACTED] as a provider and Respondent therefore consulted with MSHN, *i.e.*, the PIHP Respondent is

affiliated with, regarding a provisional approval. (Testimony of Respondent's representative; Testimony of Chief Operating Officer).

14. MSHN in turn consulted with representatives from MDHHS. (Testimony of Chief Operating Officer)
15. MSHN also conducted an on-site review of [REDACTED] (Exhibit A, page 93).
16. During that review, it noted the six video surveillance cameras in common areas and reports from a representative from [REDACTED] indicating that there was no plan to remove any cameras. (Exhibit #1, pages 8-9; Exhibit A, page 93).
17. Based on that review, MSHN determined that Petitioner's request should be denied on the basis that [REDACTED] is not eligible to receive HCBS funds unless the cameras are removed. (Exhibit A, page 93).
18. It also determined that the two individuals already living there and receiving services through Respondent must be transitioned to a new setting as soon as possible. (Exhibit A, page 93).
19. On May 4, 2024, Respondent sent Petitioner's guardian regarding MSHN's on-site review of [REDACTED], and the determination that [REDACTED] is ineligible to receive HCBS Medicaid funds due to cameras being utilized. (Exhibit #1, page 7).
20. The letter also advised Petitioner's guardian that Respondent's treatment team would assist her in identifying a setting that has been determined to be compliant with the HCBS Final Rule. (Exhibit #1, page 7).
21. On June 24, 2024, MDHHS and the Department of Licensing and Regulatory Affairs (LARA) issued an updated Behavioral Health Joint Guidance Document. (Exhibit A, pages 62-73).
22. The first version of the Joint Guidance was issued in 2017. (Exhibit A, page 62).
23. The 2017 version of the Joint Guidance did not address the use of video cameras in HCBS settings. (Exhibit #1, pages 19-29).
24. The June 24, 2024, version of the Joint Guidance does address the use of video cameras in HCBS settings. (Exhibit A, page 70).
25. Specifically, it states:

USE OF VIDEO CAMERAS

The use of video cameras for surveillance is prohibited in HCBS settings. Video cameras maybe [sic] utilized in areas where waiver participants do not enter (such as the business office, or medication distribution rooms, if the camera is fixed in its position and is facing in such a way that it cannot inadvertently record waiver participants. The responsibility to ensure a camera meets the requirements identified is upon the setting. Settings should work with their PIHP leads to confirm that any intended use of cameras is acceptable.

Cameras that are part of an external security system are allowed.

Exhibit A, page 70

26. Petitioner's guardian continued to request placement and services at [REDACTED] for Petitioner. (Exhibit #1, pages 56-57)
27. On September 18, 2024, Respondent sent Petitioner's guardian a Letter of Adverse Benefit Determination stating that Petitioner's request had been denied. (Exhibit A, pages 3-9).
28. With respect to the reason for the denial, the Letter of Adverse Benefit Determination stated in part:

CMH received a request from guardian on 8/26/2024 for the "housing placement with video cameras in common areas". CMHCM agrees H2016 Comprehensive Community Supports Services per Diem is medically necessary. CMHCM is unable to approve a placement that has video camera surveillance in common areas. The Home and Community Based Services rule and the Michigan Mental Health Code MCL 330.1724 (9) do not allow video surveillance camera use in common areas of a setting. [REDACTED] Rehabilitation's contract ends on 9/30/2024 and will not be an option for placement through CMHCM. Guardian is always able to privately place consumer at [REDACTED] without CMHCM involvement.

Exhibit A, page 3

29. On September 30, 2024, Petitioner's guardian filed an Internal Appeal with Respondent regarding that decision. (Exhibit A, page 10).
30. On October 10, 2024, Respondent sent Petitioner a Letter of Appeal Denial stating that Petitioner's Internal Appeal had been denied. (Exhibit A, pages 10-15).
31. With respect to the reason for the denial, the Letter of Appeal Denial stated in part:

Your appeal was not approved for the service(s)/item(s) listed above because:

On 7/10/24 Millie Shepherd from MDHHS (Home and Community Based Service (HSBC) Specialist, Division of Adult Home and Community Based Services, Bureau of Specialty Behavioral Health Services, Behavioral and Physical Health and Aging Services Administration) sent an e-mail to CMHCM providing the updated version of the Joint Guidance (JGD) Document. This document is specific to those settings providing behavioral health services to Medicaid recipients.

The original version of the JGD was developed in 2017 to address concerns in the field related to how the HSBC rules would interact with the requirements of the Licensing and Regulatory Affairs Administration (LARA). The JGD was developed to provide guidance to providers, and CMHSP and licensing staff about how to address any perceived conflicts between the rule and licensing requirements.

The signature of Larry Horvath, Director Bureau of Community & Health Systems (LARA director) confirms that the guidance in the document should be followed by all concerned when the person is receiving HCBS Behavioral Health Services.

On page 7 of the HSBC updated Joint Guidance it states,

"The use of video cameras for surveillance is prohibited in HCBS settings. Video cameras maybe utilized in areas where waiver participants do not enter, such as the business office, or medication distribution rooms, if the camera is fixed in its position and is facing in such a way that it cannot inadvertently

record waiver participants. The responsibility to ensure a camera meets the requirements identified is upon the setting. Settings should work with their PIHP leads to confirm that any intended use of cameras is acceptable. Cameras that are part of an external security system are allowed.”

CMHCM is unable to authorize the use of Medicaid dollars to pay for placement at a facility that has video cameras in common areas of the home as that home is not in compliance with the HSBC guidelines.

Exhibit A, page 10

32. On November 27, 2024, MOAHR received the request for hearing filed in this matter with respect to that decision.

CONCLUSIONS OF LAW

Here, as discussed above, Respondent denied Petitioner’s request for HCBS at an AFC home with video surveillance cameras in common areas on the basis that video cameras for surveillance are prohibited in HCBS settings.

Regarding HCBS through PIHPs or affiliated CMHSPs like Respondent, the Medicaid Provider Manual (MPM) states in part:

SECTION 17 –BEHAVIORAL HEALTH §1915(I) HOME AND COMMUNITY-BASED SERVICES (HCBS) STATE PLAN AMENDMENT

HCBS provides opportunities for Medicaid beneficiaries to receive services in their own home or community rather than institutions or other isolated settings. These programs serve a variety of targeted population groups, such as people with intellectual or developmental disabilities, serious emotional disturbance and/or serious mental illnesses.

NOTE: Certain services found in this section are State Plan Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services when delivered to children birth-21 years

Eligible beneficiaries may be enrolled in Michigan’s BH 1915(i) SPA and receive the supports and services defined in this section, as well as other Medicaid covered State Plan services. A BH 1915(i) SPA beneficiary must receive at least one BH 1915(i) SPA service every three months, in addition to monthly monitoring to remain eligible.

* * *

17.3 CRITERIA FOR AUTHORIZING BH 1915(I) SPA SUPPORTS AND SERVICES

The authorization and use of Medicaid funds for any of the BH 1915(i) SPA supports and services, as well as their amount, scope and duration, are dependent upon:

- The Medicaid beneficiary's eligibility for specialty services and supports as defined in this Chapter;
- The service(s) having been identified during person-centered planning;
- The service(s) being medically necessary as defined in the Medical Necessity Criteria subsection of this chapter;
- The service(s) being expected to achieve one or more of the above-listed goals as identified in the beneficiary's individual plan of service; and
- Additional criteria indicated in certain BH 1915(i) SPA service definitions, as applicable.

Decisions regarding the authorization of a BH 1915(i) SPA service (including the amount, scope and duration) must take into account the PIHP's documented capacity to reasonably and equitably serve other Medicaid beneficiaries who also have needs for these services. The BH 1915(i) SPA supports and services are not intended to meet all the individual's needs and preferences, as some needs may be better met by community and other natural supports. Natural supports mean unpaid assistance provided to the beneficiary by people in their network (family, friends, neighbors, community volunteers) who are willing and able to provide such assistance. It is reasonable to expect that parents of minor children with disabilities will provide the same level of care they would provide to their children without disabilities. MDHHS encourages the use of natural supports to assist in meeting an individual's needs to the extent that the family or friends who provide the natural supports are willing and able to provide this assistance. PIHPs may not require a beneficiary's natural support network to provide such

assistance as a condition for receiving specialty mental health supports and services. The use of natural supports must be documented in the beneficiary's individual plan of service.

Refer to the Behavioral Health Code Charts and Provider Qualifications document for supports and services provider qualifications. The Behavioral Health Code Charts and Provider Qualifications document is posted on the MDHHS website. (Refer to the Directory Appendix for website information.)

*MPM, January 1, 2025, version
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
Pages 146, 148-149*

Moreover, regarding settings for HCBS, the MPM further states in part:

SECTION 3 – HOME AND COMMUNITY BASED SETTINGS

3.1 CHARACTERISTICS OF A HOME AND COMMUNITY BASED SETTING

Through the HCBS Final Rule, CMS imposed certain requirements for HCB settings which consist of those settings where individuals live (residential settings) and those where individuals go to receive services (non-residential settings). All HCB settings where people live or receive Medicaid HCBS must have the following characteristics to the same extent as those individuals not receiving Medicaid HCBS:

- Be integrated in, and support full access to, the greater community, including opportunities to seek competitive and integrated employment, control of personal resources, and access to community services;
- Be selected by the individual from among a variety of setting options and, for residential settings, consistent with the individual's available resources to pay for room and board;

- Ensure individuals have the right to privacy, dignity and respect, as well as freedom from coercion and restraint;
- Optimize but not regiment the individual's autonomy and independence in making life choices regarding what they participate in and with whom; and
- Facilitate the individual's choice of services and supports, as well as who provides them.

When an individual chooses to receive Medicaid HCBS in a provider-owned and/or -controlled setting where the provider is paid a single rate to provide a bundle of services, the individual is choosing that provider, and cannot choose an alternative provider, to deliver all services that are included in the bundled rate. For any services that are not included in the bundled rate, the individual may choose any qualified provider, including the provider who controls or owns the setting, if the provider offers the service separate from the bundle. Any home owned or leased by a provider must adhere to the additional requirements described in federal law.

Settings that are presumed to not meet the HCB settings requirements are:

- Those in a publicly- or privately-owned facility providing inpatient treatment;
- On the grounds of, or adjacent to, a public institution; or
- Any that otherwise have the effects of isolating individuals from the broader community of individuals who are not receiving Medicaid HCBS.

Settings that are on the grounds of, or adjacent to, a private institution are not automatically presumed to have the characteristics of an institution. However, if the setting isolates the individual from the broader community (or otherwise has the characteristics of an institution) or fails to meet the characteristics of an HCB setting, the setting would **not** be considered to be compliant with the regulation.

All settings, including facility- or site-based settings (e.g. pre-vocational services in a facility-based setting such as a sheltered workshop or dementia-specific adult day care centers) must demonstrate the qualities of HCB settings, ensure the individual's experience is HCB and not institutional in nature, and does not isolate the individual from the broader community. In particular, if the setting is designed specifically for people with disabilities, or individuals in the setting are primarily or exclusively people with disabilities and on-site staff provides many services to them, the setting may be isolating unless the setting facilitates and encourages people going out into the broader community.

3.1.A. REQUIREMENTS FOR RESIDENTIAL SETTINGS

The requirements for residential settings apply to provider-owned or controlled settings. An individual's private home is presumed to be compliant with the HCB requirements. Individuals receiving Medicaid HCBS shall enjoy the same rights, protections and assurances in all living arrangements as those not receiving Medicaid HCBS.

3.1.A.1. MEALS

Individuals must have access to food at any time. This does not mean the residential setting must be prepared to make a full meal at any time, but the individual must have access to some type of food when they choose. The type of food offered must be something that the individual likes to eat.

3.1.A.2. VISITORS

Individuals must be allowed to have visitors of their choosing at any time.

3.1.A.3. LOCKABLE DOORS

Residential settings must have bedroom and bathroom doors that are lockable by the individual, with only appropriate staff having keys to the doors. The doors must be lockable from the inside of the room and equipped with positive-latching, non-locking against-egress hardware. This means the door should open from the inside in one single motion such as the turn of the knob or handle. If a setting has private bedrooms that include private bathrooms, only the main door to the bedroom/unit must be lockable, though MDHHS encourages that both the bedroom door and bathroom door be lockable.

3.1.A.4. FREEDOM TO FURNISH AND DECORATE ROOM

Individuals must have the freedom to furnish and decorate their room however they choose. In the case of a shared room, the furnishings and decor may be a collaborative effort with roommates.

3.1.A.5. CHOICE OF ROOMMATE

Individuals must have their choice of roommate if possible. In some circumstances, there may only be limited beds available at the residence so if the individual chooses that setting, they may also be choosing that bed without the ability to choose the roommate. Different arrangements may be made as the individual continues to live in that setting.

3.1.A.6. FREEDOM TO CONTROL SCHEDULE, ACTIVITIES AND RESOURCES

Individuals must have freedom to control their own schedules, activities and resources to the extent they desire. If they choose to receive assistance, that should be provided as needed and desired by the individual.

3.1.A.7. PRIVACY

Individuals must have privacy in their unit. This includes physical privacy as well as keeping any of the

individual's confidential information private. Protected health information and other confidential personal information must not be kept in an open, common, unlocked area.

3.1.A.8. ACCESSIBILITY

Each setting must be physically accessible to the individuals residing there so the individuals may function as independently as they wish. Individuals must be able to move around in the setting without physical barriers getting in their way. This is especially true for individuals utilizing wheelchairs or who require walking aids. Furniture must be placed in such a way that individuals can easily move around it, with pathways large enough for a wheelchair, scooter or walking aids to navigate easily if individuals with these types of mobility aids reside in the setting.

3.1.A.9. EVICTIONS AND APPEALS

Individuals receiving services must have a lease or other legally enforceable agreement that offers comparable responsibilities and protections from eviction that tenants have under the landlord/tenant law of the state, county, city or other locality.

For settings in which landlord/tenant laws do not apply, MDHHS or its designee must ensure that a lease or other written agreement is in place for each individual and that the lease or agreement provides protections that address eviction processes and appeals similar to that of landlord/tenant laws.

3.1.A.10. HOUSE RULES

Although house rules are optional under State of Michigan licensing rules for Adult Foster Care and Homes for the Aged, for the purposes of the HCBS Final Rule, house rules will not be permitted.

3.1.A.11. CONTROL OF PERSONAL RESOURCES

The HCBS Final Rule requires that individuals be able to control their personal resources.

*MPM, January 1, 2025, version
HCBS Chapter, pages 5-7*

Similarly, with respect to home and community-based settings, the Code of Federal Regulations (CFR) provides in part:

- (a) States must make available attendant services and supports in a home and community-based setting consistent with both paragraphs (a)(1) and (a)(2) of this section.
 - (1) Home and community-based settings must have all of the following qualities, and such other qualities as the Secretary determines to be appropriate, based on the needs of the individual as indicated in their person-centered service plan:
 - (i) The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.
 - (ii) The setting is selected by the individual from among setting options, including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service plan and are based on the individual's needs, preferences, and, for residential settings, resources available for room and board.
 - (iii) Ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint.

(iv) Optimizes but does not regiment individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact.

(v) Facilitates individual choice regarding services and supports, and who provides them.

(vi) In a provider-owned or controlled residential setting, in addition to the above qualities at paragraphs (a)(1)(i) through (v) of this section, the following additional conditions must be met:

(A) The unit or dwelling is a specific physical place that can be owned, rented or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord tenant law of the State, county, city or other designated entity. For settings in which landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each participant and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

(B) Each individual has privacy in their sleeping or living unit:

(1) Units have entrance doors lockable by the individual, with only appropriate staff having keys to doors as needed.

(2) Individuals sharing units have a choice of roommates in that setting.

(3) Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.

- (C) Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time.
- (D) Individuals are able to have visitors of their choosing at any time.
- (E) The setting is physically accessible to the individual.
- (F) Any modification of the additional conditions, under paragraphs (a)(1)(vi)(A) through (D) of this section, must be supported by a specific assessed need and justified in the person-centered service plan. The following requirements must be documented in the person-centered service plan:
 - (1) Identify a specific and individualized assessed need.
 - (2) Document the positive interventions and supports used prior to any modifications to the person-centered service plan.
 - (3) Document less intrusive methods of meeting the need that have been tried but did not work.
 - (4) Include a clear description of the condition that is directly proportionate to the specific assessed need.
 - (5) Include regulation collection and review of data to measure the ongoing effectiveness of the modification.
 - (6) Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.
 - (7) Include the informed consent of the individual.

- (8) Include an assurance that interventions and supports will cause no harm to the individual.
- (2) Home and community-based settings do not include the following:
 - (i) A nursing facility;
 - (ii) An institution for mental diseases;
 - (iii) An intermediate care facility for individuals with intellectual disabilities;
 - (iv) A hospital providing long-term care services; or
 - (v) Any other locations that have qualities of an institutional setting, as determined by the Secretary. Any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, or in a building on the grounds of, or immediately adjacent to, a public institution, or any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS will be presumed to be a setting that has the qualities of an institution unless the Secretary determines through heightened scrutiny, based on information presented by the State or other parties, that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings.

42 CFR 441.530(a)

Respondent also cites the 2024 Joint Guidance Document provided to it by its PIHP and MDHHS in support of the action in this case. That document states in part:

In 2014 the Centers for Medicare and Medicaid Services issued a Final Rule for Medicaid waiver programs that offer home and community-based services (HCBS). The Home and Community Based Services Final Rule affects home and community-based service programs that are provided through the 1915 (C) Habilitation Supports Waiver and the §1915(i) State Plan Amendment (SPA) sections of the Social

Security Act. The HCBS Final Rule established new requirements for characteristics that home and community-based settings must demonstrate in order to receive Medicaid funding. To determine compliance, behavioral health settings were assessed to ensure the settings demonstrated the characteristics outlined in the HCBS final rule.

Michigan Department of Health and Human Services and the Department of Licensing and Regulatory Affairs (LARA) worked together to identify any areas of potential conflict between the two sets of requirements and to provide settings with a document that would clearly outline the expectations of both MDHHS and LARA. In 2017 MDHHS issued the Joint Guidance Document to providers and community partners. The Joint Guidance Document has proven to be a useful and effective tool to support providers and to ensure compliance with the HCBS Final Rule while aligning with LARA requirements.

We have updated the attached Joint Guidance Document to increase clarity and to address any areas where additional guidance has been requested. This Joint Guidance Document is developed specifically for settings that provide services or supports to individuals receiving HCBS behavioral health services.

Topics addressed in the Joint Guidance document include:

- Lockable Doors
- Visiting Hours
- Residency Agreements and State Landlord-Tenant Law
- Choice of Providers
- Freedom of Movement
- Choice of Roommate
- Access to Earned Income

Secure or restrictive settings

- Legally mandated rights
- Marijuana

* * *

USE OF VIDEO CAMERAS

The use of video cameras for surveillance is prohibited in HCBS settings. Video cameras maybe utilized in areas where waiver participants do not enter (such as the business office, or medication distribution rooms, if the camera is fixed in its position and is facing in such a way that it cannot inadvertently record waiver participants. The responsibility to ensure a camera meets the requirements identified is upon the setting. Settings should work with their PIHP leads to confirm that any intended use of cameras is acceptable.

Cameras that are part of an external security system are allowed.

Exhibit A, pages 62-63, 70¹

Moreover, in addition to the Joint Guidance Document, Respondent also cites a provision of the Mental Health Code in support of its decision:

- (1) A recipient of mental health services shall not be fingerprinted, photographed, audiorecorded, or viewed through a 1-way glass except in the circumstances and under the conditions set forth in this section. As used in this section, photographs include still pictures, motion pictures, and recordings.
- (2) Fingerprints, photographs, or audiorecordings may be taken and used and 1-way glass may be used in order to provide services, including research, to a recipient or in order to determine the name of the recipient only when prior written consent is obtained from 1 of the following:
 - (a) The recipient if 18 years of age or over and competent to consent.
 - (b) The guardian of the recipient if the guardian is legally empowered to execute such a consent.
 - (c) The parent with legal and physical custody of the recipient if the recipient is less than 18 years of age.
- (3) Fingerprints, photographs, or audiorecordings taken in order to provide services to a recipient, and any copies of them, shall be kept as part of the record of the recipient.

¹ The Joint Guidance Document is also found at [JGD_Letter_2024_Combined.pdf](#)

- (4) Fingerprints, photographs, or audiorecordings taken in order to determine the name of a recipient shall be kept as part of the record of the recipient, except that when necessary the fingerprints, photographs, or audiorecordings may be delivered to others for assistance in determining the name of the recipient. Fingerprints, photographs, or audiorecordings so delivered shall be returned together with copies that were made. An individual receiving fingerprints, photographs, or audiorecordings shall be informed of the requirement that return be made. Upon return, the fingerprints, photographs, or audiorecordings, together with copies, shall be kept as part of the record of the recipient.
- (5) Fingerprints, photographs, or audiorecordings in the record of a recipient, and any copies of them, shall be given to the recipient or destroyed when they are no longer essential in order to achieve 1 of the objectives set forth in subsection (2), or upon discharge of the resident, whichever occurs first.
- (6) Photographs of a recipient may be taken for purely personal or social purposes and shall be maintained as the recipient's personal property. A photograph of a recipient shall not be taken or used under this subsection if the recipient has indicated his or her objection.
- (7) Photographs or audiorecordings may be taken and 1-way glass may be used for educational or training purposes only when express written consent is obtained from 1 of the following:
 - (a) The recipient if 18 years of age or over and competent to consent.
 - (b) The guardian of the recipient if the guardian is legally empowered to execute such a consent.
 - (c) The parent with legal and physical custody of the recipient if the recipient is less than 18 years of age.
- (8) This section does not apply to recipients of mental health services referred under chapter 10.

(9) Video surveillance may be conducted in a psychiatric hospital for purposes of safety, security, and quality improvement. Video surveillance may only be conducted in common areas such as hallways, nursing station areas, and social activity areas within the psychiatric unit. Video surveillance recordings taken in common areas shall not be used for treatment or therapeutic purposes. Before implementation of video surveillance, the psychiatric hospital shall establish written policies and procedures that address, at a minimum, all of the following:

- (a) Identification of locations where video surveillance images will be recorded and saved.
- (b) Mechanisms by which recipients and visitors will be advised of the video surveillance.
- (c) Security provisions that assure that only authorized staff members have access to view recorded surveillance video. The security provisions shall include all of the following:
 - (i) Who may authorize viewing of recorded surveillance video.
 - (ii) Circumstances under which recorded surveillance video may be viewed.
 - (iii) Who may view recorded surveillance video with proper authorization.
 - (iv) Safeguards to prevent and detect unauthorized viewing of recorded surveillance video.
 - (v) Circumstances under which recorded surveillance video may be duplicated and what steps will be taken to prevent unauthorized distribution of the duplicate.
- (d) Documentation required to be maintained for each instance of authorized access, viewing duplication, or distribution of any recorded surveillance videos.

- (e) Process to assure retrieval of distributed recorded surveillance video when the purpose for which the video was distributed no longer exists.
- (f) Archived footage of video surveillance recordings for up to 30 days unless notice is received that an incident requires investigation by the department's office of recipient rights, the licensing division of the bureau of health systems, law enforcement, licensed psychiatric hospital or unit office of recipient rights, and the United States department of health and human services centers for medicaid and medicare services. In that case, archived footage of video surveillance recordings may be retained for the duration of the investigation.
- (g) Recorded video surveillance images shall not be maintained as part of a recipient's clinical record.

MCL 330.1724

Here, as discussed above, Respondent denied Petitioner's request for HCBS at an AFC home that employs video surveillance cameras in common areas.

In support of that decision, Respondent's Chief Financial Officer testified regarding the requested services and why, despite those services being deemed medically necessary, Petitioner's request was denied due to the location of services identified in the request and the presence of prohibited video surveillance cameras.

Respondent's representative, who was Respondent's Residential Placement Coordinator at time of the initial request in this case, testified regarding the timeline of the case, including the involvement of MSHN and MDHHS and the decision to deny Petitioner's request.

Respondent's Chief Operating Officer testified that she was consulted on Petitioner's case after it was flagged due to restrictions at the AFC home, and that she reviewed the relevant information and guidelines. She also testified that she coordinated conversations with MSHN and MDHHS, and that it was determined that Petitioner's request should be denied. She did confirm that two other residents served by Respondent were already residing at [REDACTED] and that, besides the Joint Guidance Document, she was not aware of where specifically the prohibition on video surveillance cameras was found.

In response, Petitioner's representative/guardian testified and argued the HCBS Final Rule was not being applied in proper fashion, and that there is no prohibition on video cameras in either the Final Rule of the MPM, with other states permitting their use. She

also testified and argued that, while she later received copies of the Joint Guidance Document and the Department's 2020 Memorandum that do address video cameras, the memorandum is inaccurate as to the law while the Joint Guidance Document are just recently added guidelines. She further testified how cameras are generally used everywhere how they are specifically used at [REDACTED] with Petitioner willing to consent to that use.

Petitioner bears the burden of proving by a preponderance of the evidence that Respondent erred. Moreover, the undersigned ALJ is limited to reviewing the Respondent's decision in light of the information it had at the time it made the decision.

Given the record and applicable policies in this case, the undersigned ALJ finds that Petitioner has failed to meet her burden of proof; and that Respondent's decision must, therefore, be affirmed.

Petitioner's representative correctly notes that two other Medicaid beneficiaries served by Respondent have been approved for HCBS at the very same AFC home where Petitioner seeks placement and despite the presence of video cameras in the common areas. However, those other beneficiaries are in the process of being transitioned out, and regardless, it is solely the decision involving Petitioner that is at issue here.

Similarly, to the extent Petitioner's representative correctly notes that the Joint Guidance Document relied upon Respondent did not originally contain language regarding video cameras and that the most recent version still does not identify video cameras for surveillance as a topic in the list of topics to be addressed in the document, the undersigned ALJ gives her argument little weight. It is undisputed that the current version of the Joint Guidance Document expressly provides that the use of video cameras for surveillance is prohibited in HCBS settings, and that Responder specifically relied upon that current language.

Moreover, while no explicit prohibition against video cameras for surveillance is found in the applicable federal rule, 42 CFR 441.530(a); or provisions in the MPM, Section 3 of the HCBS Chapter regarding home and community-based settings, the Joint Guidance Document is not limited to addressing those sources; and it was specifically developed by MDHHS and LARA to address potential conflicts arising from different areas and requirements.

As testified to by Respondent's witnesses and provided in the notices sent to Petitioner, one other source of law that served as a basis for Joint Guidance Document is the Mental Health Code and its provisions in MCL 330.1724 regarding, in part, the photographing and audio recording of recipients of mental health services, with photographs specifically defined as including motion pictures and recordings. In particular, MCL 330.1724(1) limits such photographing to the circumstances and conditions set forth in the remainder of the section.

In relation to this case, only MCL 330.1724(2) could permit cameras in the common areas of the AFC home; and that provision provides that photographs, including motion pictures and recordings, may only be taken "in order to provide services, including research, to a recipient" if prior written consent is contained.

Here, consent is not at issue, as Petitioner's guardian wants the video cameras in common areas, but the video cameras are not being used to "provide services" as required; and consequently, they are inappropriate surveillance. The cameras are already in place prior to Petitioner being placed; they are not specifically identified as part of her Individual Plan of Service; and they are not used as an active part of her services. Instead, the cameras are general video surveillance, and as provided in the Joint Guidance Document, based on language from the Mental Health Code, not permitted in HCBS settings.

To the extent Petitioner has additional or updated information in support of the video cameras being used to provide services, and not just surveillance, she can always request placement at the AFC home with cameras again in the future. With respect to the decision in this case, however, Petitioner's Respondent's decision must be affirmed given the record.

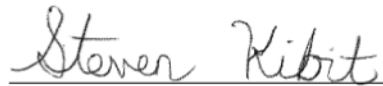
DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Respondent properly denied Petitioner's request for HCBS at an AFC home with video surveillance cameras in common areas

IT IS THEREFORE ORDERED that:

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

SK/pe


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

Via Electronic Mail:

DHHS Department Contacts

Belinda Hawks

MDHHS - BPHASA

320 S Walnut St, 5th Floor

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**Via First Class and
Electronic Mail:**

Authorized Hearing Representative

[REDACTED]

[REDACTED] MI [REDACTED]

[REDACTED]

Via First Class Mail:

Petitioner

[REDACTED]

[REDACTED] MI [REDACTED]