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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: June 29, 2022
MOAHR Docket No.: 22-002011
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 28, 2022. [REDACTED], Petitioner's mother and guardian, appeared and testified on Petitioner's behalf. Kathleen Faber, OBRA Appeals Coordinator, appeared and testified on behalf of the Respondent, Michigan Department of Health and Human Services (Respondent, MDHHS or Department).

ISSUE

Did the Department properly determine that 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 3[REDACTED]-year-old Medicaid beneficiary, who is diagnosed with hydrocephalus, unspecified; muscle weakness (generalized); repeated falls; cerebral palsy, unspecified; hemiplegia and hemiparesis; cirrhosis of liver; unspecified convulsions; GERD; difficulty walking; conduct disorder, unspecified; mild intellectual disabilities; hypertension; seasonal allergies; and sleep apnea, unspecified. (Exhibit A, p 5; Testimony)
2. Petitioner's mother is his guardian. (Exhibit D; Testimony)
3. On December 22, 2021, Petitioner was admitted to a nursing facility (NF) following an approximately 30-day stay in the hospital due to issues with strength and ataxia. (Exhibit A, p 1; Testimony)

4. On March 17, 2022, the North Country Community Mental Health OBRA Team completed a Level II OBRA screening of Petitioner. (Exhibit A, pp 1-22). 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:

No Nursing Home Placement is recommended. He has chronic medical conditions and needs assistance with ADLs, but not to the degree that would preclude him from pursuing placement in a specialized residential setting. He is 39 years old, which is a long time to reside in such a potentially restrictive and institutionalized setting. One of his goals with our agency is to increase community inclusion, make money, and/or volunteer somewhere. Outings at the nursing home are very limited, while outings at a specialized residential home are ongoing. While at home he helped around the house and even cooked some for himself. There would be opportunities at a specialized residential home for him to keep up these skills. He has adapted well to nursing home placement, which I believe points to the likeliness that if a home was found which could meet his needs, he would be able to (if not rushed) transition well. (Exhibit A, p 18; Testimony)

5. On March 25, 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 March 25, 2022, the OBRA Team provided notice to Petitioner's guardian of the Department's determination. (Exhibit C; Testimony).
7. On April 4, 2022, the Department 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.

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.)

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 screen indicates an individual may be mentally ill, 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.

Here, the Department's OBRA Appeals Coordinator testified that on December 22, 2021, Petitioner was admitted to a NF following an approximately 30-day stay in the hospital due to issues with strength and ataxia. The Department's OBRA Appeals Coordinator further indicated that on March 17, 2022, the North Country Community Mental Health OBRA Team completed a Level II OBRA screening of Petitioner and concluded that Petitioner did not require a NF level of care. The Department's OBRA Appeals Coordinator testified that on March 25, 2022, after she reviewed the OBRA assessment, 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 Petitioner has done well in the NF and has regained some of his mobility since his admission. The Department's OBRA Appeals Coordinator indicated that Petitioner transitioned well into the NF setting so it should be expected that he would also transition well into a specialized AFC home. The Department's OBRA Appeals Coordinator noted that one of the things required by federal regulations is that the Department ensure that beneficiaries are living in the least restrictive environment possible. The Department's OBRA Appeals Coordinator indicated that a specialized AFC home is not as institutionalized a setting as a NF and there are more opportunities for Petitioner to participate in activities, be involved with peers, and be with people closer to his own age. The Department's OBRA Appeals Coordinator also noted that the ratio of staff to residents is much better in a specialized AFC home, the response time to incidents is better, and the homes provide transportation to medical appointments.

The Department's OBRA Appeals Coordinator testified that they have encouraged Petitioner's mother to just look at some of these AFC homes so that she can make the best decision for Petitioner. The Department's OBRA Appeals Coordinator indicated that her fear is that because of Petitioner's relatively young age he will participate in fewer activities in a NF and he needs more of the community inclusion provided in an AFC home.

Petitioner's mother/guardian testified that her concern is that Petitioner is happy where he is and does not want to move. Petitioner's mother/guardian indicated that she would of course prefer that Petitioner move home with her but because of her health situation that is not going to happen. Petitioner's mother/guardian noted that Petitioner has indicated repeatedly that he likes the NF and wants to stay there. Petitioner's mother/guardian testified that as far as Petitioner's activity level in the NF, it is the same as it was when he lived at home with her, and it would be no better in an AFC home.

Petitioner's mother/guardian noted that Petitioner has been less and less sociable as he has gotten older and that is his choice. Petitioner's mother/guardian testified that even though Petitioner does not want to participate in a lot of activities, he is happy, and that is the most important thing. Petitioner's mother/guardian testified that the NF takes very good care of Petitioner and meets all his needs. Petitioner's mother/guardian also noted that the suggested AFC homes would also not be as convenient for her to get to, since she must rely on transportation from her sister, and any move would result in Petitioner having fewer visitors.

In response, the Department's OBRA Appeals Coordinator testified that they are actually trying to find an AFC home that is closer to Petitioner's mother and would not be out of the way for the family. The Department's OBRA Appeals Coordinator noted that the Department is not going to force Petitioner to move, and they will not move him until they find a place that everyone is comfortable with. The Department's OBRA Appeals Coordinator indicated that because neither Petitioner nor his mother have ever even looked at an AFC home, they cannot know for sure what it would be like. The Department's OBRA Appeals Coordinator noted that one of the reasons OBRA exists is because there were too many people like Petitioner in the past that were just housed in NF's for their entire lives.

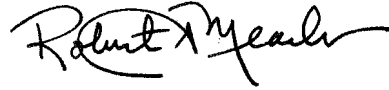
The evidence in this case establishes that the OBRA evaluation was thoroughly performed, and the review properly resulted in a determination that Petitioner does not require nursing facility level of services but does require specialized mental health/developmental disabilities services. The Department 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, Petitioner is only 39 years old, and it would not be appropriate for him to stay in a NF for the remainder of his life. He can receive the necessary level of care in a specialized AFC home, while also being given more opportunities to participate in community inclusion activities. Petitioner would also have opportunities in an AFC home to meet his goals of making money and volunteering. Petitioner would also be able to keep up his skills of helping around the house and cooking in an AFC home. Furthermore, the ratio of staff to residents is much better in an AFC home and response time to incidents is better. Petitioner transitioned well into the NF, so there is no reason to believe he will not transition well into a specialized AFC home. Also, it appears from the record that there are AFC homes in the areas surrounding Petitioner's mother/guardian, so the parties should be able to find a home that is no less convenient to visit than the NF where Petitioner currently is staying. As such, 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**.



RM/dh

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 Department Rep.
Laurie Ehrhardt
MDHHS – BPHASA
320 South Walnut, 5th Floor
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DHHS Dept. Contact
Belinda Hawks
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Via First Class Mail:

Authorized Hearing Rep.

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