FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
c/o [redacted]
[redacted]
[redacted]

DECISION

MPS/147250

PRELIMINARY RECITALS

Pursuant to a petition filed February 8, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Bureau of Prevention, Treatment and Recovery (Bureau) in regard to Medical Assistance, a hearing was held on April 30, 2013, by telephone. Hearings set for March 5 and April 9, 2013, were rescheduled at the petitioner's request.

The issue for determination is whether the Bureau's agency correctly determined that the petitioner requires both nursing facility services and specialized services pursuant to a PASARR determination.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]
By: [redacted]
[redacted]
[redacted]

Petitioner's Representative:

[redacted] Social worker
[redacted]
[redacted]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: Dan Zimmerman, PASARR Administrator
Division of Mental Health And Substance Abuse Serv
Madison, WI

ADMINISTRATIVE LAW JUDGE:
Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner, age 34, is a resident of in Winnebago County. She is currently placed in [redacted], a nursing home.

2. The petitioner was admitted to the nursing facility in January 2013, following hospital discharge.
3. A Preadmission Screening and Annual Resident Review (PASARR) assessment was performed for the petitioner in February 2013. The Bureau's agent then determined that the petitioner's needs could be met in a nursing facility, and that she needs "specialized services."
4. On February 5, 2013, the Bureau issued written notice to the petitioner advising that the PASARR determination was that a nursing facility with the provision of specialized services was appropriate for her. The petitioner timely appealed, and she has resided at the nursing home through the date of this hearing decision.
5. The petitioner is mentally retarded. She does not suffer from any psychiatric disorder.
6. The petitioner requires "specialized services." Specifically, she requires services to better understand simple commands, communicate basic needs and wants, and demonstrate behavior appropriate to the time, situation or place. For instance, the petitioner currently has little verbalization, and shows happiness by clapping and smiling or laughing. However, she surprisingly does not effectively communicate pain or displeasure. She propels herself short distances in her wheelchair with her feet. The reviewer believes that the petitioner can function at a level higher than her current one-year old performance level. The PASARR reviewer implied in her recommendation that the petitioner receive speech therapy, and hopes for the continued one-on-one attention that the petitioner currently receives. The petitioner is not a "generally independent client who [is] able to function with little supervision."
7. The petitioner's medical problems include cerebral palsy, epilepsy, low vision, obesity, and recurrent colitis. She requires the supervision of a nursing home environment, physical assistance with all ADLs and transfers, and medication administration. The petitioner is incontinent of bower and bladder, and therefore requires toileting assistance. She is incontinent and requires assistance with all activities of daily living plus transfers. The PASARR reviewer concluded that the petitioner would benefit from a nursing facility's safety, structure, and support.

DISCUSSION

PASARR determinations are required by the federal Omnibus Budget Reconciliation Act of 1987. The federal implementing regulations, found at 42 C.F.R. Parts 431 and 483.100 *et seq*., became effective January 29, 1993. Pursuant to these regulations, the State must annually make a PASARR determination on residents of all MA-certified nursing facilities who are mentally retarded or who suffer from a serious mental illness. 42 C.F.R. 483.106(a)(3). There is no dispute that the petitioner is mentally retarded; therefore a PASARR determination is mandatory for her.

The mandatory PASARR determination must contain two components. The first component is a decision as to whether the person's needs can be met in a placement other than a nursing home. The second component is the decision as to whether the person needs "specialized services." 42 C.F.R. §483.114(a) and (b). The petitioner does not disagree with the PASARR decision on the first component—both sides agree that she has medical needs that require her to be in a nursing facility at this time. Indeed, it is the petitioner's wish that she be allowed to remain at [redacted], her current nursing facility.

The parties disagree with the respect to the second determination component, which is the need for specialized services. "Specialized services" for mental retardation are described in the federal rule as follows:

§ 483.120 Specialized services.

(a) *Definition* —(1) For mental illness, specialized services means the services specified by the State which, combined with services provided by the NF, results in the continuous and aggressive implementation of an individualized plan of care ...

(2) For intellectual disability, specialized services means the services specified by the State which, combined with services provided by the NF or other service providers, results in treatment which meets the requirements of § 483.440(a)(1).

(b) *Who must receive specialized services.* The State must provide or arrange for the provision of specialized services, in accordance with this subpart, to all NF residents with MI or MR whose needs are such that continuous supervision, treatment and training by qualified mental health or intellectual disability personnel is necessary, as identified by the screening provided in § 483.130 or §§ 483.134 and 483.136.

42 C.F.R. §483.120(a)(2). The cross-referenced provision is as follows:

§ 483.440 Condition of participation: Active treatment services.

(a) *Standard: Active treatment.* (1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward—

(i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and

(ii) The prevention or deceleration of regression or loss of current optimal functional status.

(2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program.

42 C.F.R. §483.440(a)(1), (2).

In deciding whether a mentally retarded nursing home resident requires specialized services, the Bureau must determine whether the person needs such services to deal with a specific list of deficiencies caused by her retardation:

(c) *Data interpretation* —(1) The State must ensure that a licensed psychologist identifies the intellectual functioning measurement of individuals with MR or a related condition.

(2) Based on the data compiled in paragraph (b) of this section, the State intellectual disability authority, using appropriate personnel, as designated by the State, must validate

that the individual has MR or is a person with a related condition and must determine whether specialized services for intellectual disability are needed. In making this determination, the State intellectual disability authority must make a qualitative judgment on the extent to which the person's status reflects, singly and collectively, the characteristics commonly associated with the need for specialized services, including—

(i) Inability to—

(A) Take care of the most personal care needs;

(B) Understand simple commands;

(C) Communicate basic needs and wants;

(D) Be employed at a productive wage level without systematic long term supervision or support;

(E) Learn new skills without aggressive and consistent training;

(F) Apply skills learned in a training situation to other environments or settings without aggressive and consistent training;

(G) Demonstrate behavior appropriate to the time, situation or place without direct supervision; and

(H) Make decisions requiring informed consent without extreme difficulty;

(ii) Demonstration of severe maladaptive behavior(s) that place the person or others in jeopardy to health and safety; and

(iii) Presence of other skill deficits or specialized training needs that necessitate the availability of trained MR personnel, 24 hours per day, to teach the person functional skills.

42 C.F.R. §483.136(c). Items (ii) and (iii) are not relevant to this case. The petitioner currently is unable to do any of the things listed in (i)(A) through (H) above. Thus, the remaining question is whether, after receiving specialized services, the petitioner is likely to improve in any of these areas. In my view, if the services will not improve her skills, the services are not "needed." Even if occupational, physical, and speech therapy, plus basic education are provided, the petitioner will not be able to perform items (A), (D), (E), (F), and (H). Therefore, her deficiencies with respect to those items are not a basis for requiring specialized services. However, therapy might cause the petitioner to achieve items (B), (C), and (G). More specifically, the petitioner might be able to express herself with respect to pain or displeasure. Therefore, I will agree with the PASARR determination that the petitioner needs a care plan developed by a physician and a mental retardation professional that will prescribe specific treatment therapies/activities for her condition.

The petitioner's guardian stressed that the petitioner has been receiving excellent care at this nursing home. The description of the home's care suggests that the home may already be providing some "specialized

services" to the petitioner. Mr. Zimmerman suggested that the home may simply need to better document its efforts to get credit for the specialized services that it is already providing.

Based on the foregoing *de novo* review, I conclude that the petitioner is a mentally retarded person whose total needs require both nursing facility services and specialized services. The PASARR determination indicated in the notice of February 5, 2013, was correct.

This decision does not automatically decide the petitioner's placement. When the PASARR determination states that a person needs both nursing facility services and specialized services, one option is for the petitioner to remain in her current nursing facility, and to then have the specialized services provided to her at that facility, if feasible. The controlling federal regulation states as follows:

> (n) *Specialized services needed in a NF.* If a determination is made to admit or allow to remain in a NF any individual who requires specialized services, the determination must be supported by assurances that the specialized services that are needed can and will be provided or arranged for by the State while the individual resides in the NF.

Id., §483.130(n). If the petitioner and nursing facility wish to seek the State's assistance in getting specialized services for the petitioner at [redacted], they should contact PASARR administrator Dan Zimmerman at 608-266-7072.

CONCLUSIONS OF LAW

1. The petitioner is a mentally retarded resident of an MA-certified nursing facility who requires both nursing facility care and specialized services.

2. The PASARR determination of February 5, 2013, correctly determined that the petitioner's needs can be met in a nursing facility with specialized services.

NOW, THEREFORE, it is **ORDERED**

That the petition herein be dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as

"PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 15th day of July, 2013

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\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 16, 2013.

Division of Mental Health And Substance Abuse Services
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