



State of New Jersey
Department of Human Services
Division of Medical Assistance and Health Services
P.O. BOX 712
TRENTON NJ 08625-0712

PHILIP D. MURPHY
Governor

Sheila Y. Oliver
Lt. Governor

Carole Johnson
Acting Commissioner

Meghan Davey
Director

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

S.D.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE

AND HEALTH SERVICES,

RESPONDENT.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HMA 8801-2016

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this matter, consisting of the case file, the documents in evidence and the Initial Decision. Respondent filed exceptions. Procedurally, the time period for the Agency Head to file a Final Agency Decision is January 18, 2017 pursuant to an Order of Extension.

This matter concerns Petitioner's placement in a nursing facility. Petitioner suffers from developmental disability as well as medical issues. Petitioner was

hospitalized after a fall and entered a nursing facility for rehabilitation. During this period her father became unable to care for her. Petitioner is seeking to remain at the nursing facility under Medicaid.

Federal and state law sets up a gatekeeping process to prevent individuals from being inappropriately placed in nursing homes.¹ As part of the Omnibus Budget Reconciliation Act (OBRA) enacted in 1987, Congress developed the Preadmission Screening and Resident Review (PASRR) program to prevent inappropriate admission and retention of people with mental disabilities in nursing facilities. 42 U.S.C.A. § 1396r(b)(3)(F). PASRR requires that all applicants to Medicaid-certified nursing homes be assessed to identify individuals whose needs require that they receive additional services for their intellectual disability or serious mental illness. Those individuals who “test positive” at Level I are then evaluated in depth to confirm the determination of MI/ID for PASRR purposes, and the “Level II” assessment produces a set of recommendations for necessary services that are meant to form the individual’s plan of care. See 42 C.F.R. § 483.100 et seq. and N.J.A.C.8:85-1.8.

Petitioner was determined to be in need of nursing home level services. However, Petitioner did test positive at the Level I PASRR. As a result she was screened for a Level II PASRR by the Division of Developmental Disabilities (DDD) which is required to determine the need for specialized services. 42 C.F.R. § 483.100 et seq.

That assessment determined that Petitioner would benefit from specialized services, which cannot be provided in a nursing facility. As such, Petitioner is not

¹ Inappropriate placement in a nursing home causes residents “to become dependent on that facility, experiencing depletion of their financial resources and erosion of their social contacts in the community.” N.J.A.C. 30:4D-17.10.b

permitted to reside in a nursing facility. Petitioner challenged that finding and the matter was transmitted to the Office of Administrative Law.

The Initial Decision reverses the PASRR determination by finding that the testimony from Petitioner's doctor and nurse "support nursing home placement." ID at 11. As noted in exceptions, Petitioner's guardian did not appear at the hearing and appears to have refused to cooperate with the DDD assessment. Moreover, there is no dispute that Petitioner meets nursing home level of care. If she did not, Petitioner would not have been screened under PASRR. Rather Petitioner is arguing that she is exempt from PASRR due to having a "severe physical illness" and presented medical testimony to that end.

The ALJ found that Petitioner did not demonstrate that her condition rises to the level of severe physical illness at this time. Severe physical illness is defined as conditions such as a coma, ventilator dependence, functioning at a brain stem level, etc. 42 CFR § 483.10(d)(3). While it is acknowledged that Petitioner's physical condition will decline to ventilator dependence, her medical expert stated that her condition is "slowly progressing" towards that decline. ID at 4. Thus, she does not meet the criteria of a severe physical illness and a Level II PASSR is required.

Additionally, Petitioner's placement concerns the holding of Olmstead v. Linn, 527 U.S. 581 (1999). In that case, the state's refusal to transfer mentally ill patients from institutions to community-based treatment centers (when the community-based centers were appropriate placements according to the plaintiffs' doctors) was held to violate the Americans with Disabilities Act. Id. at 597. Title II of the ADA, which proscribes discrimination in the provision of public services, specifies, *inter alia*, that no qualified individual with a disability shall, "by reason of such disability," be excluded

from participation in, or be denied the benefits of, a public entity's services, programs, or activities. 42 U.S.C. § 12132. Olmstead prohibits the institutionalization of mentally handicapped individuals when community-based options are available and would not fundamentally alter a state's services and programs.

As DDD testified, there are community based group homes that permit Petitioner to receive the services she requires for her physical and mental disability. However, an impediment to DDD's assessment of services is Petitioner's guardian's refusal to cooperate with the screening necessary to make determinations regarding the specialized services and the residential placement. Such cooperation is required by the federal rules at 42 CFR § 483.440(c) (2). The record indicates that Petitioner's father and guardian died during these proceedings and new guardians have been named. As such, I instruct DDD to perform the complete assessment of services with Petitioner's new guardian.


THEREFORE, it is on this 17th day of JANUARY 2018,

ORDERED:

That the Initial Decision is hereby ADOPTED as to the finding that Petitioner is not exempt from the Level II PASRR;

That the Initial Decision is hereby REVERSED as to the finding that Petitioner's appropriate placement is the nursing facility, and

That the matter is RETURNED to DDD for further action on the Level II assessment and placement.


Meghan Davey, Director
Division of Medical Assistance
and Health Services