

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2201982
Decision Date:	10/3/2022	Hearing Date:	07/26/2022
Hearing Officer:	Thomas J. Goode	Record Open to:	09/23/2022

Appearance for Appellant:




Appearance for DDS/PASRR Screener:

Jennifer Bevilacqua, Esq., DDS; Nancy Weston, Director of PASRR Operations; Jeffrey Hetrick, DDS Deputy Area Director of Greater Boston; Sara Goodrich, Health Services Director, Bay Cove



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	Denied	Issue:	PASRR Screening
Decision Date:	10/3/2022	Hearing Date:	07/26/2022
DDS's Reps.:	Jennifer Bevilacqua, Esq. et. al.	Appellant's Reps.:	
Hearing Location:	Remote		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a notice dated January 20, 2022, the Department of Developmental Services (DDS) determined that Appellant, an individual with an intellectual disability who is seeking continued residency in a nursing facility, was screened no longer eligible for nursing facility care as a community placement was available, and that nursing facility eligibility would terminate on February 22, 2022 (130 CMR 610.037, 456.409; Exhibit 1). A timely appeal was filed on February 21, 2022, by an attorney representing Appellant's power of attorney (130 CMR 610.037, 610.015(B); Exhibits 2, 3). By notice dated April 19, 2022, a hearing was scheduled for May 13, 2022 (Exhibit 6). On April 19, 2022, Appellant's attorney withdrew her representation of Appellant's power of attorney (Exhibit 6). On April 21, 2022, Appellant's current appeal representative submitted a letter to the Board of Hearings requesting a rescheduled hearing date (Exhibit 7).¹ An agency determination regarding the scope and amount of assistance is valid

¹ The hearing was rescheduled in error by the Board of Hearings. In her April 19, 2022 letter requesting a rescheduled hearing date, Appellant's new appeal representative did not present authority to BoH to act on Appellant's or her power of attorneys' behalf. The requested reschedule of the May 13, 2022 hearing date should have been disallowed as Appellant's new representative did not present authority to act as Appellant's appeal representative (Exhibit 7). Instead, the Board rescheduled the hearing to July 26, 2022 (Exhibit 8). Appellant's appeal representative did not present authority to act on behalf of Appellant's power of attorney until July 26, 2022, evidenced by a letter of authorization allowing the appeal representative to represent Appellant at a hearing which was signed by the joint powers of attorney (Appellant's parents) on May 17, 2022 (Exhibit 10). Appellant's representative explained that she was not asked by the Board of Hearings to present evidence of her authority to act on Appellant's behalf (Exhibit 10). The BoH rescheduling error notwithstanding, Appellant's appeal representative evidenced her authority to act on behalf of Appellant's power of attorneys at the hearing held on July 26, 2022.

grounds for appeal (130 CMR 610.032, 610.037). The hearing record remained open until August 28, 2022 for the submission of a legal memorandum from DDS which was timely received (Exhibit 15). Appellant's response memorandum was due by September 9, 2022 (Exhibit 12). On August 4, 2022, Appellant's representative informed the hearing officer that she would be on a pre-planned vacation until September 9, 2022 and requested an extension until September 23, 2022 which was allowed (Exhibit 13). Appellant's reply was timely received (Exhibits 21, 22).

Action Taken by MassHealth/DDS

DDS determined that continued nursing facility placement is not appropriate for Appellant as her needs can be met in a community setting.

Issue

Whether DDS was correct in determining that continued nursing facility placement is not appropriate for Appellant as her needs can be met in a community setting.

Summary of Evidence²

The DDS representatives testified that DDS is the designated state agency responsible for conducting a PASRR evaluation under 42 CFR §483.132(a)³, which provides that the evaluator must assess whether the individual's needs are such that his or her needs can be met in an appropriate community setting; the individual's needs are such that his or her needs can be met only on an inpatient basis, which may include the option of placement in a home-and-community-based services waiver program, but for which inpatient care would be required; if inpatient care is appropriate and desired, whether the nursing facility is an appropriate institutional setting for meeting those needs in accordance with § 483.126; or if the inpatient care is appropriate and desired but the nursing facility is not the appropriate setting for meeting the individual's needs in accordance with §483.126, another setting such as an ICF/MR (including small, community-based facilities), an IMD providing services to individuals aged 65 or older, or a psychiatric hospital is an appropriate institutional setting for meeting those needs.⁴ The DDS representative explained that the federal PASRR evaluation is implemented in Massachusetts using a specific scoring tool (Exhibit 1). Section E scores medical needs and Section F scores skilled nursing needs.

Appellant is [REDACTED] years old and currently resides at [REDACTED] in the North End neighborhood of Boston. Appellant resided with her parents, in the family home in the

After reviewing the documentation of her appointment as appeal representative submitted after the hearing, the hearing officer determined that Appellant's representative sufficiently evidenced her authority to represent Appellant at the July 26, 2022 hearing pursuant to 130 CMR 610.004 (Exhibit 10).

² The DDS legal memorandum is in large part reproduced here as it accurately tracks the testimony at hearing, and DDS's application of PASRR regulations (Exhibit 15).

³ See also 130 CMR 456.410, 456.411.

⁴ See 42 CFR 435.1010 ICF: Intermediate Care Facility; IMD: Institution for Mental Diseases.

North End neighborhood for most of her life, until around [REDACTED] when she was admitted to [REDACTED]. Appellant has been eligible for the Department of Developmental Services (“DDS”) services based on a diagnosis of intellectual disability since the 1980’s. Since that time, DDS has followed Appellant and provided various services and supports to her and her family, including potential residential homes. Throughout 2020 and 2021, DDS continued to explore DDS residential placements for Appellant, which Appellant’s parents declined, as they have done in the past, expressing their preference for Appellant to remain in a nursing facility. In July 2021, DDS again met with Appellant’s family to discuss the completed PASRR, its process, and the community-rule out. Based on Appellant’s PASRR, DDS determined that her assessed needs could be met in the community, equally or better than what she is provided in the nursing facility. In August 2021, another meeting was held with Appellant’s parents, DDS and the residential service provider Bay Cove, to discuss Appellant’s discharge from the nursing facility due to the community rule out requirements. Appellant’s parents were informed that Appellant’s skilled nursing needs may be met in the community, that she could be served in the community in a 24/7 staffed group home, and that should she chose to stay at the nursing facility, Appellant may be responsible for the costs associated with that care. Due to a medical incident that required hospitalization and in-patient care, Appellant remained in the nursing facility while receiving treatment and her changing circumstances prompted additional PASRRs to be completed. On January 20, 2022, the PASRR Notice (subject of the within appeal) was mailed to Appellant and her parents. Based on Appellant’s Level II PASRR evaluation conducted on January 11, 2022, it was determined that Appellant requires skilled nursing care, however, her skilled nursing needs could be provided in the community. Appellant’s continued stay in a nursing facility was no longer appropriate because there was a suitable and available community residential program that could serve and meet all her assessed needs. Appellant was notified that she could continue to stay in the nursing facility for an additional 30 days while working on an appropriate discharge plan. However, should she elect to stay after that time, she may be responsible for payment. On February 1, 2022, DDS met with Appellant’s parents and their then attorney to go over the PASRR evaluation, the discharge plan, transition process, and to provide information on the community residence that was available. Appellant’s parents were invited to tour the identified group home and meet with the staff, nurses, and management of the group home on multiple occasions and to bring their attorney if they wished to do so; Appellant’s parents declined.

Pre-Admission Screening and Resident Review (“PASRR”) is a federally mandated program that applies to all admissions and potential admissions to a nursing facility, and is applied uniformly regardless of payor source (i.e. private pay, Medicare, and Medicaid admissions). PASRR was promulgated in the Social Security Act at 42 CFR 483.104, whereby “the State must operate a preadmission screening and annual resident review program....the State PASARR program must require (1) preadmission screening of all individuals with...intellectual disability (formerly mental retardation) who apply as new admissions to Medicaid nursing facilities...” PASRR may be completed either prior to admission, or before the 30th day of the admission, if an individual has previously been admitted to a nursing facility for less than 30 day convalescent care and then required further nursing facility care. The PASRR process consists of two parts: (1) a Level I screening to determinate if an individual has, or is suspected of having, a primary diagnosis of an intellectual disability, a developmental disability, or a serious mental illness, and (2) a Level II

screening to determine whether a nursing facility admission or continued stay is needed and whether specialized services are needed. PASRR is required for all individuals with a diagnosis of intellectual disability, developmental disability or serious mental illness who are seeking admission to or continued stay at a nursing facility. Individuals must be screened prior to admission, at short-term intervals, or following a significant change in circumstance or condition to determine: (1) whether a nursing facility admission or continued stay is appropriate, (2) whether any specialized services should be recommended, and (3) if there is an appropriate community placement that can meet the individual's assessed needs. If a nursing facility admission or continued stay is appropriate, the State must determine whether there is a community placement that may meet the individual's needs in a less restrictive setting than the nursing facility. If there is a less restrictive community placement setting immediately available, discharge planning is initiated. Prior to a nursing facility admission of a person with intellectual disability (ID) or developmental disability (DD) or a person suspected to have ID or DD, the nursing facility must identify this on the Level I form. The nursing facility is required to contact the appropriate state agency to request a PASRR screening to determine whether the individual requires the level of services provided by a nursing facility. The Massachusetts Department of Developmental Services is the designated state agency responsible for the PASRR screening of individuals believed to have an intellectual disability or developmental disability. Once an individual is identified or suspected to have an intellectual disability or developmental disability or is known to DDS to have ID or DD, a Level II screening is performed by a DDS PASRR specialist. 42 CFR 483.128 enumerates what needs are to be considered in a PASRR tool for the PASRR evaluation, but individual States are given discretion on how they issue and score the PASRR tool. The Massachusetts screening tool determines if the individual continues to require the level of services provided by a nursing facility.⁵

If the individual is admitted to a nursing facility for a short-term admission (up to 90 days), a PASRR will be administered in two subsequent 90-day increments to determine if the individual continues to require the level of services provided by a nursing facility.⁶ Each PASRR provides a snapshot which reflects an individual's needs at the time of the evaluation by the PASRR specialist. It does not consider or utilize past PASRRs as a source of an individual's needs. Each PASRR stands alone. If a person is found to no longer require nursing level of care under 42 CFR 483.118, the individual and/or legal representative is notified and provided 30-days to stay and arrange for a safe discharge. The State is required to assist in arranging said safe and orderly discharge. If the individual is found to continue to need skilled nursing level care, the PASRR evaluator "must assess whether the individual's total needs can be met in an appropriate community setting."⁷ The PASSR evaluator works with the local DDS area office to see if there are available community placement options that can provide "equal to or better" nursing level care and can meet the individual's assessed needs. If a community setting can show that the individual's total needs may be met in a less restrictive setting in the community, the PASRR tool renders a finding denying continued nursing facility stay. This PASRR finding is known as a "community rule out" finding. Once a PASRR screening has been conducted, the individual is

⁵ Citing 42 CFR 483.106, and 42 CFR 483.108.

⁶ Citing 42 CFR 483.106, and 42 CFR 483.108.

⁷ Citing 42 CFR 483.132

notified in a written Notice of Determination and given a copy of the PASRR. If the individual is dissatisfied with the Determination, he/she has a right to appeal and request a fair hearing, however, the appeal is limited to whether the State conducted the PASRR in accordance with the law. An Appellant's preferences or choice of residency is not an appealable ground.

DDS asserts that the instant case boils down to Appellant wanting her skilled nursing needs to be paid for by the Commonwealth while at the North End Rehabilitation Nursing Facility. Appellant's parents are the nominated Power of Attorneys and Health Care Proxy for Appellant. DDS notes that Appellant argues *"that Appellant continues to require nursing level of care because of her unstable complex medical conditions, and that the nursing facility placement is appropriate for her because she cannot receive the 24/7 skilled services necessary for her medical treatment at the community placement assigned to her; a group home cannot provide the same consistent medical expertise and monitoring that is available at a nursing facility."*⁸ DDS asserts that, ultimately, Appellant is arguing that (1) Appellant requires skilled nursing level of services; (2) that the community residential program cannot meet her level of needs and (3) that Appellant's preference to stay at the nursing facility was not considered. The Department agrees that Appellant requires skilled nursing services, therefore, the only contested issue is whether the community residential program can meet Appellant's skilled nursing needs. DDS asserts that Appellant's preference is not an appealable ground under 130 CMR 610.032. Further, DDS has acknowledged Appellant's preference by stating that should she elect to stay at the nursing facility, she may be financially responsible for her care.

DDS argued that PASRR was Administered Correctly. DDS asserted that Appellant extensively argues that the PASRR conclusion "must be that nursing facility placement for Appellant continues to be appropriate" and that she should have a higher score in the Medical Section (Section E) as well as in the Skilled Nursing Section (Section F). DDS argued that Appellant makes an unfounded and unsupported assumption that a higher score in these sections would result in a PASRR determination that requires Appellant to remain in a skilled nursing facility to receive skilled nursing level of care. However, the PASRR was administered correctly, and it does reflect that Appellant requires skilled nursing level of care; however, for a nursing facility to be an appropriate placement, DDS must find that the individual needs nursing facility level of services through the PASRR screening process. The PASSR regulations at 42 C.F.R. §483.132 describes the data to be collected and evaluated in determining whether an individual needs nursing facility level of services.

Nancy Weston, DDS PASRR Director (retired), testified that DDS developed and uses the PASRR tool to collect the data necessary to make that determination. To be determined to remain in the nursing facility, an individual must *either* receive a score of 11 in the Medical Section (Section E) or score of at least 1 in the Skilled Nursing Section.⁹ Although Appellant received a score of 9 in the Medical Section, she received a score of 4 in the Skilled Nursing

⁸ See Appellant's Brief Dated, July 25, 2022, Exhibit 14, p. 2.

⁹ Citing 42 CFR 483.126, "to be considered medically eligible for nursing-facility services the member or applicant must require one skilled service in 130 CMR 456.409(A)...or the member must have a medical or mental condition requiring a combination of at least three services from 130 CMR 456.409(B) and (C)..."

(Section F), which resulted in the conclusion that she does require skilled nursing level of services. On January 11, 2022, Ann Bassett, DDS PASRR Specialist, completed the 90-day PASRR screening of Appellant using the PASRR tool. Ms. Weston testified that Appellant scored 9 in the medical section (Section E) and 4 in the skilled/nursing services section (Section F) for a combined score of 13. Ms. Weston testified that the PASRR screen is a point-in-time snapshot with the scoring based on information collected from a review of Appellant's medical and other records at the nursing facility and through interviews with the facility's nurses, clinicians, and social workers.

In reviewing the January 11, 2022 PASSR screen at hearing, Ms. Weston explained that Appellant had a score of 9 in Section E (medical) for the following reasons:

- a. Item #44 Skin, score 3: Due to having, at the time, two pressure ulcers on her buttocks. *See Comments on PASRR, page 13.*
- b. Item #45 Seizures, score 1: Due to having a diagnosis of seizures that is controlled with medication and no seizures within 30 days.
- c. Item #47 Continence – Bowel, score 2: Due to being incontinent of bowl movement
- d. Item #38 Continence – Bladder, score 0: This score is a “0” because the Appellant has a Foley Catheter¹³ which is reflected in Section F (skilled/nursing services). The “0” is not a statement that the Appellant is continent but rather her incontinence requires skilled services to manage and is appropriated placed in Section F (skilled/nursing services). Medical needs cannot be “double scored” within both Sections of the PASRR.
- e. Item #49 Nutrition, score 2: that Appellant required special nutrition
- f. Item #51 Hospital Admission, score 1: Appellant had one hospital admission over the past 90 days.

Ms. Weston further explained that Appellant's score of 4 in Section F (skilled/nursing services), was due to requiring other skilled or nursing services (Item #53) for the following reasons:

- a. Activities of Daily Living (ADL) – score 1: which may include dressing, dining, bathroom use, bathing, grooming, locomotion/ambulation, and transferring;
- b. Positioning – score 1: due to Appellant being non-ambulatory and requiring assistance for lifts and positioning in her bed and chair.
- c. Foley Care – score 2: as stated above, Appellant requires skilled nursing care for the management of her Foly Catheter, which is why it is appropriately placed in the Section F and not in Section E.

The PASRR specifically instructs a finding of Nursing Facility Placement Not Approved, “if the combined score for PASARR sections E and F is 10 or under and there is no skilled/nursing need identified in Section F.”¹⁰ In other words, an individual with an intellectual disability is determined to need nursing facility level of services if the individual scores 11 or above in Section E (the medical section), or scores 10 or lower in Section E in combination with a score of at least 1 in Section F (skilled/nursing services section).

¹⁰ Citing PASRR Instruction Manual (Exhibit 18).

DDS argued that Appellant maintains that she should have received a score under “Acute or Unstable Medical Conditions/Daily Monitoring (3 points)” and “Complex Wound Care,” however Appellant does not meet the criteria to score in these areas. Acute or Unstable medical condition/daily monitoring requires skilled nursing assessment, monitoring and care daily for a condition that changes frequently and/or rapidly for which that consistent monitoring and/or frequent adjustment of treatment regimen is required. To qualify for unstable medical condition the following conditions must be met: (1) physician has ordered that nurse or therapist monitor and evaluate patient’s condition, make necessary adjustments to treatment and the nurses’ progress notes indicate that such interventions/adjustments were necessary; (2) physician’s orders dealing with patient’s unstable condition reflect that changes/adjustments to treatment have been made at least monthly; and (3) the patient is receiving hospice or palliative care.¹¹ Appellant has not provided evidence to show she meets this criteria. Complex Wound Care requires multiple steps in wound care such as irrigations, prescription medication application, pin care, wet to dry applications, packing, etc. It does not include wound care that requires simple cleaning, ointment application and bandaging, which is what Appellant was receiving at the time of the PASRR. Appellant also spends much time arguing that her nursing level of care needs should be scored higher, however, it is irrelevant as DDS agrees that Appellant demonstrates a need for skilled nursing level of care, and DDS stipulates to that conclusion, regardless of the scores as reported in Sections E and F.

Under the Community Rule Out, DDS disapproved Appellant’s continued placement in a nursing facility because her total assessed needs can be met in an appropriate and available community placement. DDS is legally mandated to determine if Appellant’s needs can be met in a less restrictive setting than a nursing facility. If so, DDS is legally mandated to disapprove her continued stay in a nursing facility, even if she qualifies for placement at a facility under 42 C.F.R. §483.126, if there is an appropriate and available community setting that can meet her total needs as provided for in 42 C.F.R. §483.132 (1). 42 C.F.R. §483.132, evaluating the need for NF services and NF level of care (PASRR/NF), provides as follows: “Basic rule. For each applicant for admission to a NF and each NF resident who has MI or MR, the evaluator [in this instance DDS] must assess whether – (1) The individual’s total needs are such that his or her needs can be met in an appropriate community setting; (2) The individual’s total needs are such that they can be met only on an inpatient basis, which may include the option of placement in a home and community-based services waiver program, but for which the inpatient care would be required; (3) If inpatient care is appropriate and desired, the NF is an appropriate institutional setting for meeting those needs in accordance with 42 C.F.R. §483.126; or (4) If the inpatient care is appropriate and desired but the NF is not the appropriate setting for meeting the individual’s needs in accordance with 42 C.F.R. §483.126, another setting such as an ICF/MR (including, small community-based settings facilities), an IMD providing services to individuals aged 65 and older, or a psychiatric hospital is an appropriate setting for meeting those needs. As part of Appellant’s PASRR screen, DDS assessed whether her total needs can be met in an appropriate community setting. That assessment was made by Ann Basset, the DDS Regional Nursing Facility Specialist who conducted the PASRR screen, in consultation with Jeff Hetrick,

¹¹ Citing PASRR Instruction Manual (Exhibit 18).

DDS Assistant Area Director; Kaitlyn Spencer, DDS Area Director; Roberta Lewonis, Metro Region Community Systems Director; Mary Jo Copper, Bay Cove Vice President of Adult Services; and Sara Goodrich, Bay Cove Health Services Director. Based on the PASRR assessment, DDS determined that Appellant's total needs can be met in the group home located in [REDACTED], Massachusetts. One of the goals of PASRR is to ensure that individuals with an intellectual disability are placed appropriately, whether in the community or in a nursing facility, with a focus on providing community integration. Where, as in Appellant's case, a nursing facility was found to have been an appropriate setting at the time of admission, there is now an alternative less restrictive setting available that can meet Appellant's assessed needs. The January 11, 2022 PASRR evaluation and determination resulted in DDS' disapproval of Appellant's continued stay in the nursing facility due to the community rule out. The disapproval was a proper exercise of DDS' authority under PASRR since an available and appropriate setting that could meet her total needs was identified.

DDS is also responsible for providing the identified community services for Appellant. DDS Policy No. 2012-2, Adults with Intellectual Disability or a Developmental Disability in Nursing Facilities¹², states that "[i]f an individual's medical needs and needs related to their disability, i.e. their 'total needs,' can appropriately be met through the provision of community services, it is the Department's policy to provide community supports for that individual and assist the individual with the transition to those supports. Since her admission to [REDACTED], DDS staff has had multiple discussions with Appellant's family, health care proxy, and attorneys-in-fact about appropriate community based residential options available to her as alternatives to a nursing facility placement. Her family has been provided the opportunity to tour several group homes that could meet her total needs at various times over her residency at the nursing facility. Specifically, since January 2022, DDS has provided information and encouraged the family to tour, speak with nursing, and engage with staff of [REDACTED]. Both Jeff Hetrick and Sara Goodrich provided testimony describing [REDACTED] and how Appellant's needs would be met at this location. The home was built to embody the Green House (GH) Model of Nursing Home Care which is a model that seeks to focus on person-directed care in a home-type setting. The concept is that GH homes are marked by smaller-sized homes located in a community neighborhood but have the skilled nursing level of care. [REDACTED] is a 4-person single family house with 24/7 staffing that at minimum maintains a 2 staff to 4 resident ratio and with one full-time Registered Nurse (RN). Staffing includes two (2) awake overnight staff of which at least one is a Licensed Practical Nurse (LPN) to ensure proper coverage and support for the residents; and during the day at peak hours the ratio is 3:4 of which staff are LPNs or Certified Nurses. The on-site RN or LPN will assist with any wound care, Foley catheter care and medication administration. If complex wound care is required, Bay Cove will assist with setting by VNA nursing services or coordination and transportation care to a wound clinic. The staff is also certified by the DPH Medication Administration Program to administer medication and treatments to the residents. There is sufficient staffing to help Appellant with all her ADLs as well as provide individualized attention for choice activities,

¹² See Exhibit 17.

whether in her home or out in the community. Appellant will receive assistance with eating and while enjoying activities with her roommates and in the community.

██████████ is a single level fully accessible house with wide corridors and large bathrooms that will allow Appellant to navigate independently in her wheelchair. Three (3) other residents with similar levels of functioning and capabilities live in the home, not unlike the nursing facility and other settings that are familiar to Appellant. The home has four private bedrooms, two large roll-out bathrooms, a large kitchen with adjacent dining room, a nurse's office/exam room and large living area. The communal space is often used to host parties, dances, and large activities, such as bowling night. The entire home is equipped with state-of-art ceiling track hoist system which eliminates the need for Hoyer lifts or staff-transfers. The ceiling track hoist offers complete coverage of the person, enabling fast transfers from one location to another. This allows an individual to be moved directly between wheelchair, bed, or shower chair and the individual is, generally, in the hoist for a shorter amount of time, thereby, reducing discomfort or risk. Each bedroom has large exterior doors, allowing staff to directly roll out a resident's beds in case of an emergency evacuation. Arrangements will also be made for Appellant to be seen and followed by a primary care physician, nutritionist, urologist, and/or endourologist and any other medical specialists necessary. The residential provider, Bay Cove, attempts to accommodate residents by working with network providers that are willing to travel to the residence for in-home appointments, but in the event of out-patient services or appointments, the residence has handicapped accessible vans for transportation. On weekdays, Appellant will have the opportunity to attend an adult day program and to participate in activities and events in the community. Additionally, Bay Cove and DDS have offered to arrange for transportation for Appellant's parents to visit her at her residence, as well as plan community visits in the North End at her parent's home. Appellant states in her brief that she is *"eager to engage in (activities) such as movies or going to the dining room to eat. If those activities resumed, she would participate again, but she would have to be mechanically lifted out of bed and placed in a wheelchair and then transported to the location."* ██████████ can immediately support Appellant in resuming these activities now, allowing Appellant the ability to be with peers and not be isolated as she is now in the nursing facility.

██████████ can meet Appellant's assessed needs equally or better than the ██████████. Appellant will be able to live in the community in a home, where she has her own room that she may decorate and arrange to her pleasing. She will be a part of the community in a home environment where she is safe because she is receiving nursing level care. She will no longer be a patient/ward in a facility and Bay Cove and DDS will assist with transportation so that she can continue to visit with her family, whether in her home or theirs. It should be noted that DDS offered extensive evidence that the identified the community residence can meet Appellant's total needs. However, it is Appellant's burden to show that the identified community residence cannot meet her needs. Although Appellant argues that the identified community residence cannot meet her needs, she did not offer any evidence to support this argument or refute DDS's testimony. PASRR is a federal regulation with which the Commonwealth is mandated to comply. The PASRR regulations do not require States to include "residential

choice/preference” as a measured factor when completing a PASRR evaluation.¹³ The only exception is when an individual does not require skilled nursing level of care.¹⁴ Appellant argues that an individual’s choice should supersede the outcome of a PASRR evaluation. However, this argument is not supported by any regulation, statute, or judicial precedent. Appellant states that there is pending Congressional legislation seeking to amend the current PASRR criteria to include residential choice. Based on this, Appellant admits that the current state of the law does not support a choice to stay with Medicaid pay. But nonetheless, proposed/pending legislation is not enforceable law. The Department is obligated to follow the law as it stands today and likewise the Board of Hearings is mandated to rule on the law as it stands today not as it may or may not be amended in the future. DDS concludes that Appellant cannot continue to reside in a nursing facility utilizing federal and state taxpayer dollars under MassHealth. Appellant’s total needs, including medical, nursing and needs related to her intellectual disability can be met in an appropriate and available community placement that DDS has identified as the Bay Cove residence. For all the foregoing reasons, the January 11, 2022 PASRR determinations for Appellant should be affirmed and the process for her discharge from [REDACTED] to the Bay Cove residence should be allowed to proceed.

DDS moved to strike from evidence exhibits attached to Appellant’s memorandum (Exhibit 16). Citing Massachusetts Guide to Evidence, DDS objects as hearsay the submission of a webpage “Preadmission Screening and Resident Review, ” (Exhibit 14, p. 19); a webpage with no web address which appears to summarize PASSRR and how to administer it, with no regulations cited (*Id.*, pp. 20-25); a PASSRR Comparison Chart created by Appellant seeking to summarize past PASSRRs (*Id.*, p. 28); Diagnoses MD Orders January through July 2022 as irrelevant and hearsay (*Id.*, pp. 29-30); a one page printout about assessments relating the Care Act of 2014 which is an Act of the Parliament of the United Kingdom and irrelevant to PASSRR (*Id.*, p. 31); slides from the Center of Medicaid and Medicare Services presentation (*Id.*, pp. 32-38); Department of Justice Guidance (*Id.*, pp. 40-49); an alleged email chain between Appellant’s prior counsel and a family member (*Id.*, pp. 52-54); and a typed alleged transcript of a telephone call from prior DDS counsel to Appellant’s counsel (*Id.*, p. 50).

Appellant’s representative submitted a memorandum and testified to its contents (Exhibit 14), and also submitted into evidence a reply to the DDS legal memorandum, and a reply to DDS’s objections to evidence submitted (Exhibits 21, 22). Appellant’s memorandum focuses on Appellant’s need for continued nursing level of care because of her unstable and complex

¹³ Citing 42 C.F.R. §483.132

¹⁴ Citing 42 CFR 483.130(m)(4) which provides a nursing facility patient the choice to stay in the facility if the following conditions are met: (1) Patient does not require level of services provided the Nursing Facility; (2) Requires specialized services; (3) has continuously resides for at least 30 consecutive months before the date of determination. When this is triggered, choice of residence is a consideration and may supersede the community rule out. Those conditions are not met with Appellant. See also 130 CMR 610.037(B)(3). Further the timing is calculated from the first annual resident review determination until the current review determination. Even if the Appellant met these conditions, her initial review was conducted in October 2019 and the current review determination is January 2022, which totals 28 months. See 42 CFR 483.118(c)(3).

medical needs requiring 24/7 skilled services.¹⁵ Appellant argues that in addition to needing nursing facility level of care, DDS policy 2012-2, Adults with Intellectual Disability or A Developmental Disability in Nursing Facilities completely ignores the language of Olmstead v. L.C., 527 U.S. 581(1999), the Supreme Court decision that informed the federal and state regulations implemented to address discrimination against persons with mental disabilities under the Americans with Disabilities Act. Appellant asserts that the regulations that are the basis for the DDS actions appear to have completely ignored one of the specific criteria in the three-prong test that the transfer from institutional care to a less restrictive setting is not opposed by the affected individual. Appellant argues that she is being forced, against her will, to move to a living situation that she and her family do not want. Appellant references Centers for Medicare & Medicaid Services (CMS) proposed changes to 42 CFR 483 dated February 20, 2020 (Federal Register/Vol. 85, No. 34/Thursday, February 20, 2020/Proposed Rules) which include changes to the Level II Determination Criteria at §483.130 to include a determination that nursing facility level of services are necessary if the individual does not want the community placement (Exhibit 14, p. 13). Appellant argues that her close-knit family opposes the transfer to [REDACTED] which would have an enormous impact on Appellant, who is visited by her mother twice daily. Appellant's parents are very involved in Appellant's care and would not be able to visit Appellant or drive to [REDACTED].¹⁶ Appellant argues that despite the DDS policy that requires individuals to move to community settings, the policy is not in accord with the intent of case law, or applicable regulations. Appellant should be characterized as "Special Circumstances" such that she should be allowed to continue to receive the expert medical care and additional staff available at the nursing facility which is essential to insure her health and well-being. Appellant also noted in her reply that pursuant to 130 CMR 610.071, the rules of evidence do not apply in a Fair Hearing, and the submissions should be part of the hearing record.

¹⁵ Appellant focuses, *inter alia*, on Appellant's continued need for nursing facility level of care due to her complex medical conditions, comparison of past PASSRs, and PASSR scoring; however, the position is not summarized here in detail as DDS stipulated to Appellant's need for nursing facility level of care (*See* Finding of Fact No. 17 and Exhibit 15).

¹⁶ Appellant's brother appeared at hearing and further underscored in his testimony that the family does not want Appellant transferred from the nursing facility.

Findings of Fact

Based on a preponderance of the evidence, I find the following:

1. DDS is the designated state agency responsible under federal law for screening all individuals believed to have an intellectual disability or other developmental disabilities who are either seeking admission to a nursing facility or continued nursing facility services.
2. PASRR is required for all individuals with a diagnosis of intellectual disability, developmental disability or serious mental illness who are seeking an admission to or continued stay at nursing facility. These individuals must be screened prior to admission, at short-term intervals, or following a significant change in circumstance or condition to determine: (1) whether a nursing facility admission or continued stay is appropriate, and (2) whether any specialized services should be recommended, and (3) if there is an appropriate community placement that can meet the individual's assessed needs. If a nursing facility admission or continued stay is appropriate, the State must determine whether there is a community placement that may meet the individual's needs in a less restrictive setting than the nursing facility. If there is a less restrictive community placement setting immediately available, discharge planning is initiated.
3. Prior to a nursing facility admission of a person with intellectual disability (ID) or developmental disability (DD) or a person suspected to have ID or DD, the nursing facility must identify this on the Level I form. The nursing facility is required to contact the appropriate state agency to request a PASRR screening to determine whether the individual requires the level of services provided by a nursing facility.
4. Once an individual is identified or suspected to have an intellectual disability or developmental disability or is known to DDS to have ID or DD, a Level II screening is performed by a DDS PASRR specialist.
5. If the individual is admitted to a nursing facility for a short-term admission (up to 90 days), a PASRR will be administered in two subsequent 90-day increments to determine if the individual continues to require the level of services provided by a nursing facility.
6. Each PASRR provides a snapshot which reflects an individual's needs at the time of the evaluation by the PASRR specialist. It does not consider or utilize past PASRRs as a source of an individual's needs.
7. If a person is found to no longer require appropriate nursing level care under 42 CFR 483.118, the individual and/or legal representative is notified and provided 30-days to stay and arrange for a safe discharge.

8. If the individual is found to continue to need skilled nursing level care, the PASRR evaluator “must assess whether the individual’s total needs can be met in an appropriate community setting.”
9. The PASSR evaluator works with the local DDS area office to see if there are available community placement options that can provide “equal to or better” nursing level care and can meet the individual’s assessed needs.
10. If a community setting can show that the individual’s total needs may be met in a less restrictive setting in the community, the PASRR tool renders a finding denying continued nursing facility stay. This PASRR finding is known as a “community rule out” finding.
11. Once a PASRR screening has been conducted, the individual is notified in a written Notice of Determination and given a copy of the PASRR. If the individual is dissatisfied with the Determination, he/she has a right to appeal and request a fair hearing.
12. The federal PASRR evaluation is implemented in Massachusetts using a specific scoring tool. Section E scores the medical needs and Section F scores the skilled nursing needs.
13. Under the Community Rule Out, DDS disapproved Appellant’s continued placement in a nursing facility because her total assessed needs can be met in an appropriate and available community placement.
14. One of the goals of PASRR is to ensure that individuals with an intellectual disability are placed appropriately, whether in the community or in a nursing facility, with a focus on providing community integration.
15. DDS is responsible for providing the identified community services for Appellant.
16. It is DDS’s policy to provide community supports for that individual and assist the individual with the transition to those supports.
17. Based on Appellant’s Level II PASRR evaluation conducted on January 11, 2022, DDS agrees that Appellant demonstrates a need for skilled nursing level of care, and DDS stipulates to that conclusion, regardless of the scores as reported in Sections E and F of the PASRR; however, DDS determined that those skilled nursing needs could be provided in the community.
18. Appellant is [REDACTED] years old and currently resides at [REDACTED] in the North End neighborhood of Boston.
19. Appellant resided with her parents, in the family home in the North End neighborhood for most of her life, until around [REDACTED] when she was admitted to [REDACTED]
[REDACTED]

20. Appellant has been eligible for the Department of Developmental Services (“DDS”) services based on a diagnosis of intellectual disability since the 1980’s. Since that time, DDS has followed Appellant and provided various services and supports to her and her family, including potential residential homes.
21. Throughout 2020 and 2021, DDS continued to explore DDS residential placements for Appellant, which Appellant’s parents declined, as they have done in the past, expressing their preference for Appellant to remain in a nursing facility.
22. In July 2021, DDS met with Appellant’s family to discuss the completed PASRR, its process, and the community-rule out. Based on Appellant’s PASRR, DDS determined that her assessed needs could be met in the community, equally or better than what she is provided in the nursing facility.
23. In August 2021, another meeting was held with Appellant’s parents, DDS and the residential service provider Bay Cove, to discuss Appellant’s discharge from the nursing facility due to the community rule out requirements.
24. Appellant’s parents were informed that Appellant’s skilled nursing needs may be met in the community, that she could be served in the community in a 24/7 staffed group home, and that should she chose to stay at the nursing facility, Appellant may be responsible for the costs associated with that care.
25. Due to a medical incident that required hospitalization and in-patient care, Appellant remained in the nursing facility while receiving treatment and her changing circumstances prompted additional PASRRs to be completed.
26. On January 20, 2022, the PASRR Notice was mailed to Appellant and her parents. Appellant was notified that she could continue to stay in the nursing facility for an additional 30 days while working on an appropriate discharge plan. However, should she elect to stay after that time, she may be responsible for payment.
27. On February 1, 2022, DDS met with Appellant’s parents and their then attorney to go over the PASRR evaluation, the discharge plan, transition process, and to provide information on the community residence that was available.
28. Appellant’s parents were invited to tour the identified group home and meet with the staff, nurses, and management of said home on multiple occasions and to bring their attorney if they wished to do so; Appellant’s parents declined.
29. Based on the PASRR assessment, DDS determined that Appellant’s total needs can be met by [REDACTED], a group home located in [REDACTED], Massachusetts.
30. [REDACTED] was built to embody the Green House (GH) Model of Nursing Home Care which is a model that seeks to focus on person-directed care in a home-type

setting. The concept is that GH homes are marked by smaller-sized homes located in a community neighborhood but have skilled nursing level of care.

31. [REDACTED] is a 4-person single family house with 24/7 staffing that at minimum maintains a 2 staff to 4 resident ratio and with one full-time Registered Nurse (RN).
32. Staffing includes two (2) awake overnight staff of which at least one is a Licensed Practical Nurse (LPN) to ensure proper coverage and support for the residents; and during the day at peak hours the ratio is 3:4 of which staff are LPNs or Certified Nurses.
33. The on-site RN or LPN will assist with any wound care, Foley catheter care and medication administration.
34. If complex wound care is required, Bay Cove will assist with setting by VNA nursing services or coordination and transportation care to a wound clinic.
35. The staff is certified by the DPH Medication Administration Program to administer medication and treatments to the residents.
36. There is sufficient staffing to help Appellant with all her ADLs as well as provide individualized attention for choice activities, whether in her home or out in the community. Appellant will receive assistance with eating and while enjoying activities with her roommates and in the community.
37. [REDACTED] is a single level fully accessible house with wide corridors and large bathrooms that will allow Appellant to navigate independently in her wheelchair.
38. Three (3) other residents with similar levels of functioning and capabilities live in the home, not unlike the nursing facility and other settings that are familiar to Appellant.
39. The home has four private bedrooms, two large roll-out bathrooms, a large kitchen with adjacent dining room, a nurse's office/exam room and large living area.
40. The communal space is often used to host parties, dances, and large activities, such as bowling night.
41. The entire home is equipped with state-of-art ceiling track hoist system which eliminates the need for Hoyer lifts or staff-transfers. The ceiling track hoist offers complete coverage of the person, enabling fast transfers from one location to another. This allows an individual to be moved directly between wheelchair, bed, or shower chair and the individual is, generally, in the hoist for a shorter amount of time, thereby, reducing discomfort or risk.
42. Each bedroom has large exterior doors, allowing staff to directly roll out a resident's bed in case of an emergency evacuation.

43. Arrangements will be made for Appellant to be seen and followed by a primary care physician, nutritionist, urologist, and/or endourologist and any other medical specialists necessary.
44. [REDACTED] attempts to accommodate residents by working with network providers that are willing to travel to the residence for in-home appointments, but in the event of out-patient services or appointments, the residence has handicapped accessible vans for transportation.
45. On weekdays, Appellant will have the opportunity to attend an adult day program and to participate in activities and events in the community.
46. [REDACTED] and DDS have offered to arrange for transportation for Appellant's parents to visit her at her residence, as well as plan community visits in the North End at her parent's home.
47. [REDACTED] will provide Appellant her own room that she may decorate and arrange to her pleasing.

Analysis and Conclusions of Law

Appellant has the burden "to demonstrate the invalidity of the administrative determination." See *Andrews vs. Division of Medical Assistance*, 68 Mass. App. Ct. 228. Moreover, the burden is on the appealing party to demonstrate the invalidity of the administrative determination. See *Fisch v. Board of Registration in Med.*, 437 Mass. 128, 131 (2002); *Faith Assembly of God of S. Dennis & Hyannis, Inc. v. State Bldg. Code Commn.*, 11 Mass. App. Ct. 333 , 334 (1981); *Haverhill Mun. Hosp. v. Commissioner of the Div. of Med. Assistance*, 45 Mass. App. Ct. 386 , 390 (1998).

The DDS legal memorandum provides a correct, and succinct roadmap to the PASRR process, and governing law, the applicability of which is not substantively challenged by Appellant.¹⁷

¹⁷ See also 130 CMR 456.410: Screening for Mental Illness and Mental Retardation

(A) The Omnibus Budget Reconciliation Act of 1987 (OBRA 87) established a requirement that individuals be screened before admission to a nursing facility to determine if the individual has a major mental illness, mental retardation, or developmental disabilities. The federal requirements are contained in 42 U.S.C. 1396r(e)(7). The Division of Medical Assistance implements this requirement under the terms of 130 CMR 456.410.

(B) The nursing facility must complete a Preadmission Screening Level I form for all admissions. The completed form must be kept in the resident's medical record. If it is determined that the individual has a major mental illness, mental retardation, or a developmental disability, then the Department of Mental Health or its agent or the Department of Mental Retardation or its agent, as appropriate, must

perform Level II screening, unless one of the conditions of 130 CMR 456.410(C) applies.

- (C) A Level II referral and screening is not required when:
- (1) the individual is to be admitted to the nursing facility directly from a hospital provided that the placement is expected to last for 30 days or less;
 - (2) a physician has certified that the individual has a terminal illness and the prognosis is six months or less;
 - (3) the individual is comatose or functioning at brain-stem level;
 - (4) the individual has a mental illness and one of the following primary diagnoses:
 - (a) Alzheimer's disease or other dementia documented by a neurological examination;
 - (b) severe and debilitating Parkinson's disease;
 - (c) severe and debilitating Huntington's disease;
 - (d) severe and debilitating amyotrophic lateral sclerosis;
 - (e) severe and debilitating congestive heart failure; or
 - (f) severe and debilitating chronic obstructive pulmonary disease.

(D) To admit individuals requiring a Level II review, the nursing facility must receive documentation from the Massachusetts Department of Mental Health, the Department of Mental Retardation, or both, as appropriate, certifying that the individual is eligible for admission to the nursing facility and whether or not the individual needs specialized services. The nursing facility must keep such documentation in the resident's record at the facility. A determination by the Massachusetts Department of Mental Health or the Department of Mental Retardation that admission to the facility is not appropriate supersedes the authorization for services by the Division or its agent.

456.411: Review of Need for Continuing Care in a Nursing Facility

(A) When a nursing facility determines during any of the quarterly reviews required by the Omnibus Budget Reconciliation Act of 1987 (OBRA 87) and implemented by regulations at 42 CFR 483.20 that the member has discharge potential, then the facility must complete and send a Long Term Care Assessment form to the Division or its agent.

(B) When the nursing facility is notified by the Division or its agent that the member no longer meets the conditions for payment criteria under 130 CMR 456.408(A), the nursing facility must initiate the nursing facility's discharge plan for the member in collaboration with the Division or its agent. All discharges must be in accordance with the federal requirements found at 42 CFR 483.12 and with 130 CMR 456.701 through 456.704.

456.408: Conditions for Payment

- (A) The MassHealth agency pays for nursing-facility services if all of the following conditions are met.
- (1) The MassHealth agency or its agent has determined that individuals aged 22 and older meet the nursing-facility services requirements of 130 CMR 456.409 or that the medical review team coordinated by the Department of Public Health has determined that individuals aged 21 or younger meet the criteria of 130 CMR 519.006(A)(4).
 - (2) The MassHealth agency or its agent has determined that community care is either not available or not appropriate to meet the individual's needs.
 - (3) The requirements for preadmission screening at 130 CMR 456.410 have been met.

Pre-Admission Screening and Resident Review (“PASRR”) is a federally mandated program that applies to all admissions and potential admissions to a nursing facility, and is applied uniformly regardless of payor source (i.e. private pay, Medicare, and Medicaid admissions). PASRR was promulgated in the Social Security Act at 42 CFR 483.104, whereby “the State must operate a preadmission screening and annual resident review program....the State PASARR program must require (1) preadmission screening of all individuals with...intellectual disability (formerly mental retardation) who apply as new admissions to Medicaid nursing facilities...” PASRR may be completed either prior to admission, or before the 30th day of the admission, if an individual has previously been admitted to a nursing facility for less than 30 day convalescent care stay and then required further nursing facility care. The PASRR process consists of two parts: (1) a Level I screening to determinate if an individual has, or is suspected of having, a primary diagnosis of an intellectual disability, a developmental disability, or a serious mental illness, and (2) a Level II screening to determine whether a nursing facility admission or continued stay is needed and whether specialized services are needed. PASRR is required for all individuals with a diagnosis of intellectual disability, developmental disability or serious mental illness who are seeking an admission to or continued stay at nursing facility. These individuals must be screened prior to admission, at short-term intervals, or following a significant change in circumstance or condition to determine: (1) whether a nursing facility admission or continued stay is appropriate, and (2) whether any specialized services should be recommended, and (3) if there is an appropriate community placement that can meet the individual’s assessed needs. If a nursing facility admission or continued stay is appropriate, the State must determine whether there is a community placement that may meet the individual’s needs in a less restrictive setting than the nursing facility. If there is a less restrictive community placement setting immediately available, discharge planning is initiated.

Prior to a nursing facility admission of a person with intellectual disability (ID) or developmental disability (DD) or a person suspected to have ID or DD, the nursing facility must identify this on the Level I form. The nursing facility is required to contact the appropriate state agency to request a PASRR screening to determine whether the individual requires the level of services provided by a nursing facility. The Massachusetts Department of Developmental Services is the designated state agency responsible for the PASRR screening of individuals believed to have an intellectual disability or developmental disability. Once an individual is identified or suspected to have an intellectual disability or developmental disability or is known to DDS to have ID or DD, a Level II screening is performed by a DDS PASRR specialist. 42 CFR 483.128 enumerates what needs are to be considered in a PASRR tool for the PASRR evaluation, but individual States are given discretion on how they issue and score the PASRR tool. The Massachusetts screening tool determines if the individual continues to require the level of services provided by a nursing facility.¹⁸

If the individual is admitted to a nursing facility for a short-term admission (up to 90 days), a PASRR will be administered in two subsequent 90-day increments to determine if the individual continues to require the level of services provided by a nursing facility.¹⁹ Each PASRR provides

¹⁸ See 42 CFR 483.106, and 42 CFR 483.108.

¹⁹ See 42 CFR 483.106, and 42 CFR 483.108.

a snapshot which reflects an individual's needs at the time of the evaluation by the PASRR specialist. It does not consider or utilize past PASRRs as a source of an individual's needs. Each PASRR stands alone. If a person is found no longer to require appropriate nursing level care under 42 CFR 483.118, the individual and/or legal representative is notified and provided 30-days to stay and arrange for a safe discharge. The State is required to assist in arranging said safe and orderly discharge. If the individual is found to continue to need skilled nursing level care, the PASRR evaluator "must assess whether the individual's total needs can be met in an appropriate community setting."²⁰ The PASSR evaluator works with the local DDS area office to see if there are available community placement options that can provide "equal to or better" nursing level care and can meet the individual's assessed needs. If a community setting is able to show that the individual's total needs may be met in a less restrictive setting in the community, the PASRR tool renders a finding denying continued nursing facility stay. This PASRR finding is known as a "community rule out" finding. Once a PASRR screening has been conducted, the individual is notified in a written Notice of Determination and given a copy of the PASRR. If the individual is dissatisfied with the Determination, he/she has a right to appeal and request a fair hearing, however, the appeal is limited to whether the State conducted the PASRR in accordance with the law. An Appellant's preferences or choice of residency is not an appealable ground.²¹

Under the Community Rule Out, DDS correctly disapproved Appellant's continued placement in a nursing facility because her total assessed needs can be met in an appropriate and available community placement. DDS is legally mandated to determine if Appellant's needs can be met in a less restrictive setting than a nursing facility. If so, DDS is legally mandated to disapprove her continued stay in a nursing facility, even if she qualifies for placement at a facility under 42 C.F.R. §483.126, if there is an appropriate and available community setting that can meet her total needs as provided for in 42 C.F.R. §483.132 (1). 42 C.F.R. §483.132, evaluating the need for NF services and NF level of care (PASRR/NF), provides as follows: "Basic rule. For each applicant for admission to a NF and each NF resident who has MI or MR, the evaluator [in this instance DDS] must assess whether – (1) The individual's total needs are such that his or her needs can be met in an appropriate community setting; (2) The individual's total needs are such that they can be met only on an inpatient basis, which may include the option of placement in a home and community-based services wavier program, but for which the inpatient care would be required; (3) If inpatient care is appropriate and desired, the NF is an appropriate institutional setting for meeting those needs in accordance with 42 C.F.R. §483.126; or (4) If the inpatient care is appropriate and desired but the NF is not the appropriate setting for meeting the individual's needs in accordance with 42 C.F.R. §483.126, another setting such as an ICF/MR (including, small community-based settings facilities), an IMD providing services to individuals aged 65 and older, or a psychiatric hospital is an appropriate setting for meeting those needs. As part of Appellant's PASRR screen, DDS correctly assessed that her total needs can be met in an appropriate community setting at [REDACTED]

²⁰ See 42 CFR 483.132

²¹ See 130 CMR 610.032(E) Individuals have the right to request an appeal of their PASRR determination. The PASRR process does not require consideration of family preferences in the determination, and thus family preferences are not appealable.

Based on Appellant's Level II PASRR evaluation conducted on January 11, 2022, DDS agreed and stipulated that Appellant demonstrates a need for skilled nursing level of care; and consistent with DDS Policy No. 2012-2, Adults with Intellectual Disability or a Developmental Disability in Nursing Facilities notified Appellant of a community placement where her skilled needs could be met.²² In objecting to the placement, Appellant offered no clinical evidence that supports a finding that Appellant's medical needs cannot be met by [REDACTED]. Appellant's representatives reiterated her family's strong preference that she remain in the nursing facility, which is not a factor in the PASRR determination.²³ Thus, the hearing officer defers to the expertise of the DDS professionals who made the assessment and concludes that Appellant has not carried the burden of proof in showing the invalidity of the DDS PASRR determination.²⁴ As previously stated, much of Appellant's arguments centered on Appellant's continued need for nursing facility level of care due to her complex medical conditions, comparison of past PASRRs, and PASRR scoring. As DDS stipulated to Appellant's need for nursing level of care, Appellant's remaining arguments revolve around a challenge to the controlling regulations in as much as she asserts that the regulations conflict with a three-prong test outlined in Olmstead, or proposed changes to CMS regulations. These arguments cannot be addressed here as the hearing officer cannot rule on the legality of such law or regulation which must be subject to judicial review in accordance with 130 CMR 610.092 (130 CMR 610.082). Similarly, this decision must be rendered in accordance with the law including the state and federal constitutions, statutes, and duly promulgated regulations, as well as decisions of the state and federal courts, with due consideration to Policy Memoranda and any other MassHealth agency representations and materials containing legal rules, standards, policies, procedures, or interpretations as a source of guidance in applying a law or regulation (*Id.*). However, Appellant correctly states that the rules of evidence observed by courts do not apply in Fair Hearings (130 CMR 610.071). DDS's objections to exhibits submitted with Appellant's memorandum are based on assertions of hearsay pursuant to the Massachusetts Guide to Evidence. While the documentation submitted by Appellant is irrelevant in as much as it has no bearing on this Fair Hearing decision, the DDS motion to strike is DENIED, and the documentation submitted is preserved in the hearing record for judicial review. Because Appellant has not carried the burden of showing the invalidity of the DDS action applying PASSR requirements and the DDS determination that Appellant's "total needs" can be appropriately met through the provision of community services at [REDACTED] located in [REDACTED], Massachusetts, in all other respects Appellant's appeal is DENIED.

²² See Exhibit 17.

²³ See fns.13, 14, and 42 C.F.R. §483.132, 483.130(m)(4).

²⁴ The assessment was made by Ann Basset, the DDS Regional Nursing Facility Specialist who conducted the PASRR screen, in consultation with; Kaitlyn Spencer, DDS Area Director; Roberta Lewonis, Metro Region Community Systems Director; Mary Jo Copper, Bay Cove Vice President of Adult Services; and Jeff Hetrick, DDS Assistant Area Director and Sara Goodrich, Bay Cove Health Services Director who appeared at hearing and testified to the ability to meet Appellant's needs through the proposed placement.

Order

Arrange for an orderly discharge of Appellant from the nursing facility to [REDACTED] located in [REDACTED], Massachusetts no sooner than 30 days from the date of this hearing decision.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Thomas J. Goode
Hearing Officer
Board of Hearings

cc: MassHealth Representative: Nancy Weston, Department Developmental Services, 500 Harrison Ave., Boston, MA, 02118

[REDACTED]