Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: Approved in Part Appeal Number: 2306638

Decision Date: 11/21/2023 **Hearing Date:** 09/14/2023

Hearing Officer: Susan Burgess-Cox Record Open to: 10/06/2023

Appearance for Appellant:

Appearance for MassHealth and the Department of Mental Health:

Jacqueline Fratus et. al.



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: Approved in Part Issue: PASRR Screening

Decision Date: 11/21/2023 Hearing Date: 09/14/2023

MassHealth & DMH's

Rep.:

Jacqueline Fratus et.

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Appellant's Rep.:

Hearing Location: All Parties Appeared

by Telephone

Aid Pending:

No

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 July 18, 2023, the Department of Mental Health (DMH) determined that as of July 13, 2023, the appellant does not have a serious mental illness but does need nursing facility services and specialized services within the facility to address specific needs related to her condition. (130 CMR 456.410; 42 CFR 483.100 et seq.). The appellant filed a timely appeal on August 4, 2023. (130 CMR 610.015; Exhibit 2). A hearing was scheduled for September 14, 2023. (Exhibit 3). At the request of the parties the record was held open, and that period was extended to October 6, 2023. (Exhibit 8; Exhibit 9).

Action Taken by the Department of Mental Health

The Department of Mental Health determined that the appellant does not have a serious mental illness but does need nursing facility services and specialized services within the facility related to her condition as of July 13, 2023.

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Issue

Whether the Department of Mental Health was correct in determining that the appellant does not have a serious mental illness but does need nursing facility services and specialized services within the facility related to her condition as of

Summary of Evidence

Representatives from MassHealth and the Department of Mental Health (DMH) appeared by telephone. Documents from MassHealth and DMH were incorporated into the hearing record as Exhibit 7. The appellant's representative, a licensed social worker from the facility where the appellant is currently a patient, appeared with another representative from the nursing facility. Documents from the appellant's representative were incorporated into the hearing record as Exhibit 6.

a hospital completed a Level I Preadmission Screening and Resident Review (PASRR) Form for the appellant. (Testimony; Exhibit 7). It was determined that the appellant met the criteria for a time-limited 7-calendar day provisional emergency categorical determination of having a serious mental illness (SMI). (Testimony; Exhibit 7). The PASRR Unit from the Department of Mental Health sent the appellant a notice stating that federal law requires a PASRR Level II Evaluation of every nursing facility applicant who is identified in a preadmission screening (PASRR Level I Form) as having a history of serious mental illness. (Testimony; Exhibit 7). The notice states that admission to a nursing facility cannot occur until the PASRR screening and/or a Level II evaluation is completed. (Testimony; Exhibit 7). The notice also states that the PASRR Level II evaluation has been completed and it was determined that the appellant is appropriate for a provisional emergency admission to a nursing facility that cannot exceed 7 calendar days. (Testimony; Exhibit 7). The notice states that should the appellant's length of stay in the nursing facility exceed the 7-calendar day approval, the nursing facility must submit a request on the appellant's behalf for an additional Level II resident review by the second calendar day after the admission. (Testimony; Exhibit 7). The notice states that PASRR Level II Evaluations are completed by Commonwealth Medicine (CWM) at the University of Massachusetts, Chan Medical School (UMASS Chan). The notice states that CWM PASRR Unit from the Department of Mental Health is responsible for making the necessary determinations. The notice then refers to a fact sheet for more information on PASRR.

The notice includes a copy of a determination summary showing that the appellant meets the criteria for a Categorical Group Determination Provisional Emergency; the determination expires 7 days from the nursing facility admission; specialized services are not required; and if a continued stay in the nursing facility is required beyond the expiration of the stated time period, an updated Level I PASRR screening must be submitted to the DMH PASRR Office. The notice from DMH regarding the determination and the determination summary are signed by two different

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individuals. The notice does not indicate a method or address for the new submission.

The Department of Mental Health did not receive a request for an additional Level II resident review by the second calendar day after the admission or prior to the expiration of the 7-day period. (Testimony; Exhibit 7). Therefore, the appellant's provisional categorical determination expired. Representatives from MassHealth noted that the nursing facility did not submit the required referral, in the form of an updated PASRR Level I Screening Form to the DMH PASRR Unit for a full Level II evaluation until That evaluation resulted in an approval of nursing facility services through July 18, 2024. (Exhibit 1). MassHealth provided a legal analysis citing Nursing Facility Bulletin 169, Section V.5.b which speaks to the issue of overpayments made to nursing facilities. (Exhibit 7).

Records presented by the appellant's representatives include a PASRR non-compliance information request form sent to the facility with a review date of a PASRR Level II and a PASRR Comprehensive Level II Evaluation Determination Summary from evaluation dated (Exhibit 6). The social worker from the facility testified that the appellant was admitted to the facility from the Emergency Department of an area hospital due to an altered mental state. The social worker from the facility testified that it was determined that the appellant was eligible for services in a skilled nursing facility but not acute psychiatric services. The social worker testified that she understood that the appellant underwent a Level I screening and it was determined that the appellant met the criteria for a time-limited 7-calendar day provisional emergency categorical determination of having a serious mental illness (SMI). (Testimony; Exhibit 7). The social worker from the facility acknowledged the need to submit additional documentation for the facility to continue to receive payment from MassHealth. The social worker from the facility testified that at one point she thought the categorical determination was for convalescent care, which would allow an individual to remain in the facility for a maximum of 30 calendar days before requiring a Post-Admission Level II Evaluation.

The social worker from the facility testified that documentation was submitted to the Department of Mental Health within 3 days of the appellant's admission in At hearing, it was not clear what documentation was submitted and whether it was received by DMH in a timely manner. It was clear from both parties that DMH did not perform an evaluation within 7 days of the date of admission. The issue was whether the parties followed the correct process in making any subsequent decisions regarding the appellant's eligibility for MassHealth coverage.

The attorney from MassHealth and representative from DMH noted that neither agency had records of such a submission. The representative from DMH testified that if the agency received documentation and it was not correct, DMH would contact the member or representative. It was noted that DMH would not issue any type of notice upon receipt of any documentation if it was not the documentation necessary to make a determination. Instead, DMH just performs some type of outreach to the party submitting the documentation. The representative from DMH testified that there was outreach in this case as the agency did not receive a request for an

additional Level II resident review by the second calendar day after the date of admission.

An attorney from MassHealth noted that the issue was whether the facility operated in compliance with PASRR regulations in The attorney noted that the regulations require specific forms and have specific deadlines that the facility did not submit or meet. The attorney acknowledged that once the facility submitted documents in compliance with the regulations in July 2023, MassHealth resumed payment.

As the social worker from the facility noted that documentation was sent to DMH in record was held open to allow the facility to produce such documentation. (Exhibit 8). At the request of the representative from DMH, the record open period was extended. (Exhibit 9). Documents from the appellant were incorporated into the hearing record as Exhibit 10. Documents from DMH were incorporated into the hearing record as Exhibit 11.

The appellant's representatives submitted a statement from the facility's social worker, electronic mail messages and documents from May 2023, June 2023 and July 2023. (Exhibit 10). Records presented by the appellant's representatives include a "DMH PASRR UNIT COVER SHEET" dated noting a referral for convalescent care; and a "PREADMISSION SCREENING AND RESIDENT REVIEW (PASRR) LEVEL I SCREENING" dated . (Exhibit 10). The PASRR Level I screening states that the nursing facility has determined that the resident will not be discharged before the expiration of the provisional emergency and is requesting a Level II evaluation from the DMH/Designee. (Exhibit 10). Records show an electronic mail message with attachments sent to an electronic mailing address for the Department of Developmental Services (DDS) PASRR office on . (Exhibit 10). Records show electronic mail messages between the social worker from the facility and a representative from the Department of Developmental Services (DDS) PASRR office in June 2023. (Exhibit 10). The June 2023 message from the social worker indicates that documents are attached to the message and asks if a Level II evaluation is necessary due to a disagreement with the findings of a Serious Mental Illness. The DDS representative responded that if the appellant only has a mental health diagnosis, the social worker needs to contact the DMH PASRR office. (Exhibit 10). This statement is made in an electronic mail message alone. (Exhibit 10). DDS acknowledged the receipt of documentation from the licensed social worker from the facility but did not take any further action other than sending an electronic mail message. (Exhibit 10).

In July 2023, the social worker from the facility sent a message to the DMH PASSR office stating that she had not heard from DMH regarding the documentation requested by the agency for the appellant. (Exhibit 10). A statement from the social worker notes that in response to this July 2023 discussion with a representative from DMH, the agency scheduled a screening. (Exhibit 10).

In response to a review of these records, the representative from DMH notes that the records appear to show that documents from May 2023 were sent to the DDS PASRR office rather than the DMH PASRR office. (Exhibit 11). The DMH representative also acknowledges contact of the social

worker from the facility with the DDS PASRR office in June 2023. (Exhibit 11). The representative from DMH states that the two offices process separate PASRRs. (Exhibit 11). DDS processes PASRR Level I screenings that screen positive for suspicion of intellectual and/or developmental disabilities and DMH processes screenings that screen positive for suspicion of Serious Mental Illness (SMI). (Exhibit 11). The representative from DMH states that the Level I screening in this case triggered positive for the suspicion of SMI so the forms submitted by the representatives from the facility should have been sent to DMH, not DDS. (Exhibit 11). DMH did not produce any documentation showing a response from DDS to the representatives from the facility regarding a denial or dismissal of their submission. (Exhibit 11).

In their submission, the representative from DMH notes that the agency conducted outreach regarding the need for an in-person Level II screening after the expiration of the 7-calendar day provisional eligibility. (Exhibit 11). Records from DMH show a July 2023 inquiry made by the social worker from the facility to the DMH PASRR electronic mailing address regarding information about the appellant's admission. (Exhibit 11). The body of the message includes the appellant's name and some information about an earlier submission. (Exhibit 11). The subject line and salutation in the message refer to a specific individual at DMH. (Exhibit 11). The response from DMH was simply that the individual does not work for DMH. (Exhibit 11). The DMH PASRR office did not acknowledge the content of the message. (Exhibit 11). Records presented by DMH at hearing and during the record open period contain a timeline that does not include information about any agency action related to submissions and inquiries from the facility made in May 2023 and June 2023. (Exhibit 11).

Findings of Fact

Based on a preponderance of the evidence, I find:

- 1. On a hospital completed a Level I Preadmission Screening and Resident Review (PASRR) Form for the appellant.
- 2. It was determined that the appellant met the criteria for a time-limited 7-calendar day provisional emergency categorical determination of having a serious mental illness (SMI).
- 3. The PASRR Unit from the Department of Mental Health (DMH) sent the appellant a notice stating that federal law requires a PASRR Level II Evaluation of every nursing facility applicant who is identified in a preadmission screening (PASRR Level I Form) as having a history of serious mental illness.
- 4. The notice states that the PASRR Level II evaluation has been completed and it was determined that the appellant is appropriate for a provisional emergency admission to a nursing facility that cannot exceed 7 calendar days.

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- 5. The notice states that should the appellant's length of stay in the nursing facility exceed the 7-calendar day approval, the nursing facility must submit a request on the appellant's behalf for an additional Level II resident review by the second calendar day after the admission.
- 6. The notice states that PASRR Level II Evaluations are completed by Commonwealth Medicine (CWM) at the University of Massachusetts, Chan Medical School (UMASS Chan).
- 7. The notice states that CWM PASRR Unit from the Department of Mental Health is responsible for making the necessary determinations.
- The notice refers to a fact sheet for more information on PASRR.
- 9. The notice includes a copy of a determination summary showing that the appellant meets the criteria for a categorical group determination provisional emergency.
- 10. The determination expires 7 days from the nursing facility admission.
- 11. The determination summary states that specialized services are not required.
- 12. The determination summary states that if a continued stay in the nursing facility is required beyond the expiration of the stated time period, an updated Level I PASRR screening must be submitted to the DMH PASRR Office.
- 13. The notice from DMH regarding the determination and the determination summary are signed by two different individuals.
- 14. The notice from DMH or the determination summary do not indicate a method or address for the new submission.
- 15. DMH did not receive a request for an additional Level II resident review by the second calendar day after the admission.
- 16. The appellant's provisional categorical determination expired.
- 17. On _____, a social worker from the facility filled out a "DMH PASRR UNIT COVER SHEET" noting a referral for convalescent care.
- 18. The cover sheet lists the address and fax number for the DMH PASRR Unit.
- 19. On the social worker from the facility signed a PASRR Level I Screening noting the expiration of the exempted hospital discharge/categorical determination.

- 20. The PASRR Level I screening states that the nursing facility has determined that the resident will not be discharged before the expiration of the provisional emergency and is requesting a Level II evaluation from the DMH/Designee.
- 21. Documents were sent to an electronic mailing address for the Department of Developmental Services (DDS) PASRR Unit on .
- 22. On June 26, 2023, the social worker from the nursing facility sent a message to the DDS PASRR Unit with additional documentation to follow-up on the submission.
- 23. One June 26, 2023, a representative from the DDS PASRR Unit informed the appellant's representative that the submission needs to be sent to the DMH PASRR Unit.
- 24. DDS did not take any further action other than sending an electronic mail message.
- 25. In July 2023, the DMH PASRR general electronic mail address received an inquiry by the social worker from the facility regarding information about the appellant's submission.
- 26. The body of the July 2023 message includes the appellant's name and some information about an earlier submission.
- 27. The subject line and salutation in the message refer to a specific individual at DMH.
- 28. The response from DMH was simply that the individual does not work for DMH.
- 29. The representative from DMH did not acknowledge the content of the message.
- 30. DMH received an updated PASRR Level I Screening Form for a full Level II evaluation on July 13, 2023.
- 31. DMH determined that the appellant does not have a serious mental illness but does need nursing and specialized services within the facility related to her condition as of

Analysis and Conclusions of Law

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.¹ The federal

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¹ The regulations cited are dated with amendments made in 2000. Current DDS policies, regulations and agency language speak to the following conditions which likely mirror those cited with more appropriate naming: intellectual

requirements are contained in 42 U.S.C. 1396r(e)(7). MassHealth implements this requirement under the terms of 130 CMR 456.410. $(130 \text{ CMR } 456.410(A))^2$

Pursuant to 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. (130 CMR 456.410(B)). If it is determined that the individual has a major mental illness, intellectual and/or developmental disability, then the Department of Mental Health or its agent or the [Department of Developmental Services] ³ or its agent, as appropriate, must perform Level II screening, unless one of the conditions of 130 CMR 456.410(C) applies. (130 CMR 456.410(B)).

Pursuant to 130 CMR 456.410(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.

To admit individuals requiring a Level II review, the nursing facility must receive documentation from the Massachusetts Department of Mental Health, the Department of Developmental Services, 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. (130 CMR

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and/or developmental disabilities. This decision will refer to naming the conditions as intellectual and/or developmental disabilities as those are the terms utilized by the agency representatives at hearing.

² The regulations governing long term care services at 130 CMR 456.000 were amended on October 1, 2023. (MassHealth Nursing Facility Manual, Transmittal Letter NF-63). As the decision on appeal and the hearing were both held prior to that date, this decision is based on regulations that were in effect at the time of the agency action. In looking at past MassHealth Nursing Facility Transmittal Letters, the most recent amendments made to the regulations applicable to this decision are dated November 1, 2000. (MassHealth Nursing Facility Manual, Transmittal Letter NF-37).

³ In June 2008, Massachusetts officially renamed the Department of Mental Retardation (DMR) to the Department of Developmental Services (DDS). While the regulations applicable in this decision refer to DMR, all of the documents and records presented by the parties reference DDS. Therefore, this decision will refer to the agency as DDS.

456.410(D)). The nursing facility must keep such documentation in the resident's record at the facility. (130 CMR 456.410(D)). A determination by the Massachusetts Department of Mental Health (DMH) or the Department of Developmental Services (DDS) that admission to the facility is not appropriate supersedes the authorization for services by MassHealth or its agent. (130 CMR 456.410(D)).

In October 2021, MassHealth issued Nursing Facility Bulletin 169 to update the Commonwealth's Preadmission Screening and Resident Review (PASRR) processes, as required under 130 CMR 456.410. The bulletin states that individuals screened positive for intellectual disability, developmental disability or serious mental illness require a referral to a PASRR authority. (MassHealth NF Bulletin 169). This is true even if the individual also may be eligible under a categorical determination. (MassHealth NF Bulletin 169).

Neither party appeared to dispute the fact that the initial screening showed the appellant receiving a categorical determination of provisional emergency admission which is time-limited and would only allow the appellant to stay for a maximum of seven days unless she received a post-admission screening. (MassHealth NF Bulletin 169). For individuals admitted under the categorical determination of a provisional emergency admission, when the nursing facility determines that the individual's stay is likely to exceed the permitted duration, the nursing facility must submit an updated PASRR Level I Screening Form and, if referring to the DMH PASRR unit, must also submit a completed DMH-approved cover sheet to make a referral for a full Level II Evaluation. The documents submitted by the appellant's representatives include a PASRR Level I Screening Form and a completed DMH coversheet to make a referral for a full Level II Evaluation dated along with an electronic mail message showing a submission sent on

The Nursing Facility Bulletin states that for the provisional emergency categorical determination, the referral must be made by the 2nd calendar day after admission. In this case, the nursing facility did not make a referral until the 10th day after the admission. At hearing, the social worker from the facility noted that at one time she believed that the categorical determination was for convalescent care. If that was the case, under the guidelines in NF Bulletin 169, the referral was timely as a convalescent care categorical determination needs to have a referral submitted by the 25th calendar day after admission. However, the records show that this case involved a provisional emergency categorical determination. Therefore, the referral should have been made by the 2nd calendar day after admission. Records show that the proper documents were sent on While the documents reflect an address of the Department of Developmental Services as the recipient of the documents, they were the correct documents and submitted to DMH during the fair hearing process.

Pursuant to 130 CMR 610.071(B), the effective date of any adjustments to the appellant's eligibility status is the date on which all eligibility conditions were met, regardless of when the supporting evidence was submitted. In this case, the appellant's eligibility status as it relates to the

submission of a PASRR referral, is based on evidence of a referral made on . Neither party appeared to challenge the decision that the appellant required nursing facility services as well as specialized services while in the facility or any dates in which the appellant's condition may have changed from May 2023 to July 2023. A review of the records and the Nursing Facility Bulletin, shows that the agency typically takes action on PASRR requests within 5 days. For example, in this case, the agency approved a referral from with a determination date of July 18, 2023 for a one year approval period. Additionally, the Nursing Facility Bulletin requires providers to submit post-admission follow-up for resident review by submitting the complete DMH-approved fax cover sheet not more than 360 days after the most recent Level II evaluation or resident review. This process gives the agency approximately 5 days to process a review for the following year. Utilizing these guidelines, MassHealth should approve the appellant for nursing facility and specialized services as of May 20, 2023 based on a submission done on This should result in a gap in coverage for the nursing facility as the appellant's provisional eligibility expired on May 12, 2023. Therefore, this appeal is approved in part.

While this decision is primarily based upon an effective adjustment date based on evidence presented at hearing, this appeal could be approved based on the agency's failure to act on a submission sent in May 2023. The records from both parties show that referral documents for a Level II review were sent in May 2023. While the representatives from the facility submitted the correct documents, they were sent to DDS rather than DMH. Both agencies work to perform preadmission screenings for individuals to receive eligibility for MassHealth long-term care coverage which is what is at issue in this appeal. As no one from DDS was present at the hearing to speak about their failure to respond to the submission, this decision is not based on those findings. However, it is troubling to receive evidence of an agency receiving information requesting services and failing to respond to that request except through an electronic mail message. The fair hearing regulations specifically include the agency's failure to act upon a request for assistance as grounds for appeal. (130 CMR 610.032(A)). In this case, evidence presented by the appellant's representatives demonstrates that the agency clearly failed to act on requests and submissions made in May 2023 and June 2023.

The regulations at 130 CMR 456.412(A) require MassHealth or its agent to notify the member or applicant and the referral source or nursing facility who submitted the request for institutional services on the member's behalf of the approval or denial of the request for authorization of nursing-facility services. If authorization for institutional services is denied, the notification will contain the following information:

- (1) the reason for the denial;
- (2) the explanation of the member's right to appeal; and
- (3) a description of the appeal procedure.

If the Department of Developmental Services or its agent or the Department of Mental Health or its agent, or both, determine in accordance with 130 CMR 456.410(D) that an individual is not eligible for admission to a nursing-facility or that specialized services are not needed, then the individual may request a fair hearing as provided for in 130 CMR 456.412(B). (130 CMR 456.412(C)).

As the regulations require MassHealth to issue notice of an approval or denial, DDS should have issued a notice rather than simply overlooking the submission of a Level I referral on more than one occasion. Again, as no one from DDS was present to speak to this issue, the hearing decision is based upon evidence of a referral sent in May 2023 that the agency should accept as evidence of meeting the correct conditions as of the date of submission. However, the agency should take notice of this inaction.

Pursuant to 130 CMR 450.235 through 130 CMR 450.240, MassHealth may access overpayments or sanctions for any period in which a facility fails to comply with all applicable PASRR rules and requirements, including the requirements set forth in Nursing Facility Bulletin 169. (Nursing Facility Bulletin 169). In this case, the only dates in which MassHealth may access overpayments or sanctions would be from May 12, 2023 to May 20, 2023 due to the failure to take timely action on the "PREADMISSION SCREENING AND RESIDENT REVIEW (PASRR) LEVEL I SCREENING" dated The issue of overpayments or sanctions are beyond the scope of this appeal but the dates noted in this decision would be applicable to such a future decision should MassHealth take further action.

The decision made by MassHealth was incorrect.

This appeal is approved in part.

Order for MassHealth

Determine the appellant eligible through a PASRR Level II Evaluation submitted on

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.

Implementation of this Decision

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If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings, at the address on the first page of this decision.

Susan Burgess-Cox Hearing Officer Board of Hearings

cc:

MassHealth Representative: Jacquelin Fratus, MassHealth Office of Long Term Services & Supports (LTSS), Executive Office of Health and Human Services, One Ashburton Place 5th Floor, Boston, MA 02108

MassHealth Representative: Rachel Rosenberg, Assistant General Counsel, Executive Office of Health and Human Services, One Ashburton Place, 11th Floor, Boston, MA 02108

DMH Representative: Stephanie Barstow, Associate Director, DMH PASRR Office, for Health Consulting at UMass Chan Medical School, 333 South Street, Shrewsbury, MA 01545

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