

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2312363
Decision Date:	8/5/2024	Hearing Dates:	02/28/2024 05/14/2024
Hearing Officer:	Thomas J. Goode	Record Open to:	06/28/2024

Appearance for Appellant:

[Redacted] Ph.D;
[Redacted] of Social Work;
[Redacted] Director of Nursing

Appearances for DDS/PASRR Screener:

Matthew Stevens, Esq.
Diane Pixley, Director of PASRR Nursing Facility
Operations; Michael Bradley, DDS Regional Nursing
Facility Specialist; Justin Hawes, Assistant Area
Director DDS Brocton Area Office



*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 Review
Decision Date:	8/5/2024	Hearing Dates:	02/28/2024 05/14/2024
DDS's Reps.:	Matthew Stevens, Esq., et al	Appellant's Reps.:	Guardian, et al.
Hearing Location:	Remote	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 November 2, 2023, the Department of Developmental Services (DDS) determined in accordance with a Level II PASRR (Pre-Admission Screening and Resident Review) screening that Appellant, an individual with an intellectual disability, does not require nursing facility care, her needs could be provided in the community, and that nursing facility eligibility would terminate on January 30, 2024 (130 CMR 610.037, 456.409; Exhibit 1). A timely appeal was filed by Appellant's legal guardian on December 12, 2023 (130 CMR 610.037, 610.015(B); Exhibit 2). Notice of a PASRR determination is a valid ground for appeal (130 CMR 610.032(E), 610.037). A hearing was scheduled for January 24, 2024, and rescheduled to February 28, 2024 due to a death in Appellant's and her legal guardian's family (Exhibits 4-6, 8). On February 28, 2024, a virtual hearing was held, after which the hearing record remained open to allow the parties to submit post-hearing memoranda. On March 19, 2024, Appellant's representative requested an extension of the hearing record-open period to March 29, 2024 due to a serious illness. The extension request was allowed (Exhibits 10,11). On March 26, 2024, Appellant's representative submitted a Motion to reopen the hearing record to submit additional medical records, which was allowed, and the record open period was extended to April 5, 2024 for memoranda and to allow DDS to review the submitted records (Exhibits 12, 13). Post-hearing memoranda were timely submitted by both parties (Exhibits 14, 15). On April 8, 2024, Appellant's representative submitted a Motion to Submit a Reply Memorandum, objecting to the contents of the DDS memoranda (Exhibit 16).

On April 10, 2024, the hearing officer notified the parties that the hearing would be reconvened on May 14, 2024 to address Appellant's Motion dated April 8, 2024, and to review and clarify all exhibits submitted into evidence (Exhibit 17).¹ During the reconvened hearing on May 14, 2024, DDS agreed to revise its memorandum, which was timely resubmitted, and Appellant waived her April 8, 2024 Motion (Exhibit 20).² On June 17, 2024, Appellant submitted a renewed Motion to Submit a Reply Memorandum no later than June 28, 2024, which was allowed (Exhibits 21, 22). Appellant's Reply Memorandum was timely received on June 28, 2024, and the hearing record closed.

Action Taken by the Department of Development Services (DDS)

By notice dated November 2, 2023, DDS determined, in accordance with a Level II PASRR (Pre-Admission Screening and Resident Review) screening, that Appellant, an individual with an intellectual disability, does not require nursing facility care, her needs could be provided in the community, and that nursing facility eligibility would terminate on January 30, 2024.

Issue

Whether DDS was correct in determining in accordance with a Level II PASRR (Pre-Admission Screening and Resident Review) screening that Appellant, an individual with an intellectual disability, does not require nursing facility care, her needs could be provided in the community, and that nursing facility eligibility would terminate on January 30, 2024.

Summary of Evidence³

DDS Summary

Pre-Admission Screening and Resident Review ("PASRR") is a federally mandated program that

¹ Appellant's representative hand delivered medical records and other documentation to the Board of Hearings. Included with the documents was an index of exhibits, submitted and proposed, that the hearing officer could not identify in the records submitted (See Exhibit 7(o)). The hearing was reconvened on May 14, 2024 in part to review all evidence submitted into evidence, and identify items identified on the index that were not in the hearing record. The record remained open to allow Appellant to re-index records being submitted into evidence (Exhibit 7(a)-(i)). Collectively, Appellants exhibits, including initial submissions and reindexed submissions are marked Exhibit 7 (a)-(o).

² At the May 14, 2024 hearing, it was agreed that the first DDS memorandum (Exhibit 14) would be removed from the record, and replaced with a subsequent memorandum (Exhibit 20).

³ The DDS legal memorandum and Appellant's memoranda are in part reproduced here because each accurately tracks the respective testimony at hearing, DDS's application of PASRR regulations, and Appellant's positions (Exhibits 15, 20, 23). Both parties requested and received copies of the audio recordings of both hearings.

applies to all admissions and potential admissions to a nursing facility of people with intellectual disability and is applied uniformly regardless of payor source. 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 PASRR 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.⁴ PASRR is required for all individuals with a diagnosis of intellectual disability, developmental disability or serious mental health illness who are seeking an admission to or continued stay at a nursing facility. These individuals must be screened prior to admission, at short-term intervals, or following significant changes in circumstances or conditions in order 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.⁵ If there is a less restrictive community placement immediately available, discharge planning is initiated.

Prior to a nursing facility admission of a person with intellectual disability (ID) or developmental disability (DD) or if ID or DD is suspected, 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 (DDS) 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.⁶ If the individual is admitted to a nursing facility for a short-term admission (up to 90

⁴ Citing 130 CMR 456.410

⁵ Citing 42 CFR 483.132

⁶ Citing 42 CFR 483.106, and 42 CFR 483.108

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.⁷ Each PASRR conducted is a snapshot and reflects an individual's needs at the time of 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 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 arrange for the 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."⁸ The PASRR evaluator works with the local DDS area office to see if there are available community placement homes that can provide "equal to or better" nursing level care and can meet the individual's assessed needs. If a community setting has proven 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. 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 appeal⁹ and request a fair hearing,¹⁰ however, the appeal is limited to whether the State conducted the PASRR in accordance with the law.¹¹ An Appellant's preference or choice of residency is not an appealable ground.

Appellant is a [REDACTED] year-old woman who currently resides at the [REDACTED] at [REDACTED] rehabilitation and nursing facility in [REDACTED]. Prior to being admitted to the nursing facility, Appellant was residing with her sister and guardian at their home located in [REDACTED] MA. Appellant became a member of the Department of Developmental Services (DDS) on 10/25/05 as a person diagnosed with Intellectual Disability. Appellant is currently served out of the DDS [REDACTED] Office. In 2021, Appellant's Guardian requested a residential group home placement for Appellant with [REDACTED]. At the time, there were no vacancies at [REDACTED]. In February 2022, Guardian had a conversation with the [REDACTED] DDS Office in which she stated Appellant recently had an appointment with a neuropsychologist, and Guardian requested Appellant be placed in a long-term care nursing facility. DDS informed Guardian that DDS could not place Appellant in a long-term nursing facility but would make referrals to DDS residential group homes that could meet Appellant's needs. Guardian declined referral to any DDS residential placements. On 3/11/22, Appellant was screened by the PASRR Specialist while at her day program for Nursing Facility ("NF") placement at the request of Guardian. Appellant did not meet NF level of care. A meeting was held between DDS and Guardian on 3/25/22 at which

⁷ Citing 42 CFR 483.106, and 42 CFR 483.108

⁸ Citing 42 CFR 483.132

⁹ Citing 130 CMR 610.015

¹⁰ Citing 130 CMR 610.012

¹¹ Citing 130 CMR 610.032

time Guardian again requested NF placement. DDS again explained that individuals do not receive NF placement unless they meet a certain level of care and there are no suitable community placements. DDS requested to move forward with referrals for DDS residential placement which Guardian, again, declined.

Appellant was admitted to the nursing facility on [REDACTED] 2022 for short term rehabilitation, expected to be less than 30 days, following emergency gallbladder surgery. The hospital physician recommended a rehabilitative admission for under 30 days. PASRR's were subsequently completed on 8/3/22 and 10/31/22. There were four more sequential PASRR screens completed in 2023 on 1/30/23, 5/3/23, 8/2/23, and 11/1/23. These PASRRs outlined Appellant's only skilled/nursing need as physical therapy. During this time, DDS had conversations with Guardian to discuss PASRR, its process, and the community-rule out. Guardian was not interested in any other placement but NF placement.

On 10/27/22, Appellant was prioritized for a placement at a [REDACTED] group home residence which has 8 hours/1 shift of nursing per day. Guardian declined the placement. Guardian subsequently toured the [REDACTED] residence in April 2023 and again declined the placement. On 10/27/23, a meeting was held at the nursing facility with Appellant, Guardian, and representatives from DDS and a residential provider. This meeting was to discuss discharge from the nursing facility should Appellant not meet the requirements for continued NF level of care after her upcoming PASRR review. The residential provider reported difficulties with the Guardian, alleging the meeting only lasted a few minutes. Again, Guardian was not willing to consider a residential placement for Appellant. The 11/1/23 PASRR Notice (subject of the within appeal) was mailed to Guardian. Based on Appellant's Level II PASRR evaluation conducted on November 1, 2023, it was determined that she did not require skilled nursing care and that her 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. Guardian was notified that she could continue to stay in the nursing facility for an additional 30 days while working on an appropriate discharge plan. Based on Appellant's PASRR, DDS determined her assessed needs could be met in the community. Guardian has declined all options presented to her and has refused to work with DDS towards community placement for Appellant.

The PASRR at issue was administered on November 1, 2023, and pursuant to that PASRR, a Notice of Determination of Need was mailed to Appellant on November 2, 2023. Appellant appealed the November 1, 2023, PASRR determination. On February 28, 2024, an administrative hearing was held regarding the PASRR appeal. The following individuals offered testimony: Diane Pixley, Director of PASRR Nursing Facility Operations, testified as to the PASRR Process and DDS' policies on nursing home admissions; Mike Bradley, DDS Regional Nursing Facility Specialist, testified as to Appellant's PASRR results and methodology, as well as DDS' ability to provide specialized services in the community; Justin Hawes, Assistant Area Director of DDS [REDACTED] Area Office, testified to DDS services, group homes, attempts to work with

Appellant's guardian, and that Appellant's assessed needs can be met in the offered group homes; [REDACTED] testified on behalf of Appellant, addressing how a transfer out of the nursing facility may affect Appellant psychologically; [REDACTED] Director of Social Work at the nursing facility, testified to her opinion on Appellant's ADL needs and the facility's ability to serve those needs; Guardian testified as to Appellant's care needs and disputed the PASRR results.

The issue before the Board of Hearings is whether DDS administered the PASRR dated November 1, 2023, in accordance with the law. Appellant bears the burden to show, by a preponderance of the evidence, that DDS's administration of the PASRR was not in accordance with the law. It is undisputed that Appellant has intellectual disability and is eligible for DDS services. PASRR regulations at 42 CFR 483.132 describe the data to be collected and evaluated in determining whether an individual needs nursing facility level of services. Mike Bradley, DDS Regional Nursing Facility Specialist, testified that DDS developed and uses the PASRR tool to collect the data necessary to make that determination. For the PASRR to result in Nursing Facility Level Services, an individual must either receive a score of 11 in the Medical Section (Section E) or score at least 1 in the Skilled Nursing Section.¹² On November 1, 2023, Mr. Bradley completed the 90-days PASRR screening of Appellant using the PASRR tool. Mr. Bradley testified that Appellant scored 6 in the medical section (Section E) and 0 in the skilled/nursing services section (Section F) for a combined score of 6. Mr. Bradley testified that the PASRR screen is a point in time snapshot with the scoring based on information collected from his review of Appellant's medical and other records at the nursing facility and through interviews with the facility's nurses, clinicians, and social workers. The PASRR specifically instructs a finding of Nursing Facility Placement Not Approved, "if the combined score for PASRR sections E and F is 10 or under and there is no skilled/nursing need identified in Section F."¹³ Mr. Bradley testified that he has administered thousands of PASRRs over 22 years and is highly experienced in PASRR process. Mr. Bradley further testified that in completing the PASRR, he relied upon independently prepared medical documentation from the nursing facility. As such, Mr. Bradley did not make his own medical determinations or opinions and applied the independently prepared medical records to the PASRR tool. Mr. Bradley testified that Appellant has diabetes, which is a stable condition treated with Metformin and a diabetic diet; has no seizure disorder or skin breakdown; has occasional bladder and bowel incontinence; no swallowing issues, or hospitalizations over a 90-day period. Mr. Bradley testified that ADLs are scored to reflect Appellant's ability to participate in completing ADLs, and that ADL assistance is part of direct care provided in group homes. Mr. Bradley also testified that specialized services are additional services added by DDS for individuals with intellectual or developmental disabilities who are admitted to a nursing home because nursing homes are not equipped to meet the needs of the ID/DD population. Mr. Bradley added that specialized services were added in anticipation of

¹² Citing 42 CFR 483.126 and 130 CMR 456.409 "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)..."

¹³ Citing PASRR Instruction Manual (Exhibit 9D).

discharge because Appellant has been a nursing home resident for so long. DDS asserts that Appellant did not challenge the PASRR tool or any specific score determinations.

Even assuming a nursing facility admission or continued stay was appropriate, DDS must determine whether there is a community placement that may meet Appellant's needs in a less restrictive setting than the nursing facility. If there is a less restrictive community placement immediately available, discharge planning must occur. 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 CFR. 483.126, if there is an appropriate and available community setting that can meet her total needs as provided in 42 CFR 483.132(a)(1). Ms. Pixley testified that it is DDS policy and the law to seek the least restrictive placement, and only admit eligible individuals to nursing facilities when there are no community options.¹⁴ Both Mr. Bradley and Mr. Hawes testified that Appellant's assessed needs, including specialized service needs, could be met in the community. Mr. Hawes testified that he is the Assistant Area Director for the [REDACTED] Area DDS Office and oversees the administration and delivery of services and manages the budget for the approximately 1,900 individuals serviced by that office. Mr. Hawes testified to attempts to arrange placement for Appellant in a residential group home. He added that, at the Guardian's insistence, Appellant was referred to a medical-based group home, which was denied by Guardian. Mr. Hawes testified that Appellant's needs would be better met in the community than the nursing facility because staffing ratios are generally 3 staff to 5 residents in a group home setting. Mr. Bradley also testified that nursing facilities are equipped to handle the general needs of the population they are serving and are not equipped to meet the needs of the ID/DD population. Community group homes, on the other hand, deal with small groups of individuals with intellectual disabilities. As such, they are better equipped to secure specific specialized services for individuals within their homes with similar disabling conditions. Furthermore, [REDACTED] who directs social work at Appellant's current nursing facility, testified that the staff to resident ratio at the nursing facility can be as high as 16:1. As such, Appellant's needs are better met in the community due to the availability of specialized services as well as significantly lower staff to resident ratios. DDS asserts that Appellant offered no evidence to support a finding that her needs cannot be met in the community, nor did Appellant point to anything lacking in the community placements identified by DDS. One suggested community placement had nursing services staffed in the home, and one did not, but DDS determined that either placement would meet Appellant's needs; however, none of the placements offered 24-hour nursing services.

DDS argues that it is required to notify the evaluated individual and her representative, in writing, of the PASRR determination and the notice must contain:

- (1) whether a NF level of services is needed;
- (2) whether specialized services are needed;

¹⁴ See DDS policy at Exhibit 9.

- (3) the placement options available to the individual consistent with the PASRR determination and 42 CFR 483.130(m);¹⁵
- (4) a statement the PASRR determination and evaluation was in accordance with 42 CFR 483.128; and
- (5) the right of the individual to appeal the determination with instructions on how to initiate an appeal. 130 CMR 610.037(B) and 42 CFR 483.130(l).

When an individual is not considered appropriate for continued placement in a NF and must be discharged, the notice must further provide information on how, when, and who will advise the resident of discharge arrangements. 42 CFR 483.130(M)(5). DDS provided written notice of the PASRR determination on November 2, 2023. The notice informed Appellant that she was not in need of NF level of services, that she did require specialized services¹⁶, that because continued placement was not appropriate, she must be discharged, and how, when, and who would advise Appellant of discharge arrangements. Specifically, the notice stated: [w]ithin 5 business days of the date of this notice, a representative from the Department will contact you to discuss this finding and the services that better meet your needs.” The notice further informed Appellant of her right to appeal the determination. Thus, DDS met its regulatory obligation in conducting and notifying Appellant of the PASRR determination.

DDS asserts that Appellant’s Guardian argued, based upon her lay opinion, that the PASRR was incorrect, as it should have resulted in requiring nursing facility level of service. DDS asserts that Appellant’s Guardian argued that this PASRR is different than previous PASRRs and is therefore incorrect, and that a nursing facility placement is the only appropriate placement due to Appellant’s medical needs. DDS maintains that it administered the PASRR according to the law, which resulted in a finding that Appellant has no skilled/nursing needs. DDS argues that Appellant’s Guardian did not challenge specific score determinations, but instead stated generally that the PASRR must be incorrect because it should reflect skilled/nursing needs. DDS notes that the Hearing Officer attempted to probe what aspects of the PASRR were contested, and the issue of ADL needs was raised. However, DDS points out, Appellant’s Guardian did not specify what portions of the PASRR were scored incorrectly, or how Appellant’s ADL needs would have resulted in a different PASRR result. DDS argues that Appellant’s Guardian failed to point to any individual item in the Skilled Nursing Section (Section F) that should have been scored differently. DDS states that of all the PASRRs administered for Appellant, the only item

¹⁵ Citing 42 CFR 483.130(m) which outlines six (6) potential placement options a PASRR determination notice may include regarding the applicant: 1. Can be admitted to a NF; 2. Cannot be admitted to a NF; 3. Can be considered appropriate for continued placement in a NF; 4. May choose to remain in the NF even though the placement would otherwise be inappropriate; 5. Cannot be considered appropriate for continued placement in a NF and must be discharged (short term residents); or 6. Cannot be considered appropriate for continued placement in a NF and must be discharged (short or long-term residents).

¹⁶ As Appellant’s representative points out, the DDS legal memorandum states that Appellant did not require specialized services. It is reasonable to consider this a “typo” as the November 2, 2023 notice clearly identifies the need for specialized services which Mr. Bradley corroborated in his testimony (Exhibit 1).

in Section F that has changed is physical therapy. Appellant required physical therapy after her surgery, a need that resolved with appropriate therapy. The need for physical therapy is what resulted in Appellant meeting the skilled/nursing level of care. Appellant's Guardian did not challenge any of the previous PASRR findings, all of which were consistent with the current PASRR, but for physical therapy, which is no longer required. Moreover, Appellant's Guardian does not assert that physical therapy is still needed, but instead argues generally that Appellant requires nursing facility level services.

DDS argues that Appellant is not challenging the administration of the PASRR or the PASRR itself but is instead ultimately seeking to appeal an unfavorable result - Appellant's removal from the skilled nursing facility. PASRRs are administered in 90-day increments to reassess the needs of the individual as they can change and result in different placements. Mr. Bradley testified that PASRRs are a snapshot in time of an individual's needs. As such, the argument that the PASRR at issue is different than previous PASRRs, and is therefore incorrect, is baseless. The changing needs of an individual are baked into the PASRR process to ensure the individual is receiving the proper level of care. Therefore, pointing out differences in the most recent PASRR lends itself to the PASRR system working as intended, as opposed to any type of error in the PASRR administration. DDS asserts that Appellant's Guardian spent a large portion of time arguing that the Guardian's knowledge of Appellant's needs renders a conclusion that nursing facility services are required. However, the Guardian does not have any specific knowledge, skill or training in PASRR. DDS argues that Appellant's Guardian's argument is based on her own lay opinion, as well as her erroneous logic that, because the November 1, 2023, PASRR had a different result than the previous PASRRs, it must be incorrect.

DDS further maintains that it credibly testified and established that Appellant's needs can be met in the community and the level of service is better than Appellant is receiving in the nursing facility for several reasons. For many years, Appellant's Guardian has refused to seriously consider community-based placements or cooperate with DDS regarding Appellant's service needs. DDS offered extensive evidence that the identified 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's Guardian argues that the identified community residence cannot meet Appellant's needs, she did not offer any evidence to support this argument or refute DDS's testimony.

In 2021, Appellant's Guardian sought a referral to [REDACTED] for Appellant, a community-based placement she views as favorable. The Hearing Officer inquired with the parties if an agreement could be reached regarding Appellant's placement at [REDACTED]. Appellant's Guardian had no objection to this and raised no issues with [REDACTED] meeting Appellant's needs. DDS noted that while DDS is ready and willing to assist in seeking a referral to [REDACTED] it cannot guarantee such placement. DDS argues, however, that this point is detrimental to Appellant's Guardian's argument. Appellant's entire case can be boiled down to a few key points: a transfer from the nursing facility would be traumatic, community placements are unable to meet Appellant's

needs, and the PASRR determination is incorrect. Here, the Guardian has no objection to placement at [REDACTED] which is a community placement that would require Appellant be transferred out of the nursing facility. This is completely incompatible with Appellant's Guardian's position and shows that Appellant's case is not grounded in issues with the PASRR, but instead with the specifics of Appellant's Guardian's preference or choice of residency, which is not a ground for appeal. Appellant's Guardian's argument revolves around Appellant being settled in at the nursing facility, and that moving her would be traumatic. DDS claims this argument carries no weight in a PASRR appeal, primarily because it is not an appealable ground pursuant to 130 CMR 610.032. DDS is unaware of any rules or regulations that consider how the individual would handle a transfer pursuant to a PASRR finding, and Appellant's Guardian has failed to provide any such rules or regulations in support of her position. Appellant's Guardian asserts that the PASRR determination should be ignored because of the effect a transfer would have on Appellant. DDS argues that the natural progression of Appellant's Guardian's argument is that Appellant should remain at the nursing facility in perpetuity because moving her anywhere else would be traumatic. This argument is completely repugnant to the law that requires DDS to place individuals in the least restrictive environment and would upend the entire PASRR processes, causing individuals who have no nursing facility needs to stay in nursing facilities because the transfer process would be traumatic.

Appellant's Guardian relied on the testimony of [REDACTED] who holds a Ph.D in psychology, to support the assertion that transferring Appellant would be traumatic. [REDACTED] testified and admitted that he was unfamiliar with the PASRR process and was also unfamiliar with the PASRR at issue in the appeal. Furthermore, [REDACTED] testified on the record that he had no experience with transferring individuals to DDS group homes or other nursing facilities. [REDACTED] testified that he did not formally assess Appellant, rather he had met with Appellant approximately three times, the first in 2020. Based on his limited experience with Appellant and no experience with PASRR, DDS, nursing facilities, or transitions to DDS community residences, he opined that moving Appellant out of the nursing facility would be a traumatic event for her. [REDACTED] further admitted that Appellant is not a patient of his, but instead a member of his religious community. Ultimately, the effect of a transfer on Appellant has no relevance to appealing a PASRR determination, which is at issue in this appeal. DDS notes, even assuming, *arguendo*, that it was relevant to the PASRR appeal, Appellant's Guardian's position is in total opposition to state and federal laws and regulations that require administration of PASRRs to ensure individuals are not inappropriately placed in a nursing facility.

DDS concludes that Appellant cannot continue to reside in a nursing facility in light of a PASRR determination that nursing facility services are not required. DDS reached this decision based upon independently prepared medical evidence, and in compliance with strict state and federal laws governing the PASRR process. Appellant's total needs, including medical, nursing, and daily needs related to her intellectual disability can be met in an appropriate and available community placement. DDS has attempted to provide such community placements to Appellant's Guardian, who has been uncooperative with DDS. For all the foregoing reasons, DDS

argues that the November 1, 2023, PASRR determination for Appellant should be upheld and the process for her discharge from the nursing facility to a residence in the community should proceed.

Appellant Summary

Appellant's Guardian argues that the appeal should be approved based upon the evidence and witness testimony, and that specific scores in Section E (medical needs) and Section F (skilled nursing needs) on the 11/01/2023 PASSR Evaluation should have been graded higher. As a result, Appellant should have been determined to need nursing facility level of services. Further, the evidence reflects that DDS did not identify appropriate residential placement options that meet Appellant's medical needs and needs related to her disability, i.e. her "total needs." This failure renders a finding that continued nursing facility stay is appropriate. Appellant, through her legal Guardian, fully cooperated with DDS in attempting to identify appropriate residential placement options that meet Appellant's total needs, without success. Further, substantial first-hand witness testimony and multiple exhibits from caregivers and medical providers, in support of Appellant's appeal, present critical factual and legal distinctions from the findings in Appeal No. 2201982, which tilts heavily in favor of a different result here. Given Appellant's fragile and deteriorating condition, a transfer at this time to another facility, indeed any significant change in routine, will have a deleterious effect upon the Appellant's health, safety, and emotional well-being.

Appellant was diagnosed with Down Syndrome at birth. For much of her life, she resided with her parents in the family home in ██████████ Massachusetts. Appellant is a high school graduate and worked for several years at the local ██████████. The death of her father in 2011, and mother in 2012, was devastating to her and to her siblings. At that time, the home in ██████████ was sold and she moved to ██████████ to be close to family. She lived first with her sister and beginning in 2019, with another sister, Appellant's Guardian. In addition to her interactions with her sister since childhood, Guardian is a social worker with over 30 years of experience, including with the community of individuals with intellectual and developmental disabilities.

While residing in ██████████ Appellant attended a community-based program at the ██████████ ██████████. Initially, it was a very good match, but as her condition declined, Appellant was transferred in early 2021 to the more medically based side of the community program at ██████████. Also in 2021, Guardian became increasingly concerned about Appellant's cognitive and functional decline since her previous evaluations (Neuropsychological Evaluation by ██████████ 2022).¹⁷ It was noted that Appellant ". . . had been diagnosed with dementia by her neurologist and has had "multiple neuroimaging studies that have shown cerebral volume loss." (See also report of ██████████ 2022, reporting episodes of agitation, wandering, and decline,

¹⁷ See Exhibits 7 and 12.

compared with the previous year.) Another concerning episode occurred when Appellant left the house without her Guardian knowing about it and did not seem to understand that this was dangerous. After a number of tests, ██████ diagnosed Appellant with Major Neurocognitive Disorder Dementia. ██████ discussed Appellant's future and deteriorating condition with Guardian, who indicated her "well-being and safety were the primary concerns." Based upon Guardian's reports of the decline in Appellant's functioning, the need for 24-hour supervision (possibly in a memory care setting) was discussed. ██████ "primary recommendation" was to explore that possibility. After Appellant's January, 2022 evaluation by ██████ further deterioration was noted. On ██████ 2022, ██████ prepared an addendum to her January, 2022 evaluation addressing in more detail the advancing decline in Appellant's condition. She stated: "Furthermore, since dementia is considered a neurodegenerative condition, the ongoing atrophy of the brain tissue is expected to have further negative impact on both cognitive and adaptive functioning." Additional changes were noted from the January 2022 evaluation, such as multiple occasions of inappropriate dressing at her day program, decline in word recall and more generalized short-term memory loss, leading to safety concerns. Compounding the situation, "... Appellant has several co-morbid medical conditions along with her Down Syndrome and Dementia, e.g., diabetes, gallstones, cardiac disease, and more. She has a lot of medications and medical specialists." In summary, ██████ stated: "The cognitive and everyday functional declines noted here are entirely consistent with the expected progression of Neurodegenerative dementia. In addition, ongoing changes are probable."

As Appellant's condition worsened, she was also evaluated on three occasions by ██████ ██████ in 2019, 2021, and July, 2022. ██████ who testified at the hearing, has over 40 years of relevant experience, along with a master's in divinity from ██████ and a Ph.D. in Pastoral Psychology from Boston University (Exhibit 7(d)). His January 2024 psychological assessment and recommendation was submitted into evidence.¹⁸ ██████ Emmett's specialty is dealing with grief and loss. He treats Down Syndrome patients as well as many Alzheimer's patients. ██████ testified that Appellant is currently diagnosed with Down Syndrome, Alzheimer's, and Major Depressive Disorder with Psychotic Features, NOS. When ██████ first met Appellant, her parents had died in 2011 and 2012 and she had been living with her sister. According to ██████ Appellant has a history of significant loss. When he first met her in 2019 and asked her why she thought he was visiting her, Appellant said "Well, my parents died" That set the scene for what ██████ felt was going to be a core element in her entire being; what he heard was all of the loss she's experienced. What ██████ . . . heard and experienced was a young lady who presents a little bit more intact than she is." Her current IQ was basically unscorable because she couldn't respond to anything. While Appellant presents as sociable and delightful, ". . . it masks a woman who is incredibly compromised, both intellectually and certainly emotionally." ██████ stated that her primary vulnerability is loss; a deep-seated fear of change and persistent anxiety which leads to extreme frailty. These factors led to ██████ assessment and recommendations.

¹⁸ See Exhibits 7(d) and 7(e).

In [REDACTED] opinion, moving Appellant to a group home ". . . could cause irreparable emotional harm to her." Because her primary vulnerability is to loss, she has a deep-seated fear of change, and all of this leads to frailty, which can deteriorate very quickly. [REDACTED] testified: "What I really want to most highlight is the really dire trajectory for her vis-a-vis, her physiological and emotional status, and with Alzheimer's, her condition could deteriorate very quickly." Based on that, "... change could lead to some real significant deterioration. If she is not provided with consistency, she could literally experience a psychotic break. I'm not being dramatic. I've seen this with other people; she just doesn't have the resistant resilience. Alzheimer's will hasten her deterioration."

Appellant's Guardian argues that both evaluations, along with the assessment and testimony of [REDACTED] document the Guardian's efforts to coordinate care with DDS. [REDACTED] noted, for example, that Guardian stated that she has been trying to coordinate future planning with DDS about a permanent residential placement. However, that process has been time consuming and inconsistent. Guardian understandably does not want to find one facility in a few months only to find that her sister then requires a higher level of care soon after moving. [REDACTED] added that "caregiving is a difficult and often stressful job. With that said, [Guardian] has acknowledged that the time has come to start thinking about [Appellant's] future. Her well-being and safety are primary concerns." [REDACTED] made similar comments: "The only person in [Appellant's] world who is uniquely qualified to make decisions about what [Appellant] needs is her sister, [Guardian], who has worked as a social worker with the dually-diagnosed population for over 30 years, and has advocated for [Appellant] since she became her legal guardian."

Appellant was first admitted to the nursing facility on [REDACTED] 2022, following gallbladder removal surgery at [REDACTED] Hospital in [REDACTED] for physical therapy, occupational therapy and overall assessment of her total needs. Appellant was diagnosed with the following: Down Syndrome; Alzheimer's; Major Depressive Disorder with Psychotic Features, NOS; heart disease; diabetes; hypothyroidism, among other serious conditions (Exhibit 7(i)). As described in Section, D of the PASSR Evaluation on 11/01/2023, Appellant was at the time taking 13 separate medications. At the nursing facility, Appellant is a resident in the Memory Care Unit with other Alzheimer's patients and has developed strong bonds with them. [Testimony of [REDACTED] Social Worker at the nursing facility]. It is in a secure unit, with 24/7 Nursing in three shifts [testimony of Kodjo Dami, Director of Nursing at the nursing facility]. Appellant is on a restricted diet for diabetes, weight management and also requires soft foods to avoid choking, all of which is managed with assistance and monitoring from a dietician and medical providers. Before her admission to the nursing facility, Appellant had a choking incident that required an emergency call to 911. Appellant's thyroid condition is complex and needs to be managed by 24-hour care and constant monitoring of her condition and medications. From the date of her admission to the nursing facility, Appellant was receiving physical therapy, and occupational therapy. That was discontinued sometime before the most recent PASSR Evaluation, which triggered the PASSR Determination at issue here. Kodjo Dami testified that PT and OT were discontinued because she had "plateaued." However, as time goes by, there

has been a decline in Appellant's mobility and the nursing facility is looking at a possible medical reevaluation to see if PT is needed again. The nursing facility provides physical therapy on site, unlike a group home.

Appellant's Guardian also asserts that Appellant has a weight management issue and has lost close to 20 pounds since her admission to the nursing facility in July, 2022. A dietitian is following her to bring her weight back up and comes to the facility to monitor her on a regular basis. Another difference between a nursing facility and a group home is the availability of medical care. All of the healthcare providers come to the nursing facility to see Appellant, as opposed to a community placement, which frequently requires a van to take patients to their healthcare appointments. There is a doctor available three days a week at the nursing facility which prevents the unnecessary transfer of patients back-and-forth to a hospital, which would be damaging for Appellant given the difficulties she has when routines change. [REDACTED] testified that she has known Appellant since she was first admitted to the nursing facility and she strongly agreed with the testimony of other witnesses that "change and transition are very difficult for Appellant." A move at this time would be detrimental and a nursing home placement is best for her.

Appellant's Guardian stipulates that the testimony from Diane Pixley is accurate regarding the rationale and procedures adopted by the Commonwealth underlying the PASSR Screening process are legally mandated. Appellant's Guardian does not challenge that. Appellant's Guardian does challenge the actual scores in Sections E and F of the 11/01/2023 PASSR Determination, as well as the community placement options identified by DDS. As described by Mr. Bradley, there are two medical sections in the PASSR. In order to screen for nursing facility level care, you need an 11 in the Medical Section (E) or a 1 in Skilled Need (F). Appellant received a 6 in Section E and zero in Section F. Based upon the evidence and witness testimony, specific scores in Section E, Medical Needs, and Section F, Skilled Nursing Needs, the 11/01/2023 PASSR Evaluation should have been graded higher. As a result, Appellant should have been determined to need nursing facility level of services. Based on the testimony of Kodjo Dami, the Director of Nursing at the nursing facility, Appellant should have received a 2 (instead of a 1) in Section 47 (Continence - Bowel); a 2 (instead of a 1) in Section 48 (Continence - Bladder); a 6 (instead of a 2) in Section 49 and a 1 (instead of 0) in Section 50 (Swallowing). The differential totals an additional 7 points, on top of the 6 she received in the 11/01/2023 PASSR, for a total of 13 points. Sections 47 and 48 required higher scores because Appellant was incontinent more than a moderate amount. While she could sometimes manage during the daytime, it fluctuated, and she was completely unable to manage herself at night. Section 49 should be a 6 (instead of a 2) because Appellant's diabetes requiring a dietitian's input, constant blood and medication monitoring by medical providers, weight management issues, and a soft food diet because of potential choking. Section 49 should be a 1 instead of a 2 because of the potential of choking, requiring a soft food regimen.

Further, under 130 CMR, Section 610.037 (B)(3), notice of the PASSR determination must

include the placement options available to the individual consistent with the determination and in accordance with 42 CFR 483.130(M). There were only two community placement options described in the testimony at the hearing, that were offered to the Appellant: (1) [REDACTED] [REDACTED] in [REDACTED] in [REDACTED]. Of these, only one, [REDACTED] is currently available, and that is not a medical group home; i.e., there is no nursing staff available. [REDACTED] is "on hold." Guardian had numerous interactions with DDS on the subject of an appropriate community placement. She asked on several occasions for a referral to [REDACTED] in [REDACTED] and asked to be put on the waitlist there. That is a medical group home that has 24/7 nursing care available and memory care facilities similar to the nursing facility.

In the spring 2023, before the most recent PASSR evaluation, Guardian visited the [REDACTED] home. When she arrived there, she noticed that there were three beds available when she had been told there was only one. She asked why and was told that, in the last two weeks there were two unanticipated deaths. Guardian was told that they " ... were still looking into it." Guardian was never provided an explanation at the time, and none of the witnesses at the hearing offered one. Guardian also inquired about medical personnel at the [REDACTED] home but was told only that "The staff do a little bit of everything." Given the complex medical and other needs of Appellant, combined with the information provided to her at the visit, Guardian declined the referral as it was not a safe or appropriate facility to meet Appellant's total needs. Nor is there a current opening and there is only a 7-hour nursing shift. Guardian was unable to visit [REDACTED] because of a number of issues, including Covid, the holidays, and a death in the family. However, [REDACTED] was not a medical home and had no nursing staff. That was not necessary, testified Justin Hawes, because the Appellant does not have a skilled need for nursing, [REDACTED] can manage her ADL needs, ". . . and bring her to all medical appointments."

Appellant's Guardian argues that the evidence reflects that DDS did not identify appropriate residential placement options that meet Appellant's medical needs and needs related to her disability, i.e. her "total needs." This failure renders a finding that continued nursing facility stay is appropriate. The testimony and Exhibits reflect that neither of the two placement options are appropriate given the severe, complicated and deteriorating condition of Appellant. Among many other reasons, the lack of 24/7 Nursing Care at the identified facilities is striking. Appellant, through her legal Guardian, fully cooperated with DDS in attempting to identify appropriate residential placement options that met Appellant's total needs, without success. Guardian vigorously contests any suggestion of non-cooperation with DDS, as demonstrated by the records and Exhibits. To the contrary, Guardian stated that she was at all times working in good faith in what she believes to be the best interests of Appellant. She said that she took an oath in Court and will work tirelessly to fulfill that pledge.

Appellant's Guardian maintains that substantial first-hand witness testimony and multiple exhibits from caregivers and medical providers, in support of Appellant's appeal, presents critical

factual and legal distinctions from the findings in Appeal No. 2201982, which tilts heavily in favor of a different result here (Exhibit 15). Appellant's Guardian presented testimony from three caregivers (including the Guardian), a psychologist, [REDACTED] and two medical reports of health care providers on the serious and deteriorating conditions related to Alzheimer's and Dementia. This is in stark contrast to Appeal No. 2201982 where Appellant essentially challenged the fairness of the PASSR regulations and process without presenting any evidence on the suitability of the identified Community Placement Option and instead refused to participate at all in the process.

Given Appellant's fragile and deteriorating condition, a transfer at this time to another facility, indeed any significant change in routine, will have a deleterious effect upon the Appellant's health, safety, and emotional well-being. The testimony of [REDACTED] Kodjo Dami, [REDACTED] and Guardian reflect enormous concern at the prospect of significant change in Appellant's current environment. Her health, safety and well-being are at stake. All of the laws and regulations supporting individuals with Intellectual and Developmental Disabilities are not in conflict with this fundamental premise. For the foregoing reasons, Appellant requests that the appeal be approved and a determination issued that Appellant needs nursing facility level of services. In addition, DDS should be required to work with Appellant's Guardian to identify a suitable community placement option, with 24/7 Nursing Care a Memory Care.

Appellant's Guardian further contends that the 11/02/2023 PASRR Notice is not appropriate in that it did not identify in writing any specific community placement options available, especially in the context of the specialized services needed and a required discharge plan. Moreover, Appellant's Guardian argues that DDS astoundingly now takes the position, on page 6 of the DDS brief, that the 11/02/2023 PASRR informed the Appellant that "she did not require specialized services." The plain language of the 11/02/2023 PASRR, in the box checked at the bottom of page one, reflects the opposite - specialized services ARE needed. If specialized services were not needed at the time of the 11/02/2023 PASRR Determination, and the Agency checked the wrong box, the 11/02/2023 PASRR Determination is fatally defective.

Appellant's Guardian argues that, pursuant to 130 CMR 610.037(B)(3), the 11/02/2023 PASRR Notice must identify in writing the placement options available to the individual consistent with the determination and in accordance with 42 CFR 483.130(M). The question raised at the second hearing is what level of specificity is needed regarding the available community placement option in these circumstances. Appellant's Guardian contends that at a minimum, the location(s) of the available and appropriate community placement(s) must be identified. The 11/02/23 PASSR did not do that. Instead, there is a vague statement that someone will contact the Appellant within 5 business days regarding the discharge finding and "the services that better meet your needs." Presumably specialized services are needed. Nowhere, however, is any community placement option mentioned in the PASRR, even in the abstract. Specific community placement options should have been identified in writing in the 11/02/2023 PASRR Notice in order to apprise the Appellant of her rights to appeal the PASRR determination

under 130 CMR Section 610.037 (B)(5). The PASRR Determination sets in motion a sequence of notices, deadlines and events, including (i) deadlines for filing an appeal to the Board of Hearings (“BOH”), (ii) preparation of a discharge plan, (iii) Appellant’s safe and orderly discharge to the identified community placement, and (iv) appeal of the discharge from the nursing facility. 42 CFR 483.130 (m). For these reasons, the items in the PASRR must be in writing. Discussions or testimony at a hearing are not sufficient. The available placement option(s) identified must be able to support Appellant’s need for specialized services as defined in 42 CFR 483.120 and identified in the 11/02/2023 PASRR Notice.

Appellant’s Guardian maintains that the need for specialized services is a crucial factor in identifying whether the available community placement identified is appropriate. DDS is responsible for providing the identified community services for Appellant. DDS Policy No. 2012-2. Appeal Number 2201982 at page 8. Indeed, the bulk of the testimony in Appeal Number 2201982 focused on this very issue. Multiple witnesses for DDS testified that the community placement would meet the Appellant’s total needs. (The name of the identified community placement was redacted from the decision). Without specificity as to the available community placement, Appellant cannot assess whether specialized services needed can be provided and whether her “total needs” can be met, including her Alzheimer’s/dementia diagnosis. To the extent that DDS now takes the position that specialized services are not needed, contrary to the plain language of the 11/02/23 PASRR Determination, the notice is defective on its face, and constitutes separate grounds for appeal. At the hearing, Attorney Stevens was unable to identify the specialized services needed. DDS now appears to take the position, on page 6 of the DDS brief, that the 11/02/2023 PASRR informed the Appellant that *“she did not require specialized services.”* The plain language of the 11/02/2023 PASRR, in the box checked at the bottom of page one, reflects the opposite - specialized services ARE needed. If specialized services were *not* needed at the time of the 11/02/2023 PASRR Determination, and the Agency *checked the wrong box*, the 11/02/2023 PASRR Determination is fatally defective. That alone is separate grounds for appeal.

If instead, this passage in the DDS Brief is merely an “oversight,” the question remains: what are the specialized needs identified on the 11/02/2023 PASRR Determination and how can Appellant’s total needs be met without identifying an appropriate community placement? As noted by the Hearing Officer in connection with Appeal Number 2201982, that decision was “...quite specific on the place and the specialized services that were going to be provided.” Under 42 CFR Section 483.15 (5), the corresponding Notice of Discharge from the nursing facility must contain “(iii) The location to which the resident is [transferred](#) or discharged” 42 CFR Section 483.15 (5)(iii). As the Hearing Officer noted, “For purposes of this appeal, where is the specified discharge plan?” DDS was unable at the hearing or in the DDS Brief to provide a satisfactory answer to that question. Under 42 CFR Section 483.15 (5), the corresponding Notice of Discharge from the nursing facility must contain “(iii) The location to which the resident is [transferred](#) or discharged” 42 CFR Section 483.15 (5)(iii). In Appeal Number 2201982, the final ORDER for Discharge identified the [redacted] Community Placement. In that case, there was testimony from 6 DDS representatives on why the community placement met total needs, both nursing and specialized services. In the instant case,

there was evidence from the medical care providers and clinicians, especially about the need for memory care services in light of the Alzheimer's/dementia diagnosis. In short, DDS got it right in Appeal Number 2201982, but not here. Circumstances may have changed significantly in the last 7 months since the 11/02/2023 PASRR. Appellant may now need physical therapy. Moreover, given the dire diagnosis of Alzheimer's/dementia, it is very possible, even probable, that significant deterioration may have occurred. As described eloquently by the Hearing Officer, "This is a complex case and it involves people who are intellectually disabled, and rights about where they are living." For all the reasons set forth above, the appeal should be sustained.

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. 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.
14. DDS is responsible for providing the identified community/specialized services for Appellant.
15. It is DDS's policy to provide community supports for the individual and assist the individual with the transition to those supports.
16. Through a notice dated November 2, 2023, the Department of Developmental Services

(DDS) determined in accordance with a Level II PASRR (Pre-Admission Screening and Resident Review) screening that Appellant, an individual with an intellectual disability, does not require nursing facility care, her needs could be provided in the community, and that nursing facility eligibility would terminate on January 30, 2024.

17. Through a notice dated November 2, 2023, the Department of Developmental Services (DDS) determined that specialized services are needed.
18. Appellant became a client with the Department of Developmental Services (DDS) on 10/25/05 as a person diagnosed with Intellectual Disability. Appellant is currently served out of the DDS [REDACTED] Office.
19. Appellant is a [REDACTED] year-old woman and is currently a nursing facility resident. On admission to the nursing facility in 2022, Appellant was diagnosed with: Down Syndrome, Alzheimer's, Major Depressive Disorder (single episode) with Psychotic Features NOS, heart disease, Diabetes Mellitus without complications, hypothyroidism (unspecified) (Exhibit 7(i)).
20. Appellant was taking 13 medications at the time of admission to the nursing facility (Exhibit 9B, p. 5).
21. Appellant is a resident in the Memory Care Unit at the nursing facility.
22. A Neuropsychological Evaluation by [REDACTED] [REDACTED] dated [REDACTED] 2022 determined the "diagnosis of best fit at this time is Major Neurocognitive Disorder (Dementia)." The report compares a 2020 evaluation speaking about the difficulty in diagnosing dementia in a person with an intellectual disorder. During the present evaluation, a combination of collateral report from the Guardian, examiner observation, and cognitive assessment collectively concluded that there had been several changes (declines) in Appellant's overall functioning (Exhibit 7(a), p. 4).
23. Based upon Guardian's reports of the decline in Appellant's functioning, the need for 24-hour supervision (possibly in a memory care setting) was discussed with [REDACTED]
24. Prior to being admitted to the nursing facility, Appellant was residing with her sister and Guardian at their home located in [REDACTED] MA.
25. Appellant attended a community-based program at the [REDACTED] [REDACTED] Appellant was transferred to the more medically based side of the community program at [REDACTED] in early 2021.
26. In February 2022, Guardian had a conversation with the [REDACTED] DDS Office in which

she stated Appellant recently had an appointment with a neuropsychologist, and Guardian requested Appellant be placed in a long-term care nursing facility. DDS informed Guardian that DDS could not place Appellant in a long-term nursing facility but would make referrals to DDS residential group homes that could meet Appellant's needs. Guardian declined referral to any DDS residential placements.

27. On 3/11/22, Appellant was screened by the PASRR Specialist while at her day program for Nursing Facility ("NF") placement at the request of Guardian. Appellant did not meet NF level of care. A meeting was held between DDS and Guardian on 3/25/22 at which time Guardian again requested NF placement.
28. On 7/7/2022, Appellant was admitted to the nursing facility for short term rehab, expected to be less than 30 days, following gallbladder emergency surgery. The hospital physician recommended a rehab admission for under 30 days. PASRR's were subsequently completed on 8/3/22 and 10/31/22.
29. Four additional PASRR screens were completed in 2023 on 1/30/23, 5/3/23, 8/2/23, and 11/1/23. These PASRRs outlined Appellant's only skilled/nursing need as physical therapy.
30. Appellant has not challenged or appealed any of the previous PASRR findings.
31. Appellant received physical therapy services at the nursing facility from September 2022 through October 2023. Appellant is no longer receiving or prescribed physical therapy.
32. PASRR screening is a point in time snapshot with the scoring based on information collected from his review of Appellant's medical and other records at the nursing facility and through interviews with the facility's nurses, clinicians, and social workers.
33. For the PASRR to result in Nursing Facility Level Services, 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.
34. Appellant scored 6 in the medical section (Section E) and 0 in the skilled/nursing services section (Section F) for a combined score of 6.
35. Appellant has diabetes which is a stable condition treated with Metformin and a diabetic diet (2 points); has no seizure disorder or skin breakdown; has occasional bladder and bowel incontinence (2 points); no swallowing issues, or hospitalizations over a 90-day period; Nutrition status places health at risk (2 points).
36. ADLs are scored to reflect Appellant's ability to participate in completing ADLs, and ADL

assistance is part of direct care provided in group homes.

37. ADLs are scored to reflect moderate assistance with dressing, bathroom use, and grooming; minimal assistance with dining, ambulation; and maximum assist with bathing; independent with transfers and positioning (Exhibit 9B, p.8).
38. IADLs (Independent Activities of Daily Living) are done by others (Id.).
39. The PASRR reviewer has administered thousands of PASRRs in 22 years and is highly experienced in PASRR process and relied upon independently prepared medical documentation from the nursing facility.
40. The PASRR reviewer did not make any of his own medical determinations or opinions and applied the independently prepared medical records to the PASRR tool.
41. Residential placements typically have a 3:5 staff to resident ratio compared to 16:1 at the nursing home.
42. On 10/27/22, Appellant was prioritized for a placement at a BAMSI group home residence which has 8 hours/1 shift of nursing per day. Guardian declined the placement. Guardian subsequently toured the BAMSI residence in April 2023 and again declined the placement.
43. On 10/27/23, a meeting was held at the nursing facility with Appellant, Guardian, and representatives from DDS and a residential provider. This meeting was to discuss discharge from the nursing facility should Appellant not meet the requirements for continued NF level of care after her upcoming PASRR review. The residential provider reported difficulties with the Guardian, alleging the meeting only lasted a few minutes. Guardian was not willing to consider a residential placement for Appellant.
44. Appellant's Guardian has sought on several occasions a referral to [REDACTED] in [REDACTED] which is a medical group home that has 24/7 nursing care available and memory care facilities similar to the nursing facility and asked to be put on the waitlist there.

Analysis and Conclusions of Law¹⁹

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

¹⁹ Relevant emphasis is in bold.

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).

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 PASRR 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.²⁰

²⁰ 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

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.²¹ If the individual is admitted to a nursing facility for a short-term admission (up to 90

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- 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.

²¹ See 42 CFR 483.106, and 42 CFR 483.108.

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.²² 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 no longer to require appropriate nursing level care under 42 CFR 483.118,²³ 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 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."²⁴ The PASSR evaluator works with the local DDS area office to

²² See *Id.*

²³ See 42 CFR § 483.118 Residents and applicants determined not to require NF level of services.

(a) Applicants who do not require NF services. If the State mental health or intellectual disability authority determines that an applicant for admission to a NF does not require NF services, the applicant cannot be admitted. NF services are not a covered Medicaid service for that individual, and further screening is not required.

(b) Residents who require neither NF services nor specialized services for MI or IID. If the State mental health or intellectual disability authority determines that a resident requires neither the level of services provided by a NF nor specialized services for MI or IID, regardless of the length of stay in the facility, the State must—

(1) Arrange for the safe and orderly discharge of the resident from the facility in accordance with [§ 483.15\(b\)](#); and

(2) Prepare and orient the resident for discharge.

(c) Residents who do not require NF services but require specialized services for MI or IID—

(2) Short term residents. Except as otherwise may be provided in an alternative disposition plan adopted under section 1919(e)(7)(E) of the Act, for any resident who requires only specialized services, as defined in [§ 483.120](#), and who has not continuously resided in a NF for at least 30 months before the date of the determination, the State must, in consultation with the resident's family or legal representative and caregivers—

(i) Arrange for the safe and orderly discharge of the resident from the facility in accordance with [§ 483.15\(b\)](#);

(ii) Prepare and orient the resident for discharge; and

(iii) Provide for, or arrange for the provision of, specialized services for the mental illness or intellectual disability.

(3) For the purpose of establishing length of stay in a NF, the 30 months of continuous residence in a NF or longer—

(i) Is calculated back from the date of the first annual resident review determination which finds that the individual is not in need of NF level of services;

(ii) May include temporary absences for hospitalization or therapeutic leave; and

(iii) May consist of consecutive residences in more than one NF.

²⁴ See 42 CFR § 483.132 Evaluating the need for NF services and NF level of care (PASRR/NF).

(a) Basic rule. For each applicant for admission to a NF and each NF resident who has MI or IID, the evaluator 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;

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 meet the individual’s total needs 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.²⁵

Here, through a notice dated November 2, 2023, the Department of Developmental Services (DDS) determined in accordance with a Level II PASRR (Pre-Admission Screening and Resident Review) that Appellant, an individual with an intellectual disability, does not require nursing facility care, her needs could be provided in the community, and that nursing facility eligibility would terminate on January 30, 2024.²⁶ Appellant does not challenge the PASRR screening process and stipulates that the rationale and procedures adopted by the Commonwealth are legally mandated. Appellant does, however, challenge the scores in Sections E and F of the 11/01/2023 PASSR Determination. For the PASRR to result in Nursing Facility Level Services, an individual must

(3) If inpatient care is appropriate and desired, the NF is an appropriate institutional setting for meeting those needs in accordance with [§ 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 [§ 483.126](#), another setting such as an ICF/IID (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.

(b) Determining appropriate placement. In determining appropriate placement, the evaluator must prioritize the physical and mental needs of the individual being evaluated, taking into account the severity of each condition.

(c) Data. At a minimum, the data relied on to make a determination must include:

- (1) Evaluation of physical status (for example, diagnoses, date of onset, medical history, and prognosis);
- (2) Evaluation of mental status (for example, diagnoses, date of onset, medical history, likelihood that the individual may be a danger to himself/herself or others); and
- (3) Functional assessment (activities of daily living).

(d) Based on the data compiled in § 483.132 and, as appropriate, in [§§ 483.134](#) and [483.136](#), the State mental health or intellectual disability authority must determine whether an NF level of services is needed.

²⁵ See 130 CMR 610.032(E) Individuals have the right to request an appeal of their PASRR determination.

²⁶ See 130 CMR [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.

either receive a score of 11 in the Medical Section (Section E) or score of at least 1 in the Skilled Nursing Section.²⁷ Mr. Bradley, who completed the PASRR evaluation at issue is an experienced

²⁷ 456.409: Clinical Eligibility Criteria

To be considered clinically eligible for nursing facility services, a member or MassHealth applicant must require one skilled service listed in 130 CMR 456.409(A) daily, 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), including at least one of the nursing services listed in 130 CMR 456.409(C). Additionally, to be considered clinically eligible for nursing facility services, a member or MassHealth applicant younger than 22 years of age must also meet criteria as determined by the multi-disciplinary medical review team coordinated by the Department of Public Health.

(A) Skilled Services. Skilled services must be performed by or under the supervision of a registered nurse or therapist. Skilled services consist of the following:

- (1) intravenous, intramuscular, or subcutaneous injection, or intravenous feeding;
- (2) nasogastric-tube, gastrostomy, or jejunostomy feeding;
- (3) nasopharyngeal aspiration and tracheostomy care, however, long-term care of a tracheotomy tube does not, in itself, indicate the need for skilled services;
- (4) treatment and/or application of dressings when the physician or PCP has prescribed irrigation, the application of medication, or sterile dressings of deep decubitus ulcers, other widespread skin disorders, or care of wounds, when the skills of a registered nurse are needed to provide safe and effective services (including, but not limited to, ulcers, burns, open surgical sites, fistulas, tube sites, and tumor erosions);
- (5) administration of oxygen on a regular and continuing basis when the member's medical condition warrants skilled observation (for example, when the member has chronic obstructive pulmonary disease or pulmonary edema);
- (6) skilled nursing observation and evaluation of an unstable medical condition (observation must, however, be needed at frequent intervals throughout the 24 hours; for example, for arteriosclerotic heart disease with congestive heart failure);
- (7) skilled nursing for management and evaluation of the member's care plan when underlying conditions or complications require that only a registered nurse can ensure that essential unskilled care is achieving its purpose. The complexity of the unskilled services that are a necessary part of the medical treatment must require the involvement of skilled nursing personnel to promote the member's recovery and safety;
- (8) insertion, sterile irrigation, and replacement of catheters, care of a suprapubic catheter, or, in selected residents, a urethral catheter (a urethral catheter, particularly one placed for convenience or for control of incontinence, does not justify a need for skilled nursing care). However, the insertion and maintenance of a urethral catheter as an adjunct to the active treatment of disease of the urinary tract may justify a need for skilled nursing care. In such instances, the need for a urethral catheter must be documented and justified in the member's medical record (for example, cancer of the bladder or a resistant bladder infection);
- (9) gait evaluation and training administered or supervised by a registered physical therapist at least five days a week for members whose ability to walk has recently been impaired by a neurological, muscular, or skeletal abnormality following an acute condition (for example, fracture or stroke). The plan must be designed to achieve specific goals within a specific time frame. The member must require these services in an institutional setting;
- (10) certain range-of-motion exercises may constitute skilled physical therapy only if they are part of an active treatment plan for a specific state of a disease that has resulted in restriction of mobility (physical therapy notes showing the degree of motion lost and the degree to be restored must be documented in the member's medical record);

PASRR evaluator who testified he has administered thousands of PASRRs over 22 years, scored 6 in the medical section (Section E) and 0 in the skilled/nursing services section (Section F) for a combined score of 6. A PASRR screen is a point in time snapshot with the scoring based on information collected from his review of Appellant's medical and other records at the nursing facility and through interviews with the facility's nurses, clinicians, and social workers. As he explained, Mr. Bradley did not make any of his own medical determinations; rather, the PASRR requires the evaluator to apply objective and independently prepared medical records and

(11) hot pack, hydrocollator, paraffin bath, or whirlpool treatment will be considered skilled services only when the member's condition is complicated by a circulatory deficiency, areas of desensitization, open wounds, fractures, or other complications; and

(12) physical, speech/language, occupational, or other therapy that is provided as part of a planned program that is designed, established, and directed by a qualified therapist. The findings of an initial evaluation and periodic reassessments must be documented in the member's medical record. Skilled therapeutic services must be ordered by a physician or PCP and be designed to achieve specific goals within a given time frame.

(B) Assistance with Activities of Daily Living. Assistance with activities of daily living includes the following services:

(1) bathing when the member requires either direct care or attendance or constant supervision during the entire activity;

(2) dressing when the member requires either direct care or attendance or constant supervision during the entire activity;

(3) toileting, bladder or bowel, when the member is incontinent of bladder or bowel function day and night, or requires scheduled assistance or routine catheter or colostomy care;

(4) transfers when the member must be assisted or lifted to another position;

(5) mobility/ambulation when the member must be physically steadied, assisted, or guided in ambulation, or be unable to propel a wheelchair alone or appropriately and requires the assistance of another person; and

(6) eating when the member requires constant intervention, individual supervision, or direct physical assistance.

(C) Nursing Services. Nursing services, including any of the following procedures performed at least three times a week, may be counted in the determination of medical eligibility:

(1) any physician- or PCP-ordered skilled service specified in 130 CMR 456.409(A);

(2) positioning while in bed or a chair as part of the written care plan;

(3) measurement of intake or output based on medical necessity;

(4) administration of oral or injectable medications that require a registered nurse to monitor the dosage, frequency, or adverse reactions;

(5) staff intervention required for selected types of behavior that are generally considered dependent or disruptive, such as disrobing, screaming, or being physically abusive to oneself or others; getting lost or wandering into inappropriate places; being unable to avoid simple dangers; or requiring a consistent staff one-to-one ratio for reality orientation when it relates to a specific diagnosis or behavior as determined by a mental health professional;

(6) physician- or PCP-ordered occupational, physical, speech/language therapy or some combination of the three (time-limited with patient-specific goals);

(7) physician- or PCP-ordered nursing observation and/or vital signs monitoring, specifically related to the written care plan and the need for medical or nursing intervention; and

(8) treatments involving prescription medications for uninfected postoperative or chronic conditions according to physician or PCP orders, or routine changing of dressings that require nursing care and monitoring.

documentation from the nursing facility to the PASRR tool. Appellant was found eligible for nursing facility level of care in 2022 because she required physical therapy after her gallbladder surgery. In each PASRR administered for Appellant since her admission, the only item in Section F that has changed is physical therapy which Appellant no longer requires because she has “plateaued.” Previous PASRRs dated November 1, 2022, January 30, 2023, and May 4, 2023, record the same findings under Section E. None of the previous PASRRs were challenged by Appellant, presumably because Appellant was receiving one skilled service under Section F (Exhibits 7K-7M). Now that physical therapy is no longer indicated, Appellant through her witnesses, endeavors to bolster the scores in Section E, which have been consistent across several PASRRs, to meet nursing facility criteria. However, the testimony from nursing facility representatives does not overcome the PASRR analysis, and the witness testimony is inherently subjective for the singular purpose of increasing scores to meet criteria under Section E. In the absence of specific and objective data, i.e., medical records, that show that the PASSR evaluation in Sections E is incorrect, the testimony offered is simply not credible and does not refute the PASRR determination.²⁸ Appellant does present evidence of a worsening Dementia and functional limitations; however, the documentation from [REDACTED] does not show that Sections E and F of the PASSR are incorrect as of November 1, 2023, or that nursing or skilled services are indicated. Thus, on a preponderance of the evidence, I conclude that Sections E and F were correctly determined under the PASRR review, and that Appellant does not require nursing facility level of care in the absence of physical therapy services.

Moreover, I do not credit [REDACTED] testimony for the same reasons outlined by DDS. [REDACTED] is unfamiliar with the PASRR process and the PASRR at issue in the appeal. [REDACTED] testified that he had no experience with transferring individuals to DDS group homes or other nursing facilities. [REDACTED] testified that he did not formally assess Appellant and had met with her approximately three times. While [REDACTED] and nursing home representatives testified that moving Appellant out of the nursing facility would be a traumatic event for her, the likelihood of which is not doubted here, his testimony, and the testimony of others in this regard, is not relevant in the context of the state and federal laws and regulations that require

²⁸ Looking to the objective nursing home medical records submitted reveals contrasting data which supports the DDS determination: “there has been no significant change over the past quarter and resident remains active in both independent and group activities. Resident likes coloring fashion designs, computer games, music, dancing, ribbon wand, noodle ball, kickball, bowling, bingo, parties, cooking group, crafts....” (Exhibit 7N, p. 5, January 1, 2024); Nursing reports her mood and behavior have been stable. She does not have any behaviors. She is cooperative with care...resident denies: pain, shortness of breath, cough, GI symptoms, GU symptoms, trouble sleeping, change in appetite, depression, anxiety (Id., p. 14); Wt. stable x 1 month. Overall slight downward trend noted in past few months. PO intake fair to good, 50-75% most meals. She has been seen eating breakfast with good appetite this week. Will add large portions to breakfast meal (Id, p. 16, November 4, 2023); Exam: [Appellant] presents as friendly, communicative, and appears happy. Her speech is brief and coherent with normal volume. There is no difficulty carrying on conversation today. Mood presents as normal with no signs of either depression or mood elevation. ...no high risk or disorganized behavior has been observed. She responds to her name and is aware of her situation. Speech is fluent and there is no word retrieval difficulty (Id., p. 22, 10/9/2023); Her blood sugar checks were stopped in 6/2023 due to stable blood sugar levels (Id., p. 27, 9/21/2023, pp. 27-28).

administration of PASRRs to ensure individuals are not inappropriately placed in a nursing facility. Pursuant to 42 CFR § 483.132(b), in determining appropriate placement, the evaluator must prioritize the physical and mental needs of the individual being evaluated, taking into account the severity of each condition, and data relied on to make a determination must include: (1) Evaluation of physical status (for example, diagnoses, date of onset, medical history, and prognosis); (2) Evaluation of mental status (for example, diagnoses, date of onset, medical history, likelihood that the individual may be a danger to himself/herself or others); and (3) Functional assessment (activities of daily living). I find Mr. Bradley's testimony credible and conclude that the evidence and testimony support that Appellant's medical conditions have been appropriately reviewed in accordance with the PASSR regulations in determining an appropriate placement and that nursing facility level of care is not required.

Pursuant to 610.037 (B), notice of the PASRR determination must include the following:

- (1) whether a nursing facility level of service is needed;
- (2) whether specialized services, as defined by 42 CFR 483.120, are needed;
- (3) the placement options available to the individual consistent with the determination and in accordance with 42 CFR 483.130(M);
- (4) a statement indicating that the individual's PASRR determination is based on the individual's PASRR and evaluation and that the individual was evaluated in accordance with 42 CFR 483.128;
- (5) a statement informing the individual of his or her right to request a fair hearing before the BOH to appeal a PASRR Determination and that provides
 - (a) the address to send a request for a hearing;
 - (b) the time frame for requesting a hearing as provided for under 130 CMR 610.015; and
 - (c) a statement that the individual may represent himself or herself or be represented by legal counsel, a relative, a friend or other spokesperson.

Each required element is present in the November 2, 2023 notice (Exhibit 1).²⁹ Appellant argued that DDS is required to state the discharge destination in the PASRR determination notice to ensure that specialized services can be properly initiated in advance of any discharge from the nursing facility, and failure to state the destination is a fatal defect. While DDS presented and discussed several residential group homes as community placements, and attempts to initiate discharge planning, there is no requirement in MassHealth regulations or 42 CFR 483.130(M) that mandates DDS to identify as part of the PASRR a specific discharge destination; rather, for an individual who has been determined to not require nursing facility level of care, the discharge must be to an appropriate setting where the State must provide

²⁹ As previously stated, the determination that Appellant needs Specialized Services is clear on the notice and was discussed at hearing.

specialized services.^{30,31} The notice must provide information on how, when, and by whom the resident will be advised of discharge arrangements and of his/her appeal rights under both PASARR and discharge provisions. While the state is required to provide specialized services, there is no requirement that specialized services are established prior to determining an appropriate community setting as part of the PASRR determination. Special services can be

³⁰ 42 CFR § 483.130(m) Placement Options Except as otherwise may be provided in an alternative disposition plan adopted under section 1919(e)(7)(E) of the Act, the placement options and the required State actions are as follows:

- (1) Can be admitted to a NF. Any applicant for admission to a NF who has MI or IID and who requires the level of services provided by a NF, regardless of whether specialized services are also needed, may be admitted to a NF, if the placement is appropriate, as determined in [§ 483.126](#). If specialized services are also needed, the State is responsible for providing or arranging for the provision of the specialized services.
- (2) Cannot be admitted to a NF. Any applicant for admission to a NF who has MI or IID and who does not require the level of services provided by a NF, regardless of whether specialized services are also needed, is inappropriate for NF placement and must not be admitted.
- (3) Can be considered appropriate for continued placement in a NF. Any NF resident with MI or IID who requires the level of services provided by a NF, regardless of the length of his or her stay or the need for specialized services, can continue to reside in the NF, if the placement is appropriate, as determined in [§ 483.126](#).
- (4) May choose to remain in the NF even though the placement would otherwise be inappropriate. Any NF resident with MI or IID who does not require the level of services provided by a NF but does require specialized services and who has continuously resided in a NF for at least 30 consecutive months before the date of determination may choose to continue to reside in the facility or to receive covered services in an alternative appropriate institutional or noninstitutional setting. Wherever the resident chooses to reside, the State must meet his or her specialized services needs. The determination notice must provide information concerning how, when, and by whom the various placement options available to the resident will be fully explained to the resident.
- (5) Cannot be considered appropriate for continued placement in a NF and must be discharged (short-term residents). Any NF resident with MI or IID who does not require the level of services provided by a NF but does require specialized services and who has resided in a NF for less than 30 consecutive months must be discharged in accordance with [§ 483.15\(b\)](#) to an appropriate setting where the State must provide specialized services. The determination notice must provide information on how, when, and by whom the resident will be advised of discharge arrangements and of his/her appeal rights under both PASARR and discharge provisions.**
- (6) Cannot be considered appropriate for continued placement in a NF and must be discharged (short or long-term residents). Any NF resident with MI or IID who does not require the level of services provided by a NF and does not require specialized services regardless of his or her length of stay, must be discharged in accordance with [§ 483.15\(b\)](#). The determination notice must provide information on how, when, and by whom the resident will be advised of discharge arrangements and of his or her appeal rights under both PASARR and discharge provisions.

³¹ Appellant points to separate PASRR hearing decision 2201982 which was recently upheld after judicial review and cited by Appellant as an example of DDS “getting it right” because the discharge destination was specified in detail, testified to at length at hearing in terms of meeting specialized services, which informed both the undersigned hearing officer’s and the Court’s determination in upholding the PASRR determination. See Suffolk Superior Court No. 2284CV92474C. Unlike the facts of the instant appeal, the PASRR determination in 2201982 was based on the appellant requiring nursing facility level of care, and specialized services. The instant appeal involves a PASRR that concluded that Appellant does not require nursing facility level of care but does require specialized services.

arranged by the state in advance of discharge.³² Thus, while several community placements were offered to Appellant and declined by her Guardian, DDS correctly determined that Appellant can be discharged to a community setting and that specialized services will be arranged on discharge in the appropriate setting. Thus, DDS correctly administered the PASRR and correctly determined that Appellant does not require nursing facility level of care and does require specialized services. DES also correctly notified Appellant of the determination and placement options.

In as much as Appellant disagrees with any discharge plan to other than a medical group home that has 24/7 nursing care available and memory care facilities, as directed under 130 CMR 450.411, when the nursing facility is notified by MassHealth 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 MassHealth or its agent. All discharges must be in accordance with the federal requirements found at 42 CFR 483.15(c) and with 130 CMR 456.701 through 456.704, which impose specific requirements for nursing facility discharges and appeal rights. The November 2, 2023 notice states: "[r]egarding your discharge, the Department is responsible for arranging for you safe and orderly discharge and for preparing and orienting you for discharge. 42 CFR 483.118(b). The nursing facility is responsible for executing your discharge in accordance with 42 CFR 483.12(a). In addition to your right to appeal your Level II PASRR determination, which is discussed in more detail below, you will also have the right to appeal your discharge from the nursing facility. 42 CFR 130(m)(6)."

³² 42 CFR § 483.120 Specialized services.

(a) Definition—

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

(i) Is developed and supervised by an interdisciplinary team, which includes a physician, qualified mental health professionals and, as appropriate, other professionals.

(ii) Prescribes specific therapies and activities for the treatment of persons experiencing an acute episode of serious mental illness, which necessitates supervision by trained mental health personnel; and

(iii) Is directed toward diagnosing and reducing the resident's behavioral symptoms that necessitated institutionalization, improving his or her level of independent functioning, and achieving a functioning level that permits reduction in the intensity of mental health services to below the level of specialized services at the earliest possible time.

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

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

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 in an appropriate community setting with specialized services and supports, Appellant's appeal is DENIED.

Order for MassHealth

None, other than within 30 days of the date of this hearing decision, prepare and orient Appellant for a safe and orderly discharge to an appropriate community setting, and arrange Specialized Services accordingly.

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

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.

Thomas J. Goode
Hearing Officer
Board of Hearings

cc:

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