



FH

[Click here to enter text.](#)

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

---

In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**DECISION**

Case #: FCP - 207790

---

**PRELIMINARY RECITALS**

Pursuant to a petition filed on February 24, 2023, under Wis. Admin. Code § DHS 10.55, to review a decision by the MY Choice Family Care regarding Medical Assistance (MA), a hearing was held on March 30, 2023, by telephone.

The issue for determination is whether the Family Care MCO correctly reduced and discontinued staffing services for the Petitioner.

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, WI 53703

By: Maureen McFadden  
MY Choice Family Care  
10201 Innovation Dr, Suite 100  
Wauwatosa, WI 53226

**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County. He has resided in a 1-2 bed adult family home (AFH) since March 2022 after a lengthy hospitalization. His mental health diagnoses include dementia, schizophrenia, anxiety disorder, depression, and bipolar disorder. Petitioner's behavioral issues include using offensive and sexually inappropriate language with staff, refusing cares, and disruptive behavior such as spitting at staff; throwing his full urinal, feces, and other items at staff; scratching, kicking, and hitting staff; disrobing and masturbating in front of staff; frequent yelling and screaming. Petitioner's medical conditions include fecal and bladder incontinence; knee, hip, shoulder, and bilateral leg pain; bone deformities; difficulty ambulating; peripheral neuropathy; partial hearing loss; osteoarthritis; anemia.
2. The Petitioner's Member-Centered Plan (MCP) has a long term outcome to reside in the least restrictive environment. Petitioner has offensive/violent behaviors that require intervention 5+ times/day which include spitting, slapping, kicking, and threatening staff; and throwing items including full urinals and feces. The MCP directs staff to use positive reinforcement, quiet tones, and to stay out of reach of the Petitioner. The MCP also identifies behaviors that include yelling and refusing medications and cares. In addition, his MCP requires a two-person Hoyer lift for transfers.
3. Petitioner has a Behavior Support Plan (BSP) developed on April 15 2022. It describes the Petitioner's "baseline behavior" as "aggressive and verbally abusive." It notes that he has delusions and hallucinations and engages in physical behavior, property destruction, sexual behavior, and verbal behavior that includes swearing, throwing items, kicking, and hitting. It states that he requires 24/7 line-of-sight supervision at all times.
4. The AFH maintained a behavior log for the Petitioner from March – October 2022.
5. On October 14, 2022, a Resource Allocation Decision (RAD) process was completed. It identifies the issue as "decrease in enhanced services - decreased from 1:1 and 12-18 hours per week of float staff to 1:1 24/7." It states that the member requires AFH staff and enhanced services of 1:1 24/7 to meet his needs. It states the most effective and cost-effective way to meet the Petitioner's needs is 1:1 24/7 staffing with removal of 12-18 hours per week of float staff.
6. On October 14, 2022, a Notice of Adverse Benefit Determination was prepared. The NOA indicates: "decrease of enhanced services: decrease from 1:1 and 12-18 hours per week of float staff" to "1:1 24/7 enhanced services." It states the reason for the reduction: "You do not need this service or level of service or support to support your outcome." The explanation of decision states: "Regarding enhanced services, we are decreasing and removing the float staff which is 12-18 hours per week, and having enhanced services changed to 1:1 24/7. We are decreasing the enhanced services due to the service level of 1:1 24/7 as float staff appear to not be needed to assure that all cares will be met."
7. On October 27, 2022, the Petitioner's sister and POA filed a grievance regarding the reduction in staffing.
8. On November 16, 2022, the FC MCO issued a Notice of Adverse Benefit Determination to the Petitioner which informed him: "The enhanced services of 1:1 staffing ratio is no longer needed. Currently there is staff present in the facility at all times, and it has been shown that line-of-sight supervision is no longer needed to assure your risk and behaviors are addressed. These services have been shown to be able to be completed with risks/behaviors mitigated through regular non-dedicated staffing within the residential facility. Your needs will continue to be met, with ongoing supervision and 24 hours of care through a regular non-dedicated staffing pattern."
9. On January 11, 2023, a Long Term Care Functional Screen (LTCFS) was completed for the Petitioner. The Petitioner requires assistance with all activities of daily living (ADLs) except eating and assistance with all Instrumental ADLs. He also requires assistance with repositioning every 2-3 hours. He requires overnight care and supervision.
10. On January 11, 2023, a RAD process was completed. The issue is identified as follows: "Due to physical and cognitive limitations and behavioral issues, member needs assistance from facility staff. Member has been receiving enhanced services of 1:1 staffing ratio." It states that Petitioner's long-

term outcome is to live in the least restrictive environment, and he needs staff assistance to remain safe in the least restrictive environment and to ensure his health and safety. It identifies the options to achieve his outcomes as: remain at current AFH provider with enhanced 1:1 staffing ratio, remain at current AFH provider with decreased or terminated enhanced staffing ratio, or moving to another residential provider with or without enhanced staffing. It notes that the Petitioner and his POA prefer that he remain at his current provider. It states that his needs can be met at his current provider with regular non-dedicated staffing pattern. A decision was made to terminate enhanced services of 1:1 staffing ratio.

11. On January 18, 2023, a grievance hearing was held. On January 23, 2023, the MCO issued a notice to the Petitioner that the grievance and appeal committee affirmed the termination of dedicated 1:1 staff for the Petitioner. The notice informed the Petitioner that his behaviors do not warrant continuation of 1:1 staff.
12. On February 24, 2023, an appeal was filed on behalf of the Petitioner with the Division of Hearings and Appeals.
13. The AFH has issued a 30 day discharge notice to the Petitioner that will take effect if his 1:1 staffing is eliminated.

### DISCUSSION

The Family Care (FC) program, which is supervised by the Department of Health Services (DHS), is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized in the Wisconsin Statutes, § 46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10.

The starting point for whether a Medicaid or waiver service should be maintained is the general criteria for determining authorization for services – medical appropriateness and necessity, cost effectiveness, statutory and rule limitations, and effectiveness of the service. See Wis. Admin. Code, § DHS 107.02(3)(e).

The Managed Care Organization (MCO) must develop an Individual Service Plan (ISP) or Member-Centered Plan (MCP) in partnership with the client. Wis. Admin. Code, § DHS 10.44(2)(f). While the client has input, the CMO does not have to provide all the services the client desires if there are less expensive alternatives to achieve the same results. Wis. Admin. Code, § DHS 10.44(1)(f). ISPs must be reviewed periodically. Wis. Admin. Code, § DHS 10.44(j)(5).

The MCP must meet all the following conditions:

1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e) 1.
2. Reasonably and effectively addresses all of the enrollee's long-term care outcomes identified in the comprehensive assessment under par. (e) 2. and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.
3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes.
4. Is agreed to by the enrollee, except as provided in subd. 5.
5. If the enrollee and the CMO do not agree on a service plan, provide a method for the enrollee to file a grievance under s. DHS 10.53, request department review under s. DHS 10.54, or request a fair hearing under s. DHS 10.55. Pending the outcome of the grievance, review or fair hearing, the CMO shall offer its service plan for the enrollee,

continue negotiating with the enrollee and document that the service plan meets all of the following conditions:

- a. Meets the conditions specified under subds. 1. to 3.
- b. Would not have a significant, long-term negative impact on the enrollee's long-term care outcomes identified under par. (e) 2.
- c. Balances the needs and outcomes identified by the comprehensive assessment with reasonable cost, immediate availability of services and ability of the CMO to develop alternative services and living arrangements.
- d. Was developed after active negotiation between the CMO and the enrollee, during which the CMO offered to find or develop alternatives that would be more acceptable to both parties.

Wis. Admin. Code, § DHS 10.44(f).

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs. In this matter, the MCO has the burden of proof because it is trying to change the present state of affairs by discontinuing Petitioner's staffing services.

The MCO representative testified that 1:1 staffing is an inherently restrictive placement that is used only as a last resort. She stated that it is generally meant to be temporary to stabilize an individual, identify behaviors and identify interventions to address behaviors. The goal for every FC participant is to be in the least restrictive placement.

The MCO representative testified that the MCO's action to reduce and eliminate 1:1 staffing for the Petitioner is based on a review of the AFH behavior logs. The MCO representative testified that the logs reflect the Petitioner's behavior is primarily yelling and swearing. The MCO noted that there is 24/7 staffing at the AFH and that the Petitioner's needs can be met through regular staffing patterns. The MCO testified that the Petitioner's behaviors don't require line-of-sight, arms-length 1:1 staffing and that 1:1 staffing is for behavioral issues only.

Representatives that testified on behalf of the Petitioner at the hearing included the Petitioner's POA/sister, the ombudsman for the Board of Aging and Long Term Care (BOALTC), and the owner/caregiver of the AFH where the Petitioner resides. They testified that the Petitioner was in a long-term placement at [REDACTED] before residing at the current AFH because they could not find a residential facility that would agree to admit the Petitioner due to his extremely aggressive behavior and high medical needs. The current AFH agreed to admit the Petitioner when the MCO approved 1:1 and 12-18 hours per week of float staff. The AFH is a two-bed facility that has been able to maintain the Petitioner's health and safety with the additional staffing. The owner testified that she had to issue a discharge notice to the Petitioner when the MCO reduced and then eliminated 1:1 staffing because she cannot ensure the health and safety of the Petitioner, the other resident, and her staff unless she has 1:1 staffing for the Petitioner. The ombudsman and Petitioner's POA testified that they have been trying to find another residential facility since October 2022 but none of the more than 15 facilities they have contacted will agree to admit the Petitioner without 1:1 staffing due to his high needs. The ombudsman testified that the Petitioner is at high risk of going back into a hospital if they cannot find a residential facility at a cost of more than \$3000/day versus the \$864/day cost at the AFH.

The Petitioner's representatives testified extensively about the Petitioner's behaviors and the challenges they have had in finding a residential facility to care for him. They note that there has been no change in the Petitioner's behaviors or his medical conditions to warrant a reduction in staffing. They testified that the current AFH has done a good job of maintaining his behaviors and medical needs with the current staffing pattern but a reduction in staffing will have an adverse negative impact on his long-term outcome because they may not be able to find another residential placement for him. The representatives pointed out that there is no Family Care or MCO policy that requires a need for "line-of-sight" or "arms-length" supervision for 1:1 staffing.

The ombudsman further asserts that the MCO did not follow correct procedure in reducing and discontinuing the Petitioner's staffing needs. Specifically, she noted that there is no documentation that the Petitioner was included in the RAD process. Further, she noted that the Petitioner appealed the October 14, 2022 reduction in staffing and the MCO never addressed this action in the grievance hearing. She noted that the MCO representative testified that the October 14, 2022 NOA was rescinded but there is no documentation to support that. In addition, the RAD for the termination of 1:1 staffing was done on January 11, 2023, after the MCO had already sent a Notice of Adverse Benefit Determination on November 16, 2022 NOA.

Based on the evidence presented, I conclude the MCO has not met its burden to demonstrate it correctly decreased and then terminated the Petitioner's staffing services. The evidence does not demonstrate that the Petitioner's long-term outcomes and goals in his ISP can be met without the staffing services that were in place since his admission to the AFH. The MCO has not demonstrated that there has been a change in his behaviors or medical needs. I do not concur with the MCO's characterization of the behavior logs noting that there almost daily incidents where the Petitioner becomes aggressive and threatening. I find the testimony of the Petitioner's representatives to be credible that the only reason the behavior does not become violent to the point of harming the Petitioner or others is because of the additional staffing and the behavior support plan followed by staff. I further concur with the Petitioner's representatives that there is no policy or provision in the MCO contract that states 1:1 staffing is only appropriate if "line-of-sight" or "arm's length" supervision is required.

I note that the RAD completed by the MCO in October 2022 concluded that the Petitioner requires 1:1 staffing. Then in November 2022, the MCO sent a notice to the Petitioner eliminating 1:1 staffing. The MCO testified that the RAD and notice for October 2022 were rescinded but there is no evidence of this. Further, there is no evidence as to the reason for the change in the MCO's position between October when it concluded he needed the 1:1 staffing and November when it concluded he did not need 1:1 staffing. The MCO's completion of a RAD in January 2023 to support its November 2022 notice is insufficient to establish that the MCO properly and correctly considered the evidence before making its determination.

Therefore, I conclude the MCO did not correctly terminate the Petitioner's 1:1 support because it has not demonstrated that the Petitioner's goals and outcomes to live in the least restrictive environment cannot be met without the additional staffing services. Further, the MCO did not demonstrate that reducing staffing is the most effective and cost-effective way to meet the Petitioner's outcome. In addition, the MCO did not demonstrate that the elimination of 1:1 staffing will reasonably and effectively address the Petitioner's outcomes.

### **CONCLUSIONS OF LAW**

The MCO did not demonstrate that it correctly reduced the Petitioner's staffing services.

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to the MCO to take all administrative steps necessary to rescind its October 14, 2022 and November 16, 2022 Notices of Adverse Benefit Determination and restore the Petitioner’s staffing services to 1:1 with 12-18 hours of float staff.

**REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5<sup>th</sup> Floor North, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important, or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

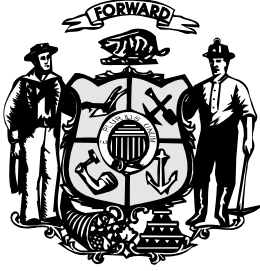
**APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 19th day of May, 2023

\s \_\_\_\_\_  
Debra Bursinger  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin \DIVISION OF HEARINGS AND APPEALS**

Brian Hayes, Administrator  
Suite 201  
5005 University Avenue  
Madison, WI 53705-5400

Telephone: (608) 266-3096  
FAX: (608) 264-9885  
email: [DHAmail@wisconsin.gov](mailto:DHAmail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on May 19, 2023.

MY Choice Family Care  
Office of Family Care Expansion  
Health Care Access and Accountability