

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2179396
Decision Date:	01/21/2022	Hearing Date:	01/12/2022
Hearing Officer:	Sara E. McGrath		

Appearances for Appellant:




Appearances for MassHealth/ESP:
Pamela Azar, Dir. of Qual. & Compliance
Gretchen Reynard, Executive Director
Dr. Susan Hardy, Medical Director
Claudia Marquez, Primary Care Provider
Alex Ketner, Rehabilitation Director
Brittany Golden, Social Worker
Jessica Shea, Care Coordinator



*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:	PACE Eligibility
Decision Date:	01/21/2022	Hearing Date:	01/12/2022
MassHealth/ESP Reps.:	Pamela Azar Gretchen Reynard Susan Hardy, MD Claudia Marquez, NP Alex Ketner Brittany Golden Jessica Shea	Appellant Rep.:	
Hearing Location:	Board of Hearings (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

On October 28, 2021, Elder Service Plan - Harbor Health Services, Inc. (ESP) notified the appellant of its decision to involuntarily disenroll him from the Program of All-Inclusive Care for the Elderly (PACE) program (Exhibit 1). The appellant filed a request for hearing on December 13, 2021 (Exhibit 1). Involuntary disenrollment from the PACE program is a valid basis for appeal (130 CMR 610.032(A)).

Action Taken by MassHealth/ESP

The ESP determined that it would involuntarily disenroll the appellant from the PACE program.

Issue

The appeal issue is whether the ESP's determination to disenroll the appellant from the PACE program is supported by regulation.

Summary of Evidence

The ESP was represented by numerous individuals, all of whom testified by video or phone. The ESP's Director of Quality & Compliance provided most of the testimony and summarized the following chronology and facts: The appellant is a male in his early 60s with diagnoses that include active alcohol and drug abuse, alcoholic hepatitis, pancreatitis, hypertension, and failure to thrive. The appellant lives alone in the community. In March 2021, the ESP evaluated the appellant for enrollment in the PACE program. Because the ESP determined that the appellant would not be safe in the community, it denied his application. The appellant appealed the denial to the Board of Hearings; that appeal was withdrawn after the ESP agreed to reassess the appellant's eligibility. In August 2021, the ESP reassessed the appellant. At that time, he had improved and had been stable for two months. Further the appellant was no longer bed bound and could walk. The ESP therefore decided that it would enroll the appellant in the PACE program effective September 1, 2021.

Over the course of the next two months, the ESP staff determined that the appellant's home was unsafe for caregivers due to lack of cleanliness, the presence of drugs and alcohol, and the presence of numerous unidentified visitors using drugs and alcohol. The ESP had two meetings with the appellant and his sister and told them that in light of these issues, the appellant would be better served at the PACE center in Mattapan. The appellant agreed to come to the center for care, but never did. As a result, on October 28, 2021, the ESP issued the disenrollment notice. The notice states that the disenrollment decision is due to the appellant's on-going noncompliance with his plan of care and behaviors that jeopardize his and his caregivers' safety (Exhibit 1). The ESP team determined that the following clinical indicators are evidence of his noncompliance:

- Inability to provide recommended services and care you need to remain safe in the community
- Violation of behavior plan for PACE clinicians' safety with home visits
- Unsafe environment for PACE clinicians in the home
- Refusal/Cancellation of attendance at PACE center for provision of care
- Active alcohol and drug abuse limiting ability to safely participate and receive care
- Failure to follow medical advice

(Exhibit 1).

After the ESP issued the disenrollment notice that is on appeal, it agreed to give the appellant another chance, or 30-day grace period, to stay enrolled if he started to come regularly to the center for care. Since then, the appellant came to the center once but did not stay long enough to receive adequate care.

The ESP referenced documentation to substantiate its disenrollment decision. Specifically, the record documents phone calls between ESP aides and supervisors describing dirty conditions, alcohol bottles, needles, marijuana smoking, evidence of cocaine, and various unidentified visitors (Exhibit 3, pp. 15-20, 28, 33). To date, three aides have indicated that they do not feel safe in the appellant's home, and they have all refused to return. In an effort to get the appellant to come to the PACE center, the ESP continues to call the appellant every Monday and Thursday morning to

assess his sobriety and to encourage him to come to the center. The ESP provides transportation to the center. Despite these efforts, the appellant has refused to come to the center. On the one occasion he did come to the center (November 4), he had a pill bottle in his sock and would not identify the contents of the bottle, nor would he turn it over to staff (Exhibit 3, p. 51).

The ESP representatives stated that the appellant meets the clinical eligibility requirements of the PACE program, and he needs the services that can be delivered at the center. The ESP has recommended physical therapy because of a history of falls and current struggles with balance and gait instability. The appellant needs a monthly Vivitrol injection to assist with his alcohol abuse. The appellant also needs assistance with his personal care. The center has a clinic and can provide all the services the appellant needs.

The ESP representatives testified that the appellant has not been compliant with care and follow-up recommendations in the following ways: The appellant has refused any type of detox treatment or alternative housing. Further, his primary care provider has noted that he has been intoxicated at medical appointments; a toxicity screen has also come back positive for cocaine (Exhibit 3, pp. 17-18). The ESP and the appellant verbally agreed to a "behavior plan" whereby the appellant agreed to come to the center for care; the appellant has not done so. The appellant reported that he had a seizure at home but refused the recommendation to seek medical treatment. There has been an occasion when he has left the emergency department against medical advice. He has refused follow up with occupational therapy and has also not complied with staff recommendation to start physical therapy.

The appellant and his representative, who is his former nurse care manager, both testified by phone. The nurse manager stated that the danger in the home was not created by the appellant, but rather by his visitors. He stressed that the appellant really needs the comprehensive services offered by the PACE program and would likely not do well with a lower level of services. The ESP representatives agreed with him and noted that they have been making all efforts to safely service the appellant. They stated that if the appellant is disenrolled from the PACE program, they will engage in discharge planning to make sure that the appellant has services in the community. They noted, however, that the appellant may be best served in the skilled nursing facility.

The appellant testified that he does not go to the center for care because of his ailments. When the ESP calls him on Mondays and Thursdays, he usually doesn't feel well. He stated that the elevator in his building is broken a lot, and he has trouble using the stairs. He sometimes leaves his rollator walker at the bottom of the stairs, and he is surprised it hasn't been stolen. He agreed that there have been many uninvited guests in his home in the past. He stated that these are people that he grew up with and there was nothing he could do about it. These visitors would sometimes climb through a window to access his apartment. The appellant has recently secured a restraining order against one of the visitors, and he has plans to get more. He stated that "everything will change" now and that he will go to the center for care.

Findings of Fact

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

1. The appellant is a male in his early 60s with diagnoses that include active alcohol and drug abuse, alcoholic hepatitis, pancreatitis, hypertension, and failure to thrive.
2. The appellant lives alone in the community.
3. On September 1, 2021, the appellant was enrolled in MassHealth's PACE program; the appellant continues to meet the clinical eligibility requirements of the program.
4. The appellant initially received services in his home until the ESP staff determined that its caregivers were not safe due the dirty condition of the apartment, the presence of alcohol and drugs, and the presence of numerous uninvited visitors actively using alcohol and drugs.
5. The ESP then discontinued home services and made an agreement with the appellant to come to the PACE center in Mattapan for services.
6. The appellant has only come to the center once and did not receive any comprehensive services on that date.
7. The appellant has not been compliant with numerous clinical recommendations for care, including refusing to come to the PACE center for care, refusing detox treatment, refusing to consider alternative housing, and refusing to follow up with physical or occupational therapy.
8. On October 28, 2021, the ESP notified the appellant of its decision to involuntarily disenroll him from the PACE program.
9. On December 1, 2021, the appellant timely appealed the involuntary disenrollment notice.

Analysis and Conclusions of Law

The PACE program is a comprehensive health program that is designed to keep frail, older individuals who are certified eligible for nursing-facility services living in the community (130 CMR 519.007(C)(1)). The MassHealth regulations set forth the following regarding PACE:

- (a) A complete range of health-care services is provided by one designated community-based program with all medical and social services coordinated by a team of health professionals.
- (b) The MassHealth agency administers the program in Massachusetts as the Elder Service Plan (ESP).
- (c) Persons enrolled in PACE have services delivered through managed care

1. in day-health centers;
2. at home; and
3. in specialty or inpatient settings, if needed.

In determining PACE eligibility, the applicant or member must meet all of the following criteria:

- (a) be 55 years of age or older;
- (b) meet Title XVI disability standards if 55 through 64 years of age;
- (c) be certified by the MassHealth agency or its agent to be in need of nursing-facility services;
- (d) live in a designated service area;
- (e) have medical services provided in a specified community-based PACE program;
- (f) have countable assets whose total value does not exceed \$2,000 or, if assets exceed these standards, reduce assets in accordance with 130 CMR 520.004: *Asset Reduction*; and
- (g) have a countable-income amount less than or equal to 300% of the federal benefit rate (FBR) for an individual.

(130 CMR 519.007(C)(2)).

In this case, the ESP determined that the appellant meets all the PACE eligibility criteria. In accordance with the above regulations, the ESP has attempted to deliver services to the appellant both at home and in a day-health center (130 CMR 519.007(C)(1)(c); Exhibit 3). The ESP then determined that due to the appellant's behavior and noncompliance, involuntary disenrollment from the PACE program was in order. The appellant disagrees, wants to stay in the program, and feels that he can be safely served in the community.

The PACE program is also governed by federal regulations. The federal regulations concerning involuntary disenrollment from the program are set forth in 42 CFR § 460.164:

(a) **Effective date.** A participant's involuntary disenrollment occurs after the PACE organization meets the requirements set forth in this section and is effective on the first day of the next month that begins 30 days after the day the PACE organization sends notice of the disenrollment to the participant.

(b) **Reasons for involuntary disenrollment.** A participant may be involuntarily disenrolled for any of the following reasons:

- (1) The participant, after a 30-day grace period, fails to pay or make satisfactory arrangements to pay any premium due the PACE organization.
- (2) The participant, after a 30-day grace period, fails to pay or make satisfactory arrangements to pay any applicable Medicaid spend down liability or any amount due under the post-eligibility treatment of income process, as permitted under §§ 460.182 and 460.184.
- (3) The participant or the participant's caregiver engages in disruptive or

threatening behavior, as described in paragraph (c) of this section.

(4) The participant engages in disruptive or threatening behavior, as described in paragraph (c) of this section.

(5) The participant moves out of the PACE program service area or is out of the service area for more than 30 consecutive days, unless the PACE organization agrees to a longer absence due to extenuating circumstances.

(6) The participant is determined to no longer meet the State Medicaid nursing facility level of care requirements and is not deemed eligible.

(7) The PACE program agreement with CMS and the State administering agency is not renewed or is terminated.

(8) The PACE organization is unable to offer health care services due to the loss of State licenses or contracts with outside providers.

(c) Disruptive or threatening behavior.

(1) For purposes of this section, a participant who engages in disruptive or threatening behavior refers to a participant who exhibits either of the following:

(i) A participant whose behavior jeopardizes his or her health or safety, or the safety of others; or

(ii) A participant with decision-making capacity who consistently refuses to comply with his or her individual plan of care or the terms of the PACE enrollment agreement.

(2) For purposes of this section, a participant's caregiver who engages in disruptive or threatening behavior exhibits behavior that jeopardizes the participant's health or safety, or the safety of the caregiver or others.

(d) Documentation of disruptive or threatening behavior. If a PACE organization proposes to disenroll a participant based on the disruptive or threatening behavior of the participant or the participant's caregiver, the organization must document the following information in the participant's medical record:

(1) The reasons for proposing to disenroll the participant.

(2) All efforts to remedy the situation.

(e) Noncompliant behavior.

(1) A PACE organization may not disenroll a PACE participant on the grounds that the participant has engaged in noncompliant behavior if the behavior is related to a mental or physical condition of the participant, unless the participant's behavior jeopardizes his or her health or safety, or the safety of others.

(2) For purposes of this section, noncompliant behavior includes repeated noncompliance with medical advice and repeated failure to keep appointments.

(f) State administering agency review and final determination. Before an

involuntary disenrollment is effective, the State administering agency must review it and determine in a timely manner that the PACE organization has adequately documented acceptable grounds for disenrollment.

Here, the ESP seeks to involuntarily disenroll the appellant due to noncompliance and behavior issues that jeopardize his caregivers (Exhibit 1). Hearing testimony made clear that the unsafe behaviors, including ongoing issues with the presence of drugs, alcohol, and unwanted visitors, occurred when the appellant was receiving services at home. While these behaviors may well have satisfied the regulatory prerequisites for disenrollment, the ESP clarified that its caregivers no longer provide services to the appellant in his home.

Instead, the ESP and the appellant agreed that the appellant must access services at the PACE center in Mattapan. There is no dispute that the appellant has not complied with this agreement and has also ignored recommendations for other necessary medical services, including but not limited to detox treatment, physical therapy, and occupational therapy. These noncompliance issues are another basis for the ESP's decision to disenroll the appellant. As set forth above, noncompliant behavior, including repeated noncompliance with medical advice and repeated failure to keep appointments, is not grounds for disenrollment when the behavior is related to a mental or physical condition (42 CFR § 460.164(e)). While the record certainly confirms that the appellant has ongoing substance abuse issues, the appellant has not adequately shown that any of his diagnoses cause or are related to his noncompliance. The ESP has offered the appellant multiple opportunities to comply, and the appellant has consistently agreed to participate, suggesting that both parties believe that he has the capacity to do so. Further, the appellant's representative, who is his former care manager, did not bring up any medical reasons that might tie his behavior to the noncompliance.¹ The evidence suggests that the appellant's compliance issues could be related to a lack of motivation rather than tied to mental or physical condition.

On this record, the ESP has provided a sufficient basis for its decision to involuntarily disenroll the appellant from the PACE program.

The appeal is denied.

Order for MassHealth/ESP

None.

¹ The appellant's representative discussed the broken elevator in the appellant's building as a potential obstacle. However, hearing testimony clarified that the elevator has now been fixed, and when it doesn't work, that the appellant can use the stairs if he has to.

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.

Sara E. McGrath
Hearing Officer
Board of Hearings

cc:

[REDACTED]