

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Dismissed	Appeal Number:	2178345
Decision Date:	3/17/2022	Hearing Date:	1/18/2022
Hearing Officer:	Cynthia Kopka	Record Open to:	3/11/2022

Appearance for Appellant:



Appearance for Respondent:

Jennifer Bevilacqua, Esq., DDS



*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:	Dismissed	Issue:	Waiver modification
Decision Date:	3/17/2022	Hearing Date:	1/18/2022
Respondent's Rep.:	Jennifer Bevilacqua, Esq.	Appellant's Rep.:	[REDACTED]
Hearing Location:	Tewksbury (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

By notice dated September 27, 2021, Massachusetts' Department of Developmental Services (DDS) notified Appellant, a MassHealth member receiving MassHealth's Moving Forward Plan - Residential Supports (MFP-RS) waiver, that his request for a modification to his Individual Support Plan (ISP) for respite in a state-operated group home was denied. Exhibit 5. Appellant requested a fair hearing with the Board of Hearings (BOH) on October 29, 2021. Exhibit 6. A fair hearing was scheduled for January 18, 2022. Exhibit 7.¹ A substantive analysis of BOH's jurisdiction to hear this appeal is analyzed *infra*.

Action Taken by Respondent

DDS denied Appellant's request for a modification to his ISP to include a respite stay in a state-operated group home as it did not come under the terms of MassHealth's MFP-RS waiver.

Issue

The appeal issue is whether the denial to the requested modification was made in error.

¹ There was a delay in scheduling the fair hearing due to BOH's administrative efforts to obtain all relevant documentation of the prior procedural history from Appellant's representatives and DDS.

Procedural History

On April 16, 2021, an attorney representing Appellant's guardian wrote a letter to DDS pursuant to 115 CMR 6.25(3) to request a modification to Appellant's ISP. The letter seeks to move Appellant from his current group home residence ("the residence") to a group home operated directly by DDS due to concerns with Appellant's treatment at the residence. The letter cites 115 CMR 6.20-6.25. Exhibit 1.

As referenced in an internal DDS letter dated June 7, 2021, meetings were held regarding this request on May 10, 2021 and thereafter. Exhibit 2. The June 7, 2021 DDS letter provides that Appellant is a participant in the MFP-RS waiver "which does not provide for a state operated group home." *Id.* The June 7, 2021 letter provides that Appellant's request for a new residential setting is contained within the ISP Vision Statement and that DDS has made multiple referrals and inquiries for placement opportunities within the MFP-RS waiver. "Upon acceptance by both the guardian and residential agency, the ISP would be modified to reflect that change." *Id.* The letter concludes that this and other concerns raised regarding the ISP, but "[a]t this time, those issues are not ready to institute an ISP modification but all parties are working together to address these concerns in a timely and satisfactory manner." *Id.*

On June 14, 2021, DDS notified Appellant's guardian and attorney that the modification was disapproved, forwarding the June 7, 2021 internal DDS letter. Exhibit 3. This letter stated that Appellant has the right to appeal this decision to the extent provided by 115 CMR 6.63 or 115 CMR 6.30 through 6.34, as applicable. *Id.*

On July 2, 2021, Appellant's present counsel wrote a letter to the regional director at DDS to appeal the decision disallowing the requested ISP modification and requesting a speedy informal conference. Exhibit 4.

As referenced by a letter from DDS to Appellant's attorneys dated September 27, 2021, an informal conference was held on August 27, 2021 to address the appeal of the denial of the request for modification of the ISP. Exhibit 5. This meeting was attended on Appellant's behalf by Appellant's guardian and representing attorneys. The meeting was attended by Respondent's attorney and representatives from DDS. According to this letter, Appellant is in the MFP-RS waiver program and receives 24/7 supports from the residence. Appellant requested that the ISP be modified to move Appellant to another residential home, a short term respite in a state-operated home, and a request for day/vocational services. The letter outlines complaints made by Appellant as to safety concerns and the quality of care he receives at Riverside. *Id.* at 2-3. The letter outlines Appellant's guardian's concerns for what group home placement would be necessary as far as proximation to the guardian's home and the type of care provided. *Id.* at 3. Appellant's guardian and attorneys requested a short-term respite stay in a state-operated group home, which would provide better care and a safer environment. *Id.* Appellant's guardian was adamant that Appellant remain on the MFP-RS waiver, despite there being other waivers Appellant would be eligible for that could provide with the requested state-home placement. However, DDS represented to Appellant that a state-operated group home placement was prohibited by the MFP-RS waiver. *Id.* at 3-4.

The letter outlines eight alternative residential placements proposed by DDS and offered to Appellant's guardian between April 2021 and September 2021. The letter lists the guardian's reasons for rejecting each of these 24/7 care placements. *Id.* at 4-5. DDS wrote in the letter that it has satisfied its obligation to offer residential alternatives to Appellant.

Regarding respite, DDS states in the letter that this is not a service included in the MFP-RS waiver and that MassHealth "has prohibited" placement in state-operated facilities. *Id.* at 5. DDS reiterated that Appellant would be eligible for other waivers offered by DDS that would allow for such placement but would remove him from the MFP-RS waiver. At the conclusion of the letter, DDS denied the request for a modification of the ISP regarding the request for placement in a state-operated group home and informed Appellant of his right to appeal this outcome by requesting a fair hearing to BOH. *Id.* at 6.

On October 29, 2021, BOH received Appellant request for a fair hearing. Exhibit 6. BOH scheduled the fair hearing to be heard remotely via telephone on January 18, 2022. Exhibit 7.

Summary of Argument

On January 13, 2022, DDS requested that BOH dismiss the appeal. DDS argued that the issue before the hearing officer is whether DDS erred in denying Appellant's request to modify his ISP and grant his request for residential placement with a provider of his choosing, relief which is not available to Appellant under 130 CMR 610 or the MFP-RS waiver policy. Exhibit 8. DDS provided a summary of the procedural history and described examples of alternative residential placements offered to Appellant. DDS argued that under the Policy for ABI-RH and MFP-RS Waivers, a participant's right to appeal is pursuant to 130 CMR 610.032. DDS argued that Appellant did not raise a valid ground for appeal under 130 CMR 610.032, and therefore his cause of action is not an appealable action. 130 CMR 610.032(G)(3). DDS argued that Appellant is demanding the provider and location of his choice without regard for whether that provider is available, suitable, or qualified under the waiver. DDS argued that Appellant cannot demand, and DDS and MassHealth cannot order, that Appellant's service plan be implemented by a specific service provider. DDS concluded by arguing that the present appeal should be dismissed because Appellant is seeking a service that is not available under the MFP-RS Waiver, Appellant is not entitled to the relief requested, and the hearing officer has no authority to grant the relief requested. DDS included in its submission a copy of Appellant's ISP and a copy of the Policy for ABI-RH and MFP-RS Waivers, dated December 30, 2016 ("Policy"). Exhibit 9.

On January 18, 2022, Appellant's counsel submitted an opposition to the motion to dismiss, as well as a request to continue the hearing and a letter from Appellant. Exhibit 10. In his letter, Appellant addressed numerous complaints and concerns for his safety and wellbeing raised by his current residence placement. In the opposition to the motion to dismiss, Appellant's counsel argued that in the past year, Appellant experienced numerous incidents, improper supervision, theft, and abuse which rise to the level of a suspension, reduction, and/or modification of services within the ambit of appealable issues enumerated in 130 CMR 610.032(G)(3). Appellant's counsel also moved to

continue the hearing date because Appellant did not feel safe testifying as to the conditions of his current residence while in the residence itself and did not have ample opportunity to arrange to appear at hearing alongside counsel.

On January 18, 2022, a fair hearing was held remotely via telephone. Given the short notice of the motion to continue, this motion was not granted. However, the attorneys at hearing presented legal argument as to BOH's jurisdiction to hear the matter, and testimony was not taken on this date. The issue in dispute identified at hearing by the parties was whether Appellant as an MFP-RS waiver participant could request a modification of his ISP to change his residential placement from his current provider to a DDS-operated group home.

At hearing, DDS's attorney argued that the hearing officer does not have authority to order DDS to place Appellant in a specific residence, nor to order DDS to provide a waiver participant a specific service with a specific provider. DDS argued that under 130 CMR 610.032, seeking a specific service provider is not a valid basis for appeal.

Addressing Appellant's allegations of abuse, neglect, and theft, DDS argued that there are more appropriate avenues of addressing these concerns, including DPPC, police, or civil action. BOH can only resolve matters granted by regulation. DDS argued that assuming the allegations of abuse, neglect, and theft are true, DDS had offered alternative placements, all of which were rejected by Appellant. Since the appeal was filed, Appellant has accepted a new placement and the transition to the new residence has begun.

DDS argued that MassHealth does not have a mechanism to pay a state-operated provider, and the waiver only covers private-pay providers. While there is not a specific prohibition contained in the Policy, providers must be approved through the Centers for Medicare and Medicaid Services (CMS). Here, the state is not an approved provider under CMS. Finally, DDS argued that Appellant is eligible for other waivers that allow for the placement he seeks, such as an intellectual disability waiver.

At hearing Appellant, by his attorney, argued that DDS placement is not explicitly excluded from coverage under the Policy. Appellant argued that he has a valid cause of action under the regulations because the aggregate effect of the care concerns he has experienced rise to the level of an effective modification, suspension, or denial of services. Appellant had valid reasons for rejecting the alternative placements offered by DDS. One of the alternatives was an elder care nursing home. Appellant is 25 years old. Other residential placements proposed by DDS were outside the mileage radius agreed to in the ISP. Such a placement would create difficulty for Appellant to be able to be visited by his guardian and for her to meaningfully perform her role as guardian.

Appellant seeks from this appeal an order to allow Appellant to be placed in a state-operated group home. Appellant does not have a specific group home in mind and would even consider placement in a state-operated group home outside the radius parameters set forth in the ISP. Appellant was not able to cite law which grants the hearing officer the authority to make such an order but agreed to brief the issue.

Appellant's guardian prefers the MFP waiver to all other alternative waivers available to Appellant, as it provides good services. Appellant is reluctant to explore alternative waivers due to his extensive need for services. Abandoning the MFP waiver would be throwing the good out with the bad.

The hearing record was held open to allow the parties to brief the legal issues raised at hearing. Exhibit 11. Appellant, in his post-hearing opposition to the motion to dismiss, reiterated the argument that the level of problems associated with Appellant's residence and the non-provision of and unsafe provision of services in the aggregate combined with DDS not providing the requested relief of a state-operated group home rose to the level of a denial, suspension, or modification identified as an appealable issue in 130 CMR 610.032(G)(3). Exhibit 12. In his opposition, Appellant argued that the Policy prohibits providers from mistreating an individual. Policy, Section IV(E)(3). Further, 130 CMR 630.408 states that MassHealth does not pay for waiver services that are unsafe, inappropriate, or unnecessary for a participant. Appellant emphasized that appealable actions under 130 CMR 610.032(G)(3) arise from either the action or inaction of the acting entity.

Appellant argued that the issue before the hearing officer is a novel issue, with a paucity of fair hearing or court decisions. As such, MassHealth's own interpretation of the regulation would be controlling in this matter. Appellant argued that the current regulatory scheme and scope of appealable issues provided to waiver participants is insufficient to provide for the safety, care, and protection of waiver participants. The limited number of appealable issues means DDS has little incentive to provide corrective action beyond offering alternative placements. Appellant urged that 130 CMR 610.032 should be read expansively because otherwise, he has few avenues of available relief. The waiver program exists to protect participants and the spirit of the program should allow an arena to address the concerns for redress, specifically the acts or omissions of care providers and agencies who should be supervising them.

In addition to the opposition, Appellant submitted a brief in support of a fair hearing, containing all the facts and allegations on which Appellant relies to support his position that he is entitled to the relief sought because his current residential placement fails to meet his safety and supervisory needs set forth under the ISP. Exhibit 13.

DDS submitted a post-hearing response, which included an objection to Appellant's Exhibit 13, a response to Appellant's opposition to the motion to dismiss on jurisdiction, and an amendment of the motion to dismiss. Exhibit 14. DDS argued that Appellant has not experienced a denial of services, but a denial of receipt of services by a non-qualified provider which is not a basis for appeal under 130 CMR 610.032. The hearing officer does not have the authority to order the relief sought, and Appellant admits that such authority cannot be found in the regulation. Appellant does not have the right to mandate that his service plan be implemented by a specific service provider. DDS reiterated that it has offered alternative placements which Appellant has rejected. As Appellant has failed to provide a legal basis for which a hearing officer would have the authority to order DDS to provide a specific service by a specific provider and mandate that said provider to provide said service, the appeal should be dismissed. Finally, DDS amended the motion to dismiss to argue that the issue is now moot, as Appellant is now in a new residential facility.

Appellant did not provide a sur-reply to DDS's written responses despite opportunity to do so. Exhibit 11.

Analysis and Conclusions of Law

The Board of Hearings will dismiss a request for hearing pursuant to 130 CMR 610.035 (emphasis added):

- (A) BOH will dismiss a request for a hearing when
 - (1) the request is not received within the time frame specified in 130 CMR 610.015;
 - (2) the request is withdrawn by the appellant ;
 - (3) the sole issue is one of state or federal law requiring automatic change in assistance for classes of members;
 - (4) **the stated reason for the request does not constitute grounds for appeal as set forth in 130 CMR 610.032.** Without limiting the generality of the foregoing, except as provided in 130 CMR 610.032(A)(11), no provider decision or action including, but not limited to, a provider determination about whether or the extent to which a service is medically necessary, constitutes an appealable action hereunder;
 - (5) the stated reason for the hearing request is outside the scope of 130 CMR 610.000 as set forth in 130 CMR 610.003;
 - (6) BOH has conducted a hearing and issued a decision on the same appealable action arising out of the same facts that constitute the basis of the request;
 - (7) the party requesting the hearing is not an applicant, member, or resident as defined in 130 CMR 610.004;
 - (8) BOH learns of an adjustment or action that resolves all of the issues in dispute between the parties;
 - (9) BOH learns that the applicant or member has passed away before or after the date of filing and there is no full compliance with 130 CMR 610.016(B) within ten days of a BOH request;
 - (10) BOH learns that the applicant or member has passed away prior to the date of filing and scheduling of the hearing and is not informed until the date of the hearing and there is no full compliance with 130 CMR 610.016(B); or
 - (11) the appellant fails to appear at a scheduled hearing.
- (B) 130 CMR 610.048(C) contains the procedure for BOH notices of dismissal and attempts to vacate such dismissals. The BOH Director may also, at his or her discretion, order a hearing scheduled to allow the appellant the opportunity to contest the dismissal.

Under 130 CMR 610.032(G), a participant in MassHealth's MFP-RS waiver participant may

request a fair hearing for certain enumerated actions or inactions by the acting entity², including disenrollment for clinical or financial eligibility and:

(3) denial, suspension, reduction, modification, or termination of services, including failure to provide choice of available provider, for waiver participants enrolled in the following HCBS Waiver Programs:

- (a) Acquired Brain Injury – Nonresidential Habilitation (ABI-N);
 - (b) Acquired Brain Injury – Residential Habilitation (ABI-RH);
 - (c) Moving Forward Plan – Community Living (MFP-CL);
 - (d) Moving Forward Plan – Residential Supports (MFP-RS); and
 - (e) Traumatic Brain Injury (TBI); and
- (4) failure to act on a waiver participant's request for a HCBS Waiver Program service within 30 days of receiving such request for waiver participants enrolled in the following HCBS Waiver Programs:

- (a) Acquired Brain Injury – Nonresidential Habilitation (ABI-N);
- (b) Acquired Brain Injury – Residential Habilitation (ABI-RH);
- (c) Moving Forward Plan – Community Living (MFP-CL);
- (d) Moving Forward Plan – Residential Supports (MFP-RS); and
- (e) Traumatic Brain Injury (TBI).

Per the Policy's informal resolution process, a waiver participant has the right to request a fair hearing

for the following actions or inactions by the state Agency pursuant to 130 CMR 610.032: Grounds for Appeal:

1. Denial of services;
2. Suspension of services;
3. Reduction of services;
4. Modification of services;
5. Termination of services; and
6. Failure to act on a participant's request for a service within 30 days of receiving such request.

Policy section IV.D, p. 19.

Appellant asserts that he has a basis for appeal pursuant to 130 CMR 610.032(G)(3) because the aggregate effect of the safety and welfare concerns he has experienced at his residence rise to the

² Per 130 CMR 610.004,

[t]he acting entity includes the Department of Developmental Services for purposes of denial, suspension, reduction, modification, or termination of services or for failure to act on a waiver participant's request for services for the following HCBS Waiver Programs: Acquired Brain Injury – Residential Habilitation (ABI-RH) and Moving Forward Plan – Residential Supports (MFP-RS).

level of an effective modification, suspension, or denial of services. However, the action or inaction of DDS that Appellant challenges is not the denial of services but the **denial of a particular service provider**. The relief sought by Appellant is not available as a remedy under 130 CMR 610. A hearing officer cannot order a specific provider to cover a MassHealth patient, nor can a hearing officer order MassHealth to pay for a provider with which it does not contract. Additionally, DDS has not failed to offer a choice of available providers because the state is not an approved provider under the MFP waiver. Appellant has not raised a valid cause of action under 130 CMR 610.032(G) and therefore this appeal is dismissed pursuant to 130 CMR 610.035(A)(4).

Order for Respondent

None.

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.

Cynthia Kopka
Hearing Officer
Board of Hearings

cc:

[REDACTED]

[REDACTED]