

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2202008
Decision Date:	7/13/2022	Hearing Date:	04/21/2022
Hearing Officer:	Christopher Jones	Record Open to:	05/26/2022

Appearance for Appellant:
Pro se

Appearance for MassHealth:
Linda Phillips, RN, BSN, LNC-CSp. – Ass. Dir. for
Appeals and Regulatory Compliance;
Leanne Govoni, RN, BSN, Med – Ass. Dir. for
Clinical Eligibility
MaryJo Kaye, RN - Clinical Reviewer



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	Approved	Issue:	MFP Waiver – Termination
Decision Date:	7/13/2022	Hearing Date:	04/21/2022
MassHealth’s Rep.:	Linda Phillips, RN; Leanne Govoni, RN; MaryJo Kaye, RN	Appellant’s Rep.:	Pro se
Hearing Location:	Remote	Aid Pending:	Yes

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 March 1, 2022, MassHealth terminated the appellant’s participation in the Moving Forward Plan – Community Living (“MFP-CL”) Waiver, effective March 21, 2022. (130 CMR 519.007(H)(2)(a)(5); Exhibit 3.) The appellant filed this appeal in a timely manner on March 16, 2022, and her benefits are protected pending the outcome of this appeal.¹ (Exhibit 4; 130 CMR 610.015(B).) Denial of assistance is valid grounds for appeal. (130 CMR 610.032.)

The appellant requested that this matter be rescheduled so that she could gather additional medical evidence and seek legal counsel. After much debate, the parties agreed to move forward, and the record was left open following the appeal until May 26, 2022 for the appellant to submit additional medical information and for MassHealth to review it. The appellant was afforded the opportunity to request the hearing be reconvened if she found legal counsel.

¹ Due to an administrative error, the appellant’s benefits were not initially protected pending this appeal. “Aid Pending” assistance is granted in appeals filed within 10 days of the date of the notice or when the Board of Hearings “receives the initial request for the fair hearing before the implementation date of the appealable action.” (130 CMR 610.036(A).) Because the appellant filed her appeal prior to her benefits being terminated, they were administratively reinstated while this appeal was pending.

Action Taken by MassHealth

MassHealth terminated the appellant's participation in the Moving Forward Plan – Community Living Waiver.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 519.007(H)(2), in determining that the appellant could not be safely served in the community, and therefore should no longer participate in the Moving Forward Plan – Community Living Waiver.

Summary of Evidence

The appellant is an elderly woman who lives alone in the community with support through the Moving People Forward – Community Living (“MFP-CL”) Waiver. This program allows for case management for individuals who require less than 24-hour a day care but are still clinically eligible for long-term-care services. In 2018 she suffered a left femur fracture and left ankle fracture that resulted in her rehabilitation at a nursing facility. She also has the following chronic diagnoses: Kallmann syndrome, anemia, asthma, GERD, hypothyroid, chronic kidney disease, morbid obesity, hyperlipidemia, cataracts, depression, post-traumatic stress syndrome (“PTSD”), congestive heart failure (“CHF”), hypopituitarism; and bilateral total knee replacements. The appellant testified that she is transiently deaf due to Meniere's disease. The diagnosis of Meniere's is confirmed in the medical records, but the degree of the appellant's deafness is disputed.²

The appellant was approved for the MFP-CL Waiver during her institutionalization so that she could receive assistance with case management in the community, including staffing personal-care attendants (“PCA”). She moved back into the community with support from the MFP-CL Waiver in the early Spring of 2019. On March 1, 2022, MassHealth issued the notice terminating the appellant's eligibility for the MFP-CL Waiver, effective March 21, 2022, on the grounds that the appellant was “longer clinically eligible for participation ... because you cannot be safely served in the community within the terms of the MFP-CL Waiver as required by 130 CMR 519.007(H)(2)(a)(5).” (Exhibit 5C, p. 2.)

The appellant is a difficult person. She regularly interrupted the other hearing participants and interjected unhelpful comments. MassHealth's decision to terminate the appellant from the program largely comes down to her difficult personality. MassHealth reviewed the appellant's care over the three years she had been enrolled in the program. The record reflects that the appellant struggled with depression, anxiety, and anger prior to the COVID-19 Pandemic, but her participation in the Waiver was otherwise unremarkable.

² The appellant testified she recently got an app for her phone that converts everything said into text. She did not express any concerns about being able to follow the telephonic hearing. The record reflects various instances where she says she cannot hear, but then participates in verbal communication.

Starting in November 2020, the appellant was reported to be non-compliant with medications and psychotherapy. She was drinking alcohol to self-medicate and would not disclose the location of a gun she owns. In the early Fall of 2021, she was involuntarily committed to a psychiatric hospital after she endorsed suicidal ideation and intent. Shortly before this incident, she had reported her PCA not appearing for shifts and alleged abuse and neglect by her caregivers. Around this time, concerns were raised regarding the appellant's behavior toward caregivers. She experienced high caregiver turnover due to her abusive behavior toward caregivers and her regularly firing them.

Her psychiatrist records reflect that prior to the Pandemic she was seen about once a month, with weekly therapy sessions. The appellant was often irritable and upset during this time, but there were no significant episodes documented. The appellant did not have a psychiatric appointment between January 17, 2020 and July 6, 2020. The notes reflect her displeasure at much of the changes were necessitated during the Pandemic, such as telephonic therapy sessions. It is during this time that she references to her deafness due to Meniere's disease begin. Her appointments with her psychiatrist were every two-to-three months, instead of monthly. The appellant regularly reports difficulty in having her medications filled, but there is some concern regarding whether she is picking up her prescriptions. She noted spending time with family out of the state and sharing their medications. In July 2021, the appellant's psychiatrist states that she is "not a priority for therapy. No specific complaints about sleep, appetite or energy."

Between that July visit and the final psychiatric note in the record, the appellant was involuntarily committed following a suicide attempt. For the final psychiatric note, the appellant was reportedly having a "deaf day" and claimed to be unable to hear. She is reported to interact perfectly in portions of the conversation. She raised concerns regarding her PCP's management of her medications and asked her psychiatrist to intervene. The psychiatrist made medication recommendations but did not take over prescribing medications. The psychiatrist noted "her abrasive speech and behavior and her frequent refusals make it difficult for others to help her." (Exhibit 6D, p. 3-4.)

MassHealth took steps to get the appellant devices for the assistance of the hearing impaired, as well as enrolling the appellant in remote American Sign Language courses. The appellant received an MRI, which found nothing to indicate the cause of deafness. MassHealth reported that the appellant would call or text her case worker at all hours of the night with complaints about medication or the care she was receiving. MassHealth argued that the appellant's behavior toward her caregivers made burnout a very real concern from a staffing perspective, which also made it difficult for MassHealth to ensure the appellant's safety in the community. Therefore, MassHealth made the determination that the appellant was too difficult a patient for them to be able to safely manage her care in the community. They noted that the appellant's eligibility for MassHealth would not be affected by her disenrollment in the MFP-CL Waiver and that she could continue to receive all of the same care as long as she coordinated it herself.³ MassHealth had not warned the appellant that she may be disenrolled prior to issuing its termination notice.

³ In addition to providing care coordination and other clinical services, the various waivers allow MassHealth coverage for individuals with income higher than is generally allowed.

The appellant was shocked that it would be problematic for her to text her case manager late at night. She felt the case manager could simply ignore any calls or texts placed after hours. It was pointed out that the case manager's job was to help ensure the appellant's safety in the community. Therefore, the case manager would feel responsible to check her phone at all hours to ensure the appellant is not expressing suicidal ideation. The appellant had never considered this. The appellant testified that she had a very difficult time receiving the care she needed during this period of time. Her therapist stopped seeing patients in person due to the COVID-19 Pandemic, and the appellant could not undergo counseling by telephone due to her hearing impairment.⁴ She lives in a very rural area and the internet services are very limited. She had received video-conferencing equipment, but she had difficulty using it.⁵

One point of contention was regarding the appellant's non-compliance with medications. The appellant argued that her PCP would only prescribe her a one-month supply of Adderall. She testified that the pharmacy would take up to two weeks to refill the prescription, so almost every month she would go through withdrawal when there was a delay in refilling the prescription. She testified that she tried for almost a year to get her medications squared away, including begging her psychiatrist to take of her prescribing her medications, a move that MassHealth felt was inappropriate. She testified that this medication mismanagement combined with her loss of in-person counseling led to her dysregulation of behaviors and mood.

The appellant recently changed her PCP, and her new PCP has started better managing her chronic medications better. She is set up for multi-month prescriptions. She has also started in-person counseling again, and she feels that she is already better able to manage her behavior. She asked that the record be left open for her to submit letters from her medical-care team to help substantiate her testimony that her mental health during the isolation of the Pandemic was extraordinary, partly due to her regularly mismanaged medications. She also testified that she had finally found a PCA with whom she got along and trusted.

The appellant's new PCP confirmed that the appellant had been without counseling during the Pandemic. She also confirmed that the appellant's thyroid levels were low during the appointment, which can impact mood and depression. She confirmed that the appellant recently re-started counseling and that she expected the appellant's ability to self-regulate her behavior and treatment of others would improve with the regular psychiatric care. (Exhibit 7.) The appellant has begun weekly counseling, (Exhibit 10) and had "significant hearing loss bilaterally" confirmed through audiograms, but the results were "considered poor reliability." (Exhibit 9.)

⁴ Much of MassHealth's frustration with the appellant arises from the appellant's refusal to participate in certain formats of care, seemingly as it suits her, due to her hearing impairment that does not have a documented physical etiology.

⁵ There is also some evidence that MassHealth had attempted to provide the appellant with video-conferencing capabilities, but the appellant cancelled her internet services. It is unclear as to who was financially responsible for maintaining the equipment or to what extent technological support was provided to set it up. (See Exhibit 6C, p. 22; 6D, pp. 38, 47.)

MassHealth did not respond during the record open period.

Findings of Fact

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

1. The appellant has been enrolled in the MFP-CL Waiver program since discharge from a rehabilitation facility in the early Spring of 2019. (Testimony by MassHealth's representative.)
2. She has the following chronic diagnoses: Kallmann syndrome, anemia, asthma, GERD, hypothyroid, chronic kidney disease, morbid obesity, hyperlipidemia, cataracts, depression, PTSD, CHF, hypopituitarism, hearing loss, Meniere's disease, and bilateral total knee replacements. (Exhibit 3; Exhibit 8, p. 18; Exhibit 9.)
3. Through a notice dated March 1, 2022, MassHealth terminated the appellant from the MFP-CL Waiver program because they determined the appellant could not be safely served in the community. (Exhibit 5C, p. 2.)
4. During the COVID-19 Pandemic, the appellant did not receive therapy and her admittedly difficult personality became worse. This dysregulated behavior was exacerbated by an inability to maintain a reliable supply of medications that affect her mood and behavior. (Testimony by the appellant; Exhibit 3; Exhibit 6D.)
5. The appellant's difficult personality has resulted in caregiver "burnout," and it presents challenges to her case manager's ability to help ensure her safety. (Testimony by MassHealth's representatives; Exhibit 6D.)
6. The appellant was unaware that she was at risk of having her case management terminated due to her treatment of others, or that her refusal to participate in certain treatments might be deemed to make her unsafe for the MFP-CL Waiver. (Testimony by the appellant and MassHealth's representatives.)
7. The appellant changed many of her healthcare providers in early 2022, just before her termination. She is now receiving more stable care than she has received for much of the Pandemic. Much of this care is focused on helping her control her behavior dysregulation. (Exhibits 7-10; testimony by the appellant.)

Analysis and Conclusions of Law

The home-and community-based services waivers allow individuals currently institutionalized in a nursing facility or hospital to be placed in a residential housing program or live on their own in the community. (See 130 CMR 519.007.) The "Moving Forward Plan Waivers (MFP Waivers)" are "approved by the CMS under § 1915(c) of the Social Security Act for persons with disabilities who

are transitioning from long-stay facilities.”⁶ (130 CMR 630.402.) The management of these waivers can be very resource intensive, and enrollment in the MFP-CL Waiver “is subject to a limit on the total number of waiver participants ... limited in a manner determined by the MassHealth agency.” (130 CMR 519.007(H)(2)(c).)

There is very limited guidance with regards to the clinical eligibility for the MFP-CL Waiver.

(a) Clinical and Age Requirements. The MFP Community Living Waiver, as authorized under § 1915(c) of the Social Security Act, allows an applicant or member who is certified by the MassHealth agency or its agent to be in need of nursing facility services, chronic disease or rehabilitation hospital services, or, for participants 18 through 21 years of age or 65 years of age or older, psychiatric hospital services to receive specified waiver services, other than residential support services in the home or community, if he or she meets all of the following criteria:

1. is 18 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;

2. is an inpatient in a nursing facility, chronic disease or rehabilitation hospital, or, for participants 18 through 21 years of age or 65 years of age and older, psychiatric hospital with a continuous length of stay of 90 or more days, excluding rehabilitation days;

3. must have received MassHealth benefits for inpatient services, and be MassHealth eligible at least the day before discharge;

4. needs one or more of the services under the MFP Community Living Waiver;

5. is able to be safely served in the community within the terms of the MFP Community Living Waiver; and

6. is transitioning to the community setting from a facility, moving to a qualified residence, such as a home owned or leased by the applicant or a family member, an apartment with an individual lease, or a community-based residential setting in which no more than four unrelated individuals reside.

(130 CMR 519.007(H)(2)(a) (emphasis added).)

The MFP participant handbook includes the following:

2. Continuing Clinical Eligibility (for Waiver Participants)

⁶ “The Moving Forward Plan Waivers were formerly named the Money Follows the Person Waivers, and any reference to “Money Follows the Person Waivers” should be given the same effect as if it read “Moving Forward Plan Waivers,” unless the context requires otherwise.” (130 CMR 630.402 (definition of Moving Forward Plan Waivers).)

As a Waiver participant, you have already gone through an initial eligibility process. To remain in the program, you must continue to meet certain clinical criteria. This section provides information about ongoing clinical eligibility.

The following clinical eligibility criteria apply in each of the four Waiver programs: Acquired Brain Injury–Residential Habilitation; Acquired Brain Injury–Non-residential Habitation; Moving Forward Plan–Residential Supports; and Moving Forward Plan–Community Living.

- You must not live in a nursing facility or long-stay hospital (i.e., chronic disease, rehabilitation, or psychiatric hospital) but continue to require a nursing facility or hospital level of care
- You must continue to need one or more of the services or supports offered under the applicable Waiver program
- You must reside in a qualified setting in which Waiver services can be delivered, and
- **You must continue to be able to be safely served in the community**

Continuing clinical eligibility assessments take place annually and as needed due to changes in your circumstances. It is important for you to provide information about changes in your circumstances. Changes that affect one or more of the clinical eligibility criteria may also affect your eligibility for the Waiver program.

For additional information on clinical eligibility, see the Waiver program regulation at 130 CMR 630.403: Eligible Members as well as the MassHealth regulation at 130 CMR 519.007(G): Home- and Community-based Services Waivers for Persons with Acquired Brain Injury and 130 CMR 519.007(H): Moving Forward Plan Home- and Community-based Services Waivers.

(ABI-MFP Participant Handbook, available at <https://www.mass.gov/doc/abi-mfp-participant-handbook/download> (last visited June 26, 2022) (emphasis added).)

Waiver services are individually tailored to each member, and providing the support needed to manage a member's participation requires a great deal of effort on behalf of multiple state agencies and their contractors. The record reflects that the appellant is not an easy person to care for in the best of times. The record also shows that the psychological care she received during the pandemic became more intermittent or non-existent.⁷ It is unreasonable to expect the case managers in the waiver program to step in and fill in the gap in the appellant's psychological care. However, the appellant should have been made aware of the fact that her dysregulated behavior and turning away

⁷ The record is unclear as to how much responsibility the appellant bears for these services being unavailable to her. There is conflicting documentation regarding the availability of reliable internet and Wi-Fi at her home, who was responsible for paying for it, and the ease of use of the other technological supports that had supposedly been made available to her.

from the offered formats of assistance indicated that she could not be safely cared for in the community during the Pandemic. There is at least one instance where the appellant is informed that a residential setting may be required if she did not feel she was receiving the services she required in the community (see e.g., Exhibit 6D, p. 43), but this was not conveyed by MassHealth.

Finally, it is unclear how terminating the appellant's care coordination in this way is likely to promote the appellant's safety. Not every form of assistance available through the MFP-CL Waiver is available directly from MassHealth, and to the extent that they may be available, each one could involve a separate prior authorization process to access. To the extent that the appellant is still clinically eligible for nursing-facility care, it is unclear how reducing her access to services improves her likelihood of safety. Therefore, this appeal is APPROVED.

Nothing in this decision is meant to require that MassHealth must take extraordinary measures to safeguard the appellant against herself. The appellant is entitled to deny care, but she should be made aware of the potential consequences of doing so. This decision is limited to the facts presented and cannot prescribe policies or practices for MassHealth (see 130 CMR 610.085), but some degree of discharge planning may be appropriate. Such planning could simply be informing the appellant of her clinical eligibility to return to an institutional setting, if MassHealth believes her denial of care is making her too great a risk to remain in the community.⁸

Order for MassHealth

Reinstate the appellant's MFP-CL Waiver eligibility without a gap in coverage. She may be reevaluated at any time to determine whether she still qualifies Waiver services. This decision in no way limits MassHealth's actions moving forward.

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.

⁸ Alternatively, if MassHealth believes that the appellant can manage her own care in the community and "would [not] be institutionalized if [she] were not receiving home- and community-based services," this would also end her eligibility for the program. (See 130 CMR 519.007.)

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.

Christopher Jones
Hearing Officer
Board of Hearings

cc:
MassHealth Representative: Prior Authorization