

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: DENIED

Appeal Number: 2203141

Decision Date: 7/15/2022

Hearing Date: 06/07/2022

Hearing Officer: Kenneth Brodzinski

Appearance for Appellant:

Pro se with [REDACTED] – Director of
Social Services; [REDACTED] – Social
Worker and [REDACTED], RN

Appearance for MassHealth:

Linda Phillips, RN; Jennifer Johnson, RN
and Marilyn Hart, RN



*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:	Community Waivers
Decision Date:	7/15/2022	Hearing Date:	06/07/2022
MassHealth's Rep.:	Linda Phillips, RN	Appellant's Rep.:	Pro se
Hearing Location:	Quincy		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through notices dated April 12, 2022, MassHealth denied Appellant's requests to participate in the MassHealth Acquired Brain Injury Residential Habilitation Waiver (hereinafter, "the ABI-RH Waiver") and the Moving Forward Plan Residential Supports Home and Community Based Services Waiver (hereinafter, "the MFP-RS Waiver") (Exhibit A). Appellant filed for an appeal in a timely manner on April 19, 2022 (see 130 CMR 610.015(B) and Exhibit A). Denial of a request to participate in a MassHealth program constitutes valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied Appellant's request to participate in the ABI-RH and MFP-RS Waiver programs.

Issue

The appeal issue is whether MassHealth properly applied the controlling regulation(s) to accurate facts when it denied Appellant's request to participate in the ABI-RH and MFP-RS Waiver programs.

Summary of Evidence

MassHealth was represented by a Registered Nurse (RN) who serves as the Associate Director of Appeals and Regulatory Compliance. She explained that MassHealth has two Home and Community-Based Services Waivers (HCBS) that assist Medicaid-eligible persons who have an Acquired Brain Injury (ABI) and are institutionalized to move into the community and obtain community-based services.

The ABI-N Waiver is for individuals who are able to move into their own home or apartment or to the home of someone else. The ABI-RH Waiver is for individuals who need placement in a residence that has supervision and staffing 24 hours/day, 7days/week. On January 13,2022, Appellant applied for the ABI-RH Waiver (Exhibit B, Tab C, page 4).¹

MassHealth has two additional HCBS Waivers that assist Medicaid-eligible persons to move into the community and obtain community-based services: the MFP-RS Waiver and the MFP Community Living (CL) Waiver. Both waivers help individuals move from a nursing home or long-stay hospital to an MFP-qualified residence in the community and obtain community-based services. The MFP-CL Waiver is for individuals who can move into their own home or apartment or to the home of someone else and receive services in the community that are less than 24 hours/day, 7 days per week. The MFP- RS Waiver is for individuals who need supervision and staffing 24 hours/ day, 7days per week. Appellant applied for the MFP-RS Waiver on January 13, 2022 (Exhibit B, Tab C, page 9).

The MassHealth representative testified that Appellant is a [REDACTED] female who has been residing in a skilled nursing facility since September 6, 2019 after receiving treatment from a behavioral health hospital for long standing schizoaffective disorder, anxiety and bipolar disorder. Appellant has previously applied for the MFP-CL and MFP-RH Waivers since 2019 but was denied due to medical and psychological instability.

Currently, Appellant has applied for the MFP-RS and ABI-RH (residential) Waivers. Appellant has a past medical history that includes cerebral infarction (2011and 2012), transient ischemic attack (TIA) (date unknown), residual left-sided weakness following stroke, combined systolic and diastolic (congestive) heart failure, chronic obstructive pulmonary disease (COPD), chronic kidney disease stage IV, atrial fibrillation, Type II

¹ The Hearing Officer uses lettered Exhibits. Where a party has made a submission which contains exhibits, the Hearing Officer uses the term "Tab." For example: if a party's submission is marked for this record as Exhibit B and the submission itself has "exhibits" attached such as "exhibit C", it is herein identified as (Exhibit B, Tab C).

Diabetes Mellitus, hypertension (HTN), retention of urine, gastroesophageal reflux disease (GERD), esophageal stricture, fibromyalgia, benign paroxysmal vertigo, glaucoma, schizoaffective disorder, bipolar disorder, major depressive disorder, and borderline personality disorder.

On March 22, 2022, a Waiver eligibility assessment was conducted in person at the facility where Appellant resides. In attendance were Appellant; Carol Soldevilla, Social Worker (SW) and Susan O'Halbran, RN from the facility and Sarah Morse, RN, MassHealth Nurse Reviewer who was representing the ABI/MFP Waiver Program.

The Waiver assessment consists of completion of ABI documents including the Minimum Data Set-Home Care (MDS-HC) (Exhibit B, Tab C, pages 14-27); ABI/MFP Clinical Determination Assessment (Exhibit B, Tab C, pages 28-37); ABI/MFP Waivers Community Risks Assessment (Exhibit B, Tab C, pages 38-39); and a review of the applicant's medical record.

During the Waiver eligibility assessment process, Ms. Morse noted the following documentation indicating that Appellant has significant health and safety risks:

January 5 ,2022 facility Progress Note states that Appellant and another resident had a verbal altercation after when the resident accidentally hit Appellant's wheelchair. The nurse in charge attempted to speak to Appellant after the incident, and Appellant became accusatory towards the nurse. Police were called to the facility to take statements related to the residents' wheelchair incident. New intervention by nursing staff is to have Appellant and the other residents smoke in separate groups outside to avoid further situations (Exhibit B, Tab D, page 20).

January 30, 2022 facility Progress Note states that the nurse was requested by CNAs to speak with Appellant regarding an incident in which Appellant gave a cup of "thin coffee" to a resident on thickened liquids (choking hazard). The nurse attempted to speak to Appellant, who then became angry and began screaming at the nurse and aides by yelling, *"Don't ever cross my path again. You'll regret this"*. The nurse asked Appellant again to not give residents other thin liquids and the conversation ended. Staff stated that Appellant has been *"yelling at us all day"* (Exhibit B, Tab D, pages 12-13).

February 16, 2022: Athena Social Service Quarterly Assessment states that Appellant is followed by team health psychiatric services and there is no safe discharge plan at this time (Exhibit B, Tab D, page 96).

February 21,2022: Psychiatric Periodic Evaluation by Kelly Hancock, NP indicates that there is a concern at the nursing facility that Appellant may be selling things to residents for a profit. Appellant has been confined to her unit and has been very upset/behavioral related to the allegations. Appellant was attempting to elope from the unit on this day via the elevator. Ms. Hancock required additional staff, with nursing collaboration to

establish a behavioral plan (Exhibit B, Tab D, pages 51-53).

Appellant continues to be medically complex which is likely at her baseline due to her multiple co-morbidities. She also continues to display behaviors with staff and other residents, while her behaviors have seemed to have lessened following multiple room changes and an eventual floor change. Carol Soldevilla SW, and Susan O'Halbran, RN state that Appellant's behaviors are disruptive and would likely continue to be disruptive in a residential setting. Her pain continues to not be well controlled, and she has been unwilling to go to a pain clinic as appointments have been made for her and then she will refuse to go and state that she only wants increases in pain medications (Exhibit B, Tab C, page 36).

On March 31, 2022, Appellant's case was discussed at the MassHealth Waiver Clinical Team review meeting which includes Massachusetts Rehabilitation Commission (MRC) and Department of Developmental Services (DDS).

The MassHealth representative further testified that on April 6, 2022, as part of the MFP Waiver eligibility process a second clinical review was conducted by the MRC Clinical Team. Based on medical record documentation and interviews with nursing facility staff, MassHealth MRC and DDS again determined that Appellant is a significant health and safety risk to herself and others and requires a higher level of medical support and supervision that cannot be provided by the ABI-RH and MFP-RS waivers; therefore, she cannot be safely served under the ABI-RH and MFP-RS Waiver.

On April 12, 2022 denial notices for the ABI RH and MFP-RS Waivers were mailed to Appellant (Exhibit B, Tab C, pages 5-6 and 10-11).

Appellant appeared on her own behalf accompanied by Carol Soldevilla (the facility social worker present during the Waiver assessments) another social worker, Katie Seymour and Angela Ortiz, RN.

Appellant testified that she believes she is ready and capable of safely residing in the community. She denied each of the behavioral incidents referenced by the MassHealth representative including giving anyone food or drink, filling in for profit, trying to elope and the verbal altercation that were said to have occurred on January 5, 2022.

Ms. Soldevilla testified that each of the behavioral incidences referenced by MassHealth was later found to be "unfounded". She explained that all allegations are written in the clinical record and later investigated. According to Ms. Soldevilla, each of these incidences was determined to be unfounded.

Ms. Soldevilla testified that she has a lengthy experience of years in dealing with patients such as Appellant and transitioning them from institutional setting to the community. According to Ms. Soldevilla, Appellant is ready and appropriate for such a transition. She

and the other facility representative stated that all the staff at the facility report Appellant's appropriateness for the waiver programs to transition her to the community setting. Ms. Seymour testified that Appellant has made significant progress by being at a facility in teaching and believes that Appellant is appropriate to transition to the community setting.

In response, the MassHealth representative noted that Appellant's behaviors go back to 2019 as revealed in previous waiver applications and her most recent records report that these behaviors have not dramatically changed although there had been some improvement.

Findings of Fact

By a preponderance of the evidence, this record supports the following findings:

1. The MassHealth ABI-RH Waiver is for institutionalized individuals who desire placement in a community residence that has supervision and staffing 24 hours/day, 7days/week.
2. On January 13,2022 Appellant applied for the ABI-RH Waiver (Exhibit B, Tab C, page 4).
3. MassHealth's MFP-RS Waiver helps individuals move from a nursing home or long-stay hospital to an MFP-qualified residence in the community and obtain community-based services.
4. The MFP- RS Waiver is for individuals who need supervision and staffing 24 hours/ day, 7days per week.
5. On January 13, 2022 Appellant applied for the MFP-RS Waiver (Exhibit B, Tab C, page 9).
6. Appellant is a [REDACTED] female who has been residing in a skilled nursing facility since September 6, 2019 after receiving treatment from a behavioral health hospital for long standing schizoaffective disorder, anxiety and bipolar disorder.
7. Appellant has made previous applications for Waivers since 2019 but was denied due to medical and psychological instability.
8. Appellant has a past medical history that includes cerebral infarction (2011and 2012), transient ischemic attack (TIA) (date unknown), residual left-sided weakness following stroke, combined systolic and diastolic (congestive) heart failure, chronic obstructive pulmonary disease (COPD), chronic kidney disease

stage IV, atrial fibrillation, Type II Diabetes Mellitus, hypertension (HTN), retention of urine, gastroesophageal reflux disease (GERD), esophageal stricture, fibromyalgia, benign paroxysmal vertigo, glaucoma, schizoaffective disorder, bipolar disorder, major depressive disorder, and borderline personality disorder.

9. On March 22, 2022, a Waiver eligibility assessment was conducted in person at the facility where Appellant resides.
10. In attendance during the Waiver eligibility assessment were Appellant; Carol Soldevilla, Social Worker (SW) and Susan O'Halbran, RN from the facility and Sarah Morse, RN, MassHealth Nurse Reviewer who was representing the ABI/MFP Waiver Program.
11. The Waiver assessment consists of completion of ABI documents including the Minimum Data Set-Home Care (MDS-HC) (Exhibit B, Tab C, pages 14-27); ABI/MFP Clinical Determination Assessment (Exhibit B, Tab C, pages 28-37); ABI/MFP Waivers Community Risks Assessment (Exhibit B, Tab C, pages 38-39); and a review of the applicant's medical record.
12. A January 5, 2022 facility Progress Note states Appellant and another resident had a verbal altercation after when the resident accidentally hit Appellant's wheelchair. The nurse in charge attempted to speak to Appellant after the incident, and Appellant became accusatory towards the nurse. Police were called to the facility to take statements related to the residents' wheelchair incident. New intervention by nursing staff is to have Appellant and the other residents to smoke in separate groups outside to avoid further situations (Exhibit B, Tab D, page 20).
13. January 30, 2022 a facility progress note states that the nurse was requested by CNAs to speak with Appellant regarding an incident in which Appellant gave a cup of "thin coffee" to a resident on thickened liquids (choking hazard). The nurse attempted to speak to Appellant, who then became angry and began screaming at the nurse and aides by yelling, *"Don't ever cross my path again. You'll regret this"*. The nurse asked Appellant again to not give residents other thin liquids and the conversation ended. Staff stated that Appellant has been *"yelling at us all day"* (Exhibit B, Tab D, pages 12-13).
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15. February 21, 2022: Psychiatric Periodic Evaluation by Kelly Hancock, NP indicates that there is a concern at the nursing facility that Appellant may be

selling things to residents for a profit. Appellant has been confined to her unit and has been very upset/behaviorally related to the allegations. Appellant was attempting to elope from the unit on this day via the elevator. Ms. Hancock required additional staff, with nursing collaboration to establish a behavioral plan (Exhibit B, Tab D, pages 51-53).

16. Appellant continues to be medically complex which is likely at her baseline due to her multiple co-morbidities.
17. Appellant continues to display behaviors with staff and other residents although her behaviors have seemed to have lessened following multiple room changes and an eventual floor change.
18. Appellant's behaviors are consistent with earlier documented behavior going back to 2019.
19. Carol Soldevilla SW, and Susan O'Halbran, RN stated that Appellant's behaviors are disruptive and would likely continue to be disruptive in a residential setting.
20. Appellant's pain is not well-controlled, and she has been unwilling to go to a pain clinic as appointments have been made for her and then she will refuse to go and state that she only wants increases in pain medications (Exhibit B, Tab C, page 36).
21. On March 31, 2022, Appellant's case was discussed at the MassHealth Waiver Clinical Team review meeting which includes Massachusetts Rehabilitation Commission (MRC) and Department of Developmental Services (DDS).
22. On April 6, 2022, as part of the MFP Waiver eligibility process, a second clinical review was conducted by the MRC Clinical Team.
23. Based on medical record documentation and interviews with nursing facility staff, MassHealth MRC and DDS again determined that Appellant is a significant health and safety risk to herself and others and requires a higher level of medical support and supervision that cannot be provided by the ABI-RH and MFP-RS waivers; therefore, she cannot be safely served under the ABI-RH and MFP-RS Waiver.
24. On April 12, 2022 denial notices for the ABI RH and MFP-RS Waivers were mailed to Appellant (Exhibit B, Tab C, pages 5-6 and 10-11).
25. Each of the behavioral incidences referenced by MassHealth were allegations written in the clinical record that were later investigated by the facility and determined to be unfounded.

26. According to the facility representatives present at the hearing, Appellant is ready and appropriate to transition to the community under the Waiver programs.

Analysis and Conclusions of Law

"The burden of proof is on the appealing party to show that the order appealed from is invalid, and we have observed that this burden is heavy" (Massachusetts Inst. of Tech. v. Department of Pub. Utils., 425 Mass. 856, 867, 684 N.E.2d 585 (1997)).

Below are the eligible criteria for the ABI Waiver as stated in 130 CMR 519.007(G)(1)(a) (emphasis supplied):

- The applicant must be living in a nursing facility or a chronic or rehabilitative hospital and must have lived there for at least 90 days;
- The applicant must have a documented acquired brain injury, acquired at age 22 or older;
- The applicant must meet clinical requirements and be in need of the Waiver services that are available through the ABI-RH Waiver;
- The applicant must the financial requirements to qualify for MassHealth. Special financial rules exist for waiver participants;
- ***The applicant must be able to be safely served in the community with the services available under the ABI-RH Waiver;*** and
- In addition to the above, to qualify for the ABI-RH Waiver, an applicant must need residential support services with staff supervision 24 hours/day, 7 days/week.

Below are the eligibility criteria for the MFP Waiver as stated in 130 CMR 519.007(H)(1)(a) (emphasis supplied):

- The applicant must be living in a nursing facility or long-stay hospital, and lived there for at least 90 consecutive days;
- The applicant must be 18years old or older, and have a disability, or be age 65 and older;
- The applicant must meet clinical requirements for, and be in need of the Waiver services that are available through the MFP Waivers;
- ***The applicant must be able to be safely served in the community within the terms of the MFP Waivers;***
- The applicant must meet the financial requirements to qualify for MassHealth special financial rules existing for Waivers' participants;
- The applicant will transition to an MFP-qualified residence in the community; and
- In addition to the above, to qualify for the MFP-RS Waiver, an applicant must

need residential support services with staff supervision 24 hours/day, 7 days/week.

Appellant has not met her burden.

At hearing, MassHealth presented a clinical professional who reviewed Appellant's medical documentation to support the agency's findings and conclusions about Appellant's current state of health and behaviors which place her outside of the regulatory requirements of the waiver program. MassHealth has shown that an extensive assessment was performed with Appellant and staff members from her current institutional residence in attendance. At that time, staff members made statements consistent with MassHealth's conclusion that Appellant's behaviors were still outside of the safety parameters of both waiver programs and that they expected these behaviors to continue. Appellant's assessment was considered by the MassHealth Waiver Clinical Team review which included input from the Massachusetts Rehabilitation Commission (MRC) and Department of Developmental Services (DDS). A second clinical assessment was thereafter performed which reached the same findings and conclusions.

At hearing, specific instances of disruptive and safety-related behaviors were discussed. While the facility staff testified that each of the underlying allegations (such as attempted elopement and giving inappropriate liquids to other residents) were later investigated and deemed to be "unfounded" this does not eliminate the concerns arising from how Appellant responded in each incident. According to the clinical records documenting these events, Appellant became combative and verbally abusive. Additionally, while MassHealth acknowledged that some lessening of these behaviors has appeared to have occurred since being first reported in prior waiver applications going back to 2019, they did so in light of multiple room changes and a floor change. Such accommodations would not be as readily available, if at all, to Appellant in the community setting under the Waiver programs.

The most recent objective medical documentation shows that, at the time the assessment was performed, Appellant's multiple physical and mental conditions and comorbidities together with her latest documented behaviors do not support a finding that Appellant can be safely served in the community within the terms of the subject ABI or MFP Waivers.

On this record, I find no basis in fact or law to disturb the agency's action. The appeal is denied.

Appellant may reapply for the waivers as she deems appropriate.

Order for MassHealth

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.

Kenneth Brodzinski
Hearing Officer
Board of Hearings

cc:MassHealth Representative: Prior Authorization