

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2204017
<b>Decision Date:</b>	8/23/2022	<b>Hearing Date:</b>	7/19/2022
<b>Hearing Officer:</b>	Cynthia Kopka		

**Appearance for Appellant:**

Pro se



**Appearance for MassHealth:**

Linda Phillips, RN, BSN, LNC-CSp.,  
Associate Director – Appeals and Regulatory  
Compliance

Brad Goodier, BSN, RN (Observing)



*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

<b>Appeal Decision:</b>	Denied	<b>Issue:</b>	Waiver
<b>Decision Date:</b>	8/23/2022	<b>Hearing Date:</b>	7/19/2022
<b>MassHealth's Rep.:</b>	Linda Phillips, RN	<b>Appellant's Rep.:</b>	Pro se
<b>Hearing Location:</b>	Quincy (remote)	<b>Aid Pending:</b>	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 April 19, 2022, MassHealth notified Appellant that he is not eligible for MassHealth's Moving Forward Plan Community Living Home-and-Community-Based Services Waiver (MFP-CL Waiver). Exhibit 1. Appellant filed a timely appeal on May 25, 2022. Exhibit 2. A determination regarding eligibility for a waiver program is a valid basis for appeal. 130 CMR 610.032. The hearing record was reopened through August 8, 2022. Exhibit 6.

## Action Taken by MassHealth

MassHealth notified Appellant that he is not eligible for MassHealth's MFP-CL Waiver.

## Issue

The appeal issue is whether MassHealth correctly determined that Appellant is not eligible for the MFP-CL Waiver because he cannot be safely served in the community within the terms of this waiver.

## Summary of Evidence

MassHealth was represented at remote hearing by its Associate Director of Appeals and Regulatory Compliance and other participants. Appellant appeared on his own behalf. The residential director of Appellant's group home was present at hearing but did not participate substantively due to

conflict of interest. Documents were submitted for hearing by both parties. Exhibits 4, 5, and 6.<sup>1</sup> A summary of documentation and testimony follows.

MassHealth offers home and community-based service (HCBS) waivers, including the Moving Forward Plan Community Living (MFP-CL) Waiver and the Acquired Brain Injury-Residential Habilitation (ABI-RH) Waiver. Both waivers help individuals move from a nursing home or long-stay hospital to an ABI or MFP-qualified residence in the community and obtain community-based services. The ABI-RH Waiver is for individuals who need placement in a residence that has supervision and staffing 24 hours per day, 7 days per week. 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 per day, 7 days per week. The MFP-CL waiver is available through MassHealth for people who have been living in a skilled facility and serves members who can move into their own home or apartment or to the home of someone else and receive services in the community. Exhibit 4 at A1. To qualify for the MFP-CL waiver, an individual must:

- Be living in a nursing facility or in a chronic disease, rehabilitation, or psychiatric hospital for at least 90 days
- Either be
  - 18 years of age or older and have a disability, or
  - 65 years of age or older
- Meet clinical requirements (that is, be at a facility),
- Need MFP waiver services
- Be able to be safely served in the community within the terms of the MFP waivers, and
- Meet the financial requirements to qualify for MassHealth Standard in the community. Special financial rules exist for waiver applicants and participants.

*Id.* at A2.

Appellant is in his sixties. His primary diagnoses as documented are traumatic brain injury status post motor vehicle accident in 1988, cerebral infarction, spastic right sided hemiplegia, dorsalgia, encephalopathy, Type II diabetes mellitus, chronic diastolic congestive heart failure, low back pain, left ankle and foot pain, dermatitis, hypercholesterolemia, colon polyp, localized edema, chronic peripheral venous insufficiency, and affective disorder. *Id.* at C30 and D40. After Appellant's motor vehicle accident and traumatic brain injury in 1988, he rehabilitated and lived in the community for 15 years. In 2009, Appellant was convicted of sexual assault and labeled a Level 2 sex offender. Appellant was remanded to a Curahealth nursing facility in 2012 as part of a diversion from an incarceration program. With support from his family, the sex offender status was reduced to level 1 on March 15, 2022. *Id.* at C29, D42, D73-74.

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<sup>1</sup> MassHealth's original testimony contained errors, primarily regarding Appellant's age and diagnoses, to which Appellant objected at hearing. After hearing, MassHealth submitted a written correction to the testimony. Exhibit 6. Appellant received a copy of the written correction and was given an opportunity to provide a written response. *Id.* No response was received as of the date of decision.

In 2013, Appellant was approved for the ABI-RH waiver and moved to a group home operated by the Department of Developmental Services (DDS) in Hudson, MA in 2017. Appellant continues to be eligible for the ABI-RH waiver. On June 16, 2021, Appellant applied for a waiver transfer to move from the ABI-RH Waiver to the MFP-CL Waiver. *Id.* at C6.

On March 15, 2022 a nurse reviewer representing MassHealth's waiver program performed an eligibility assessment at the group home. Present at the assessment were Appellant, the house manager, a clinician, and a clinician intern. *Id.* at C40. The assessment included reviews of recent evaluations performed by Appellant's providers:

- On February 17, 2021, Appellant received a neuropsychiatric evaluation with impression consistent with major neurocognitive disorder. *Id.* at D11-18. There were several impaired cognitive areas. The doctor wrote that "the patient requires continued support for ADLs and IADLs and with decision making." *Id.* at D17. As part of the evaluation, the doctor wrote that Appellant "is not interested in counseling support for psychiatric management at present. He does endorse some chronic grief and depression and may benefit from periodic counseling support." *Id.*
- On September 21, 2021, a neurologist conducted a follow-up evaluation. *Id.* at D27-34. The neurologist wrote when she told Appellant that she did not believe he could live on his own based on his cognitive and physical impairments, Appellant cursed and threw his cane down when he walked out of the door. *Id.* at D31. The neurologist wrote "in my opinion, he is not safe to live on his own," as Appellant exhibits mild cognitive disorder due to the traumatic brain injury, and as he ages there may be further compromise. *Id.* The neurologist wrote that there is a risk of injury due to his limited self-awareness regarding safety and physical limitations. *Id.* A DDS case manager wrote that Appellant sought a second neurological opinion on March 1, 2022. The case manager wrote that the second neurologist stated that Appellant "will still encounter cognitive challenges that may make it difficult for him to live independently" and recommended Appellant get brain imaging completed. *Id.* at D70.

Staff notes from Appellant's group home dated January 1-30, 2022 indicate several times that group home staff needed to intercede and provide guidance to Appellant and other residents. *Id.* at 53-63. The MassHealth representative testified that DDS staff who help and care for Appellant are very involved in keeping him calm and cooperative. Without this assistance available, Appellant is at risk for behavior complications.

On April 7, 2022, and April 13, 2022, Appellant's case was discussed at the MassHealth Waiver Clinical Team review meeting and with the MRC Clinical Team. MassHealth and MRC determined that Appellant continues to require a 24/7 residential and structured environment. The DDS behavior program and oversight that is currently available to Appellant within the ABI-RH waiver is not able to be duplicated in the community. This environment has supported Appellant with well-being and a structured living environment while encouraging Appellant to interact safely with his community. *Id.* at C33-34. Therefore, MassHealth and MRC determined that Appellant cannot transition from ABI-RH Waiver to a less structured living environment, MFP-CL Waiver. *Id.* at C7-

8.

Appellant testified that the denial is nonsense. Appellant can live independently and drive. Appellant does not like the group home or his housemates. Appellant does everything he is supposed to in the group home. Appellant denied that he lived with his mother during the 15 years he lived independently. Appellant wants to move to Framingham in his own apartment. He has friends and family in that area who can drive him places. However, Appellant needs the MFP-CL waiver because he cannot afford the rent in an apartment. Appellant argued that he is capable of living alone as he can take his own medications, drive, shop, and do housework independently. Appellant can also bathe and dress himself. Appellant has had his brain injury for 35 years and though he is paralyzed on one side, he is fully capable of everything.

Appellant provided a written submission at hearing. Exhibit 5. In this written submission Appellant wrote that he will return to driving soon. Appellant is allowed to leave the group home independently for two hours every day. *Id.* at 1. Appellant discussed difficulties he has with other residents and the condition of the group home. *Id.* at 1-2, 7. Specifically, Appellant argued that uncleanliness in the bathroom by staff and residents causes Appellant to develop welts on his skin. *Id.* at 8-11. Appellant was formerly a chef and provided examples of his ability to prepare a meal for himself, including microwaving burritos, making pork chops, and correctly defrosting chicken. *Id.* at 2, 8-11. Appellant objected to habits and behaviors of residents and staff, discussing laundry habits and wasting electricity by leaving lights on. *Id.* at 1-3. Appellant described an issue with his personal TV not working and being thrown away without his permission. Since that incident, his speakers are not working. *Id.* at 4-5. Appellant also discussed eulogizing an individual who passed away. *Id.* at 5. Appellant argued that he lived independently between 1997-2012 and wishes to return to Section 8 housing to afford to live independently. *Id.* at 6-7. Appellant testified that others ask him why he is still at the group home, as he is doing great. *Id.* at 9. Appellant does not want to die in the group home.

## Findings of Fact

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

1. In 2013, Appellant was approved for the ABI-RH waiver and moved to a DDS-operated group home in Hudson, MA in 2017. Appellant continues to be eligible for the ABI-RH waiver and resides in the same group home.
2. On June 16, 2021, Appellant applied for a waiver transfer to move from the ABI-RH Waiver to the MFP-CL Waiver, seeking to move into the community independently. Exhibit 4 at C6.
3. On April 19, 2022, MassHealth notified Appellant that he is not eligible for MassHealth's MFP-CL Waiver because he cannot be safely served in the community. Exhibit 1.
4. Appellant filed a timely appeal on May 25, 2022. Exhibit 2.

5. Appellant is in his sixties. His primary diagnoses as documented are traumatic brain injury status post motor vehicle accident in 1988, cerebral infarction, spastic right sided hemiplegia, dorsalgia, encephalopathy, Type II diabetes mellitus, chronic diastolic congestive heart failure, low back pain, left ankle and foot pain, dermatitis, hypercholesterolemia, colon polyp, localized edema, chronic peripheral venous insufficiency, and affective disorder. *Id.* at C30 and D40.
6. On March 15, 2022 a nurse reviewer representing MassHealth's waiver program performed an eligibility assessment at the group home. Present at the assessment were Appellant, the house manager, a clinician, and a clinician intern. *Id.* at C40.
7. On February 17, 2021, Appellant received a neuropsychiatric evaluation with impression consistent with major neurocognitive disorder. There were several cognitive areas that remain impaired. *Id.* at D11-18. The doctor wrote that "the patient requires continued support for ADLs and IADLs and with decision making." *Id.* at D17.
8. On September 21, 2021, a neurologist opined that Appellant is not safe to live on his own as Appellant exhibits mild cognitive disorder due to the traumatic brain injury, and as he ages there may be further compromise. The neurologist wrote that there is a risk of injury due to his limited self-awareness regarding safety and physical limitations. *Id.* at D27-34
9. Staff notes from Appellant's group home dated January 1-30, 2022 indicate several times that group home staff needed to intercede and provide guidance to Appellant and other residents. *Id.* at 53-63.
10. On April 13, 2022, MassHealth and MRC met to discuss the application and determined that determined that based on available medical records and interviews, Appellant cannot be safely served in the community within the MFP-CL Waiver. Appellant continues to require a 24/7 residential and structured environment with oversight provided by the DDS behavior program that cannot be duplicated in the community. *Id.* at C33-34.

## Analysis and Conclusions of Law

Per 130 CMR 519.007(H)(2), an MFP-CL Waiver allows an applicant or member who is certified to need nursing facility services to receive specified waiver services, other than residential support services, in the home or community instead of in a nursing facility setting. To qualify for the MFP-CL Waiver, the member must meet clinical and age requirements:

(a) Clinical and Age Requirements. The MFP Community Living Waiver, as authorized under section 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 and 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;
- (3iii) 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) (emphasis added).

MassHealth determined Appellant did not meet the requirement at 130 CMR 519.007(H)(2)(v), that Appellant would be safely served in the community. MassHealth relied on determinations from Appellant's own clinical providers that Appellant cannot safely live independently. Appellant is adamant that he can live independently but there is not evidence in the record to refute the neurological findings. Accordingly, this appeal is denied.

## **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.

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Cynthia Kopka  
Hearing Officer  
Board of Hearings

cc:

MassHealth Representative: Margie Morel @ Umass Medical