

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2302872
<b>Decision Date:</b>	5/19/2023	<b>Hearing Date:</b>	5/16/2023
<b>Hearing Officer:</b>	David Jacobs		

**Appearances for Appellant:**

Appellant;

, Social Worker

**Appearances for MassHealth:**

Brad Goodier, RN, Disability Reviewer II



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

## APPEAL DECISION

<b>Appeal Decision:</b>	Denied	<b>Issue:</b>	Eligibility for Moving Forward Plan Waivers
<b>Decision Date:</b>	5/19/2023	<b>Hearing Date:</b>	5/16/2023
<b>Appearances for MassHealth:</b>	Brad Goodier, RN	<b>Appearances for Appellant:</b>	Pro se; Social Worker
<b>Hearing Location:</b>	Board of Hearings (Remote)		

### Authority

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

### Jurisdiction

Through notices dated March 28, 2023, MassHealth notified appellant that she is not eligible for participation in MassHealth's Moving Forward Plan Residential Supports Waiver (MFP-RS Waiver) or Moving Forward Plan Community Living Waiver (MFP-CL Waiver) (Exhibit 1). Appellant filed a timely appeal on April 10, 2023 (Exhibit 2). Denial of eligibility for a waiver program is a valid basis for appeal (130 CMR 610.032).

### Action Taken by MassHealth

MassHealth determined that appellant is not eligible for participation in the MFP-RS Waiver or the MFP-CL Waiver.

### Issue

The issue is whether MassHealth correctly determined that appellant is not eligible for participation in the MFP-RS Waiver or the MFP-CL Waiver because she cannot be safely served in the community within the terms of this waiver?

## Summary of Evidence

MassHealth was represented at hearing by a registered nurse from MassHealth's Disability and Community Services. Appellant appeared at hearing with her social worker (social worker A).

The registered nurse testified that MassHealth offers two home and community-based service (HCBS) Waivers; the MFP RS and the MFP-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, 7 days per week. The appellant applied for the MFP-CL and MFP-RS Waivers on January 11, 2023 (Exhibit 4, pages 45 and 49).

Below are the eligibility criteria for the MFP Waivers (Exhibit 4, pages 6-7):

- 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 18 years 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
- For the MFP-RS Waiver, the applicant must need residential support services with staff supervision 24 hours/day, 7 days/week.

The Waiver eligibility assessment took place on February 22, 2023. Present for this interview was the appellant and registered nurses representing MassHealth. The appellant was easily distracted and emotional, requiring redirection multiple times during the interview. She struggled to stay on topic, often not answering questions fully or attempting to change the subject (Exhibit 4, pages 70 and 75).

The assessment consists of completion of MFP documents including Minimum Data Set-Home Care (MDS-HC) (Exhibit 4, pages 53-65); Clinical Determination of Waiver Eligibility (Exhibit 4, pages 66-73); Acquired Brain Injury (ABI)/MFP Waivers Community Risks Assessment (Exhibit 4, pages 74); a review of the applicant's medical record; and a discussion with the facility staff.

The appellant is a 38-year-old female, currently residing in a facility, following hospitalization. The appellant was hospitalized from June 17, 2022, through August 5, 2022, due to bacteremia, drainage of psoas abscess, empyema, chest tube drainage, and discitis of the lumbar spine. She reports that she was found at home by her mother in extreme pain and transported to the hospital. Once stabilized she was discharged to a facility for ongoing supervision and care (Exhibit 4, page 70).

Past medical history includes alcohol dependence, cocaine abuse, post-traumatic stress disorder (PTSD), anxiety disorder, major depressive disorder, discitis, back pain, joint pain, chronic viral Hep C, and bacteremia (Exhibit 4, page 70).

The appellant has a substance use disorder (SUD) history that includes alcohol, cocaine, and IV drug use. The appellant states that she was drinking half of a handle of vodka and using cocaine daily until hospitalization. The appellant reports that she has attempted SUD groups and inpatient detox in the past without success and that she has maintained sobriety since admission to the skilled nursing facility (SNF). She stated that she has had urges to use alcohol and/or cocaine but does not act on them. No documentation of SUD group attendance in January or February of 2023, while the appellant stated she attends SUD groups intermittently at this time. Psych notes document that she remains ambivalent regarding long term sobriety (Exhibit 4, page 71).

The appellant remains homeless and stated to the Waiver RN that she does not wish to return to living with her mother due to the volatile nature of their relationship. The appellant has no additional informal supports, has failed previously in the community, and has lost custody of both her children due to being unable to maintain sobriety (Exhibit 4, page 72).

During the Waiver eligibility assessment review, the following documentation indicates that the appellant is a significant safety risk to herself and others:

- August 2, 2022: Hospital progress note by the appellant's doctor indicates that CT scan revealed worsening osteomyelitis/discitis complicated by worsening retropulsion of L3, resulting in severe spinal canal stenosis (Exhibit 4, page 104).
- August 15, 2022: Hospital progress note by the appellant's substance abuse counselor indicates that while attempting to assess substance use disorder (SUD) on this day, the appellant is distraught over irregularities within her DTA account. "[The appellant] was extremely emotional and could not/would not engage around anything sans current dilemma with DTA account" (Exhibit 4, page 130).
- November 9, 2022: Progress note by the appellant's certified nurse practitioner (CNP), states that, "Patient reports feeling more depressed lately", the CNP then recommends an increase in sertraline dosage for depression (Exhibit 4, page 139).

- November 25, 2022: Progress note by appellant's social worker (social worker B), indicates that the appellant has failed in the community previously due to substance abuse. "Resulting in problems with employment, stable housing, and family relationships. Resident lost custody of two daughters due to substance abuse. Resident is pre-contemplative about substance use disorder, does not believe she has a problem" (Exhibit 4, page 145).
- January 23, 2023: Progress note by social worker B, states that, "Resident remains ambivalent about long term sobriety, maintains belief that she can use moderately" (Exhibit 4, page 161).

On March 16, 2023, the appellant's case was discussed at the MassHealth Waiver Clinical Team review meeting. In addition, on March 22, 2023, as part of the MFP Waiver eligibility process, a second clinical review was conducted by the Massachusetts Rehabilitation Commission (MRC) Clinical team, who oversees the community living waiver, and The Department of Developmental Services (DDS), who oversees the -RS waiver. MassHealth, MRC and DDS determined that the appellant is not considered to be clinically eligible for participation in the MFP-CL and -RS Waivers due to her being a significant health and safety risk to herself and others; related to a history of substance use disorder. The appellant is in the early stages of recovery, suggestive of the pre-contemplative stage, with high risk of relapse. She requires a higher level of supervision and structure to maintain safety that cannot be duplicated in a residential setting, and she does not have the informal supports needed to provide this level of support in the community. Therefore, the appellant cannot safely be served within the terms of the MFP-CL or MFP-RS Waivers. On March 28, 2023, denial notices for the MFP -CL and -RS Waivers were mailed to the appellant (Exhibit 4, pages 46 and 50).

The appellant appeared during the hearing telephonically with social worker A. She testified that MassHealth's account of her history was accurate with only a minor disagreement about the order of some of the events that occurred during her initial hospitalization. She testified that despite MassHealth's finding she can care for herself in the community.

When confronted with her history of substance abuse the appellant testified that she is capable moderating her own use and does not require admission into a facility to do so. She testified that although she had her two children removed from her custody due to substance abuse that it was mostly due to the actions of her boyfriend at the time. The Department of Children and Families (DCF) had given her three strikes to avoid losing custody of her children. Two of those strikes were due to her boyfriend's use of heroin, and the last strike was due to her own use of alcohol. When asked why she was no history in 2023 of participating in substance abuse support groups the appellant explained that she went to a few meetings in late 2022, but they only served to upset her and make her desire the things the groups were talking about. When asked how the appellant planned to manage her substance abuse in the community, social worker A testified that she would work with the appellant to start attending substance abuse support meetings. The appellant testified that she was journaling and working on improving herself daily and would reach a point where she could start going to support meetings.

The appellant was also asked about the availability of housing and how she would manage her spinal pain and depression. For the question about housing the appellant testified that she was applying for social security benefits and hoping to afford a home for herself using that money. However, as of the time of this hearing she was unsure of her eligibility for such benefits. For the question about managing her spinal pain the appellant testified that she is exercising regularly to reduce her weight and had a scheduled consultation with a doctor coming up and could continue to go to appointments while living in the community. Finally for the question about depression social worker A said that she would set the appellant up with a psychiatrist and therapist to see regularly.

### **Findings of Fact**

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

1. Appellant is a 38-year-old female.
2. Appellant has a past medical history that includes alcohol dependence, cocaine abuse, post-traumatic stress disorder (PTSD), anxiety disorder, major depressive disorder, discitis, back pain, joint pain, chronic viral Hep C, and bacteremia.
3. The appellant has a substance use disorder (SUD) history that includes alcohol, cocaine, and IV drug use.
4. The appellant was hospitalized from June 17, 2022, through August 5, 2022, due to bacteremia, drainage of psoas abscess, empyema, chest tube drainage, and discitis of the lumbar spine.
5. Appellant was transferred to a skilled nursing facility on August 5, 2022 and has remained there ever since.
6. Appellant applied for the MFP-RS and MFP-CL Waivers on January 11, 2023.
7. On February 22, 2023, MassHealth conducted an in-person assessment for waiver eligibility at the skilled nursing facility where appellant resides; the in-person assessment consisted of completion of MFP documents including MDS-HC, Clinical Determination of Waiver Eligibility, Acquired Brain Injury/MFP Waivers Community Risks Assessment. The assessment also included a review of the applicant's medical record, and a meeting with the nursing facility care team.
8. During the Waiver eligibility assessment review, the following documentation indicates that the appellant is a significant safety risk to herself and others:
  - a. August 2, 2022: Hospital progress note by the appellant's doctor indicates that CT

scan revealed worsening osteomyelitis/discitis complicated by worsening retropulsion of L3, resulting in severe spinal canal stenosis

- b. August 15, 2022: Hospital progress note by the appellant's substance abuse counselor indicates that while attempting to assess substance use disorder (SUD) on this day, the appellant is distraught over irregularities within her DTA account. "[The appellant] was extremely emotional and could not/would not engage around anything sans current dilemma with DTA account"
  - c. November 9, 2022: Progress note by the appellant's certified nurse practitioner (CNP), states that, "Patient reports feeling more depressed lately", the CNP then recommends an increase in sertraline dosage for depression.
  - d. November 25, 2022: Progress note by social worker B, indicates that the appellant has failed in the community previously due to substance abuse. "Resulting in problems with employment, stable housing, and family relationships. Resident lost custody of two daughters due to substance abuse. Resident is pre-contemplative about substance use disorder, does not believe she has a problem."
  - e. January 23, 2023: Progress note by social worker B, states that, "Resident remains ambivalent about long term sobriety, maintains belief that she can use moderately."
9. The appellant continues to have complex medical history which can lead to pain and substance abuse; and she has failed in the community previously due to substance abuse.
10. The appellant had her two children removed from her custody due to substance abuse for being found to be abusing substances three times. Two of those times were from her then boyfriend abusing heroin and the third time was due to the appellant abusing alcohol.
11. The appellant attended substance abuse meetings in late 2022 but stopped in 2023 because they upset her and made her want the substances spoken about.
12. The appellant is applying for social security benefits but has not been granted them yet.
13. MassHealth determined that appellant cannot be safely supported by the services available within the MFP-RS or MFP-CL Waivers.
14. On March 28, 2023, MassHealth notified appellant of its denial of her applications for participation in both the MFP-RS and MFP-CL Waivers.

## **Analysis and Conclusions of Law**

The instant appeal is governed by the MassHealth Regulations, specifically 130 CMR 519.007:

**519.007: Individuals Who Would Be Institutionalized**

130 CMR 519.007 describes the eligibility requirements for MassHealth Standard coverage for individuals who would be institutionalized if they were not receiving home- and community-based services.

The criteria for the MFP Community Living Waiver, for which the Appellant has applied, is found within 130 CMR 519.007(H)(2):

**(H) Money Follows the Person Home- and Community-based Services Waivers.**

**(2) Money Follows the Person (MFP) Community Living 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; 130 CMR: DIVISION OF MEDICAL ASSISTANCE 519.007: continued
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 or 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. (*Emphasis added*)

MassHealth evaluated appellant's eligibility for services under both waivers and determined that she is not able to be safely served in the community within the terms of the waivers (130



CMR 519.007(H)(1)(a)(5) and (2)(a)(5). Appellant has not demonstrated otherwise. MassHealth's primary concern is that if the appellant is allowed to live in the community, she will relapse back into her history of substance abuse. Based on the appellant's testimony it is found that MassHealth's concerns are reasonable. The appellant admits she has stopped going to substance abuse support meetings because they upset her and make her want to use again. However, she offers no alternatives for how she will avoid relapse back into substance abuse if she moves back into the community. Her social worker offered that she would try to encourage the appellant to attend support meetings once in the community, but the appellant's own testimony that she has stopped going and does not want to go casts doubt on these plans. The only assurance the appellant gives otherwise that she is journaling and performing self-improvement which are found not to be convincing. The appellant lost custody of her children due to her substance abuse, and even though the appellant tries to diminish this fact by suggesting that it was mostly her boyfriend at the time who caused it, she admits it was also her own substance abuse as well. This testimony suggests the appellant does not recognize the severity of her substance abuse problem and creates sincere doubts about her ability to maintain sobriety without the support that her current facility provides.

Furthermore, if the appellant were to pursue the CL waiver, she testified that she would be able to pay for her own home with money provided by social security benefits. However, she does not know if she even will be eligible for such benefits or how much she will receive. Therefore, it cannot be said that the appellant has a plan for where she is going to live after entering the community. Moreover, the appellant testified she has plans to see medical professionals to help with her spinal pain and mental health issues, but it is doubtful the appellant would be able to maintain these services if she were homeless. The appellant does not seem to consider living in a group home setting that the RS waiver provides acceptable.

All the above factors, taken together, support MassHealth's determination that appellant cannot be safely served in the community within the terms of the waivers. The current evidence supports a finding that appellant's risk of relapse into substance abuse is high and that she has no effective means to provide for herself and avoid homelessness if she were to enter the community.

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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David Jacobs  
Hearing Officer  
Board of Hearings

cc:

MassHealth Representative: Brad Goodier, RN, Disability and Community Services, 333 South Street, Shrewsbury, MA 01545