

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2304053
<b>Decision Date:</b>	08/18/2023	<b>Hearing Date:</b>	07/06/2023
<b>Hearing Officer:</b>	Casey Groff, Esq.		

**Appearance for Appellant:**

*Pro se;*



**Appearance for MassHealth:**

Linda Phillips, R.N., BSN, LNC-Csp., Associate  
Director of Appeals & Regulatory  
Compliance, Disability & Community-Based  
Services (DCS) Division;  
Leanne Govoni, R.N., BSN, Associate Director  
of Clinical Eligibility, DCS  
Brad Goodier, R.N., BSN, Disability Reviewer,  
DCS



*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>	Moving Forward Plan CL- Waiver
<b>Decision Date:</b>	08/18/2023	<b>Hearing Date:</b>	07/06/2023
<b>MassHealth's Rep.:</b>	Linda Phillips, RN, <i>et al.</i>	<b>Appellant's Rep.:</b>	<i>Pro se</i> ; ICS worker
<b>Hearing Location:</b>	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

Through a notice dated May 10, 2023, MassHealth notified Appellant that it would be disenrolling her from its Moving Forward Plan Community Living (MFP-CL) Home-and-Community Based Services (HCBS) Waiver because she no longer met the clinical eligibility criteria. See 130 CMR 519.007(H)(2) and Exhibit 3. Appellant filed this appeal in a timely manner on May 19, 2023, but did not identify the MassHealth action that she intended to appeal. See 130 CMR 610.015(B); Exh. 1, p. 2. On May 19, 2023, the Board of Hearings (BOH) dismissed the matter for failure to state grounds for the requested appeal. See Exh. 2. On May 24, 2023, Appellant sent BOH an updated fair hearing request and copy of the May 10<sup>th</sup> disenrollment notice. See Exh. 3. Upon receipt, BOH vacated its dismissal and scheduled a hearing. Termination of a MassHealth benefit is valid grounds for appeal. See 130 CMR 610.032.

### Action Taken by MassHealth

MassHealth notified Appellant that it was disenrolling her from the MFP-CL Waiver because she no longer met clinical eligibility criteria.

## Issue

The appeal issue is whether MassHealth was correct in determining that Appellant no longer met all requisite clinical eligibility criteria for MassHealth's MFP-CL Waiver, and on this basis, notified Appellant that she would be disenrolled from the program.

## Summary of Evidence

At hearing, MassHealth was represented by a registered nurse (RN) that serves as the associate director of Appeals and Regulatory Compliance in UMass Medical School's Disability & Community Based Solutions division. The MassHealth representative explained that MassHealth offers several Home and Community-Based Service (HCBS) waivers, including the Moving Forward Plan Waiver for Residential Services (MFP-RS) and the MFP Waiver for Community Living (MFP-CL). Both waivers are intended to 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. To enroll, MassHealth requires that all participants or applicants satisfy the regulatory criteria outlined in 130 CMR 519.007(H)(2), including the requirement that the individual "must be able to be safely served in the community within the terms of the MFP-CL waiver." See Exh. 4, p. 38.

Next, through testimony and documentary submissions, the MassHealth representative presented the following background: Appellant is under the age of 65 and has been enrolled in MassHealth's MFP-CL waiver since 2020.<sup>1</sup> In December of 2012, Appellant was diagnosed with an "unspecified brain disorder" after she sustained a right middle cerebral artery stroke. See id. at 47; 64-65. Appellant's additional diagnoses include depression, anxiety, bipolar disorder, left sided hemiparesis, and generalized weakness. Id. at 64-65. Appellant lives in her own apartment with her boyfriend. Through the MFP-CL waiver, Appellant receives coordinated community supports, including in-home caregiver services provided by Senior Helpers. The Massachusetts Rehabilitation Commission (MRC) is the agency that manages her care.

On September 22, 2022, MassHealth received a request from MRC seeking to transfer Appellant from the MFP-CL waiver to the MFP-RS waiver due to a reported change in status and need for increased support. MRC cited the following grounds for the proposed action:

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<sup>1</sup> In 2013, after sustaining her stroke and completing a stay at a skilled nursing facility (SNF), Appellant was approved for MassHealth's acquired brain injury (ABI) waiver, allowing her to receive coordinated care in the community. Upon discharge from the SNF, Appellant's health care proxy was invoked after a finding that she was incapable of making informed decisions. However, in 2020, Appellant was deemed "her own person" and capable of directing her care. MassHealth then transferred her from the ABI waiver to the MFP-CL waiver and at that time, was living independently in her own apartment.

[Appellant] requires more support than what the MFP-CL waiver can provide. The past few months the incidents and her behaviors have exacerbated placing her housing, provider services and her life at risk. Nightingale VNA that does her daily med management has also reported issues with providing her visits as she often does not respond or refuses treatment. This CM feels she will be safer under the residential waiver but at this time [Appellant] is not in agreement to transfer to the MFP-RS waiver.

See id. at 62.

In March of 2023, a registered nurse from the MFP waiver (the “MFP nurse reviewer”) initiated Appellant’s program redetermination. This process included a review of Appellant’s relevant medical records, clinical documentation, and community management progress notes, as well as performing an in-person assessment. The documentation indicated the following: Appellant requires assistance with activities of daily living (ADLs) and instrumental activities of daily living (IADLs); she has a history of falls due to stroke with left hemiplegia; and has had recent medical events for which she sought emergency room (ER) treatment. Id. at 65-68. Specifically, in September of 2022, Appellant had two hospital encounters in which she presented to the ER with altered mental status, incontinence, and possible seizure activity. In February 2023, she again returned to the ER for altered mental status, and upon admission, was diagnosed and treated for a urinary tract infection (UTI). Id.

The review further detailed that Appellant had an escalation in problematic behaviors, including frequent absenteeism from her day program, refusal of services, non-compliance with care, rude and aggressive behaviors with staff, and inappropriate sexual comments/behaviors by her live-in boyfriend. The MassHealth representative provided a selection of specific entries documented by Appellant’s caregivers and case management provider, including the following:

- November 8, 2022: a RN documented Appellant’s “chronic pattern” Appellant’s failure to cooperate with scheduled caregiver visits, including specific instances when a caregiver would arrive for a scheduled shift to find that Appellant was either not home or not answering the door and not answering her phone. Id. at 86.
- November 14, 2022: An MRC case worker wrote that while caregivers are assisting Appellant with services, her boyfriend remains present and “expresses his sexual desires for [her] while staff are bathing her or helping with ADL’s.” Id.
- March 1, 2023: Appellant reported to caregivers that she was no longer taking birth control and was “trying to get pregnant.” The note also referenced that Appellant’s children were removed from her custody due to safety and neglect concerns cited by DCF. Id. at 87-88.

- March 28, 2023: A nurse caregiver that attended Appellant’s in-person assessment noted that upon arrival Appellant “greeted them at the door, half dressed,” and was offered help to finish getting dressed. The nurse further stated that “after the meeting, [Appellant] was cautioned by [representatives from both MRC and MassHealth] that sending caregivers home before the end of their shift or not being home when the caregivers are scheduled to arrive, could greatly affect her ability to remain on the waiver.” Id. at 85.
- April 6, 2023: case management note states that Appellant’s morning caregiver arrived at Appellant’s home for the start of her 9am shift and that Appellant was not home and not answering her phone. Later that day, the afternoon caregiver accompanied Appellant on an outing with her boyfriend. When the boyfriend was cited for inappropriately parking in a handicap spot, Appellant and her boyfriend “repeatedly yelled at the caregiver that she would need to pay the citation for them,” prompting the caregiver to subsequently request she be removed from Appellant’s case. Id. at 85.
- April 8, 2023: case management note states that a caregiver arrived at Appellant’s home for her scheduled shift at 8am. There was no answer at the door or on the phone. After waiting an hour, the caregiver left at the direction of her supervisor. Appellant later called the office and stated that she had been sleeping. That afternoon, Appellant’s boyfriend found the caregiver’s contact information through social media and left her a voice message “yelling and stating that he is now taking care of [Appellant] because [the agency] failed to show up as scheduled.” As a result, Appellant and her boyfriend were educated about appropriate boundaries. Id.

Additional notes in Appellant’s clinical record reflect concerns related to Appellant’s ability to live independently, including caregivers describing her home as “excessively cluttered with food and trash on table and counter,” a “heavily soiled bathroom,” concerns that Appellant’s cat appeared malnourished with patches of fur missing and a heavily soiled litter box. Id. at 85. Other entries noted Appellant repeatedly arriving late for her scheduled day program, as well as repeated episodes of not being home to receive scheduled care. Id. at 80-88.

On March 28, 2023, the MFP nurse reviewer conducted the in-person assessment of Appellant at her apartment.<sup>2</sup> An LPN from Senior Helpers and the MRC Waiver coordinator (appearing via zoom) also attended. In her report, the MFP nurse described Appellant as being “easily distracted and required frequent redirection and cueing to answer questions.” Id. at 66. She also reported that during the interview, Appellant became engaged in an argument with her boyfriend, who was then asked to leave. During the interview, Appellant denied being non-compliant with care or engaging in inappropriate behaviors. Appellant reported that she was

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<sup>2</sup> Appellant’s boyfriend was in the apartment but not an active participant, and later asked to leave after he and Appellant had an argument.

attending her day program and could manage her current medication regimen. In the report, it was noted that these statements were not corroborated by the LPN from Senior Helpers. Id. at 66.

On April 10, 2023, the MFP nurse followed-up with a caregiver from Senior Helpers. During their conversation, the caregiver reported that since the assessment, Appellant continued to miss scheduled caregiver visits. The caregiver stated that Appellant calls her and the agency multiple times per-day, at all times of the day and night, demanding care and becoming hostile and manipulative if she does not have her needs met immediately. The caregiver expressed that she was doubtful of her own ability to continue providing care to Appellant given the escalation in behaviors and lack of boundaries by her and her boyfriend. Id. at 67.

The MFP nurse received additional information that Appellant had recently been involved in a late-night motor vehicle accident and has been cited in complaints by her property manager (i.e., that Appellant is out late at night, wanders the halls and property with her boyfriend, and disturbs other residents). The MassHealth representative testified that Appellant has been educated on appropriate behaviors and advised that noncompliance with care can result in loss of waiver services; these efforts, however, have been unsuccessful. Furthermore, MRC has had discussions with Appellant about transitioning to the MFP-RS waiver so that she can receive greater level of care and residential placement, however, Appellant has indicated she does not wish to pursue this alternative.<sup>3</sup> Id. 67-68.

On April 14, 2023, Appellant's case was discussed at the MassHealth Waiver Clinical Team review meeting which includes the MRC Clinical Team. MassHealth and MRC agreed that based on the redetermination findings, Appellant is a significant safety risk and cannot be safely served in the community within the terms of the waiver. MassHealth and MRC thus found that Appellant was no longer clinically eligible for participation in the MFP-CL Waiver. MassHealth notified Appellant of this decision via a May 10, 2023 written notice and that she would be disenrolled from the waiver program on May 29, 2023. See Exh. 3.

The MassHealth representative explained that Appellant's benefit had not yet terminated due to protections secured pending this appeal. Because Appellant declined transferring to the MFP-RS waiver, MassHealth and MRC are working to transition Appellant out of the program by contacting her providers and facilitating a PCA referral for ADL and IADL supports. Id. at 43.

Appellant and a caregiver from Senior Helpers appeared at the hearing by telephone. Appellant testified that the incidents cited by MassHealth were in the past, and that she has been doing much better in the past few months. Appellant explained that she has anxiety, depression, and was recently diagnosed with ADHD. Her doctor is initiating a treatment plan for her to start an

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<sup>3</sup> Appellant was informed that once she is removed from a MFP waiver program entirely, she would not become eligible for enrollment if, and until, she has another 90-day stay at a nursing or long-term care facility.

ADHD medication, and this will improve her ability to pay attention, focus, and understand things better. Appellant confirmed that her boyfriend still lives with her. When asked if she would consider transferring to the MFP-RS program Appellant confirmed that she wanted to remain in her apartment and would not opt to transition to a residential services placement.

Appellant's caretaker testified that since the meeting on March 28, 2023, Appellant has been doing "90% better." She further explained that Appellant underwent neuropsychological testing in May 2023. They recently received the test findings which confirmed her diagnoses of anxiety, depression, and ADHD. She is about to start medication for her ADHD which is expected to treat many of the underlying behavioral symptoms. She reported that Appellant has been more active in the community and attending her day-program 3-days per week. The caregiver took issue with the fact that no one from the waiver program or her MRC case manager had been out to visit since the meeting to review Appellant's progress. Appellant had gone above and beyond to keep services in place, and this is not captured in the small snapshot MassHealth used to make its determination.

In response, the MassHealth representative explained that when doing any redetermination, there is a 3-month look back period. If Appellant's behaviors had improved, MassHealth would need additional documentation to corroborate such change. To date, MassHealth received no evidence to suggest Appellant can be safely served in the community. Rather, the record reflected Appellant's continued non-compliance with care, even after she received warnings that her behaviors could jeopardize her services.

## **Findings of Fact**

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

1. Appellant is under the age of 65 and has been enrolled in MassHealth's MFP-CL waiver since 2020.
2. In December of 2012, Appellant was diagnosed with an "unspecified brain disorder" after she sustained a right middle cerebral artery stroke; she has additional diagnoses that include depression, anxiety, bipolar disorder, left sided hemiparesis, and generalized weakness.
3. Appellant had neuropsychological testing in May 2023, the results of which identified additional diagnosis of ADHD and she intends to start medication treatment.
4. Appellant lives in her own apartment with her boyfriend.
5. Appellant requires assistance with ADLs and IADLs; she has a history of falls due to stroke with left hemiplegia.
6. On September 22, 2022, MassHealth received a request from MRC seeking to transfer

Appellant from the MFP-CL waiver to the MFP-RS waiver stating the following grounds for the proposed action: *[Appellant] requires more support than what the MFP-CL waiver can provide. The past few months the incidents and her behaviors have exacerbated placing her housing, provider services and her life at risk. Nightingale VNA that does her daily med management has also reported issues with providing her visits as she often does not respond or refuses treatment. This CM feels she will be safer under the residential waiver but at this time [Appellant] is not in agreement to transfer to the MFP-RS waiver.* Id. at 62.

7. In March of 2023, a registered nurse from the MFP waiver initiated a redetermination.

8. In March 2023, the MFP nurse initiated a redetermination which included a review of Appellant's clinical notes spanning back to November 2022, and which documented Appellant's multiple repeated instances of non-compliance with care, absenteeism from day-program services, refusal and/or unavailability for scheduled caregiving services, being verbally aggressive/inappropriate with staff.

9. Clinical notes from the review period reported concerning living environment, including reporting her home as "excessively cluttered with food and trash on table and counter," a "heavily soiled bathroom," concerns that Appellant's cat appeared malnourished with patches of fur missing and a heavily soiled litter box.

10. In September of 2022, Appellant had two hospital encounters in which she presented to the ER with altered mental status, incontinence, and possible seizure activity; and in February 2023, she returned to the ER for altered mental status, and was diagnosed and treated for a UTI.

11. On March 28, 2023, the MFP nurse reviewer conducted the in-person assessment of Appellant at her apartment, finding that Appellant was "easily distracted and required frequent redirection and cueing to answer questions."

12. At the conclusion of the March 28<sup>th</sup> assessment, Appellant was cautioned by MRC and MassHealth representatives that her unavailability for scheduled care and/or refusal of care could greatly affect her ability to remain on the waiver.

13. On April 6, 2023, Appellant's morning caregiver arrived at Appellant's home for the start of her 9am shift and found that Appellant was not home and not answering her phone; later that afternoon, Appellant and her boyfriend yelled at the afternoon caregiver, demanded that she pay a parking ticket the boyfriend incurred during an outing, and prompting the caregiver to ask to be removed from her case.

14. On a separate occasion, on April 8, 2023, Appellant was not home and answering her phone when her caregiver arrived for her scheduled shift at 8am; prompting the caregiver to leave after waiting an hour for Appellant; later this afternoon Appellant's boyfriend found the



caregiver's number through social media and left a voice message yelling at the caregiver that he had to take care of Appellant.

15. During a April 10, 2023 follow-up conversation, Appellant's caregiver reported to the MFP nurse that Appellant's behaviors continued following the in-person assessment.

16. On April 14, 2023, the MassHealth Waiver Clinical Team met to review Appellant's redetermination findings and concluded that Appellant was a significant safety risk and could not be safely served in the community within the terms of the Waiver; thus no longer eligible for continued enrollment in the program.

17. MassHealth notified Appellant of this decision via a May 10, 2023 written notice and informed her that she would be disenrolled from the waiver on May 29, 2023.

18. Because Appellant declined transferring to the MFP-RS waiver, MassHealth and MRC are working to transition Appellant out of the program by contacting her providers and facilitating a PCA referral for ADL and IADL supports.

## **Analysis and Conclusions of Law**

The sole issue on appeal is whether MassHealth erred in its decision to disenroll Appellant from the MFP-CL Waiver because she no longer met clinical eligibility criteria. MassHealth regulations at 130 CMR 519.007 describe the eligibility requirements for individuals who would be institutionalized if they were not receiving home and community-based services. For the MFP-CL waiver, MassHealth has established the following enrollment criteria:

(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:

- (i) 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;
- (ii) 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;
- (iii) must have received MassHealth benefits for inpatient services, and be MassHealth eligible at least the day before discharge;

(iv) needs one or more of the services under the MFP Community Living Waiver;

***(v) is able to be safely served in the community within the terms of the MFP Community Living Waiver;*** and

(vi) 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)

In this case, MassHealth seeks to disenroll Appellant from the MFP-CL waiver because it determined she does not meet the criteria under subsection (v) above; specifically, that she cannot be safely served in the community within the terms of the Waiver. Id. In consideration of the evidence in the record, Appellant has not met her burden in proving that MassHealth erred in its decision. As part of the redetermination process, MassHealth conducted a thorough assessment of Appellant's medical history, reviewed clinical records, and conducted an in-person assessment of Appellant at her apartment. According to these sources, Appellant has demonstrated ongoing problematic behaviors that prevent her from receiving the care she requires. In coming to its determination, the MassHealth Clinical Waiver team noted Appellant's pattern of refusing care, not being present to receive scheduled caregiver visits, and being verbally aggressive and inappropriate with her caretakers. The clinical teams from MassHealth and the MRC came to the informed conclusion that Appellant is at risk for community failure under the terms of the MFP-CL waiver and that she requires greater residential supports. Aside from the testimony offered by Appellant and her caregiver, there was no evidence to suggest that Appellant has made any marked improvement such that she can now be safely served in the community. Rather, the evidence shows that as early as September 2022, MRC flagged Appellant's case for redetermination due to behaviors that had reportedly been escalating over the course of 18 months. Appellant continued the same behaviors, including refusal of care and inappropriate behavior, up and through the review period in March and April of 2023. In considering the entirety of evidence presented, Appellant did not demonstrate by a preponderance of the evidence that MassHealth erred in its decision to disenroll her from the MFP-CL Waiver.

Based on the foregoing, this appeal is DENIED.

## **Order for MassHealth**

Rescind aid pending. Implement intended action as stated in 5/10/23 notice adjusting disenrollment date two (2) weeks from date of this decision.

## 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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Casey Groff, Esq.  
Hearing Officer  
Board of Hearings

cc:

MassHealth Representative: Linda Phillips, RN, Associate Director, Appeals, Regulatory Compliance & Complex Cases, Disability & Community-based Services, 333 South Street, Shrewsbury, MA 01545

Appellant Representative: [REDACTED]  
[REDACTED]