

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied in Part; Dismissed in Part	Appeal Number:	2305324
Decision Date:	11/17/2023	Hearing Date:	08/10/2023
Hearing Officer:	Mariah Burns	Record Open to:	10/02/2023

Appearance for Appellant:



Appearance for MassHealth:

Linda Phillips, RN, BSN, LNC-CSp, Associate
Director – Appeals and Regulatory Compliance
Leanne Govoni, RN, Associate Director –
Clinical Services



*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 in Part; Dismissed in Part	Issue:	Home and Community Based Services Waiver; Moving Forward Plan – Residential Services
Decision Date:	11/17/2023	Hearing Date:	08/10/2023
MassHealth's Rep.:	Linda Phillips, et. al.	Appellant's Rep.:	
Hearing Location:	Remote	Aid Pending:	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 June 13, 2023, MassHealth denied the appellant's application for the Acquired Brain Injury Residential Habilitation Waiver, the Acquired Brain Injury Non-Residential Habilitation Waiver, the Moving Forward Plan Residential Supports Waiver, and the Moving Forward Plan Community Living Waiver, all due to clinical ineligibility. Exhibit 1. The appellant filed this appeal in a timely manner on July 5, 2023. See 130 CMR 610.015(B) and Exhibit 2. On June 29, 2023, the Board of Hearings issued a dismissal of the appellant's request for fair hearing for failure to provide a copy of the notice at issue. The appellant properly responded and submitted the appropriate documentation, and the case was scheduled for hearing. Denial of acceptance to a Home- and Community-Based Services (HCBS) Waiver Program due to clinical ineligibility is valid grounds for appeal. See 130 CMR 610.032(G).

Action Taken by MassHealth

MassHealth denied the appellant's application for four HCBS Waiver Programs due to clinical ineligibility.

Issue

As the appellant concedes ineligibility for the two Acquired Brain Injury waivers and chose not to pursue an appeal for the Moving Forward Plan Community Living Waiver, at issue is whether MassHealth correctly determined that the appellant is clinically ineligible for the Moving Forward Plan Residential Supports Waiver.

Summary of Evidence

The appellant was represented telephonically at hearing by his attorney. His sister and two workers from the nursing facility in which he resides testified on his behalf. MassHealth was represented by two registered nurses from UMass Chan Medical School, which runs MassHealth's HCBS Waiver programs. The following is a summary of the testimony presented and evidence provided at hearing.

The appellant is an adult MassHealth member over the age of 65 who has had a diagnosis of unspecified developmental disability since birth. He has been a Massachusetts Department of Mental Health (DMH) client since 1986 and has received services from the Massachusetts Department of Developmental Services (DDS) since 2021. He has resided in a locked unit at the nursing facility in question since [REDACTED]. The appellant resided in the community living independently in [REDACTED] Massachusetts until 2015, when he was admitted to [REDACTED] [REDACTED] for psychiatric assessment and treatment. He was discharged to the [REDACTED], and after approximately 16 months, he transitioned to a [REDACTED] group home, where he resided for just over a month before being detained pursuant to M.G.L. ch. 123, § 12 and admitted to [REDACTED] [REDACTED], and eventually [REDACTED] Treatment Center in [REDACTED]. It was from there that he was admitted to the nursing facility in which he currently resides.

In 2020, the appellant was hospitalized for psychiatric evaluation. During that stay, the appellant was diagnosed with autism spectrum disorder and was recommended for relevant treatment and services. The appellant's current diagnoses include paranoid schizophrenia¹, schizoaffective disorder, bipolar disorder, autistic disorder, and pervasive developmental disorder.

On March 30, 2023, the appellant's sister and healthcare proxy filed an application on his behalf for the MassHealth Moving Forward Plan - Residential Supports (MFP-RS) HCBS Waiver program. On May 9, 2023, MassHealth conducted an in-person assessment for Waiver-eligibility, meeting with the appellant and staff from the nursing facility. The assessment consisted of MFP documents including the Minimum Data Set-Home Care (MDS-HC) (Exhibit 6 at 84-96); Clinical Determination of Waiver Eligibility (Exhibit 6 at 97-104); ABI/MFP Waivers Community Risks Assessment (Exhibit 6 at 105); Risk Assessment-ABI-N/MFP-CL Caregiver Supplement (Exhibit 6

¹ There is some dispute as to whether this is an appropriate diagnosis for the appellant.

at 106-107); a review of the applicant's medical record; and discussions with nursing facility staff. After completing the assessment, the nurse reviewer determined that the appellant requires 24/7 hour care and/or supervision that cannot be safely met with the services available under the waiver and that he exhibits significant health and safety risks that preclude his transition to the community. Exhibit 6 at 100.

The nurse reviewer's summary highlights portions of the appellant's medical history which indicate that he has "baseline behavior of being aggressive and intrusive at times." Exhibit 6 at 142. Provider notes state that the appellant "has a history of violence towards staff, being hypersexual, episodically agitated and yelling out at various times." *Id.* at 149. The nurse reviewer noted specific instances of documented aggression, threatened self-harm, and hypersexual behaviors. *Id.* at 102.

The nurse reviewer and the MassHealth representatives concurred that the MFP-RS does not have a group home that would be able to provide the appellant with the supervision and redirection that he needs to be safely and appropriately served. The nurse reviewer wrote that the appellant is at risk for psychiatric decompensation, caregiver alienation, and exploitation, and that his history of verbal and physical aggression make him a poor candidate for the program. The MassHealth representatives reported that the group homes associated with the MFP-RS are staffed 24/7 by personal care attendants (PCAs) who are trained largely in oral medication management and assistance with activities of daily living such as mobility, bathing, and toileting. The workers at the MFP-RS group homes do not have the requisite psychiatric training to work with someone with the appellant's needs, and any disruptive behavior would likely result in the appellant being transported to the emergency room, which puts him further at risk for psychiatric decompensation. The MassHealth representatives testified that level of support, structure, and redirection required to safely serve the appellant cannot be duplicated through the MFP-RS waiver.

Two staff members from the nursing facility in which the appellant resides proffered testimony on the appellant's behalf. They reported that the appellant's behavioral issues typically manifest in verbal aggression and outbursts, and that he physically postures and clenches his fists. When he gets upset, they try to redirect and de-escalate him. They also explained that the number of residents and loudness can be a big trigger for the appellant. They opined that he would do better in a smaller, quieter setting with consistent staff that has experience working with autism and could provide 1:1 support when needed. The MassHealth representatives replied that such a setting cannot be provided through the MFP-RS waiver.

The appellant's sister also testified at hearing. She provided some context to his youth and history prior to his admission to the facility. She also explained that, about six times per year, she takes the appellant out of the nursing facility and spends 2-3 days with him at their childhood home in Western Massachusetts. She reported that, in instances where the appellant gets upset or fixated on something, she calmly redirects him and is able to refocus him. She believes that he would

benefit from an appropriate placement in the community where he could have privacy along with socialization others and supports specifically for people with autism.

The record was kept open to give the parties an opportunity to supplement their filings and submit written memoranda. The appellant submitted his on September 11, 2023, and MassHealth responded on September 27, 2023. Included in the appellant's submission were two affidavits from a registered nurse with experience in working with individuals with intellectual/developmental disability (I/DD), and with certain community-based waiver programs.² The nurse writes that she was employed by an organization that used HCBS wavier funding "to provide active treatment to individuals with I/DD who also have complex needs," including autism, though she did not specify which from which HCBS waivers her organization received funding. Exhibit 7 at 12-13. She further writes that the appellant's needs could be served in the community "with appropriate supports" including residential services from "a provider with experience in working with people with autism, in order to successfully integrate into the community." *Id.* at 29. Finally, she states "the restrictive eligibility criteria used to exclude [the appellant] from the MFP residential waiver program can and should be modified to align with other community waiver programs operated by the Executive Office of Health and Human Services." *Id.* at 56.

The appellant also submitted letters from two physicians, one clarifying his diagnosis as presenting as autism spectrum disorder (Exhibit 7 at 67), and the other opining that the appellant "could be served safely in a small, specialized residential setting with an appropriate behavioral plan developed and implemented by an autism specialist and with staff trained in using the behavioral plan and familiar with working with adults with autism." *Id.* at 68.

Findings of Fact

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

1. The appellant is an adult MassHealth member over the age of 65 who has resided in a locked unit at a skilled nursing facility since [REDACTED]. Testimony, Exhibit 5, Exhibit 6 at 129.
2. The appellant has had a diagnosis of unspecified developmental disability since birth. Testimony. He has been a Massachusetts Department of Mental Health (DMH) client since 1986 and has received services from the Massachusetts Department of Developmental Services (DDS) since 2021. Testimony, Exhibit 6 at 101.

² I give considerably less weight to the probative value and credibility of this affidavit than I do the sworn testimony, as it was not subject to examination by the Commonwealth, nor was I able to ask any clarifying questions of the signee.

3. The appellant has resided in a locked unit at the nursing facility in question since [REDACTED]. Testimony, Exhibit 6 at 101. The appellant resided in the community living independently in [REDACTED] Massachusetts until 2015, when he was admitted to [REDACTED] for psychiatric assessment and treatment. *Id.* He was discharged to the [REDACTED], and after approximately 16 months, he transitioned to a [REDACTED] group home, where he resided for just over a month before being detained pursuant to M.G.L. ch. 123, § 12 and admitted to [REDACTED], and eventually [REDACTED] Treatment Center in [REDACTED] 2016. *Id.* It was from there that he was admitted to the nursing facility in which he currently resides. *Id.*

4. In 2020, the appellant was hospitalized for psychiatric evaluation. During that stay, the appellant was diagnosed with autism spectrum disorder and was recommended for relevant treatment and services. Testimony, Exhibit 6 at 101, Exhibit 7 at 67.

5. The appellant's current diagnoses includes paranoid schizophrenia, schizoaffective disorder, bipolar disorder, autistic disorder, and pervasive developmental disorder, though there is a dispute as to whether paranoid schizophrenia and schizoaffective disorder are appropriate diagnoses. Testimony, Exhibit 6 at 143, Exhibit 7 at 67.

6. On March 30, 2023, the appellant's sister and healthcare proxy filed an application for the MassHealth Moving Forward Plan - Residential Supports (MFP-RS) HCBS Waiver program.³ Exhibit 6 at 72.

7. On and after May 8, 2023, MassHealth conducted an in-person evaluation and clinical review of the appellant's application. Exhibit 6 at 101. After that review, on June 13, 2023, MassHealth determined that the appellant was not eligible for the MFP-RS Waiver because his needs could not be safely served in the community within the terms of the waiver. Exhibit 1.

8. The appellant has a history of violence towards the staff, being hypersexual, episodically agitated and yelling out at various times. Exhibit 6 at 149. He has a baseline behavior of being aggressive and intrusive at times. Exhibit 6 at 142.

9. The appellant would require a community placement in a small, specialized residential setting with specific support and staff trained in working with adults with autism. Testimony, Exhibit 7 at 30-31 and 68.

10. The MFP-RS Waiver does not have a group home that provides specialized services for residents with autism. Testimony. MFP-RS group homes are staffed by PCAs who have not received appropriate training for working with someone with the appellant's needs. Testimony. If

³ The appellant also applied for the Acquired Brain Injury – Residential Habilitation, Acquired Brain Injury – Non-residential Habilitation, and Moving Forward Plan – Community Living Waivers, which are not relevant to this appeal. He was similarly denied participation in these waivers.

the appellant were to have a behavioral problem at an MFP-RS group home, it would likely result in his being transported to the emergency room by ambulance, further putting him at risk of psychiatric decompensation. Testimony, Exhibit 6 at 101-104.

Analysis and Conclusions of Law

MassHealth offers certain Home- and Community-Based Services (HCBS) Waiver programs for MassHealth members requiring nursing home level of care but wishing to reside in the community. Among those programs are: Acquired Brain Injury – Residential Habilitation (ABI-RH) (found at 130 CMR 519.007(G)(1)), Acquired Brain Injury – Non-residential Habilitation (ABI-N) (found at 130 CMR 519.007(G)(2)), Moving Forward Plan⁴ - Residential Supports (MFP-RS) (found at 130 CMR 519.007(H)(1)), and Moving Forward Plan – Community Living (MFP-CL) (found at 130 CMR 519.007(H)(2)). Although the appellant submitted applications for and was denied acceptance into each of these programs, he represented at hearing that he only intends to pursue an appeal related to the denial of his MFP-RS application. Therefore, the appellant's appeals with respect to the denial of applications for ABI-RH, ABI-N, and MFP-CL are hereby DISMISSED.

The sole issue on appeal is whether MassHealth erred in denying Appellant's application for enrollment in the MFP-RS Waiver program based on its determination that he did not meet clinical eligibility criteria. MassHealth has set the following eligibility requirements for the MFP-RS Waiver program:

The MFP Residential Supports 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 residential support services and other specified waiver services in a 24-hour supervised residential setting 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 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 Although MassHealth has changed the name of the MFP plan to Moving Forward Plan, the regulations in effect at the time of the appellant's denial from the program reflected a name of Money Follows the Person.

4. must be assessed to need residential habilitation, assisted living services, or shared living 24-hour supports services within the terms of the MFP Residential Supports Waiver;

5. is able to be safely served in the community within the terms of the MFP Residential Supports 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)(1)(a) (Emphasis added).⁵

At any fair hearing conducted under 130 CMR 610, the appellant has the burden of proof “to demonstrate the invalidity of the administrative determination.” *Andrews v. Division of Medical Assistance*, 68 Mass. App. Ct. 228, 231 (2006). The fair hearing decision, established by a preponderance of evidence, is based upon “evidence, testimony, materials, and legal rules, presented at hearing, including the MassHealth agency’s interpretation of its rules, policies and regulations.” 130 CMR 610.082(A) and (B).

In this case, MassHealth denied the appellant’s application for the MFP-RS Waiver because it determined that the appellant did not meet the criteria under subsection (5) above, specifically that his needs cannot be safely served in the community within the terms of the MFP-RS Waiver program. The appellant argues that his needs can be met safely in the community through the MFP-RS Waiver. After hearing and considering all of the evidence, I find that the appellant has not met his burden of proof to demonstrate error in MassHealth’s determination that he is currently ineligible for the MFP-RS Waiver.

The MassHealth representatives credibly testified that the MFP-RS Waiver program does not currently have a group home designed for someone with autism. They explained that the group home staff members are trained as PCAs who generally provide oral medication administration assistance with activities of daily living. The staff at the MFP-RS group homes are not psychiatric medical professionals who are capable of safely managing someone with the appellant’s needs. I credit the MassHealth representatives in their testimony that, in the event that the appellant exhibited a behavioral issue, he would likely be sent to the emergency room by ambulance, which puts him at risk for further decompensation and would create chaos for him. Simply put, I find that the group homes currently served by the MFP-RS Waiver program are not designed to meet the appellant’s needs. The appellant has provided no evidence to counter this.

⁵ The waiver program also has certain financial requirements an applicant must meet. 130 CMR 519.007(H)(2). There is no evidence nor assertion that the appellant does not meet the financial requirements.

Much of the appellant's testimonial and documentary evidence indicates that the appellant's needs can be safely met in the community if he were to be placed in a setting with special services designed for someone with autism. Though there is no reason to doubt these assertions, the MassHealth representatives also made clear that the MFP-Waiver has no such setting. The appellant provided no further evidence to suggest that the program is obligated to provide such a setting. He points to Appendix B-1 of MassHealth's HCBS Waiver application and argues that, because mental illness is checked off, that this means that the program applies to him. Exhibit 8 at 35. However, MassHealth rightly indicates that Autism is specifically not checked off on the form. He also refers to the level of care criteria included at Appendix B-6, but without testimony from someone with knowledge of the document, it appears that this section refers to which individuals meet prong 2 of the MFP-RS Clinical and age requirements and determining whether they require a high enough level of care to qualify for the program, not what services the program will provide. *See Id.* at 55.

The appellant's assertion in his memorandum that "the fact that MassHealth does not currently have a home with supports and services that would meet the needs of [the appellant] is not relevant to the question of whether [he] would meet the clinical eligibility criteria of the MFP-RS waiver" is counter to the requirements set forth in the regulations, which state that an applicant is only eligible for the program if their needs can be safely met "*within the terms of the MFP Residential Supports Waiver.*" 130 CMR 519.007(H)(1) (Emphasis added).

Finally, the affidavit submitted by the appellant in support of his appeal appears to concede that the program was not designed to serve someone with the appellant's needs. In it, the nurse states "the restrictive eligibility criteria...from the MFP residential waiver program can and should be modified to align with other community waiver programs operated by the Executive Office of Health and Human Services." Exhibit 7 at 56. Such an order cannot be made through the fair hearing process. A hearing officer "must render a decision based on the applicable law or regulation *as interpreted by the MassHealth agency.*" 130 CMR 610.082(C)(2) (Emphasis added). The hearing officer cannot rule on the legality of such law or regulation and must be subject to judicial review in accordance with 130 CMR 610.092. *Id.* It is also important to note that, although the nurse who signed the affidavit reports that she has worked with HCBS waiver programs across the Commonwealth in providing services to individuals with needs similar to the appellant's, there is no evidence that the MFP-RS waiver was one of those programs.

Thus, there is no evidence in the hearing record that the MFP-RS is obligated to or capable of supporting someone with the appellant's needs. The evidence does show that there would be safety risks for the appellant, staff at the group home, and/or other residents were he allowed to participate in the MFP-RS waiver program when it does not provide adequate services for him. For the foregoing reasons, I find that the appellant has not met his burden of proof that MassHealth erroneously found that his needs cannot be safely met in the community within the

terms of the MFP-RS waiver. I therefore find that MassHealth was acting within its discretion in issuing the June 13, 2023, notice. The appeal is hereby 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.

Mariah Burns
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Linda Phillips, UMass Medical School - Commonwealth Medicine, Disability and Community-Based Services, 333 South Street, Shrewsbury, MA 01545-7807

Appellant's Representative: