

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2308630
<b>Decision Date:</b>	11/28/2023	<b>Hearing Date:</b>	10/24/2023
<b>Hearing Officer:</b>	Emily T. Sabo		

**Appearance for Appellant:**




**Appearances for MassHealth:**

Linda Phillips, RN, Associate Director of  
Appeals and Regulatory Compliance  
Brad Goodier, RN, Disability Reviewer II  
Karrah Garmalo, RN, Nurse Reviewer II  
UMass Chan Medical School Disability and  
Community Based Services Unit



*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>	Eligibility for Moving Forward Plan (MFP)—Community Living (CL) Waiver; Over 65
<b>Decision Date:</b>	11/28/2023	<b>Hearing Date:</b>	10/24/2023
<b>MassHealth's Rep.:</b>	Linda Phillips, Brad Goodier, Karrah Garmalo; UMass Chan Medical School Disability and Community Based Services Unit	<b>Appellant's Rep.:</b>	
<b>Hearing Location:</b>	Quincy (Telephone)	<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 August 29, 2023, MassHealth notified the Appellant that she is not clinically eligible for MassHealth's Moving Forward Community Living Home and Community-Based Services Waiver (MFP-CL Waiver) (130 CMR 519.007(H)(2) and Exhibit 1). The Appellant filed this appeal in a timely manner on September 20, 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 the Appellant is not eligible for participation in the MFP-CL Waiver.

## Issue

The appeal issue is whether MassHealth, pursuant to 130 CMR 519.007(H)(2), correctly determined that the Appellant is not eligible for participation in 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 the hearing by Linda Phillips, a registered nurse, who is the Associate Director of Appeals and Regulatory Compliance for the UMass Chan Medical School Disability and Community Based Services Unit. The MassHealth representative appeared via telephone and testified as follows: MassHealth has two home and community-based service waivers that assist Medicaid-eligible persons move into the community and obtain community-based services. They are the MFP-Residential Services (RS) Waiver 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. To be eligible for the MFP Waivers (see also Exhibit 7, 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 MassHealth representative testified that the Appellant applied for the MFP-CL Waiver on February 7, 2023, and the only issue in dispute is whether the Appellant can be safely served in the community within the terms of the MFP-CL Waiver, which MassHealth denied. (Exhibit 1). MassHealth offered the following testimony in support of its position: the Appellant is over the age

of 65 and the MassHealth nurse reviewer conducted an in-person assessment with the Appellant at a nursing and rehabilitation center on [REDACTED]. The assessment consists of completion of MFP documents including Minimum Data Set-Home Care (Exhibit 7, pages 52-64); Clinical Determination of Waiver Eligibility (Exhibit 7, pages 65-73); Acquired Brain Injury/MFP Waivers Community Risks Assessment (Exhibit 7, pages 74-75); the Risk Assessment-ABI-N/MFP-CL Caregiver Supplement (Exhibit 7, pages 76-78); a review of the applicant's medical record; and a discussion with the nursing facility staff. During the Waiver eligibility assessment review, MassHealth noted the following documentation indicating the Appellant's medical conditions:

- [REDACTED]: Care Plan Meeting for the Appellant was held in her room with OT/PT, Activities, Nursing, Social Worker, DDS and the Appellant's representative. After discussion with the Appellant's representative regarding the Appellant's at home exercises and daily capabilities at home, the Appellant needs a lot of encouragement to work with rehabilitation and become more independent. The Appellant stated that she wants to return home and does not want a group home (Exhibit 7, page 101).
- [REDACTED]: Psychiatry Consult indicates that the Appellant was assessed today due to reported low motivation to get out of bed and participate in unit activities and with her care. During the assessment, the Appellant stated that she "is afraid that I will fall again." She has had two falls, one 6 months ago at home and recently at the facility as she self-transferred to a wheelchair. The Appellant's representative would like the Appellant to participate in her care, so that she can transition home. From a psychiatric point of view, there are no acute mood or behaviors reported by staff at this time (Exhibit 7, page 107).
- [REDACTED]: Care Plan Meeting for the Appellant included the Appellant's representative, and she stated that the Appellant "has to be able to stand, pivot and transfer into her wheelchair to come home." The Appellant's representative would like staff to encourage the Appellant to do certain tasks, i.e., take a shower but the team did inform the Appellant's representative that the Appellant is her own person and has the right to choose (Exhibit 7, page 98).
- [REDACTED]: Nursing Home 60 Day Visit Note by nurse practitioner listed numerous active medical problems that Appellant is being treated for. A few diagnoses listed are fungal rash of trunk, impaired mobility and activities of daily living, acute avulsion fracture (a failure of bone in which a bone fragment is pulled away from its main body by soft tissue that is attached to it), disability of walking and generalized osteoarthritis. In addition, nurse practitioner mentions that Appellant appears alert but frail appearing (Exhibit 7, pages 118-119).

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<sup>1</sup> The Appellant's representative, a nurse at the rehabilitation center, and a family and individual resources advocate were also present.

- [REDACTED]: Interdisciplinary Progress Notes indicate that the Appellant's representative called the nursing today (Wednesday) stating that Appellant did not get a shower on Monday. The nurse explained that "Appellant often refuses a shower, but one will be attempted today." A shower was given, and the Appellant's representative was updated (Exhibit 7, page 96).

The Minimum Data Set-Home Care Report dated [REDACTED], indicates that Appellant needs assistance with the following activities of daily living and instrumental activities of daily living (Exhibit 7, pages 56-57):

- Meal Preparation
- Housework
- Medication assistance
- Shopping
- Transportation
- Transfers
- Mobility
- Bathing
- Dressing/undressing
- Bowel/bladder care

The MassHealth representative testified that the Appellant's medical history includes developmental delay, cognitive deficits, multiple falls, lymphedema, hypertension, urinary incontinence, and weakness. The MassHealth representative testified that the Appellant was admitted to the hospital in [REDACTED] after she fell at home, while being transferred from her wheelchair to her bed by a physical therapist. The MassHealth representative testified that the Appellant's representative was present in the home when the Appellant fell.

The MassHealth representative testified that during the [REDACTED], assessment, the Appellant stated that she was fearful of falling again and referenced the fall that led to her hospitalization in [REDACTED] and another fall at the nursing and rehabilitation center when she transferred from her bed to her wheelchair (Exhibit 7, page 69). The MassHealth representative testified that the Appellant is transferred with the assistance of a Hoyer lift.

The MassHealth representative testified that a Department of Mental Health caseworker responded to the MassHealth nurse reviewer in August 2023, and stated that the Appellant cannot return home and requires 24/7 care. The MassHealth representative testified that the Department of Mental Health, the Department of Developmental Services, and the nursing and rehabilitation center staff recommended that the Appellant transfer to a group home, but that the Appellant did not want that. The MassHealth nurse reviewer found that the Appellant requires a live-in caregiver, and that while there were several individuals, including the Appellant representative, who could provide some support to the Appellant, they could not provide reliable 24/7 support

and would need additional training on the Hoyer lift.

In [REDACTED], the Appellant's case was reviewed by the MassHealth Waiver Clinical Team and the Massachusetts Rehabilitation Commission. Both determined that the Appellant requires 24/7 live-in support and supervision. The MassHealth representative testified that the Appellant cannot be safely served within the community within the MFP-CL waiver, and that it denied the waiver application by notice dated August 29, 2023. The MassHealth representative clarified that while MassHealth denied the MFP-CL waiver for the Appellant, it does not prevent the Appellant from being discharged into the community and receiving MassHealth services.

The Appellant was represented at the hearing by [REDACTED] and health care proxy. The Appellant's representative testified telephonically and verified the Appellant's identity. The Appellant's representative testified that the Appellant has been developmentally delayed since childhood and that she has cared for the Appellant over the course of her lifetime and will continue to do so. The Appellant's representative testified that some of the Appellant's falls have been situations where the Appellant decides "I can't do this," and slides down to the floor.

The Appellant's representative testified that she and her family have made modifications to their home for the Appellant's benefit. The Appellant's representative testified that she and the Appellant would have connected living spaces on the first floor of the home, so that she could quickly reach the Appellant if needed. The Appellant's representative testified that her son and his family lived on the second floor of the home and could also assist the Appellant.

The Appellant's representative testified that both she and the Appellant want the Appellant to be released from the nursing and rehabilitation center and return home. The Appellant's representative testified that the Appellant's former personal care attendant, who worked with the Appellant since 2015, visits the Appellant twice weekly and has said that she is willing to work with the Appellant again. The Appellant's representative testified that she visits the Appellant daily, and that she believes that if the Appellant returns home, she will have more visitors and be less lonely. The Appellant's representative testified that she and her son are willing to be trained on operating the Hoyer lift. The Appellant's representative testified that she believes that with encouragement and care, the Appellant could stand and pivot again. The Appellant's representative testified that she is frustrated that the Appellant's physical therapy at the nursing and rehabilitation center was discontinued because it has caused the Appellant's condition to decline. The Appellant's representative testified that the Appellant benefits from support and someone telling her, "You know you can do this." The Appellant's representative testified that with the right people working with her, the Appellant will excel and not decline. The Appellant's representative believes that the resources of the MFP-CL Waiver program would help the Appellant.

The Appellant's representative testified that, as far as she is concerned, she will do whatever is necessary to care for the Appellant. The Appellant's representative testified that if a personal care attendant is unable to be there, she will never leave the Appellant alone. The Appellant's representative testified that she intends to bring the Appellant home and that she hopes once the

Appellant is there that the Appellant will work harder and improve. The Appellant's representative believes that the Appellant should have been rehabbed and released within two months. The Appellant's representative believes that the Appellant would greatly benefit from more social interaction and therapy.

## Findings of Fact

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

1. The Appellant is over the age of 65 (Testimony; Exhibits 4 & 6).
2. The Appellant's medical history includes developmental delay, cognitive deficits, multiple falls, lymphedema, hypertension, urinary incontinence, and weakness (Testimony; Exhibit 7).
3. In [REDACTED], the Appellant fell, which required hospitalization, and later transfer to a nursing and rehabilitation center (Testimony; Exhibit 7).
4. On [REDACTED], the Appellant applied for the MFP-CL Waiver (Testimony).
5. On [REDACTED], the Appellant was being treated for fungal rash of trunk, impaired mobility and activities of daily living, acute avulsion fracture (a failure of bone in which a bone fragment is pulled away from its main body by soft tissue that is attached to it), disability of walking and generalized osteoarthritis (Testimony; Exhibit 7).
6. The Minimum Data Set-Home Care Report dated June 14, 2023, indicates that Appellant needs assistance with the following activities of daily living and instrumental activities of daily living (Exhibit 7, pages 56-57):
  - Meal Preparation
  - Housework
  - Medication assistance
  - Shopping
  - Transportation
  - Transfers
  - Mobility
  - Bathing
  - Dressing/undressing
  - Bowel/bladder care(Testimony and Exhibit 7).
7. On [REDACTED] MassHealth conducted an in-person assessment with the Appellant at the nursing and rehabilitation center. The assessment consists of completion of MFP documents

including Minimum Data Set-Home Care; Clinical Determination of Waiver Eligibility; Acquired Brain Injury/MFP Waivers Community Risks Assessment; the Risk Assessment-ABI-N/MFP-CL Caregiver Supplement; a review of the Appellant's medical record; and a discussion with the nursing facility staff (Testimony).

8. As part of its assessment, MassHealth also sought input from the Department of Mental Health, Department of Developmental Services, and the nursing and rehabilitation center staff. They recommended that the Appellant be transferred to a state-run residential setting with 24/7 care (Testimony and Exhibit 7).
9. The Appellant does not want to live in a residential group home setting. The Appellant and her representative want the Appellant to return home (Testimony; Exhibit 7).
10. MassHealth determined that the Appellant cannot be safely supported by the services available within the MFP-CL Waiver (Testimony; Exhibits 1 & 7).
11. On [REDACTED], MassHealth notified the Appellant of its denial of her application for participation in the MFP-CL Waiver.

## Analysis and Conclusions of Law

The MFP home and community-based service waivers are described at 130 CMR 519.007(H). In the present case, the Appellant seeks eligibility for the MFP-CL Waiver. The requirements for the MFP-CL waiver are set forth below:

### (2) Money Follows the Person (MFP) Community Living Waiver.<sup>2</sup>

(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 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;

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<sup>2</sup> It is noted that although "MFP" now stands for "Moving Forward Plan," the applicable regulation still references Money Follows the Person. (130 CMR 519.007(H)).



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.

(b) Eligibility Requirements. In determining eligibility for MassHealth Standard and for these waiver services, the MassHealth agency determined income eligibility based solely on the applicant's or member's income regardless of his or her marital status. The applicant or member must

1. meet the requirements of 130 CMR 519.007(H)(2)(a);
2. have countable income that is less than or equal to 300% of the federal benefit rate (FBR) for an individual;
3. have countable assets of \$ 2,000 or less for an individual and, for a married couple if the initial Waiver eligibility determination was on or after January 1, 2014, have assets that are less than or equal to the standards at 130 CMR 520.016(B); *Treatment of a Married Couple's Assets When One Spouse Is Institutionalized*; and
4. not have transferred resources for less than fair market value, as described in 130 CMR 520.018: *Transfer of Resources Regardless of Date of Transfer* and 520.019: *Transfer of Resources Occurring on or after August 11, 1993*.

(c) Enrollment Limits. Enrollment in the MFP Community Living Waiver is subject to a limit on the total number of waiver participants. The number of participants who can be enrolled in this waiver may be limited in a manner determined by the MassHealth agency.

(d) Waiver Services. Eligible members who are enrolled as waiver participants in the MFP Community Living Waiver are eligible for the waiver services described in 130 CMR 630.405(D): *Money Follows the Person Community Living (MFP-CL) Waiver*.

130 CMR 519.007(H)(2).

In the present case, MassHealth evaluated the Appellant's eligibility for services under the MFP-CL waiver and determined that she is not able to be safely served in the community within the terms of this waiver. (130 CMR 519.007(H)(2)(a)(5)). The Appellant's medical history includes developmental delay, cognitive deficits, multiple falls, lymphedema, hypertension, urinary incontinence, and weakness. In [REDACTED], the Appellant suffered a fall, which required treatment including hospitalization, and later transfer to a nursing and rehabilitation center. In [REDACTED], the Appellant was treated for multiple medical conditions including fungal rash of trunk, impaired mobility and activities of daily living, acute avulsion fracture, disability of walking

and generalized osteoarthritis. The Appellant needs assistance with the following activities of daily living and instrumental activities of daily living: transfers, mobility, bathing, dressing/undressing, bowel/bladder care, medication assistance, meal preparation, housework, shopping, and transportation. As part of its assessment, MassHealth consulted with the Department of Mental Health, Department of Developmental Services, and the nursing and rehabilitation center staff where the Appellant has been residing. They stated that the Appellant required 24/7 care and could not safely return home. On August 29, 2023, MassHealth denied the Appellant's request for the MFP-CL waiver.

I credit the Appellant's representative's testimony that the Appellant wants to return home and live with her extended family. I also credit the Appellant representative's testimony that she is devoted and dedicated to the ongoing care of the Appellant. However, the Appellant has the burden "to demonstrate the invalidity of the administrative determination." Andrews v. Division of Medical Assistance, 68 Mass. App. Ct. 228. See also Fisch v. Board of Registration in Med., 437 Mass. 128, 131 (2002); Faith Assembly of God of S. Dennis & Hyannis, Inc. v. State Bldg. Code Commn., 11 Mass. App. Ct. 333, 334 (1981); Haverhill Mun. Hosp. v. Commissioner of the Div. of Med. Assistance, 45 Mass. App. Ct. 386, 390 (1998). The Appellant must demonstrate, by a preponderance of evidence, that MassHealth's denial of the MFP-CL Waiver was incorrect, pursuant to 130 CMR 519.007(H)(2). Based upon the evidence presented, the Appellant has not met this burden. The Appellant's medical conditions require significant care and assistance. The Appellant did not provide evidence demonstrating that MassHealth erred in its determination that the Appellant could not be safely served within the community, under the terms of the waiver. Failing to meet this burden, the appeal is denied.<sup>3</sup>

## **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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<sup>3</sup> As testified to by the MassHealth representative, this determination does not prevent the Appellant from being discharged and returning to her home, if that is what the Appellant decides to do. The denial of this appeal also does not preclude the Appellant for re-applying for the MFP-CL waiver. The Appellant is encouraged to re-apply for the MFP-CL waiver if her circumstances change, and she can demonstrate that she can be safely served in the community.

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Emily T. Sabo  
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

[REDACTED]