

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	DENIED	Appeal Number:	2309146
Decision Date:	01/4/2024	Hearing Date:	11/16/2023
Hearing Officer:	Kenneth Brodzinski		

Appearance for Appellant:



Appearance for MassHealth:

Linda Phillips, RN; Leanne Govoni, RN and
Danielle Proodian, RN



*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	Issue:	MFP-RS Waiver
Decision Date:	01/4/2024	Hearing Date:	11/16/2023
MassHealth's Rep.:	Linda Phillips, RN	Appellant's Rep.:	Guardian
Hearing Location:	Quincy		

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 September 5, 2023, MassHealth denied Appellant's request to participate in the Money-Follows-the-Person – Residential Services Waiver (MFP-RS) (hereinafter, “the MFP-RS Waiver” or “the waiver”) ([Exhibit A](#)). Appellant filed for an appeal in a timely manner on October 3, 2023 (see 130 CMR 610.015(B) and [Exhibit A](#)). Denial of a request to participate in a MassHealth program constitutes valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied Appellant's request to participate in the MFP-RS Waiver.

Issue

The appeal issue is whether MassHealth properly applied the controlling regulation(s) to accurate facts when it denied Appellant's request to participate in the MFP-RF Waiver.

Summary of Evidence

The hearing was held virtually. Prior to the hearing, both parties filed documentation: MassHealth (Exhibit B); Appellant (Exhibit C).

MassHealth was represented by three nurses who testified as follows: MassHealth offers two home and community-based service (HCBS) Waivers; the MFP- RS and the MFP-Community Living (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. Appellant applied for the MFP-RS Waiver on March 27, 2023 (Exhibit B, Tab C, page 43).¹

MassHealth set forth the following eligibility criteria for the MFP Waivers (Exhibit B, Tab A, 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.

¹ Herein, the Hearing Officer uses lettered Exhibits. Where a party's submission also contains lettered exhibits, the Hearing Officer uses the term "Tab." For example: if a party's submission is marked for this record as Exhibit B and the submission itself has "exhibits" attached such as "exhibit C", it is herein identified as (Exhibit B, Tab C).

On August 1, 2023, an assessment for Waiver eligibility was conducted in-person at [REDACTED]. In attendance at the in-person assessment were Appellant and Danielle Proodian RN, MassHealth Nurse Reviewer who was representing the MFP Waiver Program. In addition, Ms. Proodian emailed and spoke to the following: [REDACTED] and [REDACTED]. A full attendance list is in Exhibit B, Tab C, page 75.

The assessment consists of completion of MFP documents including Minimum Data Set-Home Care (MDS-HC) (Exhibit B, Tab C, pages 48-61); Clinical Determination of Waiver Eligibility (Exhibit B, Tab C, pages 62-72); Acquired Brain Injury (ABI)/MFP Waivers Community Risks Assessment (Exhibit B, Tab C, pages 73-74); a review of the applicant's medical record; and a discussion with the nursing facility staff.

Appellant is in his [REDACTED]. On [REDACTED], Appellant was followed by the wound clinic at [REDACTED] for his left sided sacral ulcer and underwent bedside debridement due to the enlarging wound. On [REDACTED], he was transferred to [REDACTED] from his group home with the decubitus ulcer becoming worse. A CT scan of the abdomen and pelvis showed a deep left sacral ulcer with surrounding inflammation and cellulitis with no abscess present. The infectious disease team at the hospital started him on broad spectrum antibiotics. The group home, where Appellant had resided for the past 12 years, reported that they could not take care of the wound and recommended discharging him to a rehabilitation facility. Appellant was discharged to [REDACTED] (Exhibit B, Tab C, page 66).

Appellant's medical history includes pressure ulcer of sacral region, Unspecified Focal Traumatic Brain injury with loss of consciousness (in 1998 at age 21), Deep Vein Thrombosis, Acquired Deformity of Left foot, Colostomy, Acquired Absence of Right Leg Below Knee, Suprapubic Tube due to Neurogenic Bladder, Obesity, Apraxia, Generalized Muscle Weakness, Pressure ulcer of other site stage 3, COVID 19, history of Suicidal Behavior, Bipolar Disorder, Unspecified Psychosis not due to a known substance or physiological condition. (Exhibit B, Tab C, page 67).

During the Waiver eligibility assessment review, MassHealth noted the following documentation indicating Appellant's behavioral and medical conditions:

- January 6, 2023: [REDACTED] - Care Plan indicates that Appellant always requires 2 people (assist) during care related to accusatory and verbally abusive behaviors (Exhibit B, Tab D, page 88).
- May 18, 2023: [REDACTED] Physician Note indicates that nursing had reported hypersomnolence episodes last week during the daytime. The physician had asked Appellant if any visitors had brought any sedating drugs in which he took and he "adamantly denies it" (Exhibit B, Tab D, page 167)

- June 26, 2023: [REDACTED] Nursing Progress note states that Appellant is “non-compliant with care. Resident refused 3 attempts for treatment, and dressing changed during Am and PM shift” (Exhibit B, Tab D, page 120).

Appellant’s previous group home had previously decided to discharge Appellant effective [REDACTED] after supporting him since 2011. This letter was sent to [REDACTED] on January 12, 2023 (Exhibit B, Tab F, pages 225-228). There had been numerous discussions with all those involved in Appellant care and the primary reasons for disenrollment from the [REDACTED] group home are:

1. Increased use of marijuana with increased use resulting in destabilization of his mental status and in alterations in his baseline functioning. His treatment providers recommend abstinence from all products containing cannabis/CBD.
2. Noncompliance with wound care and recommendations were offered to try to decrease worsened wounds in November 2022. Appellant refusing dressing changes 43% of the time and declined ordered barrier cream 53% of the time. In addition, Appellant refused repositioning.
3. The Nutrition and Eating Protocol was recommended due to increased weight gain, and he was diagnosed as obese. A nutrition plan was put in place for a recommended diet and portion control, but he refused all recommendations, and his family provided him with a card with unlimited funds for take-out orders.
4. Refusing and cancelling of numerous medical appointments has been common practice by Appellant while at the [REDACTED] group home. In 2022, he has cancelled and/or refused to attend several appointments, a total of 14 with the following: with nutrition, podiatrist, eye doctor, GI, pulmonology, and physical medicine and rehab at [REDACTED].

Appellant has multiple risks when entering the community such as: medical decompensation due to his complex medical conditions and refusal of care at times; at risk for psychological decline due to history of bipolar disorder; his continued use of marijuana use against medical advice; and his noted refusals of medication, refusal of care, risk of skin breakdown due to impaired mobility, and at risk for caregiver burnout due to his refusals of care.

On August 24, 2023, Appellant’s case was discussed at the MassHealth Waiver Clinical Team review meeting. In addition, on August 30, 2023, as part of the MFP Waiver eligibility process, a second clinical review was conducted by the Massachusetts Rehabilitation Commission (MRC) Clinical team and DDS, who oversees the community living waiver and residential waivers. MassHealth, MRC, and DDS determined that Appellant continued marijuana usage has varied his sleep patterns, more frequent episodes of paranoid delusions and more mood and impairment of judgement while using marijuana. Appellant continued to use marijuana 3 days

prior to the eligibility interview with his mother. His guardian, [REDACTED] had also stated that he was provided cannabis products from his mother. Appellant is an extensive 2-person assist and dependent on caregivers for his ADLs.

According to the MassHealth representatives, it is MassHealth, MRC and DDS's clinical and professional opinion that, at this time, based on the available medical records and interviews, Appellant remains at significant risk for further medical and psychological decline by refusing medical care, using marijuana against medical advice, exhibiting high-risk behaviors and he requires a higher level 24/7 supervision and care at a level that cannot be duplicated in a residential setting. Therefore, he cannot be safely served in the community within the MFP-RS Waiver. On September 5, 2023, a denial notice for the MFP-RS Waiver was mailed to Appellant's guardian, [REDACTED]. (Exhibit B, Tab C, pages 44-45).

Appellant's Guardian testified that she has been overseeing Appellant's care for the past 11 years. The Guardian testified that many of the problems Appellant experienced in the group home are no longer an issue since being in the nursing facility. The Guardian testified that there are now less incidences of refusal of care, confrontations with staff and overall Appellant has been more stable in the nursing facility. Nevertheless, the Guardian testified that she would support Appellant in a group-home setting with additional supervision and support. The Guardian noted that nursing facilities traditionally have lower staffing-to-patient ratios than group homes. Prior to hearing, Appellant's Guardian submitted a packet of documentation consisting of Appellant's medical records from his current nursing facility, but nothing therein was specifically identified or addressed during the hearing (Exhibit C).

A social worker from the nursing facility testified that after a period of adjustment, Appellant has adapted well to the nursing facility setting. She noted there have been a few occasions of refusing care; otherwise, Appellant has been mostly compliant. She noted that Appellant is psychologically stable, incontinent, requires 24-hour care and requires a 2-to-3 person assist with a Hoyer lift.

Appellant testified that the group home's shortcomings and not his behavior were the true basis for being discharged to the nursing facility. Appellant testified that at the group home, his inflatable mattress was broken and he spent all day on a hard surface that worsened wounds and his overall condition.

Appellant's mother testified that the write-ups Appellant received at the group home were mostly efforts by the staff to cover their inadequate care. She noted that Appellant did not even have a workable call light and had to call out and yell repeatedly to obtain any assistance from the staff. Appellant's mother also noted that Appellant has always required a two-person assist with his Hoyer lift and it was always provided by the group home.

The hearing officer questioned why Appellant would want to return to the group home given

the past problems and the apparent improvement he has been experiencing at the nursing facility. Appellant's mother responded that she does not want Appellant to return to the same group home. She believes that a well-run group home can offer Appellant better care than a nursing facility. Appellant testified that a group home affords him with more independence and privacy where he can do things such as work on his art and music which he cannot do in a shared room in a nursing facility.

In response, the MassHealth representatives emphasized that the subject determination was not based on Appellant's past difficulties at the group home. Rather, it was based on the documentation of Appellant's current experience in the nursing facility. The MassHealth representatives testified that according to the documentation from Appellant's current nursing facility, Appellant still uses marijuana contrary to medical advice; still refuses care and requires a two-person assist for most activities because of continued resistance and confrontational behavior. The MassHealth representatives testified that the agency is not looking for perfection, but rather stability. Additionally, Appellant would not be appropriate for a group home setting while he requires two staff members to assist with all of his care needs as this exceeds group-home level of care. The MassHealth representatives explained again that this current level of need is due in large part to Appellant's resistant and confrontational behavior.

Lastly, the MassHealth representatives explained that Appellant could be approved on a future application if and when the documentation supports his suitability for a group-home placement pursuant to the requirements of the MFP-RS Waiver program.

Finding of Fact

By a preponderance of the evidence, this record supports the following findings:

1. MassHealth was represented by three nurses who testified as follows: MassHealth offers two home and community-based service (HCBS) Waivers; the MFP- RS and the MFP-Community Living (CL) Waiver.
2. 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.
3. 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.
4. The MFP-RS Waiver is for individuals who need supervision and staffing 24 hours/day, 7 days per week.
5. Appellant, who is in his mid-forties, applied for the MFP-RS Waiver on March 27, 2023

(Exhibit B, Tab C, page 43).

6. On August 1, 2023, an assessment for Waiver eligibility was conducted in-person at [REDACTED] with Appellant and Danielle Proodian RN, MassHealth Nurse Reviewer who was representing the MFP Waiver Program. I
7. As part of the Assessment, Ms. Proodian also emailed and/or spoke to the following: [REDACTED], [REDACTED], and [REDACTED]
8. The assessment consisted of completion of MFP documents including the Minimum Data Set-Home Care (MDS-HC) (Exhibit B, Tab C, pages 48-61); Clinical Determination of Waiver Eligibility (Exhibit B, Tab C, pages 62-72); Acquired Brain Injury (ABI)/MFP Waivers Community Risks Assessment (Exhibit B, Tab C, pages 73-74); a review of the applicant's medical record; and a discussion with the nursing facility staff.
9. Appellant's recent past medical history includes the following: On [REDACTED] Appellant was followed by the wound clinic at [REDACTED] for his left sided sacral ulcer and underwent bedside debridement due to the enlarging wound. On [REDACTED] he was transferred to [REDACTED] from his group home with the decubitus ulcer becoming worse. A CT scan of the abdomen and pelvis showed a deep left sacral ulcer with surrounding inflammation and cellulitis with no abscess present. The infectious disease team at the hospital started him on broad spectrum antibiotics. The group home, where Appellant had resided for the past 12 years, reported that they could not take care of the wound and recommended discharging him to a rehabilitation facility. Appellant was discharged to [REDACTED] (Exhibit B, Tab C, page 66).
10. Appellant's past medical history includes the following: pressure ulcer of sacral region, Unspecified Focal Traumatic Brain injury with loss of consciousness (1998 (age 21), Deep Vein Thrombosis, Acquired Deformity of Left foot, Colostomy, Acquired Absence of Right Leg Below Knee, Suprapubic Tube due to Neurogenic Bladder, Obesity, Apraxia, Generalized Muscle Weakness, Pressure ulcer of other site stage 3, COVID 19, history of Suicidal Behavior, Bipolar Disorder, Unspecified Psychosis not due to a known substance or physiological condition. (Exhibit B, Tab C, page 67).
11. The Waiver eligibility assessment review noted the following: documentation indicating Appellant's behavioral and medical conditions - January 6, 2023: [REDACTED] - Care Plan indicates that Appellant always requires 2 people (assist) during care related to accusatory and verbally abusive behaviors (Exhibit B, Tab D, page 88);
12. The Waiver eligibility assessment review noted the following: May 18, 2023: [REDACTED] Physician Note indicates that nursing had reported hypersomnolence

episodes last week during the daytime. The physician had asked Appellant if any visitors had brought any sedating drugs in which he took and he “adamantly denies it” (Exhibit B, Tab D, page 167);

13. The Waiver eligibility assessment review noted the following: June 26, 2023: [REDACTED] Nursing Progress note states that Appellant is “non-compliant with care. Resident refused 3 attempts for treatment, and dressing changed during Am and PM shift” (Exhibit B, Tab D, page 120).
14. Appellant’ previous group home had previously decided to discharge Appellant effective February 1, 2023, after supporting him since 2011.
15. A letter was sent to Appellant’s Guardian on January 12, 2023 (Exhibit B, Tab F, pages 225-228).
16. There had been numerous discussions with all those involved in Appellant care and the primary reasons for disenrollment from the [REDACTED] group home were:
 - Increased use of marijuana with increased use resulting in destabilization of his mental status and in alterations in his baseline functioning. His treatment providers recommend abstinence from all products containing cannabis/CBD.
 - Noncompliance with wound care and recommendations were offered to try to decreased worsened wounds in November 2022. Appellant refusing dressing changes 43% of the time and declined ordered barrier cream 53% of the time. In addition, Appellant refused repositioning.
 - The Nutrition and Eating Protocol was recommended due to increased weight gain, and he was diagnosed as obese. A nutrition plan was put in place for a recommended diet and portion control, but he refused all recommendations, and his family provided him with a card with unlimited funds for take-out orders.
 - Refusing and cancelling of numerous medical appointments has been common practice by Appellant while at the [REDACTED] group home. In 2022, he has cancelled and/or refused to attend several appointments, a total of 14 with the following: nutrition, podiatrist, eye doctor, GI, pulmonology, physical medicine and rehab at [REDACTED]
17. The Assessment determined that Appellant has multiple risks when entering the community such as: medical decompensation due to his complex medical conditions and refusal of care at times; at risk for psychological decline due to history of bipolar disorder; his continued use of marijuana against medical advice; and refusals of

medication, refusal of care, risk of skin breakdown due to impaired mobility, and risk for caregiver burnout due to his refusals of care.

18. On August 24, 2023, Appellant's case was discussed and considered at the MassHealth Waiver Clinical Team review meeting.
19. On August 30, 2023, as part of the MFP Waiver eligibility process, a second clinical review was conducted by the Massachusetts Rehabilitation Commission (MRC) Clinical team and DDS, who oversees the community living waiver and residential waivers.
20. MassHealth, MRC, and DDS have concluded that Appellant's continued marijuana usage has varied his sleep patterns, caused more frequent episodes of paranoid delusions and impairment of judgement while using marijuana.
21. Appellant continued to use marijuana 3 days prior to the eligibility interview with his mother.
22. Appellant's Guardian has stated that Appellant was being provided cannabis products by his mother.
23. Appellant is an extensive 2-person assist and dependent on caregivers for his ADLs.
24. MassHealth, MRC and DDS agree that, at this time, based on the available medical records and interviews, Appellant remains at significant risk for further medical and psychological decline by refusing medical care, using marijuana against medical advice, exhibiting high-risk behaviors and requires a higher level 24/7 supervision and care at a level that cannot be duplicated in a residential setting.
25. MassHealth, MRC and DDS agree that Appellant cannot be safely served in the community within the MFP-RS Waiver.
26. On September 5, 2023, a denial notice for the MFP-RS Waiver was mailed to Appellant's Guardian (Exhibit B, Tab C, pages 44-45).
27. Appellant's Guardian currently supports Appellant being placed in a group-home setting with increased supervision and support.
28. While at the at the group home, Appellant's inflatable mattress was broken and he spent all day on a hard surface that worsened wounds and his overall condition.
29. While at the at the group home, Appellant did not have a workable call light and had to call out and yell repeatedly to obtain any assistance from the staff.
30. While at the at the group home, Appellant always required a two-person assist with his

Hoyer lift.

31. Appellant wants to reside in a group home because it affords him more independence and privacy where he can do things such as work on his art and music which he cannot do in a shared room in a nursing facility.

Analysis and Conclusions of Law

The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity (*Merisme v. Board of Appeals of Motor Vehicle Liability Policies and Bonds*, 27 Mass. App. Ct. 470, 474 (1989)).

Appellant has not met his burden. At hearing, MassHealth presented clinical professionals who reviewed Appellant's medical documentation to support the agency's findings and conclusions about Appellant's current state of health, his daily care needs and Appellant's behavior regarding his daily care needs which currently place him outside of the regulatory requirements of the waiver program (130 CMR 519.007(H)). MassHealth's findings and conclusions were also supported by two other professional state agencies, MRC and DDS.

130 CMR 519.007 states in pertinent part (emphasis supplied):

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

(1) Money Follows the Person (MFP) Residential Supports Waiver.

(a) Clinical and Age Requirements. 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 they meet all of the following criteria:

- 1. are 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. are 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. *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. ***are able to be safely served in the community within the terms of the MFP Residential Supports Waiver; and***
6. *are 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.*

Appellant made no specific reference to any clinical documents and presented no objective evidence of any kind to refute MassHealth's findings or conclusions. The nursing facility social worker and Appellant's Guardian both noted that there was reduced refusal of care behavior while in the nursing facility, but neither could demonstrate that it was currently not a factor in Appellant's care. At hearing, Appellant and his representatives mainly discussed the difficulties he experienced at his prior group home. While these difficulties were noted during the Assessment, they were not the basis for the Waiver determination. The subject determination was based on a professional clinical review of Appellant's medical records from his current nursing facility and discussions with Appellant, his current caregivers and Appellant's mother. This effort led to finding that Appellant still uses marijuana contrary to medical advice; that the continued use of marijuana is having adverse effects on Appellant's perception and behavior, that Appellant still engages in refusal of care (albeit less so than in his past group home) and still requires a two-person assist for his activities of daily living due in large part to Appellant's continued resistance and confrontational behavior with staff. These factors do not support a finding that Appellant can be safely served in the community within the terms of the MFP Residential Supports Waiver and that his current heightened staffing needs can be met at a group-home level of care.

Appellant's Guardian supports Appellant's efforts to reside in a group home, but only with additional support which she offered to try to obtain. Eligibility for the Waiver, however, is dependent on the applicant's ability to be cared for "within the terms of the MFP-RS Waiver" program as cited above. The regulations provide no authority for a member to provide additional outside services to supplement what is offered through the Waiver as a means of qualifying for the Waiver.

On this record, I find no basis in fact or law to disturb the agency's action. For the foregoing reasons, the appeal is DENIED.

As noted during the hearing, this determination in no way affects Appellant's ability to re-apply for the MFP-RS Waiver at a time when he believes an Assessment will reveal that he meets the regulatory requirements of the program.

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.

Kenneth Brodzinski
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