

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2309368
Decision Date:	12/29/2023	Hearing Date:	11/17/2023
Hearing Officer:	Emily T. Sabo	Record Open to:	12/15/2023

Appearance for Appellant:



Appearances for MassHealth:

Linda Phillips, RN, Associate Director, Appeals
& Regulatory Compliance
Sue Tomasz-Taylor, RN
Eileen Cynamon, 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:	Moving Forward Plan Residential Supports Home-and-Community-Based Services Waiver (MFP-RS Waiver); Over 65
Decision Date:	12/29/2023	Hearing Date:	11/17/2023
MassHealth's Rep.:	Linda Phillips	Appellant's Rep.:	Health Care Proxy
Hearing Location:	Quincy Harbor South (Telephone)	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 August 15, 2023, MassHealth notified the Appellant that she is not clinically eligible for MassHealth's Moving Forward Plan Residential Supports Home-and-Community-Based Services Waiver (MFP-RS Waiver) (130 CMR 519.007(H)(1) and Exhibit 1). The Appellant filed this appeal in a timely manner on October 6, 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-RS Waiver.

Issue

The appeal issue is whether MassHealth, pursuant to 130 CMR 519.007(H)(1), correctly determined that the Appellant is not eligible for participation in the MFP-RS 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-RS Waiver and the MFP-Community Living 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-Community Living 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 5, page 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-RS waiver on April 14, 2023. Exhibit 5, page 45. The only issue in dispute is whether the Appellant can be safely served in the community within the terms of the MFP-RS Waiver, which MassHealth denied. Exhibit 1. The MassHealth representative testified that the Appellant is an adult over the age of 65 and that she had resided in a group home in the Berkshires prior to her undergoing a medical procedure at Mass Eye and Ear on [REDACTED], 2022. The Appellant was transferred to [REDACTED] on [REDACTED] 2022.

The Appellant was hospitalized in [REDACTED] 2022 for symptoms of sepsis and mucus plugging and twice in [REDACTED] 2023 when the Appellant's G-tube came out. Afterwards, the Appellant returned to [REDACTED]. The Appellant's past medical history includes hypertensive disorder, vocal cord paralysis/aphonia, Hodgkins Lymphoma, Extranodal (HL outside the lymph nodes) and solid organ sites, adverse effect of anesthetic, delayed emergence from anesthesia, asthma, dysphagia, GERD (gastroesophageal reflux disease), myoneural disorder unspecified, laryngeal stenosis, osteoporosis, recurrent UTI, history of traumatic injury of head, spinal paraplegia, tracheal stenosis, cognitive deficits, neuromuscular disease, complex partial epilepsy with affective symptoms, laryngeal disease, airway obstruction, and anxiety. Exhibit 5, page 67.

The MassHealth representative testified that the waiver assessment consists of completion of Acquired Brain Injury (ABI) documents including Minimum Data Set-Home Care; ABI/MFP Clinical Determination Assessment; ABI/MFP Waivers Community Risks Assessment; a review of the applicant's medical record and interview with nursing facility staff. The waiver eligibility visit took place on [REDACTED] 2023, with UMass Waiver nurse Sue Tomasz-Taylor, the Appellant, [REDACTED] and [REDACTED]. In addition, Ms. Thomasz-Taylor spoke to [REDACTED] Health Care Proxy on July 10, 2023.

As part of its assessment review, MassHealth noted the following documentation indicating the Appellant's condition:

- June 1, 2023: [REDACTED] health status note states that, "patient was awake until 4am and continues to remove TM (trach mask). Patient received new order of trazadone (sleep med) with little effect. Redirected multiple times with no change in behavior. Frequent safety checks while awake" (Exhibit 5, page 160).
- June 20, 2023: [REDACTED] health status note indicates that no pain or respiratory distress noted. Cooperative with all medications crushed through G-tube. Trach and oxygen mask in-place. Frequent safety checks provided (Exhibit 5, page 108).
- June 21, 2023: [REDACTED] progress note states that "patient remains stable. A moderate amount of thin creamy secretions noted" (Exhibit 5, page 106).

MassHealth testified that the Appellant's care plan states that she is at risk for falls and paralysis; that she is totally dependent on others for functional mobility; that she requires tube feeding related to tracheostomy; and her discharge goal is to long term care, not the community. Exhibit 5, pages 209-213. MassHealth testified that the Appellant receives 15-minute safety checks to ensure her tracheostomy oxygen support remains safely intact. The Appellant requires suctioning, as needed, and a G-Tube because she is unable to receive nutrients and fluids by mouth. The MassHealth representative testified that the Appellant is at high risk for aspiration and the head of

her bed needs to be elevated 30-45 degrees while G-tube is running and 1 hour after the G-Tube stops. Therefore, MassHealth concluded that the higher level of medical care and support that the Appellant requires 24/7 is not able to be duplicated in the MFP-RS Waiver program. Exhibit 5, page 69.

On August 3, 2023, the Appellant's case was discussed at the MassHealth Waiver Clinical Team review meeting. In addition, on August 9, 2023, the Massachusetts Rehabilitation Commission and Department of Developmental Services met to review the application. All agreed that the Appellant continues to present with medical complexity and 15-minute monitor checks for safety and medical interventions are necessary. Currently, the Appellant requires a higher level of oversight and interventions to maintain her health and safety than a 24/7 residential setting can provide. Therefore, on August 15, 2023, MassHealth determined the Appellant was clinically ineligible for the MFP-RS Waiver. Exhibit 5, pages 46-47.

The Appellant was represented at the hearing by her invoked health care proxy. The Appellant's representative appeared by phone and verified the Appellant's identity. In addition to being her health care proxy, the Appellant's representative built a close relationship with the Appellant through the representative's prior role with [REDACTED].

The Appellant experienced a brain injury at age 18. The Appellant's representative testified that prior to her stay at [REDACTED], the Appellant was able to self-propel in a wheelchair. The Appellant's representative testified that she is concerned that the Appellant is very under stimulated at [REDACTED], and that the Appellant's condition has deteriorated there. The Appellant's anxiety has increased as she has difficulty being understood. The Appellant misses her community and the experience of living in a residential group home with two other residents. The Appellant's representative testified that due to [REDACTED] location, it is very difficult for the Appellant's Berkshire community supports to visit her. The Appellant's representative testified that she has been seeking any facility west of Worcester for the Appellant to live in. The Appellant's representative explained that the Appellant's trach mask does not fit her well and that the Appellant is trying to adjust it and make it more comfortable, rather than remove it. The Appellant's representative testified that the Appellant went in for a routine surgery in [REDACTED] 2022, and then a trach was inserted, and that since then the Appellant's choices have been severely limited. The Appellant's representative expressed concern for the Appellant's quality of life, and that she is trying to advocate for the Appellant's wellbeing.

After the hearing, the record was held open for the Appellant's representative to provide evidence that a physician had invoked the Appellant's health care proxy and to provide any additional evidence that the Appellant could be safely served in the community. The Appellant's representative provided evidence that a physician had invoked the Appellant's health care proxy. The Appellant's representative did not submit any additional evidence.

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 & 5).
2. The Appellant's medical history includes hypertensive disorder, vocal cord paralysis/aphonia, Hodgkins Lymphoma, Extranodal (HL outside the lymph nodes) and solid organ sites, adverse effect of anesthetic, delayed emergence from anesthesia, asthma, dysphagia, GERD (gastroesophageal reflux disease), myoneural disorder unspecified, laryngeal stenosis, osteoporosis, recurrent UTI, history of traumatic injury of head, spinal paraplegia, tracheal stenosis, cognitive deficits, neuromuscular disease, complex partial epilepsy with affective symptoms, laryngeal disease, airway obstruction, and anxiety (Testimony; Exhibit 5).
3. The Appellant underwent a medical procedure on [REDACTED] 2022 (Testimony; Exhibit 5).
4. Since [REDACTED], 2022, the Appellant has resided at [REDACTED].
5. The Appellant was hospitalized in [REDACTED] 2022 for symptoms of sepsis and mucus plugging and twice in [REDACTED] 2023 when the Appellant's G-tube came out (Testimony).
6. On April 14, 2023, the Appellant applied for the MFP-RS Waiver (Testimony; Exhibit 5).
7. On July 10, 2023, MassHealth conducted an in-person assessment with the Appellant at [REDACTED]. MassHealth also spoke with the Appellant's invoked health care proxy (Testimony).
8. The Appellant's care plan states that she is at risk for falls and paralysis; that she is totally dependent on others for functional mobility; that she requires tube feeding related to tracheostomy; and her discharge goal is to long term care, not the community. The Appellant receives 15-minute safety checks to ensure her tracheostomy oxygen support remains safely intact. The Appellant requires suctioning, as needed, and a G-Tube because she is unable to receive nutrients and fluids by mouth. The Appellant is at high risk for aspiration and the head of her bed needs to be elevated 30-45 degrees while G-tube is running and 1 hour after the G-Tube stops. Therefore, MassHealth concluded that the higher level of medical care and support that the Appellant requires 24/7 is not able to be duplicated in the MFP-RS Waiver program (Testimony; Exhibit 5).
9. Department of Developmental Services and Massachusetts Rehabilitation Commission agreed with MassHealth's assessment (Testimony).

10. MassHealth determined that the Appellant cannot be safely supported by the services available within the MFP-RS Waiver (Testimony; Exhibits 1 & 5).
11. On August 15, 2023, MassHealth notified the Appellant of its denial of her application for participation in the MFP-RS Waiver (Testimony; Exhibit 1).

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-RS Waiver. The requirements for the MFP-RS waiver are set forth below:

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

(a) Clinical and Age Requirements. The MFP Residential Supports Waiver, as authorized under section 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 and 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 and 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.

(b) Eligibility Requirements. In determining eligibility for MassHealth Standard and for

¹ 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)).

these waiver services, the MassHealth agency determines 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)(1)(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 Residential Supports 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 Residential Supports Waiver are eligible for the waiver services described in 130 CMR 630.405(C): *Moving Forward Residential Supports (MFP-RS) Waiver*.

130 CMR 519.007(H)(1).

In the present case, MassHealth evaluated the Appellant's eligibility for services under the MFP-RS 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)(1)(a)(5). The Appellant's medical history includes hypertensive disorder, vocal cord paralysis/aphonia, Hodgkins Lymphoma, adverse effect of anesthetic, delayed emergence from anesthesia, asthma, dysphagia, GERD (gastroesophageal reflux disease), myoneural disorder unspecified, laryngeal stenosis, osteoporosis, recurrent UTI, history of traumatic injury of head, spinal paraplegia, tracheal stenosis, cognitive deficits, neuromuscular disease, complex partial epilepsy with affective symptoms, laryngeal disease, airway obstruction, and anxiety. The Appellant receives 15-minute safety checks to ensure her tracheostomy oxygen support remains safely intact and is at high risk for aspiration. The Appellant's condition is medically complex, and she requires more medical support than can be safely provided within the MFP-RS waiver program. For these reasons, MassHealth denied the Appellant's request for the MFP-RS waiver on August 15, 2023.

I credit the Appellant's representative's testimony that the Appellant would benefit from greater stimulation and closer proximity to her former community living situation in the Berkshires. I also commend the Appellant's representative for her consideration for and advocacy on behalf 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-RS Waiver was incorrect, pursuant to 130 CMR 519.007(H)(1).

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.²

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.

Emily T. Sabo, Esq.
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

² This determination does not prevent the Appellant from being discharged from North End Rehabilitation and Healthcare Center or from seeking a living situation closer to her former home. The denial of this appeal also does not preclude the Appellant for re-applying for the MFP-RS waiver. The Appellant is encouraged to re-apply for the MFP-RS waiver if her circumstances change, and she can demonstrate that she can be safely served under the terms of the waiver.

