

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2400340
Decision Date:	03/19/2024	Hearing Date:	02/06/2024
Hearing Officer:	Emily Sabo		

Appearances for Appellant:



Appearances for MassHealth:

Linda Philips, RN, Associate Director—Appeals
& Regulatory Compliance
Danielle Proodian, RN, Nurse Reviewer II



*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 Community Living & Residential Supports Home and Community Based Services Waivers
Decision Date:	03/19/2024	Hearing Date:	02/06/2024
MassHealth's Rep.:	Linda Phillips, Danielle Proodian	Appellant's Rep.:	Pro se & Social Worker
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 January 2, 2024, MassHealth notified the Appellant that he is not clinically eligible for MassHealth's Moving Forward Plan Community Living Home-and-Community-Based Services Waiver (MFP-CL Waiver) and the Moving Forward Plan Residential Supports Home-and-Community-Based Services Waiver (MFP-RS Waiver) (130 CMR 519.007(H)(1), (2) and Exhibit 1). The Appellant filed this appeal in a timely manner on January 5, 2024. (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 or MFP-RS Waiver programs.

Issue

The appeal issue is whether MassHealth, pursuant to 130 CMR 519.007(H)(1) & (2), correctly determined that the Appellant is not eligible for participation in the MFP-CL and MFP-RS waivers because he 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-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 5, page 6):

- 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 and MFP-RS Waivers on September 1, 2023. Exhibit 5, pages 43. 47. The only issue in dispute is whether the Appellant can be safely served in the community within the terms of the MFP-CL and MFP-RS Waiver. Exhibit 1. The MassHealth representative testified that the Appellant is an adult under the age of 65 who was in an accident and required surgery in [REDACTED]. The Appellant was discharged to his sister's house with visiting nurse services. However, the Appellant's surgical site became infected, and the Appellant was readmitted to the hospital. After a week's stay in the hospital, the

Appellant was discharged to a rehabilitation center where he currently resides.

The MassHealth representative testified that the Appellant's past medical history includes acute embolism, thrombosis of right and lower extremity, hypertension, hyperlipidemia, nondisplaced bicondylar fracture of right tibia, depression, anxiety, ADHD, opioid use in remission, alcohol use, and stimulant dependence. Exhibit 5, page 69. On November 28, 2023, Nurse Reviewer Danielle Proodian met with the Appellant to assess his eligibility for the waiver programs. Proodian also spoke with the Appellant's substance use disorder counselor, and tried to reach the Appellant's son and ex-wife, but those calls were not returned. The Nurse Reviewer found that the Appellant was "very pleasant and cooperative." *Id.*

MassHealth's waiver assessment consists of completion of the following documents: 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 a discussion with the nursing facility staff. *See id.*, pages 51-74. Based on the waiver eligibility assessment, MassHealth noted the following medical and noncompliance-in-care concerns about the Appellant:

- September 27, 2023: Progress Note by substance use disorder counselor states that during behavior rounds, the Appellant was discussed because he is continually asking for an increase in the stimulant medication for his diagnosis attention deficit hyperactivity disorder (ADHD). Intervention includes 1:1 with his substance use disorder counselor to better understand the Appellant's motives. *Id.* at 179.
- October 3, 2023: Nursing Progress Note states that the Appellant was observed sitting on the floor in front of his wheelchair in his room. The Appellant stated that, "he fell asleep in chair then slid off." The Appellant denied any pain or discomfort and he was assisted back to bed. Full assessment was completed, and MD was made aware. *Id.* at 169.
- October 26, 2023: Substance Use Disorder Progress Note states a room search was conducted prompted by a change in the Appellant's mental status. The Appellant took responsibility for the contraband found in his room, which included Hydroxyzine, an Adderall pill, a small burnt piece of rolling paper, one fork with a bent prong, one Axe body spray, nursing shears and one container of alcohol wipes in his belongings. In addition, he reported that he was aware that he had cigarettes, and he was aware that it is a violation of policy. The Appellant was given a final warning for violating smoking/substance use policy and placed on a no harm

contract. The Appellant expressed remorse for his actions and verbalized it would not happen again. *Id.* at 122.

- November 2023: Report indicates that the Appellant was “disruptive-socially inappropriate” 6 days out of 9 days and “verbally abusive” 7 days out of 9 days. *Id.* at 315.
- November 8, 2023: Physical Therapy-Recertification and Updated Plan of Treatment explains current impairments for physical therapy includes balance deficits, decreased functional activity tolerance, decreased range of motion, pain, and strength impairments. *Id.* at 343.

MassHealth found that the Appellant has multiple risks when returning to the community. He is at risk for medical decompensation due to complex medical conditions, at risk for psychological decompensation due to history of depression, anxiety, and ADHD, at risk for falls due to impaired mobility and at risk for substance use and medication mismanagement due to his substance use disorder history and medication seeking behaviors. *Id.* at 72.

The MassHealth representative testified that the Appellant’s case was discussed on December 21, 2023, at the MassHealth Waiver Clinical Team review meeting which includes representatives from the Massachusetts Rehabilitation Commission (MRC) and Department of Developmental Services (DDS). In addition, on December 27, 2023, as part of the MFP Waiver eligibility process, a second clinical review was conducted by the MRC Clinical Team. Based on medical record documentation, and interviews with nursing facility staff, MassHealth, MRC, and DDS determined that the Appellant is a significant health and safety risk to himself. He is at risk for medical decline and substance related concerns including drug use and he requires a higher level of medical support and supervision that cannot be provided by the MFP-CL or MFP-RS Waiver; therefore, MassHealth’s clinical and professional opinion is that the Appellant cannot be safely served in the community within the waiver program. MassHealth notified the Appellant that his applications for the MFP-RS and MFP-CL Waivers were denied on January 2, 2024. *Id.* 44-45, 48-49.

The Appellant attended the hearing by telephone and verified his identity. The Appellant was also represented by a social worker from the rehabilitation center. The social worker testified that she has worked with the Appellant since he was admitted to the rehabilitation center, and that she disputed the idea that the Appellant was “disruptive-socially inappropriate” and “verbally abusive.” The social worker testified that the Appellant is kind and cooperative and that she had never seen the Appellant exhibit those negative behaviors. She testified that the

Appellant is able to form healthy relationships and that she believes the Appellant can be safely served within the terms of the waiver. Regarding the MFP-CL waiver, the Appellant and his social worker testified that they are still in the process of obtaining safe and secure housing for the Appellant.

Findings of Fact

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

1. The Appellant is an adult under the age of 65 (Testimony; Exhibits 4 & 5).
2. The Appellant's medical history includes acute embolism, thrombosis of right and lower extremity, hypertension, hyperlipidemia, nondisplaced bicondylar fracture of right tibia, depression, anxiety, ADHD, opioid use in remission, alcohol use, and stimulant dependence (Testimony; Exhibit 5).
3. After an accident, the Appellant required surgery in [REDACTED]. The Appellant was discharged to his sister's house. The Appellant's surgical site became infected, and the Appellant was readmitted to the hospital. After a week's stay in the hospital, the Appellant was discharged to a rehabilitation center (Testimony; Exhibit 5).
4. On September 1, 2023, the Appellant applied for the MFP-RS and MFP-CL waivers (Testimony; Exhibits 1 & 5).
5. On November 28, 2023, MassHealth conducted an in-person assessment with the Appellant. MassHealth also spoke with the Appellant's substance use disorder counselor (Testimony).
6. On September 27, 2023, the Appellant's substance use disorder counselor discussed during behavior rounds that the Appellant was continually asking for an increase in his stimulant medication (Testimony; Exhibit 5).
7. On October 3, 2023, a nursing progress note stated that the Appellant was observed sitting on the floor in front of his wheelchair in his room. The Appellant stated that, "he fell asleep in chair then slid off." The Appellant denied any pain or discomfort and he was assisted back to bed (Testimony; Exhibit 5).
8. On October 26, 2023, a Substance Use Disorder Progress Note stated that a room search was conducted prompted by a change in the Appellant's mental status. The Appellant took responsibility for the contraband found in his room, which included Hydroxyzine, an Adderall pill, a small burnt piece of rolling paper, one fork with a bent prong, one Axe body spray, nursing shears and one container of alcohol wipes in his belongings. In addition, he

reported that he was aware that he had cigarettes, and he was aware that it is a violation of policy. The Appellant was given a final warning for violating smoking/substance use policy and placed on a no harm contract. The Appellant expressed remorse for his actions and verbalized it would not happen again (Testimony; Exhibit 5).

9. On November 8, 2023, the Appellant's Physical Therapy-Recertification and Updated Plan of Treatment stated that the Appellant's current impairments for physical therapy include balance deficits, decreased functional activity tolerance, decreased range of motion, pain, and strength impairments (Testimony; Exhibit 5).
10. Based on its assessment, MassHealth determined that the Appellant has multiple risks when returning to the community. He is at risk for medical decompensation due to complex medical conditions, at risk for psychological decompensation due to history of depression, anxiety, and ADHD, at risk for falls due to impaired mobility and at risk for substance use and medication mismanagement due to his substance use disorder history and medication seeking behaviors (Testimony; Exhibit 5).
11. Department of Developmental Services and Massachusetts Rehabilitation Commission agreed with MassHealth's assessment (Testimony).
12. MassHealth determined that the Appellant cannot be safely supported by the services available within the MFP-RS and MFP-CL Waivers (Testimony; Exhibits 1 & 5).
13. On January 2, 2024, MassHealth notified the Appellant of its denial of his application for participation in the MFP-RS and MFP-CL Waivers (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 and MFP-CL Waivers. The requirements for the waivers 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

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)).

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 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*.

(2) Money Follows the Person (MFP) Community Living Waiver.

(a) Clinical and Age Requirements. The MFP Community Living 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 specified waiver services, other than residential support services in the home or community, 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. needs one or more of the services under the MFP Community Living Waiver;
5. are able to be safely served in the community within the terms of the MFP Community Living 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 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)(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): Moving Forward Plan Community Living (MFP-CL) Waiver.

130 CMR 519.007(H)(1), (2).

In the present case, MassHealth evaluated the Appellant's eligibility for services under the MFP-RS and MFP-CL waivers and determined that he is not able to be safely served in the community within the terms of the waivers.² 130 CMR 519.007(H)(1)(a)(5); (H)(2)(a)(5). The Appellant's medical history includes acute embolism, thrombosis of right and lower extremity, hypertension, hyperlipidemia, nondisplaced bicondylar fracture of right tibia, depression, anxiety, ADHD, opioid use in remission, alcohol use, and stimulant dependence. During his time at the rehabilitation center, the Appellant has raised the concern of his treatment team by seeking an increase in his stimulant medication, having contraband in his room, and violating the facility's smoking/substance use policy. The Appellant slid from his wheelchair to the floor where he remained until discovered by the center's staff. The Appellant's reported physical therapy impairments include balance deficits, decreased functional activity tolerance, decreased range of motion, pain, and strength impairments. The Appellant is at risk for medical decompensation due to complex medical conditions, at risk for psychological decompensation due to history of depression, anxiety, and ADHD, at risk for falls due to impaired mobility and at risk for substance use and medication mismanagement due to his substance use disorder history and medication seeking behaviors. For these reasons, MassHealth denied the Appellant's request for the MFP-RS and MFP-CL waivers on January 2, 2024.

I credit the Appellant's representative's testimony that the Appellant is kind and cooperative, and that behavior was also displayed during the hearing. 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 and MFP-CL Waivers was incorrect, pursuant to 130 CMR 519.007(H)(1), (2).

Based upon the evidence presented, the Appellant has not met this burden. The Appellant's medical conditions along with his substance use history put him at risk for medical decompensation. 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 waivers. Failing to meet this burden, the appeal is denied.³

² While not cited by MassHealth, and so not discussed further, based on the testimony at hearing, it is not clear that the Appellant meets the eligibility criteria specified in 130 CMR 519.007(H)(1)(a)(6), (H)(2)(a)(6).

³ This determination does not prevent the Appellant from being discharged from the rehabilitation center or from seeking a living situation in the community. The denial of this appeal also does not preclude the Appellant from re-applying for the MFP-RS or MFP-CL waivers. The Appellant is encouraged to re-apply for the waivers if his circumstances change, and he can demonstrate that he can be safely served under the terms of the waivers.

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 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

Appellant Representative: [REDACTED]