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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**

JEAN MAAS
Plaintiff,
v.

MARY LOU SUDDERS et al.
Defendants.

CIVIL ACTION
NO. 18-129-D

HENRY HIRVI and EVA HIRVI
Plaintiffs,
v.

MARY LOU SUDDERS, Secretary of the Executive Office of Health and Human Services, et al.[1]
Defendants

CIVIL ACTION
NO. 18-845-D

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTIONS FOR DECLARATORY JUDGMENT

The plaintiffs, Jean Maas ("Maas") and Henry and Eva Hirvi ("Hirvis") (collectively, "Plaintiffs") brought this declaratory judgment action against Marylou Sudders, Secretary of the Executive Office of Health and Human Services and Kim Larkin, Director of the Board of Hearings of the Office of Medicaid of the Executive Office of Health and Human Services (collectively, "Office" or "Defendants"). After the court consolidated the plaintiffs' preliminary injunction motions with a hearing on the merits, the plaintiffs filed a "Memorandum in Support of Class Certification,

[1] Kim Larkin, Director of the Board of Hearings of the Office of Medicaid of the Executive Office of Health and Human Services.

Declaratory Judgment and Preliminary Injunction" ("Motion"), which the defendants have opposed. After hearing on May 30, 2018, the Motion is **ALLOWED IN PART AND DENIED IN PART.**

BACKGROUND

The Parties' stipulation, court docket and the uncontested exhibits establish the following facts.

Attached to the stipulation are copies of the notices of denial of eligibility that MassHealth mailed to the Plaintiffs, Jean Mass, Henry E. Hirvi and Eva E. Hirvi, notifying them of its determination that each of the plaintiffs had countable assets exceeding the federal and state mandated limits for Medicaid eligibility. Those denial notices are representative of the standardized denial notices that MassHealth mails to an applicant for coverage of long-term care services in a nursing facility, when MassHealth has determined that the applicant has more countable assets than federal and state Medicaid law permits for eligibility.

In relevant part, the notice sent to Maas on October 12, 2017 states:

> Important! This health-care benefits notice tells you the decisions we have made about certain programs that you may be eligible for. Please read the whole notice to find out about your health-care benefits.
>
> **MassHealth Long-Term-Care Services in a Nursing Facility**
>
> MassHealth has reviewed your application for MassHealth long-term-care services which you filed on 09/06/2017. You are not eligible for MassHealth long-term-care services for the following reasons:
>
> **Reason and Manual Citation**
>
> You have more countable assets than MassHealth benefits allow. 130 CMR 520.003 520.004
>
> **What Happens Next?**
>
> You must spend $249.796.96 of your assets. You can spend the excess assets on your needs, but you cannot give them away.
>
> You must show MassHealth within the next 30 days that you have lowered your assets to $2,000. . . .

The calculation page at the end of this notice shows how we counted your assets. . . .

* * *

How We Counted your Assets

MA Countable Assets

Life Insurance	0.00	
FNA Account	100.00	
Auto Value:	0.00	
Bank Account:	125.00	
Real Estate Value	0.00	
Other:	251,571.96	
Total Asset Amount		251,796.96
MA Asset Limit for Household (1):		2,000.00
		- - - - - - - - - - - -
Excess Asset Amount:		249,796.96

The notice also contains a similar chart showing how the Office counted Maas' income, a statement "how to ask for a fair hearing" and a "Fair Hearing Request Form." Maas appealed. On January 16, 2018, she filed this lawsuit.

A thorough review of the trust and the denial notice reveals no distinction between the Mass trust and the one in Daley v. Secretary of Executive Office of Health and Human Services, 477Mass. 188, 189 (2017) ("We conclude that neither the grant in an irrevocable trust of a right of use and occupancy in a primary residence to an applicant nor the retention by an applicant of a life estate in his or her primary residence makes the equity in the home owned by the trust a countable asset for the purpose of determining Medicaid eligibility for long-term care benefits."). The Office apparently agreed, as it granted Maas' application, after hearing, in a decision dated May 1, 2018. See Appeal

Decision at 8, Def. Opp., Ex. J. ("MassHealth is jumping over a line of demarcation between income and principal in violation of the ruling of Daley."). It turns out, based upon the Office's hearing brief dated February 13, 2018 (Comm. Opp., Ex. I) that the Office's primary (though not sole) argument (at 8-10) was that, in practice, the trustee made principal available for the benefit of the applicant. It also tried to distinguish Daley and cited a specific provision of the Mass Trust (paragraph 3(a)) not cited in the denial notice. Of note, the Office's February 13, 2018 hearing brief came four months after the denial notice of October 12, 2017.

The Hirvis' notices followed the same format, although they have a figure of "347,793.30" for "Other" assets and excess asset amounts of 386,437.48 and 387,920.71 for Henry and Eva Hirvi, respectively, reflecting differences in the amount in their respective bank accounts. Because the Hirvi matters are still pending before the Office, the record does not show what happened after the denial notice and appeal therefrom.

In each case, the "Other" assets were trusts. After commencement of these lawsuits, the Office has amended its standard notices to show specific amounts for countable assets attributable to trusts.

DISCUSSION

I. Legal Sufficiency of the Notices

a. Regulations

The key Federal Medicaid regulation states:

> A notice required under 42 C.F.R. § 431.206(c)(2) . . . must contain:
>
> (a) A statement of what action the agency . . . intends to take and the effective date of such action;
>
> **(b) A clear statement of the specific reasons supporting the intended action;**
>
> (c) The specific regulations that support or the change in Federal or State law that requires, the action;
>
> (d) An explanation of

(1) The individual's right to request a local evidentiary hearing if one is available, or a State agency hearing;
or (2) in cases of an action based on a change in law, the circumstances under which a hearing will be granted; and

(e) an explanation of the circumstances under which Medicaid is continued if a hearing is requested.

42 C.F.R. § 431.210 (emphasis added) (the "regulation"). The referenced regulation applies "[a]t at the time the agency denies an individual's claim for eligibility, benefits or services , , ,," 42 C.F.R. § 431.206(c)(2). See also 42 C.F.R §43.917(a), (b)(2) (Medicaid denial notices must be "timely and adequate" and must comply with 42 C.F.R. § 431.210). The Medicaid notice provisions are enforceable against a state Medicaid agency. See Murphy by Murphy v. Minnesota Dept. of Human Services, 260 F. Supp. 3d 1084 (D. Minn. 2017); Guggenberger v. Minnesota, 198 F.Supp.3d 973, 1023 (D. Minn. 2016).

Among other things, the Massachusetts regulations require advance written notice "to permit adequate preparation of the case." 130 Code Mass. Regs. 610.046(A).[2] Several federal and state statutes and regulations require proper and efficient administration of state Medicaid programs "in a manner consistent with simplicity of administration and the best interests of the recipients." 42 U.S.C. § 1396a(a)(19); 42 C.F.R. 435.902; G.L. c. 118E, § 12.

b. Insufficiency of the Notices

The Office's standard form of notice denying benefits because of trust assets does not provide "[a] clear statement of the specific reasons supporting the intended action" and therefore violates 42 C.F.R. § 431.210. The parties have not cited any case law interpreting that phrase. At least one federal

[2] Massachusetts regulations require "adequate" notice of an intended agency action, including the reasons for the action and citations to regulations. 130 Code Mass. Regs. § 610.026(A). They also require written notice of MassHealth eligibility determinations, including notice of an applicant's appeal rights and must "either provide[] information so the applicant or member can determine the reason for any adverse decision or direct[] the applicant or member to such information." 130 Code Mass. Regs. § 516.008.

district court has held a complaint sufficient under Fed. R. Civ. P. 12(b)(6) where the plaintiff alleged that the agency's notice provided inadequate specificity about the reasons for agency action. Darjee v. Betlach (D. Ariz. March 31, 2017) (No. CV-16-00489-TUC-RM (DTF) (The complaint's allegations "support an inference that 'your immigration status does not let you get full medical services' is not a 'clear statement of the specific reason' for reducing Sanchez Haro's benefits. 42 C.F.R. § 431.210(b).").[3]

In any event, the plain meaning of the regulatory words requires more explanation than the Office's standard provides in trust asset cases. According to the most applicable definition, "clear" means: "3.c : free from obscurity or ambiguity : easily understood : unmistakable a *clear* explanation." Merriam-Webster On line dictionary (definition of "clear"). "Specific" means:

> a : constituting or falling into a specifiable category
>
> b : sharing or being those properties of something that allow it to be referred to a particular category
>
> * * *
>
> 3 : free from ambiguity"

Merriam-Webster On line dictionary (definition of "specific"). "Specific" is the opposite of "general, generalized [and] generic." See Merriam-Webster On line thesaurus (definition of "specific"). A "reason" is "a statement offered in explanation or justification." Id. (definition 1.a of "reason"). A generic and ambiguous statement falls short of meeting these definitions. Yet that is what the standard notice provides: a statement that the applicant has too many assets, coupled with a list of the assets equal to the trust's value, without explanation why the Office counted the trust.

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[3] The court continued: "As Plaintiffs point out, the proffered reason could have a number of meanings, e.g., Sanchez Haro's immigration status changed unbeknownst to her, or Defendant changed which immigration statuses are eligible for full benefits. Sanchez Haro's inability to understand the notice's reason for the reduction supports an inference that the notice is 'confusing' and is not in compliance with federal regulations and due process."

The shortcomings in the Office's notices are apparent from the Commonwealth's accurate description of what the notices provide:

> [E]ach plaintiff received a notice that (1) indicated that the plaintiff was denied for having excess countable assets, (2) provided the relevant asset limit with citations to regulations, and (3) provided a summary of the plaintiff's assets that MassHealth had determined were countable, leading to the determination of ineligibility.

Def. Mem. at 8. Item (2) complied with 42 C.F.R. § 431.210(c). Items (1) and (3) complied with 42 C.F.R. § 431.210(a). They may also be taken as giving a general statement of reasons for denial.

They fail, however, to give any "reason" – let alone a clear statement of a specific reason -- for the most essential determination of all: why the Office deemed the asset (trust) countable. Even less does the Office's notice give a "clear statement" or "specific reasons" for counting a trust's assets as the applicant's assets for Medicaid purposes. Stating what, but not why, falls short of 42 C.F.R. § 431.210 requirements. Without the notice required by the regulation, an applicant lacks the information required "to permit adequate preparation of the case." 130 Code Mass. Regs. 610.046(A).

While there is disagreement whether the Office must actually follow the same notice practices as employed for notices in the Supplemental Security Income ("SSI") program, the plaintiffs acknowledge that the Program Operations Manual System of the Social Security Administration, § S01121.202(A)(1)(g), entitled "Manual notices" illustrates a lawful approach in a trust asset case:

> When applicable, issue a manual notice for trusts established with an individual's assets on or after 01/01/00 . . . . For such notices, specify using free-form text each reason the trust is countable (that is, why it does not meet the relevant exception(s) or requirements). In the notice, you must cite: the applicable section of the trust (or any joinder agreement, if applicable) containing the problematic language or issue; and the Program Operations Manual System (POMS) citation that contains the policy requirements on that subject.

This directive adopts a sensible way to give a clear statement of the specific reasons for including a trust as countable assets; it only requires the agency to articulate specific determinations (reasons) that agency staff must already have made if they denied benefits rationally and conscientiously.

The court does not rule that this time that the SSI approach is the only lawful one under 42 C.F.R. § 431.210(b). Because the Office might formulate a different approach to comply with that regulation, the court suspends judgment on defining the regulatory minimum at least until the defendants decide how to change their practices to conform to law. See generally Massachusetts Coalition for the Homeless v. Secretary of Health & Human Services, 422 Mass. 214, 223 (1996) ("Only when . . . there is but one way in which [an agency's legal] obligation may properly be fulfilled, is a judge warranted in telling a public agency precisely how it must fulfill its legal obligation."), quoting Matter of McKnight, 406 Mass. 787, 792 (1990).

c. Subsequent Cure Argument

The defendants argue that events occurring after the denial notice eventually give the applicant an understanding of the specific reasons why the Office denied the claim. For many reasons, this "subsequent cure" argument cannot excuse their failure to give a clear statement of the specific reasons for the denial at the outset. Cf. also Darjee at fn 8 ("The Court is not convinced that a notice is sufficient if it causes the recipient to take action. At this juncture, the allegation that Sanchez Haro called the phone number on the notice for an explanation is equally supportive of an inference that the notices are legally defective.").

First, and most simply, the argument ignores the plain language of the governing regulations, quoted above. 42 C.F.R. § 431.210 specifically applies to the notice that the agency must give the applicant "[a]t at the time the agency denies an individual's claim for eligibility, benefits or services , , ," 42 C.F.R. § 431.206(c)(2). Notice given at a later time falls outside that clear command. Moreover, 42 C.F.R. § 431.210 requires that the notice itself contain the clear statement of the specific reasons for agency action. Information provided outside the notice, at a much later time, violates that command.

To be sure, the less demanding language of other statutes may well tolerate the Office's approach. For instance, under G.L. c. 30A, any defects that may have existed in the original notice can be cured by granting access to the agency's files that contain information on the allegations, by having pre-hearing proceedings, or by statements on the record at the hearing itself (provided there is still time to prepare and respond). See Vaspourakan, Ltd. v. ABCC, 401 Mass. 347, 353-354 (1987); Solimeno v. State Racing Commission, 400 Mass. 397, 405-406 (1987) (oral notice at the hearing, which then took several weeks to complete); Aristocratic Restaurant v. Alcoholic Beverages Control Commission, 374 Mass. 547, appeal dismissed, 439 U.S. 803 (1978) (notice that gave only the citation to regulations allegedly violated was insufficient, but was cured by the availability of the commission's files to each licensee).[4] Undoubtedly aware of such doctrines in administrative law generally, HHS expressly rejected such an approach in 42 C.F.R. § 431.210. The "clear and specific" notice required by the regulation in this case contrasts with the rule applied in other contexts, governed by different statutory or regulatory language.

Second, the subsequent cure argument falls short, even if it were lawful to comply with the spirit, but not the regulatory words. The Office fails to acknowledge that the spirit of the governing regulations addresses many different and important goals. The regulation does not merely ensure that the applicant eventually learns about the agency's specific reasons before the close of evidence and argument at the agency level. If that were the sole intent, the regulation would not require clarity and specificity at the outset.

The regulation's numerous purposes respond to, and to a degree counteract, the applicant's difficulty in "navigat[ing] the labyrinth of controlling statutes and regulations to determine whether applicants are eligible for long-term care benefits under the Federal Medicaid Act . . .." Daley, 477 Mass. at 188.

[4] These cases also support the legality of this subsequent cure approach under the constitutional due process clauses at least in some contexts.

It is no accident that Daley itself addressed the Office's erroneous (and inconsistent) treatment of an irrevocable trust as a countable asset for Medicaid purposes.

For one thing, a clear statement of specific reasons promotes the statutory requirement that Medicaid applications be handled "with reasonable promptness." 42 U.S.C. § 1396a(a)(8). See G.L. c. 118E, § 48 ("the referee shall render and issue a decision without forty-five days after the date of filing of said appeal"). It reduces the prospect of delays and continuances attributable to the applicant's efforts to learn the Office's specific reasons. 42 C.F.R. § 431.210(b). These kinds of time-consuming efforts are precisely what the Office suggests in response to uncertainties inherent in an inadequate notice. Def. Mem. at 12-13 (suggesting clarification of the issues through prehearing conference, pre-hearing briefing or keeping the record open, all of which take time), citing 130 Code Mass. Regs. § 610.065(B)(3), (11). Since the agency knows (or should know) the reasons for its staff's decision, delay caused by the Office's proposal to give notice through subsequent iterative processes is not "reasonable." The subsequent cure argument assumes that delay caused by delay in learning the agency's reasons, is of no consequence under Medicaid law. That is not so. Unnecessary delay – attributable to efforts to discover what the agency already knows -- is exactly what the law seeks to avoid. See 42 U.S.C. § 1396a(a)(8); G.L. c. 118E, § 48.[5]

While delay in itself is an incurable detriment, the financial, resource and psychic burden placed upon the applicant -- and any family members or others who may be devoting their own limited time and resources to help the applicant -- during the delay are also problematic and irreparable. A clear and specific statement of reasons allows the applicant to save time and expense researching, investigating and preparing for arguments upon which the agency might have, but did not, rely. Self-represented

[5] While one could argue that this 45-day period should not include an applicant's request for a pretrial conference or briefing, the question here is not whether the Office is violating c. 118E, § 48 (although the plaintiffs (Mem. at 7 n. 8) claims that it does violate that statute). In this case, the question is whether the Office has the right to keep applicants in the dark to the point where they have to ask for such pre-trial proceedings, with attendant delays.

persons undoubtedly benefit from an ability to focus upon and understand what actually led to the agency's decision, not to mention the reduction in anxiety that uncertainty can cause. Applicants represented by counsel may save significant resources. Moneys spent trying to discern the agency's reasons cannot be recovered by suing the agency. In any case, focus upon the agency's real and stated reasons allows a better opportunity to prepare, without wasting money or diluting the applicant's efforts. That is why 130 Code Mass. Regs. 610.046(A) requires sufficient notice "to permit adequate preparation of the case."

Ironically, the Office will actually save resources if a clear statement of specific reasons actually convinces the applicant or counsel that the denial was correct. In such cases, there is no need to request a fair hearing and expend agency resources on an unnecessary appeal. Only if the initial determination is wrong or debatable would public resources be expended on an administrative hearing if the initial notice is sufficient. Giving adequate notice that will avoid protective appeals, filed to preserve rights until the Office's reasons are known, thus operates "in a manner consistent with simplicity of administration and the best interests of the recipients." 42 U.S.C. § 1396a(a)(19); 42 C.F.R. 435.902; G.L. c. 118E, § 12. It is also worth noting that a resource-based justification not only lacks any basis in the regulation, but also depends upon the assumption that the Office often cannot give a convincing clear statement of the specific reasons for its initial denial of benefits.

Moreover, the regulations prevent the agency from using its superior knowledge to the detriment of the citizen. Having reviewed the application at the staff level, the Office undoubtedly knows the clear and specific reasons why it denied the application. There is no reason why it should withhold this information, except for unfair tactical advantage. Whether intentional or not, this tactic also operates as leverage in forcing a vulnerable applicant to negotiate a quick resolution even if the Office is in the wrong. The regulation prevents the government from disadvantaging its citizens in these ways. It also serves the interest of transparency. The regulation dictates that the Office, as a government agency

supported by public funds and serving the Commonwealth's citizens, must not proceed in secret or with indecipherable code, but owes a fair explanation of its decisions to the applicants whose lives it affects, often at a time when the applicant is in a very vulnerable position.

Finally, like any rule requiring a statement of reasons, the regulation provides discipline, structures agency decision making and promotes compliance with the law. It is easy to deny an application with an opaque explanation and leave matters for an appeal. On the other hand, to give a clear and specific statement of reasons, the staff must review the application with some care. In many contexts, the courts have acknowledged the discipline that a statement of reasons imposes upon decision-making, which ensures adherence to the law and checks arbitrariness. See generally Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 48-49 (1983) and cases cited. McDonough, Administrative Law and Procedure, 38 Mass. Practice Series, § 10.37, pp. 607-608 (2016 Ed.) ("In addition to facilitating and effectuating the function of judicial review, a statement of reasons constitutes a substantial check upon the misuse of agency power because a final decision based upon a statement of reasons is far less likely than otherwise to be the product of arbitrary, capricious or unreasonable agency consideration."). That goal is particularly important in a trust assets case like this one, where "Medicaid law is 'almost unintelligible to the uninitiated,'"[6] and the Office has taken many inconsistent and sometimes contradictory positions on treatment of trusts for purposes of calculating assets under the Medicaid laws.[7] The regulation leaves less room for hidden inconsistency and whim by requiring the Office to state its reasons for denying an application clearly and specifically.

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[6] Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981), quoting Friedman v. Berger, 547 F.2d 724, 727 n. 7 (2nd Cir. 1976).

[7] Illustrative of the confusion (and not considered on the merits, or for the truth of the statements therein) are Exhibit G to the Plaintiff's Memorandum. See also Amicus Brief of Elder Law Attorneys [in Daley v. Secretary of Executive Office of Health and Human Services, supra] at 37-41 (citing inconsistent application of the terms "income", "assets" and "resources"). The court agrees in principle with Defendants' Emergency Motion to Strike, which addresses Plaintiffs' Exhibits G through I and P,

d. Declaratory Relief

Declaratory relief "may be used in the superior court to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any municipal, county or state agency or official which practices or procedures are alleged to be in violation of the Constitution of the United States or of the constitution or laws of the commonwealth, or are in violation of rules or regulations promulgated under the authority of such laws, which violation has been consistently repeated . . . ." Villages Dev. Co. v. Secretary of the Executive Office of Envtl. Affairs, 410 Mass. 100, 106 (1991). As noted above, the Office uses denial notices that follow a consistent format, to the point where the legal insufficiency of the notices is "consistently repeated."

> To secure declaratory relief in a case involving administrative action, a plaintiff must show that (1) there is an actual controversy; (2) he has standing; (3) necessary parties have been joined; and (4) available administrative remedies have been exhausted.

Id. On the "actual controversy" requirement, the Supreme Judicial Court has stated:

> An actual controversy arises under our law where there is "a real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation." School Comm. of Cambridge v. Superintendent of Sch. of Cambridge, 320 Mass. 516, 518 (1946).

Libertarian Ass'n of Massachusetts v. Secretary of the Commonwealth, 462 Mass. 538, 546-547 (2012). This case meets that test. The plaintiffs assert a legal right to a notice containing more specific reasons than the Office's standard notice provides for trust asset cases. The defendants deny that such a right exists. At least the Hirvi plaintiffs still have a definite interest in such a notice, and the matter

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because the court resolves this matter on a "case stated" basis, with the result that it considers only agreed facts and exhibits on the merits.

The court treats Exhibit G to the Plaintiffs' Memorandum effectively as amicus curiae submissions. In interpreting the law, it is significant that treatment of trust assets has generated much confusion and litigation – precisely what the key regulation seeks to minimize. That said, the text of the regulation and case law of which the court make take judicial notice lead to the same result without consideration of the contested exhibits.

has already led to litigation. Moreover, because the notice issue arises in the course of an administrative hearing that is supposed to occur quickly and involves interests that are not served even if a subsequent cure occurs, the complaint raises issues that are capable of repetition but will evade review. See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 774-775 (1978). See generally Blake v. Massachusetts Parole Board, 369 Mass. 701, 708 (1976).

It is true that. On April 28, 2018, the Office altered its policy somewhat, by adding a new category of assets for "trust assets" to its standard list of "MA Countable Assets." However, that minor change, occurring more than three months after commencement of this case on January 16, 2018, does not suffice to comply with the regulations, because it merely states what was included, not why; it is not a clear statement of specific reasons. Nor does this change moot the controversy even if it complied with the regulation. The "voluntary cessation of a challenged practice" does not make this case moot, where the defendants have stopped their unlawful practices only in response to litigation. See City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982); Reproductive Rights Network v. President of the University of Massachusetts, 45 Mass. App. Ct. 495, 500-501 (1998). There has been no statutory or regulatory change. The Office thus has not "adopted a concededly [lawful] replacement" to its prior policy. Compare American Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44, 56 (1st Cir. 2013).

Under G.L. c. 231A, § 3, the court has discretion to "refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings or for other sufficient reasons." This case has explored the Office's notices that deem trust assets countable for MassHealth purposes. It has not explored other contexts, which may well share similar deficiencies, but which might also raise different issues. From the Daley case and materials in the record, it is clear that consideration of trusts for asset counting purposes is particularly confusing or problematic and has led to inconsistent treatment.

The court therefore exercises its discretion to declare the parties' rights only with respect to notices that treat trusts as countable assets for MassHealth purposes. That is not to say that the Office's obligation to provide a clear statement of specific reasons is limited to the trust situation. Obviously, it is not. The Office may well adopt a solution for trusts that affects other contexts as well. If not, the court may need to consider a broader declaration.

II. Subpoenas

The plaintiffs also challenge the Office's regulation, 130 Code Mass. Regs. 610.052, which purports to confer discretion whether or not to issue a subpoena upon request by an applicant: "[a]ny party may submit to BOH a written request for the issuance of such subpoena. If, **in its discretion** . . . BOH allows such request, a subpoena will be issued within three business days of receipt of such request." (Emphasis added). The plaintiffs point out that, in apparent contrast to that regulation, G.L. c. 30A, § 12(3) states in mandatory and unequivocal terms: [a]ny party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding." (Emphasis added).

The parties' stipulation, ¶ 3, states that, "[o]n April 10, 2018, Eva E. Hirvi and Henry E. Hirvi, through counsel, wrote to Kim Larkin, Director of the Board of Hearings, and submitted the requests attached as Exhibit 4" to the stipulation. The first four paragraphs of Exhibit A to that subpoena request seek documents describing the facts that support the agency's decision to deny the application.

The dispute over subpoenas arises in large part because the plaintiffs have tried to use the subpoena mechanism as a means to obtain what the regulations require the Office to include in the denial notice, namely, the agency's specific reasons for denial of benefits due to trust assets deemed includable. The need to use such subpoenas in the future may diminish, change or even vanish if the Office comes into compliance with 42 C.F.R. § 431.210(b). The content of the subpoenas themselves may change, in response to the changes needed to comply with that regulation. Those changes will

likely address the most contentious reason for the Office's denial of subpoena requests – the impropriety of inquiry into the agency's unstated thought process and strategies. If the changes go far enough, litigation over that most contentious issue may be unnecessary.

As noted above, issuance of declaratory relief is discretionary. Where the nature of the issues may change as a result of the declaration of rights under 42 C.F.R. § 431.210(b), it is wiser to await full development of any controversy before issuing what may turn out to be an academic ruling. Indeed, in view of the discussion in part I above, the subpoena issue may no longer raise an actual controversy because litigation over it is not currently inevitable.

III. Consistency

Finally, the plaintiffs ask the court to order the Office to order approval of MassHealth eligibility or explain why the Daley case does not compel approval of the application. Since the Office will have to provide a clear statement of the specific reasons for its action in all cases, including the Hirvis', the court's declaration under 42 C.F.R. § 431.210(b) may afford effectively the same relief. At a minimum, it will require the agency to focus upon its rationale and will likely result either in (a) a recognition that the Daley case compels approval, or (b) specification of the trust provisions thought to be distinguishable from Daley. Thus, for essentially the same reasons as the subpoena issue discussed in part II, above, the court declines to enter declaratory relief on the "consistency" issue.

The court also notes significant concerns with judicial involvement in a question as amorphous as "consistency" in the absence of a clear statutory or regulatory requirement, such as 42 C.F.R. § 431.210(b). To do so would inappropriately "impose procedural requirements on administrative agencies in addition to those imposed by" Congress or the Legislature. See Grocery Mfrs. of America, Inc. v. Department of Pub. Health, 379 Mass. 70, 79-80 (1999), citing Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524-525 (1978). Unlike 42 C.F.R. § 431.210(b), which serves interests that cannot be vindicated through later exhaustion of the

administrative process, the failure of the Office to follow the law set forth in Daley, or other court decisions, or even its own adjudicatory decisions, can be remedied through a fair hearing decision process or judicial review.

IV. Class Action

The court declines to certify a class, largely for the same reasons it declined to do so in another, recent declaratory judgment action. Chelsea Collaborative, Inc. v. Galvin, SUCV 16-3354 (March 8, 2017). The court follows the same analysis here.

Class certification does not turn on the merits. Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 361 (2008), quoting Weld v. Glaxo Wellcome Inc., 434 Mass. 81, 84-85 (2001). See generally Aspinall v. Philip Morris Cos., 442 Mass. 381, 391-392 (2004), quoting Fletcher v. Cape Cod Gas Co., 394 Mass. 595, 605 (1985). The plaintiff's burden is well established:

> On a motion for class certification pursuant to either rule 23 or G.L. c. 93A, § 9(2), "[t]he plaintiffs bear the burden of providing information sufficient to enable the motion judge to form a reasonable judgment that the class meets the requirements of rule 23 [and c.93A § 9(2)]; they do not bear the burden of producing evidence sufficient to prove that the requirements have been met" (emphasis added). Weld v. Glaxo Wellcome Inc., 434 Mass. 81, 87 (2001).

Kwaak v. Pfizer, Inc., 71 Mass. App. Ct. 293, 297 (2008).

To grant a motion for class certification, the court must find, among other things, that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Mass. R. Civ. P. 23(b). This criterion requires consideration of the efficiency of the class-action device, the possible expense to the plaintiffs, and the likelihood of judicial economy being served. Berry v. Town of Danvers, 34 Mass. App. Ct. 507, 515 (1993); Sniffin v. Prudential Ins. Co. of Am., 11 Mass. App. Ct. 714, 724-25 (1981). Typically, a case meets the "superiority" test if it "presents a classic illustration of the policies of judicial efficiency and access to courts that underlie the [Medicaid] class action suit: it aggregates

numerous small claims into one action, whose likely range of recovery would preclude any individual plaintiff from having his or her day in court." Weld, 434 Mass. at 93.

This case includes a prayer for declaratory relief. The Court has ruled in plaintiffs' favor, and enters a declaration as requested. A declaration against the Commonwealth's agents under § 2 inures to the benefit of all affected persons who deal with the Office:

> . . . when a decree has already been entered declaring an administrative practice or procedure as defined in section two to be illegal, and **a person not a party to the original action** involving said practice or procedure is adversely affected by the same or similar practice or procedure by the same agency, said person may seek relief under this chapter by filing a petition for contempt against the agency or agent continuing said practice or procedure after the entry of said decree.

G.L. c. 231A, § 5 (second paragraph) (emphasis added). It is therefore not necessary to become a named party or class member to enforce the Court's declaration. All remedies, up to and including contempt, are available to all affected persons.[8]

On the other hand, class actions come with potentially burdensome requirements regarding notice to and representation of absent class members. That is particularly tricky here, where the class of Medicaid applicants is constantly in flux: growing – and potentially shrinking almost as fast -- as the Office receives appeals and resolves the issues at a hearing. That raises difficult questions about class action management, even if the requirements of Mass. R. Civ. P. 23(a) were met. Not the least of the problems would be identifying and

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[8] It is true that G.L. c. 231A, § 8 (paragraphs 2 and 3) states:

> Nothing set forth in this section shall bar the bringing of a class action for declaratory relief pursuant to the new rules of civil procedure.
>
> Following entry of a final decree or order favorable to the petitioner or petitioners in a class suit, any member of said class thereafter aggrieved by any violation of said order or decree shall be entitled to compel compliance therewith by instituting contempt proceedings in said class suit.

The Court cannot imagine (and the parties have not argued) how class action status in this case would give any class member greater rights under § 8 than he or she already would have under § 5.

notifying class members at the crucial time – after receipt of the denial notice and before the hearing.

Given the remedy of G. L. c. 231A, § 7, it is not persuasive that the interests of individual applicants may be too small to warrant the expenditure of individual time and money to recover what may be relatively small individual damages. Refusing class action status would still allow those applicants to invoke a favorable declaration in this case. No class member would be harmed by denial of class certification.

For all these reasons, I find that a class action is not the superior means of adjudicating this case. To provide a complete record in the event of appellate review, the Court also considers the additional components of the Rule 23 test for class certification.

1. Numerosity. The class meets the requirement in Rule 23(a)(1) that "the class is so numerous that joinder of all members is impracticable." Every MassHealth applicant with a trust is potentially affected, which appears to be a sizable number, judging simply from the number of cases that have reached the courts, including Daley and cases cited therein. While an exact number is not presently available, the Court therefore finds sufficient numerosity to certify the class described above. Cf. In re Relafen Antitrust Litigation, 218 F.R.D. 337, 342 (D. Mass. 2003). Joinder of all these present and former applicants would be impracticable, in that it would be highly unwise or imprudent. Sniffin v. Prudential Ins. Co. of America, 11 Mass. App. Ct. 714, 723-24 (1981).

Where the case is proceeding on the basis that the issue is capable of repetition yet evades review, the Court should look at the number of people affected on a regular basis when the problem repeats itself. Cf. Gonzalez v. Comm'r of Correction, 407 Mass. 448, 452 (1990) (Even if the named plaintiffs' case is moot, the Court may certify a class in "a case involving named plaintiffs . . . whose claims are likely to recur but are so transient by their

very nature they are likely to become moot before a court reasonably can rule on a certification motion".."). Otherwise, those people could lose their rights (in the absence of a declaration) or would file suits so numerous that the Courts could not handle them in the short time available.

2. Common Questions of Law and Fact. The defendants' standard denial notices raise common questions of regulatory compliance. The case therefore obviously involves common questions of law and fact. See Salvas, 452 Mass. at 366, 370 ("all members of the class were unarguably the beneficiaries of identical terms of employment"; evidence that "all of the class members . . . were subject to the identical terms and conditions" of employment).

3. Typicality. The plaintiffs' claims must be "typical of the claims . . . of the class." Mass. R. Civ. P. 23 (3). That requires "'a sufficient relationship between the injury to the named plaintiff and the conduct affecting the class,,' and [that] the claims of the named plaintiff and those of the class 'are based on the same legal theory.'" Weld, 434 Mass. at 87. The named plaintiffs are Massachusetts applicants who received standard denial notices based upon trust assets. They therefore are typical of all people who have been and will be denied the right to a clear statement of the specific reasons for denial of their claim.

4. Fair Protection of the Class's Interests. The plaintiffs must show that they and their counsel "will fairly and adequately protect the interests of the class." Mass. R. Civ. P. 23(a)(4). There can be no doubt that proposed class counsel are well-qualified and experienced in Medicaid litigation. The defendants do not challenge the adequacy and competence of class counsel.

So far as appears, the plaintiffs have sufficient personal incentive to prosecute this case, even though Maas has now prevailed at her hearing. See generally Smith and Zobel, Massachusetts Rules Practice, § 23.7, 6 Mass. Practice Series, p. 339-340 (2006). Their

diligence in doing so to date proves their adequacy as a class members. In any event, the Court stands ready to intervene in the unlikely event that any future deficiency appears on this score (id.) by issuing an order "at any stage of an action" under Rule 23 to "impose such terms as shall fairly and adequately protect the interests of the class . . .." Mass. R. Civ. P. 23(d). It may also "order entry of judgment in such form as to affect only the parties to the action and those adequately represented." There is no appreciable threat that inadequate representation will harm absent parties, either now or in the future.

5. Predomination of Common Issues. Under the law set forth above, common issues predominate. "Class certification may be appropriate where common issues of law and fact are shown to form the nucleus of a liability claim, even though the appropriateness of class action treatment in the damages phase is an open question." Salvas, 452 Mass. at 364. See also Weld, 434 Mass. at 91-93. Here, it is obvious that the predominant legal issues concern the legality of the Office's standard notice. All of the important issues are therefore common to all members of the putative class.

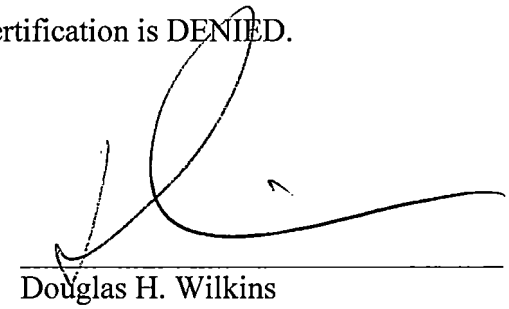
CONCLUSION

After hearing on the merits:

1. The Plaintiffs' Motion for Class Certification, Declaratory Judgment and Preliminary Injunction is ALLOWED IN PART AND DENIED IN PART.
2. The Court DECLARES that, in cases where the defendants count trust assets for Medicaid eligibility purposes, the defendants' standard notices of denial of eligibility violate 42 C.F.R. § 431.210(b) by failing to provide a clear statement of the specific reasons supporting the intended action.

3. All other requested relief is denied as premature at this time for lack of an actual controversy and as a matter of discretion pending the defendants' response to the court's declaration in paragraph 2, above.

4. The Motion for Class Certification is DENIED.



Douglas H. Wilkins
Justice of the Superior Court

Dated: June 22, 2018