

COMMONWEALTH OF MASSACHUSETTS  
TRIAL COURT

SUFFOLK, ss

SUPERIOR COURT  
DOCKET NO:

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)  
CHERYL SEVERS brought on her behalf )  
by her legal guardians RUSSELL SEVERS )  
AND ALBERTA SEVERS, )  
Plaintiff )  
)  
vs. )  
)  
EXECUTIVE OFFICE OF HEALTH )  
AND HUMAN SERVICES; MARYLOU )  
SUDDERS, Secretary of the Executive )  
Office of Health and Human Services; and )  
AMANDA CASSEL KRAFT, Acting )  
Assistant Secretary for MassHealth, )  
Defendants )  
\_\_\_\_\_ )

COMPLAINT FOR JUDICIAL REVIEW

**INTRODUCTION**

Cheryl Severs (Ms. Severs) is a severely intellectually disabled member of MassHealth’s PCA program. Alberta and Russell Severs are her permanent legal guardians, and bring this suit on Ms. Severs’ behalf. Ms. Severs is seeking judicial review pursuant to G.L. c. 30A of a final decision by the Medicaid Board of Hearings, denying her an opportunity for a fair hearing to dispute the amount of Personal Care Attendant (PCA) services cut by her Personal Care Management Agency, Tempus. The Board of Hearings refused to consider Tempus’ over 50% reduction of Ms. Severs’ PCA hours on the erroneous grounds that Tempus was acting on its own medical discretion, not as MassHealth. In fact, Tempus’ actions are so closely regulated and

prescribed by MassHealth, that they constitute state action and should be appealable with the Board of Hearings. Otherwise, PCA members like Ms. Severs are left without meaningful recourse when a PCM agency reduces the member's PCA hours, depriving them of due process.

### **JURISDICTION**

1. Jurisdiction of the plaintiff's cause of action is conferred upon the Superior Court by G.L. c. 30A § 14, G.L. c. 212 § 4, G.L. c. 214 § 1, G.L. c. 231A § 1, and 42 USC § 1983.

### **PARTIES**

2. The plaintiff, Cheryl Severs, resides in Attleboro, Bristol County, Massachusetts. Ms. Severs' permanent co-legal guardians Alberta Severs and Russell Severs bring this case on her behalf in compliance with Massachusetts Rules of Civil Procedure, Rule 17(b).

3. Defendant, Massachusetts Executive Office of Health and Human Services ("EOHHS"), is the agency charged under federal and state law with the responsibility for administering the Massachusetts Medicaid Program ("MassHealth"). The Office of Medicaid, within EOHHS, administers the MassHealth program. G.L. c. 118E § 1. The Office of Medicaid Board of Hearings ("Board of Hearings") is responsible for administering the MassHealth fair hearing process in accordance with 130 CMR 610.000 *et seq.* EOHHS is located at One Ashburton Place, Boston, Suffolk County, Massachusetts.

4. Defendant Mary Lou Sudders is the Secretary of the Executive Office of Health and Human Services. She is responsible for the oversight and control of the MassHealth program pursuant to G.L. c. 118E §2. Her office is located at One Ashburton Place, Boston, Suffolk County, Massachusetts.

5. Defendant Amanda Cassel Kraft is the Acting Assistant Secretary for MassHealth. As the Assistant Secretary for MassHealth, she is responsible for the administration

of the Medicaid program. Her office is at One Ashburton Place, Boston, Suffolk County, Massachusetts.

## FACTS

### THE MEDICAID PROGRAM

6. Medicaid is a cooperative federal-state program designed to enable each state to furnish comprehensive medical assistance to needy citizens whose income is insufficient to meet the costs of necessary medical care. 42 U.S.C. § 1396 *et seq.*

7. A state's participation in the Medicaid program is voluntary. Massachusetts has chosen to participate in the Medicaid program. The Massachusetts Medicaid program is known as "MassHealth." G.L. c. 118E §§ 1, 9, 9A. MassHealth is required to comply with the federal statutory and regulatory scheme. G.L. c. 118E §12. EOHHS is the single state agency designated by the Commonwealth to administer its Medicaid program, as required under 42 U.S.C. § 1396(a)(5); G.L. c. 118E §1.

8. A MassHealth beneficiary has the right to notice and an opportunity for a hearing to appeal an adverse MassHealth decision, and to receive a pre-termination hearing before the reduction or termination of current benefits, in a fair hearing before the Office of Medicaid Board of Hearings ("Board of Hearings"). 42 USC 1396a(a)(3) and 42 CFR 431, 130 CMR 610.002; 130 CMR 610.015(B); 130 CMR 610.032; G.L. c. 118E § 48.

### MASSHEALTH'S PERSONAL CARE ATTENDANT PROGRAM

9. MassHealth members may be eligible for coverage of personal care attendant (PCA) services when those services are prescribed by a physician, the member suffers from a permanent or chronic disability that impairs the member's functional ability to perform activities

of daily living, and the member requires physical assistance with at least two activities of daily living. 130 CMR 422.403.

10. PCA services provide physical assistance with the performance of activities of daily living such as bathing, dressing and toileting. MassHealth regulations closely define the PCA services that are available to eligible members, as well as the types of services that are specifically excluded from the PCA program, such as cueing, prompting, or supervision. 130 CMR 422.410- 422.412.

11. MassHealth requires that a member obtain prior authorization for payment of PCA services. 130 CMR 422.416. Requests for prior authorization of PCA services are made on behalf of a member by a Personal Care Management (PCM) agency. The PCM agency conducts an in person evaluation of the member in order to prepare and submit a request for PCA services. 130 CMR 422.422(C) & (D). MassHealth grants prior authorization of PCA services for a time-limited period, typically one year, and requires PCM agencies to conduct a re-evaluation before requesting renewed authorization. MassHealth then approves, modifies or denies the request for prior authorization of PCA services. 130 CMR 422.417. While prior authorization requests are typically submitted by the health care provider seeking to deliver the authorized service, a PCM agency's prior authorization request is different. PCM agencies do not provide the PCA services; the member is responsible for hiring a PCA who will deliver the services.

12. In fulfilling their responsibilities to MassHealth and its members, PCM agencies are engaging in state action. The role, responsibilities and conduct of PCM agencies is closely managed by MassHealth. First, PCM agencies operate under a contract with MassHealth, which prescribes operating standards with which the PCM agencies must comply. 130 CMR 422.419. Second, PCM agencies are closely governed by MassHealth regulations. The regulations specify

in detail how and when a PCM agency must request prior authorization from MassHealth. 130 CMR 422.416. They specify where and when PCM agencies must conduct evaluations, which type of medical professionals must conduct the evaluation, and they require the evaluations to be completed on an evaluation form developed by MassHealth. 130 CMR 422.422(C). The regulations further require evaluations to “accurately represent the member’s need for physical assistance with ADLs and IADLs, and [to] consider the member’s physical and cognitive condition and resulting functional limitations to determine ability to benefit from PCA services.” 130 CMR 422.422(D).

13. In addition to governing how, when, where, and by whom the PCA evaluations occur, and requiring PCM agencies to use a MassHealth-developed evaluation form, MassHealth has also produced subregulatory guidance in the form of a “Time for Task” tool that includes the average or typical time permitted for a PCA to perform various tasks. PCM agencies use this MassHealth-developed tool to determine the amount of PCA time to put in its prior authorization requests.

14. When evaluating members for PCA services, and requesting prior authorization for those services, PCM agencies are engaging in state action. They are not acting as private parties according to medical professional standards not established by the state. If they were, they would be evaluating the members based on their medical needs, regardless of what MassHealth has determined constitutes eligible PCA services. In reality, PCM evaluations are limited to whether members are eligible for MassHealth-covered services, using a MassHealth-developed evaluation form, and MassHealth-established definitions of eligibility and available PCA services.

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## PCM AGENCY'S REDUCTION OF MS. SEVERS' PCA HOURS

15. Cheryl Severs is severely intellectually disabled, suffers from seizures, urinary incontinence, and struggles with fine motor and visual perceptual motor skills. She is eligible to receive PCA services through MassHealth; she has been member of MassHealth and has received PCA services for over 20 years. Throughout the past two decades, MassHealth has consistently approved her for approximately 46.75 PCA hours a week, including 14 nighttime hours.<sup>1</sup> Throughout her entire time in the PCA program, Tempus Unlimited, Inc. (previously known as Cerebral Palsy of Massachusetts) has served as her PCM agency.

16. On April 27, 2021, Tempus conducted a routine reevaluation of Ms. Severs' need for PCA hours, as required by MassHealth. This evaluation was conducted by video,<sup>2</sup> took only half an hour (half as long as it has taken in previous years), and the evaluators did not thoroughly assess all of Ms. Severs' PCA-eligible needs. In fact, the evaluators did not assess her need for nighttime hours at all. Ms. Severs' condition has not improved, and her need for PCA hours has only increased with the closure of her day habitation program.<sup>3</sup> Nonetheless, citing no change in condition, Tempus submitted a request for prior approval that reduced Ms. Severs' PCA hours to only 21.5 weekly hours, thereby cutting over 50% of the hours she had been receiving for the past 20 years.

17. On May 7, 2021, MassHealth modified Tempus' request for prior approval by reducing the requested PCA time for grooming by 39 weekly minutes. MassHealth sent notice of

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<sup>1</sup> Night time hours are defined by MassHealth as occurring between 12-6am (130 CMR 422.002), and MassHealth's PCA prior authorization form states that when a member qualifies for night time hours, a minimum of 2 hours per day/ 14 hours a week must be requested.

<sup>2</sup> As a flexibility in response to the pandemic, MassHealth has temporarily allowed PCM agencies to conduct reevaluations by video.

<sup>3</sup> MassHealth does not provide PCA hours for the times that a member is in the care of a day habitation program. 130 CMR 422.412.

this decision to Ms. Severs, notifying her of her right to appeal this decision with the Board of Hearings. On May 21, 2021, Ms. Severs timely appealed, stating “MassHealth is proposing cuts to my PCA hours available, and my nighttime hours as well.”

18. Ms. Severs’ hearing was held by the Board of Hearings on June 28, 2021. Ms. Severs’ attorney<sup>4</sup>, her PCA surrogate<sup>5</sup> and legal guardian Russell Severs, and her PCA were present at the telephonic hearing on her behalf. Ms. Severs’ attorney argued that the subject of the hearing should include not only the 39 minutes that MassHealth cut, but also the 25.25 weekly hours that Tempus cut by not including them in its prior authorization request. Ms. Severs’ attorney argued that under *Mansfield v. Commissioner of Department of Public Welfare*, 40 Mass.App.Ct 1 (1996), Tempus’ cut of 25.25 weekly hours constituted state action, as there was a “sufficiently close nexus” between MassHealth and Tempus’ insufficient evaluation and request for prior authorization.

19. The Hearing Officer refused to expand the scope of the hearing beyond the 39 minutes that MassHealth cut from Tempus’ prior authorization request, and accordingly refused to allow Ms. Severs to present evidence regarding Tempus’ reduction to her PCA hours. Ms. Severs’ attorney therefore made an offer of proof regarding Tempus’ reduction to Ms. Severs’ PCA hours, stating on the record that the PCA, if permitted to do so, would have testified in detail about Ms. Severs’ ongoing need for most of the PCA time that Tempus cut from its prior authorization request. Ms. Severs’ attorney asked the Hearing Officer to consider ordering a reevaluation on grounds that Tempus’ evaluation and prior authorization request were clearly insufficient.

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<sup>4</sup> Kate Symmonds, also the filing attorney of this 30A Complaint

<sup>5</sup> A PCA surrogate is the person responsible for performing PCA management tasks that the member is unable to perform. 130 CMR 422.402. Russell Severs is Ms. Severs’ PCA surrogate.

20. The Hearing Officer rendered a decision on July 20, 2021, approving Ms. Severs' request to increase the amount of PCA time MassHealth had cut by 39 minutes, but denying Ms. Severs' request to consider Tempus' reduction of her PCA hours as the agency of MassHealth. The Hearing Officer reasoned that Tempus is not MassHealth, but a private party making medical decisions based on its own clinical evaluation, and therefore the Board of Hearings has no authority to review Tempus' actions.

21. In fact, as with all PCM agencies, Tempus was engaging in state action when it evaluated Ms. Severs and requested prior authorization for her PCA services. Tempus' evaluation of Ms. Severs, using a MassHealth-developed evaluation form, was not based on complex medical judgment and discretion, but was limited to whether she is eligible for MassHealth-covered PCA services as defined in MassHealth regulations and subregulatory guidance. For example, although Tempus noted that Ms. Severs requires cueing and supervision, it complied with MassHealth regulations which define PCA services as excluding cueing and supervision, by excluding this need from their request for prior authorization.

22. The Hearing Officer's refusal to consider and rule on the PCA hours that Tempus cut was erroneous. Tempus' reduction of Ms. Severs' PCA hours as well as MassHealth's approval of that reduction were state actions that deprived Ms. Severs of due process under the United States Constitution.

### **CAUSES OF ACTION**

23. The defendants' refusal to consider Tempus' reduction of Ms. Severs' PCA hours at a fair hearing is based upon an error of law, is in violation of constitutional provisions, and is arbitrary, capricious, or otherwise not in accordance with the law, in violation of G.L., c. 30A §14.



24. The defendants' refusal to consider Tempus' reduction of Ms. Severs' PCA hours at a fair hearing constitutes a denial of due process guaranteed by the U.S. Constitution and by 42 USC § 1983.

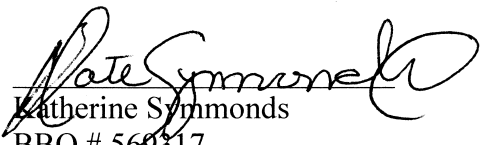
**PRAYERS FOR RELIEF**

WHEREFORE, plaintiff respectfully prays that this Court:

1. Assume jurisdiction over this action.
2. Order Defendants to conduct a fair hearing on Tempus' reduction of PCA hours in its prior authorization request for Ms. Severs.
3. Issue a declaratory judgment that Defendants' practice of denying fair hearings on the subject of a PCM agency's reduction of PCA hours is an error of law and violates the due process clause of the United States Constitution.
4. Award plaintiff her costs and reasonable attorney's fees pursuant to 42 U.S.C. 1988.
5. Order such further relief as this Court may deem just and equitable.

Date: August 19, 2021

Respectfully submitted,

  
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