COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, ss

SUPERIOR COURT
DOCKET NO: 2184CV01890

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, Assistant Secretary for MassHealth,
Defendants

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

Plaintiff is a severely intellectually disabled woman who relies on MassHealth Personal Care Attendant (PCA) services to enable her to live independently. She brings this action pursuant to G.L. c. 30A and 42 U.S.C. § 1983 to challenge the final decision of the Executive Office of Health and Human Services (MassHealth) denying her a fair hearing prior to reduction in the amount of PCA services requested by her Personal Care Management Agency (PCM) and approved by MassHealth. The MassHealth Board of Hearings refused to consider evidence pertaining to the over 50 percent reduction of Ms. Severs' PCA hours on the erroneous ground that it was not a decision attributable to MassHealth. However, a decision of the Appeals

Court directly on point holds that the actions of a PCM are attributable to MassHealth and as such constitute state action and give rise to a MassHealth beneficiary's right to a pre-termination hearing. Mansfield v. Commissioner of Dept. of Public Welfare, 40 Mass. App. Ct. 1 (1996). The Defendants' refusal to provide Ms. Severs with a hearing is a denial of due process and a violation of state and federal statutes and regulations obligating a state Medicaid agency to provide beneficiaries with the opportunity for a fair hearing prior to the reduction of their Medicaid services.

II. PROCEDURAL HISTORY

On May 7, 2021, MassHealth issued a notice of decision approving the request of the Plaintiff's PCM to reduce her PCA hours for the one year period beginning May 28, 2021. A.R. 15-22 (BOH Exhibit 1).[1] At the time of the notice, her hours were 46.75 per week including 32.75 day and 14 night hours. A.R. 79 (BOH Exhibit 5) and Transcript 16, lines 4-6 (offer of proof). The PCM requested a reduction to 21.5 hours per week with termination of all night hours.[2] The May 7, 2021 decision modified the PCM request and approved only 21 hours per week based on a reduction in the time allowed for nail care. A.R. 15-22. The time for nail care was reduced from the 49 minutes requested (A.R. 45) to 10 minutes.[3] A.R. 16. On May 21, 2021, prior to the date her current benefits were scheduled to be reduced, Ms. Severs timely appealed to the Board of Hearings, requesting a fair hearing and aid pending appeal on the grounds that "MassHealth is proposing cuts to my PCA hours available, and my nighttime hours as well." A.R. 23 (BOH Exhibit 2).

[1] References are to the Administrative Record (A.R.), and to the Transcript of the June 2021 Hearing (Transcript).
[2] Night hours cover the period from midnight to 6 a.m.(130 CMR §422.401) and if PCA services are needed, a minimum of 2 hours per day/ 14 hours a week must be requested.
[3] There is a discrepancy between the 39 minutes reduced from the request for nail care and the 30 minutes reduced from the total request that is not addressed in the record.

Ms. Severs requested that her benefits be continued pending appeal of the reduction in services, but she received aid pending for only 21.5 hours per week, not the full 46.75 hours she had been receiving prior to May 28, 2021. Transcript 6, lines15-21 ("I'm going to clarify on this that there was appending (sic) for 21 and a half hours.")

Ms. Severs' administrative hearing was held on June 28, 2021. Ms. Severs' attorney attempted to submit evidence regarding the reduction of 25.25 hours per week that the PCM requested and MassHealth approved. Transcript 21-22; A.R. 3, 4. The Hearing Officer marked as an Exhibit the 2019 PCM evaluation for the period ending May 28, 2021. (A.R. 77-96. BOH Exhibit. 5), but refused to allow testimony from the PCA regarding the additional 25.25 hour reduction in PCA hours which MassHealth had approved. Transcript, 21-22. She allowed Ms. Severs' attorney to make an offer of proof. Transcript 22-26; A.R. 4.

The Hearing Officer's July 20, 2021 decision approved an additional 39 minutes per week for nail care, but made no findings of fact regarding any change or improvement in Ms. Severs' condition since her prior evaluation, the adequacy of the current evaluation or Ms. Severs' continued need for the 25.25 hours that she had received in the past.[4] A.R.5, 11-12.

During the hearing, the Plaintiff's attorney asked the Hearing Officer to order a new evaluation. Transcript 16 and 28. The Hearing Officer has this authority under 130 CMR § 610.065 (B) (9), but she did not make such an order. In her decision, the Hearing Officer ruled as a matter of law that the Board of Hearings only had authority to review decisions of the MassHealth agency or its Managed Care Contractors, citing 130 CMR § 610.001, and that the

[4] The Hearing Officer made a finding of fact that Ms Severs suffers from incontinence 2-3 times per year based on the MassHealth file marked as Exhibit 4. A.R.5.However, the only reference in the case file to an event occurring 2-3 times per year appears to refer to incontinence associated with seizures. A.R.40 The Evaluation reports the Plaintiff wears absorbent pads every day due to incontinence 2-3 times per day and includes time related to incontinence albeit less than the time approved in the past..A.R.49 and 69

PCM was not MassHealth or a Managed Care Contractor. A.R. 12. She concluded, "As the action taken by the PCM agency is not an appealable action under 130 CMR § 422.417 and 130 CMR § 610.035(a) (4), the appeal is dismissed as to the request to grant more hours than Tempus [the PCM agency] requested." [5] The Hearing Officer's decision being the final decision of the agency, on August 19, 2021 Ms. Severs filed a complaint for judicial review.

III. FACTS

Ms. Severs is a severely intellectually disabled 52 year old woman who lives in Attleboro with her brother. A.R. 35, 39 and 53. Both she and her brother receive PCA services and live with their PCA. A.R. 53; Transcript 27. In addition to her intellectual disability, she suffers from depression, anxiety, an obsessive compulsive disorder, a seizure disorder, and incontinence. AR 40; Transcript, 8, lines 6-12. She is under the guardianship of her elderly parents who live in Warren, Rhode Island. A.R. 26 and 61. For many years she has been enrolled in the MassHealth Standard program. Despite her severe disabilities, she is able to live independently in the community with the help of services provided by MassHealth including PCA services to assist her with everyday activities that she cannot complete on her own. There is no dispute that she has at all times met the threshold criteria of the PCA program in that she has a permanent and chronic condition that impairs her ability to perform at least two activities of daily living without physical assistance.

Prior to the 2021 PCA evaluation and decision under appeal, Ms. Severs had been approved for 46.75 hours per week of PCA services based on an in-person evaluation conducted on March 22, 2019. A.R. 77 (BOH Exhibit 5). Her father testified that for many years

[5] MassHealth does not give its hearing officers authority to rule on the legality of MassHealth regulations. 130 CMR § 610.082(C).

MassHealth has consistently approved her for approximately the same number of hours a week of PCA assistance in the home, including 14 nighttime hours. Transcript, 15-16. Prior to the COVID-19 pandemic, Ms. Severs also participated in a MassHealth covered Day Habilitation program Monday–Friday from 9 a.m. to 3 p.m... A.R. 81. Day Habilitation provides services outside the home to assist individuals with intellectual disabilities, like Ms. Severs, to maintain maximum functional skill levels. 130 CMR § 419.406.

In April, 2021, the PCM agency, Tempus, conducted a routine reevaluation of Ms. Severs' continuing need for PCA services in advance of the expiration of her current authorization period. Ms. Severs was no longer participating in the Day Habilitation program at the time of the re-evaluation. Transcript 16 and 24 (offer of proof). The evaluation was conducted by video call rather than in person under policies in effect during the COVID-19 pandemic A.R. 39 and 67. Ms. Severs' father was present for the evaluation and testified that the evaluation of both Cheryl and her brother, which took place one after the other on the same day, took only an hour, 30 minutes for each, compared to two or more hours for both in prior evaluations. Transcript 17, lines 6 – 12; 18, lines 21-24. He testified there was little discussion of how long anything took or how difficult anything was. Transcript 19, lines 17-18. With regard to undressing, he testified that sometime she can take off her clothing, and other times "she just flails away and nothing really happens." Transcript 19, lines 19-24. He said he described his daughter's needs for nighttime hours to assist her with toileting, and to resettle her after wandering out of bed. Transcript 20. He testified that the PCM called him the next day to tell him the hours it would be requesting and that he would be getting a report with information

about appeal rights. Transcript 21. The record includes such a letter dated May 10, 2021 A.R. 24.[6] The Hearing Officer made no findings about the facts testified to by Ms. Severs' father.

The PCM in 2021 requested prior authorization for only 21.5 hours per week, representing an over 50 percent reduction in the hours MassHealth had previously approved. A.R. 60, 93. The PCM's prior authorization request eliminated PCA time for mobility, undressing and nighttime care, and reduced the PCA's time for hair washing, and bladder and bowel care. A.R. 44, 47-48, 52, 85, 87, 91. Ms. Severs' attorney was not permitted to present the testimony of her PCA about her continued need for these lost hours, but made an offer of proof. Transcript, 22-26; A.R. 4. For example, with respect to undressing, Ms. Severs used to receive 70 minutes per week of undressing time, A.R. 85. The 2021 request eliminated all time for this task. A.R. 47. However, Ms. Severs still needs assistance taking off her shirt, pants, and shoes; and help with buttons and zippers (Transcript, 23 line 18- 24 line 2) and additional time when her incontinence requires a change of clothing. Transcript, 24 lines 3-6 (offer of proof). With respect to toileting, Ms. Severs used to receive 460 minutes per week of bladder care and 210 minutes per week of bowel care, A.R. 87. She still needs this amount of time for assistance getting to the bathroom, wiping, changing her absorbent pad, pulling her pants back up properly, and washing her hands. Transcript (offer of proof) 24 line 15- 25, line 19. The 2021 PCM request acknowledged that she needed physical assistance with toilet hygiene, is incontinent and needs physical assistance changing her absorbent pads (A.R. 69), but it requested only 105 minutes of bladder care and 70 minutes of bowel care. A.R. 48-49. However, Ms. Severs no longer goes to her day habilitation program and actually needs *more* time for bladder care to make up for the

[6] It is not clear if MassHealth would have paid a different PCM for a new evaluation at this point, but a new prior authorization request would have to have been filed by May 7, 2021, 21 days before the current period expired, in order for Ms. Severs to receive aid pending appeal had MassHealth's decision reduced her hours. 130 CMR § § 422.416(C) and 610.036(E).

additional hours she is at home not less. Hearing Transcript, 42 lines 9-11, 15-18 (offer of proof); A.R. 4.

MASSHEALTH AND ITS PERSONAL CARE ATTENDANT PROGRAM

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*. Once a state elects to participate in Medicaid, as Massachusetts has done, it is required to comply with the federal statutory and regulatory scheme. G.L. c. 118E §12; Daley v. Secretary, 477 Mass. 188 (2017). The Massachusetts Medicaid program is known as MassHealth. G.L. c. 118E §§ 1, 9, 9A.

The Executive Office of Health and Human Services (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. The Defendants are referred to in this Memorandum as MassHealth or the MassHealth agency.

A state Medicaid agency must provide a timely and adequate notice prior to the termination or reduction of benefits and an opportunity for a hearing. 42 U.S.C. §1396a (a) (3) and 42 CFR §§ 431.210, 431.211, 431.220, 431.230. The hearing itself must give the Medicaid beneficiary an opportunity to establish all pertinent facts and circumstances and question or refute any evidence. 42 CFR §§ 431.242(c) and (e).

A MassHealth member has the right to appeal a termination or reduction of benefits in a fair hearing before the Office of Medicaid Board of Hearings (BOH). G.L. c. 118E, § 48. 130 CMR §§ 610.002; 130 CMR 610.032.

The Personal Care Attendant Program

MassHealth benefits include payment for nursing facility care, but also payment for a

range of home and community-based long term services and supports designed to enable people to live in the least restrictive setting possible See, Olmstead v. L.C., 527 U.S. 581, 597 and 607 (1999).. Nationwide, Medicaid continues to be the primary source of coverage for long-term services and supports, financing over half of these services in 2018.[7] MassHealth's Personal Care Attendant (PCA) program is one such home and community-based long term support service.

MassHealth provides payment for 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. PCA services provide physical assistance with the performance of activities of daily living (ADLs) such as bathing, dressing and toileting, and with other "instrumental" activities of daily living including cooking, shopping and cleaning (IADLs). 130 CMR § 422.410. MassHealth regulations also define the services that are not covered by the PCA benefit such as assistance in the form of cueing, prompting, supervision, guiding or coaching. 130 CMR § 422.412. However, these terms for uncovered services are not themselves defined.

PCA services are provided by Personal Care Attendants (PCAs) who are employed by the MassHealth member. G.L. c. 118E, § 73(a) and 130 CMR § 422.404(A) (1) (d). PCAs must meet certain minimum criteria such as being legally authorized to work in the U.S., not being the member's legally liable relative, and being able to understand and carry out directions and receive training and supervision provided by the member.130 CMR §422.404 (A). They are not required to have any medical training. A MassHealth member who is unable to manage the PCA

[7] M. Watts, et al., Medicaid Home and Community-Based Services and Spending, Kaiser Family Foundation, Feb 4, 2020 available at https://www.kff.org/report-section/medicaid-home-and-community-based-services-enrollment-and-spending-issue-brief/

benefit may have a surrogate such as a parent or legal guardian assume that role. 130 CMR § 422.401 (definition of surrogate).

The PCA benefit has a complex administrative structure and virtually all aspects of its administration are performed by private entities under contract with MassHealth not by state employees. One such entity is the Personal Care Management agency (PCM). MassHealth requires that in order to obtain PCA services, a PCM must request prior authorization for such services. 130 CMR § 422.416. The PCM is also charged with completing an assessment of the ability of a member or a surrogate acting on behalf of the member to manage the PCA program and other duties prescribed in its contract and MassHealth rules. 130 CMR § 422.419 (A) (4).

The PCM does not provide any medical services in the PCA program, its function is administrative. MassHealth regulations define a PCM in terms of MassHealth regulations and the PCM's contract with MassHealth. 130 CMR § 422.402. PCM functions are defined as "administrative functions provided by a PCM agency to a member in accordance with a contract with EOHHS, including, but not limited to, functions identified in the PCM agency contract and 130 CMR 422.419(A)." An organization may apply to become a PCM agency only during the time that MassHealth opens a request for responses in the state procurement system for bidders able to perform PCM functions. 130 CMR § 422.405(A) (4). There is no other licensing or certification for an organization to become a PCM. Ibid.

The PCM's request for prior authorization must include an Application for PCA Services and a MassHealth Evaluation, the MassHealth Prior Authorization Request form, and an assessment of the member's ability to manage the program, along with supporting documentation. 130 CMR § 422.416. However, MassHealth reserves the right to conduct the PCA evaluation itself or through another designee in which case the PCM agency will be paid

for other functions but will not be paid for an evaluation. 130 CMR § 422.416(D)

The role, responsibilities and conduct of PCM agencies is closely managed by MassHealth. With respect to the evaluation of a member's need for PCA services, the regulations specify an evaluation team consisting of a registered nurse and occupational therapist. 130 CMR § 422.422(C). The evaluation is completed on a form developed by MassHealth known as the Time for Task Tool. A.R. 41-59. The Time for Task Tool (A.R.54) contains this statement:

> IMPORTANT DISCLAIMER – MUST READ: Evaluators should consult 130 CMR 422.422(A) for a definition of the ADLs and IADLs described below and the Time-for-Tasks Guidelines for the MassHealth PCA Program.

The Time for Task Guidelines for the MassHealth PCA Program consist of guidelines for determining the amount of PCA time required to perform ADLS and IADLs based on the average time it may take a PCA to physically assist a member to perform a specific activity. It describes the average number of minute required as a range from minimum assistance to total dependence. It acknowledges some individuals may require more or less than the average times. It states the guidelines were developed to be used by nurses who evaluate a consumer's need for PCA services and by clinical reviewers making decisions on prior authorization requests.[8]

Once a PCM submits a request for prior authorization to MassHealth, MassHealth then approves, modifies or denies the request for prior authorization of PCA services. 130 CMR § 422.417. In 2017, MassHealth entered into a contract with a private company called Optum to provide third party administrator services for PCA services and other long term support services. All Provider Bulletin 270 (May 2017).[9] Since 2017, Optum has made prior authorization

[8] Available at https://www.masslegalservices.org/system/files/library/Time-for-Tasks%20Guidelines%20for%20the%20MassHealth%20PCA%20Program.pdf

[9] Available at https://www.mass.gov/doc/all-provider-bulletin-270-third-party-administrator-implementation-for-long-term-services-and/download.

decisions for PCA services on behalf of MassHealth.

The MassHealth PCA regulations state that if a Prior Authorization request is modified or denied, MassHealth will issue a notice stating the reason for the modification or denial and the member's appeal rights. 130 CMR § 422.417(B). However, if MassHealth approves the Prior Authorization request, its approval notice will only state the approved hours and approval period. 130 CMR § 422.417(A). The regulations do not require an approval notice to explain a reduction from the hours previously approved or require notice of appeal rights.

MassHealth grants prior authorization of PCA services for a time-limited authorization period, typically one year. Any request to increase or decrease PCA services during the authorization period must be accompanied by documentation that the need for an adjustment is a change in the member's medical condition, functional status or living situation. 130 CMR § 422.416(B) To ensure the continuation of PCA services, PCMs must request prior authorization at least 21 days before the expiration of the current prior authorization period in order to provide uninterrupted coverage.130 CMR § 422.416(C). A timely request is also required as a condition of aid pending appeal from any reduction in PCA services.130 CMR § 610.036(E).

IV. ARGUMENT

A. MassHealth Beneficiaries Are Entitled To an Opportunity for a Hearing before their PCA Services Are Reduced by MassHealth at the Request of a PCM Agency

Medicaid benefits such as MassHealth PCA services are a protected property interest that, once granted, cannot be taken away without the opportunity for a pre-termination hearing. In this case, MassHealth authorized the reduction of Ms. Severs' PCA services from 46.75 hours per week to 21.5 hours per week without an opportunity for a pre-termination hearing. It limited her right to a pre-termination hearing to only 39 minutes of the many hours taken away from her

because those few minutes made up the only time the PCM, which manages the PCA benefit under contract with MassHealth, had not requested MassHealth to make the reduction.

The central question in this case is whether MassHealth can evade review of its decision to reduce a MassHealth member's services when it has approved a request to reduce those services made by a private entity performing administrative functions for MassHealth based on MassHealth defined policies. That question has been unequivocally answered by the Appeals Court in a case holding that the PCM agency has such a close nexus to MassHealth, that when MassHealth approves the PCM's request for reduction in hours, the action is fairly attributable to MassHealth and constitutes state action. Mansfield v. Commissioner of the Dep't of Public Welfare, 40 Mass. App. Ct. 1 (1996).

1. MassHealth Members are entitled to an Opportunity for a Hearing before MassHealth Authorizes a Reduction in their PCA Services

The plain meaning of the state and federal statutes and regulations governing MassHealth establish the right of Ms. Severs to obtain a pre-termination hearing to dispute the reduction in her PCA services authorized by MassHealth in its May 2021 notice. By state statute "any individual aggrieved by the failure of the division [sic] to render adequate medical assistance ... or aggrieved by the withdrawal of such assistance…shall have a right to a hearing." G.L. c. 118E, § 48. MassHealth regulations require the agency to provide a hearing regarding: "(3) any MassHealth agency action to … reduce …a member's assistance."130 CMR §610.032. State regulations also require notice at least 10 days in advance of intended action, (130 CMR §610.015), and if a beneficiary requests a hearing before the date of intended action, the agency may not reduce services until a decision is made after a hearing. 130 CMR § 610.036.

The May 7, 2021 MassHealth notice to Ms. Severs informed her that "[i]f you are now

getting services from your provider and the Board of Hearing receives your form within 10 calendar days from the mailing date of this letter, you will keep getting these services until a decision is made on your appeal." A.R. 17 (BOH Exhibit 1). However, despite this assurance Ms. Severs did not continue to receive the 46.75 PCA hours she was getting on May 7, 2021, her aid pending appeal was only provided at the 21.5 hours the PCM had requested.

The federal Medicaid regulations implementing the federal statutory right to a hearing at 42 U.S.C. § 1396a(a)(3) are equally clear in requiring that the state agency make a fair hearing available to "[a]ny individual who requests it because he or she believes the agency has taken an action erroneously, denied his or her claim for eligibility or for covered benefits or services" including "a change in the amount or type of benefits or services". 42 C.F.R. § 431.220(a). It uses equally plain language in requiring a hearing prior to any reduction in services. The state agency must give at least 10 days advance notice of any action. 42 CFR § 431.211. An action is defined to include any reduction in services. 42 CFR § 431.202. If a beneficiary requests a hearing before the date of the intended action, the agency may not reduce services until a decision is made after a hearing. 42 CFR § 431.230.

In addition to these state and federal statutory and regulatory rights, it is well established that the Due Process Clause of the Fourteenth Amendment guarantees Medicaid beneficiaries the right to a pre-termination hearing to contest the reduction, termination or suspension of assistance. Goldberg v. Kelly, 397 U.S. 254, 262 n.8, 267-68 (1970); Daniels v. Wadley, 926 F. Supp. 1305, 1312 (M.D.Tenn.1996) vacated in part by 145 F.3d 1330 (6th Cir. 1998) (Where Medicaid law required a pre-termination hearing, lower court should not have decided the constitutional issue).

Ms. Severs experienced a 50 percent reduction in the PCA services that she has relied on for many years to enable her to live independently. That reduction was an action taken by the MassHealth agency in its notice of May 7, 2021 which reduced her hours effective May 28, 2021. The plain language of the governing state and federal Medicaid statutes and regulations, and the well-established principles of due process of law entitled her to the opportunity for a pre-termination administrative hearing to dispute the erroneous reduction in her benefits, but these rights were denied her by the Defendants.

2. The Request of a PCM Agency for a Reduction in PCA Services that is Approved by MassHealth Is a Decision Attributable to the MassHealth Agency

The Defendants' position is that the PCM, not MassHealth, was responsible for the reduction in her PCA hours. However, this position ignores the nature and function of the PCM, federal case law on when a private entity is a state actor and the controlling precedent of Mansfield v. Commissioner of the Dep't of Public Welfare, 40 Mass. App. Ct. 1 (1996).

In Mansfield, as in this case, a PCM agency re-evaluated a MassHealth member and requested prior authorization for fewer hours than she had previously received. MassHealth approved the request and the member appealed. The Hearing Officer dismissed the appeal on the grounds that the controversy was not the result of adverse action by MassHealth but rather the decision of the private care provider. Mansfield, 40 Mass. App. Ct. at 3. MassHealth argued that the PCMs were not state actors because their decisions, like those of the nursing homes in Blum v. Yaretsky, 457 U.S. 991, 1008 (1982), were "medical judgments 'made by private parties according to professional standards that were not established by the State." Mansfield, 40 Mass. App. Ct. at 4. The Appeals Court rejected MassHealth's position. It held that the PCMs were not making independent medical judgments but applying policies imposed by the State, and further,

that MassHealth was required to approve or deny the PCM requests. The necessity for the PCM to interpret MassHealth policies in requesting PCA services and the approval provisions of the MassHealth regulations created "a sufficiently close nexus" between the State and the PCM for the PCM to be considered a state actor. Mansfield, 40 Mass. App. Ct at 5.

In Mansfield, the policy in question was a rule directing the PCM to reduce the time for "instrumental" activities such as shopping and cleaning if the MassHealth member lived with family members, but recognized that "this may not always be possible." Ms. Mansfield argued that the agency had misinterpreted this policy when it reduced her benefits. Mansfield, 40 Mass. App. Ct at 5. The current version of the "shared living" rule is at 130 CMR § 422. 405(c) (1). However, it is not this shared living rule alone that reflects PCA rules and policies susceptible to misinterpretations by PCMs. Almost all of the MassHealth PCM regulations and subregulatory guidelines regarding the allowable time for required tasks reflect such non-medical policy considerations.

In the case of Ms. Severs, whose primary diagnosis is a severe intellectual disability, the determination of covered PCA hours required the PCM to repeatedly parse the distinction between the undefined terms "cueing, prompting, and supervision" which are not covered services and hands-on assistance which is covered. For example, the PCM reviewers observed Ms. Severs remove certain items of clothing with prompts to do so, but her father reported that sometimes prompting was successful and sometimes she just "flails away and nothing happens." The PCM was interpreting the MassHealth policies not exercising medical judgment in denying any time for undressing. Unless the PCM's interpretations and applications of MassHealth policies can be challenged in the fair hearing process, erroneous interpretations will evade any meaningful review.

When determining how much PCA time to request for Ms. Severs, the PCM was not making independent medical judgments "according to professional standards that [were] not established by the State." Rather, just as in Mansfield, the PCM was applying the MassHealth regulations and subregulatory guidance that control how much PCA time should be requested. The PCM is not an "entity that provides medical services to MassHealth members." 130 CMR § 610.004 (definition of provider). The PCM function is administrative not medical. 130 CMR § 422.401. The PCM employed a registered nurse and occupational therapist to complete the evaluation and prior authorization form, as required by MassHealth regulations. However, they were no more making independent medical judgments than the registered nurses employed by Optum to make the PCA prior authorization decisions on behalf of MassHealth. Indeed, MassHealth reserves to itself the right to undertake the PCA evaluation instead of the PCM when appropriate. 130 CMR § 422.416 (D).

The PCM's duty to assess and make determinations regarding a member's need for PCA services is contractually delegated to it by the agency. Further, the PCM is required to make its evaluation and prior authorization request on forms designed by MassHealth (the Time for Task Tool) and in accordance with regulations and detailed subregulatory guidance written by MassHealth (the Time for Task Guidelines). Indeed PCMs only come into existence by virtue of entering into a contract with MassHealth. 130 CMR § 422.405(A) (4). Significantly for the analysis of state action, the PCM's evaluation and determination of the necessary hours of PCA assistance have no force or effect whatever unless they are approved by MassHealth. 130 CMR §§ 422.416 and 422.417.

Mansfield does not stand alone. In a Medicaid case similar to the present action, where the issue was whether decisions by state certified home health agencies to reduce home care

services constituted state action, the Second Circuit found that state action existed where the state created a closely regulated framework of approving home health services in which the certified home health agencies making such decisions were "deeply integrated in the regulatory scheme" set up by the state. Catanzano v. Dowling, 60 F.3d 113, 119 (2d Cir. 1995). Like the certified home health agencies in Catanzano, PCMs operate only within a closely regulated framework established by the state and are "deeply integrated in the [state's] regulatory scheme." See, Medows v. Dept. of Community Health, not reported in F.Supp. 2d, 2009 WL 5062451 (N.D.Ga. 2009) (Like the CHHAs in Catanzano, GMCF is a private organization that independently reviews claimants' requests for a federally-mandated category of medically necessary services…[T]he Court finds that GMCF's conduct may be fairly attributed to the state under the nexus/joint action test."). See also, Barrows v. Becerra, __F.4th__ 2022 WL 211089 (2d Cir, Jan. 25, 2022) (Holding that the reclassification decisions of hospital utilization review committees were attributable to Medicare and violated protected interests of Medicare patients. "[T]he decision making process that URCs engage in is governed largely by statute and regulation, a factor that weighs in favor of state action.")

In J.K. v. Dillenberg, 836 F. Supp. 694 (D. Ariz. 1993) the state Medicaid agency contracted with a private entity to provide certain behavioral health services to eligible children. The private entity terminated services to the plaintiff, and no notice of or right to a hearing was provided to the plaintiffs. The state agency in Dillenberg argued that the federal notice and hearing requirements "appl[y] only to the state and not to contractors hired to perform certain services." Dillenberg 836 F.Supp. at 697. In rejecting the State's position, the court found significant that the private entities, like the PCMs in the present case, were exclusively devoted

to Medicaid support and subject to extensive state involvement. Dillenberg, 836 F. Supp. at 699. The court stated:

> The public policy implications of Defendants' position, if accepted, would be devastating. It is patently unreasonable to presume that Congress would permit a state to disclaim federal responsibilities by contracting away its obligations to a private entity. [citation omitted]. The law demands that the designated single state Medicaid agency must oversee and remain accountable for uniform statewide utilization review procedures....

Dillenberg, 836 F. Supp. at 699. See, John B. v. Menke, 176 F. Supp. 2d 786 (M.D.Tenn. 2001) ("Clearly, the failure of State contractors to follow the federal requirements does not relieve the State Defendants of their responsibilities"); Price v. Shibinette, 2021 WL 5397864 (D.NH Nov. 18, 2021). Likewise, MassHealth, as the "designated single state Medicaid agency" must oversee and remain accountable for uniform statewide decisions regarding eligibility for and the amount of PCA services and, provide aggrieved PCA recipients such as Ms. Severs an opportunity for a hearing to contest those decisions.

Finally, any doubt that a PCM's evaluation constitutes state action must be dispelled by the fact that the state reserves the right to conduct PCA evaluations itself. 130 CMR § 422.416(D). MassHealth-conducted PCA evaluations determining how many PCA hours a member needs must be subject to an administrative hearing Why should delegating that duty to a private party make any difference in the member's right to a hearing? The precedents are clear that states cannot avoid their responsibilities by contracting away their duties to private parties as MassHealth is attempting to do here. J.K. v. Dillenberg, 836 F. Supp. at 699.

B. The Decision below was based on an error of law and violation of constitutional provisions subject to de novo review under G.L. c. 30A § 14

For the reasons set out earlier in this Memorandum, the agency's refusal to grant Ms. Severs an administrative hearing regarding MassHealth's approval of the PCM agency's request

that her PCA hours be reduced is based upon an error law and violation of constitutional provisions under G.L. c. 30A § 14(7)(a) and (c) and 42 U.S.C.§ 1983. When reviewed for error of law, administrative decisions are reviewed de novo. M.G.L. c.30A §14(7). See Protective Life Ins. Co. v. Sullivan, 425 Mass. 615, 618 (1997). Further, in light of the evidence in the record of an insufficient evaluation, and the MassHealth policy requiring proof of a change in circumstances to adjust authorized hours, the Hearing Officer's failure to order a new evaluation was arbitrary and capricious and an abuse of discretion pursuant to G.L. c. 30A §14(7)(g)

C. Defendants' Affirmative Defenses Do Not Limit or Defeat Plaintiff's Claims

1. Defendants' First Affirmative Defense: Lack of Subject Matter Jurisdiction

Defendants state that Plaintiff has not demonstrated that her claim was filed within thirty days of receipt of the final administrative decision, as required by G.L. c. 30A § 14. However, Plaintiff clearly filed her claim on time. The Hearing Officer rendered the final administrative decision on July 20, 2021. Plaintiff's Complaint, ¶ 20. Regardless of when Plaintiff received notice of the decision, Plaintiff's Complaint was filed on August 19, 2021 thirty days after the decision was rendered.

2. Defendants' Second Affirmative Defense: Failure to State a Claim for Which Relief May Be Granted

Defendants' second affirmative defense asserts that G.L. c. 30A §14 provides the exclusive source of relief in this matter, in effect arguing that Plaintiff cannot join her 42 U.S.C. § 1983 claim with her 30A complaint for judicial review. However, the law is well settled on this matter. First, Superior Court Standing Order 1-96 expressly recognizes that 30A complaints for judicial review may be "joined with a claim for relief under G.L. c. 231A" as well as other claims. Second, joining such claims is a well-established procedure in Massachusetts courts. In

fact, the Mansfield case was itself an action seeking relief under G.L. c.30A, G.L. c.231A, and 42 U.S.C. § 1983 and 1988. Mansfield v. Commissioner of the Dep't of Public Welfare 40 Mass. App. Ct. 1 (1996). Further, in Johnson v. Commissioner of Public Welfare, 419 Mass. 185 at 186, 189 (1994), the Supreme Judicial Court implicitly approved joinder of claims under G.L. c, 30A, § 14, state law, and 42 U.S.C. § 1983, when it held that the plaintiff, who had prevailed on summary judgment on her state law claims, was entitled to reasonable attorneys' fees pursuant to 42 U.S.C. § 1983 and § 1988.

3. Defendants' Third, Fourth, and Fifth Affirmative Defenses Have No Relevance to This Action

Defendants' third, fourth, and fifth affirmative defenses that Plaintiff's claims must be dismissed (1) "on account of her own actions" (2) pursuant to the doctrine of estoppel and/or unclean hands, and (3) because "Plaintiff's damages, if any, were caused entirely by her own conduct and not by the conduct of Defendant" have no bearing on any facts in the record.

4. Defendants' Sixth Affirmative Defense: Sovereign Immunity

Defendants' sixth affirmative defense claims "the full immunity to which it may be entitled under principles of sovereign immunity." The State has consented to judicial review of decisions of its Board of Hearings by statute. G.L. c. 118E, § 48 and c. 30A, § 14. Plaintiff's claim under 42 USC § 1983 is brought against Marylou Sudders and Amanda Cassel Kraft as individuals in their official capacity and is not barred by sovereign immunity under well-settled law. See, e.g., Ex Parte Young, 209 U.S. 123 (1908). Nor are attorneys' fees under 42 USC § 1988 barred by sovereign immunity. Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir. 1975).

For the reasons set forth above, Plaintiff Cheryl Severs requests that this Court grant her Motion for Judgement on the Pleadings and all the relief requested therein and grant such further relief as this Court may deem just and equitable.

Respectfully submitted,

Plaintiff Cheryl Severs
By her attorney

Date: February 11, 2022

/s/ Katherine Symmonds_____
Katherine Symmonds, BBO # 569317
Massachusetts Law Reform Institute
40 Court Street, Boston MA 02108
617-357-0700 ext. 349
ksymmonds@mlri.org

REQUEST FOR HEARING

Pursuant to Superior Court Rule 9A(c)(3) and Standing Order 1-96, Plaintiff respectfully requests a hearing on this matter at the Court's earliest convenience.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Memorandum of Law in Support of Plaintiff's Motion for Judgment on the Pleadings was served upon Defendants by electronic mail on February 11, 2022 at:

Charles J. Sheehan
Assistant General Counsel
One Ashburton Place, 11th Floor
Boston, MA 02108
chuck.sheehan@mass.gov

_/s/ Victoria Pulos___
Victoria Pulos, BBO#407880
Massachusetts Law Reform Institute
40 Court Street, Boston MA 02108
617-357-0700 ext. 318
vpulos@mlri.org