COMMONWEALTH OF MASSACHUSETTS

COUNTY OF SUFFOLK

SUPERIOR COURT
Docket No. 1884CV00129

JEAN MAAS,
Plaintiff
v.
MARYLOU SUDDERS,
Secretary of 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,
Defendants

Consolidated with

Docket No. 1884CV00845

HENRY E. HIRVI and EVA E.
HIRVI,
Plaintiffs
v.
MARYLOU SUDDERS,
Secretary of 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,
Defendants

MEMORANDUM IN SUPPORT OF CLASS CERTIFICATION, DECLARATORY JUDGMENT AND PRELIMINARY INJUNCTION

I. Under Cooperative Federalism, the Commonwealth of Massachusetts Is Required to Implement and Follow the Strictures of Federal Medicaid Law

In these cases, we are dealing with cooperative federalism, with a state agency implementing a federal statute. All state Medicaid agencies are answerable to a federal agency,

the Centers for Medicare and Medicaid Services ("CMS"), formerly known as the Health Care Financing Administration.

Medicaid, known as MassHealth in Massachusetts, provides payment for medical services to eligible individuals and families. Haley v. Commissioner of Public Welfare, 394 Mass. 466, 467 (1985). In order to receive federal funding, the state program must meet all the requirements of the federal act and the implementing regulations. Id.; Sargeant v. Commissioner of Public Welfare, 383 Mass. 808, 815 (1983). Consequently, the state Medicaid statutes and regulations must be construed as showing a primary intent of compliance with federal law in order to receive federal financial reimbursement.[1] Youville Hospital v. Commonwealth, 416 Mass. 142, 146 (1993); Cruz v. Commissioner of Public Welfare, 395 Mass. 107, 112 (1985). The agency implementing Medicaid in Massachusetts is required to consider Supplemental Security Income ("SSI") law in its eligibility determinations, and no Medicaid rule may be more restrictive than the related SSI policy, per 42 U.S.C. s. 1396a(r)(2) and 42 U.S.C. s. 1396a(a)(10)(C)(i)(III).

When CMS issues an interpretation of federal law, including a regulation and provisions of the State Medicaid Manual, the state Medicaid agencies are bound by it under the introductory paragraph of the State Medicaid Manual.[2] Thus, Congress did not delegate responsibility for

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[1] Federal law provides that the federal agency administering Medicaid can deny some of the federal funding to a state if the state commits eligibility errors that exceed a specified threshold. 42 U.S.C. §1396b(u).

[2] The Foreword to the State Medicaid Manual, at B.1., states: "Contents.-- The manual provides instructions, regulatory citations, and information for implementing provisions of Title XIX of the Social Security Act (the Act). Instructions are official interpretations of the law and regulations, and, as such, are binding on Medicaid State agencies. This authority is recognized in the introductory paragraph of State plans."

interpreting federal Medicaid law to the state Medicaid agencies, as conformed by the Massachusetts Medicaid agency's enabling statute:

> "The division shall … cooperate with the appropriate federal authorities in the administration of Title XIX, under which federal funds are available to the commonwealth for Medicaid[.]" M.G.L. c. 118E, s. 11.

For these reasons, the MassHealth program in Massachusetts, and the state agency administering it, must comply with federal Medicaid and SSI laws.

II. The Executive Office of Health and Human Services Is Required to Implement an Administrative Hearing System that Complies with Federal Law

Federal law requires the Executive Office of Health and Human Services ("EOHHS"), which under M.G.L. c. 118E, § 1 is the single state agency responsible for supervision of the administration of the MassHealth program throughout Massachusetts, to maintain a fair hearing system that affords due process to Medicaid applicants and appellants. The Defendant EOHHS has an obligation under federal and state Medicaid laws to afford any denied MassHealth applicant a full and fair hearing to challenge a disputed determination and has developed fair hearing regulations which direct how such hearings are conducted, at 130 CMR 610.001 et seq.[3]

A fair hearing conducted by the EOHHS's Board of Hearings is not only supposed to be fair, but it is also supposed to be full. Under M.G.L. c. 30A, s. 10, Massachusetts agencies "shall afford all parties an opportunity for full and fair hearing." (emphasis added). The U.S. Supreme Court ruled long ago on what constitutes a "full hearing":

> The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise, the right may be but a barren one. Those who are brought into contest with the

[3] Under 130 CMR 610.012(A)(1), the fair hearing process "is an administrative, adjudicatory proceeding whereby dissatisfied applicants … can, upon written request, obtain an administrative determination of the appropriateness of … certain actions or inactions on the part of the MassHealth agency."

> Government in a *quasi*-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes, and to be heard upon its proposals before it issues its final command. Morgan v. United States, 304 U.S. 1, 18-19 (1938).

Under the federal regulation at 42 CFR 435.901, "[t]he hearing system must comply with the United States Constitution, the Social Security Act, title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and section 1557 of the Affordable Care Act and implementing regulations." Under the federal regulation at 42 CFR 431.205(d), "[t]he hearing system must meet the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970)," under which, among other due process issues, the U.S. Supreme Court held:

> "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U. S. 385, 234 U. S. 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U. S. 545, 380 U. S. 552 (1965). ... [T]hese principles require that a recipient have timely and adequate notice detailing the reasons ... and an effective opportunity to defend ... by presenting his own arguments and evidence orally. ... The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. ... Therefore, a recipient must be allowed to state his position orally. Goldberg at 267-269.

Thus, any fair hearing process that results in the appellant not receiving the specific reasons for the denial until the fair hearing has begun or shortly before the fair hearing so that the appellant cannot be prepared to make an oral presentation is inherently a violation of federal law. If the appellant must show up at a fair hearing merely to learn the reasons for the denial, only to be granted an opportunity to respond later, then it cannot even be said that the hearing is being full, fair or held in a meaningful manner, as required under Armstrong and Goldberg.

III. Medicaid State Agencies Are Required to Provide a Clear Statement of the Specific Reasons for a Denial Directly on the Denial Notice so that the Appellant Can Prepare for a Fair Hearing

The Defendant EOHHS is required under both federal and state regulations to provide the reasons for the denial of an application in its notice to the MassHealth applicant. See 42 C.F.R.

431.210(b), which requires that the notice contain "[a] clear statement of the specific reasons supporting the intended action."[4] (emphasis added). See also 42 C.F.R. 431.211 (requiring at least 10 days advance notice).

The Defendant EOHHS has implemented regulations that mirror federal Medicaid law. See 130 CMR 610.026, which states that a "notice concerning an intended appealable action must be … adequate in that it must be in writing and contain: … (2) the reasons for the intended action[.]" See also 130 CMR 610.046(A), which provides: "The time, date, and place of the hearing will be arranged so that the hearing is accessible to the appellant. At least 10 days' advance written notice will be mailed by the Board of Hearings to all parties involved to permit adequate preparation of the case." (emphasis added). Thus, the federal and Massachusetts hearing regulations contemplate that when a hearing takes place, all parties should have the opportunity to be fully prepared for it. Nevertheless, the Defendant EOHHS routinely flouts

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[4] The denial notice issued by the Office of Medicaid must "detail[] the reasons" sufficiently enough for the affected person to challenge both the application of the law to the person's factual circumstances and the "factual premises" of the state's action. Goldberg v. Kelly, 397 U.S. 254, 367-268 (1970). The explanation in the notice itself must be more than a "general explanation" or "conclusory statement[.]" Barnes v. Healy, 980 F.2d 572, 579 (9th Cir. 1992). The notice requirement "lies at the heart of due process," Gray Panthers v. Schweiker, 652 F.2d 146, 168. (D.C. Cir. 1980), "for if notice is inadequate other procedural protections become illusory," David v. Heckler, 591 F.Supp. 1033, 1042 (E.D.N.Y. 1984). To satisfy the due process requirements stated in Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 314 (1950), notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." See also "Making the Fair Hearing More Fair," Clearinghouse Review, Volume 44, Numbers 3–4, July–August 2010, (**EXHIBIT A**), found at http://povertylaw.org/clearinghouse/articles/making-fair-hearing-more-fair; "How to Protect Clients Receiving Public Benefits When Modernized Systems Fail: Apply Traditional Due Process in New Contexts," in the Clearinghouse Community, Jan. 2016 (**EXHIBIT B**), found at http://povertylaw.org/clearinghouse/articles/how-to-protect-clients; and "What Does Due Process Mean for State Notices on Receiving Public Benefits?" in the Clearinghouse Community, Feb. 2016 (**EXHIBIT C**), found at http://povertylaw.org/clearinghouse/articles/dueprocess.

these regulations, and the nominally independent Board of Hearings ("BOH"), which is a part of the EOHHS, has done nothing to stop the EOHHS from doing so, either in the Maas case[5] or the Hirvi case.[6] It has been the unfortunate pattern and practice of the EOHHS for many years to withhold the reasons for the denial until the date of the fair hearing (often upon the advice of EOHHS counsel), which prevents appellants from preparing for the hearing and determining how to proceed on potential factual issues.[7]

IV. The Defendants' Due Process Violations Violate the Applicants' Rights to Reasonable Promptness under Federal and Massachusetts Law

Federal Medicaid law at 42 U.S.C. §1396a(a)(8) provides that the Medicaid application process be handled "with reasonable promptness." Under the federal regulation at 42 CFR

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[5] On November 10, 2017, the Maas Plaintiff filed a timely notice of appeal with the BOH, which noted that the Maas Plaintiff had not been provided with the reasons for the denial, and requested "that the Board of Hearings issue an order … to the Office of Medicaid that the reasons be provided to the applicant no less than ten (10) days before the date of the appeal." In a letter to the Defendant Larkin dated December 14, 2017, the Maas Plaintiff again requested that an order … be issued by the BOH to the Office of Medicaid for the reasons for the denial. Despite the nominal "independence" of the BOH, no such order was ever issued.

[6] The Hirvi Plaintiffs, who reside in a nursing home, have applied for MassHealth, have been denied, and have been provided with MassHealth denial notices that do not provide the reasons for the denial, and therefore cannot prepare for a fair hearing. The Hirvi Plaintiffs do not know if the specific reasons for the denial are factual issues, legal issues or mixed issues of fact and law.

[7] The Defendant EOHHS has in the past argued that its lawyers represent the MassHealth worker for purposes of determining the reasons for the denial, yet such legal representation somehow does not seem to include advising the worker to provide those reasons to the appellant before the fair hearing or to include such information on the denial notice and in the applicant's case file. Lawyers at the Defendant EOHHS routinely are complicit in violations of due process by claiming that the worker, not the lawyer, made the decision to deny the application, and that any discussion about the applicant's case is protected by attorney-client privilege because the lawyer was merely providing "advice" on a complicated matter. An EOHHS lawyer cannot simultaneously be the source of advice and a shield against disclosure of the outcome of that advice, but even if the Court were to accept such actions as being proper, they do not override the federal law requirement that the MassHealth applicant is entitled to see the reasons for the denial on the denial notice and in the case file; the involvement of EOHHS lawyers in the legal process does not somehow give the EOHHS an excuse not to follow federal law and blindside MassHealth appellants (many of which are not represented by counsel) at fair hearings.

435.912(b), the state Medicaid agency must act "promptly and without undue delay." Under the federal regulation at 42 CFR 431.244(f)(4)(ii), the agency "must document the reasons for any delay in the appellant's record." The "reasonable promptness" mandate of 42 U.S.C. §1396a(a)(8) is defined in M.G.L. c. 118E s. 48:

> "[W]hen an aggrieved person appeals the rejection of his or her application for medical assistance ... the referee shall render and issue a decision within forty-five days after the date of filing of said appeal."[8]

The likelihood that the EOHHS can meet this statutorily-imposed deadline for the hearing officer to render a decision is reduced by any delay by the EOHHS in providing the appellant with the reasons for the denial; commonsensically, if the appellant does not know the reasons for the denial in sufficient detail, then the appellant cannot prepare for the fair hearing, and the hearing officer cannot (or should not) in good conscience close the record on the date of the hearing. Hence, 42 C.F.R. 431.210(b) requires that the Medicaid denial notice contain "[a] clear statement of the specific reasons supporting the intended action." Any delayed notification of the specific reasons for the denial to the appellant that results in the need to keep the record open for the appellant's response violates the EOHHS's mandate of reasonable promptness, as well as the EOHHS's duty under federal law to administer the program in a simple manner.[9]

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[8] The unfortunate reality is that the Defendants are not fulfilling their duties of reasonable promptness, as appeals are rarely even scheduled within that forty-five (45) day window, and hearing decisions are often not rendered for several months, and those lengthy delays can cause adversarial relationships to develop between MassHealth appellants and the unpaid nursing homes in which they reside.

[9] Federal Medicaid law at 42 U.S.C. §1396a(a)(19) requires that each state Medicaid program be administered "in a manner consistent with simplicity of administration and the best interests of the recipients." The federal regulation at 42 CFR 435.902 establishes that "[t]he agency's policies and procedures must ensure that eligibility is determined in a manner consistent with simplicity of administration and the best interests of the applicant or beneficiary." Massachusetts law reiterates federal Medicaid law, as M.G.L. c. 118E, s. 12 provides that our state agency "shall formulate such methods, policies, procedures, standards and criteria ... as may be

V. The Appellants' Case Files Are Legally Deficient under Federal Law

The state Medicaid agency is required under federal regulations to provide the reasons for the denial of an application not only in its notice to the applicant, but also in the applicant's file. See 42 CFR 435.914, which states that "[t]he agency must include in each applicant's case record facts to support the agency's decision on his application."[10] The applicant must be afforded the right to review the reasons for the denial in the applicant's case file before the hearing; per 42 CFR 431.242, "[t]he applicant or beneficiary, or his representative, must be given an opportunity to - (a) Examine at a reasonable time before the date of the hearing and during the hearing: (1) The content of the applicant's or beneficiary's case file …; and (2) All documents and records to be used by the State or local agency … at the hearing[.]"[11]

VI. Attorney-Client Privilege Does Not Permit the EOHHS to Withhold Its Reasons for the Denial

Under 42 CFR 431.242(a)(2), quoted above, applicants must be allowed to review all documents to be used by the Defendant EOHHS at an administrative hearing, including documents not included in the case file. The Defendant EOHHS violates federal Medicaid law when it routinely withholds from a MassHealth appellant its memorandum about the reasons for the denial, based on some notion of attorney-client privilege, while also entering it into the record once the fair hearing record has been opened. Intentionally keeping the reasons for the

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necessary for the proper and efficient operation of those programs in a manner consistent with simplicity of administration and the best interests of recipients."

[10] Given that there are only four MassHealth Enrollment Centers in the Commonwealth, an appellant having the technical ability to review the case file is not very convenient, so it is important that the actual MassHealth denial notice be informative and provide the specific reasons for the denial.

[11] The Plaintiff in the Maas case was not even given the ability to review her case file, as the MassHealth eligibility worker would not return phone calls after the denial had been issued. Counsel for the Plaintiffs in the Hirvi case has spoken directly to the MassHealth eligibility worker but has been rebuffed in his efforts to make an appointment to see the case file.

denial and the EOHHS's memorandum out of the applicant's MassHealth file has long been a pattern and practice of the Office of Medicaid. See **EXHIBIT D**, a copy of a May 27-28, 2009 email exchange between a MassHealth eligibility worker and an EOHHS lawyer known as Katy Schelong, where Attorney Schelong directed or advised the worker to destroy a memorandum that was in the appellant's MassHealth case file to prevent the appellant from learning the reasons for the denial until the day of the fair hearing.[12]

The Maas Plaintiff received the Defendant EOHHS's legal brief containing the reasons for the MassHealth denial exactly twenty (20) days before the rescheduled fair hearing, as promised on February 8, 2018 before this Court; the purported reason for the EOHHS doing so was that the rescheduling of the fair hearing had purportedly allowed the EOHHS to have extra preparation time to finalize its brief (whereas the reality of the situation was that giving the Maas Plaintiff the brief early was an attempted mooting tactic, done before the class action count had been added to the Amended Complaint). Since the time that the Hirvi fair hearing, originally scheduled for March 28, 2018, was unilaterally removed by the nominally "independent" Board of Hearings from its schedule after the Defendant EOHHS's lawyer Paul O'Neill had unsuccessfully offered its early brief in exchange for the Hirvi Plaintiffs not going forward on their motion for a temporary restraining order, no such brief has since been offered to the Hirvi appellants, even though the Defendant EOHHS has now had weeks of extra preparation time to finalize its brief.[13]

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[12] This document can be found as page A103 in the record appendix or addendum in Burt v. Director of the Office of Medicaid, 87 Mass. App. Ct. 1125 (2015).

[13] What goal can possibly be served by delaying delivery of the EOHHS's legal brief to the Hirvi Plaintiffs other than unfair surprise? Once the fair hearing has begun and the record has opened, the appellant's legal rights change, as all procedural protections afforded to appellants before the hearing then become matters of the hearing officer's discretion, and due to the busy Board of Hearings' schedule it is rare for a hearing where the record has already opened to be continued.

The difference between the treatment of the Maas and Hirvi Plaintiffs can be easily deciphered: the Defendant EOHHS thought it could moot the Maas case when it made the offer of an early brief, but now knows that such an offer will not have any chance of mooting the Hirvi case, which does not even have a fair hearing scheduled at this point, violating the EOHHS's duty of reasonable promptness. The very fact that the Hirvi Plaintiffs, whose MassHealth applications were denied on January 22, 2018 and February 12, 2018, have not yet received the reasons for the denials or any EOHHS memorandum, shows that the Defendant EOHHS is withholding the reasons for the Hirvi denials as a tactical measure, and the fact the Board of Hearings not only cancelled the scheduled fair hearing but also has not rescheduled it or issued any procedural order shows that the Board of Hearings (which perhaps unsurprisingly shares the same lawyer with the Defendant EOHHS in this case) is only nominally independent from the EOHHS.[14]

VII. Federal Medicaid Law and the State Medicaid Manual Require that the EOHHS Consider and Follow SSI Law, and the Social Security Administration Requires the Issuance of Detailed, Manual Notices When a Trust Causes a Denial

In 1994, the Health Care Financing Administration, now known as CMS, issued HCFA Transmittal 64, which eventually became part of the State Medicaid Manual, which is binding on the states by contract. The EOHHS is required to consider SSI law in its MassHealth eligibility determinations, per 42 U.S.C. s. 1396a(r)(2) and 42 U.S.C. s. 1396a(a)(10)(C)(i)(III), and in section 3259.6 D. of the State Medicaid Manual, states are specifically instructed to apply SSI law in their Medicaid eligibility determinations involving trusts:

> 1. Payments Made From Revocable Or Irrevocable Trusts to or on Behalf of Individual.--Payments are considered to be made to the individual when any

[14] The due process issues complained about by the Plaintiffs could not have developed or continued without the nominally independent Director of the Board of Hearings condoning or approving the EOHHS's actions and inactions.

> amount from the trust, including an amount from the corpus or income produced by the corpus, is paid directly to the individual or to someone acting on his/her behalf, e.g., a guardian or legal representative.
> ...
> NOTE: A payment to or for the benefit of the individual is counted under this provision only if such a payment is ordinarily counted as income under the SSI program. (emphasis added)

An SSI applicant who receives a denial due to a problematic irrevocable trust receives a detailed denial notice, so the EOHHS must do the same for MassHealth applicants who are similarly denied. Under the Program Operations Manual System of the Social Security Administration, § S01120.202(A)(1)(g), entitled "Manual notices," the specific reasons for the denial caused by an irrevocable trust are required to be provided to the applicant when the SSI application was denied due to a perceived problem with an irrevocable trust established after 1999:

> "When applicable, **issue a manual notice for trusts** established with an individual's assets on or after 01/01/00 as required per SI 01120.204. **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." (emphasis added)

In violation of the SSI comparability requirement in federal Medicaid law, the Defendant EOHHS has provided no such manual notices to the Maas Plaintiff, whose irrevocable trust was dated January 29, 2008, the Hirvi Plaintiffs, whose irrevocable trust was dated July 18, 2012, or any other MassHealth appellant whose irrevocable trust has caused a MassHealth denial in the past several years.

VIII. The Subpoena Regulation at 1340 CMR 610.052 Violates Massachusetts Law

The Defendants' subpoena regulation violates M.G.L. c. 30A and has been abused to the detriment of MassHealth applicants. The Plaintiffs seek a declaratory judgment that the MassHealth regulation is invalid to the extent of its obvious conflict with black letter law in

M.G.L. c. 30A, s. 12(3).[15] The Plaintiffs have requested that the hearing officers issue subpoenas, but the hearing officers have exercised their discretion under the invalid regulation and have not issued the requested subpoenas.[16] The latest subpoena request made by the Hirvi Plaintiffs (**EXHIBIT E**) unquestionably includes factual matters. The question validly before this Court, then, is whether the MassHealth regulation at 130 CMR 610.052, which states that subpoenas may only be issued in the discretion of the hearing officer, is invalid where its underlying authority, M.G.L. c. 30A, s. 12, states that appellants are entitled to such subpoenas as a matter of right. To the extent that the regulation grants discretion to a hearing officer on whether to issue a subpoena, the Court should find that the regulation is invalid. The Defendant EOHHS cannot legitimately claim that its enabling statute, M.G.L. c. 118E, provides the EOHHS with authority to override the appellant's rights created by M.G.L. c. 30A, the Massachusetts Administrative Procedure Act, which has been in existence since July 1, 1955 and codified appellants' subpoena rights many years before the federal Medicaid program and M.G.L. c. 118E were established. In a case decided last week, Epic Systems Corp. v. Lewis, 584 U.S. ___ (2018), the U.S. Supreme Court reiterated that an agency will not receive deference if its interpretation of a statute that it administers would conflict with and cause limitations to a different pre-existing statute:

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional

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[15] For the convenience of and comparison by the Court, **EXHIBIT F** contains M.G.L. c. 30A, s. 12 and 130 CMR 610.052. M.G.L. c. 30A, s. 12(3) states: "Any 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." Compare with 130 CMR 610.052, which states: "Any 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."

[16] Lawyers at the Defendant EOHHS routinely advise the EOHHS Secretary not to honor any subpoenas unless a hearing officer at the Board of Hearings issues them.

> enactments" and must instead strive "to give effect to both." Morton v. Mancari, 417 U. S. 535, 551 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "a clearly expressed congressional intention" that such a result should follow. Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U. S. 528, 533 (1995). The intention must be "clear and manifest." Morton, supra, at 551. And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute. United States v. Fausto, 484 U. S. 439, 452, 453 (1988).

Under M.G.L. c. 30A, s. 7, judicial review of the MassHealth regulation at 130 CMR 610.052 may be conducted. This Court should conclude that this regulation is invalid where its underlying authority, M.G.L. c. 30A, s. 12, requires the issuance of subpoenas as a matter of right. Such a due process error by the Defendants is ongoing, affects the rights of all current and future MassHealth applicants, and is capable of repetition, yet evading review.

IX. Sixty-One (61) Affidavits Support the Plaintiffs' Contention that the Defendant EOHHS Routinely Violates the Due Process Rights of MassHealth Applicants

Sixty (60) persons, almost all of which are practicing Massachusetts lawyers who deal with the Defendants on a regular basis, have issued the attached affidavits (**Exhibit G)** that support the Plaintiffs' contentions in these cases that the Defendants are in violation of federal and Massachusetts laws, that due process is not afforded to MassHealth applicants and appellants, that EOHHS lawyers are involved in intentional efforts to withhold the reasons from the denial from appellants until the day of the administrative hearing, that the lack of information in MassHealth denial notices prevent appellants from being able to prepare for the administrative hearing, that MassHealth applications and appeals are not handled with reasonable promptness, that the subpoena rights of appellants are limited, and that the Defendant EOHHS intentionally or recklessly engages in administrative inconsistency in its MassHealth eligibility determinations.

X. The Defendant EOHHS Ignores Its Previous Decisions and Recklessly Engages in Administrative Inconsistency in Its MassHealth Eligibility Determinations

The U.S. Supreme Court has stated that "[t]he touchstone of due process is protection of the individual against arbitrary action of government." (Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889)). When the Defendant EOHHS makes an eligibility determination without considering its past decisions, including previous fair hearing decisions (i.e., the "decision of the agency" under M.G.L. c. 118E, s. 48), its actions violate M.G.L. c. 30A, s. 11(8) and due process as being arbitrary action of government:

> "The problem of consistency in state administrative agency adjudicatory proceedings is fundamental in that it strikes at the very heart of the problem of administrative justice. ... Generally speaking, a state administrative agency should adhere to the doctrine of stare decisis wherever possible in its administrative adjudications. As a general proposition, a state administrative agency, just as courts, should adhere to precedent in its adjudications in order to insure insofar as possible that those similarly situated will be treated in the same manner in administrative adjudications. See Boston Gas Co. v. Department of Public Utilities, 367 Mass. 92, 104, 324 N.E.2d 372, 379 (1975). ... Where the obviously inconsistent application of agency standards to similar situations is lacking in any rational basis in the adjudicatory proceeding's final decision, the agency's final decision is arbitrary and capricious. ... M.G.L.A. c. 30A, s. 11(8) expressly provides that every final decision in an adjudicatory proceeding by a state administrative agency subject to the provisions of the Massachusetts Administrative Procedure Act must be accompanied by a statement of reasons. This statutorily imposed requirement of reasoned decision-making obliges state administrative agencies in Massachusetts to explain the reasons for their inconsistencies and departures from stare decisis in adjudicatory proceedings." McDonough, Gerald A., 38 Mass. Practice, Administrative Law & Practice s. 10:49 (2016), pp. 627-629.

When the Defendant EOHHS decides to challenge a particular type of transaction more than once, it ignores its past losses on that issue and pushes ahead with the same arguments in future cases involving the same issue, and does not even bother to mention that previous applicants had ultimately received MassHealth approval and whether there are substantive differences between the cases. An administrative agency is not allowed to trumpet its wins on a topic and be silent

about cases where its position had been repudiated. Even though the Defendant EOHHS may believe that it is being consistent when it denies the next applicant whose application brings forth the same issue, it is being arbitrary and capricious when it makes such an adverse eligibility determination and hides the fact that a previous MassHealth applicant had been approved despite that issue.

The requirement for administrative consistency under M.G.L. c. 30A is consistent with applicable case law about the procedures that agencies must take on substantive issues:

> "A party to a proceeding before an agency has a right to expect and obtain reasoned consistency in the agency's decisions." Boston Gas Co. v. Dep't of Pub. Utilities, 367 Mass. 92, 104 (1975). The law prohibits an agency "from adopting significantly inconsistent policies that result in the creation of conflicting lines of precedent governing the identical situation. ...[T]he law demands a certain orderliness. If an administrative agency decides to depart significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable. ... [T]he prospect of a government agency treating virtually identical legal issues differently in different cases, without any semblance of a plausible explanation, raises precisely the kinds of concerns about arbitrary agency action that the consistency doctrine addresses." Davila–Bardales v. Immigration and Naturalization Service, 27 F.3d 1, 5 (1st Cir., 1994). "An administrative agency must respect its own precedent, and cannot change it arbitrarily and without explanation, from case to case." Mendez-Barrera v. Holder, 602 F.3d 21, 26 (1st Cir. 2010). "The principles of claim preclusion and issue preclusion ... apply both to administrative boards and to courts." Lopes v. Board of Appeals of Fairhaven, 27 Mass. App. Ct. 754, 755 (1989). "Courts routinely apply collateral estoppel to issues resolved by agencies." Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise 13.4 at 260 (1994).

Further, under the doctrine of offensive issue preclusion, also known as offensive collateral estoppel, the Defendant EOHHS is prohibited from continuing to bring up issues where its position had already been invalidated. Bellermann v. Fitchburg Gas and Electric Light Company, 470 Mass. 43, 60 (2014).

The trust (**EXHIBIT H**) that apparently caused the MassHealth denial in the Hirvi case (according to oral argument before this Court by EOHHS Attorney Paul O'Neill) is virtually

identical (aside from names and dates) to the Daley trust (**EXHIBIT I**) that was approved by the SJC in Daley v. Secretary of Executive Office of Health and Human Services, 477 Mass. 188 (2017), subject to remand for a possible tax-reimbursement issue that the EOHHS chose not to challenge when it issued a MassHealth approval (**EXHIBIT J**) without the need for a remand fair hearing.

The Hirvi denial is not the only time the EOHHS has failed to treat similar trusts consistently. The two trusts (**EXHIBIT K**) in the 2018 Suffolk Superior Court case (being filed today) of Arthur J. Flanders, Personal Representative of the Estate of Phyllis A. Flanders v. Marylou Sudders et al are virtually identical (aside from names and dates) to the George N. Vergados Irrevocable Trust (**EXHIBIT L**), the principal of which was found to not be a countable asset in George N. Vergados v. Marylou Sudders et al, Suffolk Superior docket no. 1584CV00880, as well as the Giannoula Vergados Irrevocable Trust (**EXHIBIT M**), which was thereafter approved by the EOHHS. Giannoula Vergados received a MassHealth approval a few weeks before the EOHHS issued a denial due to the identical Flanders trust. Nothing about the EOHHS-approved Giannoula Vergados Irrevocable Trust, the court-approved George N. Vergados Irrevocable Trust or the Suffolk Superior Court cases involving those trusts was even mentioned to the hearing officer by the Defendant EOHHS in support of the eligibility denial issued in the Flanders administrative hearing, in violation of the Defendant EOHHS's duty of administrative consistency.[17]

[17] In the Suffolk Superior Court case of Arthur J. Flanders, Personal Representative of the Estate of Phyllis A. Flanders v. Marylou Sudders et al, a motion for consolidation with these cases on the administrative inconsistency issue will be served on the Defendant EOHHS (or that appellant will join this class if it is certified).

The trust (**EXHIBIT N**) in the case of Nancy Perzanoski v. Marylou Sudders et al, Suffolk Superior docket no. 1584CV02019, voluntarily dismissed in 2017 after the Daley decision when the Defendant EOHHS changed its denial to a MassHealth approval, is virtually identical (aside from names and dates) to the trust, with slightly reordered provisions, that had already been approved by the fair hearing decision in Appeal 1215864 (**EXHIBIT O**).

Administrative inconsistency has not only been shown by the Defendant EOHHS in the trust arena, where there have been well over two hundred fifty (250) fair hearings in recent years, as can be seen online at http://Irrevocable Trust.info, but has also been shown in cases that have involved joint purchases of real estate between a MassHealth applicant and a family member.

The Defendant EOHHS makes no apparent effort to be consistent in its MassHealth eligibility determinations. The Maas appellant, who has had her administrative hearing, brought to the attention of the hearing officer several previous fair hearing decisions that were seemingly intentionally omitted from the EOHHS's decision-making process. Neither the lawyer who wrote the EOHHS's memorandum nor the other EOHHS lawyer who appeared at the administrative hearing brought to the attention of the hearing officer any previous MassHealth eligibility determination or fair hearing decision that ran contrary to the one-sided position being taken by the EOHHS against the Maas appellant.[18] That is not how an agency and its lawyers are supposed to behave. [19]

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[18] The hearing officer in the Maas administrative appeal even commented on page 7 of his decision (**EXHIBIT P**) that "MassHealth reiterates an argument made in other trust appeals. … The court in Heyn ruled otherwise, however."

[19] EOHHS lawyers may well have an ethical duty to report fair hearing decisions to tribunals, including administrative hearings, even if the EOHHS chooses not to consider them when making initial MassHealth eligibility determinations; in The Law of Lawyering, § 29.11, at 29-16 (3rd ed. 2000), authors Geoffrey C. Hazard, Jr. & W. William Hodes wrote: "If a lawyer deliberately omits adverse authority, there is risk that neither opposing counsel nor the court will discover the governing law and an erroneous decision (that could have been avoided) will result.

A new Superior Court case that has today been filed, Agnes Walker v. Marylou Sudders et al, Suffolk Superior Court docket no. 1884CV00969, also presents the issue of administrative inconsistency by the EOHHS in its MassHealth eligibility process, where at least sixteen (16) previous fair hearing decisions, as well as at least two (2) Superior Court decisions, were ignored in the eligibility determination process and went unmentioned by EOHHS counsel at the administrative hearing. The Office of the Attorney General has requested additional time, to May 31, 2018, for serving its response to the motion for consolidation with the instant case on the administrative inconsistency portion of the proposed class action.

XI. The Plaintiffs Eva E. Hirvi and Henry E. Hirvi Respectfully Request That This Court Order that the Defendants Grant MassHealth Eligibility to Them or Explain Why a Virtually Identical Trust Was Recently Approved in the Daley Remand.

To the extent that the Defendant EOHHS has admitted in this Court that the Plaintiffs Eva E. Hirvi and Henry E. Hirvi have received MassHealth denials due to their irrevocable trust, and where their trust is virtually identical to the approved Daley trust, the Plaintiffs should not be required to exhaust administrative remedies. Factors the Court has considered in determining whether to suspend the exhaustion requirement include whether the case raises important public questions whose resolution will affect people beyond the parties to the case, East Chop Tennis Club v. Massachusetts Comm'n Against Discrimination, 364 Mass. 444, 450 (1973); whether pursuing the administrative agency will result in irreparable harm to either party, Everett v. Local 1656, Int'l Ass'n of Firefighters, 411 Mass. 361, 368 (1991); and, perhaps most importantly, whether there is a question of law "peculiarly within judicial competence." Id.

... Rule 3.3(a)(3) refers to "legal authority," which should be understood to include not only case law precedents, but also statutes, ordinances, regulations, and administrative rulings. Indeed, the duty to reveal the latter kinds of authority is of greater practical significance, precisely because they are less likely to be discovered by the tribunal itself." (emphasis added)

The proper interpretation of a trust is an issue of law. As has been indicated by the Defendants in oral argument before this Court by EOHHS Attorney Paul O'Neill, the case at bar turns upon whether the Hirvi trust is countable, yet the Hirvi trust is virtually identical to the Daley trust, which was approved by the SJC in Daley v. Secretary of Executive Office of Health and Human Services, 477 Mass. 188 (2017), and on remand a Notice of Eligibility (**EXHIBIT J**) was issued on April 11, 2018 by the Defendant EOHHS.

This Court has already ruled that "the plaintiffs have stated a claim to prevent an allegedly illegal practice and procedure that cannot be excused by subsequent opportunity for the agency to cure, at the expense of delay and expenditure of private funds, neither of which can be recouped in light of qualified immunity (emphasis added)." To force the Hirvi Plaintiffs to endure the delay occasioned by requiring them to exhaust administrative procedures, and subjecting them to the expenditure of private funds that process would entail, neither of which could be recouped in light of qualified immunity, would result in irreparable harm.

The Plaintiffs are entitled to "reasonable promptness" in the determination of their eligibility for Medicaid benefits. The substantial number of Affidavits attached hereto in EXHIBIT G shows the Defendants' systemic delay in their duty to "act promptly and without undue delay." At a minimum, even if this Court does not chose to order the Defendant EOHHS to approve the MassHealth applications of the Plaintiffs Eva E. Hirvi and Henry E. Hirvi, this Court should order the Defendant EOHHS to immediately place in writing all of the specific reasons that the Hirvi denials were issued on January 22, 2018 and February 12, 2018 with the virtually identical trust that the Defendant EOHHS approved afterwards, on April 11, 2018, on remand from the SJC in Daley.

XII. The Plaintiffs Request an Award of Legal Fees and Costs under 42 U.S.C. 1988 and M.G.L. c. 231, s. 6F

The Plaintiffs are intended beneficiaries of federal law, where the fair hearing system implemented by the EOHHS must accord due process to all applicants, where 42 U.S.C. § 1396a(a)(8) provides that the application process be handled "with reasonable promptness," and where 42 U.S.C. § 1396a(a)(19) includes further rights-creating language by requiring that each state Medicaid program be administered "in a manner consistent with simplicity of administration and the best interests of the recipients." The positions taken by the Defendants in this case that a dollar amount placed on a MassHealth denial notice provides the applicant with the specific reasons for the denial, and that 130 CMR 610.052 is in accordance with Massachusetts law, and that the EOHHS can choose to deny the MassHealth application of the Hirvi Plaintiffs despite afterwards approving the virtually identical trust in Daley, are violations of the Plaintiffs' rights, and frivolous as well. The Plaintiffs therefore request an award of legal fees and costs under 42 U.S.C. 1988 and M.G.L. c. 231, s. 6F.

Respectfully submitted on this 25th day of May, 2018.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this day a copy of the Plaintiffs' "MEMORANDUM IN SUPPORT OF CLASS CERTIFICATION, DECLARATORY JUDGMENT AND PRELIMINARY INJUNCTION" was delivered to:

Elizabeth Kaplan, Esq.
Commonwealth of Massachusetts
Assistant Attorney General, Government Bureau
One Ashburton Place
Boston, MA 02108

Signed under the pains and penalties of perjury on this 25th day of May, 2018.

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