

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF SUFFOLK

SUPERIOR COURT

DOCKET NO: 1884CV00129

JEAN MAAS

Plaintiff

v.

MARYLOU SUDDERS,
Secretary of the Executive Office of
Health and Human Services,

And

KIM LARKIN,
Director of the Board of Hearings
of the Office of Medicaid of the
Executive Office of Health and
Human Services

Defendants

CONSOLIDATED WITH:

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF SUFFOLK

SUPERIOR COURT

DOCKET NO: 1884CV00845

HENRY E. HIRVI and EVA E. HIRVI,

Plaintiffs

v.

MARYLOU SUDDERS,
Secretary of the Executive Office of
Health and Human Services,

And

KIM LARKIN,
Director of the Board of Hearings
of the Office of Medicaid of the
Executive Office of Health and
Human Services

Defendants

AFFIDAVIT OF COUNSEL

NOW COMES Nicholas W. Daviau, having specific knowledge and experience in dealing with MassHealth, hereby deposes and states that:

1. I, Nicholas W. Daviau, am an attorney in good standing, licensed to practice in the Commonwealth of Massachusetts, with a principal place of business at 255 Park Avenue, Suite 1000, Worcester, MA 01609.
2. Part of my practice involves assisting elders with long term care MassHealth applications. Over the last several years I have processed and advised clients on numerous MassHealth applications. About one third (1/3) of my practice involves advising on long term care planning and MassHealth applications. I have attended several administrative hearings during the past 10 years of practicing in elder law.
3. Once a long term application is filed, typically the client waits to receive his or her notice of approval or denial. If he or she receives a notice of denial for excess countable assets, the notice will simply state that the application was denied, will reference in general terms a regulation which MassHealth deems applicable and then will state the amount of the applicant's assets which MassHealth has determined exceeds the standard allowance of \$2,000.00, and information regarding the right to appeal the decision. There is no other information disclosing how that number was calculated, how the applicant violated the referenced regulation or how MassHealth came to its determination, in other words, no clear statement of the specific reasons for the denial of benefits.
4. As a result of this lack of any clear statement of the specific reasons for the action, I usually have to file an appeal and attempt to determine the specific reasons for the denial.
5. Despite submitting multiple requests for such clarity, in my experience, I have rarely if ever received additional information giving my client a clear statement of the reasons for the denial and this lack of information adversely impacts my ability to prepare for the appeal hearing.

6. The common practice of MassHealth is to decline or refuse to disclose additional information which forces appellants to go to an appeal hearing to learn for the first time why the application was denied and how the amount of disqualifying excess assets was calculated.

7. At the hearing it has been common practice and procedure for the MassHealth representative to deliver a legal memo, usually from the Legal Department of MassHealth to the appellant who sees it for the first time. In my experience, the memo has not been made available to either my client or myself prior to the start of the appeal hearing. As a result, the applicant or myself as counsel have no ability to prepare and present a challenge to the denial of the application before the hearing officer.

8. Although the hearing officer will often conclude the hearing, but leave the record open for the appellant to file a responding brief, the appellant is left without the ability to bring forward the testimony of appropriate fact witnesses at the hearing, MassHealth has an unfair advantage during the presentation before the hearing officer, and leaving the record open causes additional delays.

9. This situation is even more egregious for individuals who proceed without counsel as they are unlikely to know enough regarding MassHealth procedures to request that the Hearing Officer leave the record open in order to have the opportunity to respond to the memo on the record after reviewing its contents.

10. This is particularly problematic when dealing with more complicated matters like trusts. Often the appellant is forced to go to the hearing with absolutely no understanding of what trust provision MassHealth has deemed to violate Medicaid law or regulations and rendered the trust assets countable.

11. My clients are often in extremely vulnerable positions. They are concerned about not being able to stay in the nursing home. They are concerned about the delays as their time is often limited. This pattern and practice of failing to give a clear statement of the specific reasons for the denial in the notice, of engaging in information withholding, of forcing a hearing in which the appellant cannot adequately prepare, not only violates their due process rights but also adds additional stress at a time when appellants are vulnerable.

12. I have represented appellants whose applications were denied because trust assets were deemed countable on a theory that was discredited in prior hearing decisions, or even court decisions, and in such cases the Legal Department memo failed to disclose the existence of such contrary authorities.

SIGNED under the pains and penalties of perjury this 10th day of May, 2018.



Nicholas W. Daviau
BBO # 669268
Daviau Law Offices, P.C.
255 Park Avenue, Suite 1000
Worcester, MA 01609
(508) 797-3010
F: (508) 797-3017
nick@daviaulaw.com