COMMONWEALTH OF MASSACHUSETTS

COUNTY OF SUFFOLK

SUPERIOR COURT
Docket No: 1884CV00129

JEAN MAAS, and
HENRY and EVA HIRVI,
Plaintiffs
v.
MARYLOU SUDDERS,
Secretary of the Executive Office of
Heath 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
in Support of Plaintiffs' Motion for Class Certification

NOW COMES Robert P. Ford, on oath and in support of the named Plaintiffs' Motion for Class Certification, who deposes and states that:

1. I am, and have been for over four decades, an attorney in good standing, licensed to practice law in the Commonwealth of Massachusetts, with a principal place of business in North Andover, Massachusetts, and I have personal knowledge of all matters set forth in this Affidavit, except as to those matters stated to be upon information and belief, and as to those matters, I believe them to be true.

2. A major portion of my law practice involves assisting elders with estate planning and with MassHealth long term care applications and appeals. In addition to my own client cases, I have handled applications and appeals on cases referred to me by other attorneys. I have seen numerous MassHealth notices of denial of benefits, and I have attended administrative hearings in connection therewith. In addition, I have been on the Adjunct Faculty of the Massachusetts School of Law at Andover for over two decades, teaching courses on wills and trusts, elder law and estate planning.

3. Every notice of denial on an application for MassHealth long term care benefits that I have seen (other than a notice for a claimed failure to provide supporting documentation or a claimed disqualifying transfer), has stated as reason for denial: "You have more countable assets than MassHealth benefits allow. 103 CFR 520.003, 520.004." Section 520.003 recites the asset limits for an individual and for a couple living together in the community, and section 520.004 recites the requirements for asset reduction (spend down). No other explanation is given. Where the applicant for benefits has previously established and funded a trust, there is no explanation as to why the assets in the trust are deemed countable, and there is no reference to any MassHealth regulation, or other federal or state law, that would provide any arguable basis for the counting of the trust assets in the eligibility determination. Federal Medicaid law requires that notice of denial of an application for benefits by the Office of Medicaid (the MassHealth agency) contain "a clear statement of the *specific reasons* for the intended action". 42 CFR 431.206(c)(2) and 42 CFR 431.210(b). *[Emphasis added.]* Further, the MassHealth regulations themselves provide at 130 CMR 610.026(A)(2) that the notice must contain "the reasons for the intended action." Note the watering down of the federal law in the MassHealth regulation by omission of the word "specific". Furthermore, the statement: "You have more countable assets than MassHealth benefits allow" is a conclusion, not "a clear statement of the specific reasons" for that conclusion.

4. No appellant is seeking a full legal memorandum at the time of notice of denial of an application, but rather, every appellant is entitled as a matter of law to "sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument." G.L. c. 30A, § 11(1). MassHealth uses as an excuse for not providing its legal memorandum in advance of the hearing that the agency has the right to not file the memorandum in evidence at the hearing. Even if one accepts that statement, it does not excuse the agency from not providing a clear statement of reasons for the agency's actions. That can be accomplished far short of providing a legal memorandum. Thus, the agency is manipulating lawful rules to justify its unlawful policy of non-disclosure.

5. As a result of the failure of the Office of Medicaid (MassHealth) to provide any clear statement of the specific reasons for the denial, I usually have to file an appeal and attempt on my own to determine the specific reasons for the MassHealth denial. But that is always conjecture until the time of the hearing on appeal when the caseworker provides the memorandum of law from the legal department of the Office of Medicaid, or sometimes of late from the legal department of the Executive Office of Elder Affairs, setting forth the agency's specific reasons for the denial.

6. In fact, in some cases it has been routine that I, or my referring attorney, have appeared at the hearing for the sole purpose of receiving the agency's memorandum and requesting that the record be kept open to allow opportunity to respond. No hearing has taken place in such cases, as we were without knowledge of MassHealth's grounds for denial. In one such case, the referring attorney travelled to Taunton only to be told upon his arrival that the legal memorandum had been faxed to his office in Everett while he was driving to the hearing.

7. Based upon my personal experience, as well as discussions with other elder law attorneys, it appears to be the common practice of MassHealth to refuse to disclose specific

reasons for a denial, especially where a trust has been involved, which forces appellants to go to an appeal hearing to learn for the first time why the application was denied.

8 Without some statement of reasons for the denial, the applicant has no guidance as to how to prepare and present his/her case to the hearing officer, thus rendering meaningless federal and state law provisions for a fair hearing. It has been the experience of this attorney that time is afforded for response to the MassHealth legal memorandum first presented at a hearing by the keeping of the record open for written submissions, but that does not cure the notice failure, for now the opportunity to address the Hearing Officer at hearing with respect to the issues, and to have feedback from the Hearing Officer or counter argument from MassHealth has been lost, as Hearing Officers have denied continuance of the hearing. Perhaps avoidance of that back-and-forth scrutiny is precisely why MassHealth engages in its practice of inadequate notice. As a result, the agency's refusal to comply with not only federal law, but its own regulations, denies an applicant the full benefit that a fair hearing should afford. Instead, MassHealth engages in adjudication by ambush.

9. It appears apparent that MassHealth's practice of not providing proper notice regarding its denials is so as to not disclose that it is presenting to the Hearing Office, through its legal memorandum, arguments that are inconsistent with prior rulings by its own Hearing Officers. In response to objection to such argument by applicant's counsel, the MassHealth response is that all cases are fact-specific, and therefore no decision by a Hearing Officer sets any precedent for the agency. However, MassHealth will present in its legal memoranda prior Board of Hearings decisions that have supported MassHealth's position, and not disclose those decisions which have gone against the agency. Indeed, the MassHealth legal department will also seek to bolster their argument by citing court decisions in prior Medicaid cases. If Hearing Officer decisions set no precedent for the agency because the cases are fact-specific, how do court decisions in such cases set precedent for MassHealth to cite? The justification for administrative adjudication is to develop within the administrative agency expertise in a complex area of law so as to accomplish fair and equal treatment of applicants similarly situated. The only consistency from this agency, however, is inconsistency.

10. I once was involved with the separate long term care applications of each a husband and wife, and an in-law of one of them. All three had the exact same asset protection trust. The in-law was the first of the three to enter a nursing home. Her application for long term benefits was denied, but upon my insistence, the caseworker went back to the legal department to present my explanation as to why the trust was not disqualifying. Before the hearing was to take place, I was notified by MassHealth that the legal department had considered my explanation and accepted it, and the in-law was found eligible. Later the husband entered a nursing home and made application for long term care benefits. His application was allowed. Still later, the wife applied for benefits, and her application was denied. At this same time, this attorney learned of another applicant with the same trust language in question for the wife, and that applicant was approved. As to the wife's application, MassHealth insisted that the three other cases were not precedential. MassHealth does not accept as precedential the decisions of its own Hearing Officers, whose decisions are, by law, final agency decisions.

11. On another case, the client had been approved at time of application. A year later, on annual review, she was again approved. A few months later, she reported to MassHealth that her income had changed, and her patient paid amount (PPA) was adjusted accordingly, but otherwise she remained eligible. Then a few months later, she was notified that she was not eligible because the assets in her trust were countable for what MassHealth deemed were obvious reasons. Nothing about her trust had changed, nothing about her circumstances had changed since the last review, and it was not yet time for her next annual review. These three circumstances are the only conditions to give rise to a review of eligibility after initial finding of eligibility, and yet MassHealth declared her ineligible because of the terms in her trust which had been submitted to the agency with the application over a year earlier. An appeal had to be taken, and the client prevailed on appeal. MassHealth is relentless in its determination to deny or revoke eligibility for benefits to individuals who are eligible.

12. The purpose for such conduct on the part of the MassHealth agency appears to be to undermine confidence of applicants and their families in their legal counsel, to cause applicants and families unnecessary worry and expense while they are most vulnerable, and to try to get applicants to give up hope and surrender their rights. And this tactic goes on. Substantive and procedural rights of residents of this Commonwealth are regularly and wrongfully denied by the MassHealth agency. A further example involves subpoenas.

13. The Massachusetts Medicaid enabling statute is G. L. c. 118E, which, at §48, third unnumbered paragraph, states:

> "A referee *may* subpoena witnesses, administer oaths, take testimony and secure the production of such books, papers, records and documents as may be relevant to such hearing." [*Emphasis added.* The term "referee" here refers to a Hearing Officer of the Board of Hearings within the Office of Medicaid.]

Additionally, the Massachusetts administrative law statute is G.L. c. 30A, which, at §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. *The party may have such subpoenas issued by a notary public or justice of the peace, or* he may make written application to *the agency*, which *shall forthwith issue the subpoenas requested.*" *[Emphasis added.]*

Despite the foregoing Massachusetts statutory law, the Office of Medicaid refuses to issue subpoenas when requested and to recognize and comply with subpoenas lawfully issued by a Notary Public.

14. In one particular case of appealing a denial for Medicaid long term care benefits for a woman in a nursing home, this attorney sent by fax a properly prepared subpoena issued by a Notary Public to the Director of the Office of Medicaid. See Exhibit A, hereto. The same subpoena was also served on her by a Constable. The subpoena sought the appearance of the Director of the Office of Medicaid, or her designee, to appear at the upcoming hearing to give

testimony regarding the policy of that Office with respect to challenges to applications for benefits where a trust was involved, and to explain why the Office of Medicaid did not follow the rulings that had been issued in prior cases on the same legal issues as were in question in the instant case, as best this attorney could conjecture, since the Office of Medicaid had not given any reason whatsoever for its conclusion that the applicant in the instant case had excess assets, presumably in her trust. The subpoenas also requested the production at the hearing of suitably redacted copies of trusts involved in cases cited by the appellant with Board of Hearings appeal numbers, and which were believed to contain the same or very similar language as the language in the trust of the instant case. The requests were intended to elicit evidence going to the question of administrative consistency, and were therefore proper. Response to that request came from an Assistant General Counsel (AGC) in the Executive Office of Health and Human services, the parent agency of the Office of Medicaid, within which is the Board of Hearings. See Exhibit B, hereto. This attorney did not pursue request for a subpoena to be issued by the Board of Hearings because of reports from other attorneys that their requests were refused.

15. The AGC faxed to this attorney's office a letter stating that the subpoena was invalid and would not be honored as not having been issued by the Board of Hearings, which, he insisted, was the sole authority for issuance of subpoenas in Medicaid appeals, pointing to G.L. c. 30A, §9, G.L. c. 118E, §48 and MassHealth regulation 130 CMR 610.052. G.L. c. 118E, §48 and MassHealth regulation 130 CMR 610.052 provide simply that a Hearing Officer may issue subpoenas. Neither states that the Hearing Officer is the sole authority to issue subpoenas to a hearing before him or her. On the other hand, G.L. c. 30A, §9 directs the commissioner of administration to promulgate rules and regulations applicable to all state administrative agencies, and also allows agencies within the executive offices of the Commonwealth to promulgate rules for the conduct of adjudicatory proceedings in said agency, which rules may substitute in whole or in part, or be in addition to, the standard rules promulgated by the commissioner. Such statutory authority for rule making, however, does not authorize administrative agency overruling of statutory requirements of due process.

16. This attorney replied by fax to the AGC pointing out that the Massachusetts statute, G.L. c. 30A, at §12(3) [*see para. 13 of this Affidavit, above*], which the AGC did <u>not</u> cite in his letter to this attorney, states that the appellant is entitled to a subpoena issued by the Board of Hearings "as of right," and also that a subpoena issued by a Notary Public or Justice of the Peace is a valid option. See Exhibit C. The Executive Office of Health and Human Services, and its subsidiary agency, the Office of Medicaid, are apparently of the opinion that they have been given authority to overrule the legislature's enactment of due process requirements. However, there is no conflict between sections 9 and 12 of G.L. c. 30A, nor between chapters 30A and 118E. In chapter 30A, the legislature set out basic requirements of due process, and allowed the administrative agencies to establish rules for their respective adjudicatory proceedings to address whatever may be peculiar to themselves. Statutory authority for administrative rule making should not be construed to allow repeal of statutory recognition of basic due process and fairness.

17. The AGC, in his letter, assured this attorney that the Director would send to the hearing a representative who "will be prepared to explain the agency's decision" in the instant case. As to the requested documents, the AGC stated that the parties in those cases were not parties to the

instant case and they had not provided their assent to disclosure of their documents, and so the copies of trusts requested would not be produced.

18. At the hearing, the Hearing Officer did allow counsel the opportunity to pursue enforcement of the subpoena issued by the Notary Public. However, given the time constraints allowed, and added costs, the appellant waived its right to do so, and proceeded with the hearing. A caseworker appeared at the hearing and, in typical style, produced the agency legal memorandum, but stated that she was unable to answer any questions regarding agency policy and she could not explain the basis for denial, but rather simply made reference to the legal memorandum saying that everything is explained there.

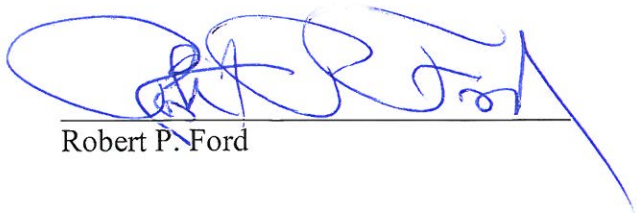
19. Because the trusts (suitably redacted) were not produced, appellant was unable to determine whether the agency had justifiable grounds for treating the instant case differently from other cases or was being inconsistent in its construction and application of the law. The appellant was therefore denied her right to a fair hearing, which placed her right to Medicaid benefits in jeopardy. This attorney was nonetheless successful on the appeal. But that outcome is not always assured.

20. What is most curious about the agency's position regarding privacy of even suitably redacted copies of trusts in other cases in which the agency was making the same arguments as in the instant case is that the trusts are part of the agency record on appeal to Superior Court where the entire file is open to the public, assuming proper redaction had been performed as it should always be.

21. When the Office of Medicaid is faced with prior agency rulings contrary to its position in an ongoing case, it dismisses out of hand those prior rulings as all being wrong. What is wrong with that position is that the agency is saying it is not performing its function of developing expertise, but rather either making mistakes over and over, or willfully and intentionally disregarding the law and violating the rights of the residents of this Commonwealth.

22. The conclusion of this attorney, once again, is that it is the clear intent of the Office of Medicaid to make application for federal benefits as difficult as possible knowing that some applicants and their families will surrender their rights in utter frustration even though the elder was entitled to benefits. In other cases where the appellant and family stand up to the Commonwealth, the agency will grant the requested procedural requests to evade court scrutiny, as was done here. As a result, the unlawful conduct of the Commonwealth is perpetuated and the people of this Commonwealth are harmed by their own government.

SIGNED under the pains and penalties of perjury on this 11th day of May, 2018.



Robert P. Ford

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
OFFICE OF MEDICAID
BOARD OF HEARINGS

Appeal No. 1516247

Mary v. Office of Medicaid

SUBPOENA DUCES TECUM

G.L. c. 30A, §12(3)
G.L. c. 118E, §48 and 130 CMR 610.052
M.R.C.P. Rules 30 & 45

To: Director of Office of Medicaid, or her designee(s)
One Ashburton Place, Floor 11
Boston, Massachusetts 02108

GREETINGS:

You, and/or your designee(s), are hereby summoned and required, in the name of the Commonwealth of Massachusetts, Executive Office of Health and Human Services, Office of Medicaid and its Board of Hearings, to appear in person, and not telephonically or electronically, before the Board of Hearings at the Chelsea MassHealth Enrollment Center, Room 2, 45-47 Spruce Street, Chelsea, Massachusetts, on January 26, 2016, at 11:00 A.M., and from day to day thereafter, until the action hereinafter named is heard and case closed by the Board of Hearings, to give evidence of what you know relating to the MassHealth application and appeal in the above-named action (including the treatment of other trusts in past MassHealth applications and appeals raising issue(s) that are in question in the above action, and also relating to the amendment to the definitions section of the MassHealth Regulations, 130 CMR 515.001, effective on or about January 1, 2014, and more specifically, the deletion of the term "available" and its definition), then and there to be heard between Mary Marino, Appellant, and Office of Medicaid, Defendant.

This subpoena encompasses requested testimony related to the Office of Medicaid's policies, positions and procedures taken in light of the fair hearing decisions in Board of Hearings decisions numbered 1214578, 1318124, 1401539, 1401798, 1404746, 1405241, 1407709, 1408319 and 1501183 & 1501994, all of which decisions addressed the question, in

EXHIBIT A, p.1

the context of a Medicaid eligibility determination, of the countability of a MassHealth applicant's home or former home held in the applicant's self-settled irrevocable trust, including the Office of Medicaid's policies, positions and procedure relative to its decision whether to order a rehearing in the aforesaid numbered cases and whether its position in connection with the foregoing decisions constitute the final position of the Office of Medicaid as it is applied to all trusts which are similar in nature, i.e., which include provisions in the trust allowing the trust settlor/MassHealth applicant to use or occupy the settlor's home or former home held in the trust.

This subpoena also encompasses requested testimony related to the Office of Medicaid's policies, positions and procedure regarding its removal of the definition of the term "available" from the definitions section of its MassHealth regulations, 130 CMR 515.001. To the extent that the Appellant's trust has similarities to trusts already ruled on, including the trust provision allowing the settlor/Appellant to use or occupy the settlor's home or former home held in the Appellant's self-settled trust, the Director of the Office of Medicaid or her designee(s) is(are) subpoenaed to explain why the Appellants in the Appeals numbered 1214578, 1318124, 1401539, 1401798, 1404746, 1405241, 1407709, 1408319 and 1501183 & 1501994 received MassHealth approval, while the Office of Medicaid challenges the Appellant's trust.

Further, redacted copies of the trusts in the Appeals numbered 1214578, 1318124, 1401539, 1401798, 1404746, 1405241, 1407709, 1408319 and 1501183 & 1501994 are subpoenaed, and you are required to bring those redacted copies of trusts with you to the hearing on January 26, 2016.

This subpoena is issued under Massachusetts General Laws, Chapter 30A, Section 12(3), Massachusetts General Laws Chapter 118E, §48 and 130 CMR 610.052, and Massachusetts Rules of Civil Procedure 30(a) and 45, at the request of the Appellant, Mary Marino, c/o Robert P. Ford, Esq., Law Office of Robert P. Ford, The Willows Professional Park, 807 Turnpike Street, Ste. 201, North Andover, MA 01845. All questions and comments regarding this subpoena should be addressed to Appellant's legal counsel, Robert P. Ford, Esq. Attorney Ford's further contact information is: Tel.: 978-681-0066, Fax: 978-681-6333, Email: rpf@fordlaw.net.

Note that the Director of the Office of Medicaid is entitled under this subpoena to designate any person(s) to appear on her behalf. It is required that the designee have knowledge of, and be able to give testimony on, the topics set forth in this subpoena. The Director's designation of individuals who have been involved in the plans, policy-making, decision-making and carrying out of procedural steps, regarding which testimony will be sought, should in no way impose any undue burden, especially in light of the duty of the

EXHIBIT A, p. 2

Office of Medicaid to administer the MassHealth agency in a fair, lawful and unbiased manner, treating all residents of this Commonwealth equally and similarly.

Whether issued directly by the Board of Hearings or a Notary Public of the Commonwealth of Massachusetts, this subpoena is valid by authority of G.L. Chapter 30A, Section 12(3), which states in relevant part:

> "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. The party may have such subpoenas issued by a notary public or justice of the peace, or he may make written application to the agency, which shall forthwith issue the subpoenas requested. However issued, the subpoena shall show on its face the name and address of the party at whose request the subpoena was issued." [*emphasis added*]

Therefore, a subpoena to appear and give testimony before a Hearing Officer of the Board of Hearings is not required to be issued by the Board of Hearings to be valid.

HEREOF FAIL NOT AS YOU WILL ANSWER YOUR DEFAULT UNDER THE PAINS AND PENALTIES IN THE LAW AND ON THAT BEHALF MADE AND PROVIDED.

Dated at North Andover, Massachusetts, the 18Th day of January, 2016.

BRENDA BODDY MICHAUD
Notary Public
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires
December 5, 2019

Brenda Boddy Michaud
Notary Public

EXHIBIT A, p.3

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
One Ashburton Place, Room 1109
Boston, Massachusetts 02108

CHARLES D. BAKER
Governor

KARYN E. POLITO
Lieutenant Governor

MARYLOU SUDDERS
Secretary

Tel: (617) 573-1600
Fax: (617) 573-1891
www.mass.gov/eohhs

January 21, 2016

VIA FAX: 978-681-6333

Mr. Robert P. Ford, Esq.
Law Offices of Robert P. Ford
807 Turnpike Street, Suite 201
North Andover, MA 01845

RE: Unauthorized Subpoena in Appeal No. 1516247 Per 130 CMR 610.052

Dear Mr. Ford:

The subpoena you faxed to MassHealth on January 18, 2015 is invalid and will not be honored by MassHealth. Pursuant to M.G.L. c. 30A, §9 and the provisions of M.G.L. c. 118E, §48, the Fair Hearing Rules at 130 CMR 610 control in BOH proceedings and require that you apply to the Board of Hearings for a subpoena, and receive the approval of the hearing officer for a valid subpoena to issue in a Board of Hearings matter. 130 CMR 610.003; 130 CMR 610.052. Until such a written application has been made to the Board, and granted by the hearing officer in the case, MassHealth will not honor the subpoena for the testimony and records requested regarding other MassHealth Board of Hearings cases in which your client was not a party.

I also note that pursuant to 42 USC 1396a(7), 42 CFR §431.300-431.306 and M.G.L. c. 118E, §49, Board of Hearings proceedings are not public proceedings and all BOH case records, except for the final redacted decisions released publicly by the BOH after the conclusion of a case, are strictly confidential and constitute "information concerning applicants and recipients" that cannot be released to outside parties who are not party litigants to a case without either the consent of those parties or a proper order.

Notwithstanding your invalid subpoena, the MassHealth Enrollment Center worker assigned to your case will appear at the hearing on behalf of MassHealth and will be prepared to explain the agency's decision in your client's particular case. In conformance with federal and state confidentiality requirements, the MEC worker will not discuss the cases, information or submissions of other MassHealth applicants or recipients, and will not answer questions regarding hypothetical situations.

Very truly yours,

Paul T. O'Neill

Paul T. O'Neill
Assistant General Counsel

Cc: MEC

EXHIBIT B

Law Office of
ROBERT P. FORD
The Willows Professional Park
807 Turnpike Street, Suite 201, North Andover, MA 01845
Tel: 978-681-0066 ~ Fax: 978-681-6333
Email: rpf@fordlaw.net or Brenda@fordlaw.net

January 22, 2016

Via facsimile to 617-573-1891

Paul T. O'Neill, Assistant General Counsel
The Commonwealth of Massachusetts
Executive Office of Health and Human Services
One Ashburton Place, Room 1109
Boston, MA 02108

Re: Authorized Subpoena in Appeal No. 1516247 per G.L. c.30A, §12(3)

Dear Mr. O'Neill

This letter acknowledges receipt of your fax letter of yesterday addressing a subpoena that was faxed to MassHealth on January 18. A subpoena was also served upon the Director of the Executive Office of Health and Human Services. That subpoena was served on Tuesday, January 19, by a constable duly appointed by the City of Boston. Would you kindly advise as to whether the Department of Health and Human Services deems that subpoena invalid as well.

I note your various citations to statutory and regulatory law. I note that you have failed to include G.L. c.30A, §12(3). While an administrative agency may have the authority to promulgate rules and regulations regarding its conduct, those rules and regulations are required to be consonant with the law that is established by the State legislature. Pursuant to the aforementioned statute, a party to an adjudicatory proceeding is "entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. That party may have such subpoenas issued by a notary public or justice of the peace, or he may make written application to the agency, which shall forthwith issue the subpoenas requested." As you can see, by this statute, as well as by the regulations to which you have made reference in your letter of January 21, application to the administrative agency for it to issue the subpoena is not mandatory, but rather optional. This is clear from the language of the statutory and regulatory law that you cite.

With regard to the production of trust documents in other cases, they are needed to determine whether the administrative agency has complied with State and federal law, which requires that the State agency be consistent in its decision making. Indeed, it is a primary reason for having an administrative agency that it develop expertise in its area and render consistent decisions so that all people of the Commonwealth are treated equally. Trusts that contain similar provisions should receive similar treatment. However, it appears quite apparent from the decisions that have been identified, that all of them raise the same issue as is anticipated to be raised by the Commonwealth at the hearing before the hearing officer. That, of course, is just a conjecture since the Office of Medicaid did not include in its Notice of Denial "sufficient notice

EXHIBIT C, p. 1

of the issues involved to afford . . . [the Applicant] reasonable opportunity to prepare and present evidence and argument." G.L. c. 30A, §11(1). Obviously, denial is going to be based upon either excess assets or disqualifying transfer.

However, the law calls for more particularity so that an appellant may properly prepare for the scheduled hearing. Without knowledge of the provisions of the trusts in the other cases cited, there is no way that an applicant/appellant can determine whether she has been dealt with consistently with other applicants or whether she has been singled out for any discriminatory purpose. The subpoena does not request any personal financial information, or health information, or the like. It requests simply the production of appropriately redacted copies of the trusts so that an anticipated issue at the time of hearing may be addressed without undue delay.

Finally, while I appreciate your assurance that the MassHealth Enrollment Center worker assigned to the above case will appear at the hearing on behalf of MassHealth, you will note from the subpoena that it is the Director of the Executive Office of Health and Human Services, or her designee or designees, that have been subpoenaed. You do not state as to whether they intend to appear or not. I can only conclude from the language of your letter that the Director of the Executive Office of Health and Human Services does not feel bound by a subpoena properly issued and served in accordance with State statutory law. Would you kindly confirm so that I may prepare to address that issue at the hearing.

Thank you for the courtesy of your early reply.

Respectfully yours,

Robert P. Ford,

ROBERT P. FORD bbm

RPF:bbm

MarinoM.Mcd.TA.17

EXHIBIT C, p. 2