

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2504308
Decision Date:	05/27/2025	Hearing Date:	04/22/2025
Hearing Officer:	Christopher Jones	Record Open to:	04/29/2025

Appearances for Appellant:



Appearances for MassHealth:

Kelly Rayen, RN – Optum Rep.
Allison Langlois – OLTSS Rep.



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	Approved	Issue:	Prior Authorization; Personal Care Attendant (PCA) Services; Surrogate
Decision Date:	05/27/2025	Hearing Date:	04/22/2025
MassHealth's Reps.:	Kelly Rayen, RN; Allison Langlois	Appellant's Reps.:	
Hearing Location:	Telephonic	Aid Pending:	Yes

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a notice dated March 12, 2025, MassHealth terminated the appellant's personal care attendant services because the appellant's "PCM agency informed you on 1/28/2025[] that you needed to find a new surrogate within 30 days As of the date of this letter, you have not obtained a new surrogate." (Exhibit 1; 130 CMR 422.420(B)(1)-(3); 422.422(B)(3).) The appellant filed this timely appeal on March 17, 2025. (Exhibit 2; 130 CMR 610.015(B).) The PCA services were set to be terminated March 25, 2025, but the appellant's PCA services are protected pending the outcome of this appeal. (Exhibit 2; 130 CMR 610.015(B); 610.036.) Termination of assistance is valid grounds for appeal. (130 CMR 610.032.)

Following the hearing, the record was left open until April 29, 2025, for the appellant and MassHealth to submit additional evidence regarding communications between the appellant and their PCM agency. MassHealth was also asked to submit additional guidance regarding when PCA services may be terminated for a surrogate's failure to communicate.

Action Taken by MassHealth

MassHealth terminated the appellant's personal-care attendant services because she did not

select a new surrogate after her PCM agency informed her that she needed to.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 422.420(B)(1)-(3); 422.422(B)(3), in terminating the appellant's PCA services.

Summary of Evidence

MassHealth was represented at hearing by a registered nurse and clinical nurse-reviewer and a representative from the Office of Long-Term Services and Supports ("OLTSS"). MassHealth's nurse-reviewer testified that the appellant's personal care management ("PCM") agency, [REDACTED], submitted an annual reevaluation for personal care attendant ("PCA") services in the spring of 2024. On June 7, 2024, the appellant was authorized for 38 hours and 15 minutes per week of PCA services. The prior authorization period ran from June 22, 2024, through June 21, 2025.

MassHealth's OLTSS representative testified that the PCA program is consumer directed. If a consumer cannot direct all areas of the program, the consumer must select a surrogate to manage the PCA. A fiscal intermediary also contracts with MassHealth to manage the PCA's payroll. The appellant's daughter is her surrogate, and [REDACTED] is the fiscal intermediary.¹ In 2024, MassHealth rolled out a new electronic visit verification ("EVV") system to track PCA services. Members or their surrogates are required to enroll in the EVV system and use it to track PCA payroll. There is an exception for members when the PCA resides with the member, but the surrogate or member must complete and file an EVV Live-in Exemption Form.

MassHealth's OLTSS representative testified that she had spoken with representatives of [REDACTED] and she was provided with progress notes from [REDACTED] PCM. MassHealth's OLTSS representative testified that the appellant was expected to enroll in the EVV system in December 2024. Tempus outreached the appellant's surrogate to get her set up in the EVV system, but the surrogate did not enroll. MassHealth's OLTSS representative also testified that the EVV Live-in Exemption Form was never filed with [REDACTED] or [REDACTED]. MassHealth's OLTSS representative testified that the regulations require surrogates to remain in contact with the PCM agency.

MassHealth's OLTSS representative reviewed the progress notes from [REDACTED] attempted to contact the appellant's surrogate on January 6, 2025, January 15, 2025, and January 22, 2025. These outreaches were regarding the EVV system. MassHealth's representative testified that Tempus PCM never heard back from the appellant or her surrogate. On January 28, 2025,

¹ Both [REDACTED] and [REDACTED] are branded as [REDACTED], Inc. MassHealth's OLTSS representative testified that they are connected but separate entities.

██████████ mailed the appellant a letter that she had 30 days to register a new surrogate. This letter does not say why she needed a new surrogate. The letter prohibits the appellant from using her daughter as her surrogate but does not give a reason why. The letter states: "If you do not identify a new Surrogate by 02/27/2025, we will notify MassHealth, which will determine whether to terminate your prior authorization for PCA services." The letter broadly references the "regulations at 130 CMR 422.000, including member responsibilities at 130 CMR 422.420." (Exhibit 5, p. 41.)

MassHealth's OLTSS representative testified that ██████████ confirmed that the surrogate was still not responsive and had not filed the EVV Live-in Exemption Form as of March 11, 2025. Therefore, MassHealth terminated the appellant from the PCA program. MassHealth mailed a letter dated March 11, 2025, and a standard PCA Program notice on March 12, 2025. The termination letter states that the appellant requires a surrogate pursuant to 130 CMR 422.420(A)(23). The letter identifies that MassHealth has the right to

terminate PCA services if a member fails to comply with any of the requirements listed in 130.CMR.422.420(A). Further, MassHealth may terminate a member in accordance with 130 CMR 422.420(B)(2) and 422.420(B)(3) if the member does not obtain a surrogate within 30 days of the PCM agency's notice and the clinical assessment.

In accordance with 130 CMR 422.422(B)(3), your PCM agency informed you on **January 28, 2025**, that you needed to find a new surrogate within 30 days who can assist you in managing the PCA program. As of the date of this letter, you have not obtained a new surrogate.

Because of these violations of the PCA program requirements, and in accordance with 130 CMR 422.420(B)(1), 422.420(B)(2), and 422.420(B)(3), **MassHealth is terminating your PCA services, effective 14 days from the date of this letter.**

(Exhibit 5, p. 37 (emphasis in original).)

MassHealth's OLTSS representative testified that the appellant's surrogate violated a regulatory requirement to stay in communication with the PCM agency. MassHealth's OLTSS representative testified that MassHealth provides PCM Operating Standards to PCMs, which includes additional guidance regarding when a surrogate should be terminated. MassHealth's OLTSS representative testified that the appellant's chosen surrogate could be reinstated if she completed the functional skills training regarding EVV and maintained contact with the PCM.

The submitted progress notes show a series of communications occurring in April 2024 related to scheduling the appellant's last annual reevaluation. The skills trainer was unable to complete the reevaluation in person due to computer issues, so she followed up with a couple of phone calls. The surrogate responded within 2 days of the first call and spoke with the skills trainer:

On 4/24/24, [skills trainer] spoke with the Surrogate and was given the Surrogates date of birth. [REDACTED] then attempted to obtain Surrogates email address when the Surrogate stated "I don't have an email address because I choose not to engage or receive information that way." [REDACTED] then explained the process for [REDACTED] going paperless and using the EVV system and also informed Surrogate that EVV [REDACTED] will f/u w/Surrogate regarding the submission of an email address. Surrogate then stated "I went on the [REDACTED] website and I saw that we don't have to enroll in EVV and can continue using the paper method." [REDACTED] then informed th...

(Exhibit 5, p. 39.) The progress note clearly continues, but the remainder is not in evidence.

There is a note from later on April 24, 2024, stating that the skills trainer completed the annual review. The next note is from June 18, 2024, regarding overbilling. No communications are in the progress notes until the call to the surrogate on January 6, 2025. There is no record of the PCM agency attempting to onboard the appellant into the EVV system in December.

The following note is from January 6, 2025:

1st attempt

Consumer appears on the EVV Warning for 12/27/24

PCM Census shows no EVV Exemption form on file

PCM report shows timesheet submitted outside of EVV for PCA ...

Called surrogate ... to address this issue and there was no answer. Left the following VM:

"Hi, my name is [REDACTED] with the [REDACTED] and I am calling to let you know that our records indicate that you have not submitted your timesheet through the EVV system. Submitting your timesheet in the EVV system is a requirement of the PCA Program and it is mandatory to use this new billing system. Not using EVV will cause you to continue to escalate in the non-compliance report. This information is sent to MH and MH can terminate your PCA services if you continue to not use the EVV system. Please call me back at 781-364-6401 so that I can assist you with the EVV registration process."

(Exhibit 5, p. 39.)

On January 15, 2025, there was another progress note:

2nd Attempt

Consumer appears on the EVV Strike 1 for 1/10/25

PCM Census shows no EVV Exemption forms on file

PCM report shows timesheet submitted outside of EVV for PCA ... on 1/6/25

There was an email address on file in Zuke and Enrollment ... I sent an email to this address attempting contact however, email was returned not deliverable due to errors.

Therefore, I called surrogate Consumer and surrogate have the same contact information and this is the same tel# on timesheets. There was no answer so I left the following VM:

"Hi, my name is [REDACTED] with the [REDACTED] program and I am calling to let you know that our records indicate that you have not submitted your timesheet through the EVV system. Submitting your timesheet in the EVV system is a requirement of the PCA Program and it is mandatory to use this new billing system. Not using EVV will cause you to continue to escalate in the non-compliance report.

This informa...

(Exhibit 5, p. 39.) The remainder of the message is not in evidence.

There are two progress notes from January 22, 2025:

[First] 3rd attempt

Called ER contact in Zuke ... Also the PCA ... and there was no answer. I left VM advising that my name is [REDACTED] from the [REDACTED] program and we are looking to get in contact with [the surrogate] as soon as possible. With Regards to an issue with the PCA program. Can you please ask [the surrogate] to call me back at 781-364-6401.

...

[Second] 3 attempts made to contact Surrogate with regards to EVV.

Requesting letter need for new surrogate

(Exhibit 5, p. 39.)

On January 28, 2025, a final progress note states: "Termination requested due to Need for Surrogate 30 day letter sent, response is due 02/27/25. NC letter, PNs, and FFS spreadsheet submitted to MB and MH." (Exhibit 5, p. 39.)

The appellant submitted screenshots from the surrogate's phone documenting numerous calls with both [REDACTED] and [REDACTED] in November 2024, none of which are captured in [REDACTED] progress notes. There are also two outgoing calls to [REDACTED] on January 23, 2025, one of which

lasted 14 minutes and 25 seconds. There is an incoming call from [REDACTED] on January 23, 2025, that lasted 10 minutes and 9 seconds. There was also a call back to [REDACTED] on February 4, 2025. The appellant submitted a copy of a letter she mailed to [REDACTED] on February 1, 2025, noting that she had made numerous calls to [REDACTED] and was trying to remain in contact with them.

The appellant's surrogate testified that she has had a very difficult time communicating with [REDACTED]. The appellant's surrogate testified that they never respond to letters or phone calls. The appellant's surrogate testified that they have mailed and faxed the EVV Live-In Exemption Form multiple times. The first time they mailed it was on January 9, 2025. The appellant's surrogate testified that [REDACTED] also called and confirmed receipt of the form on January 28, 2025.

MassHealth's OLTSS representative testified that some of the phone numbers called by the appellant appear to be [REDACTED] not [REDACTED]. MassHealth's OLTSS testified that she had confirmed that [REDACTED] still did not have an EVV Live-in Exemption Form, immediately prior to the hearing. However, she then confirmed that the EVV Live-in Exemption Form needed to be filed with [REDACTED].

The hearing record was left open until April 29, 2025, for the appellant to submit any additional documentation they had regarding communicating with [REDACTED]. MassHealth's OLTSS representative was to follow up with [REDACTED] [REDACTED] confirm whether they ever received the EVV Live-In Exemption Form or had any additional communications from the appellant. MassHealth's OLTSS representative also agreed to submit the PCM Operating Standards into evidence to document the policy by which surrogates may be terminated for non-responsiveness.²

The appellant submitted a screen shot showing an additional outgoing call to [REDACTED] on January 2, 2025; a fax receipt showing the EVV Live-In Exemption Form was faxed to [REDACTED] on January 23, 2025, and an illegible USPS receipt. MassHealth's OLTSS representative responded that the EVV Live-In Exemption Form was illegible. A clearer copy had been received by the Board of Hearings. The clearer copy was forwarded to MassHealth's representatives. It was noted that the EVV Live-In Exemption Form identified the PCA by first name only and did not include a "PCA Unique ID." MassHealth's OLTSS representative was to confirm with Tempus whether this was why it was not processed.

MassHealth's OLTSS representative noted that [REDACTED] does not log calls unless outreach is being done by a [REDACTED] employee. There was no confirmation whether [REDACTED] or [REDACTED] ever received even an illegible EVV Live-In Exemption Form. Rather, MassHealth's OLTSS representative responded that she would have Tempus outreach the appellant's surrogate. When asked again for

² The appellant had also not received MassHealth's exhibit packet, so MassHealth's clinical representative was asked to submit proof of mailing.

the PCM Operating Standards, MassHealth's representative responded with the regulation at 130 CMR 422.420(B).³

Findings of Fact

Based on a preponderance of the evidence, I find the following:

- 1) On June 7, 2024, the appellant was authorized for 38 hours and 15 minutes per week PCA services, running for the prior authorization period of June 22, 2024, through June 21, 2025. (Exhibit 1, p. 2.)
- 2) [REDACTED] is the appellant's PCM agency; [REDACTED] the appellant's fiscal intermediary; and the appellant's daughter is her surrogate. (Testimony by the appellant's daughter and MassHealth's OLTSS representative.)
- 3) In 2024, MassHealth began rolling out the EVV system to electronically track PCA hours. [REDACTED] was supposed to outreach to the appellant in December 2024 to onboard the appellant into the EVV program. (Testimony by MassHealth's OLTSS representative.)
- 4) The appellant's PCA lives with her. The appellant's surrogate filed an EVV Live-In Exemption Form several times with [REDACTED] and [REDACTED]. This form was mailed on January 9, 2025, and faxed on January 23, 2025. (Testimony by the appellant's daughter; Exhibit 6.)
- 5) The appellant's surrogate informed [REDACTED] in April 2024, that the appellant did not need to register for the EVV system according to the rules published on [REDACTED] website. (Exhibit 5, p. 39.)
- 6) [REDACTED] did not log any onboarding outreach to the appellant's surrogate in December 2024. [REDACTED] logged calls to the appellant's surrogate on January 6, January 15, and January 22, 2025. These notes documented one "Strike" for EVV noncompliance. The PCM requested termination due to "Need for Surrogate." (Exhibit 5, p. 39.)
- 7) The appellant's surrogate made numerous calls to [REDACTED] in November 2024 and January 2025, none of which are captured by [REDACTED] progress notes. The appellant's surrogate called [REDACTED] on January 2, 2025. There are two calls that last more than 10 minutes on January 23, 2025. The appellant's surrogate also called [REDACTED] on February 1, 2025. (Exhibit 2; Exhibit 7; testimony by the appellant's daughter.)

³ MassHealth's nurse-reviewer supplied the tracking information showing that UPS had attempted delivery twice. After the record closed, both MassHealth and the appellant reached out with additional information. Neither party requested that the record be reopened, so both responses were returned and not entered into evidence.

- 8) On January 28, 2025, [REDACTED] mailed the appellant a letter that she had 30 days to register a new surrogate. The appellant could no longer use her daughter as her surrogate. No reason is given for why a new surrogate was needed or why the appellant's daughter could not be her surrogate. This letter references the "regulations at 130 CMR 422.000, including member responsibilities at 130 CMR 422.420." (Exhibit 5, p. 41.)
- 9) Through a letter dated March 11, 2025, MassHealth informed the appellant that it was terminating the appellant's PCA services because [REDACTED] had informed the appellant that she needed to find a new surrogate within 30 days in accordance with 130 CMR 422.422(B)(3). (Exhibit 5, pp. 37.)
- 10) Through a notice dated March 12, 2025, MassHealth terminated the appellant's PCA services, effective March 25, 2025, for not finding a new surrogate within 30 days of [REDACTED] January 28, 2025 letter. (Exhibit 1; Exhibit 5, pp. 3-4.)
- 11) The appellant filed a timely appeal on March 17, 2025. The Board of Hearings ordered MassHealth to protect the appellant's PCA services pending the outcome of the appeal. (See Exhibit 2.)
- 12) [REDACTED] reported to MassHealth that the appellant's surrogate never filed an EVV Live-In Form and never responded to their numerous outreach attempts. (Testimony by MassHealth's OLTSS representative; Exhibit 6.)

Analysis and Conclusions of Law

Aid pending

MassHealth members have a right to request a fair hearing on "any MassHealth agency action to suspend, reduce, terminate, or restrict a member's assistance." (130 CMR 610.032(A)(3).) A member may request a fair hearing if MassHealth "denies or modifies a prior authorization request for PCA services." (130 CMR 422.417(B)(2).) Requests for continuation of services during an appeal must be made in accordance with 130 CMR 610.036. (130 CMR 422.417(B)(2).) When the appealable action "involves the reduction, suspension, termination, or restriction of assistance, such assistance will be continued until the BOH decides the appeal ... if the BOH receives the initial request for the fair hearing before the implementation date of the appealable action." (130 CMR 610.036(A).)

The provisions of 130 CMR 610.036(A) and (B), regarding assistance pending a hearing decision, will not apply to assistance requiring prior authorization where such assistance terminates as the result of the expiration of the specified, finite authorization period, and the member's provider has failed to timely submit a new prior authorization request.

(130 CMR 610.036(E).)

Here, the appellant's PCA services at 38 hours and 15 minutes per week were expected to run through June 21, 2025. MassHealth notified the appellant that her PCA services would terminate on March 25, 2025. The termination was not due to the expiration of the authorization period (set to expire June 21, 2025) but because MassHealth determined the appellant failed to appoint a new surrogate. The appellant filed this appeal on March 17, 2025, and specified that she wished to keep her level of benefits pending the outcome of the appeal. The appellant's termination from PCA services is an appealable issue.⁴ The appellant submitted the request for a fair hearing before the appealable termination. As such, the appellant is entitled to keep her PCA services pending the outcome of this appeal.⁵

Terminating PCA Services for Not Appointing a Surrogate

A member's responsibilities in the PCA program are set forth in 130 CMR 422.420. These requirements include completing and signing the appropriate forms, employing PCAs within the hours and scope authorized by MassHealth, and cooperating with MassHealth and the PCM agency during assessments and evaluations. (130 CMR 422.420(A).) These requirements mandate that a member:

if assessed by the PCM Agency to require a surrogate ... in accordance with 130 CMR 422.422(A)(1)(b), locate and appoint a surrogate ... to assist the member in performing the PCA management tasks or related administrative functions that the member is unable or unwilling to perform as described in the service agreement in accordance with 130 CMR 422.423(A)(1) and (2). In appointing a surrogate ..., the member must select a surrogate ... who is not the member's PCA or an employee or contractor of the member's PCM agency or fiscal intermediary, and who must live in proximity to the member and be readily available to perform the tasks described in the service agreement. ...

(130 CMR 422.420(A)(22).)

⁴ Though 130 CMR 422.417 does not mention termination as an appeal issue, the March 12, 2025 notice describes MassHealth's action taken as a modification of the prior authorization request. In any event, 130 CMR 610.032(A)(3) makes clear that any termination of assistance is appealable.

⁵ It was noted during the hearing that the appellant's benefits were in Aid Pending. After the hearing record closed, the appellant claimed that PCA services were not being protected. This fact is not in evidence, and no order is made regarding Aid Pending. This analysis remains as guidance to MassHealth and the PCM agency regarding their obligation to continue services while an appeal is pending before the Board of Hearings.

MassHealth reserves the right to

- (1) terminate PCA services if a member fails to comply with any of the requirements listed in 130 CMR 422.420(A);
- (2) terminate PCA services if a member's **surrogate becomes unavailable, or the MassHealth agency requires the member to replace the current surrogate, and another surrogate cannot be identified within 30 days of the** PCM agency's notification to the member and the MassHealth agency in accordance with 130 CMR 422.422(B);
- (3) require a member who is receiving PCA services to obtain a surrogate ... and the PCM agency will refer the member to an appropriate service provider;
- (4) **require a member to replace the surrogate or administrative proxy if the surrogate or administrative proxy is not performing PCA tasks on behalf of the member in accordance with MassHealth regulations and after intervention from a skills trainer pursuant to 130 CMR 422.419(A)(17)(g);** and
- (5) recover costs of overtime from the member for any activity time ... in excess of the weekly hour limit without an authorization from the MassHealth agency for the member pursuant to 130 CMR 422.418(A).

(130 CMR 422.420(B) (emphasis added).)

PCM agencies and fiscal intermediaries are organizations that contract with MassHealth to perform the functions specified in the PCM agency contract and the regulations contained in 130 CMR 422.000. (130 CMR 422.405(A), (B).) The PCM "must provide personal care management functions ... including, but not limited to:"

...

- (4) conducting a formal, written assessment of the member's ability to manage the PCA program independently and, if applicable, **conducting a formal, written assessment of the ability of the surrogate** or administrative proxy to manage the PCA program on behalf of the member in accordance with 130 CMR 422.422(A) and the PCM agency contract, and in the form and format required by the MassHealth agency;

...

- (10) maintaining policies and procedures for the receipt and timely resolution of member complaints in accordance with the PCM agency contract;

...

(17) establishing a cooperative working relationship with the fiscal intermediary by:

...

(g) responding to the fiscal intermediary's request for skills training for a member or surrogate who is having difficulty managing the PCA program including, but not limited to, a member or surrogate who repeatedly submits activity forms in excess of the PCA hours per week authorized by the MassHealth agency pursuant to 130 CMR 422.416(E), the scheduling and provision of PCA services resulting in overtime hours in excess of those authorized by 130 CMR 422.418(A), **or noncompliance with the use of EVV pursuant to 130 CMR 422.420(A)(3) and 422.420(A)(5)(c).**

...

(20) notifying the MassHealth agency if, in the opinion of the PCM agency, the member's surrogate or administrative proxy is not managing PCA tasks for the member in accordance with 130 CMR 422.000.

(130 CMR 420.419(A) (emphasis added).)

PCM agencies are also responsible for managing the consumer's need for a surrogate.

422.422: PCA Program: Personal Care Management Agency Operating Procedures

(A) Assessment. For each member determined initially eligible for PCA services in accordance with 130 CMR 422.421(A)(2), the PCM agency must conduct a written assessment of the member's capacity to manage PCA services independently **and, if applicable, a written assessment of the ability of the surrogate or administrator proxy to manage PCA services on the member's behalf.** ... **The PCM agency must document the assessments in the application for PCA services and in the member's record. The assessments must be in a form and format required by the MassHealth agency.** ... The PCM agency must:

(1) based on an in-person visit with the member, conduct a written assessment of the member's ability to manage PCA services and to function as an employer of PCAs. ... The result of an assessment of the member is that the member either:

(a) is able to perform independently all tasks required to manage the PCA program ... ; or

(b) requires the assistance of a surrogate or administrative proxy to perform some or all of the PCA management tasks that the member

is unable or unwilling to perform. (**A surrogate or administrative proxy must be identified before the PCM agency submits a prior-authorization request to the MassHealth agency**);

(2) if the member requires the assistance of a surrogate or administrative proxy, **based on an in-person visit with the surrogate or administrative proxy, conduct a written assessment of the ability of the surrogate or administrative proxy to manage PCA services on behalf of the member. The assessment must be conducted** before submitting an initial request for prior authorization for PCA services to the MassHealth agency and **whenever necessary due to a change in circumstances that may affect the ability of the surrogate or administrative proxy to manage PCA services on the member's behalf. The result of an assessment of a surrogate or administrative proxy is that the surrogate or administrative proxy is either:**

(a) able to perform the tasks designated to the surrogate or administrative proxy to manage the PCA program on behalf of the member; or

(b) unable to perform the tasks designated to the surrogate or administrative proxy to manage the PCA program on behalf of the member;

(3) complete an assessment of the member at the time of the member's reevaluation, ... ;

(4) complete an assessment of any new surrogate or administrative proxy;

(5) review the assessment of the member and modify it, as appropriate, when:

...

(6) **review the assessment of the surrogate** or administrative proxy and modify it, as appropriate, when:

(a) there is a change in circumstances that may affect the ability of the surrogate or administrative proxy to manage PCA services on behalf of the member; or

(b) the member, the surrogate or administrative proxy, the fiscal intermediary, or the MassHealth agency requests review of an assessment;

...

(B) Surrogates and Administrative Proxies.

(1) If the PCM agency's assessment described in 130 CMR 422.422(A) determines that the member requires the assistance of a surrogate or administrative proxy, the member must appoint a surrogate or administrative proxy who meets the criteria described in 130 CMR 422.402, who is not the member's PCA or an employee or contractor of the member's PCM agency or fiscal intermediary, and who can assist the member to manage the PCA program in accordance with MassHealth regulations and the member's service agreement. The PCM agency must assist the member or legal guardian in locating a surrogate or administrative proxy. The PCM agency will document the name, address, telephone number, and relationship to the member on the MassHealth evaluation and submit it to the MassHealth agency, along with the prior-authorization request for PCA services.

(2) If the member does not locate or appoint a surrogate or administrative proxy, the PCM agency must refer the member to an appropriate service provider, and must not submit a PA request for PCA services to the MassHealth agency.

(3) If a member's surrogate or administrative proxy becomes unavailable at any time during the prior-authorization period, or the MassHealth agency requires the member to replace the surrogate or administrative proxy pursuant to 130 CMR 422.420(B)(3), the PCM agency must immediately notify the member of the need to locate another surrogate or administrative proxy within 30 calendar days.

(a) If another surrogate or administrative proxy cannot be identified within 30 calendar days, the PCM agency must notify the MassHealth agency in writing **and refer the member to an appropriate service provider.**

(b) The MassHealth agency may terminate a member's PCA services in accordance with 130 CMR 422.420(B) when a surrogate or administrative proxy cannot be identified.

(4) If a member's capacity to independently manage PCA services changes during the prior-authorization period, the PCM agency will conduct an assessment in accordance with 130 CMR 422.422(A).

...

(5) The PCM agency must provide the MassHealth agency and the fiscal intermediary with the name, address, and phone number of the member's surrogate or administrative proxy, and report any changes in surrogate information.

(130 CMR 422.422(A)-(B) (emphasis added).)

MassHealth's regulations appear to give the agency plenary authority to require members to replace surrogates without cause or reason. Both 130 CMR 422.420(B)(2) and 422.422(B)(3) include the clause "or the MassHealth agency requires the member to replace the current surrogate," as an unqualified basis for requiring the replacement of a surrogate. This authority appears separately from MassHealth's authority to "replace the surrogate ... [for] not performing PCA tasks on behalf of the member ... after intervention from a skills trainer pursuant to 130 CMR 422.419(A)(17)(g)." (130 CMR 422.420(B)(4).)

However, MassHealth's letter does not identify itself as the entity requiring the appellant's surrogate be replaced. Rather, the letter states that in "accordance with 130 CMR 422.422(B)(3)," [REDACTED] sent a letter requiring the appellant select a new surrogate. MassHealth's letter lists out its reserved rights and powers, but MassHealth is not the decisionmaker in this termination. MassHealth terminated the appellant's PCA services in accordance with 130 CMR 422.420(B)(1)-(3), because the appellant did not select a new surrogate in response to Tempus's letter.⁶ (See Exhibit 5, p. 37.)

No reason is given in Tempus's letter as to why the surrogate needs to change. The only reason given is MassHealth's citation to 130 CMR 422.422(B)(3) on March 11, 2025. Because MassHealth is not the entity requiring the surrogate to be changed, [REDACTED] must have determined that the appellant's surrogate became "unavailable."⁷ This is the only basis upon which [REDACTED] may refer a member for termination under 130 CMR 422.422(B)(3).

The evidence in the record includes the hearsay testimony of unidentified [REDACTED] employees and incomplete progress notes. The progress notes in evidence do not record communication between the surrogate and the fiscal intermediary, or any communications from the surrogate to which the PCM did not respond. The appellant has evidence of phone calls to both [REDACTED] PCM and [REDACTED] FI from November 2024 and January 2025. Furthermore, the appellant submitted evidence that the EVV Live-In Exemption Form was submitted multiple times. [REDACTED] PCM and [REDACTED] reportedly have no record of receiving any form, regardless of whether that form was filled out correctly or fully legible. Given this evidence, I do not credit the testimony that the appellant's surrogate never responded to [REDACTED] and never submitted the EVV Live-In Exemption Form.

⁶ Interestingly, MassHealth does not cite 130 CMR 422.420(B)(4) as grounds for termination, which would be a termination for not performing PCA management services after a skills trainer has intervened.

⁷ The record does not reflect whether [REDACTED] modified its written assessment of the surrogate to document that "there is a change in circumstances that may affect the ability of the surrogate ... to manage PCA services on behalf of the member." (130 CMR 422.422(A)(2), (6).) MassHealth's representative identified that there is additional guidance regarding when a surrogate could be found "unavailable." MassHealth would not submit it into the record. Therefore, this sub-regulatory guidance cannot be given even "due consideration." (See 130 CMR 610.082(C).)

Therefore, I cannot agree that the appellant's surrogate "unavailable." As MassHealth's termination turns solely upon the PCM's determination that the surrogate was unavailable, this appeal is APPROVED.

This decision is not an affirmative finding that the appellant's surrogate has provided all necessary documentation for the appellant to be in compliance with MassHealth's EVV policy. This decision does not seek to create any policy regarding how [REDACTED] or MassHealth determine when or whether a surrogate is unfit to remain in their role. [REDACTED] or MassHealth may still determine that the submitted EVV Live-In Exemption Form is incomplete. [REDACTED] may update its written assessment of the surrogate to document that she is not fit to manage the appellant's PCA services. (See 130 CMR 422.422(A)(2), (6).) MassHealth may find that the surrogate has failed "to comply with any of the requirements listed in 130 CMR 422.420(A)," such as the requirement to "cooperate with the MassHealth agency, the PCM agency, and the Fiscal Intermediary for the implementation and use of EVV." (See 130 CMR 422.420(B)(1).) It is noted, however, that the record reflects that the appellant was at "Strike 1" with regard to EVV system violations when [REDACTED] referred them for termination from the PCA program. Presumably, it takes 3 strikes to be out.

The appellant's PCA services shall be restored at least through the end of the prior authorization period, June 21, 2025. If [REDACTED] is unable to perform the requisite reevaluation of the appellant prior to the end of the prior authorization period, MassHealth shall allow [REDACTED] an extension of up to 45 days to ensure that the reevaluation is able to occur as it would have had this termination of services not occurred.

Order for MassHealth

Rescind the March 11, 2025, letter and the March 12, 2025, notice terminating the appellant's PCA services. Reinstate the appellant's surrogate. Reinstate the appellant's prior level of services (38 hours and 15 minutes per week) through a minimum of 30 days from the date of this decision. If needed, grant [REDACTED] an extension to the current prior authorization to complete a reevaluation for the appellant's PCA services for the next prior authorization period.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings, at the address on the first page of this decision.

Christopher Jones

Hearing Officer
Board of Hearings

CC:

[REDACTED]

MassHealth Representative: Optum MassHealth LTSS, P.O. Box 159108, Boston, MA 02215

MassHealth Representaitve: OLTSS