

**District of Columbia
Office of Administrative Hearings**

One Judiciary Square
441 Fourth Street, NW, Suite 450N
Washington, DC 20001-2714
Tel: (202) 442-9094
Fax: (202) 442-4789

V.B.

Petitioner

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH CARE
FINANCE

ABA HOME HEALTH SERVICES
Respondents

Case No: 2011-DHCF-00423

FINAL ORDER

I. Summary of this Final Order

This Final Order reverses the Department of Health Care Finance's (DHCF) termination of Petitioner from the Elderly and Individuals with Physical Disabilities (EPD) Waiver Program and instructs DHCF to restore Petitioner's to the EPD Waiver Program consistent with this decision.

II. Procedural Background

On December 30, 2011, Petitioner V.B., through the Office of the Health Care Ombudsman, filed a request for a hearing concerning DHCF's termination of his home health care services through the EPD Waiver Program. Consequently, this administrative court scheduled a status conference for January 17, 2012.

On January 17, 2012, the status conference proceeded as scheduled. Mark Atwood, Esq., of Cozen O'Connor, Petitioner's counsel, appeared on behalf of and accompanied by Petitioner. Sheryl Johnson, Esq., Assistant Attorney General and General Counsel, appeared on behalf of

DHCF. Additionally, Gloria Everett appeared on behalf of ABA Home Health Services (ABA), which is or was Petitioner's home health care provider. At the onset of the status conference, I added ABA as a Respondent, which addition the parties and ABA agreed upon. OAH Rule 2816.1. The parties agreed on an evidentiary hearing date of February 21, 2012.

The evidentiary hearing proceeded as scheduled on February 21, 2012. At the conclusion of the evidentiary hearing, the parties agreed to submit, by March 16, 2012, written citations to the authorities cited at the hearing and any other authorities they rely upon in support of their respective positions. I also allowed the parties to file, by March 16, 2012, written arguments on the appropriate remedy for any insufficient notice that may have been issued to Petitioner. On March 16, 2012, DHCF filed Written Citations to Authority in Support of Respondent's Position. And, also on March 16, 2012, Petitioner filed Citations to Relevant Authorities and Proper Remedy for Failure to Give Notice.

In its Written Citations to Authority in Support of Respondent's Position, DHCF requested admission into evidence of Exhibit A-1, which is a page of the notice sent to Petitioner that DHCF asserts was inadvertently excluded from the notice that was admitted into evidence at the hearing. Before admitting Exhibit A-1 into evidence, I allowed Petitioner an opportunity to respond to DHCF's request, by Order issued March 29, 2012. On April 26, 2012, Petitioner filed a Response to Respondent's Request to Submit Additional Evidence, stating that he does not object to admission of Exhibit A-1. Accordingly, Exhibit A-1 is admitted into evidence.

Upon consideration of the testimony of the witnesses, my assessment of their credibility, the exhibits admitted into evidence, the parties' post-hearing submissions, and the entire record in this matter, I hereby make the following Findings of Fact and Conclusions of Law.

III. Findings of Fact

Petitioner has multiple disabilities, which include an amputated leg, diabetes, and hypertension. Based on his disabilities, Petitioner receives Social Security Disability Insurance (SSDI) benefits through the Social Security Administration (SSA). Petitioner applied for and was certified as eligible to participate in the District of Columbia's EPD Waiver Program approximately two to three years ago.

Most recently as it relates to this case, Petitioner was certified for the EPD Waiver Program for the annual certification period through October 31, 2011. Petitioner selected ABA as his home health care provider. Surrounding the time of Petitioner's re-certification for the certification period ending October 31, 2011, ABA performed an initial assessment of Petitioner's home health care needs. Based on that assessment, ABA provided case management, personal care aide services, and personal emergency response to Petitioner under the EPD Waiver Program. Services that Petitioner required and that ABA provided included assistance with bathing, dressing, mobility, housekeeping, meal preparation, shopping, laundry, and medication management. ABA determined that Petitioner required, and it provided, services 7 days per week, 8 hours per day. ABA provided services to Petitioner for about 7 months, until approximately August 15, 2011.

On August 15, 2011, Petitioner declined further home health care services from ABA. The ABA aide who had provided services to Petitioner for seven months was unavailable due to a personal emergency. Petitioner informed ABA that he did not want a new aide in his home, even though he still needed services. ABA considered this a "suspension of services" to Petitioner. Respondent's Exhibit ("RX") 202. When ABA ceased services to Petitioner, Petitioner paid out-of-pocket for services provided by an individual of his own choice. ABA then discharged Petitioner from its care, because Petitioner had refused its services for at least 30 days. RX 203.

Upon being contacted by a community advocate acting on Petitioner's behalf, ABA re-opened Petitioner's case and attempted to transfer Petitioner to another home health care agency, which agency Petitioner selected. That agency informed the case manager at ABA that it would not accept Petitioner. RX 205. ABA did not inform Petitioner of the rejection. In the meantime, Petitioner continued to decline home health care services from ABA.

On September 15, 2011, ABA discharged Petitioner from its care again because Petitioner had refused its services for at least 30 days . RX 203.

On or about September 30, 2011, the Department of Human Services (DHS), on behalf of DHCF, issued a notice to Petitioner informing him that his coverage under the EPD Waiver and Medicaid Programs would expire on October 31, 2011, because he had not returned a completed signed recertification form. The notice warned Petitioner that it was time to re-certify for Medical Assistance and that if he did not re-certify he would lose his coverage. RX 200, 201, A-1. Petitioner construed the September 30, 2011 as a notice of reminder that he needed to complete re-certification papers.

After receiving the notice, Petitioner contacted ABA on September 23, 2011, to request case manager assistance with re-certification. Then, on September 26, 2011, ABA re-opened Petitioner's case in response to Petitioner's request. RX 204. But, again at Petitioner's request, ABA did not provide actual home health care services to Petitioner. An ABA case manager met with Petitioner to complete re-certification forms for the EPD Waiver and Medicaid Programs. Using information in its files as well as information Petitioner supplied, ABA completed, and Petitioner signed, all forms necessary for Petitioner's annual re-certifications. RX 204. On October 6, 2011, Petitioner's physician completed and signed certification forms that ABA had submitted to him. In turn, ABA submitted the completed re-certification forms to the Government.

During this time, Petitioner continued to request a transfer from ABA to another home health care provider. RX 204. ABA submitted a transfer request to Nursing Enterprises Inc., but that agency did not accept the transfer request. RX 205.

On October 14, 2011, ABA again discharged Petitioner because he continued to refuse personal care aide services from ABA. RX 206.

Petitioner's EPD Waiver Program Services were terminated effective October 31, 2011, based on his purported failure to submit re-certification papers. Sometime in November 2011, Petitioner learned, through his doctor, that his benefits had been terminated. Until then, he believed that he had been re-certified.

IV. Conclusions of Law

A. Introduction

It is unclear whether Petitioner's termination from the EPD Waiver Program resulted from ABA's failure to submit re-certification papers to DHCF or DHCF's failure to process the papers. What is clear is that Petitioner fulfilled his responsibilities by timely completing the re-certification papers required of him and by submitting those papers through the ABA case manager. What is also clear is that the notice terminating Petitioner from the EPD Waiver Program was insufficient.

B. Overview of the EPD Waiver Program

Through the Medicaid Home and Community-Based Services Waiver Program, Medicaid provides funding for community-based care for individuals who would otherwise require institutional care. 42 U.S.C. § 1396n(c). In order to obtain approval of a waiver program, a state submits an application to the Center for Medicaid and Medicare Services (CMS). The number of

beneficiaries who can participate in a waiver program is limited to the number proposed by a State and approved by CMS. 42 U.S.C. § 1396n(c)(9)-(10); 42 C.F.R. 441.303(f)(6). Under waiver programs, the federal government agrees to waive certain requirements of the Medicaid Act without jeopardizing federal financial participation in the State's plan. 42 U.S.C. § 1396n(c)(3). Among those requirements that may be waived are the requirement that the State offer services to all Medicaid recipients in the same amount, duration and scope. 42 U.S.C. § 1396a(a)(10)(B).

The District of Columbia's EPD Waiver Program is one such waiver program. Under the District's EPD Waiver Program, individuals with physical disabilities or those who are sixty-five or more years old who would otherwise require the level of care provided in a nursing facility can receive home and community-based care. Under the EPD Waiver Program, which is administered by DHCF, the District may pay for, among other things, case management services, homemaker services, response system services, assisted living services, chore aide services, and personal care aides. DHCF maintains a list of Medicaid-enrolled providers who provide case management services, from whom an EPD Waiver Program applicant may select the provider from whom he would like to receive case management services. The case manager is responsible for creating an individual service plan that is subject to DHCF approval and that must specify the community-based services to be furnished, their frequency, the type of provider who will furnish each specified service, and how backup and emergency services will be provided. 29 DCMR Chapter 42.

C. Notice of Termination from the EPD Waiver Program

Medicaid and EPD Waiver Program benefits are a matter of statutory entitlement for persons qualified to receive them. *See Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S. Ct. 1011 (1970). Such entitlements are property interests which enjoy protection under the due process clause. *Atkins v. Parker*, 472 U.S. 115, 86 L.Ed. 2d 81, 105 S. Ct. 2520 (1985). As such, DHCF must provide notice of termination, suspension or reduction of Medicaid or a waiver service to Medicaid recipients and EPD Waiver Program recipients. At least ten days prior to any action to terminate benefits, DHCF must provide a recipient timely and adequate notice of the adverse action to be taken. 42 U.S.C. § 1396a(a)(3); 42 CFR 431.211. Due process also requires that notice and a meaningful opportunity to be heard be made available to recipients faced with termination.

Notices of termination must state what action is being taken; the reasons for the intended action; the specific law and regulations that support the action; an explanation of the recipient's right to request a hearing; and, an explanation of the circumstances under which Medicaid is continued if a hearing is requested. 42 CFR 431.210; D.C. Official Code § 4-205.55(a); IMA Policy Manual, Chapter 10.

In this case, a series of actions concerning Petitioner's services was taken. Those actions ranged from ABA's suspension and discharge of Petitioner to Petitioner's termination from the EPD Waiver Program¹. It is only the termination from the EPD Waiver Program that Petitioner challenges².

¹ The case manager is required to suspend or terminate a recipient's services if the recipient's behavior poses a threat to the safety and well being of the provider staff. 29 DCMR 4218.18. There is evidence that ABA suspended services to Petitioner. There is no evidence or suggestion that Petitioner's behavior posed a threat to the safety and well being of the provider's staff.

The case manager also may terminate waiver services when a recipient is unwilling to use available services and the multidisciplinary team is unable to propose a plan that is acceptable to the recipient. 29

The notice provided to Petitioner and relied upon by DHCF for its termination of Petitioner from the EPD Waiver Program reads, in pertinent part, as follows:

Your coverage under the Medical Assistance Waiver Program expires on the last day of October. Because you did not return a completed signed and dated recertification form.

IMA Manual Citation: Part 8, Chapter 4, Section 4.3.

RX 200.

The notice did not state that Petitioner's Medicaid waiver services were being terminated. Instead, the notice merely informed Petitioner that his "medical assistance waiver program expires on the last day of October" because he had not returned recertification papers. It is only reasonable that Petitioner construed the notice not as a termination notice, but as a reminder to complete recertification papers. Additionally, the notice did not contain the specific law and regulations that supported the action, as required by 42 CFR 431.210 and D.C. Official Code § 4-205.55. Instead, only IMA Manual Part 8, Chapter 4, Section 4.3 was cited in the notice. RX 200.

IMA Manual Part 8, Chapter 4, Section 4.3 itself corroborates Petitioner's position that the notice was a reminder notice, not a termination notice. Section 4.3 is entitled "Notification of

DCMR 4218.15(h). If termination of services is based on 4218.15(h), the case manager must provide the recipient with a 30 day notice in advance of the date of termination. The notice must include, among other things, the decision to terminate services, the reason for termination of services, and information on the recipient's right to a fair hearing. 29 DCMR 4218.16. There is no evidence that ABA provided such notice of suspension to Petitioner.

Although the issue is not before me, it appears that ABA did not adhere to the regulations in its suspension and discharge of Petitioner.

² Petitioner challenges only his termination from the EPD Waiver Program. He does not challenge any of the various actions, such as suspension and discharge, taken by ABA. This administrative court has authority to hear cases that involve disputes concerning governmental action or inaction on issuance, denial, reduction or termination of benefits. It is not clear to me that this administrative court has authority to hear cases that involve disputes between EPD Waiver Program participants and home health care providers concerning action or inaction on the part of home health care providers. *See* D.C. Official Code § 2-1831.03. Governing statutes and regulations require a fair hearing process, but do not clarify the forum for such disputes. *See, e.g.,* 29 DCMR 4218.16.

Recertification/Review Date.” The text of Section 4.3 as relates to Medical Assistance provides for issuance of a notice 90 days prior to the end of the current certification period. The notice is to include the recertification forms. The notice informs the recipient that it is time to re-certify in order to maintain continuing eligibility. Petitioner heeded the notice as for the very purpose the IMA Manual suggests, a reminder notice to re-certify, not as a termination notice.

Based on the shortcomings of the notice, DHCF violated the Medicaid and EPD Waiver Programs’ and due process requirements by failing to give Petitioner sufficient notice of its adverse action.

D. Grounds for Termination from the EPD Waiver Program

Even if the notice of termination provided to Petitioner was sufficient, DHCF did not establish grounds for Petitioner’s termination from the EPD Waiver Program. The reason DHCF provided for termination in its notice states as follows:

Your coverage under the Medical Assistance Waiver Program expires on the last day of October. Because you did not return a completed signed and dated recertification form.

IMA Manual Citation: Part 8, Chapter 4, Section 4.3.

RX 200.

Part 8, Chapter 4, Section 4.3 of the IMA Manual reads, as relates to Medical Assistance, as follows:

ACEDS will automatically generate a notice 90 days prior to the end of the current certification period. The notice includes the actual recertification form and informs

the recipient that it is time to have his case recertified in order to determine continuing MA eligibility. MA recertifications are done by mail. However, if a customer meets with her/her SSR for another purpose during this 90-day period, the customer can (and should be encouraged to) recertify MA eligibility during the office visit. MA cases that are not recertified prior to the end of the current certification period will automatically be terminated by ACEDS.

Whenever the Government terminates a public benefit, or proposes to do so, the Government has the burden of producing sufficient evidence to establish the reasons for its action. OAH Rule 2822.2(b). The Government terminated Petitioner from the EPD Waiver Program because he did not timely re-certify for Medical Assistance. RX 200. The evidence adduced at the hearing established that Petitioner timely completed the re-certification papers through his case manager, as he was required to do. Thus, the Government did not produce sufficient evidence to establish the reasons given for its termination of Petitioner from the EPD Waiver Program.

While only the Government's termination of Petitioner from the EPD Waiver Program is at issue here, ABA's case management services to Petitioner are directly related to the termination due to the role case management services plays with respect to re-certification and must be considered.

Case management services are an integral part of the EPD Waiver Program. The case manager carries tremendous responsibilities and is required to provide much more than mere coordination of home health care services. Case management services are services above and beyond that of the personal care aide and other direct services. Among other things, the case manager creates the service plan. The service plan drives the services to be furnished, their frequency, the type of provider, and how backup and emergency services will be provided. The case manager ensures that all services are in place, and that the quantity and quality of services are sufficient. The case manager ensures that the recipient is given free choice of all qualified providers

for each service in the service plan. 29 DCMR 4218. The case manager is required to assist the recipient in the selection of a new provider and ensure a smooth and complete transfer if the recipient desires to transfer to another service provider³. 29 DCMR 4218.7. Additionally, the case manager is required to ensure completion of certain documents on an annual basis prior to expiration of the current certification period and for their submission to the Government for review and approval. 29 DCMR 4218.4. Case management services are billed separate and apart from personal care aide and other services. 29 DCMR 4208 – 4213.

Here, a case manager created a service plan for Petitioner on his commencement with ABA. For seven months, that service plan was in place and, seemingly, smoothly implemented until the personal care aide departed. When the ABA aide left due to an emergency, Petitioner expressed that he did not want a new aide. Other than to suspend Petitioner and services to him from ABA, without notice, little or no case management services were rendered to him.

By DHCF's own regulations, the case manager, not Petitioner, is required to file papers for Petitioner's annual re-certification, for Medicaid and the EPD Waiver Programs. 29 DCMR 4218.4; 29 DCMR 4216.8 (a). The case manager is required to submit the documentation to MAA within seven working days of its receipt. 29 DCMR 4216.8. Petitioner cooperated with the case manager in completing the papers in a timely fashion; indeed, Petitioner initiated contact with the ABA case manager to arrange for completion of the papers. Petitioner's doctor timely completed the re-certification documents required of him. Petitioner believed that ABA properly and timely filed the re-certification papers. Moreover, ABA itself purports to have timely submitted all re-certification papers to DHCF on Petitioner's behalf. By all accounts, Petitioner's re-certification paperwork was submitted to the Government timely and there was no basis for his termination

³ The case manager cannot abandon the recipient until the new provider has been successfully obtained. 29 DCMR 4223.10. It appears that ABA did not adhere to this regulation.

