

elderly adults.¹ M200.1(k). As part of its management of the program, DAIL contracts with community providers to deliver "specialized" services to eligible individuals. These services can cover medical, housekeeping, and personal care needs.

3. It is DAIL's responsibility to establish clinical eligibility and provider requirements for its subcontractors. DAIL requires community providers to determine the needs of the clients and to coordinate and deliver services to the clients to meet their needs within the rules of the Medicaid program. This "plan of care" developed by the waiver-team is reduced to writing and approved and annually reviewed by DAIL.

4. The Windsor County Medicaid waiver-team (hereafter waiver-team) for which COASEV is the coordinator has contracted with DAIL to provide Medicaid services to elderly and disabled persons in the petitioner's town. As part of its delivery of services, the waiver-team employs a "consumer-directed" option which allows persons to manage their own care providers if COASEV determines they are capable of doing so. This includes hiring and discharging

¹ The Department for Children and Families makes the financial and categorical eligibility decisions for persons in the waiver program. See M200.1(k).

care providers and keeping track of and submitting their hours to COASEV.

5. The petitioner is a client of the waiver-team and receives case management services from COASEV. In the past, COASEV had allowed the petitioner to employ the "consumer-directed" option for services. However, in January of 2005, the waiver-team became concerned that the petitioner was not appropriately managing his own care. The team alleged that the petitioner was submitting inaccurate time sheets and had other care-giver problems which they attributed to alcohol abuse. The petitioner vehemently disagreed (and still disagrees) with the facts alleged by the waiver-team and about its proposal to take him out of the "consumer-directed" option.

6. The waiver-team gave the petitioner a hearing on January 20, 2005. COASEV then issued a decision in writing on February 12, 2005 reaffirming its decision to take him off the consumer-directed program. COASEV told the petitioner that he had a right to appeal to the Commissioner of DAIL and the Human Services Board.

7. On February 15 2005, the petitioner appealed to the Board and the Commissioner. The petitioner was given an opportunity to speak with the Commissioner of DAIL's

representative on March 14, 2005 about the actions of the waiver-team. The representative concluded in a letter dated March 24, 2005, that the waiver-team's decision changed nothing in the annual approved plan of care and that the petitioner was continuing to get all of the needed services. The representative offered the opinion that the actions of the waiver team seemed reasonable under the circumstances and advised him that he could appeal to the Board.

8. On March 7, 2005, the petitioner responded to the Board's scheduling request and the matter was set for hearing on April 14, 2005. However, the petitioner made a "Motion for Continuance" on April 11, 2005 because he believed that he had thirty days from the date of the Commissioner's letter, or until April 24, 2005 to file a new appeal. At DAIL's request and with the agreement of the petitioner, the April 14, 2005 hearing became a status conference. At that time DAIL informed the petitioner that it intended to request that the case be dismissed for lack of jurisdiction. DAIL was ordered to make that request in writing and the petitioner was advised that he needed to respond to that motion in writing. The petitioner was also advised to obtain the help of legal aid or some other lawyer. He said he had already tried and had been unable to obtain legal help.

9. DAIL filed its motion to dismiss and a memorandum of law on May 5, 2005. DAIL maintains that decisions as to which persons actually arrange for, direct and perform services to Medicaid waiver-clients is totally within the discretion of the waiver-team as the service provider. DAIL says it neither made nor adopted the decision. It argues that as DAIL is not the decision or policy maker, but rather COASEV and the waiver-team, it follows that the Human Services Board has no jurisdiction to hear the case.

10. The petitioner was made aware of the above allegations by DAIL both orally and in writing. In response, the petitioner filed a "Motion to Quash" and memorandum on June 15, 2005 in which he laid out the course of his appeal and emphasized that he had been repeatedly told to appeal to the Human Services Board. He has concluded from this information that the Board must have jurisdiction. He also proffered a letter from his psychiatrist attesting to his competency to manage his own affairs. He did not disagree with any of the facts alleged by DAIL with regard to the discretion of the waiver-team, his continued receipt of all services or DAIL's lack of a role in the action.

11. On June 27, 2005, the petitioner wrote a "Motion for Injunction" filed with the Board on July 7, 2005 claiming

that the waiver-team had "obstructed justice", denied his due process rights and committed a "criminal violation." He asked the Board to take jurisdiction over his case. The petitioner has made no further response to the allegations made by DAIL.

12. As DAIL's allegations with regard to the procedural history, its lack of a role in the decision-making process, and its responsibilities and obligations to the petitioner as detailed above have not been denied or controverted by the petitioner, they are found as fact for purposes of this motion to dismiss.

ORDER

DAIL's request to dismiss this matter for lack of jurisdiction is granted.

REASONS

The statute granting the Board's authority to hear and adjudicate cases provides, in pertinent part, as follows:

An applicant for or a recipient of assistance, benefits or social services from the department of social and rehabilitation services, the department of prevention, assistance, transition, and health access, the office of economic opportunity, the department of aging and disabilities, the office of child support, or an applicant for a license from one of those departments or offices, or a licensee, may file a request for a fair hearing with the human

services board. An opportunity for a fair hearing will be granted to any individual requesting a hearing because his or her claim for assistance, benefits, or services is denied, or is not acted upon with reasonable promptness; or because the individual is aggrieved by any other agency action affecting his or her receipt of assistance, benefits or services, or license or license application; or because the individual is aggrieved by agency policy as it affects his or her situation.

3 V.S.A. § 3019(a)

DAIL agrees that as the successor agency to "the department of aging and disabilities" it is a party properly before the Board if it has made a decision with regard to services or benefits available to a client of their programs. The question before the Board here is whether DAIL has in fact made a decision affecting the services or benefits available to the petitioner. Based on the facts as found in this matter, it must be concluded that DAIL has not made a decision regarding the petitioner's eligibility for Medicaid waiver-services and has no authority or responsibility to make decisions with regard to what persons in its contractee's agency will direct and provide service under its regulations or contracts.

To be sure, even if DAIL is not the official decision-maker in a Medicaid-waiver matter, it can still be held to have approved or ratified a decision of a community provider

if it has legal control over the matter decided. For example, a decision by the subcontractor to cut off a Medicaid service is in essence a decision by DAIL because as the program administrator DAIL is subject to rules about Medicaid coverage and service eligibility which it must adhere to and enforce. However, many matters of administration are left to the discretion and control of subcontractors. The manner in which a service is managed appears from the evidence offered here to be one which is within the discretion of the subcontracted provider. If the action of the subcontractor does not violate regulations and contracts, DAIL will not attempt to micromanage the methodology. This matter is very much like a patient complaining about the management of his medical care by a physician provider who must use his judgment about the way he provides care, such as prescribing certain medications. Clearly, DAIL would not interfere with nor take responsibility for the decision of the physician so long as he provides the needed medical service. This matter is not all that different.

The petitioner has been rightly confused during this process by repeated instructions given to him to appeal to DAIL and the Board. The petitioner should be aware, however,

that employees and subcontractors have been trained to provide this information to the recipient of services and not to make judgments themselves about what matters can or cannot be heard by the Board. Those judgments are correctly made by the Board itself and it is important that the matter actually reach the Board for consideration of its jurisdiction.

The petitioner should also understand that the Board cannot exercise authority in excess of that given in the above statute. Even if the Board were to hear the case and reach a different decision, it has no authority to direct the community waiver-team to do anything. It has only the authority to affirm, reverse or modify decisions made by DAIL. See Fair Hearing No. 16,929.

The petitioner has no recourse before this Board but can continue to make his case and present any new evidence he wishes to the community review team.² If in the future, the petitioner can point to a specific right in the Medicaid law allowing him to direct his waiver services, then DAIL may have an obligation to oversee the decision and he may have a right to be heard by the Board. However, DAIL denies such a right and the petitioner has not been able to show otherwise.

² The petitioner should speak to an attorney about whether he has any legal recourse against the waiver-team itself as a public entity.

Therefore, the Board is bound to grant DAIL's motion to dismiss as it has no jurisdiction to hear the case.

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