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DISTRICT OF COLUMBIA
OFFICE OF
ADMINISTRATIVE HEARINGS
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ANN ROBERTSON AS PARENT AND NEXT FRIEND OF B.R. Petitioner v. DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH CARE FINANCE and HEALTH SERVICES FOR CHILDREN WITH SPECIAL NEEDS Respondents	Case No.: 2013-DHCF-00037

ORDER ON CONTINUING BENEFITS

I. Introduction

This Order concludes that the District of Columbia Public Assistance Act, D.C. Official Code § 4-205.59, requires the Respondent Health Services for Children with Special Needs ("HSCSN") to continue to provide fitness therapy services for B.R. while this case is pending.

II. Background

Petitioner Ann Robertson filed this case on February 12, 2013. She is seeking review of a decision by HSCSN that refused to pay for fitness therapy services for her daughter, B.R., after October 1, 2012. B.R.'s doctor had recommended that the therapy be provided by Fitness for

Health, a Maryland provider of therapy services, because the doctor believed that Fitness for Health was the only provider specialized enough to furnish the specific services that B.R. needed.

HSCSN is a managed care organization that provides Medicaid benefits for B.R. Fitness for Health is not part of HSCSN's network of providers. As a result, HSCSN and Fitness for Health entered into a "Single Case Agreement" authorizing services for B.R. Curiously, the agreement, attached as Exhibit A to HSCSN's memorandum on continuing benefits, states that it is effective May 10, 2012, although it also states that the beginning date of service is April 1, 2012. The agreement says that the final date of service would be October 1, 2012.

Fitness for Health's representative signed the agreement on May 17, 2012. The signature of HSCSN's representative does not have a date, but all parties have agreed that the agreement was not signed by HSCSN until August 2012, well after both the beginning date of service and the effective date specified in the agreement. The agreement authorized a fitness therapy evaluation for B.R., as well as fitness therapy itself. Ms. Robertson did not sign the agreement, and there is no evidence that she received a copy of it.

The parties agree that B.R. received the evaluation authorized in the agreement and received fitness therapy thereafter from Fitness for Health. She continued to receive fitness therapy from Fitness for Health through December 2012.

Fitness for Health requested payment for the services, but HSCSN did not pay for any services rendered after October 1, 2012. On January 4, 2013, HSCSN sent a letter to Fitness for Health refusing to pay for any services furnished to B.R. after October 1, 2012, because those services were outside the scope of the Single Case Agreement, which did not authorize services

after October 1, 2012. The letter (Exhibit 2 to Petitioner's Memorandum) informed Fitness for Health that "you have the right to appeal this decision," either by pursuing HSCSN'S internal appeal procedures or by filing a hearing request at the Office of Administrative Hearings. (*Id.* at 2). It also said that, under certain circumstances, services would be continued, "if you file an appeal with HSCSN." (*Id.* at 2). HSCSN sent a copy of that letter to B.R.'s parents.

On January 29, 2013, Fitness for Health filed a hearing request to challenge the denial of payment. (Case No. 2013-DHCF-00021). Ms. Robertson filed this case on February 12, 2013. The parties subsequently agreed to dismissal of Fitness for Health's case and on March 21, 2013, I issued a Final Order dismissing it. The parties have been attempting to settle this case, but have not reached agreement. A further status conference is scheduled for April 24, 2013 at 9:30 AM.

III. Conclusions of Law

The question presented here is whether HSCSN must continue to pay for fitness therapy services for B.R. while this case is pending. The parties – Ms. Robertson, HSCSN and the Department of Health Care Finance ("DHCF") – have filed memoranda addressing both federal Medicaid regulations and District of Columbia law on this issue. Because I find the District of Columbia Public Assistance Act to be dispositive of this issue, I will not address the federal regulations.

A. The Legal Requirements for Continuing Benefits

When public assistance benefits, including Medicaid benefits, are terminated, suspended, or reduced, the Public Assistance Act permits the beneficiary to ask for a hearing to review that decision. D.C. Official Code § 4-210.01. The Act also specifies the circumstances when

benefits must continue while a hearing request is pending. If the beneficiary received timely notice of a proposed adverse action and requested a hearing at any time before the effective date of that action, the benefits generally must continue unchanged until a final decision is issued after the hearing. D.C. Official Code § 2-205.59(a).[1] If the beneficiary did not receive timely notice (and such notice is required) benefits must be restored if the party asks for a hearing within 10 days of the postmark of the notice that she does receive. D.C. Official Code § 4-205.59(c).[2] If, however, the recipient asks for a hearing more than 10 days after the effective date of the proposed action, benefits do not continue. D.C. Official Code § 4-205.59(d).

To decide whether D.C. Official Code § 4-205.59 requires HSCSN to continue paying for B.R.'s fitness therapy while this case is pending, four questions must be answered: 1) Did the Public Assistance Act require HSCSN to give Ms. Robertson timely notice of its decision not to pay for fitness therapy services after October 1, 2013? 2) If so, did HSCSN comply with that obligation? 3) If HSCSN did not comply, how does that affect B.R.'s right to continued benefits while this case is pending? 4) Are continuing benefits precluded because this case presents solely an issue of law? I discuss each issue below.

B. Was HSCSN Required to Provide Timely Notice to Ms. Robertson?

The Public Assistance Act requires that a recipient of benefits must receive "timely and adequate notice" of "intended action to discontinue, withhold, terminate, suspend, reduce

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[1] Section 4-205.59(a) provides several exceptions to that general rule. Two of them – withdrawal of the hearing request, or a subsequent change in benefits for which the recipient does not ask for a hearing – are inapplicable in this case. The other exception – if the hearing request presents only an issue of law – is discussed further below.

[2] Here, too, an exception for a hearing request presenting only an issue of law applies.

assistance, or make assistance subject to additional conditions . . . ." D.C. Official Code § 4-205.55(a).[3]

"Timely" notice is notice that is postmarked at least 15 days before the effective date of the intended action. D.C. Official Code § 4-205.55(a)(1). "Adequate" notice must include:

> a statement of what action the Mayor intends to take, the reasons for the intended action, the specific law and regulations supporting the action, an explanation of the individual's right to request a hearing, and the circumstances under which assistance will be continued if a hearing is requested.

D.C. Official Code § 4-205.55(a)(2)

Because B.R.'s physician recommended fitness therapy without any expiration date, HSCSN's decision to authorize those services only until October 1, 2012, was a decision to make medical assistance "subject to additional conditions." Alternatively, its decision not to pay for any such services after October 1 was a decision to "discontinue, withhold, terminate, suspend [or] reduce" those services. In either event, § 4-205.55(a) required HSCSN to provide timely and adequate notice of that decision to Ms. Robertson.

C. Did HSCSN Give Ms. Robertson Timely Notice?

HSCSN argues that it gave Ms. Robertson notice of its decision when it sent her a copy of its January 4, 2013, letter informing Fitness for Health that HSCSN would not pay for fitness therapy services for B.R. after October 1, 2012. Assuming for the moment that the letter to Fitness for Health qualifies as notice to Ms. Robertson (but see discussion below), it was not timely notice. To be timely, notice must be postmarked 15 days before the effective date of the

[3] Section 4-205.55(a) imposes the responsibility of giving notice upon the Mayor, whose responsibilities for administering the Medicaid program have been assigned to DHCF. D.C. Official Code § 7-771.07(1). No one has argued that HSCSN, which acts on DHCF's behalf in providing Medicaid services, is exempt from the notice requirement.

proposed action. D.C. Official Code § 4-205.5(a)(1). Regardless of whether the effective date of HSCSN's decision was October 1 (the date beyond which services were not authorized) or January 4 (the date of the letter), HSCSN did not mail it 15 days before either date. Ms. Robertson, therefore, did not receive timely notice.

D. Consequences of the HSCSN's Failure to Give Timely Notice

Because Ms. Robertson did not receive timely notice of HSCSN's decision, the continuing benefits provisions of D.C. Official Code §§ 4-205.59(c) and (d) apply. Section 4-205.59(c) says that, when timely notice is not given, benefits must be restored if the recipient asks for a hearing within 10 days of receipt of notice. Section 4-205.59(d) places an outer limit on the obligation to restore benefits:

> A request for a hearing made more than 10 days after the date upon which the action would become effective . . . shall not result in the continuation of disputed benefits. If the claimant's position is upheld by the hearing decision, the Mayor shall promptly make corrective payments retroactively to the date the incorrect action was taken.

Whether the effective date of HSCSN's decision was October 1 or January 4, Ms. Robertson's February 12 hearing request was filed outside the 10 day deadline. It would seem, therefore, that the request came too late to trigger any continuing benefits requirement.

The Court of Appeals has held, however, that deadlines for requesting administrative hearings are subject to an important condition. No such deadline may start to run until a party receives clear notice of the deadline and of how to file the hearing request. *E.g., Wright-Taylor v. Howard University Hospital,* 974 A.2d 210, 217 (D.C. 2009); Zollicoffer *v. District of Columbia Public Schools,* 735 A. 2d 944, 946 (D.C. 1999). HSCSN argues that it gave the necessary notice of Ms. Robertson's hearing rights when it sent her a copy of the January 4 letter

that it addressed to Fitness for Health. The letter says, "you have the right to appeal this decision. You can appeal directly to HSCSN or request a Fair Hearing with the District of Columbia." (January 4 Letter at 2.) The letter goes on to give additional information about the hearing process, but it provides that information to "you," and never mentions any rights of B.R. or her parents.

Any doubt about who "you" might be is dispelled by the beginning of the letter:

> Dear Mr. Sickel [of Fitness for Health]:
>
> The purpose of this correspondence is to notify **you** that **your** request for payment for the services rendered to the above referenced member after October 1, 2012 are [*sic*] being denied as of January 4, 2013.
>
> January 4, 2013, Letter at 1 (emphasis added).

HSCSN argues that "[a]ny reasonable parent in Petitioner's position would appreciate the availability of an appeal" after receiving a copy of that letter. (HSCSN's Memorandum at 8.) I do not agree. An attorney familiar with the intricacies of the Public Assistance Act and Medicaid law might well understand that a hearing was available, but a lay person receiving a copy of a letter that unambiguously told Fitness for Health, and only Fitness for Health, that it had a right to a hearing can not reasonably be expected to understand that she also had that right.

Because Ms. Robertson did not receive notice about her right to request a hearing, including the right to continuing benefits and information about the applicable deadlines, those deadlines did not begin to run. Two consequences follow from that conclusion. First, the deadline in D.C. Official Code § 4-205.59(c), which requires benefits to be restored if a party requests a hearing within 10 days of the postmark of notice, has not yet started to run because Ms. Robertson did not receive notice of her right to ask for a hearing. Second, the deadline in

D.C. Official Code § 4-205.59(d), which says that benefits may not be continued if a hearing request is filed more than 10 days after the effective date of an action, did not start to run because Ms. Robertson never received notice of that deadline. Her hearing request, therefore, must be treated as filed within the permissible periods and B.R.'s fitness therapy benefits must continue until a Final Order is issued in this case.

A contrary ruling would create the wrong incentive for a managed care organization. If § 4-205.59(d) cuts off the right to continuing benefits whenever the organization unlawfully fails to notify a beneficiary of an adverse decision, the organization can avoid the expense of continued benefits simply by delaying legally required notice. A Medicaid beneficiary may be faced with the sudden withdrawal of treatment that she justifiably expected to continue without interruption, precisely because she did not receive any notice to the contrary.[4]

E. The "Issue of Law" Exception

There remains the question of the exception in § 4-205.59(c), which denies a recipient's right to continuing benefits if "a determination is made at the hearing that the sole issue is one of law and not of incorrect grant computation." At this stage of the proceedings, I am unable to determine that only legal issues are involved here. Among the factual issues that may be presented are whether the fitness therapy services are medically necessary and whether Fitness for Health is the only available provider of such services. In addition, at the most recent status conference, the parties reported that coverage from another insurer may be available for B.R.'s

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[4] Section 4-205.59(d)'s requirement for retroactive payment of benefits if the claimant prevails at a hearing may make the claimant whole if cash benefits such as Food Stamps or Temporary Assistance for Needy Families are at issue. When treatment from Medicaid is denied, however, it may not be as easy for a claimant to recover the benefits of treatment that did not occur.

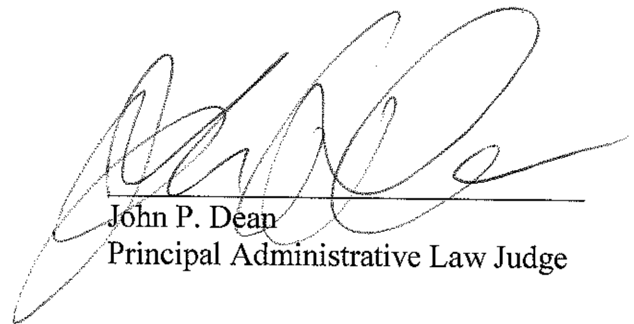
fitness therapy. Because this case in its present posture presents factual issues, the exception for cases involving solely a question of law does not apply.

IV. Order

For the reasons stated above, it is, this 22nd day of April, 2013:

ORDERED, that HSCSN must restore B.R.'s fitness therapy services while this case is pending; and it is further

ORDERED, that HSCSN shall report on its implementation of this Order at the April 24, 2013 status conference.



John P. Dean
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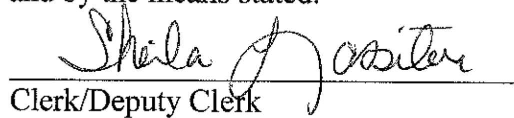
I hereby certify that on April 22, 2013 this document was served upon the parties named on this page at the address(es) and by the means stated.



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