2010 WL 9545599 (Minn.App.) (Appellate Brief)
Court of Appeals of Minnesota.

Harold YOUNG, Appellant,

v.

Cal LUDEMAN, Commissioner of Human Services, and Steele County Human Services, Respondents.

No. A10-1303.
August 27, 2010.

Appellant's Brief, Addendum, and Appendix

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***1 LEGAL ISSUES PRESENTED**

1. Does Appellant have the right to free choice of any qualified and willing provider of Medical Assistance-**Elderly** Waiver services under Minnesota's federally approved § 1915(c) Home and Community-Based Services Waiver, so that appellant can choose to continue receiving services at the qualified, state-licensed facility where he has resided since June, 2008?

Issue Raised Below: This issue was raised by appellant's first appeal request to Steele County Human Services (Administrative Record, Exhibit 2), and was the focus throughout the evidentiary hearing (Tran. 11, et seq.).

The Commissioner ruled: The facility where Appellant resides is enrolled as a provider by the Commissioner's Department of Human Services, but the facility is not a qualified provider because it does not have a contract with the county agency. Appellant can only choose to receive **Elderly** Waiver services from providers that have a contract with the county. (Decision, Conclusions of Law 4, 7; ADD - 7).

Issue Preserved for Appeal: Appellant raised this issue in his request to the Commissioner to reconsider the decision. (App-3). Reconsideration was denied. (App-8). Appellant raised and briefed this issue for the District Court. The District Court affirmed the Commissioner. (App- 9, 15).

Most Apposite Authorities: 42 U.S.C. § 1396a(a)(23); ***2** 42 C.F.R. §431.51; 42 U.S.C. § 1396n(c); Minn. Stat. § 256B.0915 (2008).

2. Does the Commissioner have the duty to assure that Appellant can continue receiving medically necessary **Elderly** Waiver services from his freely chosen qualified provider, including the exercise of authority to require Steele County Human Services to arrange by contract for those services with the chosen provider?

Issue Raised Below: This issue was raised throughout the evidentiary hearing (Tran. 11, et seq.).

The Commissioner ruled: No provision of Minnesota law could force the county board to execute a contract with a vendor. Minn. Stat. § 256.0112. Nothing in state law or the state's contract with the federal government suggests that the Department of Human Services must execute a contract with a vendor to preserve Appellant's free choice of provider. (Decision, Conclusions of Law 6, 7; ADD - 7).

Issue Preserved for Appeal: Appellant raised this issue in his request to the Commissioner to reconsider the decision. (App-3). Reconsideration was denied. (App-8). Appellant raised and briefed this issue in District Court. The District Court affirmed the Commissioner. (App- 9, 15).

Most Apposite Authorities: Minn. Stat. § 256.045, subd. 6 (2008); Minn. Stat. § 256.0112 (2008).

***3 STATEMENT OF THE CASE**

Appellant Harold Young, age 80, is diagnosed with dementia from Alzheimer's disease, and is receiving 24-hour customized living services in a memory care unit at the Valleyview facility in Owatonna. The Commissioner of Human Services has affirmed Steele County Human Services' cessation of Medical Assistance payment for these services because Steele County has ended its contract with Valleyview for reasons suiting the county's best interests but unrelated to appellant's needs and the quality of his care.

Appellant qualifies for Medical Assistance through a spenddown of his excess income, and was approved in June, 2008, by Steele County Human Services to receive customized living services under the Minnesota Department of Human Services' **Elderly** Waiver program. This present appeal arises from the second Department of Human Services' administrative proceeding involving these parties.

Respondent Steele County Human Services issued a notice on December 12, 2008, to deny appellant services under the **Elderly** Waiver program effective January 1, 2009. The notice stated that the action to be taken was "cessation of **Elderly** Waiver payments to a vendor which Steele County does not have a contract with." (App-1). Appellant [1] by letter to the county on December 22, 2008, requested a fair hearing under Minn. Stat. § 256.045, subd. 3(a)(1), and continuation of benefits until the conclusion of the appeal ***4** process. (Administrative Record, Exhibit 2).

Human Services Judge Margaret Manderfeld conducted a telephone hearing in DHS Appeal Docket # 107153 on February 20, 2009, receiving twelve numbered exhibits, oral argument by counsel, and testimony. (ADD - 2). Subsequent to the hearing, Human Services Judge Manderfeld in May, 2009, granted appellant's request to supplement the record by accepting the Department of Human Services' Bulletin # 09-25-03, issued in April, 2009.2 (Decision, Findings [2], ADD-2).

Human Services Judge Manderfeld's recommended findings and conclusions were adopted by Chief Human Services Judge Kenneth M. Mentz and issued as the Commissioner's Order on August 28, 2009. (ADD-8). Appellant requested reconsideration of the decision under Minn. Stat. § 256.045, subd. 5. (App-3). Virginia Rae Bly, Director of Appeals and Regulations Division, affirmed the decision without modification by letter of October 8, 2009. (App-8).

Appellant timely appealed under Minn. Stat. § 256.045, subd. 7, for judicial review of the Commissioner's decision. Honorable Joseph A. Bueltel, Third Judicial District, issued an order and memorandum filed on May 6, 2010, affirming the Commissioner's

decision. (App - 9). Appellant timely initiated this appeal to the Court *5 of Appeals under Minn. Stat. § 256.045, subd. 9, authorizing an appeal from the district court as in other civil cases. (App - 16).

Prior administrative proceeding between the parties: The Commissioner's Decision in this case describes in the Findings of Fact the first administrative appeal proceeding involving these same parties and the same services, identified as DHS Appeal Docket # 105046. (See Decision, Findings of Fact 3, 4, 5; ADD - 2, 3). On June 3, 2008, appellant began residing at Valleyview of Owatonna. Steele County Human Services through its **Elderly** Waiver case manager arranged and approved appellant's placement in this facility, relying on the purchase-of-services contract in effect between Valleyview and Steele County Human Services. (Admin. Record, Exhibit 7, "Home and Community Based Services Waiver Contract"). Appellant received 24-hour customized living services, in addition to regular medical assistance services, paid for by the **Elderly** Waiver portion of Minnesota's Medical Assistance program. (Decision, Findings of Fact 2, 3; ADD -2). Appellant was receiving these services through a managed care organization, South Central Health Alliance, that is authorized to limit its enrolled Medical Assistance participants to obtaining services from a specific network of providers.

Steele County Human Services informed appellant's guardian orally on June 11, 2008, that the county Board of Commissioners had voted to end the contract with appellant's provider of **Elderly** Waiver services. On June 27, 2008, the county agency's case manager orally informed appellant's guardian that after June 30, 2008, the county *6 would no longer pay for appellant's customized living services through the **Elderly** Waiver program. (ADD-2).

Appellant made a written request on September 8, 2008, to the Department of Human Services for a fair hearing to dispute the county agency's refusal to make **Elderly** Waiver payments, and to dispute the lack of written notice of the adverse action. (Decision, Findings 4; ADD-3). After the hearing was conducted but before a decision was issued, South Country Health Alliance, the county-based health plan providing Medical Assistance coverage in which appellant was enrolled, notified appellant on October 21, 2008, that it would provide on-going coverage for his **Elderly** Waiver services, as well as retroactive coverage back to July 1, 2008. (Decision, Findings 5; ADD-3). The Department of Human Services then dismissed appellant's appeal. *(Id.).*

Present legal proceeding: The present proceedings stem from Steele County Human Services' notice of action dated December 12, 2008, proposing to deny **Elderly** Waiver services to appellant because he resided in a facility with which the county did not have a contract. (Exhibit 5; App-1). On December 22, 2008, South Country Health Alliance notified appellant that he would be disenrolled from that managed care plan effective December 31, 2008, stating that it had been informed by the state Department of Human Services that appellant's Medical Assistance benefits "will be fee-for-service *7 through the State of Minnesota as of January 1, 2009". [3]

Appellant requested a fair hearing and continued benefits under Minn. Stat. § 256.045, subd. 3(a)(1), with respect to both the county's notice of denial of **Elderly** Waiver benefits, and from the South Country Health Alliance's notice of disenrollment. [4] (Decision, Findings 1; ADD-2). The evidentiary fair hearing was held on February 20, 2009. Appellant was then no longer receiving Medical Assistance services through the South Country Health Alliance plan, and did not further challenge the determination that he was not eligible to be in the managed care plan. [5] The hearing focused on (1) whether appellant could rely on the federal right of Medicaid recipients in a fee-for-service system to free choice from any qualified, willing provider of services, in order to remain in the *8 memory-care unit where appellant had been residing since June, 2008; and (2) whether the Commissioner had to assure that appellant could continue to receive **Elderly** Waiver services from his chosen qualified provider, including the duty to require the county agency to arrange a purchase of services contract with appellant's chosen qualified provider.

STATEMENT OF FACTS

Appellant was originally a resident of LeSueur County and has lived in Steele County since October 2007. (Tran. 50). Age 79 at the time of the hearing in this matter, appellant began residing in Steele County when he was placed in the Cedar View nursing facility in Owatonna to recover from a broken hip. (Decision, Findings 2; ADD-2). Appellant has dementia, diagnosed as Alzheimer's. (Tran. 52). When it was determined that he could not return to live at his home, appellant's guardian obtained an assessment by the Steele County Human Services' case manager who approved appellant's placement in the Valleyview of Owatonna facility. *(Id.).* Appellant has been residing in Valleyview since June 3, 2008. *(Id.).*

Appellant began receiving 24-hour customized living services[6] under the portion ***9** of the Minnesota Medical Assistance program called the **Elderly** Waiver. In Minnesota the **Elderly** Waiver provides community living supports to about 19,200 individuals who are at risk of institutional care such as a nursing home. (§ 1915(c) Home and Community-Based Services Waiver Application, cover page, ADD-9). Appellant qualifies for the **Elderly** Waiver because he requires the level of care provided in a nursing home. Appellant receives 24-hour customized living services under the **Elderly** Waiver to reside in the community instead of in a nursing home or institution. The package of **Elderly** Waiver services is arranged by the case manager based on the individualized case plan or community support plan developed for each participant. (Admin. Record, Exhibit 7).

Steele County Human Services had a purchase of services contract with Valleyview under which Valleyview, as the "provider", would furnish services to eligible persons in accordance with applicable federal and state statutes and rules. In June, 2008, the Steele County Board of Commissioners voted to terminate this contract. (Decision, Findings 3; ADD-2). Steele County Human Services orally informed appellant's guardian that the county would no longer permit use of Medical Assistance - **Elderly** Waiver funds to cover appellant's services after June 30, 2008. (Id.). Without the **Elderly** Waiver funding, appellant would have to be moved to some other setting or institution.

On September 8, 2008, appellant submitted a written request for a fair hearing to the Minnesota Department of Human Services, claiming that the county agency had taken ***10** an adverse action requiring written notice and that appellant had appeal rights under Minn. Stat. § 256.045, subd. 3(a)(1). (Decision, Findings 4; ADD-3). In that appeal, identified as Department of Human Services Appeal Docket No. 105046 (Decision, Findings 4; ADD-3), the county agency asserted that termination of the contract was not an adverse action, that appellant's Medical Assistance benefits remained in place, and that the county agency would pay for services if appellant were to be at a facility with which it had a contract. *(Id.).*

During that appeal proceeding it became clear that appellant was enrolled in a multi-county health plan/managed care organization, South Country Health Alliance, which had a contract with Minnesota Department of Human Services and Steele County to provide Medical Assistance benefits, including **Elderly** Waiver services, to enrolled participants. On October 21, 2008, South Country Health Alliance notified appellant and his guardian that it would provide payments for the **Elderly** Waiver services at Valleyview retroactive to July 1, 2008, and on an on-going basis. (Decision, Findings 5; ADD-3). The Human Services Judge then dismissed appellant's pending appeal. *(Id.).*

On December 12, 2008, Steele County Human Services issued the notice that is the subject of the present appeal, stating that it would deny **Elderly** Waiver benefits to appellant effective January 1, 2009. (Exhibit 5; App-1). The reason given in this notice is "cessation of **Elderly** Waiver payments to a vendor which Steele County does not have a contract with", and the authority cited is "MN Statute 256.0112". (Id.). In a December ***11** 15, 2008, letter transmitting the notice to appellant and his guardian, Steele County Human Services' supervisor of social services, Heather Goodwin, informed appellant and his guardian that "Steele County maintains its position to not contract with Valleyview of Owatonna". (Exhibit 4; App-2; emphasis in original). The letter invited appellant to contact the county case manager "regarding other placement options", and stated that "Steele County is happy to authorize public funding at a facility with which we hold a contract". *(Id.).*

Appellant's daughter, his guardian, wants her father to remain at Valleyview where she believes he is getting excellent care. Three other facilities offered by Steele County Human Services as possible alternative placements were not located in Steele

County. (Tran. 50; Findings 9, ADD-4). She objects to the county's proposal that appellant has to move to a facility out of Steele County because he needs Medical Assistance-**Elderly** Waiver to pay for his care. (Tran. 50). Appellant's daughter wants to keep him in the memory care unit and not disrupt his on-going care. She and his physician are located close to the Valleyview facility where he resides. (Tran. 52). The Valleyview facility has been and remains licensed by the Minnesota Department of Health as a qualified provider of 24-hour customized living services (Tran. 19), and it is listed on a Minnesota Department of Human Services webpage as an enrolled provider of **Elderly** Waiver services. (Decision, Findings 11; ADD-4).

Appellant filed a request for a fair hearing and for continuing benefits. (Decision, ***12** Findings 1; ADD-2). One of the Commissioner's Human Services Judges, Margaret Manderfeld, held a telephone evidentiary hearing on February 20, 2009. Appellant argued that the federal law right to free choice of qualified provider applied (Tran. 11), that the Commissioner's duty to supervise the **Elderly** Waiver program required that the county's refusal be overridden (Tran. 11), that there was no health or safety basis justifying a refusal to contract for the services (Tran. 20), and that there was no claim by the county that appellant was not receiving adequate care (Tran. 22). The county agency argued that the county could not be forced to contract with any provider (Tran. 14), and that because the Steele County Board of Commissioner was an elected body, that there is a separation of powers issue preventing the Commissioner's appeal tribunal from overriding that legislative body's action. (Tran. 9). A portion of the hearing involved argument by counsel-addressing whether the Human Services Judge had jurisdiction to resolve the dispute. See, Tran. 9-19.

Testimony from social services supervisor Goodwin confirmed that the county agency had no factual basis for any claim that appellant was not receiving adequate services at Valleyview. (Tran. 22). The only mention in the transcript of health or safety concerns was testimony about a hand-written list of incomplete construction items that pre-dated by a month and a half the opening of the facility and the county's contract with the facility, concerns which were satisfactorily resolved before the facility opened. (Tran. 54-55). The county agency's counsel admitted that “these are past issues” (Tran. 45, ***13** statement of Mr. McIntosh) from before the facility opened.

Steele County Human Services' Director Kelly Harder testified that Steele County had not raised any health or safety concerns about the Valleyview facility with any other county (Tran. 29). Mr. Harder agreed that appellant had “chosen a qualified provider” (Tran. 30), from whom to receive the **Elderly** Waiver services, and that the county agency had no role or jurisdiction over the state agencies' licensing Valleyview. (Tran. 34). “We don't license. We contract.” (Tran. 35, test. of Harder). Qualifying the facility as a provider of services “is not our jurisdiction.” (Tran. 36, test. of Harder).

Director Harder explained that several factors influenced the county board to terminate the purchase of services contract with the facility where appellant resides. In Findings of Fact 12, 13, and 14, the Commissioner's Decision summarizes the county agency's contentions.[7] (ADD-4, -5). Mr. Harder stated that the federal and state rules for the program could not force the county's elected representatives “into a position that puts them at risk of legal liability, financial liability, to provide care and services for residents that are not the responsibility of that county”. (Tran. 30). “We feel and we do have adequate resources to meet the needs of our jurisdictional duties, which is for Steele County [residents] “. (Tran. 31, test. of Harder). Supervisor Goodwin also confirmed that the county board was concerned about having to provide case management services ***14** to people moving to the facility from outside the county. (Tran. 21). Director Harder claimed that case management services was a “$6,000.00 liability to the county, by the multiplier of 80 to 100 residents” (Tran. 58) that might reside at Valleyview. The Board of Commissioner's cancelled the contract because “it was not in the county's best interest”. (Tran. 59, test. of Harder).

Testimony from Lisa Rotegard, the Department of Human Services' manager of Aging and Adult Services, fleshed out additional details about the legal and operational structure applying to **Elderly** Waiver program services. Asked whether there was any written provision in state law or rule, or in the Department's instructional and manual materials stating that a county could just choose not to contract with an otherwise qualified provider, Rotegard confirmed, “No, not, not, not like that no.” (Tran. 60). Agreeing that the county has an obligation to contract with any provider that is chosen to authorize services for an individual (Tran. 60), Rotegard explained: “... [I]f a person is in fact receiving services or in a situation where they want to receive services

from what the state would consider qualified, in terms of meeting all of the standards that we have in place and the county determines they can authorize services at a payment rate they're willing to pay and those will, those services will meet the needs of that person according to their service plan, then the expectation would be that they enter into a contract and authorize those services." (Tran. 60-61, test. of Rotegard). Manager Rotegard's next answer was even more clear:

***15** Q: So is there something in the state's application for this **elderly** waiver for the home and community based service waiver that authorizes the county to refuse to make a contract, but the vendor is otherwise qualified and when they can meet the needs of the individuals and when the individual chooses that provider?

A: No.

(Tran. 62).

Rotegard was asked about Steele County's declared motivation not to have the facility draw residents from outside the county.

Q: So how does this waiver program work if every county can exclude out of county residents from choosing providers in another county? Is that, is that consistent with the waiver application?

A: No, that isn't consistent, but neither is, is this happening statewide.

(Tran. 65).

Rotegard also confirmed that the Department of Human Services was obligated to comply with and enforce the provisions of the waiver agreement with the federal government: "...[T]he Department's agreement is with the federal government and the counties are our agents, correct." (Tran. 67).

Manager Rotegard also clarified that there are different waivers operated by the Department, pointing out that appellant is in a relatively small group of 7% of **Elderly** ***16** Waiver participants who are not in a managed care plan. Rotegard explained the portion of the approved "Application for a § 1915(c) HCBS Waiver" document (Exhibit 6; ADD -9, -18), that describes the other waivers that the Department of Human Services operates concurrently under separate legal authority. The county attorney asked Rotegard about the "X" marked in section 1, item G next to "§ 1915(b)(4) (selective contracting/limit number of providers)" (see ADD-12). Manager Rotegard explained this provision:

A: This I believe refers to the fact that 97% of our **elderly** waiver population runs through the managed care option under a 1915B waiver and we talk about that in this document. ***. Under the 1915B state authority managed care organizational networks can limit who they include in their, as their providers. ***. But right, but when you're, when you're operating at this 1915C outside of the B authority, the expectation is, as we've been discussing that all willing and qualified providers can be enrolled and that people have access free choice of providers and again, in this state, under that fee for service arrangement, for what amounts to 3% of the people on the program, as of January 1st or 7% rather, means that they have, there's a standard shall we say about who you're including in the network.

(Tran. 73, lines 9-12, lines 21-23; 74, lines 1-9).

***17** Manager Rotegard was asked specifically about whether free choice of qualified provider could be restricted for appellant who was part of the 7% of **Elderly** Waiver participants in the fee-for-service part of the waiver.

Q: Okay and so I think you said 93% of the people in **elderly** waiver are in a managed care and the other 7% are not.

A: That's correct.

Q: So while free choice of provider, the state has authority to restrict that for the 93%. It doesn't have authority to restrict that free choice for the other 7% like Mr. Young?

A: In accordance with what our agreements with the feds are that's correct.

(Tran. 80).

Manager Rotegard also answered this direct question from the Human Services Judge:

Q: So if DHS has qualified the person and if the facility is meeting the needs of the individual based on their plan, is it, is it then I mean, I mean is it then still okay for the county to exclude, exclude this provider or refuse to contract with this provider based largely on financial considerations?

A: I don't believe we could agree with that. (Tran. 78).

***18 STANDARD OF REVIEW**

Judicial review of the Commissioner's decision is authorized by Minn. Stat. § 256.045, subd. 7 (2009). The Court of Appeals independently reviews the administrative agency's decision, and gives no deference to the District Court's opinion. *Zahler v. Minn. Dept. of Human Services,* 624 N.W.2d 297, 301 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). The scope of review is governed by Minn. Stat. § 14.69 (2009), Zahler, 624 N.W.2d at 301. The party challenging the Commissioner's decision has the burden of proving the existence of a statutory ground for reversal under §14.69. *Erickson v. Commissioner of Dept. of Human Services,* 494 N.W.2d 58, 62 (Minn. App. 1992).

Minn. Stat. § 14.69 provides that the reviewing court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision -

... if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

(a) In violation of constitutional provisions; or

(b) In excess of the statutory authority or jurisdiction of the agency; or

(c) Made upon unlawful procedure; or

(d) Affected by other error of law; or

(e) Unsupported by substantial evidence in view of the entire record as submitted; or

(f) Arbitrary or capricious.

The Commissioner's decision must be supported by substantial evidence in view of the entire record as submitted. *Johnson v. Minn. Dept. of Human Services, 565*

***19** N.W.2d 453, 457 (Minn. App. 1997). Substantial evidence is defined as:

1. Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;

2. More than a scintilla of evidence;

3. More than some evidence;

4. More than any evidence; and

5. Evidence considered in its entiret.

Hazelton v. Commissioner, Dept. of Human Services, 612 N.W.2d 468, 471 (Minn. App. 2000), citing to *Cable Communications Bd. v. Nor-West Communications Partnership,* 356 N.W.2d 658, 668 (Minn. 1984) (internal citation omitted).

Judicial review of an agency's decision making is only possible if the agency states with clarity and completeness the facts and conclusions essential to its decision so that the reviewing court can determine whether the facts support the agency's action. *People for Environmental Enlightenment & Responsibility v. Minn. Environmental Quality Council,* 266 N.W.2d 858, 871 (Minn. 1978); *Carter v. Olmsted County H.R.A.,* 574 N.W.2d 725, 729 (Minn. App. 1998).

When a decision turns on the meaning of words in a statute or regulation, a legal question is presented. *St. Otto 's Home v. Minn. Dept. of Human Services,* 437 N.W.2d 35, 39 (Minn. 1989); *Northern Natural Gas Co. v. O'Malley,* 277 F.2d 128, 137 (8th Cir.1960) [citing Trust of Bingham v. Commissioner, 325 U.S. 365, 371 (1945)]. A reviewing court is not bound by an agency's determination of legal issues, and when considering such questions of law, reviewing courts are not bound by the decision of the agency and need not defer to agency expertise. *State by McClure v. Sports & Health* ***20** *Club,* 370 N.W.2d 844, 854 n. 17 (Minn. 1985); *No Power Line, Inc. v. Minnesota Environmental Quality Council,* 262 N.W.2d 312, 320 (Minn. 1977).

Judicial deference to the agency decision may be appropriate in some instances:

As a general rule, this court defers to an agency's interpretation when the language subject to construction is so technical in nature that only a specialized agency has the experience and expertise needed to understand it, *Reserve Mining Co. v. Herbst,* 256 N.W.2d 808 (Minn. 1977), when the language is ambiguous or when the agency interpretation is one of long standing. *Estate of Abbott v. Dancer,* 213 Minn. 289, 6 N.W.2d 466 (1942). We do not defer when the language employed or the standards delineated are clear and capable of understanding.

Resident v. Noot, 305 N.W.2d 311, 312 (Minn. 1981). There is no reason to defer when the language is not overly technical or ambiguous, or when the agency has not demonstrated its interpretation to be one of long standing. *Id.,* at 312-313.

SUMMARY OF ARGUMENT

The Medicaid Act requires a state's plan to assure recipients free choice to receive services from any willing, qualified provider. The free choice provision applies to the **Elderly** Waiver program as a matter of law and through the waiver agreement between Minnesota and the federal government. The state's Health and Human Services departments license and enroll providers of waiver services. The local county assesses an individual's needs and arranges a package of necessary services by contracting with the ***21** recipient's freely chosen qualified providers. Appellant is not in the state's managed care waiver program that limits his free choice of qualified providers. The local county agency's decisions on appellant's **Elderly** Waiver are fully reviewable through the administrative appeal process. The Commissioner can change even a discretionary county agency decision.

ARGUMENT

I. THE RECIPIENT'S RIGHT TO FREE CHOICE OF A WILLING, QUALIFIED PROVIDER OF SERVICES IS FUNDAMENTAL IN THE MEDICAID PROGRAM.

Appellant rests his claims in this case on the federal statutes and regulations that require Minnesota to assure his right to free choice of a willing, qualified provider of the necessary services he has been receiving under the **Elderly** Waiver program.

A. Minnesota's state Medicaid plan must provide for free choice of provider.

The federal Medicaid program - called Medical Assistance in Minnesota - is built on the fundamental principle that recipients have free choice to obtain services from any willing and qualified provider of those services. Federal statute makes this part of the requirements that are mandatory on each state that participates in Medicaid.

> A State plan for medical assistance must - ***(23) provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an ***22** organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services ***.

42 U.S.C. § 1396a(a)(23)(A). The freedom-of-choice provision at § 1396a(a)(23)(A) in the Medicaid Act creates "enforceable rights that a Medicaid beneficiary may vindicate through [a private action under 42 U.S.C.] § 1983." *Harris v. Olszewski*, 442 F.3d 456, 461 (6th Cir. 2006).

This federal statutory right of the recipient to free choice of qualified, willing providers is reiterated in the federal Medicaid regulations:
***[A] recipient may obtain Medicaid services from any institution, agency, pharmacy, person, or organization that is - (i) Qualified to furnish the services; and (ii) Willing to furnish them to that particular recipient.

42 C.F.R. § 431.51(b) (Admin. Record, Exhibit 12; reproduced at ADD-30). There is no dispute in this case that appellant's freely chosen provider is an enrolled provider of Medical Assistance services that is qualified by its state licensure to provide 24-hour customized living services to appellant, and that this provider is willing to do so. There is no evidence in the record nor a finding that appellant's health, safety, and other needs are not being properly satisfied in the facility where he has chosen to reside.

B. Waivers approved under § 1915(b) can restrict free choice of providers.

The federal Medicaid statute has an exception to the right of free choice of provider when a state obtains a waiver from the federal Centers for Medicare and Medicaid Services (CMS) under § 1915 of the Social Security Act, 42 U.S.C. § 1396n. One available waiver program allows a state Medicaid plan to restrict recipients' free ***23** choice of provider by requiring recipients to enroll in a managed care plan and to obtain services from that plan's network of providers. Minnesota operates approved waivers under the authority of both § 1915(b)(1) and (b)(4), codified at 42 U.S.C. § 1396n(b)(1), (b)(4), providing for mandatory enrollment of recipients in a managed care organization and permitting the managed care organizations to limit the number of providers in their network. (See, Minnesota's HCBS Application, section 1 at item G, describing concurrent waiver operations; ADD-12).

Appellant was receiving **Elderly** Waiver services through the state's § 1915(b) waiver authority while enrolled in the South Central Health Alliance managed care plan, continuing until the disenrollment action was taken as of December 31, 2008. While Minnesota operates several waivers concurrently, an individual with a medical spenddown is not eligible to participate in the **Elderly** Waiver through the § 1915(b) authority. (See, HCBS Application, section 2, describing service delivery; ADD-14).

C. Under the § 1915(c) Elderly Waiver program, appellant lives in a community setting costing no more than his care in a nursing home.

Appellant requires the level of care provided in a nursing home but receives 24-hour customized living services under the **Elderly** Waiver to reside in the community instead. The **Elderly** Waiver program in this case is operated under a § 1915(c) Home and Community-Based Services Waiver agreement that Minnesota applied for. (Exhibit 6, reproduced at ADD-9 to -18). The waiver was approved by CMS under § 1915(c) of ***24** the Social Security Act, 42 U.S.C. § 1396n(c).

§ 1915(c) waivers authorize states to use Medical Assistance payments for "part or all of the cost of home or community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the state plan." 42 U.S.C. § 1396n(c)(1).

The theory of granting the waivers to facilitate a recipient's choice of community instead of institutional care is that the program is "expenditure neutral". *Bryson v. Shumway*, 308 F.3d 79, 82 (1st Cir. 2002). Thus, one of the assurances to CMS in Minnesota's waiver application is that while the waiver is in effect, "the average per capita expenditures under the waiver will not exceed 100 percent of the average per capita expenditures that would have been made under the Medicaid State plan for the level(s) of care specified for this waiver had the waiver not been granted." (HCBS Application, section 5, E; ADD-17).

D. Minnesota has assured freedom of choice to recipients of home and community-based services under the state's § 1915(c) waiver.

A § 1915(c) waiver cannot be granted unless a State provides certain assurances to CMS, so that there are appropriate safeguards for recipients' health and welfare, and there ***25** is provision for an evaluation of an individual's need for nursing facility services. Once an individual is determined to need nursing facility-level care, the State must assure that the individual is "*informed of the feasible alternatives*, if available under the waiver, *at the choice of such individuals*, to the provision of ***nursing facility services ***". 42 U.S.C. § 1396n(c)(2)(C) [emphasis supplied]. This language in § 1396n(c)(2)(C) carries through into the home and community-based services waiver programs the same freedom-of-choice principle that is embedded in a state's Medicaid plan by 42 U.S.C. § 1396a(a)(23)(A). This freedom-of-choice provision for home and community-based services confers on recipients individual rights that can be enforced under 42 U.S.C. § 1983. *Ball v. Rodgers*, 492 F.3d 1094, 1119-20 (9th Cir. 2007). In essence, the waiver assurances are required terms of the contract for Minnesota to receive the federal Medical Assistance funding.

Minnesota's application for the § 1915(c) Home and Community-Based Services waiver includes the assurances listed in the application document at section 5, items A through J. Item D is the assurance that the state will inform recipients of "any feasible alternatives" under the waiver, and that recipients are given a choice between institutional care or home and community-based services. (ADD-16, -17). As an additional waiver requirement, Minnesota agreed to section 6, item E: "In accordance with 42 CFR § 431.51, a participant may select any willing and qualified provider to furnish waiver services included in the service plan unless the State has received approval to limit the ***26** number of providers under the provisions of § 1915(b) or another provision of the Act." (ADD-18).

Because appellant qualifies for Medical Assistance through a medical spenddown, he is not eligible to participate in the **Elderly** Waiver as part of Minnesota's § 1915(b) managed care waiver program which limits choice of providers to those within the managed care organization's network of providers. (ADD-14). Appellant's **Elderly** Waiver services are covered as fee-for-service Medical Assistance. As described in DHS Aging Services' manager Lisa Rotegar's testimony, "...when you're operating

at this 1915C outside of the B authority, the expectation is, as we've been discussing that all willing and qualified providers can be enrolled and that people have access to free choice of providers ***under that fee for service arrangement... ". (Tran. 74).

II. THE COMMISSIONER MAKES AN ERROR OF LAW BY ALLOWING THE COUNT'S DELEGATED CONTRACTING FUNCTION TO INTERFERE WITH APPELLANT'S RIGHT TO FREE CHOICE OF QUALIFIED PROVIDERS.

The Commissioner's Decision makes a clear error by the conclusion that appellant's chosen provider of 24-hour customized living services is not a "qualified provider" because it has no contract with the county agency. This ruling is not based on any text in the federal statutes or regulations, and it disregards all the principles on which the state's Home and Community-Based Services Waiver is based.

A. A qualified provider is one that meets the state's licensing standards, and *27 is able properly to furnish the services needed by the recipient.

The Commissioner's Conclusion of Law 7 states without citation to any authority that "A qualified provider is not the same as a licensed and certified provider. A qualified provider must have a contract with a lead agency." (ADD-7). While portions of these conclusions are correct, the further conclusion that "appellant may not receive **elderly** waiver services while residing at Valleyview" (ADD-7) is erroneous.

The federal Medicaid statute uses "qualified" as descriptive of the capabilities of a provider, giving the recipient free choice from "any institution, agency, community pharmacy, or person, qualified to perform the service or services required". 42 U.S.C. § 1396a(a)(23)(A). This usage clearly comprehends the credentials or professional qualifications of the provider, but nothing suggests that having a contract with the county agency - in addition to being qualified by credentials or licensure - is included in what it means to be a qualified provider. In this sense, the facility where appellant resides fully meets this federal requirement of being qualified, because the Valleyview facility holds the licenses and state-level credentials to provide 24-hour customized living services. There is no claim or evidence to the contrary.

B. Qualification of a provider of Elderly Waiver services is the responsibility of the state Departments of Health and of Human Services, not the county agency.

There was no dispute during the evidentiary hearing in this case that establishing *28 standards and assessing whether an individual provider is qualified are functions that are state-level responsibilities, not the province of the local county human services office. The county agency's director, Mr. Harder, admitted that any county-level requirements do not relate to a provider's qualifications: "That is not our jurisdiction." (Tran. 36). The Valleyview facility is licensed by the Minnesota Department of Health, and is enrolled as a provider of services by the Minnesota Department of Human Services.

Exhibit 11, admitted at the evidentiary hearing, is a four-page section from the Minnesota Health Care Programs Provider Manual defining "customized living services" available under the **Elderly** Waiver: "Customized living services are up to 24 hours of supervision, individualized home care aide tasks, home health aide tasks, and home management tasks provided to residents of a congregate living setting licensed as a home care provider and registered as Housing with Services Establishment." There is no dispute in this case that the facility where appellant has chosen to live is both licensed and registered according to this definition, so that it is a qualified provider of 24-hour customized living services. (Decision, Conclusions 3; ADD-7).

When a recipient has chosen a provider who meets the state's qualifications for a specific service, the Health Care Programs Provider Manual describes the role played by the local county agency. "The case manager is the primary party that is responsible for negotiations with the provider to assure that the needs of the recipient are fully met through the package that is created

specifically for that recipient." (Admin. Record, ***29** Exhibit 11). Thus, the county agency's role is to arrange for the services that the recipient needs by negotiating arrangements with the providers who are qualified to furnish the necessary services.

This is consistent with the description provided by DHS Manager Lisa Rotegard at the hearing. Recognizing that a provider may not be qualified to meet the needs of every recipient, Rotegard explained that "Well the current approval with our federal partners are the, and through our state law is that, that counties hold contracts and the providers enroll with the state and the counties oversee the client care planning and service authorization." (Tran. 63). The county's role is to arrange by contract the package of services from qualified providers that meet the needs of the individual recipient.

C. Minn. Stat. § 256B.0915 does not establish standards for qualified providers of Elderly Waiver services, nor does it grant veto power over provider credentials to county agencies.

The Commissioner's Decision cites to Minn. Stat. § 256B.0915 in Conclusions 3, 5, and 7. However, the portions of the statute cited in these Conclusions relate to 'case management services', and do not support the result ordered by the Commissioner, that appellant cannot continue receiving **Elderly** Waiver services from his chosen qualified provider.

Minn. Stat. § 256B.0915, subd. 1, authorizes the Commissioner to apply for the home and community-based services waiver under § 1915(c) of the Social Security Act in ***30** order to obtain federal funding to expand the availability of these services. Subdivisions la and lb address a related but separate service, "**elderly** waiver case management services". Case management services have never been an issue in appellant's case, nor do these two subdivisions have any application to customized living services. The Commissioner's Conclusion 3 recites that the Commissioner is to enroll "qualified providers of **elderly** waiver case management services", and states that providers are qualified if they meet the standards of "subdivision lb". The conclusion and citation to § 256B.0915, subd. lb, in Conclusion 3 is simply irrelevant to the dispute.

Similarly, Conclusion 5 states that "The county has articulated concerns about whether Valleyview meets the qualifications and standards listed at subd. lb." (ADD-7). But Valleyview is simply not a 'provider of **elderly** waiver case management services', so the qualifications and standards at § 256B.0915, subd. lb, are inapplicable to this case.

Likewise in Conclusion 7, the Commissioner cites to § 256B.0915, subd. la(a) in holding that an eligible recipient may choose any qualified provider of **elderly** waiver case management services. This is a true statement, but inapposite to the issue before the tribunal. And the Commissioner also ignores from the cited text that the free choice provision relating to case management services carries through the same federal right that appellant is claiming with respect to the services that really are at issue in this case, 24-hour customized living services under the **Elderly** Waiver.

Minn. Stat. § 256B.0915 does address customized living services in subdivisions ***31** 3e (see ADD-23), and 3h (see ADD-24). Subd. 3e(a) directs that payment for customized living services is "a monthly rate negotiated and authorized by the lead agency within the parameters established by the commissioner." The agreement must "delineate the services that have been customized for each recipient and specify the amount of each service to be provided." (ADD-23). The county is required to "ensure that there is a documented need for all services authorized". Subdivision 3h addresses 24-hour customized living services in much the same language as in 3e(a), directing the county to document the need for services, ensure that the services meet the recipient's needs, and limiting the total payment so that it does not exceed the upper cost limit.

Absent from the Commissioner's Decision is any reference to § 256B.0915, subd. 8(a), which requires that "Services and supports shall meet the requirements set out in United States Code, title 42, section 1396n." (ADD-25). This language clearly incorporates into state law for waiver services the freedom of choice element stated in 42 U.S.C. § 1396n(c)(2(C) that requires a recipient to be informed of and given the choice of feasible alternatives to institutional care. The Valleyview facility is clearly a feasible alternative for appellant, lacking only a contract with the county. Nor does the Commissioner's Decision consider § 256B.0915, subd. 8(b), mandating that "Services and supports shall promote consumer choice and be arranged and provided consistent with individualized, written care plans." (ADD-25). The county agency's action here, as approved by the

Commissioner, negates rather than promotes appellant's choice, and has ***32** no apparent relationship to his individualized care plan.

D. The county agency's refusal to contract with appellant's chosen qualified provider is based on the county's interests, not on the needs, choices, or rights of the appellant. This refusal is unlawful.

The Home and Community-Based Services waiver application is based on "seven broad, participant-centered desired outcomes for the delivery of waiver services, including assuring participant health and welfare," as listed on the first page of the HCBS waiver application. (Exhibit 6; ADD-10). The county agency's refusal to contract with appellant's chosen provider, condoned by the Commissioner's Decision, is inconsistent with these guiding principles of the waiver.

The first listed element in the HCBS Quality Framework is participant access, so that individuals "have access to home and community-based services and supports in their communities." (ADD-10). Second is participant-centered service planning and delivery, so that the services are "effectively implemented in accordance with each participant's unique needs, expressed preferences and decisions concerning his/her life in the community." (*Id.*). Fourth is participant safeguards, so that a participant is safe and secure, "taking into account their informed and expressed choices". (*Id.*). Fifth is participant rights, so that participants "receive support to exercise their rights". (*Id.).* Sixth is participant outcomes and satisfaction, focusing on participants being "satisfied with their services and achieve desired outcomes". (*Id.*).

***33** The county agency's refusal to contract with appellant's provider denies him access to a provider in his community. One of appellant's main objections is that the county's action would force him to move out of the county, away from his physician and away from his daughter who is his guardian - this outcome is a form of "government-controlled health care" that has no legal authorization in the record or law of this case.

The county agency's refusal to contract with appellant's provider has nothing to do with appellant's unique needs and his expressed preferences and decisions about his life. The county's articulated reasons (see Findings 12, 13, 14; ADD-4, -5) negate appellant's choices and decisions about his life; the county's reasons [8] are "in the county's best interests" (Tran. 59), not centered on the participant's needs, preferences, and decisions.

The county agency's refusal to contract with appellant's provider does not take his choice into account, and does not support appellant's exercise of his federal right to freedom of choice. This is not in compliance with the waiver and is unlawful. The Commissioner has approved the county agency to act in complete disregard of the principles and purposes of the Home and Community-Based Services waiver. That decision must be reversed.

***34 E. The Court should defer to the Department of Human Services' written interpretation of federal requirements for operation of the Elderly Waiver program.**

The record in this case contains repeated statements from the Department of Human Services' program manager about the operation of the **Elderly** Waiver services under the HCBS Waiver. The Decision does not cite to or distinguish these statements, but Conclusion 4 errs in finding that "a DHS representative argue[s] that Valleyview would not be a qualified provider for the appellant because a lead agency does not have a contract with it." (Citing Rotegard testimony; ADD-7). This misstates Rotegar's testimony. When asked about "qualified", Rotegard made the point that one sense of the term is to be qualified by licensure, and the other sense is a practical one, whether the needs of the individual recipient can be met by the provider - a qualified provider may not be qualified to meet the needs of every individual.

But when that ambiguity was removed from the hypothetical question asked by Human Services Judge Manderfeld, Rotegard's answer was unequivocal.

Q: So if DHS has qualified the person and if the facility is meeting the needs of the individual based on their plan, is it, is it then I mean, I mean is it then still okay for the county to exclude, exclude this provider or refuse to contract with this provider based in large part on financial considerations?

A: I don't believe we could agree with that.

***35** (Tran. 78).

To the extent there may be ambiguity about the operation of the HCBS waiver programs, the Court should defer to the Commissioner's interpretation of the statutory scheme. Surely the **Elderly** Waiver program is, like the Minnesota Family Investment Program, "...a complex regulatory scheme that requires the technical expertise of the Commissioner to interpret and administer." *Greene v. Commissioner of Minn. Dept. of Human Services,* 755 N.W.2d 713, 722 (Minn. 2008).

Here, the Commissioner's conclusion is not reconciled with the testimony of the DHS manager at the hearing. After the February 20, 2009, hearing, Human Services Judge Manderfeld agreed to accept into the record the Department's April 20, 2009, Bulletin #09-25-03, addressing the county contracting process for the **Elderly** Waiver program. (See ADD-32). But the content of this Bulletin is not mentioned in the Decision.

The Bulletin's language expresses that when renewing Minnesota's HCBS waiver, CMS "expressed concern regarding the assurance of provider access for all qualified providers and the related concern of access and choice for waiver participants". (ADD-33). DHS states that it responded by tightening the contracting procedures and issuing a template. "The parameters of the contract cannot be altered in any way that would exclude otherwise qualified providers or restrict or create lack of choice for consumers among qualified providers." (ADD-34). Nothing in this Bulletin refers to ***36** Minn. Stat. § 256.0112 or any other means for a county to circumvent the contracting requirements. The language in the Bulletin is directly on point with appellant's claims.

The Commissioner's failure to rely on or to distinguish the Department's own interpretations of the applicable law is unexplained in the Decision, further indicating an arbitrary, unsustainable result. If there is any ambiguity in the statutory scheme for the **Elderly** Waiver program, the materials in this record documenting the Department's pronouncements interpreting the law "are entitled to some respect and may be used to persuade" the court. *Martin ex rel. Hoff v. City of Rochester,* 641 N.W.2d 1, 22 (Minn. 2002), citing to *Christensen v. Harris County,* 529 U.S. 576, 587 (2000). This Court should grant deference to the persuasive force of the the contents of DHS Bulletin # 09-25-03, which not only reinforces but goes beyond the hearing testimony from DHS Aging Manager Rotegard.

F. The general contracting authority delegated to counties under Minn. Stat. § 256.0112 does not grant Steele County unreviewable discretion to arbitrarily refuse to contract with an otherwise qualified provider chosen by an Elderly Waiver participant.

The Commissioner's Decision in this case rests almost entirely on Minn. Stat. § 256.0112 (reproduced at ADD-27). Conclusion 6 adopts the county agency position that "no provision of Minnesota law ...could force the board to execute a contract with a vendor". (ADD-7). The Commissioner cites § 256.0112, subd. 6(d), as "recogniz[ing] ***37** that the local agency may decline to negotiate a contract with a local vendor", and accepts that "There are no listed reasons why a county may decline to negotiate a contract." (ADD-7). Since the county can decline a contract for no reason and the provider needs a contract to be qualified, the Commissioner affirms refusal to pay for appellant's **Elderly** Waiver services. This legal theory is erroneous and must be reversed.

Minn. Stat. § 256.0112, subd. 1, provides general authority for counties to "purchase community social services by grant or purchase of service contract from agencies or individuals approved as vendors." This statute is not specific to **Elderly**

Waiver services or even to the Medical Assistance program, but covers all social services that are purchased by counties. The Commissioner cites to no language in § 256.0112 -for there is none - making this contracting function a vehicle to override federal law at the whim of a county board.

Minn. Stat. § 256.0112, subd. 1, does state that a county "may purchase" services from approved vendors. (ADD-27). Why does this grant of authority exist, permitting the counties to make such purchases? Subd. 2 indicates that the county is supposed to ensure that individual social services plans are developed based on client needs, and that the county should monitor its purchases and contracts based on client outcomes. Subd. 3 allows local written criteria for vendors only when the county purchases "from a vendor that is not subject to state licensing laws or department rules." Subd. 6 addresses the contracting function "within and across county lines," directing that once a local county ***38** agency arranges a contract with a vendor, that "lead county contract" governs all other local agencies with respect to that vendor. Subd. 6(a) (ADD-27).

The Commissioner's Decision in Conclusion 6 cites subd. 6(d) to recognize that a county "may decline to negotiate a contract with a local vendor". This statement abbreviates the process described in the statute. Subd. 6(b) provides that when a local county wants to purchase services and there is no contract with the vendor, the agency "must negotiate and execute a contract with the vendor". (ADD-28). This is clearly mandatory language 'forcing the county to execute a contract' - but it is in the context of a decision having first been made that the services of that vendor were needed. Missing from the Commissioner's Decision is recognition of the primary issue: a vendor has been chosen freely and is otherwise licensed and qualified to meet the recipient's needs. If the recipient does have the right to choose, then the local agency 'wants to purchase services' in order to meet the CMS quality standards for the **Elderly** Waiver program agreed to by Minnesota. In that circumstance, the county agency must negotiate and execute a contract with the vendor. That is what Rotegard meant when testifying that "... the expectation would be that they enter into a contract and authorize those services". (Tran. 61).

§ 256.0112, subd. 6(c), provides for one county agency to inquire from another county about a vendor contract when a county wants to purchase from a vendor in another county. Subd. 6(c) sets out a procedure for the two counties to follow, with a provision in subd. 6(d) for default or declination by the county where the vendor is located, but with ***39** the end result that a contract is arranged for the services that the county wants to purchase. Subd. 6(c)(3) requires that when a county "where the vendor is located will not negotiate a contract with the vendor because of concerns related to clients' health and safety, the agency must share those concerns with the inquiring agency." (ADD-28). In this case, the Steele County Human Services' director admitted that the agency had not responded to any other county agency that it would not do a contract with Valleyview because of concerns for clients' health and safety. (Tran. 29, test. of Harder). In this case the county agency did not use the portion of subd. 6 on which the Commissioner's Decision purports to be based.

The Commissioner's focus in Conclusion 6 is on a clause in § 256.0112, subd. 6(d), describing what an inquiring county should do when the county where a vendor is located declines to negotiate a contract for some reason. But the issue is not the abstract right of the county to make contracts or not. The reason for statutes regulating county contracting is to guide the counties in effectuating the federal and state programs that are administered at the local level. A county does not make a contract for no reason - but is required to make contracts as necessary to arrange for the needs of an individual's specialized plan of care. The county's refusal to contract comes at the expense of the person the county is supposed to be serving - instead the county board here has done what it perceives to be in its own best interests. (Tran. 59).

An administrative agency decision is arbitrary and capricious if the agency relied ***40** on factors which the legislature had not intended it to consider, or if it entirely failed to consider an important aspect of the problem. *Trout Unlimited, Inc. v. Minn. Dep't of Agric.*, 528 N.W.2d 903, 907 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995). The decision of the county agency refusing to contract is arbitrary under this standard because it entirely fails to consider the federal law structure of the **Elderly** Waiver program, which puts recipient choice foremost. With no fact-based reason that the facility was not meeting or could not meet appellant's specialized needs, the county's refusal is clearly an exercise of will, rather than judgment about how to fulfill the purposes of the HCBS waiver agreement by arranging for appellant's freely chosen services.

This same standard makes the Commissioner's Decision arbitrary and capricious. The Commissioner's reliance on generalized language in § 256.0112 pays no attention to how that statute is to operate within the legal structure of the **Elderly** Waiver, ignoring not just one important aspect but the entire problem - which is to meet the recipient's documented needs through freely chosen qualified providers. The Commissioner's Decision affirming cessation of services must be reversed.

***41 III. THE COMMISSIONER HAS PLENARY AUTHORITY OVER THE COUNTY AGENCY, WHICH INCLUDES DIRECTING THE COUNTY TO CONTRACT WITH APPELLANT'S FREELY CHOSEN QUALIFIED PROVIDER.**

The county agency's notice of cessation of appellant's **Elderly** Waiver payments stated that he could appeal the action. (Exhibit 5; App-1). Steele County Human Services argued that this was not an agency action but one by the county's Board of Commissioners that could not be reviewed or reversed by the Commissioner's appeal process because of a 'separation of powers' issue. (See, Conclusions 2; ADD-6).

The Commissioner's Decision lists as an issue for the hearing whether the "county's decision to end its contract... is an adverse action which may be the subject matter of a state fair hearing." (ADD-2). Although this question was not explicitly answered, Conclusion 1 states that the Commissioner "has jurisdiction over this appeal under Minn. Stat. § 256.045, subd. 3". (ADD-6). A state agency hearing is granted to "any person ***having received *** medical care, or a program of social services granted by the state agency or a county agency ***whose assistance is suspended, reduced, terminated". Minn. Stat. § 256.045, subd. 3(a)(1). This language clearly covers the appellant's situation.

Minn. Stat. § 256.045 in subd. 6(a) states that the Commissioner "may initiate a review of any action or decision of a county agency" and direct that a hearing be held. Since it is Steele County Human Services that issued the notice of cessation of benefits to appellant, the county agency's decision is reviewable through the appeal process under ***42** subd. 6(a) as well. Moreover, even if stopping appellant's benefits were completely a matter of local county discretion, the statute's text makes that subject to the authority of the Commissioner: "In all matters dealing with human services committed by law to the discretion of the county agency, the commissioner's judgment may be substituted for that of the county agency." Minn. Stat. § 256.045, subd. 6(a).

The respondent county agency has not cited any rule, statute, or provision of the Constitution to support its claim of 'separation of powers'. The statutes governing the human services system clearly vest plenary authority in the Commissioner of Human Services. The Commissioner has the authority to "administer and supervise all forms of public assistance provided for by state law". Minn. Stat. § 256.01, subd. 2(a). The Commissioner has the authority to "monitor, on an ongoing basis, the performance of county agencies in the operation and administration of human services" and to "enforce compliance with statutes, rules, federal laws, regulations, and policies governing welfare services". Minn. Stat. § 256.01, subd. 2(a)(2). The Commissioner has the authority to "require county agencies to make an adjustment to the public assistance benefits issued to any individual consistent with federal law and regulation and state law and rule and to issue or recover benefits as appropriate". Minn. Stat. § 256.01, subd. 2(a)(4).

These statutory provisions provide a complete answer to the county agency's unsupported assertion that 'separation of powers' prevents any remedy for the refusal to make a contract with appellant's freely chosen qualified provider of **Elderly** Waiver ***43** services. The Decision's conclusion to the contrary must be reversed.

CONCLUSION

Appellant has a clear right under federal and state law to freely chose to receive **Elderly** Waiver services from the qualified provider where he is residing. The Commissioner has clear supervisory authority to direct the county agency to effectuate appellant's choice through the normal contracting function that is delegated to the local county agency. The Commissioner's

Decision violates appellant's rights because it is inconsistent with the assurances given by Minnesota to CMS in the § 1915(c) Home and Community-Based Services waiver agreement. This Court must reverse the cessation of **Elderly** Waiver benefits.

Footnotes

1 Appellant appears in these proceedings through his daughter and legal guardian, Catherine Smith. Tran. 48.

2 The four pages of this DHS Bulletin, without its attachments, was accepted as part of the administrative record (see, May 12, 2009, letter by Human Services Judge Manderfeld) but was not marked as an exhibit. The Bulletin is reproduced at ADD-32 to -35. The document is also available at: http:// www.dhs.state.mn.us/main/groups /publications/documents/pub/dhs16_144764.pdf (visited on August 17, 2010).

3 This letter is included in the administrative record but was not identified with an exhibit number. Tran. 8.

4 Findings of Fact para. 6 needs a clarifying comment. The third sentence indicates that the present appeal is from the disenrollment action of South Central Health Alliance; the fifth sentence makes clear that appellant at the February, 20, 2009, hearing was no longer disputing the disenrollment, but only the county's refusal to continue appellant's **Elderly** Waiver services at the same facility when his eligibility was switched from the managed care plan-type of waiver to the fee-for-service waiver.

5 In Minnesota, “Approximately two-thirds of enrollees receive their Medicaid benefits through MCO's [managed care organizations]. Medical Assistance recipients age 65 and over are required to receive their Medical Assistance benefits through MCO's, with two exceptions: recipients who are required to pay a medical spenddown; and, certain people served by American Indian tribes. These recipients and those who are not yet enrolled in managed care may receive waiver services covered fee-for-service.” This explanation is part of Minnesota's approved § 1915(c) Home and Community Based Services Waiver application page 5, reproduced at ADD-14 (“Brief Waiver Description: Service Delivery Methods”). Because appellant does have a medical spenddown, appellant has not disputed the disenrollment from the managed care plan.

6 As described in Exhibit 11, a section from Minnesota's Health Care Programs Provider Manual, “Customized living services are up to 24 hours of supervision, individualized home care tasks, home health aide tasks, and home management tasks provided to recipients of a congregate living setting ... ”.

7 Recitation of a party's claims are not true findings of fact. Dean v. Pelton, 437 N.W.2d 762, 764 (Minn. App. 1989).

8 One of the county agency's asserted reasons is liability: “...[N]o matter how many hold harmless and indemnify clauses we have in contracts with vendors, people want to sue the county and the state doesn't, doesn't provide us any you know protection or tort limits or, or indemnify us when we're sued by recipients of provided providers.” (Tran. 57, test. of Harder). The Commissioner's Decision does not address Minn. Stat. § 256B.0915, subd. 8(c), which states that the county is not liable for damages, injuries, or liabilities arising from purchasing services under the federally approved waiver plan.

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