

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Petitioner,)
)
vs.) Case No. 11-2734
)
BETH SHALOM CORP., d/b/a BETH)
SHALOM HOME CARE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge, John D. C. Newton, II, of the Division of Administrative Hearings, heard this case, as noticed, on October 27, 2011, in Miami, Florida.

APPEARANCES

For Petitioner: Nelson E. Rodney, Esquire
Agency for Health Care Administration
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For Respondent: Brian J. Perrault, Jr., Esquire
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STATEMENT OF THE ISSUES

1. Did Respondent, Beth Shalom Corp., d/b/a Beth Shalom Home Care (Beth Shalom), violate the staffing standards of Florida Administrative Code Rule 58-5.031(2)(d), by failing to

contract with a registered nurse to provide limited nursing services to administer medication and feedings by a percutaneous endoscopic gastronomy tube for residents?

2. Did Beth Shalom violate the admission criteria requirements of section 429.26(1), Florida Statutes (2011)^{1/} and Florida Administrative Code Rule 58A-5.0181(4) (d)?

3. If Beth Shalom violated the staffing standards or admission criteria requirements, what penalty should be imposed?

PRELIMINARY STATEMENT

By a three-count Administrative Complaint dated April 25, 2011, Petitioner, Agency for Health Care Administration (AHCA), began proceedings to revoke the assisted living facility license of Beth Shalom and impose a fine of \$22,500.00. Beth Shalom requested a formal hearing. On May 26, 2011, AHCA referred the matter to the Division of Administrative Hearings (Division) for conduct of the requested hearing. On June 2, 2011, the Division set the case for hearing to be held August 11, 2011. In July, AHCA moved to amend the administrative complaint. The motion was granted.

The hearing was continued twice, once upon the agreed motion of the parties and once for the parties' failure to comply with the Order of Prehearing Instructions. In an Amended Prehearing Stipulation, the Agency withdrew Count III of the Amended Administrative Complaint.

The hearing was held October 27, 2011. AHCA presented testimony from Jonny Alter and Scott Tenney. AHCA's Exhibits 1, 2, and 3, were admitted into evidence. Beth Shalom presented testimony from Odalis Guaico, Victor Padilla, M.D., and Evelyn Olacregui, R.N. Beth Shalom Exhibits 88, 186, 657, 679, 720, 727, 767, 813, 835, 844, 944, 1082, 1211, 1296, 1298, 1299, 1300, 1301, 1302, 1304, 1305, 1306, 1307, 1308, 1311, 1312, 1313, 1314, 1315, 1316, 1318, 1321, and 1324, were admitted into evidence.

The proceedings were recorded and transcribed. The parties timely filed proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Beth Shalom and AHCA

1. Beth Shalom is a licensed six-bed Assisted Living Facility (ALF) with a Limited Nursing Services (LNS) license. It has been in operation for approximately 15 years and is located in Hialeah, Florida.

2. Since September 2010, Beth Shalom has had a contract with an R.N. to be available to serve residents as necessary. The contract was in effect for all of M.M.'s stay at Beth Shalom. The agreement with the R.N. provided, among other things, that the nurse was responsible for general supervision of nursing services for Beth Shalom residents and following

doctor's orders. It also provided that "[t]he LNS nurse will be available to [sic] any needs that the residents may have 24 hours a day as soon as the service starts [sic] order by MD." Beth Shalom's LNS Nurse Job Description includes the same requirements.

3. AHCA licenses and regulates ALFs. An ALF is a residential facility that provides housing, meals, and one or more personal services for more than 24 hours to one or more adults who are not related to the owner or administrator.

4. "Limited nursing services" are acts performed by people licensed under Florida's Nurse Practice Act in the course of their professional duties. But they are limited to acts that AHCA specifies by rule as allowed in ALFs. The limited acts cannot be complex enough to require 24-hour nursing supervision. They may include services such as care of routine dressings, care of casts, braces, and splints.

5. Periodic facility surveys are part of AHCA's oversight of ALFs. The surveyors who conduct the reviews are checking to determine compliance with statutes and rules governing ALFs. Surveyors may determine that an ALF has a Class I, Class II, Class III, or Class IV violation. Class I violations are the most severe. Class IV violations are the least severe.

6. AHCA may impose fines or other sanctions for any violation. Class I violations must be corrected within 24 hours

or a period that AHCA specifies. AHCA must impose a fine for Class I and Class II violations, even if the violation is corrected. Class III and Class IV violations must be corrected within a time specified by AHCA. If the facility timely corrects the violation, AHCA may not impose a fine.

7. In 2007, AHCA found that Beth Shalom had eight Class III violations. In 2008, AHCA determined that Beth Shalom had five Class III violations. In June of 2011, AHCA found that Beth Shalom had three Class III violations. In each instance, Beth Shalom timely corrected the violations. During Beth Shalom's 15 years of operation, AHCA has never imposed a fine, moratorium, suspension, or revocation on Beth Shalom.

8. Class III violations are conditions or occurrences related to the operation and maintenance of an ALF or to the care of clients which the agency determines indirectly or potentially threaten the physical or emotional health, safety, or security of clients, other than Class I or Class II violations. Class I and Class II deficiencies involve direct threats to the physical or emotional health, safety or security of ALF residents.

Patient M.M. and the AHCA Survey of April 6, 2011

9. M.M. resided at Beth Shalom at two different times. She was first admitted to Beth Shalom on August 1, 2006. Later she left. On October 19, 2009, M.M. was again admitted to Beth

Shalom after being discharged from a hospital. At that time, M.M. was terminally ill, in advanced-stage Parkinson's disease, had dementia, and was under the care of the Odyssey Hospice (Odyssey). But she did not require 24-hour nursing care.

10. When Beth Shalom admitted M.M. in 2009, a Percutaneous Endoscopic Gastronomy tube (PEG-tube) was in place. A PEG-tube runs through a patient's abdomen to the stomach. It is used to feed a patient and provide fluids and medicine.

11. Odyssey's Interdisciplinary Plan of Care for M.M. provided that she was to continue feeding and medication by way of the PEG-tube and provided for continuing education of the Beth Shalom staff about use of and care for the PEG-tube. M.M.'s physician's orders provided for medication to be administered by ALF staff through the PEG-tube. The orders do not state if the staff must be nurses.

12. At the time of admission and throughout her residence at Beth Shalom, M.M. required administration of medication by a third party. She was unable to administer medication herself, even with assistance.

13. Beth Shalom staff who were not licensed nurses provided M.M. food, fluids, and medication through her PEG-tube. They also cared for and cleaned the tube. This included providing M.M. cinnamon tea through the tube. There is no persuasive evidence that providing cinnamon tea through a PEG-

tube is any different than providing other fluids or presents any risk of harm to a patient.

14. Evelyn Olaciregui, R.N., the Odyssey case manager and nurse for M.M., was experienced in the care and use of PEG-tubes. She thoroughly instructed Beth Shalom's staff about use of and care for the PEG-tube. Ms. Olaciregui spent time to make sure the staff knew how to administer food, fluids, and medicines through the PEG-tube; how to care for the PEG-tube; and the signs of trouble that they should watch for.

15. When M.M. was admitted to Beth Shalom in October 2009, Ms. Olaciregui trained the staff in use of the PEG-tube for three days and then evaluated their abilities. She trained the staff to raise the patient's head and to flush the tube with water before and after feeding or medication. The staff performed the procedures properly. She also trained Beth Shalom staff about when to seek assistance from her or another licensed medical provider.

16. Ms. Olaciregui visited M.M. daily at the beginning of her stay at Beth Shalom and at the end. In between she visited M.M. two or three times a week.

17. Ms. Olaciregui checked the PEG-tube for cleanliness and function on each visit. Often during her visits, she observed the staff feeding M.M. or giving her medication. The staff performed the procedures properly. During M.M.'s stay at

Beth Shalom, the hospice nurse retrained the care givers every two weeks.

18. For example the hospice nurse's notes from her September 28, 2010 visit report:

Pt. has a PEG tube that is in place free of infections and functional. I stayed time enough in the ALF to re instructed [sic] the new employees and the owners about use of the PEG tube, feedings with the HOB elevated, flushing with water and I made a daily schedule of all feeding that has to receive [sic] the Pt. to place in a safe place and guide the employees and personnel. I re instruct [sic] about medications, and aspiration. I demonstrate how to feed Pt. and how reposition Pt. for feedings and sleep. ALF's employees also re instructed [sic] to report any new findings, 911 calls, disease process, aggressive treatment, hospice care, palliative treatments, PEG tube teaching, and on call services.

19. During M.M.'s 17-month stay at Beth Shalom, M.M. never had any problems due to her PEG-tube. Beth Shalom staff cared for and used the PEG-tube correctly. They provided M.M. good care. M.M. did not experience complications, such as gastrointestinal distress or infection, due to the PEG-tube, with one exception. A minor infection developed at the tube site. After Ms. Olaciregui consulted with a doctor, she successfully treated the infection with an antibiotic ointment.

20. On April 6, 2011, M.M. vomited. This was the onset of a period of intractable vomiting. Her caregiver at Beth Shalom promptly contacted Ms. Olaciregui who came to visit the patient.

Ms. Olaciregui conducted a thorough assessment of M.M. There were no signs of problems due to the PEG-tube or its use.

21. Also, on April 6, 2011, AHCA conducted a survey of Beth Shalom. The facts and charges at issue in this proceeding arise from that survey.

22. The AHCA survey determined that M.M.'s residence at Beth Shalom was a Class I violation and required that Beth Shalom correct the violation immediately. Beth Shalom did; it discharged M.M. to a hospital. M.M. died on April 7, 2011. Her death was not related in any way to the PEG-tube or the care she received at Beth Shalom.

PEG-tubes

23. Physicians install PEG-tubes for patients who suffer from an inability to swallow. The causes for the inability may include neuromuscular problems, dementia, or blockage of the esophageal tube.

24. The first three days after installation of a PEG-tube, the tube and the surrounding tissue should be cleaned intensively with hydrogen peroxide. Antibiotic ointment should be applied, and the gauze should be changed regularly. After the insertion area heals, PEG-tubes usually require only general but regular daily cleaning with soap and water.

25. Once the PEG-tube is successfully and safely installed, feedings and cleanings for most patients may safely

be performed by unlicensed caregivers who have been properly trained and have quick access to a nurse or other medical provider if a problem arises.

26. The caregiver must position a patient correctly, elevating the patient's head. The caregiver must be careful to ensure that the stomach is not over-filled. The patient must also be carefully observed. At any sign of difficulty, the caregiver should contact a medical provider such as a nurse.

27. PEG-tubes present the potential for complications including aspiration of vomit, infection, and bleeding. For most patients, the risk of these complications, however, is no greater than for other patients in similar situations or with similar complications. For instance, all bed-bound patients are at risk for aspiration, not just patients with PEG-tubes.

28. Administration of food, fluids, and medication by a properly trained layperson does not necessarily create an imminent danger or substantial probability of harm to the physical or emotional health, safety or security of ALF residents. It also does not necessarily present a direct threat to the physical or emotional health, safety or security of ALF residents. The risk depends upon the patient's conditions, the layperson, the layperson's training and actions, and accessibility to prompt medical assistance.

29. The persuasive evidence in this case establishes that patient health and safety do not require that only nurses or other licensed medical personnel administer feedings, liquids, or medications by PEG-tube. The evidence in this case did not prove that a nursing or other medical license is always medically necessary to safely feed ALF residents through PEG-tubes, clean PEG-tubes and the surrounding tissue, and administer medication through PEG-tubes.

30. The findings about the care, use, and risks of PEG-tubes are unique to the facts of this case. They are based on the evidence presented at the hearing. They necessarily required determinations of credibility and evaluations of persuasiveness. To the extent that the findings conflict with AHCA's evidence, it is because the evidence was not clear and convincing or as persuasive as other evidence. In particular, the AHCA evidence was not consistent with the weight of the undisputed evidence establishing that unlicensed friends and family caregivers often routinely and safely provide food, fluids, and medication by PEG-tube.

The Charges Against Beth Shalom

31. By the time of the hearing, AHCA was proceeding only on Counts I and II of the Amended Administrative Complaint (Complaint).

32. Count I alleges that administering food and medication through a PEG-tube is a nursing skill and that unlicensed Beth Shalom staff were administering food and medication through M.M.'s PEG-tube. It also alleges that this amounts to a violation of rule 58A-5.031(2)(d), requiring employment of or a contract with a licensed nurse who is available to serve residents when needed. Count I alleges that the violation is a Class I violation. It seeks revocation of Beth Shalom's license and a \$7,500.00, fine.

33. Count II alleges that because M.M. required use of the PEG-tube she should not have been admitted to Beth Shalom or retained there. This, Count II alleges, was a violation of section 429.26(1), Florida Statutes, and rule 58A-5.0181(4)(d). Count II alleges that this violation is also a Class I violation. It seeks revocation of Beth Shalom's license and a \$7,500.00 fine.

AHCA's Prior Practice

34. Before April 6, 2011, AHCA had never categorized serving an ALF resident with a PEG-tube as a Class I violation, although it was aware of PEG-tube residents in ALFs. Before April 2011, AHCA treated PEG-tube violations as Class II violations.

35. Treating the violation as a Class I violation was a change from AHCA's prior agency practice.

36. The only evidence AHCA presented to explain the change was testimony that the Class II practice was due to "lack of leadership" by a previous field office manager who was replaced in January or February of 2011. There were no changes in governing statutes, changes in rules, changes in PEG-tube technology, new medical studies, or new information about PEG-tubes, their use or their risks. AHCA also offered no evidence of varying treatment of PEG-tube violations in different geographic areas by different field office managers.

37. On April 28, 2011, AHCA sent a letter to each ALF in Florida advising the facilities of AHCA's position that a person with a PEG-tube may not be admitted to an assisted living facility with a standard, a limited mental health, or a limited nursing service license. The letter stated:

At no time may unlicensed staff, friends, family members or volunteers provide services or care that would involve the administration of medication, assistance with self-administration of medication via a peg-tube or assistance with feedings via a peg-tube. Unlicensed facility staff, friends, family members and volunteers are also precluded from removing, cleaning and adjusting a resident's peg-tube.

38. AHCA sent the letter because it learned from a meeting of providers in April and communications from ALF providers that many providers believed that they could admit residents with

PEG-tubes and permit feeding and medication by unlicensed individuals.

CONCLUSIONS OF LAW

39. The Division has jurisdiction over the subject matter and of the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes.

40. AHCA must prove the material allegations of the Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996), and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Clear and convincing evidence must be credible. The memories of witnesses must be clear and not confused. The evidence must produce a firm belief that the truth of allegations has been established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). Evidence that conflicts with other evidence may be clear and convincing. The trier of fact must resolve conflicts in the evidence. G.W.B. v. J.S.W. (in Re Baby E.A.W.), 658 So. 2d 961, 967 (Fla. 1995).

41. AHCA is limited to the charges articulated in the Complaint. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005). Those charges make clear that the facts AHCA relies on are the admission and continued residence of M.M., a patient with a PEG-tube, at Beth Shalom. The charges also make clear AHCA's position that only a licensed nurse or other

licensed medical provider may administer food and medicine through a PEG-tube to an ALF resident. But the charges specify violations of a statute and two rules that do not explicitly require that only a nurse or other licensed medical professional may administer food and medicine through a PEG-tube to an ALF resident.

Count I

42. Count I alleges Beth Shalom violated rule 58A-5.031(2)(d). Rule 5.031, governing LNS providers, establishes resident care standards for LNS facilities in section 2.

Rule 58A-5.031(2)(d) provides:

Facilities licensed to provide limited nursing services must employ or contract with a nurse(s) who shall be available to provide such services as needed by residents. The facility shall maintain documentation of the qualifications of nurses providing limited nursing services in the facility's personnel files.

43. AHCA's attenuated theory in this case is that, although Beth Shalom contracted with a nurse to provide services as needed by a resident, the fact that the nurse did not actually administer food and medication to M.M. amounts to a violation of the requirement to employ or contract with a nurse.

44. AHCA cobbles a rule and a statute together to form its theory. Rule 58A-5.0181 establishes the patient admission criteria for ALFs. Rule 58A-5.0181(1)(k)(2) specifies that

patients requiring assistance with tube feeding may not be admitted to an ALF. The rule categorizes tube feeding as a nursing service. Section 429.256(4)(e) provides that assistance with self administration of medication does not include assistance with "[a]dministration of medications by way of a tube inserted in a cavity of the body."

45. From this statute and this rule, AHCA argues that Beth Shalom did not satisfy the requirement to contract with or employ a nurse available to provide residents services as needed because the nurse did not administer M.M.'s food and medication. Even giving deference to AHCA's interpretation, the theory fails. See Mayo Clinic Jacksonville v. Dep't of Prof'l Reg., 625 So. 2d 918, 919 (Fla. 1st DCA 1993) (Clearly erroneous agency interpretations that do not honor the plain and ordinary meaning of words in a statute do not receive deference.).

46. AHCA's interpretation violates the prime principle of statutory construction that words should be given their plain, ordinary meaning. Sch. Bd. v. Survivors Charter Sch., Inc., 3 So. 3d 1220, 1233 (Fla. 2009). "Contract" has an established, ordinary meaning. It means to make a legally enforceable agreement. Webster's New Riverside University Dictionary 306 (1984). In addition, AHCA's theory does not make common sense. It relies on one hand, upon a rule that says a patient with a PEG-tube should not be admitted to an ALF. On the other hand,

AHCA maintains that it is permissible for a nurse to administer food and medication to the patient who should not be there.

Sch. Bd. v. Survivors Charter Sch., Inc., 3 So. 3d 1220, 1235 (Fla. 2009) ("We are not required to abandon either our common sense or principles of logic in statutory interpretation.").

47. AHCA, in the words of its ALF Supervisor, at page 64 of the hearing transcript, maintains that: "'Available' means that the services must be provided." "Available" is not a term of art or a medical term requiring special expertise to interpret. It is a common word with a commonly accepted meaning. "Available" means "accessible for use; at hand" or "having the qualities and the willingness to take on a responsibility." Webster's New Riverside University Dictionary 141 (1984). "Available" does not mean actually in use.

48. Count I charges that Beth Shalom violated Rule 58A-5.031(2)(d). The evidence in this case did not prove the violation alleged. Beth Shalom contracted with a nurse who was available to provide needed services. There is no evidence that the nurse was not available.

Count II

49. Count II alleges that because M.M. required use of the PEG-tube she should not have been admitted to Beth Shalom or retained there. This, Count II alleges, was a violation of section 429.26(1), Florida Statutes, and rule 58A-5.0181(4)(d).

50. Section 429.26(1) provides, in pertinent part:

The owner or administrator of a facility is responsible for determining the appropriateness of admission of an individual to the facility and for determining the continued appropriateness of residence of an individual in the facility. A determination shall be based upon an assessment of the strengths, needs, and preferences of the resident, the care and services offered or arranged for by the facility in accordance with facility policy, and any limitations in law or rule related to admission criteria or continued residency for the type of license held by the facility under this part.

51. The minimum criteria for admission establish the appropriateness of admission of an individual to an ALF. Fla. Admin. Code R. 58A-5.0181(1). Among other things they require that the resident must "[b]e capable of taking his/her own medication with assistance from staff, if necessary." Fla. Admin. Code R. 58A-5.0181(1)(e). But an ALF may admit a resident who cannot administer her own medication if the ALF "contracts with a licensed third party to provide the service." Fla. Admin. Code R. 58A-5.0181(1)(e)2. "Provide" is not the same as "available." "Provide" means to furnish or supply. Webster's New Riverside University Dictionary 948 (1984). The plain meaning of the word permits concluding that provision requires that the licensed person administer the medication.

52. The criteria for continued residence in an ALF are the same as for admission, with some exceptions. Rule 58A-5.0181(4)

provides: "Except as follows in paragraphs (a) through (e) of this section, criteria for continued residency in any licensed facility shall be the same as the criteria for admission."

Paragraph (d) reiterates the ALF administrator's continuing responsibility to monitor residents for continued appropriateness of placement.

53. Since Beth Shalom did not provide for a licensed party to administer M.M.'s medication, M.M. did not meet the criteria for admission to an ALF or the criteria for continued admission. Her placement and continued residence were not appropriate.

54. Beth Shalom relies upon rule 5.0181(4)(c), as permitting M.M.'s continued residency. That section permits a terminally ill resident who no longer meets the criteria for continued residency to remain if four requirements are satisfied. They are: (1) if the resident is under the care of a hospice that ensured provision of any additional care and services needed; (2) continued residency is agreeable to the resident and the facility; (3) the hospice develop and implements an interdisciplinary care plan, which may permit facility staff to provide nursing services; and (4) the facility maintains documentation of satisfaction of the requirements for the exception in the resident's file.

55. Reliance upon this exception fails for two reasons. First, M.M. was not appropriate for admission during her entire

stay because Beth Shalom did not provide the legally required nursing services, even though it had a nurse available to provide them. Second, the evidence does not establish that Beth Shalom maintained the required documentation in M.M.'s file. Fla. Admin. Code R. 58A-5.0181(4)(c)4.

56. AHCA proved the violation alleged in Count II of the Amended Complaint. Beth Shalom's administrator did not satisfy the requirements of section 429.26(1) and rule 58A-5.0181(4)(d) to ensure the appropriateness of M.M.'s placement.

The Penalty

57. AHCA maintains that Count II is a Class I violation and seeks revocation of Beth Shalom's license, as well as imposition of a \$7,500.00, fine. This is inconsistent with AHCA's prior practice of classifying PEG-tube violations as Class II violations. Section 120.68(7)(e) requires AHCA to explain this inconsistency with its prior practice. See also Exclusive Inv. Mgmt. & Consultants Inc. v Ag. for Health Care Admin., 699 So. 2d 311 (Fla. 1st DCA 1997). AHCA did not present a persuasive explanation. AHCA offered scant evidence to explain its changed position that PEG-tube violations were Class I violations. This terse testimony of the ALF Supervisor at page 80, of the hearing transcript is representative.

Q. And why were they [PEG-tube violations] cited as Class II's?

A. Lack of Leadership.

58. The following testimony at page 53, of the hearing transcript exemplifies AHCA's evidence of the process for and the reasoning for the change.

Q. And how did you determine that [non-licensed individuals administering food and medication through a PEG-tube presented a substantial probability of death or serious physical or emotional harm for a patient]?

A. In consultation with the agency nurses who are experienced in the matters of PEG-tube feedings. We also had a conference call with Tallahassee and in discussing it with the people in Tallahassee, it was determined that indeed this was a Class I violation.

59. In addition, the facts of this case do not support finding a Class I violation. A Class I violation presents "an imminent danger to the clients of the provider or a substantial probability that death or serious physical or emotional harm would result" from the violation. § 408.813(2)(a), Fla. Stat. The persuasive evidence did not prove that, in M.M.'s case, unlicensed individuals administering food and medication through her PEG-tube presented a substantial probability of death or physical or emotional harm. The persuasive evidence in this case also did not prove that, as a general practice, ALF residents always face a substantial probability of death or physical or emotional harm when properly trained unlicensed people administer food or medication through a PEG-tube. The

scant evidence of a probability of harm presented probability ranges so broad as to be meaningless.

60. A Class II violation is one in which "conditions or occurrences related to the operation and maintenance of a provider or to the care of clients which the agency determines directly threaten the physical or emotional health, safety, or security of the clients, other than class I violations." The persuasive evidence in this case did not establish that Beth Shalom's care for M.M. directly threatened M.M.'s physical or emotional health, safety, or security. The persuasive evidence in this case also did not establish that, in general, administration of food, fluids, and medication through a PEG-tube to ALF residents by unlicensed caregivers directly threatens the residents' health, safety, or security.

61. The facts of this case establish a Class III violation. Section 408.813(2)(c) defines a Class III violation as follows:

Class "III" violations are those conditions or occurrences related to the operation and maintenance of a provider or to the care of clients which the agency determines indirectly or potentially threaten the physical or emotional health, safety, or security of clients, other than class I or class II violations. The agency shall impose an administrative fine as provided in this section for a cited class III violation. A citation for a class III violation must specify the time within which the violation is required to be corrected.

If a class III violation is corrected within the time specified, a fine may not be imposed.

62. Admitting and retaining a patient who does not meet the criteria for admission presents indirect or potential threats to the patient. In this case, the nature of M.M.'s medical needs, the staff training by the hospice nurse, and the limited nature of PEG-tube feeding risks, based upon the persuasive evidence presented, resulted in M.M.'s not being at direct risk. But Beth Shalom's failure to abide by the admission and continued admission criteria that it provide for administration of M.M.'s medication by a licensed health care provider presented the indirect or potential threat of harm to this patient who could not administer her own medications.

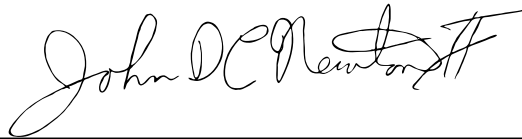
63. The survey specified that the violation should be corrected immediately. Beth Shalom immediately corrected the violation. Consequently, as section 408.813(2)(c) provides, Beth Shalom may not be fined for this violation.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Agency for Health Care Administration, (1) enter a final order dismissing Counts I and III^{2/} of the Amended Administrative Complaint and (2) enter a final order finding that Respondent, Beth Shalom Corp., d/b/a Beth Shalom Home Care, violated section 429.26(1), Florida

Statutes, and Florida Administrative Code Rule 58A-5.0181(4)(d), but imposing no penalty.

DONE AND ENTERED this 20th day of November, 2011, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of December, 2011.

ENDNOTES

^{1/} All citations to the Florida Statutes are to the 2011 edition unless otherwise noted.

^{2/} Dismissing Count III formalizes the withdrawal of Count III that occurred during the course of this proceeding.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.