

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Petitioner,)
) Case No. 11-2894MPI
vs.)
)
LA HACIENDA GARDENS, LLC,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on December 20, 2011, by video teleconference at sites in Miami and Tallahassee, Florida, before Administrative Law Judge (ALJ) Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Rachic Avanni Wilson, Esquire
Office of the General Counsel
Agency for Health Care Administration
2727 Mahan Drive, Suite 3431
Fort Knox Building 3, Mail Station 3
Tallahassee, Florida 32308

For Respondent: Norman J. Ginsparg, Esquire
Sefardik Associates, LLC
1221 West Dixie Highway
North Miami, Florida 33161

STATEMENT OF THE ISSUE

Whether Respondent, a Medicaid provider, committed the

violations alleged in the agency action letter dated March 14, 2011, and, if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

Respondent is an assisted living facility and a provider under the Florida Medicaid Program. Following a routine inspection, Petitioner determined that Respondent failed to have an authorized representative timely sign "Resident Service Plans" (RSPs) for eight residents as required by the Medicaid Assistive Care Services Coverage and Limitations Handbook. Petitioner proposes to fine Respondent \$1,000.00 for each violation, for a total of \$8,000.00.

Respondent thereafter timely requested a formal administrative hearing before DOAH, admitting the violations, but challenging the reasonableness of the sanctions. The matter was referred to DOAH, and this proceeding followed.

On December 7, 2011, Petitioner filed a Motion to Relinquish Jurisdiction premised on its assertion that there remained no disputed issues of material fact. Following hearing on the motion, the undersigned denied same on December 15, 2011.

At the final hearing, Petitioner presented the testimony of Marie Josue (an inspector with the Medicaid Program) and Horace Dozier (a Field Office Manager for the Medicaid Program). Petitioner offered 16 sequentially-numbered exhibits, each of which was admitted into evidence without objection. Respondent

presented the testimony of Claudia Pace (its administrator). Respondent offered two lettered exhibits, both of which were admitted into evidence without objection. At the request of Respondent and without objection from Petitioner, official recognition was taken of Petitioner's Responses to Respondent's First Set of Requests for Admissions.

A Transcript of the hearing was filed January 3, 2012. Both parties timely filed a Proposed Recommended Order, which have been duly considered by the undersigned in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to Florida Statutes (2011).

FINDINGS OF FACT

1. At all times relevant to this proceeding, Respondent has been a provider with the Florida Medicaid Program and has had a valid Medicaid Provider Agreement with Petitioner.

2. Petitioner is the agency of the State of Florida charged with the responsibility of administering the Florida Medicaid Program.

3. At all times relevant to this proceeding, Respondent was subject to all applicable federal and state laws, regulations, rules, and Medicaid Handbooks.

4. Respondent is required to comply with the Florida Medicaid Provider General Handbook (the General Handbook). The

General Handbook requires a provider to have medical documentation that justifies the necessity of services provided to a recipient. The General Handbook advises that sanctions may be imposed if appropriate documentation is not kept.

5. Respondent is an "Assistive Care Services" provider under the Florida Medicaid Program and is required to comply with the "Assistive Care Services Coverage and Limitation Handbook" (ACS Handbook). The ACS Handbook requires that each recipient of Assistive Care Services from the Florida Medicaid Plan have a RSP, and provides, in relevant part (at Petitioner's Exhibit 7, page 39):

Every [Assistive Care Services] recipient must have a service plan completed by the [Assistive Care Services] service provider. . . . The ALF [is] responsible for ensuring the service plan is developed and implemented.

6. The ACS Handbook further requires (at Petitioner's Exhibit 7, page 40):

The Resident Service Plan for Assistive Care Services (AHCA-Med Serv [sic] Form 036) must be completed within 15 days after the initial health assessment or annual assessment, be in writing, and based on information contained in the health assessment. . . .

7. The ACS handbook further provides (at Petitioner's Exhibit 7, page 40), that both the recipient (or the recipient's guardian or designated representative) and the ALF administrator

(or the person designated in writing by the administrator) must sign and date the RSP. The RSP is considered complete as of the last date signed by either party. The provider (in this case Respondent) is responsible for timely completing the RSP for each Medicaid recipient in its facility.

8. Inspector Marie Josue conducted an on-site visit to Respondent's premises on February 1, 2011. At the time of that inspection, Respondent reviewed a sample of ten RSPs for ten residents who received Assistive Care Services from the Florida Medicaid Program. Two of those ten RSPs had been timely signed and dated by the resident (or the resident's guardian or designee) and by Respondent's administrator (or the administrator's designee). The remaining eight RSPs had been timely signed and dated by the resident (or the resident's guardian or designee), but each had not been signed or dated by Respondent's facility administrator (or the administrator's written designee). Each RSP pre-dated February 1, 2011, by more than 15 days. The respective health assessments that formed the basis for each RSP occurred between March 23 and December 25, 2010.

9. Respondent subsequently provided Ms. Josue with certain records that she had requested, including copies of the eight RSPs at issue in this proceeding. When she reviewed those records, Ms. Josue discovered that Respondent's administrator

had signed and dated each previously unsigned RSP on February 1, 2011. Those signings by the administrator were untimely.

10. Ms. Josue forwarded the results of her investigation to Mr. Dozier with a recommendation that Respondent be sanctioned for violating the provisions of section 409.913(15)(e), Florida Statutes, by the imposition of a \$1,000.00 fine for each of the eight violations pursuant to Florida Administrative Code Rule 59G-9.070(7)(e).

11. When she made her recommendation, Ms. Josue understood that the cited rule required a minimum fine of \$1,000.00 per violation.

12. Mr. Dozier accepted that recommendation and prepared the agency action letter dated March 14, 2011. Mr. Dozier consulted with two of his fellow administrators before concluding that the fine recommended by Ms. Josue was appropriate. He testified that he could have charged Respondent with violating section violating section 409.913(15)(d), which could have resulted in an administrative fine in the amount of \$20,000.00^{1/} Mr. Dozier considered an administrative fine in the amount of \$8,000.00 to be more appropriate.

13. Based on services provided to Medicaid patients pursuant to approved RSPs, Respondent submits claims to the Florida totaling between \$6,450.00 and \$9,200.00 per month. Petitioner routinely pays those claims.

14. Each RSP at issue in this proceeding complied with the ACS Handbook except for the failure of the facility administrator (or designee) to timely sign the eight RSPs.

15. RSPs are the guides to the services that will be provided by Respondent and reimbursed by the Medicaid Program by Petitioner. The requirement that the administrator (or designee) sign each plan is an effort to combat fraud.

16. There was no evidence that the failure to sign the eight plans at issue in this proceeding was more than an error. Specifically, there was no evidence of fraud.

17. There was no allegation that the lack of the administrator's signature on the eight plans at issue had any effect on the care provided to the eight Medicaid patients.

18. Ms. Pace has been Respondent's administrator for over 13 years. Ms. Pace is familiar with RSPs and the rules and regulations governing the Florida Medicaid Program. Ms. Pace knew that the RSPs must be completed within 15 days of the assessment by a physician. Ms. Pace knew that the patient (or designee) and the administrator (or designee) must sign the RSP for it to be complete. Ms. Pace acknowledged that the eight RSPs at issue in this proceeding were not signed by anyone on behalf of the provider until February 1, 2010.

19. Ms. Pace had designated a subordinate to sign the eight PSAs at issue in this proceeding on behalf of the

provider. She had no explanation why those RSPs were not timely signed by anyone on behalf of the provider.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1).

21. The purpose of the Florida Administrative Code Rule 59G-9.070(1) is as follows:

PURPOSE: This rule provides notice of administrative sanctions imposed upon a provider, entity, or person for each violation of any Medicaid-related law.

22. Petitioner seeks to impose sanctions against Respondent for violating section 409.913(15)(e), which is as follows:

(e) The provider is not in compliance with provisions of Medicaid provider publications that have been adopted by reference as rules in the Florida Administrative Code; with provisions of state or federal laws, rules, or regulations; with provisions of the provider agreement between the agency and the provider; or with certifications found on claim forms or on transmittal forms for electronically submitted claims that are submitted by the provider or authorized representative, as such provisions apply to the Medicaid program;

23. Florida Administrative Code Rule 59G-9-070 provides disciplinary guidelines relevant to this proceeding. Subsection

(7) (e) of that rule specifically references section 409.913(15) (e) and provides, in relevant part, as follows:

(e) For failure to comply with the provisions of the Medicaid laws: For a first offense, \$1,000.00 per claim found to be in violation. . . .

24. Subsection 409.913(16) provides, in relevant part, as follows:

(16) The agency shall impose any of the following sanctions or disincentives on a provider or a person for any of the acts described in subsection (15):

* * *

(c) Imposition of a fine of up to \$5,000 for each violation. Each day that an ongoing violation continues, such as refusing to furnish Medicaid-related records or refusing access to records, is considered, for the purposes of this section, to be a separate violation. . . .

* * *

The Secretary of Health Care Administration may make a determination that imposition of a sanction or disincentive is not in the best interest of the Medicaid program, in which case a sanction or disincentive shall not be imposed.

25. Subsection 409.913(17) provides, in relevant part, as follows:

(17) In determining the appropriate administrative sanction to be applied, or the duration of any suspension or termination, the agency shall consider:

(a) The seriousness and extent of the violation or violations.

(b) Any prior history of violations by the provider relating to the delivery of health care programs which resulted in either a criminal conviction or in administrative sanction or penalty.

(c) Evidence of continued violation within the provider's management control of Medicaid statutes, rules, regulations, or policies after written notification to the provider of improper practice or instance of violation.

(d) The effect, if any, on the quality of medical care provided to Medicaid recipients as a result of the acts of the provider.

(e) Any action by a licensing agency respecting the provider in any state in which the provider operates or has operated.

(f) The apparent impact on access by recipients to Medicaid services if the provider is suspended or terminated, in the best judgment of the agency.

The agency shall document the basis for all sanctioning actions and recommendations.

26. Respondent's primary contention is that the amount of the fine should be reduced because Mr. Dozier did not consider the factors set forth in section 409.913(17). Respondent also contends that the amount of the fines is excessive when compared to Respondent's billings to the Medicaid Program. Those contentions are rejected because the agency has adopted a rule that specifies the amount of the sanction for the violations at issue in this proceeding.

27. The sanction letter issued by Mr. Dozier relied on Florida Administrative Code Rule 59G-9-070(7)(e), which clearly provides that for first offense violations the administrative fine is to be \$1,000.00 per violation. That rule is the expression by Petitioner of its interpretation of a statute it is charged with enforcing. See § 120.52(16) Fla. Stat. As such, deference should be given the rule until it is repealed, amended, or determined to be invalid. See Verizon Fla. v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002); Creative Choice XXV, LTD. v. Fla. Hous. Fin. Corp., 991 So. 2d 906, 908 (Fla. 1st DCA 2002); and Colonnade Med. Ctr., Inc. v. Ag. for Health Care Admin, 847 So. 2d 540, 542 (Fla. 4th DCA 2002).

28. Respondent has not challenged the validity of that rule pursuant to section 120.56.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the Agency for Health Care Administration enter a final order finding La Hacienda Gardens, LLC, guilty of the eight violations of section 409.913(15)(e) alleged in the agency action letter dated March 14, 2011. It is further recommended that the final order impose administrative fines in the amount of \$1,000.00 per violation for a total of \$8,000.00.

DONE AND ENTERED this 1st day of February, 2012, in
Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of February, 2012.

ENDNOTE

^{1/} Section 409.913(15)(d) makes it a violation for the provider to fail "to maintain medical records made at the time of service, or prior to service, if prior authorization is required, demonstrating the necessity and appropriateness of the goods or services rendered." Florida Administrative Code Rule 59G-9.070(7)(d) imposes a sanction for violating section 409.913(15)(d) of \$2,500.00 per violation if there are more than two patients for which no records are maintained.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 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.