STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

ALTERNATIVE CARE STAFFING, INC.,

Respondent.
_____/

DOAH CASE NO. 13-4642MPI
C.I. NO. 11-1872-000
RENDITION NO.: AHCA-14-0771 -FOF-MDO

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), John D.C. Newton II, issued a Recommended Order after conducting a formal hearing. At issue in this proceeding is whether the Agency for Health Care Administration ("Agency") is entitled to recover alleged Medicaid overpayments from Respondent, and whether a fine should be imposed on Respondent. The Recommended Order dated July 28, 2014, is attached to this Final Order and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

Both parties filed exceptions to the Recommended Order.

In determining how to rule upon each party's exceptions and whether to adopt the ALJ's Recommended Order in whole or in part, the Agency for Health Care Administration ("Agency" or "AHCA") must follow Section 120.57(1)(*l*), Florida Statutes, which provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or

> interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. . . .

§ 120.57(1)(*l*), Fla. Stat. Additionally, "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat. In accordance with these legal standards, the Agency makes the following rulings on both parties' exceptions:

Petitioner's Exceptions

In its first exception, Petitioner takes exception to the Statement of the Issues in the Recommended Order, arguing that a clarification should be made concerning Exhibit A to the proposed recommended orders and the Recommended Order. However, the Statement of the Issues contains neither findings of fact or conclusions of law. Thus, a party cannot take exception to it. See § 120.57(1)(*l*), Fla. Stat. Therefore, the Agency must deny Petitioner's first exception.

In its second exception, Petitioner takes exception to the last sentence of Paragraph 26 of the Recommended Order, arguing that it incorrectly suggests that there was a legitimately raised dispute of whether representative claims were properly input into the extrapolation formula. It appears that Petitioner is confused over the meaning of that sentence. It is obvious that the ALJ meant the issue in dispute revolves around the Agency's decision concerning whether the claims

in the representative sample were correctly billed by Respondent. This is consistent with all prior cases involving cluster sampling, as well as the issues raised in the parties' Joint Pre-hearing Stipulation. Therefore, the Agency denies Petitioner's second exception.

In its third exception, Petitioner takes exception to the findings of fact in Paragraph 40 of the Recommended Order, arguing that the findings of fact are not based on competent, substantial evidence and cannot be used to support a claim of equitable estoppel against the Agency. The "findings of fact" in Paragraph 40 of the Recommended Order are, in reality, the ALJ's ultimate findings on the issue of whether Respondent was permitted by law to provide companion services to four recipients who resided in a group home at the time the services were provided. Since these ultimate findings are infused with policy considerations, they fall within the Agency's substantive jurisdiction, and the Agency finds that they are not based on competent, substantial evidence. When Respondent voluntarily agreed to become a Medicaid provider, it agreed to "comply with local, state, and federal laws, as well as rules, regulations and statements of policy applicable to the Medicaid program, including the Medicaid Provider Handbooks issued by AHCA." See Petitioner's Exhibit 1 (emphasis added). The Developmental Disabilities Waiver Services Coverage and Limitations Handbook clearly states that "Recipient's [sic] living in licensed residential settings, excluding foster homes, are not eligible to receive [companion] services." See Petitioner's Exhibit 12 at Bates-stamped page 1111 (emphasis added). Recipients 7, 13, 14 and 25 resided in a licensed group home at the time Respondent provided, and billed Medicaid for, companion services to them. Thus, Respondent violated the provisions of the Developmental Disabilities Waiver Services Coverage and Limitations Handbook. The opinion Respondent received from the Agency for Persons with Disabilities ("APD") on the issue has no bearing on this issue because AHCA, not APD, is the

single state agency in charge of administering Florida's Medicaid program, and its interpretation of the laws and rules governing such program is the only one entitled to deference. Therefore, the Agency grants Petitioner's third exception and modifies Paragraph 40 of the Recommended Order as follows:

> 40. In light of the Agreement, the way in which the Agency and APD held themselves out to providers, the relationship between APD and providers, the practice of relying upon APD for guidance about the HCB Waiver, the approval of the support plans, and the subsequent issuance of service authorizations, Alternative ~~reasonably~~ relied upon APD-approved support plans and the waiver support coordinator-provided service authorizations when providing and obtaining payment for companion services to Recipients 7, 13, 14, and 25. However, by virtue of being a Medicaid provider, Respondent should have known that its billing for these recipients clearly violated the provisions of the Developmental Disabilities Waiver Services Coverage and Limitations Handbook.

In its fourth exception, Petitioner takes exception to the finding of fact in the second (or last) sentence of Paragraph 41 of the Recommended Order, arguing that the issue in the finding was not timely raised by Respondent, and that Respondent had, in fact, stipulated that "the sampling and extrapolation techniques used by the Agency are professionally accepted and valid, and were appropriately applied in this matter." While there may be factual evidence that Recipients 7, 13, 14 and 25 were the only recipients served by Respondent who resided in licensed residential facilities (See Transcript, Volume II, Pages 230-231), the ALJ's legal conclusion that they should not be used when calculating the extrapolated overpayment amount is erroneous. First, as pointed out by Petitioner in its exception, the parties stipulated to "[t]he sampling and extrapolation methodologies used by the Agency are professionally accepted and valid, and were appropriately applied in this matter." See IX. 6. of the parties' Joint Pre-hearing Stipulation. Second, there was no record evidence presented on what, if any, effect the inclusion

or exclusion of the claims for these four recipients in the overall sample would have on the extrapolated overpayment amount. Thus, it was improper for the ALJ to reach such a legal conclusion. Therefore, the Agency finds that it has substantive jurisdiction over the ALJ's conclusion of law in the second sentence of Paragraph 41 of the Recommended Order, and that it can substitute a conclusion of law that is as or more reasonable than that of the ALJ. Therefore, Petitioner's fourth exception is granted, and Paragraph 41 of the Recommended Order is hereby modified as follows:

> 41. ~~In addition,~~ While there is ~~the weight of the persuasive~~ evidence ~~establishes~~ that Recipients 7, 13, 14, and 25 are the only recipients living in a licensed residential facility for which Alternative received payments for companion services provided during the audit period~~.~~, ~~Consequently,~~ there is no evidence that ~~using~~ excluding those claims ~~to extrapolate to a recipient-wide population is not factually supported~~from the extrapolation process (that the parties stipulated was appropriately applied in this matter) would have any effect on the extrapolated overpayment amount itself considering that those claims are only a small fraction of the total claims included in the sample.

In its fifth exception, Petitioner takes exception to the conclusions of law in Paragraph 118 of the Recommended Order, arguing that the second-to-last sentence of the paragraph is a finding of fact that is not based on competent, substantial evidence. The Agency agrees. There is nothing in the record to support the ALJ's finding that "The Agency does not dispute that estoppel may be applied in a proceeding before DOAH." Therefore, the Agency grants Petitioner's fifth exception and modifies Paragraph 118 of the Recommended Order as follows:

> 118. The DD Handbook in effect at the time the Agency paid Alternative for providing companion services to residents of licensed facilities did not allow payment for the services. This Alternative acknowledges. But it argues that the facts here present one of the exceptional cases in which estoppel may be applied against the state. The Agency ~~does not dispute that estoppel may be applied in a proceeding before DOAH. But it~~ argues that in this

case the facts do not meet the standards for application of estoppel against the state.

In its sixth exception, Petitioner takes exception to the conclusions of law in the last sentence of Paragraph 119 of the Recommended Order, the second and third sentences in Paragraph 121 of the Recommended Order, and the first sentence of Paragraph 122 of the Recommended Order, arguing that the ALJ erred in reaching these conclusions of law. The Agency agrees. As stated in the ruling on Petitioner's third exception supra, APD's representations have no bearing on whether Respondent was overpaid for the services provided to Recipients 7, 13, 14 and 25. Respondent was required to comply with the relevant Medicaid provider handbooks, and the Developmental Disabilities Waiver Services Coverage and Limitations Handbook clearly prohibits a Medicaid provider from providing companion services to a recipient who resides in a licensed residential setting. Furthermore, "[p]rior approval does not justify payment when contrary to law." Agency for Health Care Admin. v. Florida Hospital Orlando, DOAH Case No. 11-2892 (DOAH May 3, 2012; AHCA June 18, 2012). Since the Agency is the single state agency charged with administering Florida's Medicaid program (Section 409.902(1), Florida Statutes) it finds that it has substantive jurisdiction over the conclusions of law in Paragraphs 119, 121 and 122 of the Recommended Order, and that it can substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency grants Petitioner's sixth exception and modifies Paragraphs 119, 121 and 122 of the Recommended Order as follows:

> 119. In order to establish estoppel, the party must show a misrepresentation of a material fact contrary to a later claimed position, reliance on the misrepresentation, and a detrimental change in position because of the representation and reliance. Council Bros., Inc. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994). To establish estoppel against the state, a party must also show affirmative conduct by the government

beyond negligence, that not applying estoppel will cause a serious injustice, and that applying estoppel will not unduly harm the public interest. Alachua Cnty. v. Cheshire, 603 So. 2d 1334, 1337 (Fla. 1st DCA 1992). ~~The compelling facts here establish proper circumstances for the application of estoppel.~~Here, APD's actions in no way bind the Agency because the Agency is the only state agency charged with administering Florida's Medicaid program, and the Agency's Developmental Disabilities Waiver Services Coverage and Limitations Handbook clearly prohibited Respondent from providing companion services to recipients who resided in licensed residential facilities.

121. Alternative incorrectly relied upon the representations of APD by its practice of approving support plans and by providing the services to the benefit of the recipients instead of complying with the provisions of the Agency's Developmental Disabilities Waiver Services Coverage and Limitations Handbook. ~~Requiring Alternative to repay substantial sums, when it provided the services, would be a serious injustice. Applying estoppel will not unduly harm the public interest since the recipients received the benefit of the companion services.~~

122. For this reason, the payments to Alternative for companion services provided to residents of licensed residential facilities should ~~not~~ be disallowed ~~or included in the recoupment calculation~~. There is an additional reason that the payments should not be used in the Agency's extrapolation.

In its seventh exception, Respondent takes exception to the conclusions of law in the second sentence of Paragraph 122 of the Recommended Order and Paragraph 125 of the Recommended Order, arguing that they are erroneous. Based upon the reasoning set forth in the Agency's ruling on Petitioner's fourth exception supra, the Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraphs 122 and 125 of the Recommended Order, and that it can substitute conclusions of law that are as or more reasonable than that of the ALJ. Therefore, the Agency grants Petitioner's seventh exception and rejects the conclusions of law in the second sentence of Paragraph 122 and in all of Paragraph 125 of the Recommended Order in their entirety.

In its eighth exception, Petitioner takes exception to the conclusions of law in Paragraph 126 of the Recommended Order, arguing that the ALJ misinterpreted and misapplied the cited excerpt from APD Procedure No. APD 18-002. Based upon the reasoning set forth in the Agency's rulings on Petitioner's third and sixth exceptions, the Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraph 126 of the Recommended Order, and that it can substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency grants Petitioner's eighth exception, and rejects the conclusions of law in Paragraph 126 of the Recommended Order in their entirety.

In its ninth exception, Petitioner takes exception to the conclusions of law in Paragraph 141 of the Recommended Order, arguing that the ALJ's conclusions of law are based on an erroneous interpretation of the applicable sanction statutes and rules. As stated in Ag. for Health Care Admin. v. Gonzalez, DOAH Case No. 10-0262MPI (DOAH Recommended Order November 23, 2010; AHCA Final Order February 2, 2011), Section 409.913(16), Florida Statutes, states that the Agency's Secretary may, in her discretion, find that imposing a sanction will not serve the best interests of the Medicaid program. The Agency reads the language of Section 409.913(16), Florida Statutes, to mean that, in order for the ALJ to recommend that a fine not be imposed, the ALJ must first make a finding that the Secretary of AHCA has made a determination that the imposition of a sanction or disincentive is not in the best interest of the Medicaid program. See § 409.913(16), Fla. Stat. If no such finding is made, then Section 409.913(16)(c), Florida Statutes, dictates that "[t]he agency shall impose ... a fine of up to $5,000 ... [for] [e]ach instance of improper billing of a Medicaid recipient." (Emphasis added).

Here, the Agency's Secretary did not find that a sanction was not in the best interests of the Medicaid program. The Agency's Final Audit Report imposed a fine, and the Agency

specifically asked the ALJ to adopt the findings of the Final Audit Report as they related to the fine. See Pages 39 and 40 of Petitioner's Proposed Recommended Order. Since the ALJ found several instances where the Respondent improperly billed Medicaid for services to a Medicaid recipient (See Paragraphs 46, 48, 52, 56, 63, 66, 70, 72, 76, 79-80, 83, 87, 91-92, and 102) and did not make any finding that AHCA's Secretary had determined that imposition of a sanction is not in the best interest of the Medicaid program in this case, he erred by concluding that the imposition of a fine in this matter would not be appropriate. The Agency finds that it has substantive jurisdiction over the ALJ's conclusions of law in Paragraph 141 of the Recommended Order since it is the single state agency responsible for administering Florida's Medicaid program and for ensuring state compliance with federal Medicaid laws and rules (§ 409.902(1), Fla. Stat.), and that it can substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency grants Petitioner's exception and modifies the ALJ's conclusions of law in Paragraph 141 of the Recommended Order as follows:

> 141. ~~Weighing all the factors in section 409.913(17) mitigates the imposition of any fine upon Alternative. There is no evidence of previous administrative sanctions, no evidence that Alternative continued any of the errors after being advised of them, no evidence of any negative effect on patient care, no evidence of an impact upon access to services, and no evidence of action against Alternative by other jurisdictions.~~The Agency's imposition of a fine against Respondent is hereby upheld since there is no evidence that the Secretary of the Agency found that such imposition would not be in the best interests of the Medicaid program.

Respondent's Exceptions

In Exception 1.a., Respondent takes exception to the findings of fact in Paragraphs 45 and 46 of the Recommended Order, arguing that the findings are actually an erroneous interpretation of an administrative rule. Respondent also argues that, if these paragraphs are findings of fact, they are not based on competent, substantial evidence. The Agency finds that

Paragraphs 45 and 46 of the Recommended Order are purely factual findings, and that they are based on competent, substantial evidence. See Transcript, Volume III, Page 289; Petitioner's Exhibit 8 at Pages 450-451. As such, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Therefore, the Agency must deny Exception 1.a.

In Exception 1.b., Respondent takes exception to the findings of fact in Paragraphs 48 and 49 of the Recommended Order based on its arguments in Exception 1.a. Based upon the reasoning set forth in the Agency's ruling on Exception 1.a. supra, the Agency must also deny Exception 1.b.

In Exception 1.c., Respondent takes exception to the conclusions of law in Paragraph 131 of the Recommended Order as they relate to Benjamin Alvarez. Based on the reasoning set forth in the Agency's ruling on Exception 1.a. supra, the Agency also denies Exception 1.c.

FINDINGS OF FACT

The Agency adopts the findings of fact set forth in the Recommended Order, except where noted supra.

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order, except where noted supra.

IT IS THEREFORE ADJUDGED THAT:

Based upon Paragraphs 2-15[1] of the ALJ's Recommendation, as well as the parties' stipulation to some of the claims at issue, Respondent is hereby required to repay an extrapolated overpayment amount of $155,747.97, plus interest at a rate of ten (10) percent per annum as

[1] The Agency does not accept the ALJ's recommendations in Paragraphs 1 and 16 of the Recommendation section of the Recommended Order as evidenced by its rulings on Petitioner's exceptions supra.

required by Section 409.913(25)(c), Florida Statutes, to the Agency. In addition, the Agency hereby imposes a $6,000 fine[2] on Respondent. Respondent shall make full payment of the overpayment and fine to the Agency for Health Care Administration within 30 days of the rendition date of this Final Order unless other payment arrangements have been agreed to by the parties. Respondent shall pay by check payable to the Agency for Health Care Administration and mailed to the Agency for Health Care Administration, Office of Finance and Accounting, 2727 Mahan Drive, Mail Stop 14, Tallahassee, Florida 32308.

Additionally, the parties shall attempt to agree to amount of investigative, legal, and expert witness costs for this matter. If the parties are unable to reach such agreement, either party may file a request for hearing with the Division of Administrative Hearings under this case style within 30 days of the date of rendition of this Final Order, and the Administrative Law Judge who presided over this matter shall determine the amount of such costs.

DONE and ORDERED this 9 day of September 2014, in Tallahassee, Florida.

ELIZABETH DUDEK, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

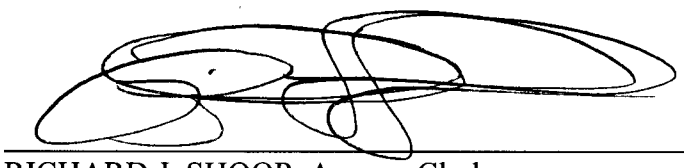
[2] The original fine amount imposed by the Agency (20% of the overpayment amount) was based on the wrong version of Rule 59.G-9.070(7)(e), Florida Administrative Code. The Agency should have imposed a fine on Respondent in accordance with the 2008 version of the rule, which would have resulted in the amount reflected above.

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY ALONG WITH THE FILING FEE PRESCRIBED BY LAW WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U.S. or interoffice mail to the persons named below on this 10th day of September, 2014.



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