STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

vs. Case No. 14-0136MPI

THE CHRYSALIS CENTER, INC.,

Respondent.
_____/

FINAL ORDER

On October 21, 2014, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing in Tallahassee, Florida.

APPEARANCES

For Petitioner: Steven L. Perry, Esquire
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PL-01, The Capitol
Tallahassee, Florida 32399-1050

For Respondent: Steven A. Grigas, Esquire
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Tallahassee, Florida 32301

Eduardo R. Lacasa, Esquire
The Chrysalis Center, Inc.
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STATEMENT OF THE ISSUE

The issue is the determination of reasonable attorneys' fees, under section 57.105(1)(a) and (5), Florida Statutes, incurred by Respondent in defending Petitioner's claims for the recovery of alleged Medicaid overpayments and the imposition of fines and costs.

PRELIMINARY STATEMENT

By Final Audit Report (FAR) dated July 10, 2013,[1/] Petitioner advised that it was seeking to recover overpayments to Respondent totaling $284,535.83, impose fines of $56,907.17, and assess costs of $172.29. The FAR determined that the billed services provided by Respondent were reimbursable to various managed care organizations (MCOs) under the Nursing Home Diversion Waiver (NHDW) program standard contract and thus should not have been reimbursed to Respondent on a fee-for-service basis.

After obtaining an extension of time, by letter dated August 23, 2013, Respondent requested a hearing or, in the alternative, a revision to the FAR to reduce the total overpayments to $2,587.38. Respondent stated that it had properly billed and obtained payment for all but $2,587.38 of the paid services. Respondent's letter stated that nearly all of the Healthcare Common Procedure Coding System procedure codes (Codes) at issue--psychosocial rehabilitation services (Code H2017),

therapeutic behavioral services (Code H2019HR), and treatment plan review (Code H0032TS)--are services that Respondent properly billed on a fee-for-service basis. The overpayment amount of $2,587.38 represents the total overpayment attributable to services under all of the Codes other than Codes H2017, H2019HR, and H0032TS.

The August 23 letter states that Mr. Keith Young, a program analyst employed by Petitioner, had previously determined that services under the three above-mentioned Codes were reimbursable on a fee-for-service basis, even when the recipients were enrollees of NHDW plans, because the NHDW service contract does not cover services under these codes. The letter adds that Ms. Megan O'Malley, a program analyst employed by the Department of Elder Affairs (DOEA), agreed with Mr. Young.

On September 10, 2013, Petitioner transmitted the file[2/] to DOAH. Three days later, the parties filed an Agreed Motion to Relinquish Jurisdiction, which was granted on September 16, 2013. Subsequently, on January 9, 2014, unable to settle the dispute, Petitioner filed a Motion to Reopen Proceedings. By Notice of Hearing issued January 15, 2014, the Administrative Law Judge set the final hearing for March 17, 2014.

On February 25, 2014, Respondent filed a Notice of Intent to Seek Costs and Fees. The notice cites sections 57.105, 57.111, and 120.595, Florida Statutes, and "other applicable law."

The hearing on the overpayment issue took place as scheduled. This hearing will be referred to as the Overpayment Hearing, and the corresponding case will be referred to as the Overpayment Case. The hearing setting the amount of attorneys' fees will be referred to as the Fees Hearing, and corresponding case will be referred to as the Fees Case. References to the "recommended order" are to the recommended order of the undersigned in the Overpayment Case, references to the "Final Order" are to Petitioner's final order on the recommended order, and references to the "final order" are to this order on the Fees Case.

On May 16, 2014, the parties filed proposed recommended orders. On June 3, 2014, the Administrative Law Judge issued the recommended order. On July 2, 2014, Respondent filed a Petition for Proceeding to Establish Amount of Reasonable Attorneys' Fees. On September 2, 2014, Petitioner filed the Final Order, which adopted the recommended order, except for certain matters concerning Petitioner's liability for reasonable attorneys' fees under section 57.105, Florida Statutes. After the issuance of the recommended order, Petitioner appealed the determination that it was liable for reasonable attorneys' fees, but the appellate court later dismissed the appeal as premature until the liability determination was joined by an award of reasonable attorneys' fees.[3/]

At the start of the Fees Hearing, the Administrative Law Judge acknowledged that Respondent was seeking costs, in addition to fees, but that the notice to Petitioner of this claim was inadequate. The Administrative Law Judge offered to conduct an evidentiary hearing on costs at a later date, if the parties were unable to agree upon an alternative means to present the factual and legal issues as to costs. The parties have not subsequently addressed this matter.

At the Fees Hearing, Petitioner called one witness and offered into evidence one exhibit: Petitioner Exhibit 1. Respondent called three witnesses and offered into evidence six exhibits: Respondent Exhibits 1 through 6. All exhibits were admitted, but, as to Respondent Exhibit 4, the pages starting with "filename" are hearsay and were admitted solely to supplement or explain other admissible evidence, pursuant to section 120.57(1)(c), Florida Statutes.

The court reporter filed the transcript of the Fees Hearing on November 5, 2014. Respondent filed its proposed final order on November 25, 2014, and Petitioner filed its proposed final order on November 26, 2014.

FINDINGS OF FACT

1. At all material times, as an enrolled Medicaid provider, Respondent provided community behavioral health services to Medicaid recipients and submitted fee-for-service reimbursement

claims, which Petitioner paid. As a result of an audit of Respondent's claims that were submitted from January 1, 2008, through December 31, 2011, Petitioner issued the above-described FAR to recover these payments on the ground that they were overpayments because these services were covered by NHDW plans sponsored by various MCOs. The FAR represents Petitioner's formal filing of its overpayment claims; the preliminary audit report is merely part of the negotiations leading to the formal claim.[4/]

2. The FAR was issued by Petitioner's Office of Medicaid Program Integrity (OMPI), which is responsible for the recovery of Medicaid overpayments, but did[5/] not possess the same subject-matter knowledge of the NHDW program that could be found elsewhere in Petitioner. Because operational authority for the NHDW program was divided between Petitioner and DOEA, expertise in the NHDW program primarily resided in two program analysts employed by these agencies: Mr. Young of Petitioner and Ms. O'Malley of DOEA.

3. As detailed in the recommended order, prior to the issuance of the FAR, Petitioner was aware that Mr. Young had expressed the opinion that Respondent was entitled to fee-for-service reimbursement of community mental health services[6/] to enrollees of NHDW plans because these services were not included in the NHDW standard contract and, thus, were not included in the

capitated rates paid to the MCOs sponsoring NHDW plans. Shortly after the issuance of the FAR, Ms. O'Malley confirmed Mr. Young's opinion that services provided under Codes H2017, H2019HR, and H0032TS were not covered under the NHDW standard contract and were thus eligible for fee-for-service reimbursement.

4. In his request for hearing, Mr. Lacasa asserted that the services that Respondent provided and billed under Codes H2017, H2019HR, and H0032TS were not covered under the NHDW standard contract and were properly reimbursed on a fee-for-service basis to Respondent. This meant that, as noted in the Preliminary Statement, Petitioner was entitled to recover about one percent of the total overpayment amount claimed in the FAR.[7/]

5. The recommended order confirmed the opinions of Mr. Young, Ms. O'Malley, and Mr. Lacasa and rejected the overpayment determinations contained in the FAR. Determining that Petitioner knew or should have known that its overpayment claim--in excess of the minor amount that Respondent never disputed--was not supported by the material facts necessary to support the claim, the Administrative Law Judge, on his own initiative, determined in the recommended order that Petitioner was liable for Respondent's attorneys' fees, under section 57.105(1)(a) and (5), Florida Statutes.[8/]

6. At the start of the Fees Hearing, Petitioner stipulated to the reasonableness of all of the hourly rates at issue in this

case. Ignoring relatively small amounts of time billed by other attorneys at Mr. Grigas' law firm, which, as noted below, have been rejected as excessive or inappropriate, these rates are $395 per hour for Mr. Grigas and $350 per hour for Mr. Lacasa. The lodestar determination thus turns on a determination of how much legal work was reasonable.

7. During the Fees Hearing, Respondent introduced exhibits showing 240 hours of time for a total of $95,028 among lawyers at Akerman LLP, of which 230.8 hours was attributable to Mr. Grigas, and showing 244.9 hours of time by Mr. Lacasa for a total of $86,170. The combined total of attorneys' fees that Respondent seeks to recover in the Fees Case is therefore over $180,000.

8. As discussed in more detail below, Respondent argues that the complexity of the Overpayment Case justified 475 billed hours, which even Respondent's expert witness, Mr. William Furlong, conceded is at the upper range of what is reasonable. Respondent's complexity argument is at odds with the implied determination of the Administrative Law Judge, in awarding Petitioner its reasonable attorneys' fees under section 57.105(1)(a) and (5), Florida Statutes, that the facts of the Overpayment Case are straightforward and clearly do not support Petitioner's overpayment claim.

9. If the Overpayment Case had been as factually complicated as Respondent now claims, somewhere, in the pile of

transcripts and exhibits constituting the record of the Overpayment Hearing, a material fact would have provided enough support for Petitioner's overpayment claim to avoid liability for attorneys' fees under section 57.105, Florida Statutes. To the contrary, Respondent is entitled to reimbursement of its reasonable attorneys' fees because much of that pile of evidence was irrelevant or at least unnecessary--a fact that, at this stage, now inures to the detriment of Respondent as it attempts to prove the reasonableness of extensive legal work in the Overpayment Case.

10. Respondent repeatedly argues that considerable lawyer time was required to discharge Respondent's burden of proving a negative--that is, that services under the three Codes were not covered under the NHDW standard contract.[9/] This assertion is incorrect.[10/]

11. At least by the time of the Overpayment Hearing, Petitioner relied upon one provision of the NHDW standard contract to prove that the NHDW plans covered the services under the three Codes--and, thus, to prove that these services were not available for billing by Respondent on a fee-for-service basis. The provision of the NHDW standard contract predicated coverage upon two conditions: 1) the services were "psychiatric in nature" and 2) the services were provided by, or at the recommendation of, a physician. It bears restating that both

conditions had to be satisfied for a service to have been covered under the NHDW standard contract.

12. Surprisingly, the record of the Overpayment Hearing contains little evidence concerning the first requirement. As noted in the recommended order, the record is oddly devoid of a single record detailing the services under Code H2017, H2019HR, or H0032TS.[11/] But a few minutes' analysis of the services described under these three Codes reveals that they do not satisfy the first requirement, that they be psychiatric in nature, for the reasons set forth in the recommended order. It is, thus, unnecessary to address whether there was any legitimate dispute concerning the second requirement.[12/] The lack of a material issue of fact is underscored by the simplicity of this analysis of the "psychiatric-in-nature" requirement and the lack of any contrary evidence on this crucial point.

13. Petitioner also based its claim for overpayment on a strained reading of various Medicaid documents governing the procedures for submitting claims, including pre-authorization procedures. For the reasons set forth in the recommended order, the various Medicaid documents on which Petitioner relied do not support Petitioner's procedural argument.

14. Petitioner's procedural argument suffered from a crucial problem. Respondent readily conceded that Petitioner could not be required to pay the same claim twice--once in the

capitated rate paid to the MCO in whose NHDW plan a particular recipient was enrolled and once to Respondent as a fee-for-service that Respondent provided to the same recipient. Respondent incorporated this concession in its argument that it was free to "roll the dice" in providing services to enrollees of NHDW plans sponsored by MCOs without first contacting the MCOs or Petitioner; if a recipient was an enrollee of an MCO's NHDW plan that covered the service, Respondent was not entitled to reimbursement when it provided the same service to this enrollee.

15. In making its procedural argument, Petitioner repeatedly addressed the double-pay scenario, even though Respondent disclaimed any right to receive a double payment. By directing attention to this moot point, Petitioner ignored the livelier question of whether Respondent's so-called procedural noncompliances in presenting reimbursement claims could relieve Petitioner of the obligation of paying these claims, not twice, but even once. The flaws in Petitioner's reading of its Medicaid documents emerged more starkly in this unattractive no-pay scenario. Petitioner's procedural argument was thus unsupported by a material issue of fact.

16. As is evident in the preceding findings, the Administrative Law Judge continues to find that the Overpayment Case was so simple as to warrant reasonable attorneys' fees under section 57.105(1)(a) and (5), Florida Statutes, and, therefore,

Respondent's attempt to justify extensive attorneys' fees on the ground of the complexity of the Overpayment Case must fail. These findings require a substantial reduction in the hours of legal work that Respondent presents for reimbursement.

17. Before undertaking these reductions, it is necessary to note that nothing whatsoever in the record suggests any conscious overbilling by any lawyer in the Overpayment Case. Other reasons may exist for the billing of considerably more hours than were reasonably necessary.[13/]

18. The Administrative Law Judge, also, is not unmindful of the point made by Mr. Lacasa during the Fees Hearing that, while the Overpayment Case did not present an existential threat to Respondent, it was a very serious matter. Respondent had to note the Overpayment Case as pending litigation on financial reports and other documents, and Respondent was forced to postpone, by almost one year, its plans to expand into Palm Beach County until the Overpayment Case was resolved. The Administrative Law Judge has taken these factors into account in making the following reductions.

19. Both Mr. Furlong and Michael Riley, whom Petitioner called as its expert witness, demonstrated considerable familiarity with the Overpayment Case and possessed such experience and expertise that their opinions are entitled to thoughtful consideration. Mr. Riley did not opine that the

amount of time was unreasonable, but he testified that technical problems with the supporting documentation, such as block billing, insufficient detail, and apparent duplication of work between Mr. Grigas and Mr. Lacasa, effectively precluded review of the legal work for a reasonableness determination. These technical problems made it difficult at times to assess the necessity of time billed by each attorney, especially Mr. Lacasa, but Mr. Riley overstates the magnitude of the problem. Noting that Mr. Lacasa had not kept contemporaneous time records, Mr. Riley also emphasized the comparative lack of reliability in Mr. Lacasa's reconstructed time records. However, the rejection of about 93 percent of Mr. Lacasa's time as unreasonable is not based on a finding that he fabricated any of this time, or even that he misrecorded it; the rejection is based on the fact that this rejected time was unreasonable or inappropriate.

20. Turning to the itemized hours, by attorney, the Akerman lawyers expended the following time:

Mr. Grigas:	230.8 hours
Martin Dix:	1.1 hours
Katherine Giddings:	3.5 hours
Sheryl Rosen:	2.1 hours
Julie Gallagher:	0.8 hours
Kristen Fiore:	1.7 hours

Capable attorneys in their own right, the Akerman lawyers other than Mr. Grigas, who is likewise a capable lawyer, provided a little over nine hours of legal work that, on the facts of the

Overpayment Case, was unnecessary or inappropriate for the reasons explained below.

21. Mr. Dix's 1.1 hours occurred very early in Akerman's involvement in the case, which was over four months after the issuance of the FAR and during the period when DOAH no longer had jurisdiction. Mr. Dix appears to have duplicated work of Mr. Grigas. Mr. Dix did no more work on the Overpayment Case and his time is excessive.

22. All of Ms. Giddings' time was spent on the Fees Case or the appeal and is not appropriate for recovery in connection with the Overpayment Case.

23. All of Ms. Rosen's time was spent on a public records request, which appears in the billing records on June 25, 2014. This date occurs between the recommended order and the Final Order. Aside from a billing entry mentioning "certain preliminary audit reports issued by the Agency," the billing entries do not permit a determination that the work pertained to the Overpayment Case, so this time is not appropriate for recovery in connection with the Overpayment Case.

24. For 0.2 hours, Ms. Gallagher advised Mr. Grigas as to Petitioner's exceptions to the recommended order. For 0.6 hours, Ms. Gallagher read the portion of the recommended order determining that Petitioner was liable for attorneys' fees and prepared a strategy for filing a petition for attorneys' fees.

The 0.6 hours is not appropriate for recovery in connection with the Overpayment Case. The 0.2 hours would be found to be reasonable, if Respondent had established a difference in experience or expertise between Ms. Gallagher and Mr. Grigas as to the admittedly technical matter of filing exceptions; absent such evidence, the 0.2 hours is excessive.

25. All of Ms. Fiore's time was spent on the appeal and is not appropriate for recovery in connection with the Overpayment Case.

26. Thus, all of the time of the Akerman lawyers, other than Mr. Grigas, is rejected for the reasons stated above. At this point, the sole remaining question as to the Akerman lawyers is the reasonableness of Mr. Grigas' time.

27. From November 21 through December 10, 2013, Mr. Grigas spent 10.3 hours familiarizing himself with the file, discussing the Overpayment Case with Petitioner's counsel and Mr. Lacasa, and reviewing Medicaid documents. This time was reasonable.

28. As noted above, DOAH reopened the Overpayment Case in early January 2014, and the hearing took place on March 17, 2014. From the first January time entry on January 6, 2014, through the day prior to the hearing, Mr. Grigas recorded 98.8 hours of time.

29. The time spent in securing an expert witness on Medicaid and preparing the witness, as well as contesting the opinions of the OMPI witnesses, was unnecessary. As noted

above,[14/] the issues were amenable to the understanding of lawyers without recourse to Medicaid experts. Regardless of the opinions of these experts, whether outside consultants or OMPI employees, there was no material fact supporting the assertion that the NHDW standard contract covered the services under the three Codes, and there was no material fact supporting Petitioner's procedural argument based on its misreading of its Medicaid documents.

30. The time spent securing a Medicaid actuary was likewise unnecessary. Respondent eventually obtained testimony from the actuary as to how little of the capitated rate paid to MCOs sponsoring NHDW plans was attributable to community behavioral health services. Given the lack of any material facts supporting the assertion that the NHDW standard contract covered the services under the three Codes or Petitioner's procedural argument based on its misreading of its Medicaid documents, the testimony of the actuary was an unnecessarily indirect way of getting to the coverage issue.

31. The deposition of Mr. Young was reasonably necessary, even though, ultimately, resolution of the coverage question and procedural argument did not rely directly on his opinion. Likewise, it was necessary for Mr. Grigas to examine Petitioner's 24 exhibits, prepare his three witnesses, review his eight exhibits, prepare a prehearing stipulation, conduct legal

research for the final hearing, and engage in detailed re-review of the evidence in the days preceding the final hearing.

32. The reasonable amount of time spent on the above-listed tasks from January 6 through March 16, 2014, was 50 hours.

33. The time spent in the final hearing was 8.0 hours, which is reasonable.[15/]

34. Between March 18 and June 2, 2014, which is the day before the recommended order was issued, Mr. Grigas spent 77.6 hours, including 40 hours preparing the proposed recommended order. The time spent on the proposed recommended order was reasonable; at the Fees Hearing, Petitioner conceded as much.

35. The time spent on a posthearing deposition of Mr. Young, which was taken at the instance of Petitioner, was necessary. Due to the reasons set forth in the recommended order, problems emerged from Petitioner's unsuccessful attempt to recall a witness who had testified at the hearing and from Petitioner's substitution of Mr. Young in this posthearing deposition. Additional problems emerged in Petitioner's attempt to present documentary evidence through Mr. Young at this posthearing deposition. These problems were entirely of Petitioner's making and occurred at the critical posthearing stage of the Overpayment Case, prior to the issuance of the recommended order, so all of Mr. Grigas' time dealing with these problems was reasonable. Again, Mr. Grigas' block billing of

this time with other matters necessitates some approximations, but he spent about 20 hours on these matters.

36. The remainder of Mr. Grigas' time during this period was unnecessary. Adding the 40 hours for the proposed recommended order to the 20 hours for the matters detailed in the preceding paragraph, 60 hours during this period were necessary, and 17.6 hours, most of which were spent on a posthearing deposition of the actuary, were unnecessary.

37. The last period is from June 3, which is the day on which the recommended order was issued, through the last entry of Mr. Grigas' time before the issuance of the Final Order. Mr. Grigas billed 37.8 hours during this period. About 12.7 hours was devoted to reading the recommended order, reading Petitioner's exceptions, and preparing responses to Petitioner's exceptions. Petitioner filed ten exceptions and a motion to vacate the order awarding attorneys' fees in a 23-page double-spaced document. Petitioner eventually overruled all of the exceptions and did not grant the motion to vacate. Mr. Grigas' time on these matters was reasonable.

38. However, the remaining time was unnecessary or not appropriate for recovery in connection with the Overpayment Case. Much of this time involves the appeal, the Fees Case, and the public records request.

39. Adding Mr. Grigas' reasonable time allowances generates 141.0 hours, which, at $395 per hour, justifies $55,695 in legal fees.

40. Mr. Lacasa was Respondent's sole counsel until Akerman's first involvement on November 21, 2013. Following the issuance of the FAR up to November 21, Mr. Lacasa spent 25.6 hours on the Overpayment Case. All of this time was reasonable except the 9.0 hours spent on November 18, 2013, attending a provider meeting in Tallahassee.

41. After Akerman's entry into the Overpayment Case, four major problems arise in crediting Mr. Lacasa's time. First, as noted above, it is reconstructed, although he appears to have carefully correlated his time entries to documented dates, including the time records of Mr. Grigas. Second, Mr. Lacasa also was the chief operating officer of Respondent, raising the possibility that, in some of his conversations with Mr. Grigas, Mr. Lacasa was serving as the client, not the client's co-counsel. Third, Mr. Lacasa billed some of his time in blocks covering several items and sometimes failed to identify specifically what his time was devoted to. Fourth, given the above-described simplicity of the Overpayment Case, Mr. Grigas has accounted for nearly all of the attorney time that can be allocated to the Overpayment Case.

42. Given these problems, notwithstanding the above-described seriousness of the Overpayment Case to Respondent, it is impossible to credit any additional time of Mr. Lacasa as reasonably necessary. Thus, the 16.6 hours that Mr. Lacasa expended prior to Akerman's involvement is reasonable, which, at $350 per hour, justifies an additional $5,810 in reasonable attorneys' fees. Adding this sum to the $55,695 allowed for Mr. Grigas, the lodestar amount of reasonable attorneys' fees is $61,505. In arriving at this figure, the Administrative Law Judge has already considered the time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly; the amount involved, the importance of the case to Respondent, and the results obtained; and the experience, reputation, and ability of the attorneys representing Respondent. No further adjustments are indicated.

CONCLUSIONS OF LAW

43. DOAH has jurisdiction. §§ 57.105(5), 120.569, and 120.57(1), Fla. Stat.

44. As noted above,[16/] the Administrative Law Judge has already determined that Petitioner is liable for attorneys' fees under section 57.105(1)(a) and (5), Florida Statutes. This Fees Case is thus limited to a determination of a reasonable amount of attorneys' fees.

45. The burden of proof is on Respondent. See generally, United Services Automobile Ass'n v. Kiibler, 364 So. 2d 57 (Fla. 3d DCA 1978). However, the burden of showing with specificity which hours should be deducted falls on Petitioner. Centex-Rooney Constr. Co. v. Martin Cnty., 725 So. 2d 1255, 1259 (Fla. 4th DCA 1999). The allocation of the burden of proof in this case, though, is irrelevant to the results reached.

46. In determining reasonable attorneys' fees, the trial court must determine a reasonable hourly rate and a reasonable number of hours expended on the litigation, so as to arrive at a lodestar amount. Fla. Patients' Comp. Fund v. Rowe, 472 So. 2d 1145, 1150 (Fla. 1985). In the process, the trial court must make "specific findings" stating the "grounds on which it justifies the enhancement or reduction." Id. at 1151. The Rowe opinion cites other factors to be considered by the trial court after it has arrived at the "lodestar," which represents the reasonable hourly rate multiplied by the reasonable number of hours.

47. After establishing the lodestar, the trial court must consider a series of factors in determining whether to increase or reduce the attorneys' fees award. Id. at 1150. As relevant to this case, the factors are set forth in the final paragraph of the Findings of Fact. These factors have little bearing on the

determination of a reasonable attorneys' fee award and have already been duly considered in arriving at the lodestar amount.

48. For the reasons set forth in the Findings of Fact, the reasonable attorneys' fees in the Overpayment Case are $61,505.

ORDER

It is

ORDERED that, pursuant to section 57.105(1)(a) and (5), Florida Statutes, Petitioner shall pay Respondent $61,505 in reasonable attorneys' fees.

It is further

ORDERED that, if, within 30 days from the date of this Final Order, Respondent does not file a petition seeking costs or the parties do not file a joint stipulation concerning costs, the Administrative Law Judge will deem that Respondent has withdrawn and waived any claim to costs in the Overpayment Case.

DONE AND ORDERED this 5th day of December, 2014, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of December, 2014.

ENDNOTES

[1/] There are three FARs, as well as three preliminary audit reports, due to Respondent's submittal of reimbursement claims under three provider numbers. For ease of reference, this Final Order will refer to the audits and reports in the singular. The work papers admitted in the Overpayment Case pertain to only one of the three audits and one of the three PARs and FARs, but nothing in the record suggests that the work papers for this audit are not representative of the work papers supporting the other two audits.

[2/] As discussed in the preceding endnote, there were three FARs and, thus, Petitioner transmitted three files, which became DOAH Case Nos. 13-3380MPI, 13-3385MPI, and 13-3386MPI.

[3/] AHCA v. Chrysalis Center, Inc., 143 So. 3d 491 (Fla. 1st DCA 2014).

[4/] Respondent contends that the filing of the preliminary audit report marks the commencement of the overpayment claim for which Petitioner is now liable for attorneys' fees. As noted in the text accompanying this endnote, negotiations, including the submittal of additional documentation by the provider, typically follow the issuance of the preliminary audit report. Somewhat in support of Respondent's argument, though, Florida Administrative Code Rule 59G-9.070(2) provides that, unless Petitioner offers amnesty, the provider's liability for sanctions attaches upon the issuance of the preliminary audit report. However, the Administrative Law Judge nonetheless finds that the formal commencement of Petitioner's claim takes place with the issuance of the FAR, not the preliminary audit report.

[5/] In 2013, the NHDW program was incorporated into the Long-Term Managed Care program.

[6/] On the facts of this case, no material difference exists between community behavioral health services and community mental health services.

[7/] As discussed in the recommended order, Respondent never disputed the existence of a small overpayment of about one percent

of the total overpayment claimed. Nearly the entire amount in dispute is generated by three Codes (actually, one--H2017) and, for the sake of simplicity, this final order discusses only these Codes. However, as noted in the recommended order, relatively small adjustments were required based on the proper treatment of other Codes. Apparently for this reason, the final order determines that the overpayment is closer to two percent. These matters, though, are irrelevant to the present issues.

[8]/ Having heard the Overpayment Case on the merits, the Administrative Law Judge determined that a hearing on liability in the Fees Case was unnecessary. Although in dictum, a line of cases acknowledges that a trial judge, under appropriate circumstances, may summarily determine liability for attorneys' fees under section 57.105, Florida Statutes. In one such case, referring to the liability determination under section 57.105, a court stated: "this finding must be predicated upon substantial competent evidence presented to the court at the hearing on attorney's fees or otherwise before the court and in the trial court record." Strothman v. Henderson Mental Health Ctr., 425 So. 2d 1185, 1185-86 (Fla. 4th DCA 1983) (reversing trial court's section 57.105 liability determination without evidentiary hearing following an order granting a motion to dismiss). See also Mason v. Highlands Cnty. Bd. of Cnty. Comm'rs, 817 So. 2d 922, 923 (Fla. 2d DCA 2002) (same); Murphy v. WISU Props., 895 So. 2d 1088, 1094-95 (Fla. 3d DCA 2004) (same). In two cases, appellate courts have reversed trial courts and mandated an award of attorneys' fees under section 57.105 without an evidentiary hearing on liability. Southford v. Hatton, 566 So. 2d 527 (Fla. 2d DCA 1990) (following a summary judgment on the grounds of res judicata and collateral estoppel); Olson v. Potter, 650 So. 2d 635 (Fla. 2d DCA 1995) (following a summary judgment on the ground of res judicata). In Americana Associates v. WHUD Real Estate, 846 So. 2d 1194 (Fla. 5th DCA 2003), the court mandated an award of attorneys' fees under section 57.105, reversing a trial court that granted a summary judgment, but, without an evidentiary hearing, denied the fees request, finding that the losing party had presented a good faith argument for the modification of existing law or the establishment of new law.

[9]/ The Administrative Law Judge questions the extent to which Petitioner effectively relieved itself of its burden of proof by introducing into evidence the FAR. As discussed in the recommended order, the FAR accomplished little else besides establishing the Codes of the services that Respondent provided to recipients who were simultaneously enrolled in NHDW plans of various MCOs. Absent a clear statement for denying reimbursement

for Respondent's resulting claims, it is unclear whether such a FAR "constitutes evidence of the overpayment" as an "audit report, supported by agency work papers, showing an overpayment to a provider," as provided by § 409.913(22), Florida Statutes. However, this Final Order assumes that Respondent bore the burden of producing evidence following the admission of the FAR.

[10]/ Proving a lack of coverage under the NHDW standard contract in the Overpayment Case was an uncomplicated process requiring, at most, three steps. First, Respondent needed to obtain the NHDW standard contract, if necessary, by a request to produce. Second, by interrogatories and depositions, Respondent needed to ask Petitioner and its OMPI witnesses to identify any provisions in the NHDW standard contract covering the services under Codes H2017, H2019HR, and H0032TS. Third, taking the provisions identified by Petitioner and its OMPI witnesses or, if none was so identified, finding the provision of the NHDW standard contract that comes closest to providing coverage, Respondent needed to show how these provisions do not apply to the services billed by Respondent under Codes H2017, H2019HR, and H0032TS. As conceded in Petitioner's proposed recommended order, there was never any issue as to whether the services, if not covered under the NHDW standard contract, were properly reimbursable to Respondent on a fee-for-service basis.

[11]/ In this respect alone, the Overpayment Case lacked the complexity of most Medicaid-overpayment cases, which feature hundreds or thousands of pages of patient records.

[12]/ In testimony that was fully credited, Respondent's Administrative Director, Leslie Lynch, testified that no physician provided any of the billed services, no physician recommended any of the services billed under Code HI0032TS, and physicians recommended no more than ten percent of the services billed under Code H2017 and five percent of the services billed under Code H2019.

[13]/ Two such reasons readily come to mind. First, Respondent's counsel clearly spent excessive amounts of time trying to rebut Petitioner's procedural argument, which was advanced almost exclusively by OMPI employees. As the Administrative Law Judge stated during the Fees Hearing, much legal work may be necessary to prepare an attorney promoting or challenging a scientific expert, such as a hydrologist opining as to groundwater movement, as to which we lawyers, as lawyers, typically possess little, if any, expertise. But much less legal work is necessary to address a coverage question in a document approximating an insurance

policy or to interpret the procedural provisions of other documents, as to which we lawyers possess considerably more expertise. Second, the Administrative Law Judge cannot discount the possibility that Respondent's counsel may have determined that overpreparation was necessary on the delicate ground that sometimes trial counsel do not share the same opinion as to the perspicacity of the trial court as is held by the trial court itself.

[14/] See first reason set forth in endnote 13 above.

[15/] Although the Administrative Law Judge recorded only 7.5 hours, the difference may be due to a lunch break, during which Mr. Grigas presumably continued to go over the case with Mr. Lacasa or witnesses.

[16/] See endnote 8 above and text accompanying this endnote.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.