



BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS FILED
STATE OF GEORGIA OSAH

MAY 8 2013

SEA BREEZE PERSONAL CARE HOME,
Petitioner,

v.

DEPARTMENT OF COMMUNITY
HEALTH,
Respondent.

Docket No.:
OSAH-DCH-PROP-1328859-44-Baxter

Kevin Westray
Kevin Westray, Legal Assistant

Agency Reference No.: P13-024

INITIAL DECISION

Petitioner Sea Breeze Personal Care Home (“Sea Breeze”) appeals a decision by Respondent Department of Community Health (“DCH”) to recoup \$49,312.94 previously paid to Sea Breeze by DCH for services rendered under the Medicaid program. Pursuant to O.C.G.A. § 49-4-153(a)(2), a hearing was held on April 4, 2013, before the Office of State Administrative Hearings (“OSAH”). After careful consideration of the evidence and the arguments of the parties, DCH’s determination is hereby **REVERSED**.

I. Findings of Fact

1.

Sea Breeze, owned by Nicole Thebaud, manages several personal care homes and is enrolled as a provider in Georgia’s Medicaid program, which is administered by DCH. (Testimony of Thebaud.)

2.

In order to participate in the Medicaid program, Sea Breeze must agree to follow DCH’s applicable policy and procedure manuals, including Part II, Policies and Procedures for Comprehensive Supports Waiver Program (“Manual”). Of importance in this matter, Manual Section 1001 provides, “failure to adhere to any provision of the COMP Program will require that the provider repay all funds collected for services.” (Testimony of D. Smith; Ex. R-4.)

3.

Duhart McDew is a resident in one of Sea Breeze’s personal care homes. McDew who has a history of violent behavior, is subject to an August 28, 2012, court order, which requires that all

doors and windows of the personal care home be kept “double locked” while McDew is in the home. (Testimony of Thebaud; Ex. R-11.)

4.

In August 2012, DCH began the reissuance process for McDew’s Individual Service Plan (“ISP”). The ISP is issued yearly and addresses an individual’s “support need areas” and any health and safety issues identified. Patsy Smith, a DCH contractor and McDew’s Support Coordinator, was responsible for creating and reissuing the ISP with feedback from Sea Breeze and others. Only Smith, not Sea Breeze, could create or amend the ISP. (Testimony of P. Smith; Ex. R-4.)

5.

Based on her review of the court order, Thebaud recommended increased monitoring for McDew because locking the doors was not an option under the State’s personal care home rules. At that time, Thebaud requested the appropriate additional funding from DCH to support the increased monitoring. (Testimony of Thebaud.)

6.

Smith incorporated Thebaud’s recommendations into McDew’s August 25, 2011 ISP (“2011 ISP”), requiring 1:1 support in the home and community as well as 24-hour awake supervision. (Testimony of P. Smith; Ex. R-7.)

7.

At some point, DCH declined to pay the additional funds for the increased monitoring. Thebaud provided the services for which DCH was willing to fund. Smith, either through conversations with Thebaud or by her regular visits to the personal care home or both, was aware that Sea Breeze did not receive the additional funding and was not providing the increased monitoring. Even though she was aware of the change in monitoring, Smith did not revise the 2011 ISP until after DCH conducted an October 2012 audit of Sea Breeze. (Testimony of Thebaud & P. Smith.)

8.

The October 2012 audit identified the fact that McDew’s 2011 ISP required 1:1 staffing, but that Sea Breeze was not providing such staffing. Instead, Sea Breeze provided one staff member for the two residents in the home. Further, the audit found Sea Breeze’s documentation deficient

regarding the requirement for 24-hour awake supervision. (Testimony of D. Smith; Exs. R-6, R-10.)

9.

To correct the error, Patsy Smith issued an ISP addendum, removing the increased monitoring language. This amendment, dated November 15, 2012, states that

The purpose of this ISP addendum is to correct current ISP of Duhart staffing ration that state 1:1 staffing in the home and 24/7 awake staff. Duhart does require close monitoring and supervision in the home and community. The ratio in his Community Residential Alternative residents is 2:1, adequate to meet Duhart support needs. Duhart does not require 24/7 awake staff in his CRA resident.

Patsy Smith wanted to amend McDew's 2011 and 2012 ISPs, even though the 2011 ISP had already expired in August 24, 2012. (Testimony of P. Smith; Ex. R-9.)

10.

DCH determined that the addendum could not amend the 2011 ISP because it had already expired and thus, sought recoupment for all of Sea Breeze's services to McDew for the year, totaling \$43,312.94. Based on the audit and the funding issues, Thebaud requested that McDew be removed from her personal care home. DCH declined to remove McDew and Thebaud continues to provide services. (Testimony of D. Smith & Thebaud.)

II. Conclusions of Law

1.

DCH bears the burden of proof in this matter. Ga. Comp. R. & Regs. r. 616-1-2-.07(1)(c). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21(4).

2.

The Georgia Medical Assistance Act of 1977 (O.C.G.A. §§ 49-4-141 to 49-4-157) affords a provider participating in the state Medicaid program the opportunity to request an administrative hearing in order to appeal a determination by DCH regarding the amount of Medicaid reimbursement due to the provider. O.C.G.A. § 49-4-153(b)(2). The administrative hearing is *de novo* and this Court must make an independent determination on the basis of the evidence presented at the hearing. Ga. Comp. R. & Regs. r. 616-1-2-.21(1), (3). See also Longleaf Energy Assocs., LLC v. Friends of the Chattahoochee, Inc., 298 Ga. App. 753, 769 (2009), *cert.*

denied, 2009 Ga. LEXIS 809 (Sept. 28, 2009) (ALJ must consider applicable facts and law anew, without according deference or presumption of correctness to decision of agency).

3.

The relationship between the Petitioner and DCH is a contractual one. See Pruitt Corp. v. Dept. of Commty. Health, 284 Ga. 158, 160 (2008). The Petitioner, as a participating provider in the Medicaid program, is required to abide by DCH's Manual. "Providers of services are not required to participate in a state's Medicaid program, but if they do choose to participate, they must agree to accept payment in accordance with the state plan provisions." Briarcliff Haven, Inc. v. Dept of Human Resources, 403 F. Supp. 1355, 1362-63 (N.D. Ga. 1975).

4.

The evidence demonstrates that the 2011 ISP included increased monitoring based on an expectation of additional funding. When DCH declined to fund the increased monitoring, Sea Breeze proceeded to provide the services that DCH approved for payment. While aware of the change, DCH's contractor did not amend the 2011 ISP until after its expiration and only because of the DCH audit. Perhaps Sea Breeze should have been more proactive in demanding that DCH update the 2011 ISP, but DCH's recoupment of an entire year's worth of services because its own contractor failed to update the 2011 ISP is unwarranted.

5.

DCH submitted excerpts from the Manual, which the Court has carefully reviewed. The only Manual provision provided by DCH that relates to this matter is the general requirement in Section 1001 that providers comply with program requirements. DCH has cited no Manual provision that places the responsibility for amending an ISP on a provider. Rather, the Manual provisions provided clearly indicate that the Support Coordinator (i.e., the DCH contractor) is responsible for amendments. Thus, DCH has provided no Manual provision, rule or statute that justifies recoupment in this matter. Finally, it bears repeating that this client, a high-risk individual that DCH had difficulty placing, received the exact services that DCH was willing to fund and there was no attempt by Sea Breeze to seek payment for services not performed. Accordingly,

III. Decision

In accordance with the foregoing Findings of Fact and Conclusions of Law, DCH's claim of recoupment is hereby **REVERSED**.

SO ORDERED this 3rd day of May, 2013.



AMANDA C. BAXTER
Administrative Law Judge