BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

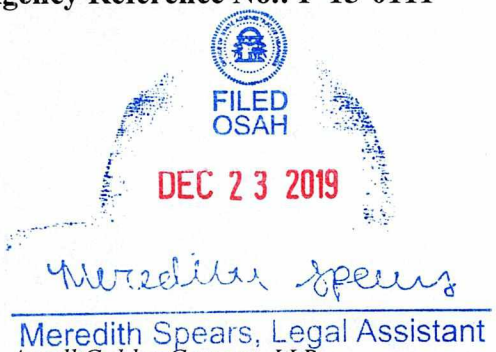
STEVENS PARK HEALTH AND REHAB CENTER, RIVERVIEW HEALTH & REHAB, BROWN HEALTH & REHAB, GREENE POINTE HEALTH & REHAB, LYNN HAVEN NURSING HOME,
Petitioners,

v.

DEPARTMENT OF COMMUNITY HEALTH,
Respondent.

Docket No.: 1926998
1926998-OSAH-DCH-PROP-60-Barnes

Agency Reference No.: P-15-0111



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Sandra L. Jean, Esq, *Community Health Services of Georgia*

For Respondent: Tara Dickerson, Esq., *Georgia Department of Community Health*

FINAL DECISION

I. Overview

Petitioners Stevens Park Health and Rehabilitation Center (Provider No. 03143404A) ("Stevens Park"), Riverview Health and Rehab (Provider No. 00040741A) ("Riverview"), Brown Health & Rehab (Provider No. 00059562A) ("Brown Health"), Greene Point Health & Rehab (Provider No. 00142634A) ("Greene Point"), and Lynn Haven Health & Rehab (Provider No. 00083036A) ("Lynn Haven") (collectively referred to as "Petitioners" or "Providers") requested a fair hearing to appeal the Respondent Department of Community Health's ("Department" or "DCH") decision not to increase the Fair Rental Value ("FRV") rates applied to the Providers. The hearing was held in Atlanta, Georgia at the Office of State Administrative Hearings before the undersigned. The following witnesses provided testimony at the hearing: Ronnie D. Rollins, President of Community Health Systems; Kim Sheffield, Senior Vice

President of Business Services, Community Health Systems; and Darryl Threat, Senior Manager of Reimbursement, Department of Community Health.

Due to the complexity of the factual and legal issues and the ALJ's hearing schedule, IT IS ORDERED that the deadline for issuance of this Final Decision be extended to December 23, 2019, as authorized by the Georgia Administrative Procedures Act, O.C.G.A. 50-13-41(a). After consideration of the admissible evidence and the parties' legal arguments, and for the reasons set forth below, Respondent's decision is **REVERSED.**

II. Findings of Fact

1. The Department administers Georgia's Medicaid program, which serves Georgia's most vulnerable residents. The Providers, part of a nonprofit healthcare system in Georgia, provide nursing home care, pharmaceutical services, hospice, home health, community care services, and more. The patients at the Providers' nursing facilities include Medicaid beneficiaries. For four of the Providers, Medicaid beneficiaries comprise between 70% and 80% of the Provider's census. For the fifth Provider, the Medicaid census ranges between 50% and 60%. In order to participate in the Medicaid program, providers enter into a form contract known as a "Statement of Participation", which is prepared by the Department. The contract incorporates by reference the requirements set forth in the Department's policy and procedure manuals: *Part I, Policies and Procedures for Medicaid/Peach Care for Kids* ("Part I Manual") and *Part II, Policies and Procedures for Nursing Facility Services* ("Nursing Facility Manual") (collectively, the "Manuals"). (Exhibits P-1, P-2).

2. Medicaid pays nursing facilities for care provided to Medicaid beneficiaries on a per diem, or per-patient-per-day, basis. "The objective of reimbursement based on reasonable costs is to reimburse the institution for its necessary and proper expenses incurred related to

patient care." (Tr. 10-11; Exhibit P-2, App. D, D-4). "As a matter of general reimbursement principle, costs with respect to individuals covered by the Medicaid Program will not be borne by those not covered and costs with respect to individuals not covered by the Medicaid Program will not be borne by the Program." (Tr. 169; Exhibit P-2, App. D, D-4, p. 31 of 37).

3. Nursing facility Medicaid rates are set pursuant to the provisions described in Chapter 1000 of the *Nursing Facility Manual*, which is titled "Basis for Reimbursement." The per diem rate is calculated to cover five components of nursing facility costs. Each component corresponds with the bundle of services that nursing homes are legally required to provide. These five components are: 24-hour nursing care; dietary; laundry and housekeeping; administrative and general; and property. The first four components are determined by a cost report provided by nursing facilities to DCH. The fifth component—the property component—is the component relevant to the instant action. (Tr. 11-12). Providers allege that the Department improperly calculated the Providers' fair rental value ("FRV") per diem amounts by using numbers based on outdated bed capacity for each Provider.

A. <u>The Property Component</u>

4. The property component is meant to compensate nursing facilities for the current value of capital assets on a per diem basis. The capital assets referred to are essentially the physical space and shelter component of the care provided by the nursing facility. The property component is referred to in the Nursing Facility Manual as the "Net Per Diem for the Property and Related Cost Center." *Nursing Facility Manual* § 1002.2. This property component is set by the fair rental value. ("Effective for dates of service on and after July 1, 2012, the Property and Related Net Per Diem shall be the amount computed using the Fair Rental Value (FRV) reimbursement system." (*Nursing Facility Manual §* 1002.5(1); Exhibit P-2; Tr. 13)).

B. The FRV Reimbursement System

5. On July 1, 2009, the legislature enacted the fair rental value reimbursement system. Once the legislature approved the FRV system and the Department drafted its manuals to reflect the change, Community Health Systems strategized about how best to function within the FRV framework. (Tr. 60-62). By all accounts, the FRV system is complex. (Tr. 155:1-3). Initially, all stakeholders were unclear of how best to implement the FRV legislation. *Id.* "[O]ne of the purposes of the system is to provide incentives for providers to renovate, upgrade, and replace aging facilities in order to improve the quality of life of its nursing home residents." (Exhibit P-12 at 12). Community Health Systems engaged consultants to address the associated issues and attempted to create a template of sorts that would help Georgia communities "transform nursing home services" in accordance with the legislation. *Id.* Community Health Systems approached its implementation "slowly and methodically." (Tr. 60-61).

6. "Under a FRV system, a facility [is] reimbursed on the basis of the established current value of its capital assets in lieu of direct reimbursement for depreciation, amortization, interest, and rent/lease expenses." *Nursing Facility Manual* § 1002.5(1). "The FRV system shall establish a nursing facility's bed value based on the age of the facility, its location, and its total square footage." *Id.* The "bed value" represents the allocation of the facility's capital asset reimbursement on a per-patient-per-day basis. The two-step process of calculating a facility's bed value is as follows: **Step One**: Calculate the facility's aggregate annual "Rental Amount." *Id.* at § 1002.5(2)(b). **Step Two**: Allocate the aggregate annual Rental Amount on a per-patient-per-day basis to obtain a daily "bed value." *Id.* at § 1002.5(2)(g).

1. Calculating the Facility's Aggregate Annual Rental Amount

7. The FRV system calculates a provider's aggregate annual Rental Amount for the

Facility's capital assets based on factors such as the facility's allowed square footage, location, and age. *Id.* at §§ 1002.5(2)(b) and 1002.5(2)(a)(f). First, the facility's replacement value is determined. Second, the facility's replacement value is adjusted to account for depreciation. This step considers equipment value, facility value, and FRV adjusted age. Third, the land value is calculated by multiplying the facility replacement value by the land percentage. Fourth, the Rental Amount is determined by adding the depreciated replacement value to the land value and multiplying the sum by the rental rate. (Exhibit P-14). The resulting aggregate Rental Amount represents the aggregate annual rental value of the entire facility for the given year. The Rental Amount constitutes the numerator of the FRV per diem rate. (Tr. 81:5-8). For the Providers in the instant action, the numerator portion of the FRV per diem calculation is not in dispute. (Tr. 21:23 - 28:2).

2. Allocating the Facility's Aggregate Annual Rental Amount on a Per-Patient-Per-Day (Per Diem) Basis

8. After the aggregate annual Rental Amount, or numerator, is calculated, that aggregate annual Rental Amount must be allocated on a per-patient-per-day (per diem) basis to obtain the daily bed value. "The Annual Rental Amount [determined in Step One] is divided by the greater of the facility's actual cumulative resident days during the 2006 cost reporting period [historical patient days] or 85% of the licensed bed capacity of the facility multiplied by 365. The resulting figure constitutes the Property and Related Net Per Diem established under the FRV system." *Nursing Facility Manual* § 1002.5(2)(g)). The number of patient days represents the denominator of the FRV per diem rate calculation. "[T]he larger that denominator, the lower the per diem rate." (Tr. 29:14). Mr. Threat testified that the Department does not actually use the 2006 cost reporting period in practice, which creates an ambiguity. (Tr. 175). In practice, the Department has used the 2012 cost reporting period or another cost reporting period that

accurately reflected a facility's capacity. (Exhibit P-3.6, the March 5, 2015 "Newnan Letter").

9. The use of a historical number of patient days assumes that the capacity for patient days remains constant. The Providers in this matter allege that the historical number of patient days and the minimum occupancy attributed to them by the Department are known to be inaccurate and invalid, resulting in inaccurate "bed values" for each Provider. The Providers seek to have the Department adjust the FRV per diems to accurately reflect the bed reductions at each of their facilities.

C. The Providers' Licensed Bed Capacity

10. Each nursing home in Georgia has a maximum bed capacity, which is set by the certificate of need ("CoN"). The CoN is set by law and caps the number of licensed beds for each nursing home, based on the flat cap allowed in each county of the state. For the five Providers at issue in this matter, the nonprofit Community Health Systems reduced the licensed bed capacity as part of a larger strategy. Ultimately, Community Health Systems sought to create a "more livable space" for residents by decreasing volume and focusing on value. In the Providers' facilities, 3-bed resident wards were eliminated in favor of semi-private rooms. At Riverview, Brown Health, and Stevens Park, the number of private rooms increased. For all five Providers, the square footage per bed significantly increased. The reduction in the number of licensed beds also impacted the total potential patient days at each facility. Fewer beds in a facility would result in a smaller number of annual patient days. (Tr. 13:22, 63:13, 68:12).

11. Riverview Health and Rehab Center is located at 6711 Laroche Avenue, Savannah, Georgia, 31406. According to a Nursing Home Permit issued by the Department for Riverview Health and Rehab Center, the facility was licensed to maintain and operate 190 beds, effective March 22, 2018. Riverview's previous licensed bed capacity was 284 beds. This

constitutes a reduction of 94 beds. (Exhibit P-13.1; Tr. 101-103).

12. Brown Health and Rehabilitation is located at 545 Cook Street, Royston, Georgia, 30662. According to a Nursing Home Permit issued by the Department for Brown Health and Rehabilitation, the facility was licensed to maintain and operate 100 beds, effective March 22, 2018. Brown Health's previous licensed bed capacity was 144 beds. This constitutes a reduction of 44 beds. (Exhibit P-13.2; Tr. 101-103).

13. Greene Point Health and Rehabilitation is located at 1321 Washington Highway, Union Point, Georgia, 30669. According to a Nursing Home Permit issued by the Department for Greene Pointe Health and Rehabilitation, the facility was licensed to maintain and operate 50 beds, effective March 22, 2018. Greene Point's previous licensed bed capacity was 71 beds. This constitutes a reduction of 21 beds. (Exhibit P-13.3; Tr. 101-103).

14. Lynn Haven Health and Rehabilitation is located at 747 Monticello Highway, Gray, Georgia, 31032. According to a Nursing Home Permit issued by the Department for Lynn Haven Health and Rehabilitation, the facility was licensed to maintain and operate 77 beds, effective May 25, 2018. Lynn Haven's previous licensed bed capacity was 104 beds. This constitutes a reduction of 27 beds. (Exhibit P-13.4; Tr. 101-103).

15. Stevens Park Health and Rehabilitation is located at 820 Stevens Creek Road, Augusta, Georgia, 30907. According to a Nursing Home Permit issued by the Department for Stevens Park Health and Rehabilitation, the facility was licensed to maintain and operate 42 beds, effective July 2, 2018. Stevens Park's previous licensed bed capacity was 50 beds. This constitutes a reduction of 8 beds. (Exhibit P-13.1; Tr. 101-103).

16. Upon receiving each of the above Nursing Home Permits, the Providers submitted letters notifying the Department of the respective decreased licensed bed capacities. Each letter

was accompanied by a copy of the applicable permit, as well as a completed Fair Rental Value System Initial Start Up and Fair Rental Value System Reimbursement (FRVS) Update Request Form (hereinafter, "FRV Update Submission"). (Exhibits P-5.1 – P5.5; Tr. 103 – 105). The Providers presented the FRV Update Submissions "[i]n order for the FRV calculations to be more respective of the newly licensed beds in facility, in order for the rental amount to also reflect [the] newly licensed beds as well so the patient days can be correct in that calculation." (Tr. 104). The Department had adjusted FRV calculations to account for adjusted licensed bed capacities in prior dealings with the Providers. The Providers expected the Department to adjust the FRV calculations based on the 2018 licensed bed capacity reductions in their facilities as the Department had done previously. (Tr. 106-107).

D. The Department Did Not Adjust FRV Per Diem to Reflect Updated Bed Capacity

17. In a January 4, 2019 letter following a reconciliation conference between the parties, the Department acknowledged the bed reductions, but refused to adjust each Provider's FRV per diem, asserting, "[W]e don't have a policy in place that allows for FRV rate adjustments based on bed reductions" . . . [and] "that making adjustments to Line 'H'[1] would be contrary to how FRV rate adjustments are made for bed additions." (Exhibit P-12 at 11-13). Using this reasoning, the Department declined to adjust the FRV per diem for any Provider. As a result, the FRV per diem assigned to each Provider is based on a historical number of total patient days. The Providers assert that the Department's reliance on historical patient days has resulted in improper calculation of FRV per diem. For instance:

- Using a former bed capacity of 284, the Department calculated Riverview's FRV per diem to be $13.19, effective July 1, 2018. Using the updated March 22, 2018 bed capacity of 190, Riverview's FRV per diem is calculated to be $16.46.

[1] In the mathematical formula used to determine FRV per diem, Line H represents a facility's total patient days and is determined by Department Data. (Exhibit P-2, *Nursing Facility Manual* § 1002.5(2)).

(Exhibit P-7.1).

- Using a former bed capacity of 144, the Department calculated Brown Health's FRV per diem to be $10.63, effective July 1, 2018. Using the updated March 22, 2018 bed capacity of 100, Brown Health's FRV per diem is calculated to be $15.38. (Exhibit P-7.2).

- Using a former bed capacity of 71, the Department calculated Greene Point's FRV per diem to be $8.49, effective July 1, 2018. Using the updated March 22, 2018 bed capacity of 50, Greene Point's FRV per diem is calculated to be $12.04. (Exhibit P-7.3).

- Using a former bed capacity of 77, the Department calculated Lynn Haven's FRV per diem to be $8.64, effective July 1, 2018. Using the updated May 25, 2018 bed capacity of 100, Lynn Haven's FRV per diem is calculated to be $12.04. (Exhibit P-7.4).

- Using a former bed capacity of 50, the Department calculated Stevens Park's FRV per diem to be $27.87, effective October 1, 2018. Using the updated July 2, 2018 bed capacity of 42, Stevens Park's FRV per diem is calculated to be $34.43. (Exhibit P-7.5).

18. Providers argue that the Department's refusal to adjust the FRV per diem rates to reflect bed reductions relies on the use of inaccurate and invalid data, results in an inaccurate "bed value", and makes it impossible for the Providers to recover the reimbursable value of their capital assets. The Providers assert that the Department *does* have a policy in place that allows for a rate adjustment.

E. Historical FRV Per Diem Adjustments

19. The Department has modified FRV per diem rates based on bed count adjustments for other facilities in the past. (Tr. 97-101,106-107). Specifically, the Department has adjusted the total "patient days" (the denominator of the FRV per diem calculation) to account for changes in the number of available licensed beds. In October 2013, Newnan Health & Rehabilitation (Provider No. 00040719A)[2] reduced its beds from 143 to 77. Effective July

[2] Newnan Health is a nursing home in Coweta County, Georgia managed by the same organization as the Providers. (Tr. 30:20-25).

2016, Newnan Health increased its beds from 77 to 104. With each adjustment—the 2013 bed reduction and the 2016 bed increase—the Department re-calculated Newnan Health FRV per diem based on its then-current actual number of licensed beds. (Tr. 100:25 – 101:7; Exhibit P-3.6). The Department concluded that it would be "inappropriate" to knowingly use outdated data to calculate FRV per diem. (Exhibit P-3.6).

20. Initially, the Department calculated a FRV per diem rate of $7.68 to Newnan Health for 2014. This rate was based on historical patient days of 50,264 in 2012, when Newnan Health had 143 beds. (Exhibit P-3.5). Newnan Heath appealed the Department's rate calculation, arguing that the Department should "determine the former 2012 occupancy percentage and multiply that percentage by the total number of patient days available using the current number of beds in order to determine the patient days to be used in the calculation." (Exhibit P-3.6). The Department agreed, stating:

> We have determined that the patient day information used to establish this facility's FRV rate effective July 1, 2014 [50,264 patient days] is inappropriate. Therefore, the facility's FRV rate effective July 1, 2014 will use patient days determined at 85% of full occupancy using the current 77 beds.

Id. As a result, the Department recalculated the FRV per diem rate for Newnan Health and increased it to $16.69 for that time period. *Id.* (Tr. 163 – 166).

21. The Department similarly revisited the FRV per diem for Harrington Park Health & Rehabilitation (Provider No. 003165726A) in 2018. Harrington Park increased its beds from 50 to 58 in July 2018. The Department recalculated the FRV per diem based on the increased bed value. (Exhibits P-4.1, 4.2, P-10).

22. The Providers here relied on the Department's past treatment of bed count adjustments when they reduced the licensed bed capacities at their facilities. (Tr. 74:1 – 76:23). They contend that, because the Department has not taken the bed reductions into account in this

instance, the Department allocated each facility's aggregate Rental Amount to a number of "patient days" that would be impossible to achieve with the current number of licensed beds. The "Higher of Minimum Occupancy or Total Patient Days" used by the Department was greater than the number of possible patient days available to each facility, even at 100% occupancy every day of the year. (Exhibit P-10, p. 4; Tr. 90:15-91:3).

23. However, the Department determined that it would "not make any changes to the providers' FRV rates." (Exhibit P-11). The Department reasoned that the Providers' bed reductions "are not considered to be an approved project" because they "cannot be used to determine a facility's adjusted age." (Exhibit P-11, p. 2). According to the Department, the FRV rate adjustment for Newnan Health was inapplicable to the Providers because that FRV rate adjustment "was done during a period when bed reductions were considered in determining a facility's adjusted age. Effective July 1, 2015, bed reductions were no longer considered for determining a facility's adjusted age." *Id.*

III. Conclusions of Law

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

2. The Supreme Court of Georgia has found that "[a] Medicaid provider agreement entered into by a provider of skilled nursing home services and Georgia's state agency charged with administering the Medicaid program is an arms length business contract." *Pruitt v. Ga. Dept. of Community Health*, 284 Ga. 158, 160, 664 S.E.2d 223, 226 (2008) (citations and quotation marks omitted). Thus, disagreements between providers and the Department regarding

the interpretation of a manual are "determined by application of the rules of contract construction." *Id.* "In construing a contract, courts focus on the intent of the parties, and where the terms of a written contract are clear and unambiguous, [a] court will look to the contract alone to find that intent. When the contract language is ambiguous, however, the court must apply the rules of contract construction to resolve the ambiguity." *Dept. of Community Health v. Pruitt Corp.*, 295 Ga. App. 629, 632, 673, 673 S.E.2d 36, 39 (2009).

3. Under O.C.G.A § 13-2-2(2), words contained in a contract "generally bear their usual and common signification." *Pruitt Corp.*, 295 Ga. App. at 632, 673 S.E.2d at 39. Additionally, when a contract provision is ambiguous, it must be construed "against the drafter—in this case, the department." *Id.* Similarly, contracts of adhesion, while permissible in Georgia, "are construed strictly against the drafter." *Hosp. Auth. of Houston v. Bohannon*, 272 Ga. App. 96, 611 S.E.2d 663, 666 (2005). The *Nursing Facility Manual* and the *Part I Manual*, as drafted, show the necessity to use valid data when calculating the Providers' reimbursement, including FRV per diem rates. The Providers point to specific provisions in the Department-drafted manuals that reflect this position:

- "The objective of reimbursement based on reasonable costs is to reimburse the institution for its necessary and proper expenses incurred related to patient care. (Exhibit P-2, p. 31, *Nursing Facility Manual*, App. D, D-4).

- "As a matter of general reimbursement principle, costs with respect to individuals covered by the Medicaid Program will not be borne by those not covered and costs with respect to the individuals not covered by the Medicaid Program will not be borne by the Program." *Id.*

- "The FRV system shall establish a nursing facility's bed value based on the age of the facility, its location, and its total square footage. (Exhibit P-2, p. 17, *Nursing Facility Manual* § 1002.5(1)).

- The "Total Allowed Per Diem Billing Rate . . . is subject to retroactive adjustment according to the relevant provisions of Part I, Chapter 400 of the Manual and Appendix I. (Exhibit P-2, p. 2, *Nursing Facility Manual* § 1002). "The Division may adjust the reimbursement rate of any provider whose rate is established specifically for it on the basis of cost reporting, *whenever the Division determines that such adjustment is appropriate*. The adjustment may be implemented retroactively, prospectively, or both." (Exhibit P-1, p. 2, *Part I Manual* § 409) (emphasis added).

4. The aforementioned manual provisions underscore the need to employ valid data to obtain accurate and appropriate FRV per diem reimbursement rates. Any ambiguities in the manual must be resolved against the Department, as it drafted the provisions. *Pruitt Corp.*, 95 Ga. App. at 632. Further, the Court must consider the parties' construction and interpretation of the relevant contractual provisions in prior dealings. *See Atlanta Dev. Auth. v. Clark Atlanta Univ., Inc.*, 298 Ga. 575, 581, n.5 (2016) ("In general, the parties' construction of a contract, as shown by their acts and conduct, is entitled to much weight and may, in some circumstances, be conclusive."); *see also Richard Bowers & Co. v. Clairmont Place, LLC*, 324 Ga. App. 673 (2013).

5. "The parties' interpretation is entitled to great, if not controlling, influence, and will generally be adopted and followed by the courts, particularly when the parties' interpretation is made before any controversy, or when the construction of one party is against his interest." *Clark v. AgGeorgia Farm Credit ACA*, 333 Ga. App. 73, 79 (quoting *Anderson v. Anderson*, 274 Ga. 224, 226 (2001). The parties' interpretation, as articulated in the Department's March 5, 2015 Newnan Letter, is that it is <u>inappropriate</u> to use outdated, invalid patient day information to establish a facility's FRV per diem rate. Further, the Providers' acts and conduct—that is, reducing the bed counts at their facilities—demonstrates their construction of the manual's provisions. That the Providers relied on the Department's previous interpretation in the Newnan

Letter underscores their construction and will be given "much weight" by the undersigned. *See Atlanta Dev. Auth.*, 298 Ga. at 581, n.5.

6. Section 1002 of the *Nursing Facility Manual* provides that the "Total Allowed Per Diem Billing Rate[3] . . . is subject to retroactive adjustment according to the relevant provisions of Part I, Chapter 400 of the Manual and Appendix I." The Part I Manual, Chapter 400, Section 409 states, "The Division may adjust the reimbursement rate of any provider whose rate is established specifically for it on the basis of cost reporting, whenever the Division determines that such adjustment is appropriate. The adjustment may be implemented retroactively, prospectively, or both." Thus, the Department *does* have a policy in place that allows for a rate adjustment based on bed reductions.

7. The Department points to a post-Newnan-Letter change in the policy that provides, "Bed reductions will not be used to determine a facility's adjusted age." *Nursing Facility Manual* § 1002.5(5)(b). This provision is the only change to the FRV reimbursement policy since the Newnan Letter. Reliance on this provision is misguided in the instant case because the Providers do not seek an adjusted age calculation. As discussed above, the FRV adjusted age is reflected as part of the numerator of the FRV per diem rate. The parties have no dispute regarding the numerator. That the bed reductions may not impact the adjusted age of the Providers' facilities is of no moment. The *Nursing Manual* further provides that "[a]ge adjustments and [r]ate adjustments are not synonymous." *Id.* at § 1002.5(5)(c). As such, the Department's argument that it must use outdated, invalid bed count data in its FRV per diem calculations, fails.

[3] The FRV per diem is a component of this calculation.

8. Georgia law imposes a "duty of good faith and fair dealing" upon each party to a contract. *Brazeal v. Newpoint Media Grp., LLC*, 340 Ga. App. 689, 691 (2017).

> [T]his implied duty requires both parties to a contract to perform their promises and provide such cooperation as is required for the other party's performance. And, whether the manner of performance is left more or less to the discretion of one of the parties to the contract, he is bound to the exercise of good faith.

Id. at 692 (emphasis in original). "[P]rinciples of good faith fill the gap" in a contract and disallow one party to "take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and therefore was not resolved explicitly by the parties." *Id.* The use of patient days based on inaccurate and invalid bed counts to calculate the Providers' FRV per diems was inappropriate, according to the Department on March 5, 2015. The Providers improved the accommodations for Medicaid patients in their facilities, but the Department has declined to properly reimburse the Providers for those accommodations. Though the Department worked with the nursing home provider community and other stakeholders to develop the FRV system, its refusal now to apply updated bed counts to the FRV per diem calculations is a complete about-face from its previous position. Further, the Department's insistence on now using outdated information—even when that information results in an impossible number of patient days for each Provider—is not fair, particularly in light of its prior interpretation of the policy it drafted.

9. The parties appear to agree that the Fair Rental Value system must be applied fairly. Based on the evidence presented, the undersigned finds that the Providers are attempting to adjust their FRV per diem rates to accurately reflect the number of beds at their facilities. This is not an exercise of greed or system-gaming. Rather, the Providers have relied on the Department's prior conduct and made renovations and upgrades to their facilities to further the

purpose of the FRV reimbursement system. Now, the Department must also keep with the spirit and intent of the FRV reimbursement system and pay its fair share.

10. The Petitioners have demonstrated by a preponderance of the evidence that the Department improperly calculated each Provider's FRV per diem. The Department was aware of the bed reductions at the Providers' facilities. By using the outdated number of beds at each facility, the Department made it impossible for each Provider to recover its reimbursable bed value, thus frustrating the purpose of the FRV reimbursement system as drafted by the Department.

IV. Decision

In accordance with the foregoing Findings of Fact and Conclusions of Law, Respondent's decision in this matter is **REVERSED**. The Department is directed to recalculate the FRV per diem for each Provider using the reduced bed counts at each respective facility. As provided in the Manual, these adjustments are to be made retroactively.

SO ORDERED, this 22nd day of December, 2019.

SHAKARA M. BARNES
Administrative Law Judge

NOTICE OF FINAL DECISION

Attached is the Final Decision of the administrative law judge. The Final Decision is not subject to review by the referring agency. O.C.G.A. § 50-13-41. A party who disagrees with the Final Decision may file a motion with the administrative law judge and/or a petition for judicial review in the appropriate court.

Filing a Motion with the Administrative Law Judge

A party who wishes to file a motion to vacate a default, a motion for reconsideration, or a motion for rehearing must do so within 10 days of the entry of the Final Decision. Ga. Comp. R. & Regs. 616-1-2-.28, -.30(3). All motions must be made in writing and filed with the judge's assistant, with copies served simultaneously upon all parties of record. Ga. Comp. R. & Regs. 616-1-2-.04, -.11, -.16. The judge's assistant is Kevin Westray - 404-656-3508; Email: kwestray@osah.ga.gov; Fax: 404-818-3719; 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303.

Filing a Petition for Judicial Review

A party who seeks judicial review must file a petition in the appropriate court within 30 days after service of the Final Decision. O.C.G.A. §§ 50-13-19(b), -20.1. Copies of the petition for judicial review must be served simultaneously upon the referring agency and all parties of record. O.C.G.A. § 50-13-19(b). A copy of the petition must also be filed with the OSAH Clerk at 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303. Ga. Comp. R. & Regs. 616-1-2-.39.

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