

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the SIRS Appeal of J.L.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

The above-entitled matter came before Administrative Law Judge Laura Sue Schlatter for a hearing on September 16, 2016. The record closed on that date.

Brett O. Terry, Assistant Attorney General, appeared on behalf of the Department of Human Services (Department). Respondent J.L. (Respondent) appeared on his own behalf.

STATEMENT OF THE ISSUE

Whether the Department properly suspended Respondent's participation as a provider in the Minnesota Health Care Program (MHCP) for a period of six months.

SUMMARY OF CONCLUSIONS

The Administrative Law Judge concludes that the Department demonstrated that a six-month suspension of Respondent's participation as an MHCP provider is an appropriate sanction.

REGULATORY BACKGROUND

Medicaid

Medicaid is a jointly-financed federal and state program established under Title XIX of the United States Social Security Act.¹ Its purpose is to provide necessary medical assistance to eligible persons who have insufficient income and resources to pay for the cost of their medical care.² The federal government shares the cost of providing medical assistance with states that elect to participate in the Medicaid program.³ In return, the states must comply with federal statutes and the rules issued

¹ 42 U.S.C. §§ 1396-1396w-5 (2012).

² See 42 U.S.C. § 1396-1; see also *Atkins v. Rivera*, 477 U.S. 154, 156 (1986) ("In Massachusetts, persons who lack sufficient income, measured on a monthly basis, to meet their basic needs automatically qualify for Medicaid.").

³ See 42 U.S.C. §§ 1396a, b.

by the Centers for Medicare and Medicaid (CMS) of the United States Department of Health and Human Services.⁴

CMS regulations require states to have surveillance and utilization control programs in order to guard against the “unnecessary or inappropriate use of Medicaid services and . . . excess payments.”⁵ In order to discover and correct inappropriate use of Medicaid payments and excess payments, states must conduct post-payment reviews.⁶

The Medicaid program in Minnesota is administered by the Department and is an MHCP, commonly referred to as Medical Assistance (MA).⁷ Because the Department receives and administers federal funds, it must establish and maintain a program of utilization review in order to prevent the unnecessary or inappropriate use of MA, and to determine whether excess MA payments are being made.⁸ State law permits the Department to impose sanctions on the provider and/or recover the excess payments if the Department discovers that a provider has inappropriately billed MA or erroneously received excess payments.⁹

In order to safeguard against inappropriate use of MA and excess MA payments, the Department created the Surveillance and Integrity Review Section (SIRS) and promulgated rules to monitor providers’ compliance with federal and state rules, regulations, and statutes.¹⁰ SIRS conducts post-payment reviews or audits of claims submitted for MA payments.¹¹ These investigations are necessary to prevent fraud and abuse, as well as to detect instances of improper payment of MA funds.¹²

Abuse is defined under the rules governing the MA program to include the following practices: submitting claims that lack required information or contain incorrect information; submitting claims that overstate the level or amount of health service provided; submitting repeated claims or causing claims to be submitted for health services that are not reimbursable under the programs; and failing to develop and maintain required health service records.¹³ The Department may suspend or terminate a vendor’s participation in the MHCP if the Department determines the vendor has

⁴ See 42 U.S.C. § 1396a; 42 C.F.R. § 430.10 (2015); see also *Atkins*, 477 U.S. at 156-57 (“The Federal Government shares the costs of Medicaid with States that elect to participate in the program. In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services.”).

⁵ 42 C.F.R. § 456.3(a) (2015).

⁶ 42 C.F.R. § 456.23 (2015).

⁷ See Minn. Stat. §§ 256B.01-.85 (2016).

⁸ Minn. Stat. § 256B.04, subd. 15(a); see also 42 C.F.R. §§ 456.1-.725 (2015).

⁹ See Minn. Stat. §§ 256B.064, .0641.

¹⁰ See Minn. R. 9505.2160-.2245 (2015).

¹¹ See 42 CFR § 456.23 (requiring post-payment reviews); Minn. Stat. § 256B.04, subd. 15(a), (requiring post-payment reviews).

¹² See Minn. R. 9505.2200, subp. 1; .2215, subp. 1(A).

¹³ Minn. R. 9505.2165, subp. 2.

committed fraud, theft, or abuse in connection with the provision of medical care to recipients of public assistance.¹⁴

Personal Care Assistants

Recipients of personal care assistant (PCA) services require services to live independently in the community in a stable medical condition.¹⁵ PCA services covered under the Medicaid program include services and supports furnished to an individual to assist in accomplishing “activities of daily living; health-related procedures and tasks; observation and redirection of behaviors; and instrumental activities of daily living.”¹⁶ The amount and types of services authorized are based on assessment of the recipient’s needs in several areas of dependency.¹⁷ MA payments cover personal care services that include, among other activities, bowel and bladder care; skin care; range of motion exercises; respiratory assistance; bathing; grooming and hair washing; turning and positioning; assistance with medication that is ordinarily self-administered; cleaning equipment; dressing or undressing; assistance with food and nutrition; accompanying the recipient to medical appointments and to other activities, such as church and school if the PCA is needed to provide services while the recipient is away from home; and other services essential to the provision of covered services.¹⁸

PCA services must be documented daily by each personal care assistant, on a time sheet form approved by the commissioner.¹⁹ The following criteria must be included in the time sheet: (1) full name of personal care assistant and individual provider number; (2) provider name and telephone numbers; (3) full name of recipient; (4) consecutive dates, including month, day, and year, and arrival and departure times with a.m. or p.m. notations; (5) signatures of recipient or the responsible party; (6) personal signature of the personal care assistant; (7) any shared care provided, if applicable; (8) a statement that it is a federal crime to provide false information on personal care service billings for MA payments; and (9) dates and location of recipient stays in a hospital, care facility, or incarceration.²⁰

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

¹⁴ Minn. Stat. § 256B.064, subds. 1a(1), b.

¹⁵ See Minn. R. 9505.0335, subp. 1(H) (2015).

¹⁶ Minn. Stat. § 256B.0659, subd. 2(a).

¹⁷ See *id.*, subd. 3a.

¹⁸ Minn. R. 9505.0335, subp. 8 (2015).

¹⁹ Minn. Stat. § 256B.0659, subd. 12.

²⁰ *Id.*

FINDINGS OF FACT

Background

1. Z.S. is a child who requires round-the-clock care for all activities of daily living.²¹ Z.S.'s aunt, A.L., is also his legal guardian and his responsible party for PCA purposes.²²

2. A.L. is married to the Respondent in this matter.²³

3. Respondent was employed by the City of Blaine during all times relevant to this matter.²⁴

4. In July of 2012, Respondent applied through St. David's Center for Child & Family Development (St. David's Center) to be a PCA.²⁵ Respondent applied because he wanted to be able to provide PCA services for Z.S.²⁶ At the time that Respondent applied to be a PCA, he was engaged to be married to A.L.²⁷ Respondent signed a St. David's Center Employee Agreement²⁸ and a state MHCP PCA Provider Agreement on July 24, 2012.²⁹

5. N.S. is A.L.'s daughter.³⁰ In May of 2013, the Department was contacted by the fraud investigator for the Otter Tail County Attorney's office regarding PCA services N.S. was providing for Z.S. at N.S.'s home in Fergus Falls on weekends. The county raised questions regarding who was providing PCA services for Z.S., and where the services were being provided.³¹

6. During the course of her investigation into the PCA services Z.S. was receiving, the Department's investigator learned that Respondent was providing PCA services to Z.S.³² The investigator determined that, on 19 days between January 1, 2013 and June 20, 2013, Respondent billed for providing PCA services to Z.S. at times when he was either commuting to or from, or was punched into, his job with the City of Blaine, as follows:³³

²¹ Testimony (Test.) of J.L.; Test. of A.L.

²² Test. of J.L.; Test. of A.L.; Exhibit (Ex.) 8 at 90.

²³ Test. of A.L.

²⁴ Ex. 6.

²⁵ Ex. 8 at 81-90.

²⁶ Test. of J.L.

²⁷ Ex. 8 at 89.

²⁸ *Id.* at 87.

²⁹ Ex. 9 at 358-59.

³⁰ Test. of A.L.

³¹ Ex. 2; Test. of Michelle Ryan.

³² Ex. 1 at 5; Test. of M. Ryan.

³³ Test. of M. Ryan; Exs. 3, 19. Ex. 19 is an enlarged version of Ex. 3. It is identical to Ex. 3 except that the legend "SUBJECT TO PROTECTIVE ORDER" and the Bates stamp numbers are not visible on Ex. 19.

Date	Respondent's billed PCA hours³⁴	Respondent's City of Blaine hours³⁵	Number of units of overlap³⁶	Dollar amount of overlap
1/8/2013	5 a.m. - 9 a.m. 3 p.m. - 11:15 p.m.	6:59 a.m. - 3 p.m.	12	\$46.80
1/14/13	12 p.m. - 1 p.m.	6:59 a.m. - 3 p.m.	4	\$15.60
1/28/13	3 p.m. - 11:45 p.m.	11 a.m. - 2:54 p.m.	4	\$15.60
2/4/13	5 a.m. - 6 a.m.	2:55 a.m. - 11 a.m.	4	\$15.60
2/26/13	3 p.m. - 8:45 p.m.	7:06 a.m. - 3:03 p.m.	4	\$15.60
4/11/13	5 a.m. - 7 a.m.	7:12 a.m. - 12:30 p.m.	4	\$15.60
4/16/13	5 a.m. - 6:30 a.m.	6:58 a.m. - 3 p.m.	6	\$23.40
4/23/13	5 a.m. - 6 a.m.	2:54 a.m. - 11 a.m.	4	\$15.60
5/4/13	1 p.m. - 2 p.m.	7:57 a.m. - 1:03 p.m.	4	\$15.60
5/16/13	3 p.m. - 7 p.m.	6:59 a.m. - 3:01 p.m.	4	\$15.60
5/20/13	3 p.m. - 11 p.m.	6:54 a.m. - 3:01 p.m.	4	\$15.60
5/21/13	4 a.m. - 6 a.m.	6:55 a.m. - 3 p.m.	4	\$15.60
5/22/13	4 a.m. - 6 a.m.	6:54 a.m. - 3 p.m.	4	\$15.60
5/23/13	4 a.m. - 6 a.m.	6:51 a.m. - 3 p.m.	4	\$15.60
5/24/13	5 a.m. - 6 a.m.	6:54 a.m. - 2 p.m.	4	\$15.60
5/28/13	4 a.m. - 6 a.m.	6:59 a.m. - 3:01 p.m.	4	\$15.60
5/29/13	4 a.m. - 6 a.m.	6:55 a.m. - 3:00 p.m.	4	\$15.60
5/30/13	4 a.m. - 6 a.m.	6:51 a.m. - 3:01 p.m.	4	\$15.60
6/21/13	5 a.m. - 6:30 a.m.	6:59 a.m. - 3 p.m.	2	\$ 7.80
TOTAL				\$327.60 ³⁷

³⁴ See Ex. 7.

³⁵ See Ex. 6.

³⁶ 1 unit is equal to 15 minutes. Test. of M. Ryan.

³⁷ The NOTICE AND ORDER FOR PREHEARING CONFERENCE AND HEARING stated the total overpayment amount was \$335.40. NOTICE AND ORDER FOR PREHEARING CONFERENCE AND HEARING at 2 (Dec. 6, 2015).

7. Respondent and A.L. both acknowledged that the Department's determination of overlapping times between Respondent's reported PCA hours and his work or commute times is correct.³⁸

8. In addition to caring for Z.S., A.L. is the guardian for Z.S.'s two older siblings, J.S and H.S., who also have special needs.³⁹

9. During the time period from January through late June of 2013, Z.S. was experiencing an ongoing medical crisis. The doctors expressed concerns about whether Z.S. would survive.⁴⁰ As a result, the household, which included A.L., Respondent, Z.S., J.S. and H.S., was in chaos for a number of months.⁴¹

10. Respondent did not fill in his own time sheets for the PCA services he provided for Z.S. Nor were the time sheets filled in on a daily basis.⁴² During the months of January through June 2013, A.L. filled out the PCA time sheets once every two weeks, on the dates they were required to be provided to St. David's Center.⁴³ After A.L. completed the time sheets, Respondent briefly reviewed his time sheets and signed off on them.⁴⁴

11. In deciding to sanction Respondent and what sanction to apply to Respondent's participation as a PCA provider, the Department considered the nature, severity, and chronicity of Respondent's conduct.⁴⁵

12. The Department's concern about the nature of Respondent's conduct was that he submitted multiple inaccurate PCA time sheets. The Department was less concerned about the severity of Respondent's conduct because the Department was not concerned about a risk to Z.S.'s health or safety and there was no indication that Z.S. was neglected. The Department's concern was solely about whether Respondent provided services to Z.S. when Respondent said he did, based on the time reports he provided. Similarly, the amount of money at issue was not a great concern to the Department. What was a greater concern was the number of times Respondent submitted inaccurate time sheets, with overlapping times. Due to this repeated pattern of inaccurate time sheets, chronicity also played an important role in the Department's evaluation of an appropriate sanction. Based on a review of the nature, severity and

At the beginning of the hearing in this matter, Counsel for the Department requested that the NOTICE AND ORDER FOR PREHEARING CONFERENCE AND HEARING be revised to include a lower overpayment amount of \$327.60, instead of \$337.40, to reflect the Department's decision to drop its pursuit of an overpayment claim for June 7, 2013. Because the proposed amendment to the NOTICE AND ORDER FOR PREHEARING CONFERENCE AND HEARING does not prejudice Respondent, and Respondent did not object, the Administrative Law Judge permitted the oral amendment.

³⁸ Test. of J.L.; Test. of A.L.

³⁹ Test. of A.L.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*; Test. of J.L.

⁴³ Test. of J.L.

⁴⁴ *Id.*; Test. of A.L.; see Ex. 7.

⁴⁵ Test. of Deborah Tsuchiya.

chronicity of Respondent's conduct, the Department determined that suspending Respondent's PCA provider participation in the MHCP for six months is an appropriate sanction.⁴⁶

13. On July 1, 2014, the Department notified Respondent that it was suspending his participation as a PCA in the MHCP for a period of six months.⁴⁷ In a letter dated July 2, 2014, the Department notified St. David's Center that it would suspend Respondent from participation as a PCA for six months beginning 30 days from July 2, 2014, unless Respondent appealed the Department's suspension.⁴⁸

14. Respondent appealed the agency action.⁴⁹ In a letter dated August 5, 2014, the Department requested additional information regarding the basis for Respondent's appeal. The Department received Respondent's reply on August 10, 2014. The Department considered Respondent's original appeal letter and his August 10, 2014 letter before sending Respondent a letter stating the Department had not changed its decision regarding the suspension. The letter stated that the case was being referred to the Attorney General's office for a contested case hearing.⁵⁰

15. Because Respondent's appeal stayed the suspension, the Department never notified St. David's Center that Respondent was suspended from participating as a PCA provider in the MHCP.⁵¹ Nonetheless, St. David's Center stopped paying Respondent for his PCA services as soon as it became aware of the Department's investigation of him.⁵²

16. The Department issued its Notice and Order for Prehearing Conference and Hearing on December 6, 2015. The hearing was originally scheduled for July 19, 2016, but was continued at Respondent's request because his witness was not available on the original date.⁵³

17. The Department recovered the overpayment in this case from St. David's Center as part of a quality assurance process.⁵⁴

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

⁴⁶ Test. of D. Tsuchiya.

⁴⁷ Ex. 11 at 16-17.

⁴⁸ *Id.* at 18.

⁴⁹ Ex. 12.

⁵⁰ Test. of D. Tsuchiya; Exs. 14, 15.

⁵¹ Test. of D. Tsuchiya.

⁵² Test. of J.L.

⁵³ ORDER GRANTING CONTINUANCE (July 18, 2016).

⁵⁴ Test. of M. Ryan.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Human Services (Commissioner) have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.50; 256B.04, subd. 15(c); .064, subd. 2 (2016).
2. The Department has complied with all relevant procedural requirements of statute and rule.
3. A PCA must document daily the PCA services the PCA provides on a time sheet form approved by the Commissioner.⁵⁵
4. The Commissioner may impose sanctions against a vendor of medical care for fraud, theft, or abuse in connection with the provision of medical care to recipients of public assistance.⁵⁶
5. A PCA who submits repeated claims, or causes claims to be submitted, from which required information is missing or incorrect has committed abuse in connection with the provision of medical care to recipients of public assistance.⁵⁷
6. The Department bears the burden of demonstrating, by a preponderance of the evidence, that Respondent's participation as a provider in MHCP should be suspended.⁵⁸
7. The Department established by a preponderance of the evidence that Respondent violated the requirements of Minn. Stat. § 256B.0659, subd. 12, when he failed, over a period of approximately ninth months, to personally complete his PCA time sheets each day he provided services for Z.S.
8. The Department established by a preponderance of the evidence that Respondent committed abuse pursuant to Minn. R. 9505.2165, subp.2.A(1), when he repeatedly reported that he provided PCA services during times he was working for the City of Blaine, or commuting to or from his job with the City of Blaine. The Department may impose sanctions based on Respondent's conduct.⁵⁹
9. In determining the appropriate sanction, the Department must consider the nature, chronicity, or severity of the conduct, as well as the impact on the health and safety of the person served.⁶⁰
10. The Department demonstrated by a preponderance of the evidence, taking into consideration the nature, chronicity, and severity of Respondent's conduct, that Respondent's six-month suspension is an appropriate sanction.

⁵⁵ Minn. Stat. § 256B.0659, subd. 12.

⁵⁶ Minn. Stat. § 256B.064, subd. 1a.

⁵⁷ Minn. R. 9505.2160, subp.1; .2165, subp. 2.A(1).

⁵⁸ Minn. R. 1400.7300, subp. 5 (2015)

⁵⁹ Minn. Stat. § 256B.064, subd. 1b.

⁶⁰ *Id.*

11. Pursuant to Minn. Stat. § 13.46, subds. 1 and 2 (2016), data maintained by the welfare system on individuals who are not vendors is private data and shall not be disclosed subject to certain statutory exceptions.

12. When welfare investigative data on persons, including vendors of services, is submitted to an administrative law judge in an administrative proceeding, the data becomes public pursuant to Minn. Stat. § 13.46, subd. 3 (2016). An Administrative Law Judge may seal all or part of the hearing record if a party asks for protection of not public data that would otherwise become public once admitted into evidence.⁶¹

Based upon these Conclusions of Law, and for the reasons set out in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION AND ORDER

1. The Administrative Law Judge **RECOMMENDS** that the Commissioner affirm the Department's action suspending Respondent's participation in the MHCP for six months.

2. It is **ORDERED** that Exhibits 1, 2, 3, 7, 12, 14, 17, 18 and 19 be sealed.

Dated: October 3, 2016


LAURASUE SCHLATTER
Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

⁶¹ Minn. Stat. § 14.60, subd. 2 (2016); Minn. R.1400.5600 M. (2015).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2016), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Debra Schumacher, Administrative Law Attorney, PO Box 64254, St. Paul, MN 55164-0254, (651) 431-4319 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2016). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2016), the Commissioner is required to serve her final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

A.L. and Respondent each testified credibly that they did not intend to falsify the time reports. They acknowledged that they were careless in their record-keeping between January and late June of 2013, the time period at issue in this case. A.L. and Respondent asserted that that period of time was especially difficult and chaotic in their household because Z.S., for whom Respondent was providing PCA services and for whom A.L. serves as both responsible party and guardian, was critically ill. Z.S.'s siblings, who also have special needs and for whom A.L. serves as guardian, were also in the home. Respondent continued working for the City of Blaine and was frequently up at night with Z.S. A.L. alleged that St. David's Center changed the supervisor assigned to work with Z.S. and the family, and that the problems arose in part as a result of inadequate support they received from St. David's Center.

The Administrative Law Judge recognizes, as did Ms. Tsuchiya, the Department's witness who supervises SIRS investigators, that family members who provide PCA services are performing difficult, and often exhausting, work. Nonetheless, PCA services are funded with scarce public resources and vendors of those services are required to report their hours accurately. To call the mistakes made in this case "abuse" sounds harsh. But Respondent and A.L. developed a habit of filling out Respondent's time sheet just once every two weeks, when it was due to be turned in to St. David's Center. Furthermore, A.L. routinely filled in Respondent's hours then gave it to him for a quick review and his signature. These practices encouraged a casual and

careless approach to reporting hours, which cannot be tolerated in a program funded with public dollars. Respondent's ongoing practice of approaching his time reporting in this manner warrants a sanction.

The Department considered the situation according to the factors required by statute and found that a six-month suspension is appropriate. The Administrative Law Judge agrees that this suspension is appropriate. If Respondent is to resume his work as a PCA, he must understand the importance of accurate, daily time reporting. The Administrative Law Judge respectfully recommends that the Commissioner affirm the Department's six-month suspension of Respondent's participation as an MHCP provider.

L. S.