OAH 84-1800-34588

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the SIRS Appeal of Elite Nursing Services, Inc.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

The above-entitled matter came on for a contested case hearing before Chief Administrative Law Judge Tammy L. Pust on January 9-10, 2018, at the Office of Administrative Hearings in St. Paul, pursuant to a Notice and Order for Prehearing Conference and Hearing (Notice of Hearing) dated August 4, 2017, and filed August 7, 2017. The hearing record closed on January 19, 2018, upon receipt of Respondent's correspondence as referenced in the Post-Hearing Order in this matter dated January 12, 2018.

Bradley Hutter, Assistant Attorney General, appeared on behalf of the Minnesota Department of Human Services (Department). Taweh Anderson, TVA Law Office, appeared on behalf of Respondent Elite Nursing Services, Inc. (Respondent).

STATEMENT OF THE ISSUE

Did the Department properly conclude that Respondent's claims for Personal Care Assistance (PCA) services between January 1, 2015 and December 31, 2016, as reportedly provided for certain recipients by Respondent's employees, resulted in improper payments of $586,675.09, which the Department has the authority to recover?

SUMMARY OF RECOMMENDATION

Due to Respondent's failure to timely and accurately complete required PCA documentation and to conduct required QP supervisory visits, the Chief Administrative Law Judge recommends that the Notice of Overpayment and Stipulated Provider Agreement be affirmed.

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

FINDINGS OF FACT

I. Regulatory Background

1. Minnesota participates in the federal Medicaid program[1]and shares with the federal government the task of funding medical assistance for eligible persons unable to pay for their medical care.[2] The Department administers the Medicaid program in Minnesota. It is a part of the Minnesota Health Care Programs (MHCP) and is often referred to as Medical Assistance (MA).[3]

2. Among other activities, MA funds personal care assistants (PCAs) to help MA-eligible persons with certain medical needs live independently in the community.[4] PCA services include services and supports to assist individuals with "activities of daily living," such as grooming, bathing, eating, and health-related procedures and tasks.[5] The amount and types of services authorized are based on an assessment of the recipient's needs in several areas of dependency.[6]

3. PCAs are employed by personal care assistance provider agencies, which are MA-enrolled providers.[7]

4. PCAs are supervised by a "qualified professional" (QP), defined under Minnesota law as either a mental health professional, registered nurse, licensed social worker, or qualified designated coordinator.[8] The QP ensures that the recipient receives the appropriate care as documented in the assessment and resulting personal care assistance care plan.[9]

5. Minnesota law requires that all personal care assistance care plans be completed within the first week after the start of services with the provider agency,[10] be updated annually or more often as needed,[11] and include, among other required information, start and end dates.[12]

6. State law also requires that a QP, through direct observation, evaluate the services provided by a PCA within the first 14 days of the initiation of services to a

[1] 42 U.S.C. § 1396-1396w-5 (2012).
[2] *See* 42 U.S.C. § 1396-1.
[3] *See* Minn. Stat. §§ 256B.01-.85 (2016); Minn. R. 9505.0295, .0335 (2017).
[4] Minn. Stat. §§ 256B.0659; .0913, subds. 1, 5; Minn. R. 9505.0335, subp. 1(H).
[5] Minn. Stat. § 256B.0659, subd. 2(a).
[6] *Id.*, subd. 3a.
[7] *Id*., subd. 1(l).
[8] Minn. Stat. § 256B.0625, subd. 19c.
[9] Minn. Stat. § 256B.0659, subd. 1(n).
[10] Minn. Stat. § 256B.0659, subd. 7(c).
[11] *Id.*
[12] Minn. Stat. § 256B.0659, subd. 7(b)(1).

recipient. Thereafter, a QP must evaluate the PCA's provision of services every 90 days for the first year and every 120 days after the first year of service.[13]

7. To guard against inappropriate use of MA funds, the Department created the Surveillance and Integrity Review Section (SIRS) and promulgated rules for monitoring providers and their employing agencies' compliance with federal and state statutes, rules and regulations.[14] The SIRS is charged with "identifying and investigating fraud, theft, abuse, or error by vendors or recipients of health services through a program . . . that is administered by the Department and for the imposition of sanctions against vendors and recipients of health services."[15]

II. Factual Background

8. Respondent is a Minnesota company that provides PCA services to qualified recipients.[16] Respondent opened in 2007 and has been an active MA-enrolled provider since 2010.[17]

9. Mr. Banbah Dennis Garsinii (Garsinii), Respondent's sole owner and administrator, oversees its operations.[18]

10. During 2015 and 2016, Respondent employed approximately 65 employees: five worked as office staff, three registered nurses worked as QPs, and the remainder worked as PCAs providing care to recipients.[19]

11. On July 26, 2016, a SIRS investigator, Jesse Ruttger, conducted a revalidation screening at Respondent's offices.[20]

12. Mr. Ruttger noted that Respondent's recipient files did not contain proper PCA care plans and that the QP visits did not appear to be documented in compliance with law.[21] Mr. Ruttger informed Respondent that PCA care plans must contain start and end dates.[22]

13. Based on the information found at the revalidation screening, Mr. Ruttger referred the case to SIRS for further investigation. Respondent's case was assigned to SIRS Investigator Angelica Weidemann, who verified Respondent's status as an enrolled provider and scheduled an on-site visit at Respondent's offices to investigate further.[23]

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[13] Minn. Stat. § 256B.0659, subd. 14(c).
[14] *See* Minn. R. 9505.0180, .2160-2245 (2017).
[15] Minn. R. 9505.2160, subp. 1.
[16] Exhibits (Exs.) 1 (SIRS Investigation Report) and 3 (MMIS Data).
[17] Exs. 1 (SIRS Investigation Report) and 2 (SIRS Onsite Review Report).
[18] Ex. 1 (SIRS Investigation Report); Testimony (Test.) of Banbah Garsinii.
[19] Test. of B. Garsinii.
[20] Ex. 1 (SIRS Investigation Report) at 1.
[21] *Id.*
[22] Test. of B. Garsinii.
[23] Ex. 1 (SIRS Investigation Report).

14. On January 26, 2017, Investigator Weidemann and Investigator Rebecca McNeil conducted an on-site visit at Respondent's offices. They provided Mr. Garsinii a list of recipients whose files they wanted to review, all of whom had received PCA services provided by Respondent between January 1, 2015 and December 31, 2016 (Review Period).[24]

15. In response to the request, Mr. Garsinii provided Investigator Weidemann with files of original documents, all of which the investigator scanned into a computer.[25]

16. In response to Investigator Weidemann's request, Mr. Garsinii confirmed that he had provided all of the documents Respondent had for the requested recipients relevant to the Review Period.[26]

17. After the SIRS' on-site visit, Respondent's employees added missing information to some of its PCA care plans and supplemented some of its files with additional documentation.[27] At hearing, Mr. Gasinii testified that Respondent had recently moved offices and it was unable to make all of the requested documents available to the SIRS investigators during the on-site visit.[28]

18. As a result of the SIRS investigation of Respondent, the Department determined that Respondent failed to maintain proper QP documentation, failed to maintain proper PCA care plans, and failed to properly supervise PCA services it provided to recipients.[29]

19. In considering the nature, chronicity, and severity of Respondent's conduct, the Department determined Respondent should be required to enter into a Stipulated Provider Agreement for five years.[30]

20. The Department sent a Notice of Overpayment and Stipulated Provider Agreement to Respondent on June 6, 2017, seeking recovery of $586,675.09 in claims made to the State of Minnesota for PCA services.[31]

21. The Department received notice of Respondent's timely appeal of the Department's decision on July 6, 2017.[32]

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[24] Test. of Angelica Weidemann.
[25] Test. of A. Weidemann.
[26] *Id*.
[27] Test. of B. Garsinii.
[28] *Id*.
[29] Test. of A. Weidemann.
[30] *Id*.
[31] Ex. 23 (Notice of Overpayment, Stipulated Provider Agreement, and Supporting Spreadsheet).
[32] Ex. 24 (Appellant's Notice of Appeal).

22. A Notice and Order for Prehearing Conference and Hearing (Notice) in this matter was issued on August 4, 2017, and filed on August 7, 2017.[33]

23. An evidentiary hearing was held on January 9-10, 2018, at which the Department submitted into evidence all documentation provided by Respondent during the on-site investigation. Respondent supplemented this documentation as indicated below. All referenced documentation was admitted into evidence.

III. Respondent's File Documentation[34]

24. **File A.S.**: Respondent's first billed services were provided to A.S. on January 16, 2016.[35] The file contained no QP supervision notes indicating that any supervisory visits occurred.[36] The only PCA care plan in the file, signed April 7, 2016, lacked a start and end date[37] and was not created within the first week of the provision of PCA services.[38] At hearing, Respondent offered a late-produced document identical to the April 7, 2016 PCA care plan, except that it contained start and end dates.[39]

25. **File A.J.**: Respondent's first billed services were provided to A.J. on February 1, 2016. The file contained no notes indicating that any QP supervisory visits occurred. There was no PCA care plan in the file.[40]

26. **File C.D**.: Respondent's first billed services were provided to C.D. on May 24, 2016. The file contained a note indicating that a QP supervisory visit occurred on July 22, 2016, which was not within the first 14 days of service, and there was not another QP visit within 90 days.[41] The file also contained two identical copies of a PCA care plan dated June 4, 2016 that did not have start and end dates.[42] The PCA care plan was not completed within the first seven days of service.[43] At the hearing, Respondent offered a late-produced copy of the June 4, 2016 PCA care plan identical to the copy

[33] Notice of Hearing (August 4, 2017).
[34] At the end of the contested care hearing, the Chief Administrative Law Judge heard the Department's motion to seal the record, specifically Department Exhibits 1 (SIRS Investigation Report), 4 (Samples of Claims Data), 5-22 (Documentation relating to specific recipients), and 25 (Electronic Copies of Claims Data Spreadsheet and Supporting Spreadsheet). The Department argued that these records should be sealed from public access because they contain medical data under the Minnesota Data Practices Act. Respondent did not object to this motion. The Chief Administrative Law Judge determined that in balancing the Department's interest in protecting sensitive information and the interest in not protecting information that the public has a right to know, the Department exhibits would not be sealed *en masse*, but that the names would be redacted. As such, the names of the recipients discussed in these Findings of Fact will be referred to by their initials.
[35] Ex. 5 (Documents for Recipient A.S.) at 2.
[36] *Id*.
[37] Ex. 5 at 1.
[38] Test. of A. Weidemann.
[39] Ex. 118 (Respondent's documentation for A.S.).
[40] Exs. 6 (Documents for Recipient A.J.); 100 (Affidavit (Aff.) of B. Garsinii) at 11; 117 (Respondent's documentation for A.J.).
[41] Ex. 7 (Documents for Recipient C.D.) at 1; Test. of A. Weidemann.
[42] Exs. 7 (Documents for Recipient C.D.) at 2-3 and 100 (Aff. of B. Garsinii) at 8.
[43] Test. of A. Weidemann.

earlier provided, except that it included diagnosis information and special instructions not included in the Department's copy. Respondent also offered a duplicate QP supervision note.[44]

27. **File C.G.**: Respondent's first billed services were provided to C.G. on August 4, 2015. The file contained notes indicating that QP supervisory visits occurred on September 29, 2015, April 23, 2016, and November 9, 2016. The file also contained two PCA care plans: one dated August 29, 2015 that had no start and end dates, and another with no start and end dates, no signature dates, and no information about the care required by C.G.[45] The PCA care plan was not signed or dated until 25 days after Respondent first billed the Department for services.[46] The first QP visit was not within 14 days of the first date of service and the follow-up visits were not within 90 days of each other.[47] The PCA care plan was not created within the first seven days of service.[48] At the hearing, Respondent offered a late-produced PCA care plan identical to the second plan, except that Respondent's copy had additional information: start and end dates; dated signatures; special instructions; and information about C.G.'s care. Respondent also produced other documents duplicative of earlier produced documents.[49]

28. **File F.B.-R.**: Respondent's first billed services were provided to F.B.-R. on August 4, 2015. F.B.-R.'s file contained a note indicating that a QP supervisory visit occurred on August 11, 2016. F.B.-R.'s file also contained a PCA care plan dated April 24, 2016 that had start and end dates.[50] The first QP visit did not occur within 14 days of the first date of service.[51] At the hearing, Respondent offered a PCA care plan and a note identical to documents already produced.[52]

29. **File G.M.**: Respondent's first billed services were provided to G.M. on June 29, 2016. G.M.'s file did not contain any PCA care plans or QP supervisory notes.[53] At the hearing, Respondent did not offer any QP supervisory notes or PCA care plans for G.M.[54]

30. **File J.C.**: Respondent's first billed services were provided to J.C. on September 27, 2015. The file contained a note indicating that a QP supervisory visit occurred on January 18, 2016.[55] The file also contained a PCA care plan for J.C. that had no signature dates and no start and end dates.[56] J.C. received PCA services through the

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[44] Ex. 108 (Respondent's documentation for C.D.).
[45] Ex. 8 (Documents for Recipient C.G.).
[46] *Id*.
[47] Test. of A. Weidemann.
[48] *Id*.
[49] Ex. 115 (Respondent's documentation for C.G.).
[50] Ex. 9 (Documents for Recipient F.B.-R.). The SIRS Investigation Report incorrectly indicates that recipient's PCA care plan lacks start and end dates.
[51] Test. of A. Weidemann.
[52] Ex. 109 (Respondent's documentation for F.B-R.).
[53] Ex. 10 (Documents for Recipient G.M.).
[54] Ex. 112 (Respondent's documentation for G.M.).
[55] Exs. 1 (SIRS Investigation Report) and 11 (Documents for Recipient J.C.) incorrectly indicate that this visit took place on November 18, 2016.
[56] Ex. 11 (Documents for Recipient J.C.).

Choice option.[57] The first QP supervisory visit did not occur within 14 days of the first date of service and there were no other documented QP visits.[58] At the hearing, Respondent offered a late-produced PCA care plan identical to the produced plan except that it included signature dates not found in the earlier copy; it continued to lack start and end dates. Respondent also offered a duplicate note already admitted through the Department.[59]

31. **File J.B.**: Respondent's first billed services were provided to J.B. on February 22, 2015. The file contained notes indicating that QP supervisory visits occurred on December 5, 2015 and August 6, 2016. J.B.'s file also contained a PCA care plan dated December 5, 2015 that had no start and end dates.[60] J.B. received PCA services through the Choice option.[61] The first QP supervisory visit did not occur within 14 days and the second QP supervisory visit did not occur within 90 days.[62] The PCA care plan was not created within seven days of the start of PCA services.[63] At the hearing, Respondent offered a duplicate of the already produced PCA care plan.[64]

32. **File J.L.**: Respondent's first billed services were provided to J.L. on February 4, 2016. J.L.'s file contained notes indicating that QP supervisory visits occurred on March 1, 2016, March 20, 2016, October 19, 2016, and November 1, 2016. J.L.'s file also contained two PCA care plans: one dated March 1, 2016, without start and end dates, and one dated October 19, 2016, with what appear to be start and end dates on the bottom of the form, though the start date is listed as January 1, 2016.[65] The first QP supervisory visit was not within 14 days of service and the October 19, 2016 visit was more than 90 days after the March visits.[66] Neither of the PCA care plans provided were completed within the first seven days of billed services.[67] At hearing, Respondent offered duplicate notes and a PCA care plan dated October 19, 2016. Respondent also offered a PCA care plan acknowledgement form dated October 19, 2016.[68]

33. **File L.K.**: Respondent's first billed services were provided to L.K. on February 1, 2016. L.K.'s file contains a note indicating that a QP supervisory visit occurred on August 30, 2016.[69] The file also contains a PCA care plan dated March 18, 2016 that

[57] Ex. 1 (SIRS Investigation Report).
[58] Test of A. Weidemann.
[59] Ex. 116 (Respondent's documentation for J.C.).
[60] Ex. 12 (Documents for Recipient J.B.).
[61] Ex. 1 (SIRS Investigation Report).
[62] Test of A. Weidemann.
[63] *Id*.
[64] Ex. 105 (Respondent's documentation for J.B.).
[65] Ex. 13 (Documents for Recipient J.L.).
[66] Test. of A. Weidemann.
[67] *Id*.
[68] Ex. 106 (Respondent's documentation for J.L.).
[69] Ex. 14 (Documents for Recipient L.K.) incorrectly indicates that the file contained a QP supervisory note dated August 11, 2016, but the file contained no such note; Test. of A. Weidemann.

has no start and end dates.[70] L.K. received PCA services through the Choice option.[71] The first QP supervisory visit did not occur within 14 days of the start of services, no other QP visits were documented, and the PCA care plan was not completed within seven days.[72] At hearing, Respondent offered a late-produced PCA care plan dated May 12, 2016 that contained no emergency contact phone numbers. Respondent also offered a late-produced PCA care plan identical to the March 18, 2016 plan, except that it includes start and end dates.[73]

34. **File M.P.**: Respondent's first billed services were provided to M.P. on June 17, 2012.[74] M.P.'s file contained notes indicating that QP supervisory visits occurred on July 2, 2013, July 10, 2014, August 19, 2014, March 4, 2015, and May 16, 2015.[75] The file contained PCA care plans for M.P. dated June 17, 2012, March 16, 2015, and August 18, 2016, none of which had start and end dates.[76] The initial QP supervisory visit did not occur with the first 14 days of service.[77] At the hearing, Respondent offered duplicate documents already submitted through the Department.[78]

35. **File N.D.**: Respondent's first billed services were provided to N.D. on June 1, 2016.[79] The file contained a note indicating that a QP supervisory visit occurred on July 22, 2016.[80] N.D.'s file also contained a PCA care plan dated June 4, 2016 that had no start and end dates.[81] The first QP supervisory visit did not occur within 14 days of the date of service.[82] At the hearing, Respondent produced two documents that are identical to documents admitted through the Department.[83]

36. **File N.D.(2)**: Respondent's first billed services were provided to N.D.(2) on May 23, 2016. The file contained a note indicating that a QP supervisory visit occurred on July 22, 2016. N.D.(2)'s file also contained a PCA care plan that had no start and end dates.[84] The initial QP supervisory visit did not occur within 14 days of the first date of

[70] Ex. 14 (Documents for Recipient L.K.). The SIRS Investigation Report incorrectly indicates that recipient's file contained no PCA care plans.
[71] Ex. 1 (SIRS Investigation Report).
[72] Test of A. Weidemann.
[73] Ex. 119 (Respondent's documentation for L.K.).
[74] Ex. 15 (Documents for Recipient M.P.).
[75] The SIRS Investigation Report incorrectly indicates that recipient's first QP supervisory note was dated 329 days after the June 17, 2012 PCA care plan was signed.
[76] Ex. 15 (Documents for Recipient M.P.).
[77] Test of A. Weidemann.
[78] Ex. 104 (Respondent's documentation for M.P.).
[79] Test. of A. Weidemann. Ex. 16 (Documents for N.D.) incorrectly indicates that this recipient's first billed services were provided on May 23, 2016.
[80] Ex. 16 (Documents for N.D.).
[81] *Id*.
[82] Test. of A. Weidemann.
[83] Ex. 110 (Respondent's documentation for N.D.).
[84] Ex. 17 (Documents for Recipient N.D.(2)).

service.[85] At hearing, Respondent produced two documents that are identical to documents in the Department's exhibits.[86]

37. **File P.F.**: Respondent's first billed services were provided to P.F. on January 30, 2012. The file contained notes indicating that QP supervisory visits occurred on September 19, 2014, January 24, 2015, March 7, 2015, April 19, 2015, June 14, 2015, July 1, 2015, August 9, 2015, October 25, 2015, February 27, 2016, March 17, 2016, April 15, 2016, and June 17, 2016. The file contained two PCA care plans for P.F., both dated June 15, 2014, that contain different information and that lack start and end dates. The file also contained PCA care plans dated August 9, 2014, January 24, 2015, and February 27, 2016 that had no start and end dates.[87] P.F. received PCA services through the Choice option.[88] The first QP supervisory visit was not within 14 days of the first date of service and the first PCA care plan was not completed within the first seven days of service, but instead approximately 2.5 years later.[89] At the hearing, Respondent offered several documents that are duplicates of documents in the Department's exhibits.[90]

38. **File P.G.**: Respondent's first billed services were provided to P.G. on November 29, 2011. The file contained notes indicating that QP supervisory visits occurred on June 24, 2014[91], February 8, 2015, April 21, 2016, April 22, 2016, and October 15, 2016. P.G.'s file also contained one PCA care plan dated June 25, 2013 that had no start and end dates.[92] The first QP supervisory visit was not within the first 14 days of service and the follow-up QP supervisory visit was not within 90 days or 120 days.[93] At the hearing, Respondent offered late-produced notes indicating that additional QP supervisory visits occurred on October 28, 2015 and October 15, 2016. Respondent also offered a late-produced PCA care plan dated October 15, 2016 that lacked emergency contact information, along with other documents that are duplicates of the Department's exhibits.[94]

39. **File R.P.**: Respondent's first billed services were provided to R.P. on October 1, 2015. The file contained notes indicating that QP supervisory visits occurred on November 24, 2015 and November 8, 2016. R.P.'s file also contained a PCA care plan dated November 24, 2015 that had no start and end dates. The file also contained a PCA care plan dated November 8, 2016 that had no start and end dates.[95] The first QP supervisory visit did not occur within 14 days, there was a gap of approximately one year before the next QP supervisory visit, and neither of the PCA care plans provided were

[85] Test. of A. Weidemann.
[86] Ex. 111 (Respondent's documentation for N.D.(2)).
[87] Ex. 18 (Documents for Recipient P.F.).
[88] Ex. 1 (SIRS Investigation Report).
[89] Test. of A. Weidemann.
[90] Ex. 114 (Respondent's documentation for P.F.).
[91] Ex. 19 (Documents for P.G.) incorrectly omits this visit.
[92] Ex. 19 (Documents for P.G.).
[93] Test. of A. Weidemann.
[94] Ex. 103 (Respondent's documentation for P.G.).
[95] Ex. 20 (Documents for Recipient R.P.).

completed within the first 7 days of service.[96] At the hearing, Respondent offered a late-produced copy of the November 8, 2016 PCA care plan, except that it included start and end dates. Respondent also produced other documents that are duplicates of documents in the Department's exhibits.[97]

40. **File T.P.**: Respondent's first billed services were provided to T.P. on December 8, 2014. The file contained notes indicating that QP supervisory visits occurred on December 26, 2014, September 4, 2015, May 13, 2016, August 30, 2016, and December 28, 2016. T.P.'s file contained PCA care plans dated December 12, 2014 and December 15, 2015 that had no start and end dates. T.P.'s file also contained a PCA care plan for T.P. with a start date of November 1, 2016 that was not signed until December 28, 2016[98]. At the hearing, Respondent offered three late-produced PCA care plans that were identical to plans in the Department's exhibits, except that they have start and end dates. Respondent also offered QP supervisory notes that were duplicate copies of documents in the Department's exhibits.[99]

41. **File C.B.**: Respondent's first billed services were provided to C.B. on February 24, 2014. C.B.'s file contained notes indicating that QP supervisory visits occurred on April 4, 2014, August 6, 2014, October 20, 2014, August 11, 2016, and August 27, 2016. The file contained PCA care plans for C.B. dated March 7, 2014, October 20, 2014, and August 27, 2016 that had no start and end dates. The file also contained a PCA care plan for C.B. dated October 20, 2015 that appears to be a copy of the October 20, 2014 PCA care plan with altered signature dates but lacking start and end dates.[100] There was no documentation of QP supervisory visits during 2015 and the first 8 months of 2016.[101] At the hearing, Respondent offered duplicate copies of three of the PCA care plans for C.B. already included in the Department's exhibits.[102]

42. The Department demonstrated by a preponderance of the evidence that Respondent failed to properly document the services it provided to recipients and failed to maintain complete and legally compliant care plans for recipients during the Review Period.

IV. Respondent's PCA Care Plans

43. Many of Respondent's PCA care recipients came to Respondent from other PCA agencies that had already created PCA care plans for them. For those recipients, Respondent often provided PCA services based on the PCA care plan created by the prior agency rather than creating a new PCA care plan for the recipient.[103]

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[96] Test. of A. Weidemann.
[97] Ex. 113 (Respondent's documentation for R.P.).
[98] Ex. 21 (Documents for T.P.).
[99] Ex. 107 (Respondent's documentation for T.P.).
[100] Ex. 22 (Documents for Recipient C.B.).
[101] Test. of A. Weidemann.
[102] Ex. 102 (Respondent's documentation for C.B.).
[103] Test. of B. Garsinii.

44. When Respondent created a PCA care plan for its recipients during the Review Period, Respondent consistently used a template that did not have a space for the QP to enter the start and end dates of the care plan.[104]

45. The PCA care plans provided for 15 recipients during the Review Period lacked start and end dates: A.S.[105]; C.D.[106]; C.G. (one contained no signature date)[107]; J.C. (one contained no signature date)[108]; J.B.[109]; J.L.[110]; L.K.[111]; M.P.[112]; N.D.1[113]; N.D.(2)[114]; P.F.[115]; P.G.[116]; R.P.[117]; T.P. (plans dated Dec. 12, 2014 and Dec. 15, 2015)[118]; and C.B. (one with an altered signature date)[119]. Additionally, the PCA care plans for J.L. and L.K. lacked safety and vulnerability measures.[120] Two files, A.J.[121] and G.M.[122], contained no PCA care plans at all.

46. The Department demonstrated by a preponderance of the evidence that Respondent failed to properly maintain complete PCA care plans for recipients during the Review Period and failed to properly supervise PCA services it provided to recipients.

V. Respondent's QP Supervisory Visits

47. During the Review Period, Respondent's QPs did not conduct all of the required QP supervisory visits or create corresponding notes for QP visits provided to recipients.[123]

48. Respondent had "significant difficulties" conducting QP visits, and its inability to do so was a recurring problem.[124] Mr. Garsinii testified that Respondent failed to conduct QP visits because Respondent's recipients were uncooperative and failed to make themselves available for QP visits.[125]

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[104] Exs. 5-22 (Documents for Recipients).
[105] Ex. 5 (Documents for Recipient A.S.).
[106] Ex. 7 (Documents for Recipient C.D.).
[107] Ex. 8 (Documents for Recipient C.G.).
[108] Ex. 11 (Documents for Recipient J.C.).
[109] Ex. 12 (Documents for Recipient J.B.).
[110] Ex. 13 (Documents for Recipient J.L.).
[111] Ex. 14 (Documents for Recipient L.K.).
[112] Ex. 15 (Documents for Recipient M.P.).
[113] Ex. 16 (Documents for Recipient N.D.).
[114] Ex. 17 (Documents for Recipient N.D.(2)).
[115] Ex. 18 (Documents for Recipient P.F.).
[116] Ex. 19 (Documents for Recipient P.G.).
[117] Ex. 20 (Documents for Recipient R.P.).
[118] Ex. 21 (Documents for Recipient T.P.).
[119] Ex. 22 (Documents for Recipient C.B.).
[120] Exs. 13-14. L.K.'s PCA care plan also failed to include a backup staffing plan. *See* Ex. 14.
[121] Exs. 6 (Documents for Recipient A.J.) and 100 (Aff. of B. Garsinii).
[122] Ex. 10 (Documents for Recipient G.M.).
[123] Ex. 100 (Aff. of B. Garsinii); Test. of B. Garsinii.
[124] *Id*.
[125] Test. of B. Garsinii.

49. Despite the recipients' alleged failure to comply with the required QP visits, Respondent's PCAs continued providing PCA services to the recipients. Respondent's PCAs did not encounter problems making contact with or providing services to recipients.[126]

50. Respondent failed to perform any of the required QP supervisory visits with the following recipients: A.S.[127]; A.J.[128]; and G.M.[129] . Respondent also failed to conduct the required QP supervisory visit within 14 days of when services began for the following recipients: C.D.[130]; C.G.[131]; F.B.-R.[132]; J.L.[133]; L.K.[134]; N.D.[135]; N.D.(2)[136]; P.F.[137]; P.G.[138]; R.P.[139]; T.P.[140]; C.B.[141]; and M.P.[142] Two recipients participated in the Choice program. Respondent conducted one QP supervisory visit for J.C.'s case on January 18, 2016, but failed to conduct further QP supervisory visits.[143] For J.B., Respondent failed to conduct QP supervisory visits within the 180-day interval.[144]

51. The Department demonstrated by a preponderance of the evidence that Respondent failed to timely conduct and properly document the QP supervisory visits related to the Respondent's provision of PCA services to recipients.

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[126] *Id*.
[127] Exs. 5 (Documents for Recipient A.S.) and 100 (Aff. of B. Garsinii).
[128] Exs. 6 (Documents for Recipient A.J.) and 100 (Aff. of B. Garsinii).
[129] Ex. 10 (Documents for Recipient G.M.).
[130] Ex. 7 (Documents for Recipient C.D.).
[131] Ex. 8 (Documents for Recipient C.G.). Respondent was also out of compliance with the 90-day and 120-day intervals.
[132] Ex. 9 (Documents for Recipient F.B.-R.). Respondent was out of compliance with QP supervision requirements between April 4, 2016 and August 11, 2016, and none of the PCA services provided to recipient during that timeframe are reimbursable.
[133] Ex. 13 (Documents for Recipient J.L.). Respondent was also not fully compliant with the 90-day intervals for QP supervisory visits.
[134] Ex. 14 (Documents for Recipient L.K.).
[135] Ex. 16 (Documents for Recipient N.D.). Respondent was also out of compliance with the 90-day intervals.
[136] Ex. 17 (Documents for Recipient N.D.(2)).
[137] Ex. 18 (Documents for Recipient P.F.). There were no documented QP supervisory visits between January 2012 and December 2014.
[138] Ex. 19 (Documents for Recipient P.G.). There were no documented QP supervisory visits between November 2011 and January 2015.
[139] Ex. 20 (Documents for Recipient R.P.). Respondent was also out of compliance with the 90-day intervals.
[140] Ex. 21 (Documents for Recipient T.P.). Respondent was also out of compliance with the 90-day and 120-day intervals. The Department is seeking to recover claims for PCA services provided from December 8, 2014 through May 28, 2016. *See* Ex. 23 (Notice of Overpayment, Stipulated Provider Agreement, and Supporting Spreadsheet).
[141] Ex. 22 (Documents for Recipient C.B.). Respondent was also out of compliance with the 90-day and 120-day intervals.
[142] Ex. 15 (Documents for Recipient M.P.).
[143] Ex. 12 (Documents for Recipient J.B.).
[144] *Id*.

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

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 complied with all procedural requirements of statute and rule in this matter.[145]

3. The Commissioner is authorized to impose various sanctions against a "vendor of medical care" for fraud or "abuse" in connection with the provision of medical care to public assistance recipients.[146] Sanctions include suspending or terminating participation in the program, withholding payments to a vendor, imposing a fine, and/or recovering money that has been improperly paid.[147]

4. Respondent is a "vendor of medical care" within the meaning of the statutes and rules pertaining to PCA services and the MA program.[148]

5. Applicable rules define "abuse" to include the submission of repeated claims, or causing claims to be submitted, from which required information is missing or incorrect.[149]

6. Minn. Stat. § 256B.064, subd. 1c, authorizes the Department to obtain monetary recovery from a MA vendor which has been improperly paid as a result of fraud, theft, or abuse, or as a result of a vendor or Department error, regardless of whether the error was intentional.[150]

7. Minn. R. 9505.2215, subp. 1, requires the Department to seek monetary recovery from an MA program vendor if payments made by the Department to the vendor were the result of "fraud, theft, abuse, or error on the part of the vendor, department, or local agency."

8. The Department demonstrated by a preponderance of the evidence that Respondent failed to properly document the PCA services it provided to recipients during the Review Period. Respondent failed to maintain complete PCA care plans for recipients during the Review Period, failed to timely conduct QP supervisory visits, and failed to

[145] Minn. Stat. § 256B.064, subd. 2.
[146] Minn. Stat. § 256B.064, subd. 1a.
[147] Minn. Stat. § 256B.064, subd. 1b.
[148] Minn. Stat. § 256B.02, subd. 7; Minn. R. 9505.2165, subp. 16a.
[149] Minn. R. 9505.2165, subp. 2(A)(1).
[150] Minn. R. 9505.0465, subp. 1, provides that the Department "shall recover medical assistance funds paid to a provider if the [D]epartment determines that the payment was obtained fraudulently or erroneously."

maintain PCA care plans or conduct QP supervisory visits in some instances. This conduct is in violation of Minn. Stat. § 256B.069, subds. 7 and 14. This conduct constitutes "abuse" under Minn. Stat. § 256B.064, subd. 1a, and as defined in Minn. R. 9505.2165, subp. 2(A)(1).

9. During the Review Period, Respondent provided PCA services to recipients under Minn. Stat. § 256B.0659 and Minn. R. 9505.0335.

10. To be reimbursable, PCA services must be provided to a recipient who has a PCA care plan.[151] Minn. Stat. § 256B.0659, subd. 7 provides nine elements that comprise a PCA care plan. These elements include a start and end date of the care plan, emergency contact information and a backup staffing plan, and dated signatures of the recipient or responsible party and the Qualified Professional. The initial PCA plan is required to be completed within one week of the start of services with a PCA provider agency and a new PCA care plan is required annually at the time of reassessment.[152]

11. Under Minn. R. 9505.0335, PCA services must be provided under certain conditions. PCA services must be provided under the supervision of a QP.[153] In the traditional PCA program, the QP must perform a supervisory visit within 14 days of the start of services, every 90 days for the rest of the first year of services, and every 120 days after that.[154] In the Choice program, QPs must perform visits every 180 days.[155]

12. By submitting repeated claims for recipients who lacked proper PCA care plans or documentation of required QP supervisory visits, Respondent engaged in "abuse" within the meaning of Minn. Stat. § 256B.064, subd. 1a; Minn. R. 9505.2165, subp. 2(A)(1).

13. Under Minn. R. 9505.2185, a vendor shall make health services records available to the Department on the date when they are requested by the Department. Failure to disclose or make a recipient's health service records available to the Department as required by Minn. R. 9505.2185 is abuse.[156]

14. Respondent also committed abuse by failing to make available all of the recipient records requested by the Department for the January 26, 2017 on-site visit.[157]

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[151] Minn. R. 9505.0335, subp. 2(D).
[152] Minn. Stat. § 256B.0659, subd. 7. In the Choice program, the recipient or responsible party must create the PCA care plan with the assistance of the QP, if needed. Minn. Stat. § 256B.0659, subd. 19(a)(2).
[153] Minn. R. 9505.0335, subps. 1, 2, 4.
[154] Minn. Stat. § 256B.0659, subd. 14.
[155] Minn. Stat. § 256B.0659, subd. 19.
[156] *See* Minn. R. 9505.2165, subp. 2(A)(9).
[157] Minn. R. 9505.2185, supb. 2, .2165, subp. 2(A)(9).

15. In imposing sanctions, the Commissioner must "consider the nature, chronicity, or severity of the conduct and the effect of the conduct on the health and safety of persons served by the vendor."[158]

16. Given the nature, chronicity and severity of the Respondent's lack of complete documentation, as well as the its failure to properly conduct supervisory visits for the purpose of ensuring the safety and appropriateness of care provided to recipients, the preponderance of evidence established that the Department has grounds to sanction Respondent, including recovery of non-reimbursable claims and implementation of a five-year Stipulated Provider Agreement, pursuant to Minn. Stat. § 256B.064, subds. 1a, 1b; Minn. R. 9505..2210, supb. 2(B), .2215, 2200, subps. 4, 5.

17. Any of the foregoing Conclusions of Law more properly designated as Findings of Fact are hereby adopted as such.

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

RECOMMENDATION

The Commissioner of Human Services should **AFFIRM** the Notice of Agency Action dated June 6, 2017. The Commissioner should recover from Respondent $586,657.09 in non-reimbursable claims for PCA services provided during the Review Period pursuant to the Notice of Overpayment and **AFFIRM** the Stipulated Provider Agreement dated June 6, 2017.

Dated: May 22, 2018

TAMMY L. PUST
Chief Administrative Law Judge

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No Transcript Prepared

[158] Minn. Stat. § 256B.064, subd. 1b; *see also* Minn. R. 9505.2205 (stating that the Commissioner shall consider the nature, extent and history of fraud, theft, abuse, or error and actions taken or recommended by other state regulatory agencies).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services 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

I. Introduction

Respondent repeatedly failed to maintain complete PCA care plans and failed to conduct QP supervisory visits in a timely manner. Although Respondent presented some evidence of PCA care plans with start and end dates, along with other paperwork, this documentation was not provided to the Department during the July 26, 2016 re-validation visit.[159] Respondent has argued that this documentation was not available at the time of the re-validation visit due to Respondent's recent move to a different office space.[160] However, Respondent admitted that it was possible that some of the dates found in the PCA care plans submitted as exhibits by Respondent were added later by QPs, after the re-validation visit.[161] Respondent continues to argue that its lack of compliance with Minnesota law should be overlooked in that it was due not to its own inadequate business practices but to an alleged lack of cooperation of the MA recipients themselves.

In imposing sanctions, the Commissioner must "consider the nature, chronicity, or severity of the conduct and the effect of the conduct on the health and safety of persons served by the vendor."[162] Given the amount of the overpayment, the number of recipients involved, and the two-year time span of Respondent's conduct, the imposition of a five-

[159] *See generally* exs. 15-22 and 102-119.
[160] Test. of B. Garsinii.
[161] *Id.*
[162] Minn. Stat. § 256B.064, subd. 1b.

year Stipulated Provider Agreement is appropriate in this case. Incomplete PCA care plans indicate either that care plans were not completed on time or, if completed timely but lacking start and end dates, that the care plans were not current. Without a start and end date, a PCA could have inaccurate information regarding the care to be provided at the PCA visit. Additionally, lack of documentation of required supervisory visits impacts recipients as it indicates that PCAs were not being adequately supervised by QPs as required under law.

II. Authority to Recover Paid Claims

Respondent argues that Minn. Stat. §§ 256B.0659, subd. 28, .064, subd. 2(f), limit the Department's ability to recover the amounts already paid to Respondent. Minn. Stat. § 256B.0659, subd. 28, provides that "[t]he Commissioner may assess a fine of up to $500 on provider agencies that do not consistently comply with the requirements of this subdivision."[163] Minn. Stat. § 256B.064, subd. 2(f) states:

> The [C]ommissioner may order a vendor to forfeit a fine for failure to fully document services according to the standards in this chapter and Minnesota Rules, chapter 9505. The [C]ommissioner may assess fines if specific required components of documentation are missing. The fine for incomplete documentation shall equal 20 percent of the amount paid on the claims for reimbursement submitted by the vendor, or up to $5,000, whichever is less.[164]

In addition to the Department's ability to impose fines, as described above, it may also impose other sanctions or recover overpayments. When the Department reimburses a vendor as a result of abuse, the Department "shall" recover the payments, and the Department is authorized to do so by statute.[165] The Department has the authority to impose fines on vendors who fail to maintain proper PCA documentation, in addition to pursuing monetary recovery and imposing other sanctions for abuse and fraud.[166] The Department's ability to recover overpayments is not limited by its ability to also impose fines for noncompliant PCA documentation.

III. Alleged Lack of Cooperation of Recipients

At hearing, Mr. Garsinii testified that various recipients failed to cooperate with completion of QP supervisory visits and asserted that this lack of cooperation abrogated Respondent's obligation to comply with applicable documentation requirements.[167] Respondent acknowledges that no legal authority exists in support of this position. [168] The

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[163] Minn. Stat. § 256B.0659, subd. 28.
[164] Minn. Stat. § 256B.064, subd. 2(f).
[165] *See* Minn. R. 9505.2215, subp. 1(A); Minn. Stat. 256B.064, subd. 1c(a)-(b) (regarding monetary recovery by the Department).
[166] *See* Minn. Stat. § 256B.064, subd. 1; Minn. R. 9505.2210, .2215 (discussing monetary recovery, suspension or withholding of payments, suspension or termination of participation in MHCP, or imposition of a fine as alternate ways for the Department to address abuse or fraud in MHCP).
[167] Test. of B. Garsinii.
[168] *See* Respondent Reply Br. at 5.

law is not advisory; it mandates the content and timeliness of required documentation. Having failed to comply with the statute's requirements, Respondent will find no safe haven in pointing to the alleged "bad acts" of others, including the recipients it has been paid to serve.

IV. Service Agreement

Respondent argues that it was prevented, as a provider agency, from discontinuing service to an uncooperative recipient due to the Department's Services Agreement. The Chief Administrative Law Judge does not find this argument persuasive. Respondent is aware of its ability to submit a Change Request to the Department in order to stop providing PCA services, and did so on at least one occasion.[169] Respondent could have submitted a similar request for any uncooperative recipient who prevented Respondent from fulfilling its PCA compliance obligations. Respondent failed to do so and instead continued to provide PCA services, submit claims, and accept payment from the Department. As such, Respondent knowingly continued to receive payments to which it was not legally entitled, which it now must repay.

V. Conclusion

The Chief Administrative Law Judge has carefully considered the testimony from the evidentiary hearing and the underlying record of documents. The Notice of Overpayment and Stipulated Provider Agreement is warranted in this case due to the nature, chronicity, and severity of Respondent's violations in the areas of timely development and completion of PCA case plans and timely completion of QP supervisory visits.

T. L. P.

[169] Ex. 108 (Respondent's documentation on C.D.) at 53.