

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Oakwood Community ICF/MR,)	
(Provider No. 18G003),)	Date: April 15, 2008
)	
Petitioner,)	
)	Docket No. C-06-24
- v. -)	Decision No. CR1670
)	
Centers for Medicare & Medicaid)	
Services.)	

DECISION

Petitioner, Oakwood Community, is a state-owned-and-operated intermediate care facility for the mentally retarded (ICF/MR) in Somerset, Kentucky. Based on two surveys conducted by the Kentucky Division of Health Care Facilities and Services (state agency), the Centers for Medicare & Medicaid Services (CMS) found Petitioner out of compliance with standards and conditions of participation for ICF/MRs, determined that conditions at the facility posed immediate jeopardy to client health and safety, and proposed to cancel Petitioner's approval to participate in Medicaid as an ICF/MR. Petitioner appealed, and the cancellation of Petitioner's approval to participate in Medicaid has been halted pending resolution of this case. For the reasons discussed below, I find that CMS has a basis to cancel Petitioner's approval to participate in the Medicaid program as an ICF/MR.

I. Background

On August 22, 2005, the state agency completed a survey of Petitioner's facility (August survey). By letter dated August 29, 2005 (notice letter), CMS notified Petitioner that the state agency had determined that Petitioner was out of compliance with conditions of participation for ICF/MRs¹ and that conditions at the facility posed an immediate

¹ The regulations express these conditions of participation as broadly stated
(continued...)

jeopardy to the health and safety of its clients. CMS Ex. 1, at 1. CMS specifically cited section 1905(d) of the Social Security Act (Act) and the condition of participation related to client protections at 42 C.F.R. § 483.420² and the condition of participation related to facility staffing at section 483.430 as out of compliance with participation requirements. CMS's notice letter informed Petitioner that to stave off Medicaid termination, set for September 14, 2005, it had to submit an allegation of compliance. If the regional office found it acceptable, a revisit would be conducted prior to the termination date. If the reasons for the termination continued, Petitioner would be terminated from participation in the Medicaid program. If immediate jeopardy was removed, but compliance with other conditions had not been achieved, Petitioner "may be granted [additional time] for correction." CMS Ex. 1, at 1-2.

By letter dated September 19, 2005, CMS sent Petitioner a final notice of termination (second notice). The second notice reflects that on September 14, 2005, the state agency completed a revisit to reassess Petitioner's compliance with Medicaid certification requirements, with special attention to the areas of noncompliance which formed the basis for CMS's earlier finding of immediate jeopardy on August 22, 2005. CMS stated that the revisit found that the immediate jeopardy related to client protections had not been abated and that a new complaint was also investigated. The new complaint, which was initiated on September 12, 2005, identified an immediate and serious threat to client health and safety under the condition of participation for client protections at 42 C.F.R. § 483.420, and the condition of participation for governing body and management at 42 C.F.R. § 483.410. CMS also stated that as Petitioner was unable to remove the continuing immediate jeopardy situations within the 23-day time-frame allowed where immediate jeopardy is present, Petitioner's Medicaid provider agreement was terminated effective September 14, 2005. CMS Ex. 34, at 1-2.

¹ (...continued)

participation criteria. The regulations also state standards of participation as subsidiary components of the conditions.

² In its prehearing brief, CMS stated that it is relying also on a violation of the regulatory standard at 42 C.F.R. § 483.420(d)(1) (Tag W 149) under this condition, which was not included in the statement of deficiencies (SOD, statement of deficiencies, or CMS 2567) prepared by the surveyors following the August survey. CMS notes that Petitioner has not challenged this "revision." As Petitioner has had ample notice of this allegation of noncompliance, I am considering the violation asserted under this section of the regulations.

By letter dated September 27, 2005, CMS forwarded to Petitioner the statements of deficiencies from the September 14, 2005 revisit survey and September 12-17, 2005 complaint investigation survey, as referenced in the second notice (third notice). The third notice stated that Petitioner did not meet the requirements of section 1905(d) of the Act and the conditions of participation at 42 C.F.R. §§ 483.410 (governing body), 483.420 (client protections), 483.430 (facility staffing), and 483.440 (active treatment). CMS Ex. 35, at 1-2.

Petitioner timely requested a hearing by letter dated October 18, 2005. The case was assigned to me for hearing and decision on October 26, 2005.³ Following assignment of the case to me, Petitioner changed counsel, the parties requested numerous extensions, including requesting that two scheduled hearings be canceled. For a lengthy period, I gave the parties the time they requested to attempt to settle the case. The parties did not, however, settle the case, and, to move the case forward, I set a final hearing date and heard the case on December 3, 2007, in Louisville, Kentucky. At the hearing, I admitted into evidence CMS exhibits (CMS Exs.) 1-4, 7-38, and 40-56. No CMS exhibits identified as CMS Exs. 5, 6, and 39 were offered. Transcript (Tr.) 17. I admitted into evidence Petitioner's exhibits (P. Exs.) 1-7, 9-15, 22, and 23. No P. Exs. 8, 16-21, 24 or 25 were offered. Tr. 18. Testifying for CMS were Douglas Boyd, a Detective for the Kentucky State Police (Tr. 29-40), and Sandy Goins, R.N., Assistant Regional Program Manager for the state agency and a former surveyor. Tr. at 41-100. Petitioner did not offer any witnesses. Both parties submitted post-hearing briefs (CMS and P. Brief respectively) and post-hearing reply briefs (CMS and P. Reply respectively).

II. Issue

Whether Petitioner was out of substantial compliance with the conditions of participation for ICF/MRs.

Whether CMS is authorized to cancel Petitioner's approval to participate as an ICF/MR in Medicaid, thus terminating Petitioner's program participation.⁴

³ Termination of Petitioner's provider agreement has been withheld pending my decision or a CMS determination that preserving the provider agreement constitutes an immediate and serious threat to the health and safety of Petitioner's clients.

⁴ The State Operations Manual (SOM) notes that the Act uses the terms "cancel" and "terminate" interchangeably. SOM, section 3040 (Rev. 1, 05-21-04).

III. Statutory and Regulatory Background

An ICF/MR is a facility whose primary purpose is to provide health or habilitative services to mentally retarded individuals. Section 1910(b) of the Act provides that the Secretary of Health and Human Services (Secretary) “may cancel approval of any intermediate care facility for the mentally retarded at any time if he finds on the basis of a determination by him as provided in section 1902(a)(33)(B) that a facility fails to meet the requirements contained in section 1902(a)(31) or section 1905(d), or if he finds grounds for termination of his agreement with the facility pursuant to section 1866(b).” Section 1866(b)(2) provides that the Secretary may terminate an agreement when the Secretary determines that a facility “fails to comply substantially with the provisions of the agreement, with the provisions of this title and regulations thereunder . . .” The Secretary will notify the state agency and the ICF/MR that the facility’s approval to participate in Medicaid and Medicare will be terminated at a time specified by the Secretary, and the ICF/MR will not be reinstated until the reason for termination has been removed and there is reasonable assurance that it will not recur. Act, section 1910(b)(1).

The Secretary has published regulations setting forth conditions of participation for ICF/MRs and standards of participation within each condition. 42 C.F.R. §§ 483.400-480. To determine whether a provider is complying with a particular condition of participation, surveyors evaluate the manner and degree to which a facility satisfies each of the standards within the condition. CMS may terminate an ICF/MR’s approval to participate without offering it an opportunity to correct identified deficiencies: 1) if CMS concludes that the documented deficiencies are of such character as to render the ICF/MR substantially incapable of providing adequate care to its clients; or 2) if CMS determines that the documented deficiencies may adversely affect client health and safety. 42 C.F.R. §§ 488.24(b) and (c); Act, section 1910(b)(2). Actual harm is not required to sustain a finding of a condition-level deficiency. *See Prime Care Home Health Agency, Inc.*, DAB No. CR1678 (2007); 42 C.F.R. § 488.26(b).

“Immediate jeopardy” has been defined as a situation in which immediate corrective action is necessary because the provider’s noncompliance with one or more requirements of participation or conditions of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to an individual receiving care in a facility. 42 C.F.R. § 442.2; *see* 42 C.F.R. § 489.3.

Petitioner has a right to request a hearing based on CMS’s cancellation of its approval to participate in Medicaid. 42 C.F.R. § 498.3(b)(9); 498.5(j)(1). If an ICF/MR requests an administrative hearing, its participation agreement remains in effect until an adverse hearing decision is issued, unless continuation of provider status constitutes an immediate and serious threat to the health and safety of patients, and a facility has failed to correct its deficiencies after being notified of the deficiencies. Act, section 1910(b)(2); 42 C.F.R. § 498.5(j)(2).

IV. Burden of Proof

As an evidentiary matter, CMS must set forth a prima facie case that a facility is not in substantial compliance with participation requirements. Petitioner then has the burden of coming forward with evidence sufficient to establish the elements of any affirmative argument or defense, and bears the ultimate burden of persuasion. To prevail, Petitioner must prove, by a preponderance of the evidence, that it was in substantial compliance with relevant statutory and regulatory provisions. *See Batavia Nursing and Convalescent Inn*, DAB No. 1911 (2004); *Batavia Nursing and Convalescent Center*, DAB No. 1904 (2004), *applying Hillman Rehabilitation Center*, DAB No. 1611 (1997), *aff'd*, *Hillman Rehabilitation Center v. HHS*, No. 98-3789 (GEB), slip op. at 25 (D.N.J. May 13, 1999).

V. Findings of Facts, Conclusions of Law, and Discussion

I make findings of fact and conclusions of law to support my decision in this case. I set forth each finding, below, in italics, as a separate heading. I discuss each finding in detail.

A. Petitioner was out of substantial compliance with conditions of participation during both the August and September survey periods.

Petitioner is an ICF/MR established in 1972 and located in Somerset, Kentucky, a town of approximately 12,000 people, located 80 miles south of Lexington, Kentucky and 135 miles southeast of Louisville, Kentucky. Petitioner houses more than 200 residents with moderate to severe mental retardation. P. Brief at 1. In its brief, CMS set forth facts which it asserts are essentially uncontested by Petitioner. CMS Brief at 5-10. Petitioner does not rebut the essential facts set forth by CMS with regard to the August survey, and I adopt the following facts asserted by CMS, adding citations where appropriate. CMS Br. at 5-7; *see* P. Brief and P. Reply.

1. August Survey

CMS asserts that Petitioner failed to appropriately supervise a client who had a history of seizures and failed to ensure that a safe environment was maintained for the client during bathing. On August 13, 2005, while Client 1⁵ was in the bathtub unsupervised, Client 1 had a seizure and drowned. CMS Ex. 2, at 5. CMS has cited Petitioner as out of compliance with the condition-level deficiencies of client protections and facility staffing

⁵ The clients who were the focus of the August and September surveys were both titled Client 1 in the relevant statements of deficiencies (there is also a Client 2 referenced in the September complaint survey). I will refer to the client who was the focus of the August survey as Client 1, and the client who was the focus of the September survey as Client 1-S.

at sections 483.420 and 483.430 of 42 C.F.R. Subpart H. And, CMS has added specifically a citation regarding a deficiency at 42 C.F.R. § 483.420(d)(1), which citation I noted that I would allow at footnote 2 of this decision. Specifically, in its brief, CMS asserts that:

1. On August 13, 2005, Client 1 had a seizure and drowned while he was in the bathtub unsupervised. CMS Exs. 2, at 8; 9, at 1-4, 49-52.
2. Client 1 was admitted to Petitioner's facility on May 10, 1978, with a diagnosis of profound mental retardation and a history of seizures. CMS Exs. 2, at 10-11; 11, at 29-30.
3. A "Quality of Life Plan" dated April 25, 2005, revealed that Client 1 enjoyed a hot bath to ease his muscles and that he required moderate to total assistance with bathing. The plan failed to address the level of supervision necessary to maintain a safe environment for Client 1 while bathing, but other documents did contain levels of supervision for Client 1 while at home, outside the home, and on community outings. CMS Ex. 11, at 14, 17-19.
4. Client 1 had seizure activity on February 16, 2005, resulting in respiratory arrest and transfer to a local hospital. On April 4, 2005, May 22, 2005, August 4, 2005, and August 5, 2005, Client 1 experienced seizures. The August 4 and 5, 2005 seizures reveal that heat was a contributing factor to the onset of seizure activity. CMS Exs. 2, at 11; 9, at 5-13; 24, at 7.
5. On August 13, 2005, the building where Client 1 lived was hot because of an electrical outage. At 6:45 p.m., facility staff took Client 1 to the bathroom and left him unsupervised in the bathtub. At 8:18 p.m., staff found Client 1 in the bathtub, submerged in water, unresponsive and without respiration. Resuscitation measures were immediately taken and emergency medical personnel summoned. Client 1 was pronounced dead at 9:05 p.m. He was not provided one-to-one supervision while bathing, and he was alone in the tub without supervision for a significant period of time. CMS Exs. 3, at 11-12; 11, at 6-13; 15, at 7-9.
6. The autopsy report revealed bite marks on Client 1's tongue and listed Tonic-Clonic Seizure Disorder as a significant condition that contributed to his death, in addition to drowning. CMS Ex. 9, at 55-56.
7. Three staff members were caring for Client 1 at the time of the incident. Two were not normally assigned to work with Client 1. One stated that on August 13, 2005, he was unaware of the client's history. Two others had no knowledge that he required one-to-one supervision during bathing. CMS Exs. 2, at 12-13; 24, at 11-26, 45-47.

8. Oakwood staff temporarily assigned to care for clients are supposed to receive training regarding the care needs, level of supervision, medical issues, and training/service objectives of a client. This training was not provided to the reassigned staff caring for Client 1. CMS Ex. 24, at 24, 46.

9. The second shift supervisor, on duty during the incident, was aware that individuals with a history of seizures were required to receive one-on-one supervision, but he was unaware until this incident that his staff was not providing continuous supervision for clients with a history of seizures. CMS Exs. 2, at 13; 24, at 6.

10. In an interview, the assistant medical director stated that Client 1 needed staff attendance at all times during bathing. The Quality of Life Plan for Client 1 for the year 2003 stated he should have one-on-one supervision while bathing, and the client's medical condition had not changed since that plan was put in place. CMS Exs. 2, at 13-14; 9; 10, at 51; 24; 25; 26.

11. Six of seven clients residing in Resident 1's cottage had a history of seizure activity. These clients also were not provided with continuous supervision while bathing. CMS Exs. 2, at 14; 10, at 14, 22; 27.

Based on the above, CMS adopted the state agency's findings that Petitioner was out of compliance with conditions of participation for ICF/MRs and, moreover, that immediate jeopardy to Petitioner's residents resulted. Petitioner does not contend that it was in compliance and, moreover, does not contest that it was out of compliance at a level of immediate jeopardy during the August survey. Based on these facts, I find that Petitioner was out of compliance at a level of immediate jeopardy. Client 1 had episodes of seizure activity in August that the facility believed were precipitated by heat. Leaving Client 1 alone in a hot bathtub placed the client in patent immediate jeopardy.

2. September Surveys

Petitioner submitted a plan of correction following the August survey containing completion dates from August 26-September 11, 2005. CMS Ex. 2. CMS accepted the Petitioner's allegations of compliance and asserts that from September 12-17, 2005, the state agency conducted a revisit based on Petitioner's plan of correction and an additional complaint survey to determine if corrective action taken by Petitioner had removed the immediate jeopardy. CMS Ex. 35, at 20. CMS sees this as one continuous survey, consisting of the revisit survey of September 14, 2005 and the complaint investigation survey CMS alleges took place from September 12-17, 2005. CMS admits that the revisit survey on September 14, 2005, found that Petitioner had implemented its credible allegation regarding the removal of immediate jeopardy related to supervision of clients with seizure disorder. However, the complaint survey, which CMS asserts took place from September 12-17, 2005, found that immediate jeopardy existed and was ongoing

related to Petitioner's failure to provide supervision and protection from abuse for Client 1-S and Client 2. CMS determined that immediate jeopardy existed related to Petitioner's failure "to provide supervision in a community setting; failure to report and investigate allegations of suspected sexual abuse; and failure to protect clients from further potential abuse." CMS Ex. 35, at 1. Based on this, CMS asserts that,

1. Client 1-S had a diagnosis of severe mental retardation and limited communication skills. He could speak a few words and communicated with gestures and a few signs. Tr. 44.

2. Client 2 has moderate mental retardation, Down's Syndrome, and hearing loss. CMS Ex. 42, at 13.

3. Clients 1-S and 2 were placed in an outside employment program in the community. The facility failed, however, to ensure that a written agreement with the outside employment program was obtained prior to Clients 1-S and 2 being placed in the program. The facility did not ensure that the outside services met standards of quality or were geared toward successful completion of established goals and objectives for each client. CMS Exs. 35; 46; 48, at 6-23.

4. Client 1-S began a job in a grocery store on April 18, 2005. Petitioner did not assess Client 1-S regarding the suitability of the job placement; did not address his progress; and did not develop goals or objectives for him related to his working in the community. After placement, Client 1-S displayed increased maladaptive behaviors and expressed a dislike of going to his place of employment. Petitioner continued to send him to the job site. The client did not receive aggressive and consistent training, treatment, and services by trained staff in accordance with his needs. CMS Exs. 35; 48, at 6-23, 36, 38, 57-58, 61; 50, at 2.

5. The qualified mental retardation professional (QMRP⁶) for Client 1-S stated that a vocational assessment should have been completed prior to the client's placement in a community job, but that no assessment was completed for Client 1-S. CMS Ex. 35, at 26, 48, 51, 52.

6. Client 1-S was not monitored regarding his progress toward goals and objectives (staying on task while working). CMS Ex. 35, at 26, 48.

7. The Habilitation Director stated that there was no specific oversight or monitoring in place regarding Client 1-S's off-campus job placement. CMS Exs. 35, at 40; 48, at 36-44.

⁶ Each client's active treatment program must be integrated, coordinated and monitored by a QMRP. 42 C.F.R. § 442.430.

8. According to his individual program plan, Client 1-S required indirect supervision while in the community, which means that he needed to be under the visual supervision of facility staff at all times. Client 1-S did not receive this level of supervision while working at his community job. CMS Exs. 50, at 23; 35, at 20, 48.

9. On August 31, 2005, Client 1-S's job coach allowed Client 1-S's supervisor to remove Client 1-S from the job site unsupervised. CMS Exs. 35, at 20, 45, 48; 50. The supervisor told the job coach he was taking Client 1-S to get ice cream while the job coach remained in the store. The job coach agreed to the arrangement. CMS Exs. 35, at 30-33, 44-45; 48, at 52-53; 50, at 18.

10. Client 1-S's job coach had received no training related to the duties of a job coach as of August 31, 2005. The job coach stated that he thought that Client 1-S's supervisor had been trained to provide supervision to the client and that it was acceptable for the client to leave with him. Client 1-S's previous job coach also stated she had received no formal training related to her job coach duties and that she permitted Client 1-S to leave the job site with the same adult male on three or four occasions. CMS Exs. 35, at 20, 30-32, 44-45; 48, at 35, 52-53; 50.

11. Facility employee Juanita Whitis, R.N. (Nurse Whitis), suspected that Client 1-S might have been subjected to sexual abuse on August 31, 2005. CMS Ex. 45, at 21. The suspected abuse was not reported to any state agency outside of Petitioner. CMS Ex. 48, at 99-104.

12. On September 12, 2005, Client 2 started a job in the same grocery store where Client 1-S worked. Petitioner failed to assess Client 2 regarding the suitability of the community job placement. Petitioner failed to develop goals or objectives for Client 2 related to working in the community. Client 2 did not receive aggressive and consistent training, treatment and services by trained staff in accordance with her needs. CMS Exs. 41; 42; 48, at 6-22.

13. The QMRP stated that a vocational assessment should have been completed for Client 2 prior to her placement in a community job, but was not done. CMS Ex. 48, at 9. Petitioner's staff had noted that Client 2's mental health and behavior declined after she started the community job. CMS Ex. 41.

14. Petitioner's abuse and incident management policies failed to address the manner in which abuse allegations would be investigated or how clients would be protected from further potential abuse when the perpetrator was not an employee or client. The policies failed to address the manner in which allegations of sexual abuse would be reported. CMS Ex. 44.

CMS asserts other facts it says are disputed by Petitioner, but which it asserts illustrate why it believes it had the authority to terminate. Some of those additional facts include:

1. Petitioner's policy regarding incident management required allegations of sexual abuse to be reported to the Office of the Commissioner for Mental Health and Mental Retardation. CMS Ex. 44. This was not done prior to the survey. The staff investigator who investigated the case stated that her instructions were to focus on the job performance of the job coach, not the allegation of abuse. CMS Exs. 35, at 20; 40, at 26-27; 48, at 105-08; 50.

2. Interviews revealed that staff (including nurses, the examining physician, the assistant medical director, the home manager, the lead facility investigator, the risk manager, the acting facility director, and the staff investigator) were aware of the suspected sexual abuse by word-of-mouth, by document review, and in some cases, by both. Staff either notified supervisors or conferred with each other, but failed to ensure that the suspected abuse was investigated and reported in accordance with state law procedures. CMS Exs. 35, at 20; 40, at 24-33; 48; 49; 50.

3. On September 13, 2005, after extensive interviews, Client 1-S's supervisor admitted to a Kentucky State Police Officer that an inappropriate sexual incident with Client 1-S had occurred on August 31, 2005. CMS Exs. 35, at 20; 38, at 18-21. Immediately thereafter, Client 1-S's supervisor stated that Client 1-S should not return to the job site. CMS Ex. 50, at 1; Tr. 29-40.

Petitioner does not dispute the general facts set forth by CMS regarding Client 1-S and does not refer at all to Client 2. However, Petitioner has set forth its own facts with regard to the incident that occurred on August 31, 2005 regarding Client 1-S. Petitioner asserts that a patient aide went to pick up Client 1-S and his job coach at 11:00 a.m. on August 31, 2005. CMS Ex. 40, at 64. The patient aide learned that the job coach had allowed Client 1-S to get ice cream with the owner/manager of the business where he worked. *Id.* The patient aide stated to a facility investigator that the resident returned at approximately 11:15 a.m. and was smiling and laughing. CMS Ex. 50, at 50. Petitioner agrees with CMS that Client 1-S's level of supervision was indirect in the community. CMS Ex. 50, at 22. The job coach remained on the job site throughout Client 1-S's shift and indicated he did not object to Client 1-S leaving the job site with the owner/manager because he thought Client 1-S had been allowed to leave with him before. CMS Ex. 40, at 14. The patient aide reported the unauthorized departure to his supervisor. An incident report indicates that Petitioner notified the client's guardian of the breach in the level of supervision, as well as the home coordinator, nurse, physician, social worker and investigator. The incident report notes that Client 1-S was not injured and did not complain of pain. Boxes to indicate alleged physical or sexual abuse were not checked. CMS Ex. 40, at 64.

Nurse Whitis performed a physical examination on Client 1-S after his return, standard facility policy for a client who left Petitioner's supervision. CMS Ex. 40, at 66; Tr. at 67. Nurse Whitis noticed stool in Client 1-S's underpants and around his rectum (and that he was "very tense" around his rectal area), but she saw no signs of blood. CMS Ex. 40, at 66. Nurse Whitis asked Client 1-S if he had been touched by anyone and he "shook his head yes." *Id.* Nurse Whitis requested that Client 1-S be examined by a facility physician. *Id.* Nurse Whitis later stated that if she thought Client 1-S had been sexually abused, and that Petitioner had not properly addressed the situation, she would have reported it to the State Police herself. P. Ex. 11, at 10.

Vivek Patel, M.D., examined Client 1-S, in the presence of Edward Schertz, M.D. CMS Ex. 40, at 67. Dr. Patel wrote a progress note on August 31, 2005, at 3:15 p.m., stating that he was asked by Nurse Whitis to "[check] for possible sexual abuse. Resident in no obvious distress. His underwear are stained [with] stool [and] stool is also present in his rectal area. Examined resident in presence of Dr. Shertz. No anal tear or laceration seen, sphincter tone good." *Id.* Both Dr. Patel and Dr. Schertz concluded that there was no reasonable basis on which to suspect abuse. P. Ex. 11, at 10, 22; CMS Ex. 53, at 12. Dr. Patel stated that if he had suspected abuse he would have asked Dr. Schertz for his opinion and would have sent the client to the hospital for further evaluation. P. Ex. 11, at 10.

At approximately 8:20 p.m. on August 31, 2005, a nurse noted a small red-colored stain on Client 1-S's underwear. She notified a physician and the stain was attributed to Client 1-S's history of internal hemorrhoids. CMS Ex. 50, at 76.

Angela Shelton, a facility investigator, investigated the incident shortly after 2:00 p.m. on August 31, 2005. According to Petitioner, because there was no reason at the time to suspect abuse, the investigation was initially assigned as a Class II investigation of the job coach's work performance. P. Ex. 11, at 26.⁷ Petitioner reevaluated the classification after learning of Client 1-S's physical examination. In light of the physician's conclusion that there were no signs of abuse coupled with Client 1-S's history of not completely cleaning himself after toileting and that he nodded indiscriminately in agreement when asked a question, Petitioner determined the classification should remain Class II. *Id.* at 19, 26. Ms. Shelton concluded her investigation on September 2, 2005. *Id.* at 52. Client 1-S was returned to work on September 12, 2005, after the internal investigation was completed and Client 1-S's job coach trained on his level of supervision. CMS Ex. 40, at 20.

⁷ Investigations are assigned class designations based on the seriousness of the incident and whether the incident would need to be reported to state agencies. A Class III incident would require reporting.

On September 13, 2005, Client 1-S's supervisor at his job site confessed to Kentucky State Police Detective Doug Boyd that the resident had masturbated him on August 31, 2005. CMS Ex. 38, at 19-20; Tr. 31. I adopt these facts as set forth by Petitioner. They make no difference, however, to my ultimate conclusion in this case.

Petitioner makes two basic arguments in support of its position. First, Petitioner asserts that the immediate jeopardy alleged in connection with the August survey was abated within 23 days, and that CMS's decision to terminate based on an unrelated subsequent finding of immediate jeopardy made at the September complaint survey was arbitrary and capricious. Second, Petitioner argues that the finding of immediate jeopardy made in the September 2005 complaint survey was substantively erroneous. P. Brief at 2.

Petitioner's first argument is predicated on its belief that the two September surveys are separate surveys. Petitioner believes that the September 14 revisit survey was conducted to review only the areas specific to clients requiring one-on-one supervision with seizure activity. CMS Ex. 37, at 2. Petitioner argues that although the state agency found condition-level deficiencies remained in three areas, those deficiencies found did not rise to the level of immediate jeopardy. Thus, Petitioner believes that based on the results of that survey it should have been given 67 more days to come into compliance based on a 90-day termination track.⁸ And, Petitioner believes that the complaint investigation

⁸ Petitioner relies on the SOM to make its argument regarding the timing of termination. It asserts that it was put on a 23-day track for termination based on immediate jeopardy found in the August survey. Petitioner asserts that when the state agency found the immediate jeopardy related to the August survey abated during the September 14 survey it should have been placed on a 90-day termination track for that survey and on another 23-day termination track for the deficiencies identified during the complaint survey. P. Brief at 10-16. I disagree. The SOM provides only suggestions to state agencies and is without the force or effect of law, and it may not be relied on to extend, enlarge, or otherwise alter the plain meaning of applicable regulations. *Prime Care Home Health Agency, Inc.*, DAB CR1678, citing *Beverly Health & Rehabilitation Services, Inc. v. Thompson*, 223 F. Supp. 2d 73, at 99-106 (D.D.C. 2002); *Cal Turner Extended Care Pavilion*, DAB No. 2030 (2006); *Aase Haugen Homes, Inc.*, DAB No. 2013, at 15 (2006). However, I need not address Petitioner's argument here, as I do not find the two September surveys separate in the form Petitioner suggests. And, I do not, as Petitioner would suggest, find it was arbitrary, capricious, or improper for CMS to so view them.

survey, which took place from September 12 to September 17, 2005, was “wholly unrelated” to the revisit survey. Petitioner asserts that there were separate statements of deficiencies for the surveys and different surveyors involved. Petitioner asserts that as of September 9 there was no “continuing” immediate jeopardy.⁹ P. Br. at 5, 10.

Petitioner has failed to explain why characterizing the revisit and complaint surveys as distinct surveys is even relevant here. Petitioner was obliged to achieve “total compliance,” as noted in CMS’s August 29, 2005 letter, before a halt to termination would be assured. CMS Reply at 3; CMS Ex. 1, at 2. The Act gives CMS the authority to terminate an ICF/MR whenever it finds that a condition-level deficiency exists. Act, section 1910(b). The Act and regulations do not mandate revisits if a condition-level deficiency exists or persists. 42 C.F.R. §§ 488.24; 488.28; *see Beverly Health and Rehabilitation - Spring Hill*, DAB No. 1696. Instead, the Act requires substantial compliance with the conditions of participation. If condition-level deficiencies existed at the time of the revisit survey, it is irrelevant that they were discovered during a concurrent complaint survey - the salient fact would be that Petitioner was not in compliance with all conditions of participation at that time and Petitioner’s only recourse would be to prove that it was, in fact, in compliance at that time.¹⁰

With regard to its second argument, Petitioner does not dispute that there was a brief failure to provide Client 1-S with the proper level of supervision in the community as identified during the complaint survey. Petitioner asserts, however, that this failure did not constitute immediate jeopardy. P. Brief at 20-21. Petitioner misapprehends the issue. The issue is not whether the failure constituted immediate jeopardy, but whether Petitioner was noncompliant with a condition of participation.

⁹ Petitioner refers to September 9 as the date by which there was no continuing immediate jeopardy, although in its credible allegation of compliance asserts a final compliance date of September 11, 2005 for certain items. CMS Ex. 2, at 12, 21.

¹⁰ Petitioner also argues that even if the noncompliance and immediate jeopardy findings contained in the September 17 SOD were valid and could be construed as related to the revisit, they don’t support termination, as a revisit survey should focus on events after the alleged compliance date. P. Reply at 6. However, here what the surveyors discovered was that the facility was failing in a different way to supervise its residents, and it discovered that the failure of supervision at the facility was pervasive. And, that failing, as discussed below, was not ameliorated by the date of alleged correction.

Failure to supervise clients was a systemic and regrettably-pervasive problem at Petitioner's facility. The SOD from the September complaint survey states that the governing body failed to provide operating direction over the facility to ensure that the facility was in compliance with conditions of participation. These failures included long-term systemic problems related to supervising clients, failing to supervise clients at a community job site, and placing two clients in a community job without an employment program, without an agreement with the outside employer, and without a vocational assessment. CMS Ex. 35, at 22-28. Petitioner does not meaningfully contest CMS's version of these facts. While the SOD also cited a failure to report and investigate suspected abuse under this condition, it was not the only focus of the deficiency. Petitioner also failed to supervise and to provide any meaningful training to its job coaches, violating the condition of participation at client protections. Petitioner does not meaningfully contest the CMS version of these facts either. While the failure to report and investigate sexual abuse was a part of this deficiency, it was not the entire violation. CMS Ex. 35, at 30-32. Petitioner also violated the condition of facility staffing by its failure to provide supervision to Client 1-S and its failure to train its job coaches. Petitioner does not meaningfully contest these facts. CMS Ex. 35, at 42-45. *See* P. Brief and P. Reply. Petitioner's continuing failures under these conditions place it out of substantial compliance with conditions of participation during both the August and September surveys.

B. CMS is authorized to cancel Petitioner's approval to participate as an ICF/MR in Medicaid, thus terminating Petitioner's program participation.

I do not have to make a finding that immediate jeopardy existed to uphold CMS's determination to terminate, as CMS may terminate a facility if only one condition of participation is out of compliance. *See Community Home Health*, DAB No. 2134 (2007). Given the facts set out during the September survey, however, I do not find clearly erroneous CMS's determination that immediate jeopardy existed at Petitioner's facility during the September survey. At a minimum, Petitioner's failure to train its job coaches led to Client 1-S's being allowed to leave the job site unsupervised, and that left him prey to abuse. Petitioner's submission of a credible allegation of compliance with regard to the August survey did not address its pervasive failure to supervise. And the submission of a plan of correction is not sufficient to remove either immediate jeopardy or a condition-level finding of a deficiency absent survey findings. CMS must make a determination that a facility has come into compliance with the regulations. *See Sonali Diagnostic Laboratory*, DAB No. 2008 (2006).

VI. Conclusion

For all of the reasons set forth above, CMS is authorized to cancel Petitioner's approval to participate as an ICF/MR in Medicaid, thus terminating Petitioner's program participation.

/s/
Richard J. Smith
Administrative Law Judge