

Before the
Administrative Hearing Commission
State of Missouri



NEW TRAILS, LLC,)	
)	
Petitioner,)	
)	
vs.)	No. 13-0666 SP
)	
DEPARTMENT OF SOCIAL SERVICES,)	
MISSOURI MEDICAID AUDIT AND)	
COMPLIANCE UNIT,)	
)	
Respondent.)	

DECISION

The petitioner, New Trails, LLC (“New Trails”), a Missouri Medicaid provider, is subject to the sanction of attendance at provider education sessions because it did not timely gather and tender the documentation to support the billing for services to one of its resident clients.

Procedure

New Trails filed two complaints on April 25, 2013, challenging the final decision of the Department of Social Services (“, Missouri Medicaid Audit and Compliance Unit (“the Department”) to impose the sanction of recoupment against it for certain violations with which it was charged after a post-payment review. We opened cases 13-0666 SP and 13-0939 SP. The Department filed an answer in both cases on May 30, 2013.

On July 15, 2013, the Department filed a motion for summary decision in this case. We denied the Department's motion on August 28, 2013.

On October 8, 2013, New Trails filed a motion for stay, asking the Commission to prevent the recoupment by the Department from taking place until a final determination of its appeal could be rendered. On November 1, 2013, we convened a hearing on the motion for stay. On November 5, 2013, we granted the motion for stay effective upon the posting of a \$12,000 bond by New Trails.

We convened a consolidated hearing in cases 13-0666 SP and 13-0939 SP December 20, 2013. New Trails was represented by David Barrett. The Department was represented by Assistant Attorney General Matthew Laudano.

On February 10, 2014, New Trails filed its waiver of the requirement found in § 208.221¹ that we render our decision in this matter within 300 days of New Trails filing its complaint.

This case became ready for our decision on June 11, 2014, the date the last written argument was filed. Commissioner Karen A. Winn, having read and personally considered the portions of the record cited or referred to in the parties' written arguments, renders the decision. Section 536.080.2; *Angelos v. State Bd. of Regis'n for the Healing Arts*, 90 S.W.3d 189 (Mo. App. S.D. 2002).

Findings of Fact

1. New Trails is a MO HealthNet provider participating in the Home and Community-Based Services Developmental Disabilities Waiver program administered in part by the Missouri Department of Mental Health ("DMH"). It operates several group homes at which it provides residential habilitation services to developmentally disabled individuals. Two of

¹Statutory references are to RSMo 2000 unless otherwise noted.

those groups homes are the Stanberry home, the one at issue in this case, and the 9th Street home, at issue in case no. 13-0939 SP.

2. On June 28, 2010, Rick Smith, the administrator and one of the owners of New Trails, executed a contract with DMH whereby New Trails agreed to provide residential habilitation services to DMH clients for reimbursement between July 1, 2010 and June 30, 2013 (“the DMH agreement”). The DMH agreement contained, among other things, the service requirements, billing codes, provider credentialing requirements, and other terms and conditions under which New Trails agreed to provide and be compensated for the services provided under the agreement.

3. Under the DMH agreement, residential habilitation services include “care, skills training in activities of daily living, home management and community integration, and supervision (protective oversight).” Resp. Ex. C at 104.

4. New Trails also has a Title XIX participation agreement with the Department (“the Title XIX agreement”). Under the Title XIX agreement, New Trails agrees that it shall be “financially responsible for all services which are not documented.” Resp. Ex. B at 3-4. The Title XIX agreement also requires New Trails to “maintain fiscal and medical records to fully disclose services rendered to Title XIX Medicaid recipients. These records shall be retained for five (5) years, and shall be made available on request by an authorized representative of the Department of Social Services[.]” *Id.* at 4.

5. The Department reimburses New Trails for its services to DMH clients through its MO HealthNet Division (“MO HealthNet”) and exercises an audit function through its Missouri Medicaid Audit and Compliance Unit (“MMAC”).

Post-Payment Review of Stanberry Home

6. On July 9, 2012, Debra Henley, a Medicaid Specialist with MMAC, conducted an

on-site, post-payment review of New Trails' Medicaid claims for the Stanberry and 9th Street group homes. For Stanberry, Henley requested the records for two residents, D.B. and M.M., from October 1, 2011 through December 31, 2011 (hereinafter the "audit period").

7. During the post-payment review on July 9, 2012, Thomas Sagun of New Trails was present at the Stanberry home and assisted Henley and Henley's assistant by pulling the records she requested for various residents at both facilities.

8. Sagun was the assistant administrator for New Trails and was the house manager for the Stanberry home in which residents M.M. and D.B. were living throughout the audit period.

9. In addition to Sagun, Henley and her assistant were also helped by other members of the New Trails staff in gathering documents and scanning them to computer files for later use in the preparation of audit findings. Part of the required record keeping for the DMH clients housed in New Trails' group homes, under the contract guidelines, is the creation and maintenance of a set of narrative entries, describing each resident's daily activities, called observation notes.

10. Despite Henley's request for them, the observation notes for D.B. for the audit period were not produced for Henley and her assistant on July 9, 2012, because they could not be found. Henley informed Smith that she could not accept any records after she left the facility, and Smith indicated that he understood.

11. Henley and her assistant were on site at New Trails from approximately 1:30 p.m. to 6:00 p.m. on July 9, 2012, and were accompanied and assisted by Sagun throughout that time. Although Smith was present in the facility and met with the auditors, Smith left the facility before 6:00 p.m. in order meet a prior commitment. Sagun was left to sign the verification papers presented to him by the auditors before they left New Trails that evening.

12. Sagun signed the document disclosure statement affirming that New Trails had “produced and disclosed all records, in their entirety, to the above State agency as required by 13 CSR 70-3.030(3)(A)4.” Resp. Ex. E at 2, 4.

Post-Payment Review of Stanberry

13. Based on records gathered during the site visit, the Department determined that resident M.M. had been absent from the facility on December 31, 2011, although billing records did not reflect the absence so that MO HealthNet had been billed as if M.M. had been present on that date. It also determined that New Trails had not supplied adequate documentation to establish that D.B. was present and receiving services on each day of the audit period.

14. In fact, D.B. was present at the Stanberry facility, and residential habilitation services were provided to him, during the dates in question during the audit period. M.M. was present at the Stanberry facility for part of the day on December 31, 2011.

Post-Audit Process and Imposition of Sanctions

15. The day after MMAC’s visit to New Trails for the post-payment review, July 10, 2012, Sagun e-mailed additional records of New Trails’ client services to Henley, including attendance records for D.B. and M.M., and Henley responded that she was able to open all attachments to his email but would not have time to review the records for several weeks.

16. In November of 2012, Henley, Sagun, and Smith corresponded via e-mail again regarding details of the audit in regard to staff/resident ratios. This information was not the subject of any alleged deficiency in New Trails’ procedures and was not the subject of any violation notice related to the audit.

17. On April 10, 2013, the Department sent New Trails its final decision notifying New Trails that it had been overpaid in the amount of \$18,052.23 for services incorrectly

billed for Stanberry residents. The sanction of recoupment for the full amount of the alleged overpayment was imposed.

18. The majority of the recoupment amount charged to New Trails from the review of Stanberry, in the amount of \$17,858.12, was assessed because observation notes prepared for D.B. were not produced to the Department. This amount was based on the per diem rate for services for D.B., \$194.11, multiplied by the number of days in the audit period, or 92.

19. The additional \$194.11 was assessed because the Department determined that another resident, M.M., was not present at the facility on December 31, 2011, but that New Trails billed for services for her as if she had been present.

20. After receiving the overpayment letter, Smith contacted Henley in mid-April and advised that he had gathered all of the observation notes for D.B. that had not been included in the audit files. He asked to tender them to Henley.

21. Henley refused to accept and review the observation notes, stating it was too late to supplement the records and that the recoupment demand was a final decision of the Department that could only be appealed to this Commission.

22. The day before the hearing, the Department lowered the recoupment demand by \$5,046.86. This action was based on Henley's further review of the documents provided at the time of the audit that contained references to services provided to D.B. on the following dates in 2011: October 5, 9, 10, 11, 21, 24, 25, and 30; November 4, 5, 11, 16, 17, 21, 23, and 30; and December 1, 10, 12, 13, 14, 21, 23, 24, and 31.

23. The same documents also provide references to services provided to D.B. on October 4 and 18, November 14, and December 7 and 16, and to M.M. on December 31, 2011.

Conclusions of Law

We have jurisdiction over this matter. Sections 208.156.5 and 621.055.1. New Trails has the burden of proof. Section 621.055.1. We decide whether New Trails is liable for an overpayment or sanction and, if so, the amount of the overpayment or the appropriate sanction. We decide the issues *de novo*, and need not exercise our discretion in the same way as the Department in its underlying decision. *Department of Soc. Servs. v. Mellas*, 220 S.W.3d 778 (Mo. App. W.D. 2007). The Department's answer provides notice of the basis for disallowing claims and imposing sanctions. *Ballew v. Ainsworth*, 670 S.W.2d 94, 103 (Mo. App. E.D. 1984).

The issues here are whether certain claims that New Trails submitted for payment, and for which it received payment, were properly billed to the MO HealthNet program and, if not, whether a sanction is appropriate.

MO HealthNet providers must verify with adequate documentation that they rendered services for which they submitted claims for payment. 13 CSR 70-3.030(3)(A)² Adequate documentation is "documentation from which services rendered and the amount of reimbursement received by a provider can be readily discerned and verified with reasonable certainty." 13 CSR 70-3.030(2)(A). Such documentation must be furnished to Department officials promptly upon request. 13 CSR 70-3.030(3)(A)4.

The Department asserts in its answer thirteen grounds under 13 CSR 70-3.030(3)(A) for which it is authorized to impose sanctions:

1. Presenting, or causing to be presented, for payment any false or fraudulent claim for services or merchandise in the course of business related to MO HealthNet;
2. Submitting, or causing to be submitted, false information for the purpose of obtaining greater compensation than that to which the provider is entitled under

² All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

applicable MO HealthNet program policies or rules, including, but not limited to, the billing or coding of services which results in payments in excess of the fee schedule for the service actually provided or billing or coding of services which results in payments in excess of the provider's charges to the general public for the same services or billing for higher level of service or increased number of units from those actually ordered or performed or both, or altering or falsifying medical records to obtain or verify a greater payment than authorized by a fee schedule or reimbursement plan;

4. Failing to make available, and disclosing to the MO HealthNet agency of its authorized agents, all records relating to the services provided to MO HealthNet participants...Copies of records must be provided upon request of the MO HealthNet agency or its authorized agents, regardless of the media in which they are kept. Failure to make these records available on a timely basis at the same site at which services were rendered...shall constitute a violation of this section and shall be a reason for sanction...Failure to send records, which have been requested via mail, within the specified time frame shall constitute a violation of this section and shall be a reason for sanction;

5. Failing to provide quality, necessary, and appropriate services, including adequate staffing for long-term care facility MO HealthNet participants, within accepted medical community standards...

6. Engaging in conduct or performing an act deemed improper or abusive of the MO HealthNet program or continuing the conduct following notification that the conduct should cease. This will include inappropriate or improper actions relating to the management of participants' personal funds or other funds;

7. Breaching of the terms of the MO HealthNet provider agreement or any current written and published policies and procedures of the MO HealthNet program (Such policies and procedures are contained in provider manuals or bulletins which are incorporated by reference and made a part of this rule as published by the Department of Social Services, MO HealthNet Division, 615 Howerton Court, Jefferson City, MO 65109, at its website www.dss.mo.gov/mhd, September 15, 2009. This rule does not incorporate any subsequent amendments or additions.) or failing to comply with the terms of the provider certification on the MO HealthNet claim form;

28. Billing for services through an agent, which were upgraded from those actually ordered, performed; or billing or coding services, either directly or through an agent, in a manner that services are paid for as separate procedures when, in fact, the services were performed concurrently or sequentially and should have been billed or coded as integral components of a total service as prescribed in MO HealthNet policy for payment in a total payment less than the

aggregate of the improperly separated services; or billing a higher level of service than is documented in the patient/client record; or unbundling procedure codes;

* * *

31. Failing to take reasonable measures to review claims for payment for accuracy, duplication, or other errors caused or committed by employees when the failure allows material errors in billing to occur. This includes failure to review remittance advice statements provided which results in payments which do not correspond with the actual services rendered;

32. Submitting improper or false claims to the state or its fiscal agent by an agent or employee of the provider;

33. For providers other than long term care facilities, failing to retain in legible form for at least five (5) years from the date of service, worksheets, financial records, appointment books, [etc.]...;

* * *

37. Failure to comply with the provisions of the Missouri Department of Social Services, MO HealthNet Division Title XIX Participation Agreement with the provider relating to health care services;

38. Failure to maintain documentation which is to be made contemporaneously to the date of service;

39. Failure to maintain records for services provided and all billing done under his/her provider number regardless of whom in his/her employ or service produced or submitted the MO HealthNet claim or both;

40. Failure to submit proper diagnosis codes, procedure codes, billing codes regardless to whom the reimbursement is paid and regardless of whom in his/her employ or service produced or submitted the MO HealthNet claim;

41. Failure to submit and document, as defined in subsection (2)(A) the length of time (begin and end clock time) actually spent providing a service, except for services as specified under 13 CSR 70-91.010(4)(A) Personal Care Program[.]

Analysis

In this case, New Trails argues that it should not be liable for the recoupment amounts demanded by the Department pursuant to MMAC's audit findings. First, it argues that it did provide the records when Henley was on site, but she must have lost them or been unable to scan them. Second, it argues that even if we find it did not provide the records to Henley on July 9,

2012, it should have been permitted to supplement the audit records by providing a complete and authentic set of observation notes for D.B., which it offered to do within days of receiving the recoupment letter.

New Trails' first argument, based on the testimony of Rick Smith, lacks a credible foundation. At the hearing, Smith testified that he did not "have any reason to think that [the observation notes for D.B.] weren't provided to MMAC." Tr. 35. In New Trails' written argument, it states: "It is the position of New Trails that the Observation Notes pertaining to D.B. were provided to MMAC for the audit period on the day of the site visit." Pet. Post-Hearing Brief at 4. This position is inconsistent with Henley's account and with New Trails' own complaint, in which Smith stated, "I believe the Observation Notes were not given to the investigators."

We weigh New Trails' equivocal and inconsistent statements against Henley's testimony and the other evidence in the record. We determine that D.B.'s observation notes were not provided to Henley on July 9, 2012.

As to New Trails' second point, the Department argues that the holding in *Stacy v. Department of Social Services, Division of Medical Services*, 147 S.W.3d 846 (Mo. App. S.D. 2004), is dispositive. *Stacy* is instructive, but it differs from this case, too.

Stacy was a licensed professional counselor and Medicaid provider. Like this case, in *Stacy*, a Department auditor conducted a post-payment review of submitted Medicaid claims. The auditor visited *Stacy* in person and asked him for records. *Stacy* told him his records were off site, but later sent him his progress notes for his Medicaid clients. The auditor contacted *Stacy* again and asked him whether he had any records such as calendars or appointment books to reflect when he was seeing his clients. *Stacy* said he did not, and signed a "Document Disclosure Statement," in which he stated he had produced all records "which would reflect the

amount of time I spent in delivery of services billed in their entirety [sic], to the above State agency as requested.” *Id.* at 849. After Stacy received an overpayment letter from the Department, he tendered a previously undisclosed document containing start and stop times for each disallowed service. *Id.* After a hearing, this Commission upheld the Department’s decision ordering Stacy to repay the amounts for the disallowed services.

In affirming our decision, the court of appeals noted that the Department “presented Commission with a rational basis for the decision not to accept Stacy’s belated tender of records, namely the general concern that records furnished outside the audit period might ‘be reconstructed,’ or created after audit results were announced.” *Id.* at 853.

The Department’s decision here is also rational. As Henley testified and the *Stacy* court noted, the Department has consistently refused to consider records produced after an audit was completed. But this case differs from *Stacy* in some important ways.

First, the records presented by New Trails after the fact – the observation notes pertaining to D.B. – are long and detailed, and different handwriting appears on different days. In other words, they bear indicators of contemporaneous creation and, thus, reliability. In fact, at the hearing, Henley testified as follows:

Q: Is there any doubt in your mind that during the months of October, November and December of 2011, DB received services from New Trails?

A: No.

Tr. 157.

Second, the records that *were* provided to Henley on July 9, 2012, contain a number of references to D.B. and his care and treatment – enough, in fact, that the Department abandoned its claims for recoupment on 25 of the 92 days at issue during the audit period. In our

examination of those records, we have found several more such references, as well as references to services provided to M.M. on December 31, 2011.

Third, a resident at a home for the developmentally disabled is not like a client of a professional counselor in private practice, who has freedom of movement and may or may not show up for an appointment. Attendance records for D.B. *were* provided to Henley, and they reflect that D.B. was present every day. What Henley did not receive at her on-site visit was the more detailed observation notes with their information about D.B.'s particular behaviors on a given day and the services provided to him.

We bear these considerations in mind as we consider the grounds for sanction set forth by the Department. Each section below discusses one of the subparagraphs contained in 13 CSR 70-3.030(3)(A) as set forth in the Department's answer.

Cause for Sanctions

1. Presenting for payment any false or fraudulent claim for service in the course of business related to MO HealthNet.

We have found that D.B. was present at the Stanberry home and receiving services on those days. We have also found that M.M. was present for at least part of the day on December 31, 2011. Therefore, New Trails did not present false or fraudulent claims for payment.

2. Submitting false information for the purpose of obtaining greater compensation than that to which the provider is entitled under applicable MO HealthNet program policies or rules—See # 1, above.

4. Failing to make all records relating to services available on request and on a timely basis. New Trails failed to provide important records relating to D.B. – the observation notes – to the auditor when she was on site. There is cause to sanction it under 13 CSR 70-3.030(3)(A)4.

5. Failing to maintain quality, necessary and appropriate services within accepted medical community standards. There was no evidence presented that such failures existed in the provision of services to New Trails residents.

6. Engaging in conduct or performing an act deemed improper or abusive of the MO HealthNet program. Because the regulation does not define the term “improper,” we turn to the dictionary to determine the plain meaning of the word. *See E&B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011) (Absent a statutory definition, the plain meaning of words used in a statute, as found in the dictionary, is typically relied on); *Evans v. Brown Builders*, 254 S.W.3d at. “Improper” means “not proper: as **a** : not in accord with fact, truth, or right procedure : INCORRECT.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1137 (unabr. 1986). “Abusive” is the adjective derived from the noun “abuse,” which is defined under § 208.164(1)³ as:

a documented pattern of inducing, furnishing, or otherwise causing a recipient to receive services or merchandise not otherwise required or requested by the recipient, attending physician or appropriate utilization review team; a documented pattern of performing and billing tests, examinations, patient visits, surgeries, drugs or merchandise that exceed limits or frequencies determined by the department for like practitioners for which there is no demonstrable need, or for which the provider has created the need through ineffective services or merchandise previously rendered.

New Trails failed to make important records immediately available to a Department representative, as its Title XIX agreement required it to do. Such conduct does not meet the

³ In *Indep. Living Center of Mid Mo. Inc. v. Dep't of Social Services, MO HealthNet Div.*, 391 S.W.3d 52 (Mo. App. W.D. 2013), the court stated in dicta that it saw no “obvious connection” between 13 CSR 70-3.030(A) and § 208.164, because the regulation was promulgated under the authority of §§ 208.153 and 208.201. We conclude there is a connection, however. Section 208.153 mandates that the predecessor to MO HealthNet promulgate rules to “define the reasonable costs, manner, extent, quantity, quality, charges and fees of medical assistance herein provided,” and specifies that persons entitled to medical assistance may obtain it “from any provider of services with which an agreement is in effect under this section and which undertakes to provide the services, as authorized by the division of medical services.” Section 208.164 defines “medical assistance benefits,” “provider,” and “service,” and provides that the “department or its divisions shall have the authority to suspend, revoke, or cancel any contract or provider agreement” when it determines a provider has committed acts defined as abuse or fraud in this section. The two statutes are *in pari materia* and we therefore find § 208.164’s definition applicable herein. *See Frye v. Levy*, 2014 WL 3107299, *16 (Mo. banc, 2014).

statutory definition of abusive, but it was not in accord with correct procedure and was therefore improper. It is a basis for sanction under 13 CSR 70-3.030(3)(A)6.

7. Breaching of the terms of the MO HealthNet provider agreement or any current written and published policies and procedures of the MO HealthNet program. Although we believe that New Trails maintained the necessary records, it did not make them “available on request by an authorized representative of the Department” as required by its provider agreement. There is cause to sanction it under 13 CSR 70-3.030(3)(A)7.

28. Billing for upgraded services or a higher level of service than that which was provided. We were provided no evidence of such misconduct on the part of New Trails and find no cause for sanctions under this paragraph.

31. Failing to take reasonable measures to review claims for payment for accuracy, or other errors when the failure allows material errors in billing to occur. Because we have found that New Trails provided the services for which it billed, we find no errors in billing, and no cause for sanction under this paragraph.

32. Submitting improper or false claims to the state or its fiscal agent by an agent or employee of the provider. See # 1, above.

33. Failing to retain documents for a requisite number of years. Because we believe New Trails contemporaneously created the observation notes relating to D.B. and was able to produce them after it received the overpayment letter, we conclude it did not fail to retain the documents. We find no cause for sanction under this paragraph.

37. Failure to comply with the provisions of the Missouri Department of Social Services, MO HealthNet Division Title XIX Participation Agreement with the provider relating to health care services. There is no evidence that New Trails failed to comply with any provision of its participation agreement that related to health care services.

38. Failure to maintain documentation which is to be made contemporaneously to the date of service. We find no evidence of such a deficiency.

39. Failure to maintain records of services provided and billing done under his/her provider number. We find no evidence of such a deficiency.

40. Failure to submit proper diagnosis codes, procedure codes, or billing codes. We find no evidence of such a deficiency.

41. Failure to submit and document start and end clock times for services. We find no evidence of such a deficiency. Moreover, there is no explanation in the record as to why such information would be required for the type of services provided to developmentally disabled residents of group homes. We find no cause to sanction New Trails under this paragraph.

Summary of Cause

There is cause to sanction New Trails under 13 CSR 70-3.030(3)(A)4, 6, and 7.

Sanctions

Regulation 13 CSR 70-3.030(4) provides:

Any one (1) or more of the following sanctions may be invoked against providers for any one (1) or more of the program violations specified in section (3) of this rule:

* * *

(B) Termination from participation in the MO HealthNet program for a period of not less than sixty (60) days nor more than ten (10) years;

(C) Suspension of participation in the MO HealthNet program for a specified period of time;

(D) Suspension or withholding of payments to a provider;

(E) Referral to peer review committees including PSROs or utilization review committees;

(F) Recoupment from future provider payments;

(G) Transfer to a closed-end provider agreement not to exceed twelve (12) months or the shortening of an already existing closed-end provider agreement;

(H) Attendance at provider education sessions;

(I) Prior authorization of services;

(J) One hundred percent (100%) review of the provider's claims prior to payment;

(K) Referral to the state licensing board for investigation;

(L) Referral to appropriate federal or state legal agency for investigation, prosecution, or both, under applicable federal and state laws;

(M) Retroactive denial of payments[.]

The Department argues that the appropriate sanction is retroactive denial of payments for services, and recoupment of those amounts, for services to D.B. and M.M. for which adequate documentation was not provided.

Under 13 CSR 70-3.030(5)(A), the imposition of a sanction is discretionary. *Mellas*, 220 S.W.3d at 781. The filing of the appeal vests the Department's discretion in this Commission, but we are not required to exercise it in the same way the Department did. *Id.* at 782-83. Regulation 13 CSR 70-3.030(5)(A) provides guidance for the exercise of that discretion:

The following factors shall be considered in determining the sanction(s) to be imposed:

1. Seriousness of the offense(s)—The state agency shall consider the seriousness of the offense(s) including, but not limited to, whether or not an overpayment (that is, financial harm) occurred to the program, whether substandard services were rendered to MO HealthNet participants, or circumstances were such that the provider's behavior could have caused or contributed to inadequate or dangerous medical care for any patient(s), or a combination of these. Violation of pharmacy laws or rules, practices potentially dangerous to patients and fraud are to be considered particularly serious;

2. Extent of violations—The state MO HealthNet agency shall consider the extent of the violations as measured by, but not limited to, the number of patients involved, the number of MO HealthNet claims involved, the number of dollars

identified in any overpayment and the length of time over which the violations occurred;

3. History of prior violations—The state agency shall consider whether or not the provider has been given notice of prior violations of this rule or other program policies. If the provider has received notice and has failed to correct the deficiencies or has resumed the deficient performance, a history shall be given substantial weight supporting the agency's decision to invoke sanctions. If the history includes a prior imposition of sanction, the agency should not apply a lesser sanction in the second case, even if the subsequent violations are of a different nature;

4. Prior imposition of sanctions—The MO HealthNet agency shall consider more severe sanctions in cases where a provider has been subject to sanctions by the MO HealthNet program, any other governmental medical program, Medicare, or exclusion by any private medical insurance carriers for misconduct in billing or professional practice. Restricted or limited participation in compromise after being notified or a more severe sanction should be considered as a prior imposition of a sanction for the purpose of this subsection; [and]

5. Prior provision of provider education—In cases where sanctions are being considered for billing deficiencies only, the MO HealthNet agency may mitigate its sanction if it determines that prior provider education was not provided. In cases where sanctions are being considered for billing deficiencies only and prior provider education has been given, prior provider education followed by a repetition of the same billing deficiencies shall weigh heavily in support of the medical agency's decision to invoke severe sanctions[.]

We address the five factors in turn:

1. Seriousness of the offense. Given our determination that New Trails actually did provide services to D.B. on every day of the audit period, and to M.M. on December 31, 2011, we cannot conclude there was financial harm to the Medicaid program, that substandard services were rendered to participants, or that the provider's behavior could have caused or contributed to inadequate or dangerous medical care. These conclusions militate against a severe sanction.

2. Extent of Violations. New Trails failed to produce observation notes for D.B. at the time of the audit visit, and the records that were produced failed to adequately support the provision of daily comprehensive services in accordance with his service plan. Although there were some sporadic references pertaining to D.B. in the facility records tendered during and after

the audit, we find that the failure to provide the daily observation notes for D.B constituted an extensive violation.

3. History of Prior Violations. The record contains no evidence of prior violations in New Trails' history.

4. Prior Imposition of Sanctions. The record is devoid of any reference to the Department ever imposing sanctions on New Trails.

5. Prior Provision of Provider Education. Sanctions may be mitigated if the Department did not give the provider appropriate education. 13 CSR 70-3.030(5)(A)5. If it did, a more severe sanction may be appropriate if the same deficiencies were repeated. *Id.* There is no evidence in the record concerning provider education given to New Trails, and we therefore infer that New Trails has not been subject to provider retraining, so some leeway could have been properly afforded under the circumstances.

If we were to order the sanction of recoupment, as requested by the Department, we would lower the amount to be recouped from the \$18,052.23 set forth in the overpayment letter. First, the Department independently decided to lower that amount by \$5,046.86. Second, we have found that records timely supplied to Henley contain references to services provided to D.B. and M.M. on an additional six days, so we would lower the recoupment amount by another \$1,164.66 (six multiplied by the daily rate of \$194.11). But we exercise our discretion differently. Given our conclusion that New Trails provided the services for which it received payment from the Department, contemporaneously created the records reflecting the provision of the services, and maintained the records, we determine that a lesser sanction is warranted. We impose the sanction of provider education, the appropriate form and extent of which shall be determined by the Department.

Summary

New Trails is subject to the sanction of attendance at provider education sessions.

SO ORDERED on August 21, 2014.

\s\ Karen A. Winn

KAREN A. WINN

Commissioner