

05-32-09

RECEIVED
MAY 29 2009

RECEIVED
2009 MAY 29 PM 2:51
SECRETARY OF STATE
PUBLICATIONS

BEFORE THE TENNESSEE DIVISION OF MENTAL RETARDATION SERVICES

IN THE MATTER OF:)
)
ROCHELLE CENTER)
)

CASE NO. 09.19-025105

NOTICE OF SETTING AND RESPONSE TO PETITION FOR DECLARATORY ORDER

COMES the Tennessee Division of Mental Retardation Services, (DMRS), Respondent, and gives notice pursuant to T.C.A. § 4-5-224 of the matters herein.

Petitioner's name: Rochelle Center, Inc.

Petitioner's address: 1020 Southside Court, Nashville, TN 37204

Relief is sought under: T.C.A. § 33-1-309 (d) and Medicaid Home and Community Based Day Services Waiver for Mentally Retarded and Developmentally Delayed, as amended effective May 1, 2007 - definition of "day services"

In response to the Petition, the DMRS hereby states the following:

1. **AGREE** to Petitioner's Number 1 of the petition.
2. **AGREE** to Petitioner's Number 2 of the petition as it relates to the recitation of the statutes applicable to rate methodology.
3. **AGREE** to Petitioner's Number 3 of the petition as it relates to a recitation of the statute.
4. **AGREE** to Petitioner's Number 4 of the petition as it relates to the January 2008 6.1 % rate adjustment on all services, but **DISAGREE** that DMRS failed to follow any applicable rules.

5. **DISAGREE** to Petitioner's Number 5 of the petition as it relates to the rate adjustments in November 2008.

6. Concerning Petitioner's Number 6, Respondent does not know what, if any, affect its November 2008 rate adjustment may have on Rochelle's operation and the services provided to service recipients in the aforementioned categories. Respondent **DISAGREES** with any implication that these provider day services are or should be reduced quantitatively or qualitatively because of DMRS rate adjustments.

7. **DISAGREE** that portion of Petitioner's Number 7 in the petition that DMRS' rate adjustments forced the Rochelle Center to either reduce the cost of its Developmental Services Program or to close it. However, the Respondent **AGREES** that Rochelle threatened to reduce the cost of its Developmental Services Programs or to close the program.

8. The Respondent does not **AGREE** or **DISAGREE** with entirety Petitioner's Number 8 but demands proof thereof.

9. **AGREE** to that portion of Petitioner's Number 9 of the petition that Petitioner notified DMRS, but **DISAGREE** that such a change was necessary and in compliance with the applicable waiver and the provider agreement.

10. **DISAGREE** in its entirety Petitioner's Number 10 of the petition.

11. **AGREE** to Petitioner's Number 11 of the petition.

COUNT 1 of the PETITION

12. **AGREE** to the incorporation of the preceding paragraphs as Petitioner stated in the petition, however, DMRS continues to **DISAGREE** with those paragraphs and portions as stated above.

13. **DISAGREE** in its entirety the Petitioner's Number 13, Count 1 of the petition.

14. **DISAGREE** in its entirety the Petitioner's Number 14, Count 1 of the petition.

15. **DISAGREE** in its entirety the Petitioner's Number 15, Count 1 of the petition.

COUNT 2 of the PETITION

16. **AGREE** to the incorporation of the preceding paragraphs as Petitioner stated in the petition, however, DMRS continues to **DISAGREE** with those paragraphs and portions as stated above.

17. **DISAGREE** in its entirety the Petitioner's Number 17, Count 2 of the petition.

18. **DISAGREE** in its entirety the Petitioner's Number 18, Count 2 of the petition.

19. **DISAGREE** in its entirety the Petitioner's Number 19, Count 2 of the petition.

COUNT 3 of the PETITION

20. **AGREE** to the incorporation of the preceding paragraphs as Petitioner stated in the petition, however, DMRS continues to **DISAGREE** with those paragraphs and portions as stated above.

21. **DISAGREE** with Petitioner's Number 21, Count 3 of the petition.

22. **DISAGREE** with Petitioner's Number 22, Count 3 of the petition.

23. **AGREE** to Petitioner's Number 23, Count 3 of the petition as a recitation or portion of a recitation.

24. **AGREE** to Petitioner's Number 24, Count 3 of the petition as a recitation or portion of a recitation, but **DISAGREE** that transportation can be included in the six hour requirement for direct services pursuant to the applicable waiver.

25. **AGREE** to Petitioner's Number 25, Count 3 of the petition as a recitation or portion of a recitation; however, **DISAGREE** that this in any way incorporates transportation into the six hours of direct services pursuant to the applicable waiver.

26. **AGREE** to Petitioner's Number 26, Count 3 of the petition as it recites a portion of the applicable waiver.

27. **DISAGREE** with Petitioner's Number 27, Count 3 of the petition.

28. **AGREE** to petitioner's Number 28, Count 3 of the petition as a recitation or portion of a recitation, but **DISAGREE** that this establishes transportation as a direct day service.

29. **AGREE** to Petitioner's Number 29, Count 3 of the petition as a recitation or portion of a recitation, but **DISAGREE** that this definition establishes that transportation services are direct day services.

30. **AGREE** to Petitioner's Number 30, Count 3 of the petition as a recitation or portion of a recitation, but **DISAGREE** that this establishes that transportation services are direct day services.

31. **AGREE** to Petitioner's Number 31, Count 3 of the petition that necessary transportation is important, but **DISAGREE** that this establishes that transportation services are direct day services.

32. **DISAGREE** with Petitioner's Number 32 in the petition.

THEREFORE, in addition and in support of the responses herein the DMRS now states the following:

1. Since the filing of this petition, on March 2, 2009, a moratorium on admissions was placed on Rochelle Center for the agency's ongoing refusal to follow the Medicaid Home and Community Based Waiver definition for day services. The waiver states that a provider agency may receive reimbursement per diem for day services if the service recipient receives six (6) hours per day or the service recipient receives a total of six (6) hours of day services comprised of community based or facility based direct services plus supported employment day services. The waiver does not allow flexibility in these six (6) hours of direct services unless there is documentation that the service recipient was unable to complete the full six (6) hours of day services for reasons beyond the control of the agency provider and if the service recipient receives at least two (2) hours of day services for that day.

2. DMRS employees from its Middle Tennessee Regional Office were present and observed at the Rochelle Center on February, 17, 2009, service recipients leaving the center without receiving the required six (6) hours of direct services. In addition, Rochelle is calculating the actual transportation time of these service recipients as direct services time, which is not allowable under the waiver and is asserted above by DMRS as non-includable.

3. Rochelle was informed on March 2, 2009, that the moratorium would remain in effect until such time as it honored the provider agreement and the waiver definition for day services. On April 3, 2009, the implementation of the moratorium was stayed pending UAPA contested case hearing, pursuant to T.C.A. § 4-5-301, on the matter could be commenced.

4. The rate adjustments in January 2008 and November 2008, do not and should not have any impact upon the contractual, programmatic and Medicaid waiver duty of Rochelle to follow the applicable waiver requirements pertaining to "day services". DMRS rate adjustments do not give Rochelle the right to breach the provider agreement or to supply services to the service recipients of a kind and nature that are less than what is required by contract, the program and the waiver.

5. DMRS has not implemented rate adjustments in a manner that are voidable or should be declared void.

6. **This matter shall be set for hearing at Andrew Jackson Building, 13th Floor Large Conference Room, 500 Deaderick Street, Nashville, TN 37243, at 9:00 a.m. July 29, 2009.**

REQUESTED RULING

6. For these reasons, the Petition for a Declaratory Order should not be granted and should be dismissed.

8. DMRS also seeks such other relief as may be deemed just and proper under the circumstances.

Respectfully submitted,
DIVISION OF MENTAL RETARDATION SERVICES

By: 
Stephen O. Tepley, General Counsel, #006480
Marilynn A. Tucker, Managing Attorney, #010850
Division of Mental Retardation Services
Andrew Jackson Building, 13th Floor
500 Deaderick Street
Nashville, Tennessee 37243
(615) 253-2025

CERTIFICATE OF SERVICE

NOTICE is hereby given that I have this day delivered a true and correct copy of the above Notice of Charges to

Robert D. Tuke, Esq.
Trauger & Tuke
222 Fourth Avenue No.
Nashville, TN 37219

Pamela Hayden-Wood, Senior Counsel
Office of the Attorney General, General Civil DMRS
425 Fifth Avenue North
Nashville, TN 37202

Kathleen Clinton, Regional Director
Middle Tennessee Regional Office
275 Stewarts Ferry Pike
Nashville, TN 37214

DATED this the 14th day of April, 2009.


Marilynn A. Tucker

2008 FEB 14 PM 01:58
SIR

RECEIVED FEB 23 2009

**PETITION FOR DECLARATORY ORDER BEFORE THE
DIVISION OF MENTAL RETARDATION SERVICES OF THE
DEPARTMENT OF FINANCE AND ADMINISTRATION**

RECEIVED
R.../...
KLS

PETITIONER: THE ROCHELLE CENTER, INC.
1020 Southside Court
Nashville, Tennessee 37203

**RULE/ORDER/
STATUTORY
PROVISION
FOR WHICH
DECLARATORY
ORDER SOUGHT** T.C.A. § 33-1-309(d) & Order effective January 1, 2008 reducing
payment rate for services under Home and Community Based
Services Waiver for the Mentally Retarded and Developmentally
Disabled, as amended effective May 1, 2007.

T.C.A. § 33-1-309(d) & Order effective November 1, 2008
reducing payment rate for facility-based Level IV adult day
habilitation services and community-based adult day habilitation
services under Home and Community Based Services Waiver for
the Mentally Retarded and Developmentally Disabled; as amended
effective May 1, 2007.

Interpretation of "Day Services" under Home and Community
Based Services Waiver for the Mentally Retarded and
Developmentally Disabled, as amended effective May 1, 2007.

The Rochelle Center, Inc. hereby petitions the Division of Mental Retardation
Services of the Department of Finance and Administration ("DMRS") for a declaratory
order pursuant to T.C.A. § 4-5-223.

STATEMENT OF FACTS

1. The Rochelle Center provides adult day habilitation services ("Day Services")
under the Home and Community Based Services Waiver for the Mentally Retarded and
Developmentally Disabled, as amended effective May 1, 2007 ("Waiver"), pursuant to its
Provider Agreement dated March 3, 2005 ("Provider Agreement").

2. Under T.C.A. §§ 33-1-309 and 33-5-108, DMRS must provide an opportunity for
public comment and an assessment of fiscal impact before imposing mandatory operating
guidelines on service providers.

3. Under T.C.A. § 33-1-309(d), DMRS must adopt any methodology used to determine payment to service providers as a rule in accordance with the Uniform Administrative Procedures Act ("UAPA"), compiled in Title 4, Chapter 5, of the Tennessee Code Annotated, which methodology must be consistent among providers providing substantially the same services.

4. Effective January 1, 2008, DMRS imposed a 6.1% reduction in the payment rate for all services under the Waiver ("January 2008 Reduction"). DMRS did not adopt this payment methodology as a rule in compliance with the UAPA.

5. Effective November 1, 2008, DMRS imposed an additional 13.3% reduction in the payment rate for facility-based Level IV Day Services and a 10.8% reduction in the rate for community-based Day Services ("November 2008 Reduction"). DMRS did not adopt this payment methodology as a rule in compliance with the UAPA.

6. The November 2008 Reduction affects services provided by the Rochelle Center to thirty-seven (37) adults through its Developmental Services Program of which twenty-six (26) are Level IV consumers.

7. The combined impact of the January 2008 Reduction and the November 2008 Reduction forced the Rochelle Center to either reduce the cost of its Developmental Services Program or close it.

8. Prior to January 2, 2009, the Rochelle Center's Day Services consisted of six or more hours of services in the facility and an hour or more of round-trip transportation time.

9. On December 9, 2009, the Rochelle Center informed the DMRS regional director and families and conservators that it was necessary to change its Day Services schedule

to five hours in facility and one hour total round-trip transportation time, effective January 2, 2009.

10. Reducing in-facility Day Services by one hour may enable the Rochelle Center to continue providing Day Services to its consumers, despite the January 2008 and November 2008 Reductions.

11. On January 7, 2009, DMRS stated to the Rochelle Center that the one-hour reduction was not permitted under the Waiver, that DMRS would recoup one-sixth of the compensation paid to the Rochelle Center for Day Services to reflect the reduction from six to five hours, and that DMRS had the authority to recoup *all* compensation paid to the Rochelle Center for any day on which fewer than six hours of service in the facility were provided.

**COUNT 1
FAILURE TO COMPLY WITH UAPA IN
ADOPTION OF JANUARY 2008 REDUCTION**

12. The preceding paragraphs are incorporated by reference.

13. The January 2008 Reduction was not adopted as a rule in compliance with the UAPA as required by T.C.A. § 33-1-309(d).

14. DMRS's failure to comply with the UAPA deprived the Rochelle Center from participating in the process for the adoption of the rule and therefore interfered with or impaired their rights and privileges.

15. The January 2008 Reduction is therefore void and unenforceable.

**COUNT 2
FAILURE TO COMPLY WITH UAPA IN
ADOPTION OF NOVEMBER 2008 REDUCTION**

16. The preceding paragraphs are incorporated by reference.

17. The November 2008 Reduction was not adopted as a rule in compliance with the UAPA as required by T.C.A. § 33-1-309(d).

18. DMRS's failure to comply with the UAPA deprived the Rochelle Center from participating in the process for the adoption of the rule and therefore interfered with or impaired their rights and privileges.

19. The November 2008 Reduction is therefore void and unenforceable.

**COUNT 3
INCLUSION OF TRANSPORTATION TIME
IN DEFINITION OF DAY SERVICES**

20. The preceding paragraphs are incorporated by reference.

21. The Waiver defines the term "Day Services" to include "services" and "supports" and states that "transportation" is a "component" of Day Services that "shall be included in the Day Services reimbursement rate." Waiver, pp. B-18 to B-19 (emphasis added).

22. Regulations issued by the Bureau of TennCare define the term "Day Services" to include "services" and "supports." See Tenn. Comp. R. & Regs. 1200-13-1-.25(1)(g) and 1200-13-1-.28(1)(f) ("TennCare Regulations").

23. Title 33 of the Tennessee Code Annotated defines "support" as "any activity or resource that enables a service recipient to participate in a service for ... developmental disabilities or in community life." T.C.A. § 33-1-101(23).

24. Transportation to and from the facility is a "resource" that enables service recipients to participate in Rochelle Center's services for the developmentally disabled and in community life and is therefore a "support" within the meaning of T.C.A. § 33-1-101(23), the TennCare Regulations, and the Waiver.

25. Day Services are facility-based or community-based. Waiver, p. B-18.

26. The Waiver states, with reference to per diem reimbursement to providers, in relevant part:

For an enrollee who is receiving facility based or community based Day Services that day, the provider may receive the per diem reimbursement for Day Services if:

- a. The enrollee receives 6 hours of direct services comprised of community based and/or facility based Day Services. (Services provided by natural supports are not reimbursable and are excluded.)

Waiver, p. B-19.

27. The required "6 hours" refer to the defined term "Day Services," which includes transportation as a "component."

28. The required "6 hours" specifically excludes "natural supports" provided by family, friends, and volunteers, and therefore implicitly includes "supports" provided by the facility, such as transportation.

29. Regulations issued by the Department of Mental Health and Developmental Disabilities define "Mental Retardation Services" to include "all services **pertaining to and incidental to** the ... habilitation, counseling, or supervision of mental retardation or service recipients who have mental retardation." Tenn. Comp. R. & Regs. 0940-05-1-.02(33) (emphasis added).

30. Transportation to and from the facility pertains to and is "incidental to" the habilitation, counseling, and supervisory services provided by the Rochelle Center to service recipients.

31. Transportation to and from the facility is essential to ensure that service recipients have access to Day Services.

32. Therefore, under the Waiver, transportation to and from the facility is includable in the six hours of required Day Services, the Rochelle Center's schedule of five hours in-facility services and one-hour round trip of transportation complies with the Waiver, and the Rochelle Center is entitled to be reimbursed on the basis of providing six hours of Day Services to its service recipients.

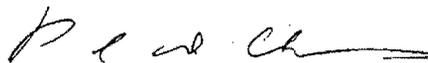
REQUESTED RULING

For the foregoing reasons, the Rochelle Center requests DMRS to:

1. Declare the January 2008 Reduction void, because it was not issued in compliance with the UAPA;
2. Declare the November 2008 reduction void, because it was not issued in compliance with the UAPA;
3. Declare that under the Waiver: (1) transportation to and from the facility is includable in the six hours of required Day Services; (2) the Rochelle Center's schedule of five hours in-facility services and one-hour round trip of transportation complies with the Waiver; and (3) the Rochelle Center was and is entitled to be reimbursed on the basis of providing six hours of Day Services to its service recipients;
4. Grant such other relief as is necessary or appropriate.

Dated: February 23, 2009

Respectfully submitted:

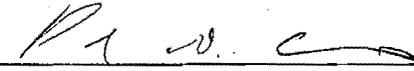


Robert D. Tuke (BPR# 004650)
Paul W. Ambrosius (BPR# 020421)
TRAUGER & TUKE
222 Fourth Avenue North

Nashville, Tennessee 37219
Telephone 615-256-8585
Telecopier 615-256-7444
rtuke@tnlaw.net
pambrosius@tnlaw.net
Counsel for The Rochelle Center, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the Division of Mental Retardation Services of the Department of Finance and Administration, 500 Deaderick Street, Nashville, Tennessee 37243, by hand delivery today, February 23, 2009.



Paul W. Ambrosius