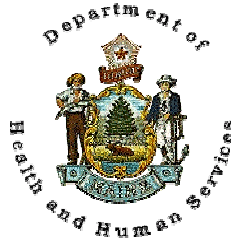


John Elias Baldacci
Governor



John R. Nicholas
Commissioner

*Maine Department of Health and Human Services
11 State House Station
Augusta, Maine 04333-0011*

TO: John R. Nicholas, Commissioner
Department of Health and Human Services
221 State Street
State House Station 11
Augusta, ME 04333

ADMINISTRATIVE HEARING RECOMMENDATION

An administrative hearing was held on 4/25/05 in the case of the Marshwood Center for Health Care and Rehabilitation, at Lewiston, Maine, before Ronald S. Stoodley, Hearing Officer. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner, Department of Health and Human Services (DHHS).

CASE BACKGROUND AND ISSUE:

Marshwood Center for Health Care and Rehabilitation is a nursing facility (NF) and is hereinafter referred to as "Marshwood." DHHS conducted a Case Mix Review of Marshwood on 3/10/04 and 3/11/04. DHHS reviewed the records of 15 residents of Marshwood and determined that the records of 6 of those residents were in error, and determined that 40% of the records that it reviewed were in error, and determined that Marshwood was subject to a 5% sanction.

Marshwood disputed the DHHS findings and requested an Informal Review (exhibit # HO-8). DHHS conducted an Informal Review and affirmed its original findings. The results of the Informal Review were conveyed to Marshwood by letter dated 1/25/05 (exhibit # HO-6). By letter dated 2/25/05, Marshwood requested an administrative hearing (exhibit # HO-5). This matter was referred to the Office of Administrative Hearings by the Order of Reference dated 3/14/05 (exhibit # HO-2). This issue at this hearing was stated in the Order of Reference:

- (1) Was the Department correct when, as a result of a Case Mix Review conducted on March 11, 2004 of Marshwood Center for Health Care, it determined that there was a 40% error rate and a 5% sanction?

At the hearing, the parties clarified that, of the 6 case records that DHHS had found to be in error, Marshwood agreed with the DHHS findings on 3, but disagreed with the DHHS findings on the other 3. The disputed records are those of the 3 residents designated herein as Resident 8, Resident 12 and Resident 13.

Following the hearing on 4/25/05, the hearing record remained open until 5/9/05 in order to allow the parties to submit closing arguments. Both sides submitted closing arguments. The hearing record was closed on 5/9/05.

APPEARING ON BEHALF OF MARSHWOOD CENTER FOR HEALTH CARE:

Andrea Otis-Higgins, Director of Clinical Services, Sandy River Health System
Gail Smith, Marshwood
Leslie Currier, Administrator, Marshwood

APPEARING ON BEHALF OF AGENCY:

Bernadette Mynahan, R.N.
Carole Kus, R.N.

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer exhibits:

- HO-1. Letter scheduling hearing dated 3/17/05
- HO-2. Order of Reference dated 3/14/05
- HO-3. Fair Hearing Report dated 3/8/05
- HO-4. Letter dated 3/4/05 acknowledging hearing request
- HO-5. Letter requesting hearing dated 2/25/05
- HO-6. Informal Review results dated 1/25/05
- HO-7. Memo dated 6/18/04 to Audrey Savoie from Chris Zukas-Lessard
- HO-8. Letter dated 4/9/04 requesting Informal Review
- HO-9. Exit Conference memo dated 3/11/04
- HO-10. Information provided by Marshwood in connection with Informal Review:
 - Exhibit-1. Excerpt from CMS RAI Version 2.0 Manual, p. 3-124
 - Exhibit-1-A Excerpt from CMS RAI Version 2.0 Manual, p. 3-125
 - Exhibit-2. Continence Assessment Data Sheet relative to Resident #8
 - Exhibit-3. Nursing Kardex relative to Resident #8
 - Exhibit-4. Excerpt from Care Plan relative to Resident #8
 - Exhibit-5. Resident Daily Care Record relative to Resident #8
 - Exhibit-6. Excerpt from MDS relative to Resident #8
 - Exhibit-7. FMP Quarterly Summary relative to Resident #8
 - Exhibit-8. Excerpt from CMS RAI Version 2.0 Manual, p. 3-192, relative to Resident #8
 - Exhibit-9. Same as exhibit # 3
 - Exhibit-10. Excerpt from Care Plan relative to Resident #8
 - Exhibit-11. Range of motion sheet relative to Resident #8
 - Exhibit-12. FMP Quarterly Summary relative to Resident #8
 - Exhibit-13. Nursing Rehab/Restorative Record relative to Resident #8
 - Exhibit 13-A. Continence Assessment Data Sheet relative to Resident #12
 - Exhibit-14. Nursing Kardex relative to Resident #12
 - Exhibit-15. Excerpt from Care Plan relative to Resident #12
 - Exhibit-16. Resident Daily Care Record relative to Resident #12
 - Exhibit-17. FMP Quality Summary relative to Resident #12
 - Exhibit-18. Excerpt from MDS relative to Resident #12

- Exhibit-19. Continenence Assessment Data Sheet relative to Resident #13
- Exhibit-20. Nursing Kardex relative to Resident #13
- Exhibit-21. Excerpt from Care Plan relative to Resident #13
- Exhibit-22. Resident Daily Record relative to Resident #13
- Exhibit-23. FMP Quarterly Summary relative to Resident #13
- Exhibit-24. Excerpt from MDS relative to Resident #13
- HO-11. Maine MDS RUG [Resource Utilization Group] III Codes

Department exhibits:

- DHHS-1. Excerpt from MaineCare Benefits Manual, Chapter III, Section 67
- DHHS-2. Excerpt from MaineCare Benefits Manual, Chapter II, Section 67
- DHHS-3. Exit Conference memo dated 3/11/04, with attachments
- DHHS-4. Information relative to Resident #8
- DHHS-5. Excerpt from RAI User's Manual
- DHHS-6. Excerpt from Regulations Governing the Licensing and Functioning of Skilled Nursing Facilities and Nursing Facilities
- DHHS-7. Information relative to Resident #12
- DHHS-8. Information relative to Resident #13
- DHHS-9. Excerpt from MaineCare Benefits Manual, Chapter I, Section 1.03

Marshwood Center for Health Care exhibits:

None

Other items in the record:

- A. Letter dated 4/26/05 to the parties from the hearing officer
- B. Closing arguments from Bernadette Mynahan dated 5/6/05
- C. Closing arguments from Andrea Otis-Higgins dated 4/26/05

FINDINGS OF FACT:

1. Regarding Resident 8:

Resident 8's Assessment Reference Date was 1/7/04. Marshwood assessed her need for toileting assistance on 10/21/03 and determined she should be offered toileting assistance every two hours and as needed. Resident 8's Care Plan dated 10/27/03 and her Nursing Kardex both reflect that the direct care staff should offer her toileting assistance every two hours and as needed. Resident 8's Resident Daily Care Record shows that she received toileting assistance under her toileting program from the direct care staff. The FMP [Functional Maintenance Plan], entries dated 10/21/03 and 1/13/04, shows that Resident 8 had a continuing need to be offered toileting assistance every two hours and as needed.

Marshwood completed an MDS on Resident 8 on 1/13/04 and, among other things, indicated that Resident 8 had "any scheduled toileting plan" and was receiving "range of motion (active)."

Resident 8 had a scheduled toileting plan on 1/7/04 and was receiving passive, not active, range of motion services.

2. Regarding Resident 12:

Resident 12's Assessment Reference Date was 1/21/04. Marshwood assessed her need for toileting assistance on 11/4/03 and determined she should be offered toileting assistance every two hours and as needed. Resident 12's Care Plan dated 11/7/03 and her Nursing Kardex both reflect that the direct care staff should offer her toileting assistance every two hours and as needed. Resident 12's Resident Daily Care Record shows that she received toileting assistance under her toileting program from the direct care staff. The FMP, entries dated 11/14/03 and 1/27/04, shows that Resident 12 had a continuing need to be offered toileting assistance every two hours and as needed.

Marshwood completed an MDS on Resident 12 on 1/26/04 and, among other things, indicated that Resident 12 had "any scheduled toileting plan."

Resident 12 had a scheduled toileting plan on 1/21/04.

3. Regarding Resident 13:

Resident 13's Assessment Reference Date was 12/30/03. Marshwood assessed her need for toileting assistance on 9/29/03 and determined she should be offered toileting assistance every two hours and as needed. Resident 13's Care Plan dated 10/16/03 and her Nursing Kardex both reflect that the direct care staff should offer her toileting assistance every two hours and as needed. Resident 13's Resident Daily Care Record shows that she received toileting assistance under her toileting program from the direct care staff. The FMP, entries dated 5/1/03, 7/22/03 and 12/14/03, shows that Resident 13 had a continuing need to be offered toileting assistance every two hours and as needed.

Marshwood completed an MDS on Resident 13 on 1/2/04 and, among other things, indicated that Resident 13 had "any scheduled toileting plan."

Resident 13 had a scheduled toileting plan on 12/30/03.

4. Marshwood is a facility owed by Sandy River Health System. Andrea Otis-Higgins is the Director of Clinical Services for Sandy River Health System. Ms. Otis-Higgins has acted as or helped cover the role of the Director of Nursing at Marshwood. Ms. Otis-Higgins has knowledge of the MDS system and is certified by the American Association of Nurse Assessment Coordinators.

RECOMMENDED DECISION:

The hearing officer recommends that the Commissioner reverse the DHHS action and find that the Department was not correct when, as a result of a Case Mix Review conducted on March 11, 2004 of Marshwood Center for Health Care, it determined that there was a 40% error rate and a 5% sanction.

REASONS FOR RECOMMENDATION:

The Principles of Reimbursement for Nursing Facilities (Chapter III, Section 67, of the MaineCare Benefits Manual) are the MaineCare rules governing reimbursement to NFs for MaineCare-eligible residents. Under these rules, NFs are reimbursed for MaineCare-eligible residents on the basis of a number of different variables including a “direct care cost component.” Reimbursement to NFs for the direct care cost component is based on a “resident classification system” that classifies each resident into one of 45 case mix classification groups (Section 41, first unnumbered paragraph, and Section 41.2).

NFs are required to assess all their residents through the use of the “Resident Assessment Instrument,” or “RAI,” which is comprised of the “Minimum Data Set,” or “MDS,” and the “Resident Assessment Protocols,” or “RAPs.” Under the MDS, residents are classified into one of the 45 case mix classification groups (Section 41.2).

DHHS conducts “MDS assessment reviews” to ensure that NF assessments accurately reflect residents’ clinical conditions (Section 41.23.1[2]). At an MDS assessment review, DHHS reviews a sample of the NF’s MDS assessments for residents for whom the MaineCare Program is reimbursing the NF.

As a result of its MDS assessment review, DHHS determines the NF’s “assessment review error rate,” which is the percentage of “Unverified Case Mix Group Records” in the sample of cases it reviewed (Section 41.23.1[4]).

The “Unverified Case Mix Group Record” is a resident’s record that DHHS has determined does not accurately represent the resident’s condition, and therefore results in the resident’s inaccurate classification into a case mix group that increases the case mix weight assigned to the resident (Section 41.23.1[6]). Section 41.23.1(6) reads in part:

(6) “Unverified Case Mix Group Record” is one which, for reimbursement purposes, the Department has determined does not accurately represent the resident’s condition, and therefore results in the resident’s inaccurate classification into a case mix group that increases the case mix weight assigned to the resident.

Depending on the magnitude of the “assessment review error rate,” DHHS must sanction the NF by reducing the NF’s “total direct care cost component,” thus reducing MaineCare reimbursement to the NF. The decreases are 2% if the NF’s error rate is 34% or greater but less than 37%, 5% if the NF’s error rate is 37% or greater but less than 41%, 7% if the NF’s error rate is 41% or greater but less than 45%, and 10% if the NF’s error rate is 45% or greater (Section 41.23.4).

The instructions for the coding of the MDS are contained in the Centers for Medicare and Medicaid Services’ “Resident Assessment Instrument (RAI) User’s Manual” (RAI User’s Manual). Exhibit # DHHS-5 contains the applicable excerpts from the RAI User’s Manual.

In this case, DHHS determined that Marshwood’s records for Residents 8, 12 and 13 were Unverified Case Mix Group Records. For all three residents, DHHS determined that Marshwood’s records were Unverified Case Mix Group Records because Marshwood had classified all three residents as requiring “(a) any scheduled

toileting plan” on the MDS under Section H (“continence in the last 14 days”), Sub-Section 3 (“appliances and programs”), but DHHS determined Marshwood’s records were not adequate to meet the documentation requirements for “any scheduled toileting plan” for any of the three residents, and therefore resulted in an inaccurate classification into a case mix group that increases the case mix weight assigned to each of these residents. In addition, for Resident 8, DHHS determined that Marshwood’s records were Unverified Case Mix Group Records because Marshwood had classified Resident 8 as requiring “(b) range of motion (active)” on the MDS under MDS Section P (Special Treatments and Procedures”), Sub-Section 3 (“Nursing Rehabilitation/ Restorative Care”), but DHHS determined that Marshwood’s records showed that Resident 8 was not receiving “range of motion (active),” and therefore resulted in an inaccurate classification into a case mix group that increases the case mix weight assigned to Resident 8.

The issue of “(a) any scheduled toileting plan” on the MDS under Section H (“continence in the last 14 days”), Sub-Section 3 (“appliances and programs”) is referred to hereinafter as “H3a.” The issue of “(b) range of motion (active)” on the MDS under MDS Section P (Special Treatments and Procedures”), Sub-Section 3 (“Nursing Rehabilitation/ Restorative Care”) is referred to hereinafter as “P3b.”

Regarding H3a:

Under the RAI User’s Manual, at page 3-124, “(a) any scheduled toileting plan” is defined as:

a. Any Scheduled Toileting Plan - A plan whereby staff members at scheduled times each day either take the resident to the toilet room, or give the resident a urinal, or remind the resident to go to the toilet. Includes habit training and/or prompted voiding.

The RAI User’s Manual, at page 3-124, provides “clarifications” relevant to “any scheduled toileting plan.” These clarifications include that the scheduled toileting plan must be “scheduled” (that is, the activity must be performed according to a specified timing schedule that is communicated to caregivers), and that the “program” must be organized, planned, documented, monitored and evaluated:

Clarifications: There are 3 key ideas captured in Item H3a: 1) scheduled, 2) toileting, and 3) program. The word “scheduled” refers to performing the activity according to a specific, routine time that has been clearly communicated to the resident (as appropriate) and caregivers. The concept of “toileting” refers to voiding in a bathroom or commode, or voiding into another appropriate receptacle (i.e., urinal, bedpan). Changing wet garments is not included in this concept. A “program” refers to a specific approach that is organized, planned, documented, monitored and evaluated. A scheduled toileting program could include taking the resident to the toilet, providing a bedpan at scheduled times, or verbally prompting to void.

And, under the RAI User’s Manual, at page 3-125, the NF is instructed to check item H3a when the NF has a scheduled toileting plan for the resident and the NF is actually carrying out that plan for the resident:

If the scheduled plan is recorded in the care plan and staff are actually toileting the resident according to the multiple specified times, check Item H3a.

Regarding the requirement that the scheduled toileting plan be scheduled, the evidence in the hearing record shows that Marshwood had assessed each of these residents relative to continence (the Continence Assessment Data Sheet for each resident, contained in exhibit # HO-10), and that Marshwood decided that each of these residents required a toileting plan to be carried out according to a specified, routine time schedule, and that Marshwood had established and recorded a scheduled toileting plan in each resident's Care Plan (the Care Plans contained in exhibits # DHHS-4, 7 and 8). The hearing officer concluded that Marshwood met the "scheduled" requirement for a "scheduled toileting plan" for each of the residents.

Regarding the requirements that the "program" must be organized, planned, documented, monitored and evaluated, Ms. Otis-Higgins argued that the documents Marshwood provided at the Informal Review (the 24 sub-exhibits contained in exhibit # HO-10) showed that these requirements had been met. Ms. Otis-Higgins specified the exhibits that pertained to each of the requirements for each of the residents on p. 2 of her closing argument (item C). Those exhibits are: the Continence Assessment Data Sheet, the Nursing Kardex, the Care Plan excerpt, the FMP [Functional Maintenance Plan] Quarterly Summary, and the Resident Daily Care Record for each of the residents. Ms. Otis-Higgins argued that the Continence Assessment Data Sheet, Nursing Kardex, Care Plan excerpt and FMP Quarterly Summary for each of the residents show that the plan was organized; that the Nursing Kardex and Care Plan excerpt for each of the residents show that the plan was planned and communicated; that the Resident Daily Care Record for each of the residents shows that the plan was documented; and that the FMP Quarterly Summary for each of the residents shows that the plan was monitored and evaluated. The hearing officer agrees with Ms. Otis-Higgins' argument.

Ms. Mynahan argued that the FMP Quarterly Summary did not meet the evaluation requirement for Resident 8 or Resident 13 because the evaluation did not "speak to the objective (intact skin) but rather to the problem (urinary incontinence)." Ms. Otis-Higgins argued that the RAI User's Manual contained the applicable rules and that the RAI User's Manual does not require a particular format for the evaluation of the program, and that the program was being evaluated on a periodic basis as shown on each resident's FMP Quarterly Summary. The hearing officer agrees with Ms. Otis-Higgins' argument.

The hearing officer concluded that Marshwood met the "program" requirements for a "scheduled toileting plan" for each of the residents.

Regarding the requirement that the NF actually carry out the plan for the resident, the evidence in the hearing record shows that Marshwood had actually provided the toileting assistance to each of these residents in accord with the scheduled toileting plan. There is a Nursing Kardex for each of these residents. Ms. Otis-Higgins testified that each resident's Nursing Kardex, under Marshwood's established policies and procedures, is the method Marshwood uses to communicate and instruct its direct care staff as to what care each resident is to receive, and that the staff follows the instructions on the Kardex when delivering care to the resident, and that the

information contained on each resident's single-sheet Kardex is an easily-understood and readily-accessible summary of the information contained on each resident's multi-page Care Plan, and that the Kardex is updated whenever a resident's Care Plan is updated. In addition, there is a record, called the Resident Daily Care Record, that shows the care provided for each of these residents. While the Resident Daily Care Record for Resident 8 and Resident 12 did not actually specify that the toileting plan was to be carried out on a two-hour frequency (the Resident Daily Care Record for Resident 13 did more closely specify the two-hour frequency), the hearing officer concluded, on the basis of the preponderance of the evidence in the hearing record, that the toileting plan was actually carried out for each of the three residents as specified in each resident's Care Plan. The hearing officer found Ms. Otis-Higgins to be credible and reliable. DHHS presented no evidence to show that the toileting plans were not actually carried out for any of the three residents, but only raised some question as to the quality and specificity of Marshwood's record-keeping, specifically the Kardexes not being signed or dated.

Having concluded that that Marshwood had met the "scheduled" requirement for a scheduled toileting plan for each of the residents, and that Marshwood met the "program" requirements for a scheduled toileting plan for each of the residents, and that Marshwood had actually provided the toileting assistance to each of these residents in accord with the scheduled toileting plan, the hearing officer concluded that Marshwood's records for Residents 8, 12 and 13 were not Unverified Case Mix Group Records with respect to H3a.

Regarding P3b:

The terms "range of motion (active)" and "range of motion (passive)" are defined in the RAI User's Manual at page 3-192.

Marshwood had classified Resident 8 as requiring "range of motion (active)" on the MDS at Section P, Sub-Section 3, meaning that the resident performs the range of motion exercises without the caregiver's assistance (except, if necessary, assistance by the caregiver with the "final stretch"). DHHS found that Resident 8 was actually receiving "range of motion (passive)" meaning that the caregiver provides the range of motion exercises on the resident while the resident provides no assistance in performing the exercises. Marshwood agreed with the DHHS finding that Resident 8 was receiving passive range of motion services, and that the entry on the MDS was erroneous, and that the entry on the MDS should have indicated that Resident 8 required passive range of motion services.

Although Marshwood and DHHS agreed that the P3b entry was incorrect, there apparently continued to be some disagreement as to whether this error was or was not an error that "results in the resident's inaccurate classification into a case mix group that increases the case mix weight assigned to the resident" (Section 41.23.1[6]). Ms. Otis-Higgins maintained that the error made no difference to the case mix weight assigned to the resident, and thus was not a "Unverified Case Mix Group Record," and therefore was an error that could lead to a sanction. Ms. Mynahan agreed with Ms. Otis-Higgins' analysis at one time during the hearing, but at other times seemed to disagree, and her position is still not clear in her closing argument (item B, p. 5). The hearing officer cannot find sufficient evidence in the hearing record to resolve this

issue. The hearing officer does not find it necessary to resolve this issue in this case. Given the hearing officer's conclusions relative to the toileting program, and given Marshwood's agreement that 3 other cases were in error, even if this P3b error means that Resident 8's record is an "Unverified Case Mix Group Record," the result would be 4 Unverified Case Mix Group Records out of the 15 reviewed by DHHS. This would result in a 26.6% error rate, which is below the 34% error rate threshold at which any penalty could be imposed on Marshwood.

Therefore, the hearing officer recommended that the Commissioner reverse the DHHS action and find that the Department was not correct when, as a result of a Case Mix Review conducted on March 11, 2004 of Marshwood Center for Health Care, it determined that there was a 40% error rate and a 5% sanction.

MANUAL CITATIONS:

MaineCare Benefits Manual, Chapter III, Section 67
Resident Assessment Instrument (RAI) User's Manual

DATED: May 24, 2005 .

SIGNED: _____
Ronald S. Stoodley
Hearing Officer

RIGHT TO FILE RESPONSES OR EXCEPTIONS:

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS WITHIN 20 DAYS OF RECEIPT OF THIS RECOMMENDED DECISION. THIS TIME FRAME MAY BE ADJUSTED BY AGREEMENT OF THE PARTIES. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE OFFICE OF ADMINISTRATIVE HEARINGS STATE HOUSE STATION # 11, AUGUSTA, MAINE 04333-0011. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

cc: Andrea Higgins, Director of Clinical Services, Sandy River Health System
Leslie Currier, Administrator, Marshwood Center for Health Care and Rehabilitation
James Lewis, Assistant Director, BMS
Carole Kus, Division of Health Care Management, BMS
Bernadette Mynahan, BMS
Audrey Savoie, BMS