

Janet T. Mills  
Governor



Jeanne M. Lambrew, Ph.D.  
Commissioner

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**IN THE MATTER OF:**

Ocean Way Manor )  
Ocean Way Mental Health Agency )  
c/o Laurie Ryan ) **FINAL DECISION**  
78 Beechwood Street )  
Thomaston, ME 04861 )

This is the Department of Health and Human Services' Final Decision.

The Recommended Decision of Hearing Officer Benedict, mailed April 24, 2019 has been reviewed.

I hereby adopt the findings of fact and I accept the Recommendation of the Hearing Officer that the Department was correct when it determined that Ocean Way Mental Health Agency and Ocean Way Manor should be terminated as providers to deliver MaineCare reimbursed services based on the violations cited in the 12/7/2016 notices of termination and Final Informal Review Decisions dated 1/25/2018 and 1/29/2018.

DATED: 2-18-19 SIGNED:   
JEANNE M. LAMBREW, Ph.D., COMMISSIONER  
DEPARTMENT OF HEALTH & HUMAN SERVICES

**YOU HAVE THE RIGHT TO JUDICIAL REVIEW UNDER THE MAINE RULES OF CIVIL PROCEDURE, RULE 80C. TO TAKE ADVANTAGE OF THIS RIGHT, A PETITION FOR REVIEW MUST BE FILED WITH THE APPROPRIATE SUPERIOR COURT WITHIN 30 DAYS OF THE RECEIPT OF THIS DECISION.**

**WITH SOME EXCEPTIONS, THE PARTY FILING AN APPEAL (80B OR 80C) OF A DECISION SHALL BE REQUIRED TO PAY THE COSTS TO THE DIVISION OF ADMINISTRATIVE HEARINGS FOR PROVIDING THE COURT WITH A CERTIFIED HEARING RECORD. THIS INCLUDES COSTS RELATED TO THE PROVISION OF A TRANSCRIPT OF THE HEARING RECORDING.**

cc: William Logan, DHHS/OMS



Paul R. LePage, Governor Ricker Hamilton, Acting Commissioner

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Jeanne M. Lambrew, Ph.D.  
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Date Mailed: APR 24 2019

**In the Matter of: Ocean Way Manor  
Ocean Way Mental Health Agency  
Termination of MaineCare Provider Contract**

**ADMINISTRATIVE HEARING RECOMMENDED DECISION**

An administrative hearing in the above-captioned matter was held on November 26, 2018 before Hearing Officer Miranda Benedict, Esq., at Augusta, Maine. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner of the Maine Department of Health and Human Services.

The hearing was originally scheduled to be held on June 18, 2018. However, the parties jointly requested that the hearing be rescheduled due to settlement discussions taking place. The hearing was rescheduled to be held on September 11, 2018. However, the Administrative Hearings Unit was contacted by the legal firm representing Ocean Way Manor and Ocean Way Mental Health Agency to inform it that it was no longer representing the agencies. Based upon the need for Ocean Way to obtain legal counsel, the parties agreed to a continuance. The record was held open until December 31, 2018 to provide an opportunity for the parties to submit closing arguments. The arguments were received, and the record was closed.

Pursuant to an Order of Reference dated April 23, 2018, the issue presented *de novo* for hearing,

***Was the Department correct when it determined that Ocean Way Mental Health Agency and Ocean Way Manor should be terminated as providers to deliver MaineCare reimbursed services based on the violations cited in the 12/7/2016 notices of termination and Final Informal Review Decisions dated 1/25/2018 and 1/29/2018? See, HO-3.***

**APPEARING ON BEHALF OF THE APPELLANT**

Riley Fenner, Esq.  
Laurie Ryan, owner  
Stephanie Truman  
Jeanette Noltan, former employee, Ocean Way Mental Health Agency

**APPEARING ON BEHALF OF THE DEPARTMENT**

William Logan, Esq.

Beth Ketch, Director of Provider Relations, Office of MaineCare Services

Derrick Grant-Hearings Specialist

Patrick Bouchard, CHP-2

**ITEMS INTRODUCED INTO EVIDENCE**

Hearing Officer Exhibits

- HO-1 Scheduling Notice dated August 14, 2018 with attached notices
- HO-2 Fair Hearing Report Form dated April 5, 2018
- HO-3 Order of Reference dated April 23, 2018
- HO-4 Entry of Appearance from Riley Fenner, Esq.
- HO-5 Witness List submitted by Ocean Way
- HO-6 Written objection from the Department to the witness list submitted by Ocean Way
- HO-7 Letter from hearing officer to parties dated November 27, 2018

Department's Exhibits:

**Ocean Way Manor**

- DHHS-1 Notice of Termination dated December 19, 2016 with Provider Agreement attached
- DHHS-2 Emergency Request for Immediate Review and Modification of Letters Terminating Provider Agreement for Ocean Way Mental Agency and Ocean Way Manor dated January 12, 2017
- DHHS-3 Submission of Additional Information Related to Emergency Request dated February 17, 2017
- DHHS-4 Final Informal Review Decision dated January 25, 2018
- DHHS-5 Appeal and Request for Hearing dated March 30, 2018
- DHHS-6 Fair Hearing Report Form dated April 5, 2018
- DHHS-7 Notice of Violation dated November 15, 2016
- DHHS-8 Request for Informal Review dated November 21, 2016
- DHHS-9 Final Informal Review Decision (recoupment) dated February 3, 2017
- DHHS-10 Appeal and Request for Hearing regarding recoupment dated April 7, 2017
- DHHS-11 Chapter I, §1, MaineCare Benefits Manual (Last updated March 23, 2016)<sup>1</sup>
- DHHS-12 Chapter II, §21, MaineCare Benefits Manual (Last updated September 1, 2014)
- DHHS-13 Notice of approval of Ocean Way Manor to be enrolled in the MIHMS system dated April 22, 2010
- DHHS-14 List of employees and accreditation
- DHHS-15 Authorization Release of Confidential Substantiated Maine Child Abuse and Neglect Records Information for employee's date on or about October 17, 2016

<sup>1</sup> References to the MaineCare Benefits Manual are to the provisions that were in effect at the time of the Department's action and does not necessarily reflect the current version of the rules.

- DHHS-16 Email from Laurie Ryan to Patrick Bouchard dated October 15, 2016
- DHHS-17 Email from Laurie Ryan to Jodi Ingraham regarding DSP certification of employees
- DHHS-18 Employee Coverage June 2016
- DHHS-19 Employee Coverage July 2016
- DHHS-20 Final Informal Review Payment Spreadsheet
- DHHS-21 Closing Argument

**Ocean Way Mental Health Agency**

- DHHS-1 Notice of Termination dated December 7, 2016
- DHHS-2 Request for Informal Review of Termination dated January 12, 2017
- DHHS-3 Submission of Additional Information Relating to Request for Informal Review of Termination dated February 10, 2017
- DHHS-4 Final Informal review of Termination Decision dated January 29, 2018
- DHHS-5 Appeal and Request for Hearing of Termination dated March 30, 2018
- DHHS-6 Fair Hearing Report From dated April 5, 2018
- DHHS-7 Notice of Violation dated October 19, 2016
- DHHS-8 Request for Informal Review dated November 1, 2016
- DHHS-9 Final Informal Review Decision dated December 22, 2016
- DHHS-10 Appeal and Request for Hearing dated February 21, 2017
- DHHS-11 MaineCare Benefits Manual, Chapter 11, §17, last updated October 1, 2009
- DHHS-12 MaineCare Benefits Manual, Chapter II, §17, last updated March 22, 2016
- DHHS-13 Community Licensing Standards CS.4 and Cs.7
- DHHS-14 MaineCare Provider Agreement dated January 4, 2013
- DHHS-15 Member 1 Record
- DHHS-16 Member 2 Record
- DHHS-17 Member 22 Record
- DHHS-18 Member 24 Record
- DHHS-19 Member 30 Record
- DHHS-20 Member 34 Record
- DHHS-21 Member 38 Record
- DHHS-22 Member 41 Record
- DHHS-23 Member 65 Record
- DHHS-24 Member 1 Comprehensive Assessment
- DHHS-25 Member 49 Record
- DHHS-26 Member 5 Record
- DHHS-27 Email from Laurie Ryan dated October 15, 2016
- DHHS-28 Closing Argument <sup>2</sup>

Appellant Exhibits

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<sup>2</sup> The Department exhibits were organized to correspond to each of the two facilities. Cites to the Department's closing argument will be to both DHHS-21 (Ocean Way Manor) and DHHS-28 (Ocean Way Mental Health Agency)

Ocean Way-1	Letter from Carlton Lewis, Program Manager Residential Treatment, SAMHS, dated [REDACTED] 2015
Ocean Way-2	State of Maine DHHS, Agreement to Purchase Services dated July 28, 2015
Ocean Way-3	Letter from Suzanne Kearns, DHHS to Laurie Ryan, Ocean Way Mental Health Agency dated October 25, 2016 granting license to operate Mental Health Agency
Ocean Way-4	Closing Argument

### **RECOMMENDED DECISION:**

The hearing officer recommends that the Commissioner find that the Department was correct when it determined that Ocean Way Mental Health Agency and Ocean Way Manor should be terminated as providers to deliver MaineCare reimbursed services based on the violations cited in the 12/7/2016 notices of termination and Final Informal Review Decisions dated 1/25/2018 and 1/29/2018.

### **RECOMMENDED FINDINGS OF FACT:**

#### **Ocean Way Manor**

1. Laurie Ryan was the owner and operator of Ocean Way Manor and Ocean Way Mental Health Agency.
2. Ocean Way Manor provided direct supports services to MaineCare members who received services under the Home and Community Benefits for Members with Intellectual Disabilities or Autistic Disorder (§21, MaineCare Benefits Manual).
3. On November 15, 2016, the Department served notice to Ms. Ryan of several violations allegedly committed by Ocean Way Manor.
4. On December 19, 2016, the Department served notice on Ms. Ryan that the Department was terminating Ocean Way Manor as a MaineCare provider based upon a Notice of Violations dated November 15, 2016.
5. On January 25, 2018, the Department served Ms. Ryan's attorney with a Final Informal Review Decision, terminating the MaineCare Provider Agreement with Ocean Way Manor.
6. Ocean Way Manor violated §22,10-1(A), Chapter II, MCBM when it employed individuals who were not qualified as DSPs.
7. Ocean Way Manor violated §22,10.1 (C), MCBM when it failed to timely perform employee background checks for any adult or child abuse or neglect history.
8. Ocean Way Manor violated §1.03(J), Chapter I, MCBM when it billed MaineCare for services that were not rendered.
9. Ocean Way Manor violated §1.03-3(Q), Chapter I, MCBM when it permitted a non-employee to transport client's protected health information.

## Ocean Way Mental Health Agency

1. Laurie Ryan was the owner and operator of Ocean Way Manor and Ocean Way Mental Health Agency.
2. Ocean Way Mental Health Agency provided direct support services to MaineCare members who received services under Community Support Services (§17, MaineCare Benefits Manual).
3. On October 19, 2016, the Department served notice to Ms. Ryan of several violations allegedly committed by Ocean Way Mental Health Agency.
4. On December 7, 2016 the Department serviced notice on Ms. Ryan that the Department was terminating Ocean Way Mental Health Agency as a MaineCare provider based upon a Notice of Violations dated October 19, 2016.
5. On December 22, 2016 the Department served Ms. Ryan with a Final Informal Review Decision, terminating the MaineCare Provider Agreement with Ocean Way Mental Health Agency.
6. Ocean Way Mental Health Agency violated §17.04-1(B), Chapter II, MCBM when it failed to correctly date Comprehensive Assessments and when it used identical language when completing two different assessments, evidencing that at least one of the assessments was 'cut and pasted' from the other.
7. Ocean Way Mental Health Agency violated §17.0702(A), Chapter II, MCBM when it failed to complete Individual Service Plans in a timely manner.
8. Ocean Way Mental Health Agency violated §17.07-3, Chapter II, MCBM when it produced progress notes that failed to meet the minimum standards as outlined in the rule.
9. Ocean Way Mental Health Agency violated §17.06, Chapter II, MCBM when it billed MaineCare for non-covered services.

## REASONS FOR RECOMMENDATION:

### Ocean Way Manor

Ocean Way Manor provided services to MaineCare members in receipt of §21 services. Pursuant to the rule in effect at the time,

***The Home and Community Based Benefit (HCB or Benefit) for members with Intellectual Disabilities (ID) or Autism Spectrum Disorder (ASD) gives members eligible for this Benefit the option to live in their own home or in another home in the community thus avoiding or delaying institutional services. The Benefit is offered in a community-based setting as an alternative for members who qualify to live in an Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID). The Benefit supplements, rather than replaces supportive, natural personal, family, work, and community relationships. It does not duplicate other MaineCare services. See, Chapter II, §21.01 MCBM.***

The Department terminated Ocean Way Manor's provider contract based upon several violations of the MaineCare provider contract and the regulations governing the provision of §21 services. This was based upon a review of records for the time period January 1, 2016 through June 1, 2016.

Pursuant to the rules in effect at the time, the Department may terminate or exclude a provider from participation in MaineCare if it breaches the terms of the MaineCare Provider Agreement, and/or the requirements of Chapter I, §1.03-3, MCBM. See Chapter I, §1.19-1(G) and Chapter 1 §19-2(A), MCBM. Section 1.03-3 lays out the extensive responsibilities that a provider must fulfill. Among these are the responsibilities to bill only for covered services and supplies, the maintenance of contemporaneous financial, provider and professional records, and hold confidential all MaineCare information regarding members. See Chapter I §1.03 (J), (M) and (Q) MCBM.

On November 15, 2016, the Department served notice to Ms. Ryan that it had determined that Ocean Way Manor had violated the terms of the MaineCare provider contract. On December 19, 2016, the Department served notice on Ms. Ryan that the Department was terminating Ocean Way Manor as a MaineCare provider based upon a Notice of Violations dated November 15, 2016. See, DHHS-7 (Manor). The Termination letter cited at least three violations of the MaineCare Benefits Manual,

***“The Office MaineCare Services has received a copy of the Notice of Violation sent to you on November 15, 2016 from the Program Integrity Unit in the Department of Health and Human Services. This Notice detailed several violations of the MaineCare Benefits Manual. The review of records encompassed the period from January 1, 2016 to June 1, 2016. The following violations of Section 21, Home and community Benefits for Members with Intellectual Disabilities or Autism Spectrum Disorder and Chapter I, General Administrative Policies and Procedures of the MaineCare Benefits Manual were noted:***

***Direct Support Professional-Violation of Chapter II, §21.10-1***

- ***Services were provided by employees lacking qualifications to provide Direct Support Professional services***
- ***Background checks for employees listed on employment roster were provided but you did not complete the required checks for abuse, neglect, or exploitation prior to October 2016.***

***Requirements of Provider Participation – Violation of Chapter I, §1.03-3(J)***

- ***MaineCare was billed for services when the member was out of the facility and not utilizing support services***

***In addition to the violations described in the Notice of Violation, an additional violation of the terms of the MaineCare Benefits Manual was discovered.***

**Confidentiality of MaineCare Information – Violation of Chapter 1, §1.03-3(Q) and (R)**

- ***You allowed a family member to handle, transport, and deliver documents containing protected health information of members”. See DHHS-1 (Manor)***

Ocean Way Manor disputed the Notice of Termination and requested a Final Informal Review. See DHHS-2 (Manor). The Department issued a Final Informal Review Decision on January 25, 2018, acknowledging the additional documentation submitted by Ocean Way Manor. See, DHHS-4 (Manor). The Department upheld the Notice of Termination. In its Notice, the Department emphasized that Ocean Way Manor had ‘supplied little or nothing in the way of disputing the cited violations.’ and that Ocean Way Manor conceded that certain violations had occurred. See, DHHS-4 (Manor).

***Persons providing services without the proper credentials***

Pursuant to the rule in effect at that time, a Direct Support Professional (DSP) is defined as a person ‘who provides Home Support, Work Support, Community Support, Career Planning or Crisis Intervention and has completed the DSP curriculum as adopted by DHHS’. See Chapter II, §22.10-1 (A) MCBM. In other words, in order to provide direct care services to members receiving §21 services, that person must be qualified as a DSP. In addition, that person must have completed the curriculum within six months of his/her hire date.

According to the Department, Ocean Way Manor violated Chapter II, §21.10-1 MCBM when it employed persons who did not have the requisite accreditation. According to the Department, evidence provided at hearing showed that there were at least two individuals who were employed by Ocean Way Manor, providing direct care services, and did not have DSP qualifications.

In addition, according to the Department, Ocean Way Manor admitted to this lapse in two separate emails,

***“The Department established that in order to provide services under Section 21, the provider must be a Direct Support Professional. MaineCare Benefits Manual Ch. II, Sec. 21.10-1 (DHHS-OWM Exh. 12). The Department, through the testimony of Patrick Bouchard, identified two persons employed by OWM who provided services to members despite lacking DSP qualifications. OWM admits these individuals lacked DSP qualifications in its own email messages. (DHHS-OWM Exh. 16 & 17). OWM argued that there was no evidence to show that one of the persons, Lawrence Tardiff, was not within his initial six-month of hire – during which persons are permitted to perform work as a DSP notwithstanding that they have not yet completed the training. MBM CH. II, Sec. 21.10-1. However, OWM’s own witness, Jeannette Knowlton admitted on cross-examination that Mr. Tardiff was not in his first six months of hire at OWM and had been a long-time employee***



**of OWM. The failure to ensure its employees met the requirements to provide the service violated Ch. II, Sec. 21.10-1 and consequently Ch. I, Sec. 1.03-3(R) of the MBM." See, DHHS-21/28.**

The emails to which the Department refers are two emails sent by Ms. Ryan to DHHS employees. The first was to Jodi Ingraham. In that email, Ms. Ryan lists the professional background of the Manor employees. She lists one employee as being a MHRT-C with four years of college in social services, but who has no DSP qualifications. See, DHHS-17 (Manor). In an email to Patrick Bouchard, Ms. Ryan appears to question the need for DSP accreditation and argues that one of her employee's educational background should supersede her need to obtain DSP accreditation,

***'I must say the varied responses of the definition of the DSP was extremely different from all angles, even confusing Stacey Tupper at Goodwill who in turn called Andrew Hart Director and Mr. Hart stated, 'these should be updated'. I too second this because in the past 2-3 years our agency have had some walk outs (this can be common in this industry) so I believe (sic) that perhaps some emergency protocol could be in the language perhaps similar (sic) to the ice storm emergency plan. Just my thoughts of course but I felt like it was critical to cover my folks with someone that they felt safe with and someone that they knew for years and Annette Burns has a four year degree, MHRT-1 an MHRT-C which should supersede the DSP requirements.'* See, DHHS-16 (Manor)**

Ocean Way Manor argued that the lack of DSP accreditation only applied to two employees who were in the process of getting their certifications. According to Ocean Way Manor, this violation had very little impact on the agency's overall functioning and adherence to MaineCare rules,

***"Specifically, the evidence indicates that services to Members were provided by only two employees who lacked Direct Support Professional ("DSP") credentials during the relevant time period, with some evidence indicating that these employees were in the process of completing their DSP certifications and may have been within the applicable grace period for doing so during some or all of the time when they were providing services to Members. The total amount of services provided to Members by these employees was in any event a small portion of the total services provided to Members by OWM during the relevant time period."* See, Ocean Way-4.**

The hearing officer has determined that the Department has shown by a preponderance of the evidence that Ocean Way Manor employed persons who provided direct care and did not have requisite certification. The rules are quite clear that completion of DSP training is necessary for person providing direct care under §21.

### ***Failure to perform checks for abuse or neglect***

Pursuant to the rule in effect at that time, a DSP must have an adult protective and child protective check. See Chapter II, §22.10-1 (C) MCBM.

According to the Department, Ocean Way Manor violated this by failing to have an adult and child protective record check of employees in a timely manner, and certainly not before these employees were providing direct care to clients,

***“OWM presented no real challenge to this finding. The Department’s witness, Patrick Bouchard, testified that the Department reviewed claims from January 1, 2016 through June 1, 2016. (DHHS-OWM Exh. 1). OWM failed to provide any documentation to establish it had performed the checks required by the MBM, Ch. II, Sec. 21-01(C<sup>3</sup>). (DHHS-OWM Exh. 12). Furthermore, the Department established that OWM did not actually submit the requests for these checks until October of 2016 – four months after the six-month period of review. (DHHS-OWM Exh. 15). Failing to perform the required background checks violates Ch. I, Sec. 1.03-3(R) of the MBM.” See, DHHS-21/28.***

Ocean Way argued that Ocean Way Manor did perform the requisite background checks and that the result was that there no child or adult protective history for any of the employees. According to Ocean Way Manor,

***“Regarding OWM’s failure to provide the required background checks for its employees during the relevant time period, the evidence indicates that OWM provided the required background checks for all of its employees subsequent to the issuance of the Notice of Violation to OWM, and that no problems with any employee backgrounds were identified as a result.” See Ocean Way-4.***

The hearing officer has determined that the Department has shown by the preponderance of the evidence that Ocean Way Manor did not timely submit their employees for a back-ground check in regard to child or adult protective history. As Mr. Bouchard, in his testimony, pointed out, the requests for background checks were all dated October 6, 2016, four months after the six-month period of review as required under §21.10-1. See, DHHS-15 (Manor). Ocean Way Manor’s argument that none of the employees were determined to have any adult or child protective history is irrelevant. The rule is clear that such background checks must be completed within a six month period, which, in this case they were not.

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<sup>3</sup> The closing argument submitted by the Department mistakenly cited this section of the rule. It is actually §21.10-1(C).

### ***Billing for services not rendered***

Pursuant to the rule in effect at that time, enrolled MaineCare providers must,

***Bill only for covered services and supplies delivered, See, Chapter I, §1.03(J), MCBM.***

According to the Department, Ocean Way Manor billed for MaineCare services when such services were not rendered. According to the Department,

***"The department established numerous instances where OWM billed for services on dates where the member was not present in the facility and not receiving services from OWM. (DHHS-OWM Exh. 20). OWM presented no challenge to this violation. Billing for services not rendered would violate Ch. I, Sec. 1.03-3(J) of the MBM." See, DHHS-21/28.***

Ocean Way does not directly address this specific issue. However, Ocean Way argues that the agency 'has a history of favorable licensing reviews dating back to 1995, with no history of prior violation notices or imposition of sanctions'. See, Ocean Way-4.

The hearing officer has determined that the Department has shown by a preponderance of the evidence that Ocean Way Manor billed for services not rendered. In the case of a client identified as Member-3, MaineCare was billed for DSP services when the client was on two home visits. A spreadsheet produced by the Department showed that Ocean Way Manor billed for MaineCare for services rendered on [REDACTED] of 2016 and for services rendered on [REDACTED] 2016. Ocean Way Manor's own documentation confirms that Member-3 was, on each of those days, on a home visit. See, DHHS-20 (Manor).

### ***Mishandling of Protected Health Information***

Pursuant to the regulation in effect at that time, a provider must,

***Hold confidential, and use for authorized program purposes only, all MaineCare information regarding members. In situations where it is medically necessary for the member's well being, information may be share between providers. The rules of confidentiality apply to all providers involved as referenced in Section 1.03-5 of this Manual. Confidentiality requirements described in 22 MRSA Section 1711-C apply. See, Chapter I §1.03-3(Q) MCBM.***

1.03-5 continues that,

***Providers may disclose information regarding individuals participating in MaineCare only for purposes directly connected with the administration of MaineCare. Providers must maintain the confidentiality of information regarding***

**MaineCare members in accordance with 42 CFR 431 et seq. and other applicable sections of State and Federal law and regulations, including compliance with the privacy and security requirements of the Health Insurance Portability and Accountability Act (HIPAA).**

According to the Department, Ocean Way Manor used a non-employee to handle and deliver protected health information that would potentially violate HIPAA rules,

***“The Department established, through the testimony of Beth Ketch, that OWM permitted a non-employee to handle medical records and deliver those records to the Department. Ms. Ketch testified that this would violate HIPAA. OWM did not challenge this basis at all. A provider’s failure to adequately protect the privacy of patient records would violate Ch. I, Sec. 1.03-3(R) and (Q). See, DHHS-21/28.***

According to Ocean Way Manor, since there was no disclosure of the documentation, no sanction should attach,

***“Regarding the alleged violation concerning transportation and delivery of records containing protected health information by a family member, there is no evidence that any actual disclosure of protected health information occurred, and it was acknowledged at hearing that no violation would have occurred at all had the box containing Member records been sealed prior to being transported and delivered. OWM likewise has a history of favorable licensing reviews dating back to 1995, with no history of prior violation notices or imposition of sanctions. As with OWMHA, a lesser sanction would be adequate to remedy the problems identified in these termination proceedings.” See Ocean Way Manor-4.***

The hearing officer has determined that the Department has shown by a preponderance of the evidence that Ocean Way Manor violated the MaineCare rules when it permitted a non-employee to transport protected health information. The fact that no actual impermissible disclosure occurred is not relevant. The rules governing the protected health information of MaineCare members is quite clear that it is the provider’s responsibility to protect the confidentiality of these records. By directing a non-employee, who has no legal responsibility to protect this information, Ocean Way Manor, violated the rules governing HIPAA.

## **Ocean Way Mental Health Agency**

The Department terminated Ocean Way Mental Health Agency’s provider contract based upon several violations of the MaineCare provider contract and the regulations governing the provision of §17 services. This was based upon a review of records for the time period April 1, 2015 through April 30, 2016.

Pursuant to the rules in effect at the time, the Department may terminate or exclude a provider from participation in MaineCare if it breaches the terms of the MaineCare Provider Agreement, and/or the requirements of Chapter I, §1.03-3, MCBM. See Chapter I, §1.19-1(G) and Chapter 1 §19-2(A), MCBM. Section 1.03-3 lays out the extensive responsibilities that a provider must fulfill. Among these are the responsibilities to bill only for covered services and supplies, the maintenance of contemporaneous financial, provider and professional records, and to protect the confidentiality of all MaineCare information regarding members. See Chapter I §1.03 (J), (M) and (Q) MCBM.

Ocean Way Mental Health Agency provided services to MaineCare members who received services under Chapter II, §17, MCBM. Eligible members were provided community integration and other services in the member's home and community. The basic eligibility requirements were that the individual was an adult and had an Axis I or Axis II mental health disorder.

According to the termination notice Ocean Way Mental Health Agency had violated several sections of the MaineCare Benefits manual. The review of the records was for the period April 1, 2015 through April 30, 2016.

According to the notice, Ocean Way Mental Health Agency had violated:

- Chapter I §1.03-3(M) and Chapter II, §17.08-1 because of deficiencies found in the Comprehensive Assessments.
- 17.01-11 and §17.08(2)(B) because of deficiencies found in the Individual Service Plans.
- 17.08-3 because of deficiencies in Program Notes
- Chapter 1, §1.06-4, §17.06-A, §17.06(B) and §17.06 (B) because the agency billed MaineCare for non-covered services. See, DHHS-1 (Mental Health Agency)

According to the Department,

***“The Department noted several bases for the termination of Ocean Way Mental Health Agency as a MaineCare provider. Those bases were: various deficiencies with Comprehensive Assessments; various deficiencies with Individual Service Plans; deficiencies with progress notes; and billing for non-covered services.***

***At the outset, it is important to note that OWMHA presented no real challenge to the vast majority of the facts the Department presented at hearing relating to these violations. In contrast, the Department provided concrete examples to establish the violations.” See, DHHS-21/28.***

## Comprehensive Assessments (CA)

Pursuant to the rule,

***A Community Support Provider furnishing Community Integration Services must employ a certified MHRT/C who performs the following:***

***B. Performs a psychosocial assessment, including history of trauma and abuse, history of substance abuse, general health, medication needs, self-care potential, general capabilities, available support systems, living situation, employment status and skills, training needs, and other relevant capabilities and needs. See, Chapter II, §17.04-1(B) MCBM.***

According to the Department, comprehensive assessments performed by Ocean Way Mental Health Agency were incorrectly dated, and in one instance an assessment for one member was almost verbatim for another, evidencing that an Ocean Way Mental Health Agency employee merely 'cut and pasted' the assessment of another client,

***"Providers are required to perform a psychosocial assessment for members seeking Community Support Services. MBM Ch. II, Sec. 17.04-1(B). (DHHS-OWMHA Ex. 11). From that assessment, the provider would develop an Individual Service Plan. MBM, Ch. II, Sec. 17.04-1(C). Id. The assessment must be developed as soon as possible, but no later than 30 days from the start of services. MBM, Ch. II, Sec. 17.07-1(A). Id.***

***The Department provided an example of incorrect dating of assessments. (DHHS-OWMHA Ex. 15). In this exhibit, the CA was dated [REDACTED] and signed by Tiffany Norton from OWMHA. However, the progress notes from OWMHA detail that the member and Ms. Norton completed the CA on [REDACTED]. In another example, OWMHA also provided a CA for another member dated [REDACTED] and clinically approved by Alan Letourneau on that same date. However, Mr. Letourneau did not approve the CA until [REDACTED] according to a progress note of the same date. (DHHS-OWMHA Ex. 19). There were other cases where CA were missing required clinical approval. (DHHS-OWMHA Ex. 20).***

***Finally, the Department's review found an instance where the assessments for two different members contained identical, verbatim language in almost every section of the assessment. (DHHS-OWMHA Ex. 24 and 25). Ocean Way provided no evidence or argument to explain how this occurred. It is obvious that OWMHA simply cut and pasted another member's CA info into at least one different member's CA – there is simply no reasonable argument that two persons both have the identical background and problems. Moreover, it is implausible that identical language would appear in two different assessments – one written in [REDACTED] and the other in [REDACTED]. Finally, the second Assessment (DHHS-OWMHA Ex. 11) contains language in sub-section 18***

***"Financial Status and Needs" that obviously would not have been written in [REDACTED] It mentions a client currently working a seasonal job ending on [REDACTED] is inconceivable that someone writing an assessment in [REDACTED] would use those words to describe events occurring in the prior***

***The Department notes that OWMHA provided little or no argument in response to the Department's evidence. Moreover, OWMHA itself admitted to issues where assessments did not have the proper dates. (DHHS-OWMHA Exh. 27)". See, DHHS-21/28***

Ocean Way Mental Health Agency argued that many of the violations alleged by the Department were in fact discrepancies in dates. As such, the Department's imposition of sanctions and termination notice was not justified,

***"It is further noted that aspects of other claimed violations by OWMHA were addressed by the submission of additional documentation by OWMHA in connection with its requests for review of the termination of its provider agreement, resulting in a substantial reduction in the quantity of claimed violations during the course of review from the time when the Notices of Violation and Termination were initially issued to OWMHA. Additional questions were raised at hearing with respect to OWMHA's remaining alleged violations with respect to Comprehensive Assessments and Individual Service Plans, with some indication that a substantial portion of these alleged violations were due to discrepancies in the dates of these documents and underlying progress or treatment notes, rather than a failure to provide these documents justifying the need for services to the respective Members at all. This evidence is also relevant to the serious of the alleged offenses and the extent of the alleged violations. Regarding any history of prior violations or prior imposition of sanctions, OWMHA was established in 1999 and has received consistently satisfactory licensing reviews, including a license renewal in October of 2016, nearly contemporaneously with the notice of violation underlying the subsequent termination notice. While prior licensing surveys occasionally identified specific deficiencies, all were promptly addressed and corrected, and OWMHA has not been subject to any prior notices of violation or prior sanctions. Accordingly, these factors do not favor imposition of a sanction of termination in this case." See, Ocean Way-4.***

The hearing officer has determined that the Department has shown, by a preponderance of the evidence that there were serious deficiencies with Comprehensive Assessments. In an instance referenced by the Department a Comprehensive Assessment was completed for member 30 on [REDACTED] and approved by the supervisor on the same day. See, DHHS-19 (Ocean Way Mental Health Agency). However, according to a Case Management

Note dated [REDACTED] the case manager and the client were only 'just starting' to complete the comprehensive assessment,

***"CI completed clients (sic) intake and started working on the comprehensive assessment". See, DHHS-19 (Ocean Way Mental Health Agency)***

The most egregious example was cited by the Department in its closing argument. A Comprehensive Assessment performed for Member 1 on [REDACTED] and one performed for Member 49 on [REDACTED] evidenced that Member 49's assessment was taken, verbatim in several areas, from Member 1's assessment. Member 1 was a [REDACTED] year old female and Member 49 was a [REDACTED] year old female. The first two questions are answered, seemingly specific to each member. However, by question 3, the exact wording is used. When describing the Clients Strengths and Weaknesses, both read,

***"Client's strengths include her engagement in services and her willingness to change, client is struggling with her finances for herself and her [REDACTED] children. [REDACTED]. Clients natural support are her family, but they are only able to help with things such as childcare, so she can work a seasonal job. Client is engaged in school to better herself to be able to provider for her family." See DHHS-24 and DHHS-25, (Mental Health Agency).***

Question 5 asks for a Personal Family Social History. Again, the wording is identical including the fact that both members were from a family of [REDACTED], and lived in [REDACTED] Maine. Both members had a [REDACTED]. Both members work a seasonal job and are attending school for [REDACTED]. See, DHHS-24 and DHHS-25, (Mental Health Agency).

Questions 6 through 20 are answered identically, including Question 20 which identifies both Member 1 and Member 49 as [REDACTED] even though Member 49 was originally indicated to be [REDACTED]. The most telling of these answers is the answer to Question 17 which addresses housing. According to the assessments both member 1 and Member 49 are,

***"[REDACTED] with [REDACTED]" See, DHHS-24 and DHHS-25 (Ocean Way Mental Health Agency).***

### **Individual Service Plans (ISP)**

Pursuant to the rule in effect at the time [REDACTED]

***The ISP as defined in 17.04-1. C. must be reviewed and approved in writing by a mental health professional within the first thirty (30) calendar days of application of the member for those services.***



In addition, the ISP must be based upon the results of the Comprehensive Assessment. See, Chapter II, §17.07-2(A) MCBM.

According to the Department, ISPs were not completed in a timely manner and sometimes were done simultaneously with the Comprehensive assessments,

***“Providers are required to develop an ISP for members which must be reviewed and approved by a mental health professional within 30 calendar days from the start of services and updated at least every 90 days thereafter. MBM, Ch. II, Sec. 17.07-2(F). (DHHS-OWMHA Exh. 11). Among other requirements, the ISP must be based on the results of the assessment and must identify the clinical services to be provided. MBM, Ch. II, Sec. 17.07-2(A) and (C). Id.***

***As noted above, there was an example provided where the CA was completed on [REDACTED] 15 as evidenced by a progress note – yet both the CA and ISP indicate completion on [REDACTED] 15. If the assessment had not yet been completed by [REDACTED] 15 – then the ISP could not have been ‘based upon the assessment.’” See DHHS-21/28***

Ocean Way Mental Health Agency reiterated its stand that the errors were mere discrepancies and not violations that lead to sanctions and termination as a MaineCare provider.

The hearing officer has determined that the Department has shown, by a preponderance of the evidence, that Ocean Way Mental Health Agency violated MaineCare rules. In the instance referenced by the Department, the Comprehensive Assessment and the ISP were completed for Member 1 by Tiffany Norton were dated as being completed on the same day, [REDACTED] 2015. If the ISP is based upon the Comprehensive Assessment, it seems improbable that both were completed on the same day. In addition, according to the progress notes on this member dated [REDACTED] 2015, neither was completed until that date.

According to the Case Management Note, again authored by Tiffany Norton,

***“CI and client completed her ISP and Comprehensive Assessment”. See, DHHS-15 (Ocean Way Mental Health Agency).***

### **Progress Notes**

Pursuant to the rule, the provider must maintain an ‘individual record for each member receiving covered services. See, Chapter II, §17.07-3 MCBM. According to the rule, the record, at the minimum, must include name, birthdate, MaineCare ID number, pertinent medical information, the written ISP and documentation of each service provided, including the date of service, the type of service, the goals to which the services relates, the duration of the service, the progress the member has made towards goal attainment and the signature and credentials of the individual performing the service.

According to the Department, progress notes were found to be deficient in several respects,

***“The Department provided examples of progress notes that failed to meet requirements. There were progress notes that did not contain the goals worked on. (DHHS-OWMHA Exh. 17 and 6). Progress notes missing the member’s name. (DHHS-OWMHA Exh. 20). Progress notes that contained units of service significantly less than those billed to MaineCare. (DHHS-OWMHA Exh. 23). In another example, there was a progress note dated [REDACTED] that contained no information whatsoever. (DHHS-OWMHA Exh. 18). Nevertheless, OWMHA billed the Department for 80 units of service (20 hours). There were also notes missing the credentials or signature of the staff supplying the service. See progress notes dated [REDACTED] – night shift, [REDACTED] – night shift, [REDACTED] – night shift, [REDACTED] – night shift. (DHHS-OWMHA Exh. 18).” See, DHHS-21/28.***

Ocean Way did not specifically address this issue in its closing argument.

The hearing officer has determined that the Department has shown, by a preponderance of the evidence, that Ocean Way Mental Health Agency violated MaineCare rules by failing to produce accurate and complete progress notes. The Department presented evidence of the lapses in the progress notes. See above.

### **Non-Covered Services**

Pursuant to the rule, providers may only bill MaineCare for services that are covered by MaineCare. Pursuant to Chapter II, §17.06 MCBM, there are several types of services that are specifically not covered. Pursuant to 17.06-A through G, the following are not covered services under §17: Socialization, housekeeping, substance abuse treatment, psychotherapy, paperwork, internal meetings, and transportation costs.

According to the Department,

***“The Department provided numerous examples of billings for non-covered services. OWMHA billed MaineCare for completing paperwork. (DHHS-OWMHA Exh. 19). It billed for a cancelled appointment. (DHHS-OWMHA Exh. 19). It billed for services that were educational in nature. (DHHS-OWMHA Exh. 22). OWMHA billed for services that were primarily social or recreational. (DHHS-OWMHA Exh. 23). It also billed for services that were either transportation or car-shopping related. (DHHS-OWMHA Exh. 26).***

***OWMHA did not present any evidence or argument to rebut the Department’s evidence. As such, the Department respectfully submits that it clearly established a chronic pattern of billing for non-covered services.” See DHHS-21/28***

Ocean Way, in its defense, brought up an example where the agency had been directed by a DHHS staffer to order more hours for a specific MaineCare member.

Ocean Way Manor argued that an instance where Carlton Lewis, the Program Manager Residential Treatment for the Office of Substance Abuse and Mental Health Services *had* allegedly authorized 20 hours of DLSS services to an Ocean Way client, went to the Department's overreaching in its decision to terminate Ocean Way Manor as a MaineCare provider,

***"Regarding OWMHA, the aspect of the claimed violations with the largest financial implication, by far, was billing for provision of "non-covered services" to a single Member, referenced in DHHS Exhibit 18 and at hearing as Member 24. Primarily, the Department contends that OWMHA improperly billed for Daily Living Support Services (DLSS) to Member 24 in excess of the number of hours allowed by the MaineCare Benefits Manual on an ongoing basis during the applicable period of review, typically for up to 20 hours of DLSS per day. However, OWMHA presented evidence at hearing that DHHS had authorized OWMHA to provide up to 20 hours of DLSS per day to Member 24 because Member 24 was a member of the Class subject to the terms of a consent decree for former residents of AMHI. (See Ocean Way Exhibit 1, ██████████ 2015 Letter from Carlton Lewis, Program Manager Residential Treatment for the office of Substance Abuse and Mental Health Services).***

***The Department contends that this express written authorization from Mr. Lewis is irrelevant to the issues presented in the termination proceeding because it did not authorize payment for this level of services to Member 24 from MaineCare funds, and rather authorized payment for this level of services to Member 24 from other funds of the Department's Substance Abuse and Mental Health Services division ("SAMHS"). However, even assuming the Department's contention to be correct, the written authorization from Mr. Lewis to provide additional DLSS services to Member 24 is highly relevant to the seriousness of OWMHA's alleged offenses and the extent of OWMHA's alleged violations in this case. Specifically, there is no evidence that OWMHA billed any other division of DHHS for the services provided to Member 24, and the evidence instead indicates that OWMHA billed MaineCare for services provided to Member 24 in accordance with the written authorization received from Mr. Lewis. Ms. Knowlton, OWMHA's former office manager who was responsible for submitting bills for Member Services during much of the relevant time period under review, testified that she was made aware of the authorization by Mr. Lewis for the provision of additional DLSS services to Member 24, and was not made aware that bills for those additional services were to be submitted to any division of DHHS other than the MaineCare program." See, Ocean Way Manor-4.***

The Department addressed this argument in its closing argument,

***"Ocean Way focused its arguments primarily on one member – member #24. (see DHHS-OWMHA( Exh. 18) Essentially, OWMHA argues two things. First, that it was***

*permitted to bill the Department for 20 hours of Daily Living Support Services (DLSS) on a daily basis because of a letter received from Carlton Lewis – a then-employee of the Office of Substance Abuse and Mental Health Services (SAMHS). (OWMHA Exh. 8). Second, it argues that any improprieties in billing were simply confusion due to a state-funded contract it had with the Department. (OWMHA Exh. 8). Neither of these arguments survives scrutiny.*

*To begin with the [REDACTED] 2015 letter from Carlton Lewis, it is apparent from OWMHA's arguments that it contends the letter permitted it to bill 20 hours per day of DLSS and that OWMHA was somehow otherwise "excused" from compliance with the requirements of Section 17 of the MaineCare Benefits Manual. The letter does indicate that the member was temporarily (for a 90-day period) authorized to receive "up to 20 hours" of DLSS. However, those hours were for a limited time and more importantly, nowhere does the letter from Mr. Lewis state, or even imply, that OWMHA did not need to comply with all other applicable MaineCare regulations – which it was contractually obligated to do by the terms of its MaineCare provider agreement.*

*Next, the state-funded agreement to purchase services is a red herring that has no bearing on the Department's decision. In fact, the agreement does not apply to MaineCare at all. The agreement specifically provides that its purpose is to provide Community Integration Services to "individuals who do not currently have MaineCare insurance..." (OWMHA Exh. 8, Rider A Section (II)(b)(a)). Member 24 was a MaineCare member – as indicated by the fact that bills were submitted to and paid by MaineCare and further proven by the Member's ISP – which explicitly references MaineCare as the funding source. (DHHS-OWMHA Exh. 18). A contract that applies only to services for non-MaineCare members has no conceivable relevance to the issue of whether a provider is properly complying with all of the terms of the MBM and its provider agreement in furnishing services to MaineCare members." See, DHHS-21/28.*

The example of Member 24 and the authorization by Mr. Lewis for the member to receive 20 hours of DLSS services per day has some validity regarding the Department's allegation. Mr. Carlton did, in fact, authorize these hours. However, this example of the Department's implicit authorization for one member does not outweigh the validity of the Department's allegations regarding Ocean Way Mental Health Agency's violations of the MaineCare Benefits Manual.

The hearing officer has determined that the Department has shown, by a preponderance of the evidence, that Ocean Way Mental Health Agency billed MaineCare for non-covered services.

According to DHHS-19, MaineCare was billed for the case manager's review, by themselves of a member's Comprehensive Assessment,

***"This work did clinical review of Comprehensive Assessment regarding Clinical content and adherence to clinical principles and completeness."***

In another instance, MaineCare was billed for arranging a social visit with the member's father,

***"CI coordinated with client's father and staff at Ocean Way Manor to arrange a socialization visit for client." See, DHHS-23 (Ocean Way Mental Health Agency)"***

In conclusion, the hearing officer recommends that the Commissioner find that the Department was correct when it determined that Ocean Way Mental Health Agency and Ocean Way Manor should be terminated as providers to deliver MaineCare reimbursed services based on the violations cited in the 12/7/2016 notices of termination and Final Informal Review Decisions dated 1/25/2018 and 1/29/2018.

#### **MANUAL CITATIONS**

- MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101

#### **RIGHT TO FILE RESPONSES AND EXCEPTIONS**

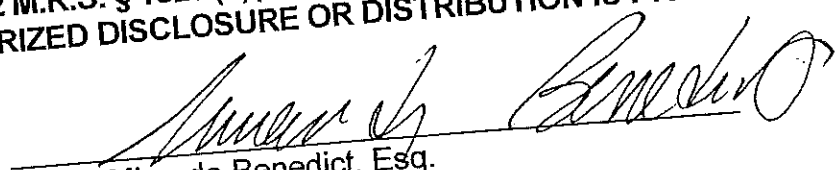
**THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS. ANY WRITTEN RESPONSES AND EXCEPTIONS MUST BE RECEIVED BY THE DIVISION OF ADMINISTRATIVE HEARINGS WITHIN FIFTEEN (15) CALENDAR DAYS OF THE DATE OF MAILING OF THIS RECOMMENDED DECISION.**

**A REASONABLE EXTENSION OF TIME TO FILE EXCEPTIONS AND RESPONSES MAY BE GRANTED BY THE CHIEF ADMINISTRATIVE HEARING OFFICER FOR GOOD CAUSE SHOWN OR IF ALL PARTIES ARE IN AGREEMENT. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE DIVISION OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. COPIES OF WRITTEN RESPONSES AND EXCEPTIONS MUST BE PROVIDED TO ALL PARTIES. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.**

CONFIDENTIALITY

THE INFORMATION CONTAINED IN THIS DECISION IS CONFIDENTIAL. See 42 U.S.C. § 1396a (a)(7); 22 M.R.S. § 42 (2); 22 M.R.S. § 1828 (1)(A); 42 C.F.R. § 431.304; 10-144 C.M.R. Ch. 101 (I), § 1.03-5. ANY UNAUTHORIZED DISCLOSURE OR DISTRIBUTION IS PROHIBITED.

Dated: April 23 '19

  
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