December 22, 2005

Sent Via Facsimile

William Swiss
Anthony Wayne Rehabilitation Center
2826 South Calhoun Street
Fort Wayne, IN 46807

Dan Stewart
Achieva Resources Corporation, Inc.
P.O. Box 1252
Richmond, IN 47375

Robert L. Bond
ResCare, Inc.
17815 McNabb Road
Spencerville, IN 46788

Pamela Verbarg
REM Indiana Community Services, Inc.
8925 North Meridian Street, Suite 200
Indianapolis, IN 46260

Randy Hall
Cardinal Center, Inc.
504 N. Bay Drive
Warsaw, IN 46580

Bill Smith
First Chance Center
986 W. Hospital Road
Paoli, IN 47454

Thomas N. Gaybrick
Dungarvin Indiana, Inc.
2345 S. Lynhurst Drive, Suite 211
Indianapolis, IN 46241

Patrick G. Cockrum
Sycamore Rehabilitation Services
1001 Sycamore Lane
Danville, IN 46122

Re: Formal Complaint 05-FC-239; Alleged Violation of the Access to Public Records Act by the Indiana Family and Social Services Administration, Division of Disability and Rehabilitative Services

Dear Sirs and Madam:

This is in response to formal complaints alleging that the Division of Disability and Rehabilitative Services of the Family and Social Services Administration ("DDARS") violated the Access to Public Records Act by failing to disclose information concerning rate calculation

data used to support per diem rates assigned to providers by DDARS. I find that the DDARS did not violate the Access to Public Records Act.

BACKGROUND

The complainants addressed above are each providers of services to developmentally disabled consumers who are covered by the Medicaid program. Collectively, you are "providers" and I will address you throughout this advisory opinion in the third person. On or about November 3, 2005, the providers requested of Peter Bisbecos, Director of the DDARS, data upon which the providers' daily rate calculations were based. The rates that were issued by DDARS were specific to a consumer served by the provider, and were daily rates, or "per diem" rates. The rates were based on paid claims data specific to a consumer for a particular period of time. Each provider has requested the actual paid claims data which served as the underlying basis for the rate calculation.

The DDARS issued responsive letters to the providers in a timely manner. In its November 4 responses, DDARS Deputy General Counsel Kay L. Benedict stated that the General Counsel's office would review the request and would issue a status update within two weeks of the request. When November 18 arrived, no status update or data had been received. The providers needed the data by November 30, which was the deadline to perfect an appeal of the rates. Although the record was not necessary in order to file an appeal, the providers did not wish to appeal unless necessary.

I sent a copy of each provider's complaint to Ms. Benedict. Ms. Benedict provided a written response, which I include with this opinion for reference. I also have had two or three meetings or discussions with Ms. Benedict and Mr. Bisbecos regarding this issue. In essence, the DDARS contends that no record exists that will satisfy the record request. However, the DDARS intends to fulfill the providers' need for the data, and is working with the providers to reach a solution that will satisfy the providers' need for the data.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). "Public record" means any writing, paper, report or other material that is created, received, retained, maintained, or filed by or with a public agency, and includes electronically stored data. IC 5-14-3-2(m). A public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency's data storage system. IC 5-14-3-3(d).

If a public agency receives a request for a record via hand-delivery, the agency is required to respond within 24 hours or the next business day, or the request is deemed denied. IC 5-14-3-9(a). If the public agency does not maintain the record or information, the public agency should state this clearly. There are no specific timeframes for when an agency must

produce a record. The public agency should produce the record within a reasonable period of time.

A public agency is not required to create a record in order to satisfy a request for information. This is because the APRA states only that an agency is required to disclose a public record, which by implication is a record that is in existence. If, after reviewing a request for a record, the agency determines that no record exists, this fact should be communicated within a reasonable period of time to the requester.

Although it is not determinative of this complaint, identifying information regarding Medicaid applicants and recipients is confidential by federal law. 42 CFR 431.300. Consequently, it is confidential under the APRA. IC 5-14-3-4(a)(3). Hence, Medicaid paid claims data specific to an individual consumer may not be disclosed by the DDARS to a provider who does not provide services to the consumer, except as allowed by other applicable law.

The issue presented by this complaint is whether the DDARS has a record containing the paid claim information that formed the basis for the consumer-specific per diem rates. The DDARS avers that no such record exists in the computer or in hard-copy form. In an effort to understand how the rates were calculated without generating such a report or computer file, I spoke with Ms. Benedict and with the DDARS' staff person knowledgeable about the computer system, Robert Posluszny.

The DDARS explained the process by which the rates were determined. The DDARS's contractor Milliman regularly receives paid claims history data from EDS, the state's Medicaid fiscal agent. The claim data relates to all Medicaid recipients for which EDS pays claims in the Medicaid program, not just the consumers served by the providers involved in this complaint. To determine the rates, Milliman wrote a program that extracted the relevant paid claim data from the claims database that Milliman maintains, and performed an arithmetic calculation that resulted in the daily rates for each consumer. The claim data had been aggregated only for the calculation, and was not preserved in a computer file or maintained in any format. In other words, the claim history on which the rates were based was not an "output" of the query.

Given my understanding of the facts, I do not find that the DDARS violated the Access to Public Records Act. The DDARS was not obliged under the APRA to write a computer program that would extract the claim data upon which it based the consumers' rates upon the providers' request. This would be creating a record that does not currently exist, an obligation that does not exist under the APRA. However, the DDARS has stated that it is willing to provide the data upon terms and in a format that the parties can agree to.

CONCLUSION

For the foregoing reasons, I find that the Division of Disability and Rehabilitative Services did not violate the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Kay L. Benedict