



## AGG Attorneys Help Nursing Facilities Obtain Increase of Fair Rental Value Rates

Glenn P. Hendrix and W. Jerad Rissler

During 2018, five nursing facilities sought to create a more livable space for their residents by reducing their licensed bed capacities. These changes eliminated 3-bed wards in favor of semi-private rooms and improved living conditions for residents by providing more square footage per licensed bed. The nursing facilities sought adjustments to the property component of their reimbursement rates to reflect the improved conditions of the facilities. The Georgia Department of Community Health (DCH or the “Department”) refused to adjust the nursing facilities’ reimbursement rates, however, and, instead, kept in place rates that reflected outdated and inaccurate data. The nursing facilities ultimately appealed these determinations to an Administrative Law Judge (ALJ) of Georgia’s Office of State Administrative Hearings (OSAH). On December 23, 2019, the ALJ issued a Final Decision reversing the Department’s determinations and directing the Department to recalculate the property component of the nursing facilities’ reimbursement rates to reflect accurate data.

Georgia’s Medicaid program pays nursing facilities for care provided to Medicaid beneficiaries on a per diem (i.e., per-patient-per-day) basis. These per diem rates are set pursuant to the provisions described in Chapter 1000 of the *Part II, Policies and Procedures for Nursing Facility Services (“Nursing Facility Manual”)*. The per diem billing rate includes a component (the “Property Component”) meant to compensate nursing facilities for the current value of capital assets on a per diem basis (essentially the physical space and shelter component of the care provided by the nursing facility). This Property Component is called the “Net Per Diem for the Property and Related Cost Center.”<sup>1</sup> With respect to the Property Component, “[e]ffective for dates of service on and after July 1, 2012, the Property and Related Net Per Diem shall be the amount computed using the Fair Rental Value (FRV) reimbursement system.”<sup>2</sup>

“Under a FRV system, a facility [is] reimbursed on the basis of the established current value of its capital assets in lieu of direct reimbursement for depreciation, amortization, interest, and rent/lease expenses.”<sup>3</sup> According to the *Nursing Facility Manual*, “[t]he FRV system shall establish a nursing facility’s bed value based on the age of the facility, its location, and its total square footage.”<sup>4</sup> This “bed value” represents the allocation of the facility’s capital asset reimbursement on a per-patient-per-day basis. Establishing the nursing facility’s “bed value” is a two-step process: (1) calculating the facility’s aggregate annual “Rental Amount” (i.e., the annual rental value of the entire nursing facility) and (2) allocating that aggregate annual Rental Amount on a per-patient-per-day basis to obtain a daily “bed value.” The allocation in step two is achieved by dividing the Rental Amount by the greater of (i) an historical number of actual patient days in a benchmark year or (ii) an 85% minimum occupancy (licensed bed capacity \* 365 days \* 85%).

At the OSAH hearing, the nursing facilities established that they reduced their licensed bed capacities, resulting in better living conditions for their residents. They further established that they relied on the Department’s past practice of adjusting FRV per diem rates in identical circumstances.

<sup>1</sup> *Nursing Facility Manual* § 1002.2.

<sup>2</sup> *Nursing Facility Manual* § 1002.5(1).

<sup>3</sup> *Nursing Facility Manual* § 1002.5(1).

<sup>4</sup> *Nursing Facility Manual* § 1002.5(1) (emphasis added).

In addition, they demonstrated that the FRV per diem rates established by the Department were based on a number of patient days that were pure fantasy; because of the reduction in licensed beds, the nursing facilities could not achieve the number of patient days in the Department's calculation even at 100% occupancy. Finally, the nursing facilities showed that the Department's *Nursing Facility Manual*, as interpreted under Georgia contract law principles, required the Department to adjust the nursing facilities' FRV per diem rates.

On December 23, 2019, the ALJ issued a Final Decision reversing the Department's determinations and directing the Department to recalculate the property component of the nursing facilities' reimbursement rates to reflect accurate data. In reaching this Decision, the ALJ found:

- The relevant "manual provisions underscore the need to employ valid data to obtain accurate and appropriate FRV per diem reimbursement rates."
- "The parties' interpretation . . . is that it is inappropriate to use outdated, invalid patient day information to establish a facility's FRV per diem rate. Further, the Providers' acts and conduct—that is, reducing the bed counts at their facilities—demonstrates their construction of the manual's provisions. That the Providers relied on the Department's previous interpretation . . . underscores their construction and will be given 'much weight' by the undersigned."
- "The use of patient days based on inaccurate and invalid bed counts to calculate the Providers' FRV per diems was inappropriate. . . . The Providers improved the accommodations for Medicaid patients in their facilities, but the Department has declined to properly reimburse the Providers for those accommodations. . . . Further, the Department's insistence on now using outdated information—even when that information results in an impossible number of patient days for each Provider—is not fair, particularly in light of its prior interpretation of the policy it drafted."
- "Based on the evidence presented, the undersigned finds that the Providers are attempting to adjust their FRV per diem rates to accurately reflect the number of beds at their facilities. This is not an exercise of system-gaming. Rather, the Providers have relied on the Department's prior conduct and made renovations and upgrades to their facilities to further the purpose of the FRV reimbursement system. Now, the Department must also keep with the spirit and intent of the FRV reimbursement system and pay its fair share."

Glenn P. Hendrix and W. Jerad Rissler of Arnall Golden Gregory LLP represented the nursing facilities in the appeal.

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