

**DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF DIRECTOR**

ACTION REFERRAL

TO <i>Roberts</i>	DATE <i>1-23-14</i>
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DIRECTOR'S USE ONLY	ACTION REQUESTED
1. LOG NUMBER 000248	<input type="checkbox"/> Prepare reply for the Director's signature DATE DUE _____
2. DATE SIGNED BY DIRECTOR <i>cc: Mr. Keck, Kost, Liggett, Hutto cleared 2/19/14, letter attached.</i>	<input checked="" type="checkbox"/> Prepare reply for appropriate signature DATE DUE <i>2-3-14</i>
	<input type="checkbox"/> FOIA DATE DUE _____
	<input type="checkbox"/> Necessary Action

APPROVALS (Only when prepared for director's signature)	APPROVE	* DISAPPROVE (Note reason for disapproval and return to preparer.)	COMMENT
1.			
2.			
3.			
4.			

Thomas L Colter
328 Gaston Springs Ct.
Gaston, South Carolina 29053

RECEIVED

JAN 22 2014

Department of Health & Human Services
OFFICE OF THE DIRECTOR

January 20, 2014

Dear Mr. Anthony Keck
Director of South Carolina Department of Health and Human Services
PO Box 8206
Columbia, SC 29202

My name is Thomas L. Colter and I am the owner and CEO of Personal Touch Homecare, LLC. I am writing to you in an attempt to make you aware of the ongoing difficulties and financial and emotional hardships I have experienced due to multiple errors and delays in communication from The South Carolina Department of Health and Human Services.

To give a background on the event that unfolded, my daughter, Felicia D. Colter is a Licensed Practical Nurse. She was the original owner of Homecare Advantage, Inc. In December of 2009 Felicia was charged with Medicaid Fraud after the Attorney General's Office of Investigation erroneously claimed that her nursing license had not been active from the time she had moved from New York State to South Carolina which totaled 6 months. In fact, Felicia had been told by LLR that all of the paperwork regarding the transfer of her license was current and valid. Felicia was fined \$25,000 and placed on the Medicare Exclusion List. Because of the financial hardship this placed on Felicia, I purchased Homecare Advantage, Inc. from her and changed the name to Personal Touch Homecare, LLC.

In May of 2010 the Attorney General Office of Investigation called and stated that they needed to investigate the company due to the family relationship between Felicia (my daughter) and myself. On May 21, 2010, the Attorney General Office and The Department of Health and Human Services reviewed the files dated from February 19, 2010 to May 21, 2010 and determined that Felicia Colter has never worked for Personal Touch Homecare, LLC.

Through further review, DHHS found that I, as the company owner had signed on the supervisor line of task sheets, not realizing that it should have been the Registered Nurse doing this. This was in no way, an attempt on my part to collect more money than was owed to my company. This was an oversight that was quickly corrected. But because of this clerical error, I was fined over \$36,000. I fully understand that I made an error. It was an unintentional clerical error. Having said this, I believe that some of the liability lies with The Department of Health and Human Services. DHHS was obligated to do an audit of the company within 30 days of operation. They failed to do this. If they had conducted the audit within those thirty days, we would have caught the problem and it would not have evolved into a \$36,000 oversight.

In February of 2013, the Department of Health and Human Services wrongfully terminated their contract with Personal Touch Homecare, LLC not even 30 days after Personal Touch finished paying back \$36,000. When they did this, it created a domino effect with the company's other contracts including one with Palmetto Senior Care and a pending contract with the VA due to the fact that they both had close ties to the State. I appealed the termination and won the appeal. DHHS was ordered to reinstate the contract immediately, but because of communication errors on the part of a state employee named Debra Carter, who claimed that she never received the order to reinstate, it took 3 full months for the contract to finally be reinstated.

Through all of this, I have lost faith in the multiple institutions of the State of South Carolina. I and my former employees have lost present and future revenues and my staff has lost their wages. We have been subject to extreme emotional distress, and the reputation of Personal Touch Homecare, LLC has been tarnished. I feel that I am being blamed for the charge against Felicia Colter which snowballed into my company being fined an outrageous amount due to a small, unintentional clerical error. I am being harassed and discriminated against. As of today, Personal Touch is still without clients.

I am a 66 year old retired veteran and also retired from Waste Management Sanitation Company. I am and always have been an honest person and an honest worker, but I am not being treated as one. I have lived in South Carolina all of my life and I never thought these state agencies would fail me and my company as they have.

If you feel that you can help me in this situation in any way please contact me via phone, email or US mail.

Enclosed you will find the Content Order for Personal Touch to pay back over \$36,000 and the final appeal decision from The Department of Health and Human Services.

Thank you so much for your time and help in this matter,

Thomas L. Colter
803-477-0759/803-735-6615
Personaltouchhomecare@msn.com
CEO of Personal Touch Homecare, LLC.

**FINAL ADMINISTRATIVE DECISION
IN THE APPEAL MATTER OF
PERSONAL TOUCH HOMECARE, LLC. vs. DHHS**

Case #13-PA-005

Hearing Date: March 08, 2013

JURISDICTION

This case is adjudicated under the authority granted by the South Carolina General Assembly to the South Carolina Department of Health and Human Services (SCDHHS) to administer various programs and grants (See e.g., S.C. Code Ann. 44-6-10, et seq.). This appeal has been conducted pursuant to the provisions of the Appeals and Hearings regulations of the South Carolina Department of Health and Human Services (Reg. 126-150, et seq.) and the South Carolina Administrative Procedures Act (S.C. Code Ann. 1-23-310, et seq.).

STATEMENT OF THE CASE

Petitioner and Respondent entered into a contract on or about July 1, 2011 which was amended on or about September 01, 2012. Petitioner had a prior contract for the services mentioned below. This was a contract for the provision of Medicaid Home and Community-Based Waiver services in the form of Personal Care I and II services, attendant care services, respite services, nursing services and companion services. Periodically, Respondent conducts audits on their contracted organizations and assesses their compliance with the terms of the contract. Respondent conducted several of these audits with Petitioner between September 2010 and December 2012. Respondent determined that Petitioner was no longer performing adequately under the terms of the contract and decided to terminate the contract on February 08, 2013. Petitioner appealed that contract termination.

Petitioner was represented by Philip Florence, Esquire along with Gawain Burton, Serivia Whetstone and Thomas Colter. Respondent was represented by Bruce Carter, Esquire along with Debora Carter and Tony Matthews. All witnesses were sworn to give truthful testimony. The Hearing Officer was Michael Easterday.

ISSUE

The determinative issue on appeal is whether the Respondent properly terminated Petitioner's contract. Any issues raised in the proceedings or hearing of this case but not addressed in this decision are deemed denied.

SUMMARY OF EVIDENCE AND ARGUMENTS

Respondent's Evidence and Arguments:

Ms. Carter testified for Petitioner. She stated that she is a program coordinator, has worked at DHHS for 25 years and worked in the CLTC department for 8 years. She testified that her job is to evaluate provider compliance with the contract terms and reviews the reviews that the nurses conduct when they go out and assess the providers. She noted that Petitioner was reviewed on 9/3/10 and had a score of 280. Petitioner

was notified of the score and required to submit a corrective action plan (CAP) by 10/10/10. Petitioner did submit the CAP. On December 01, 2010, Ms. Carter notified Petitioner that the adjusted score was brought down to 279 and, based on the deficiencies; Respondent was suspending new participant referrals for 60 days.

Ms. Carter testified that a routine compliance survey was conducted on June 15, 2011 and that a CAP was required by July 15, 2011 for the score of 252. Petitioner submitted the CAP and the adjusted score was 198 and, based on the deficiencies, Respondent was suspending new participant referrals for 30 days.

Ms. Carter testified that a routine compliance survey was conducted on February 27, 2012 and that a CAP was required by March 20, 2012 for the score of 108. Petitioner submitted the CAP and the adjusted score was unchanged and, based on the deficiencies, Respondent was suspending new participant referrals for 30 days. This letter also included a notice that this was the third suspension in a short period of time and any future score of 100 or more would result in termination of the contract.

Ms. Carter testified that another review was conducted on December 10, 2012 and that review resulted in a score of 175. She stated that the CAP was submitted and the adjusted score was still 142 points.

Ms. Carter explained the scoring methodology they use and the various penalties under their rules for non-compliance. She testified that she made a decision on or about February 08, 2013 to terminate the contract because Petitioner failed to perform as required under the contract. She testified that the letter was sent certified mail by the USPS. She stated she emailed Mr. Colter on February 13, 2013 and attached a copy of the termination letter.

Respondent noted that although they mailed the termination letter as certified mail, they had not received the signature card back or the original undelivered envelope back from the USPS.

Under cross-examination, Ms. Carter stated that section A1 of the contract gives the agency the authority to terminate the contract for breach of contract and she believed Petitioner had materially breached the contract.

Respondent's counsel argued that if they were to follow Petitioner's theory of contract termination, they would not be able to ever terminate a contract. He also noted the termination was for a material breach of the contract. He said Petitioner showed a lack of compliance over a period of time and that it was a totality of the bad reviews. Furthermore, it was the same issue that was deficient over and over again in every review.

Petitioner's Evidence and Arguments:

Mr. Gawain Burton testified for Petitioner. He said he is the CFP of the business and that he first found out about the termination from a co-worker who said a client had called and said they were being terminated. He said he called Ms. Carter and asked what did they do and she said they did not get enough points to reduce the score to keep from being terminated. He testified he never saw the letter except a copy that came with the email. He testified on cross-examination that DHHS came out four times in 2012 and Mr. Colter bought the business and they had to pay \$30,000 in fines. He said they did everything they could to be in compliance and sometimes clients will let aides come in but won't let the supervisory nurses come into the home.

Ms. Whetstone testified next and stated she is the office manager at the business. She stated that she makes sure the visits are done and was the one to review the agency's reviews, submit the CAPs and sign off on them. She stated she never saw the letter come in and did not receive the termination letter via certified mail.

Petitioner's counsel argued that the termination was not proper because Respondent did not follow the termination procedure under the contract. He also argued that the penalty was harsh and that the agency was creating their own internal policy that said if you get three bad reviews your contract will be terminated.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, and considering the burden of persuasion by the parties, I make the following findings of fact by a preponderance of the evidence:

SPECIFIC FINDINGS

1. Petitioner had a contract to perform personal care services for Respondent's members in the home (Respondent's exhibit #1);
2. Respondent conducted numerous compliance audits (reviews) and reported a number of deficiencies (Respondent's exhibits #2-5);
3. Respondent notified Petitioner of the deficiencies and had Petitioner submit a corrective action plan to resolve those deficiencies (Respondent's exhibits #2-5);
4. Petitioner reviews were as follows (Respondent's exhibits #2-5);
 - a) Review dated 9/3/10; initial score = 280; post-CAP score = 270; 60 day suspension of new clients;
 - b) Review dated 6/15/11; initial score = 252; post-CAP score = 198; 30 day suspension of new clients;
 - c) Review dated 2/27/12; initial score = 108; post-CAP score 108; 30 day suspension of new clients;
 - d) Review dated 12/10/12; initial score = 175; post-CAP score 142; decision to terminate the

contract;

5. Respondent indicated in the letter dated December 21, 2012 that Petitioner was at risk of having the contract terminated if they did not improve their audit scores (Respondent's exhibit #5);
6. Respondent made a decision to terminate Petitioner's contract on February 08, 2013 (Hearing testimony);
7. Respondent testified they mailed such notice of termination via certified mail on February 08, 2013; however, no receipt was received by Respondent proving Petitioner received such notice (Hearing testimony);
8. Respondent emailed Petitioner on February 13, 2013 and stated the contract had been terminated and sent a copy of the termination letter along with the email (Respondent's exhibit #5).

APPLICABLE LAW

- (1) Medicaid "is intended to enable each state...to furnish medical assistance on behalf of permanently and totally disabled individuals, whose income and resources are insufficient to meet the cost of necessary medical services. 79 Am. Jur.2d *Welfare Law* §38.
- (2) The preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in the mind the belief that what is sought to be proved is more likely true than not true. Sanders, Neese, and Nichols, South Carolina Trial Handbook, §9:5 *Quantum of Evidence in Civil Cases* (1994), (citing Frazier v. Frazier, 228 S.C. 149, 89 S.E.2d 225 (1955)).
- (3) Contract between South Carolina Department of Health and Human Services and Personal Touch Homecare, LLC. (See Respondent's exhibit #1)

ANALYSIS AND DISCUSSION

The relationship between the two parties in this matter, and the services requested and rendered, are the result of a contract which is governed by South Carolina contract law (citations omitted above). I believe

both lawyers would stipulate that as a fact so we will look to what that document states. The contract number is C 4 5054 C and is 22 pages in length. Numerous addendums or amendments for the various programs are included. However, the termination clause is found in Article VII and the relevant sections are found in *C. Termination for Breach of Contract* and *K. Notice of Termination*. Under C, either party may terminate the contract at any time whenever one party has determined the other party has materially breached or materially failed to comply with the obligations of the contract. However, the contract does not define what a material breach is or what a material failure to comply means. While there are numerous cases or other documents that might assist in giving these terms meaning I find that to be a secondary issue. The main issue is whether proper notice was given. Respondent may have all of the grounds in the world to terminate the contract or visa-versa, but the contract is clear as to how a terminating party must proceed. Under K, it is clear the notice must be in writing, must be given to the other party, and must be sent by certified mail, return receipt requested. It also states, "If this Contract is terminated pursuant to any Section of this Article, termination shall be effective upon the date set forth in the notice." The evidence shows Respondent put the notice of termination in writing and the letter indicates it was being sent certified mail. The evidence does not show that it was *given* to the other party via certified mail, return receipt requested [emphasis mine]. The undisputed part of the hearing is that the termination letter was never received by Petitioner, via certified mail delivered by the USPS. The contract does not allow notice to be given solely via email, facsimile or any other method. Therefore, I find proper notice of termination of the contract was not given pursuant to the terms of the contract. Petitioner's attorney argued the contract should be reinstated with sanctions per the contract. I have reviewed the contract and do not see sanctions as a remedy for the wrongful termination of the contract. I agree that the contract should be reinstated, but while it is obvious that Petitioner has lost clients and revenue as a result of having the contract terminated, I do not find authority to grant further remedy.

CONCLUSIONS OF LAW

Based upon the above findings of fact and the testimony put forth in this case, I conclude:

- (1) Respondent did not provide proper notice of termination as required by the contract.
- (2) Respondent did not properly terminate Petitioner's contract.

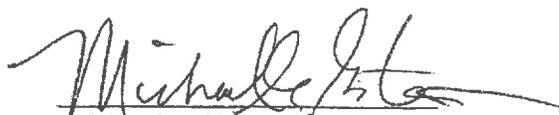
DECISION

Based on the Findings of Fact, Applicable Law and Conclusions of Law, it is my decision that the termination notice was never effectively given to Petitioner. Respondent shall reinstate Petitioner as a provider until such time as proper notice is given. Nothing in this Order requires termination of the contract.

AND IT IS SO ORDERED.

Dated at Columbia
SOUTH CAROLINA

March 27, 2013.


Michael E. Easterday, Esq.
Hearing Officer

ADMINISTRATIVE PROCEEDING
APPEALS CASE #10-PA-060 (CONTROL #P4107)

CONSENT ORDER

This Appeal was to be heard by this Hearing Officer on Wednesday, June 15, 2011 at 10:00 am. Prior to commencement of the appeal hearing, the attorneys for the parties advised this Hearing Officer that an agreement had been reached. The agreement is as follows:

1. Personal Touch Homecare, L.L.C. (Personal Touch) agrees to pay and the South Carolina Department of Health & Human Services (DHHS) agrees to accept \$35,573.44 as full and final settlement of this matter.
2. The total payment of \$35,573.44 shall be made in 18 equal monthly installments commencing August 1, 2011 and continuing each month thereafter until the total is paid in full. No interest will be charged for the first 90 days. After the initial 90 days, interest will be charged on the outstanding balance at a rate of prime plus 2%. All payments are due on the first day of each month and Personal Touch may pay the entire balance at any time without a penalty.
3. All payments are to be made to DHHS at the following address:

SC Department of Health and Human Services
Division of Program Integrity
PO Box 100210
Columbia, SC 29202

Attn: Marilyn Leneau
4. If Personal Touch shall miss a single payment, the entire balance will become due immediately. Additionally, if Personal Touch shall miss a payment, DHHS shall have the option of excluded Personal Touch from providing service.

AND IT IS SO ORDERED.

Vastine G. Crouch
Hearing Officer

Columbia, South Carolina
June _____, 2011

WE CONSENT:

F. Xavier Starkes
Attorney for Personal Touch Homecare, L.L.C.

George R. Burnett
Assistant General Counsel, DHHS

Personal Touch Homecare, LLC
328 Gaston Springs Ct
Gaston, SC 29053

Mr. Anthony Keck
Department of Health and Human Services
PO Box 8206
Columbia SC 29202

RECEIVED

JAN 22 2014

Department of Health & Human Services
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Nikki Haley GOVERNOR
Anthony Keck DIRECTOR
P.O. Box 8206 Columbia, SC 29202
www.scdhhs.gov

February 19, 2014

Mr. Thomas L. Colter
328 Gaston Springs Ct.
Gaston, South Carolina 29053

RE: Letter of January 20, 2014

Dear Mr. Colter:

Your letter dated January 20, 2014, has been forwarded to me for response. As a result of your letter, a review was conducted of the interaction between the South Carolina Department of Health and Human Services (SCDHHS) and Personal Touch Homecare, LLC (Personal Touch). There has been a considerable amount of interaction between SCDHHS and Personal Touch. Based on our review, it appears that Personal Touch notified SCDHHS of its purchase of Homecare Advantage, Inc. in November 2009 and requested assignment of the contract between SCDHHS and Homecare Advantage, Inc. The request included copies of the Bill of Sale and Asset Purchase Agreement conveying the assets of Homecare Advantage, Inc. to Personal Touch. The principals involved on behalf of the two companies were Felicia D. Colter for Homecare Advantage, Inc. and you on behalf of Personal Touch. The transactions were dated November 11, 2009. We also received a Bill of Sale and Asset Purchase Agreement dated November 12, 2009. On December 31, 2009, you were notified that SCDHHS consented to the assignment of its July 1, 2009, contract with Homecare Advantage, Inc. to Personal Touch. You were provided with a copy of the contract and other documentation. The contract was renewed in 2011 for the period from July 1, 2011 through June 30, 2014.

In your letter you indicated that Felicia D. Colter is your daughter and that you purchased her business as a result of the financial hardship she incurred associated with her "being fined \$25,000 and placed on the Medicare exclusion list." According to SCDHHS records, on January 13, 2010, we received a letter from William Gambrell, head of the Medicaid Fraud Control Unit of the South Carolina Attorney General's Office, notifying us that Felicia D. Colter had been indicted and pled guilty to one count of filing false claims in violation of Section 43-7-60(B) of the South Carolina Code of Laws. As a result of that guilty plea, SCDHHS, by letter dated January 22, 2010, notified Ms. Colter that she was excluded from participation in the South Carolina Medicaid program for a period of 3 years and that, in accordance with federal regulations, notification of this action was being sent to the Office of Inspector General of the U.S. Department of Health and Human Services. By letter dated April 30, 2010, SCDHHS was notified that the U.S. Department of Health and Human Services had excluded Ms. Colter from participation in Medicare, Medicaid and all federal health programs. SCDHHS notified Ms. Colter of this additional action by letter of August 26, 2010.

It is a cause for concern when a provider that has been indicted, and subsequently convicted and sanctioned for their actions, is sold from one family member to another. The federal regulations at 42 C.F.R. §1001.1001(a)(ii)(B) allows the Office of Inspector General to exclude a provider in situations where an owner transfers ownership or control of an entity to an immediate family member in anticipation

of or following a conviction or the imposition of an exclusion. The state Medicaid agency, SCDHHS, has the authority to exclude entities under 42 C.F.R. §1002.1. SCDHHS did not choose to take action in accordance with these provisions.

We cannot speak to any investigation undertaken by the South Carolina Attorney General's office. However, the Program Integrity unit of SCDHHS did conduct a post-payment review of Personal Touch covering the period from February 1 through April 30, 2010, which covers roughly the first quarter of operation by Personal Touch. You were notified of the results of that audit by letter dated September 8, 2010. The Program Integrity findings included 1) insufficient documentation, including daily task sheets not signed by the nurse supervisor, not signed or initialed by the aide and length of service provided was not documented in the daily task sheets, and 2) errors in the number of units and/or hours billed. The total amount of the overpayment identified was \$50,819.20. This audit was settled by a Consent Order requiring the repayment of \$35,573.44 in 18 monthly installment payments starting August 1, 2011. This overpayment was satisfied in January 2013.

The Program Integrity review cited the contractual basis for each finding and referred you to the exact pages of the contract for you to review. In your letter, you indicate the errors were clerical in nature and were quickly corrected. It is the provider's responsibility and duty under the terms of the contract to be familiar with and to follow the terms of the contract, including the Appendices that more fully set out the Scope of Work and requirements for coverage, documentation and billing. If you did not understand the Scope of Work or requirements, SCDHHS could have been contacted for clarification, assistance and further education.

In addition to the Program Integrity post payment review, the Community Long Term Care division of SCDHHS (CLTC) conducted four compliance reviews of Personal Touch. These reviews were conducted on September 3, 2010; June 15, 2011; February 27, 2012; and, December 10, 2012. The reviews were conducted in accordance with the process found in the Scope of Work Appendix for the particular service being reviewed. The Appendices are part of the contract and should be used as guidance for provider operations. Compliance reviews are scored based on the documentation contained in the provider's files. Scoring is based on the presence or absence of documentation in the client record and the severity of the deficiency based on significance of the service at issue and the consequences to participants if the requirement is not met. One (1) is the lowest level of severity and three (3) is the highest level of severity. Scores are accumulated based on the review and the provider's review history. The final score of the review determines what, if any, sanction will be applied. Sanctions range from plans of correction to suspension of new referrals for a period of time, and, ultimately to termination, although for the time period at issue in the termination appeal, termination was not listed as a sanction.

Based upon my review of the interaction between SCDHHS and Personal Touch, there is no indication anyone at SCDHHS has taken any inappropriate action directed at Personal Touch. No one at SCDHHS had any contact with Palmetto Senior Care, the VA or anyone else concerning Personal Touch other than the South Carolina Attorney General's office and the U.S. Department of Health and Human Services, Office of Inspector General as outlined in this letter. There were findings in each review that indicate issues that should be addressed. Ms. Carter is responsible for the CLTC compliance area. She signs all CLTC compliance review determination letters to all providers and handles the plan of correction reviews, as well as responding to questions and issues raised by providers.

The decision of the Hearing Officer outlines the history of the compliance reviews that were conducted on Personal Touch. Based on the sanction scale in place at the time of the December 10, 2012, compliance review, Personal Touch should have received a 30 day suspension of new referrals. The Hearing Officer's decision required reinstatement of the contract. The Hearing Officer's decision was sent to the Personal Touch's counsel and to the SCDHHS Office of General Counsel. No copy was sent to the

Letter to T.L. Colter
February 19, 2014
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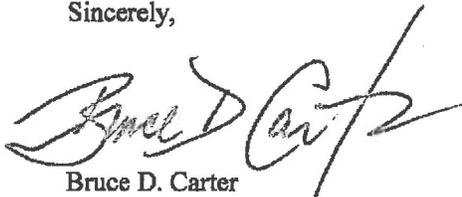
CLTC division. The usual practice in the agency has been for the decision to be communicated to the program area, CLTC in this case, and a copy to the Office of General Counsel if they are involved in the appeal. The program area implements the decision. Our Office of General Counsel believed that notice had been sent to CLTC and that the decision would be implemented. Until contacted by Personal Touch's counsel, we did not know that CLTC had not been apprised of the decision. Our process has been revised to require notice to the appropriate program area of all applicable hearing decisions and our Office of General Counsel now verifies that the program area has received copies of the decisions.

Personal Touch was reinstated retroactive to the date the decision was received by the Office of General Counsel. This would allow any claims for existing clients of Personal Touch to be processed and paid. Referrals are made based on the choice of the Medicaid recipient. Case managers are told to respect the choice of the recipient. Such freedom of choice on the part of the Medicaid recipient is required by the Social Security Act and SCDHHS is required to follow the law in this matter.

While we are sympathetic with the position in which you find yourself, nothing in the contract between SCDHHS and Personal Touch guarantees any referrals to Personal Touch and SCDHHS cannot guarantee Personal Touch or any other provider a particular level of patient census or reimbursement.

If you need assistance with issues related to your contract or education regarding the requirements and responsibilities of a Medicaid provider, please contact Tony Matthews of our Community Long Term Care Division. He may be reached at 803.898.2590.

Sincerely,



Bruce D. Carter

Assistant General Counsel

cc: Tony Matthews, SCDHHS