



Maine Department of Health and Human Services  
Commissioner's Office  
11 State House Station  
221 State Street  
Augusta, Maine 04333-0011

PAUL R. LEPAGE  
GOVERNOR

BETHANY L. HAMM  
ACTING COMMISSIONER

**IN THE MATTER OF:**

Blue School, Inc. )  
c/o Edmond Bearor, Esq. )  
Rudman Winchell ) **FINAL DECISION**  
PO Box 1401 )  
Bangor, ME 04402-1401 )

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

The Recommended Decision of Hearing Officer Pickering, mailed October 18, 2018 has been reviewed.

I hereby adopt the findings of fact and I accept the Recommendation of the Hearing Officer that the Department was not correct when for the review period of 1/1/2008 through 5/1/2009, it determined that Blue School, Inc., owes \$428,680.00 in recoupment due to billing for services not provided; lack of documentation; and billing for non-covered services. For the review period of 1/1/2008 through 5/1/2009, Blue School, Inc., owes \$285,980.00 in recoupment due to billing for services not provided.

DATED: 11/19/18 SIGNED: Bethany Hamm  
BETHANY HAMM, ACTING 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: Edmond Bearor, Esq., Rudman Winchell, PO Box 1401, Bangor, ME 04402  
Thomas Bradley, AAG, Office of the Attorney General  
Patrick Bouchard, DHHS/Program Integrity



Maine Department of Health and Human Services  
Administrative Hearings  
11 State House Station  
221 State Street  
Augusta, Maine 04333-0011

PAUL R. LEPAGE  
GOVERNOR

BETHANY L. HAMM  
ACTING COMMISSIONER

TO: Bethany L. Hamm, Acting Commissioner  
Department of Health and Human Services  
221 State Street  
11 State House Station  
Augusta, ME 04333

DATE MAILED: **OCT 18 2018**

In Re: Blue School, Inc.—Appeal of Final Informal Review dated May 30, 2017

**RECOMMENDED DECISION**

On November 16, 2017 and September 20, 2018, Hearing Officer Joseph Pickering, Esq. held a *de novo* administrative hearing at Bangor, Maine in the case of Blue School, Inc. By special appointment, the Commissioner of the Department of Health and Human Services conferred jurisdiction to the Hearing Officer. At Blue School, Inc.'s request, the Hearing Officer continued the hearing on November 16, 2017. At Blue School, Inc.'s request, the hearing was repeatedly continued to September 20, 2018. The Hearing Officer left the record open until October 9, 2018 for the parties to submit written arguments, which both parties did.

**FACTUAL BACKGROUND AND ISSUE:**

On or about October 1, 2009, the Department of Health and Human Services, Division of Audit, Program Integrity (the "Department") notified Blue School, Inc. that based upon lack of documentation, billing for services not provided, and billing for non-covered services it sought a recoupment of \$428,680.00 for MaineCare claims paid between January 1, 2008 through May 1, 2009. In response, Blue School, Inc. provided additional information and comments. On or about May 30, 2017, the Department notified Blue School, Inc. that it was insisting upon the original recoupment amount to \$428,680.00 for MaineCare claims paid from January 1, 2008 through May 1, 2009.

On or about July 28, 2017, Blue School, Inc. appealed. The Department did not notify the Administrative Hearings Unit of the request for hearing until September 1, 2017. Pursuant to an Order of Reference dated September 5, 2017, this matter was assigned by James D. Bivins, Esq., Chief Administrative Hearing Officer to the undersigned Hearing Officer to conduct an administrative hearing and to submit to the Commissioner written findings of fact and recommendations on the following issue:

*Was the Department correct when for the review period of 1/1/2008 through 5/1/2009, it determined that Blue School, Inc. owes \$428,680.00 in recoupment due to billing for services not provided; lack of documentation; and billing for non-covered services?*

**APPEARING ON BEHALF OF APPELLANT:**

Edmond Bearor, Esq.  
Amanda Palmer, Blue School, Inc. owner  
Vicki Vincent (did not testify but appeared on 11/16/2017), Accountant  
James Fortin, AAG (via telephone)

**APPEARING ON BEHALF OF AGENCY:**

Thomas Bradley, AAG  
Kelli Johnson, Program Integrity  
Patrick Bouchard, Program Integrity  
Jeffrey Wrigley, HealthCare Crimes Unit (via telephone)

**ITEMS INTRODUCED INTO EVIDENCE:**

Hearing Officer Exhibits:

- HO-1. Notice of hearing dated 09/06/2017
- HO-2. Order of Reference dated 09/05/2017
- HO-3. Fair Hearing Report
- HO-4. DHHS letter dated 10/01/2009
- HO-5. Letter of Peter DeTroy, Esq. dated 07/27/2010—no attachment
- HO-6. DHHS letter dated 05/30/2017
- HO-7. Letter of Kelly Hoffman, Esq. dated 07/26/2017
- HO-8. Email dated 11/09/2017
- HO-9. Notice of hearing dated 11/21/2017
- HO-10. Pre-hearing order dated 11/27/2017
- HO-11. Letter of Thomas Bradley, AAG dated 12/01/2017
- HO-12. Pre-hearing order dated 12/04/2017
- HO-13. Denial of continuance dated 01/02/2018
- HO-14. Letter of Jay McCloskey, Esq. dated 01/05/2018
- HO-15. Continuance dated 01/05/2018
- HO-16. Pre-hearing order dated 01/11/2018
- HO-17. Notice of hearing dated 01/18/2018
- HO-18. Letter of Jay McCloskey, Esq. dated 03/29/2018
- HO-19. Letter of Thomas Bradley, AAG dated 04/11/2018
- HO-20. Pre-hearing order dated 04/11/2018
- HO-21. Continuance dated 04/23/2018 with request for continuance
- HO-22. Email chain dated 05/22/2018
- HO-23. Notice of hearing dated 07/03/2018
- HO-24. Withdrawal of Jay McCloskey, Esq.
- HO-25. Pre-hearing order dated 07/20/2018
- HO-26. Email of Thomas Bradley, AAG dated 09/10/2018
- HO-27. Email chain dated 09/12/2018
- HO-28. Request for continuance dated 09/12/2018
- HO-29. Email of Thomas Bradley, AAG dated 09/13/2018
- HO-30. Request for subpoenas dated 09/13/2018

- HO-31. Letter of Joseph Pickering, Esq. dated 09/18/2018
- HO-32. Letter of Miranda Benedict, Esq. dated 09/18/2018
- HO-33. DHHS Closing Argument
- HO-34. Blue School, Inc. Closing Argument

Department Exhibits:

See attached list for Exhibits DHHS 1—DHHS 30

- DHHS-31. Not offered
- DHHS-32. Attendance records—all three schools
- DHHS-33. Adjustment document
- DHHS-34. Adjustment document with comments--redacted

Appellant Exhibits:

- A-1. Letter of William Savage, AAG dated 09/15/2015
- A-2. Email from James Fortin, AAG dated 03/11/2011
- A-3. Annual corporate reports—Blue School, Inc. 2008 to 2010
- A-4. Email from Kelly Hoffman, Esq. dated 09/19/2010

**RECOMMENDED FINDINGS OF FACT:**

1. Notice of these proceedings was given in a timely and adequate manner. Blue School, Inc. made a timely appeal.
2. In 2007, Blue School, Inc. entered into an agreement with the Department to become a MaineCare provider.
3. As part of the agreement, Blue School, Inc. agreed to follow the terms of the MaineCare Benefits Manual. Blue School, Inc. also agreed to bill only for services that were actually provided to MaineCare members
4. In 2008 and 2009, Blue School, Inc. was an enrolled MaineCare provider.
5. Blue School, Inc. provided developmental therapy services for pre-school children.
6. In 2008 and 2009, Blue School, Inc. had facilities in Bangor, Belfast, and Ellsworth.
7. MaineCare requires that the children be present for developmental therapy services.
8. From January 1, 2008 to May 1, 2009, Blue School, Inc. billed MaineCare for developmental therapy services when the children were not present.
9. Some of the dates when the children were not present included snow days and vacations when Blue School, Inc. was not open.
10. From January 1, 2008 to May 1, 2009, the Department paid \$285,980.00 for Blue School, Inc.'s MaineCare claims for developmental therapy services when the children were not present.

11. On October 1, 2009, the Department sent Blue School, Inc. a notice of violation seeking a recoupment of \$428,680.00.
12. On October 1, 2009, the HealthCare Crimes Unit of the Office of Attorney General seized documents from Blue School, Inc.'s home office and Bangor location as part of a criminal investigation.
13. The HealthCare Crimes Unit is not part of the Department of Health and Human Services.
14. On November 23, 2009, Blue School, Inc. requested an Informal Review through its attorney, Peter DeTroy, Esq.
15. Kelly Hoffman, Esq., an attorney at Peter DeTroy's firm, also represented Blue School, Inc.
16. From October 2009 to May 2011, the Department was represented by James Fortin, AAG.
17. In 2009 and 2010, Blue School, Inc.'s attorney repeatedly stated to the Department that it needed copies of the records seized from its Bangor offices to defend itself.
18. In October 2010, Blue School, Inc. and its attorneys met with the Department and James Fortin, AAG to try to resolve matters. A resolution was not met.
19. In March 2011, James Fortin, AAG delivered one to two boxes of records seized from the Bangor offices to Kelly Hoffman, Esq.
20. The HealthCare Crimes Unit requested the Department to put its audit case on hold while the criminal investigation was pending.
21. No criminal charges were brought against Blue School, Inc.
22. On September 15, 2015, William Savage, AAG, the Director of the HealthCare Crimes Unit notified Kelly Hoffman, Esq. that the HealthCare Crimes Unit wished to dispose of the records seized from Blue School, Inc.
23. The letter from William Savage, AAG did not reference the audit, the Notice of Violation dated October 1, 2009, or the Final Informal Review process.
24. On October 9, 2015, Blue School, Inc. picked up 24 boxes of records from the HealthCare Crimes Unit.
25. Blue School, Inc. did not look at these records when it picked them up,
26. Blue School, Inc. placed the records in its owners' basement.
27. Blue School, Inc. did not look at the records until after May 30, 2017.
28. After September 15, 2015, Blue School, Inc. was still "on edge" regarding the pending audit.

29. After consultation with its attorney, Blue School, Inc. decided that "no news was good news" and "to let sleeping dogs lie".
30. Between October 9, 2015 and May 30, 2017, Blue School, Inc. did not request an update from the Department or request the Department to provide any documents from the review period.
31. On May 30, 2017, the Department issued its Final Informal Review Decision.
32. For the review period of January 1, 2008 to May 1, 2009, Blue School, Inc. did not file any additional claims or claims for underpayment with the Department.
33. Blue School, Inc. did not request an extension to file additional claims or claims for underpayment.
34. Blue School, Inc. was not prejudiced by the Department's delay in issuing the Final Informal Review Decision dated May 30, 2017.

#### **RECOMMENDED DECISION:**

The Department was not correct when for the review period of 1/1/2008 through 5/1/2009, it determined that Blue School, Inc. owes \$428,680.00 in recoupment due to billing for services not provided; lack of documentation; and billing for non-covered services. For the review period of 1/1/2008 through 5/1/2009, Blue School, Inc. owes \$285,980.00 in recoupment due to billing for services not provided.

#### **REASON FOR RECOMMENDATION:**

Blue School, Inc. is a Maine corporation. See Exhibit A-3. In 2007, Blue School, Inc. entered into an agreement with the Department to become a MaineCare provider. As part of the agreement, Blue School, Inc. agreed to follow the terms of the MaineCare Benefits Manual. Blue School, Inc. also agreed to bill only for services that were actually provided to MaineCare members. See Exhibit DHHS-29.

When the hearing began, Kelli Johnson was a Medicaid Surveillance Supervisor in the Program Integrity Unit. Ms. Johnson no longer works for the Department. She was present for both days of the hearing. Ms. Johnson testified that Blue School, Inc. had been providing developmental therapy to preschool children. Child Development Services (CDS) would refer the children to Blue School, Inc.

Ms. Johnson testified that based upon a complaint the Department began an audit of Blue School, Inc. Ms. Johnson testified that at first the Department requested records for some random weeks. Ms. Johnson testified that the Department then expanded its request for all records from January 1, 2008 to May 1, 2009 and did a site visit.

Ms. Johnson testified that Blue School, Inc. had three locations, Bangor, Belfast, and Ellsworth. Based upon this audit, the Department issued a notice of violation. The notice of violation sought a recoupment of \$428,680.00 for MaineCare claims paid from January 1, 2008 through May 1, 2009. The basis for the notice of violation was the claim that Blue School, Inc. had billed for services not provided, had billed for non-covered services, and did not have appropriate documentation for services. See Exhibit DHHS-3.

Ms. Johnson testified that Blue School, Inc. had billed for services when the child was not present. She also testified that Blue School, Inc. billed for days when it was closed such as snow days and vacations. Ms. Johnson testified that the Department based its determination on Blue School's attendance and inventory records.

In 2008 and 2009, MaineCare regulations required that the child must be present for a provider to be reimbursed for developmental therapy. See MaineCare Benefits Manual, Chapter II, Sections 27.01-7 and 27.04-1. MaineCare Benefits Manual Chapter I, Section 1.03(J) requires that a provider can only bill for services actually delivered.

In 2008 and 2009, MaineCare Benefits Manual Chapter II, Section 27 also required that developmental therapy services must be required under the child's Individualized Education Program (IEP) and/or Individualized Family Service Plan (IFSP). Ms. Johnson testified that Blue School, Inc. did not have IEPs and IFSPs to warrant service or to warrant service in the Extended School Year (the summer).

At the second day of hearing on September 20, 2018, the Department lowered its claim to \$285,980.00. The Department asserted it was only seeking reimbursement for services not provided. Patrick Bouchard is a Comprehensive Health Planner, II at Program Integrity. Mr. Bouchard testified that DHHS Exhibit 28 is a summary of all of the claim lines for which the Department is seeking recoupment. Mr. Bouchard testified that DHHS Exhibit 28 is only for absenteeism. Mr. Bouchard testified that the Department was only seeking reimbursement for claims made when the child was not present. Mr. Bouchard testified that the summary exhibit was based upon Blue School, Inc.'s attendance sheets and inventory records. Mr. Bouchard further testified that DHHS Exhibit 28 reflected all applicable reductions that the Department had previously offered in 2011. See Exhibit A-2.

Amanda Palmer f/k/a Amanda Corey is the former President of Blue School, Inc. Ms. Palmer testified that she was the sole shareholder of Blue School, Inc. in 2008 and 2009. See also Exhibit A-3. Ms. Palmer did not dispute that DHHS Exhibit 28 showed billing for days when children were not present at Blue School, Inc. Ms. Palmer agreed that DHHS Exhibit 28 was accurate in regards to the dates when children were not present and when billing for those dates was made.

Much of Blue School, Inc.'s closing argument is spent on fighting battles that Blue School, Inc. had already won. Blue School, Inc. spends a great deal of time arguing about claims based upon IEPs and IFSPs. Blue School, Inc. also spends a great deal of time arguing about the Department's prior offer of reduction. See Exhibit A-2. As noted above, the Department dropped all claims regarding inadequate paperwork for IEPs and IFSPs. The final amount sought by the Department already includes the reduction previously offered by the Department.

Blue School, Inc. argued that no recoupment should be allowed due to violations of due process. Blue School, Inc. also argued that the equitable doctrines of laches and estoppel barred recovery. To some extent, these arguments overlap.

Blue School, Inc. notes that there was a long delay between the Notice of Violation dated October 1, 2009 and the Final Informal Review Decision dated May 30, 2017. Ms. Johnson testified that she began working for the Department in early 2017. For events prior to 2017, Ms. Johnson's testimony was based upon her review of the Department's file and her conversations with co-workers at Program Integrity.



Ms. Johnson testified that the main reason for the delay in issuing the Final Review Decision was there was a simultaneous investigation by the HealthCare Crimes Unit of the Attorney General's Office and that the HealthCare Crimes Unit had requested Program Integrity to wait. In October 2009, the HealthCare Crimes Unit seized a large number of documents from Blue School, Inc. In 2015, the HealthCare Crimes Unit informed the Program Integrity Unit that the criminal case was not going forward. Ms. Johnson testified that between 2015 and 2017 there was a great deal of staff changeover, which put the case and others on hold. When she started at the Department, she picked up the case and started working on finishing the Final Informal Review.

In late 2009 and throughout 2010, Blue School, Inc.'s attorney, Peter DeTroy sent various letters regarding the informal review noting that Blue School, Inc. did not have possession of its records from its Bangor facility. In his letters, Peter DeTroy notes that he has requested copies from the HealthCare Crimes Unit but that they reported they were not ready to provide them. See Exhibits DHHS 4-B to 4-F.

James Fortin is an Assistant Attorney General. In 2010 and early 2011, he represented the Department for audit hearings. On March 11, 2011, AAG Fortin sent an email to Kelly Hoffman, Esq., who was an attorney in Peter DeTroy's firm. In the email, AAG Fortin mentions that the Medicaid Fraud Unit would be making copies of the records from the Bangor facility by the end of the week and that he planned to drop them off in Portland the next Wednesday. See Exhibit A-2.

AAG Fortin testified. AAG Fortin testified that he still works for the Attorney General but stopped doing DHHS audits in May 2011. AAG Fortin testified that he mostly dealt with Atty. Hoffman. He specifically recalled delivering one to two banker boxes of files from the Bangor facility. AAG Fortin vaguely recalled meeting with Atty. Hoffman and Atty. DeTroy. He did not recall meeting with Amanda Palmer. AAG Fortin could not say whether the HealthCare Crimes Unit asked Program Integrity to put their case on hold while the criminal investigation was pending. He stated that he did not typically communicate with the HealthCare Crimes Unit. He stated that he did not know the protocol. Based upon AAG Fortin's testimony and his email dated March 11, 2011, the Hearing Officer finds that James Fortin delivered one to two boxes of Bangor records to Kelly Hoffman in March 2011.

Jeffrey Wrigley is a Senior Detective with the HealthCare Crimes Unit. Detective Wrigley testified that he was involved in the initial seizure of documents from Blue School, Inc. He testified that they executed a search warrant at both Amanda Palmer's home and the Bangor facility. Detective Wrigley testified that the HealthCare Crimes Unit is aware of the evidentiary importance of documents seized. He testified that they treat the documents like physical evidence. They are itemized. He testified that they either photocopied or scanned the documents that they were looking at. Detective Wrigley testified that the current protocol is to scan all documents but in 2009 they probably just made copies.

Detective Wrigley testified that he was involved in the return of the documents within the past "couple of years". He testified that they had closed the investigation so the records were made available. In response to a question, Detective Wrigley testified that 24 boxes being returned "sounded correct". Detective Wrigley testified that he was not the primary on the case. He did not know if the HealthCare Crimes Unit requested Program Integrity to put their case on hold. He did state that they are in communication with Program Integrity on a regular basis and that the directors were often in contact.

Amanda Palmer testified that the HealthCare Crimes Unit seized the Bangor records on October 1, 2009. She testified that she next saw the documents when her husband picked them up in 2015. She testified

that there were 18 to 20 boxes. She also referenced that the receipt listed the number of boxes. The receipt signed by Ms. Palmer's husband states that he picked up over 24 boxes on 10/09/2015. See Exhibit DHHS 30. Based upon the receipt, the Hearing Officer finds that the Department returned 24 boxes of records on 10/09/2015.

Ms. Palmer testified that when the audit began she hired Peter DeTroy, Esq. and Kelly Hoffman, Esq. She testified that she gave Atty. DeTroy Blue School, Inc.'s records for the Belfast and Ellsworth facilities. She did not give him the Bangor records as they had been seized by the HealthCare Crimes Unit.

Ms. Palmer testified that she also hired an accounting firm to help process the records and claims. The accounting firm was also limited to the Belfast and Ellsworth records. Ms. Palmer testified that she had a meeting with Program Integrity, her lawyers, and James Fortin, AAG in October 2010. She testified that she did not hear anything further until they received the letter from the HealthCare Crimes Unit about the return of documents in 2015.

Peter DeTroy, Esq. died a few years ago. Ms. Palmer testified that when they received the records that they contacted Kelly Hoffman, Esq. on what to do. Ms. Palmer testified that Atty. Hoffman said it was up to them on what to do with the records. She reported that Kelly Hoffman stated they could destroy them or keep them. Ms. Palmer testified that she and her husband placed the records in their basement and did not look at them until they received the Final Informal Decision dated May 30, 2017.

Ms. Palmer testified that after they received the documents that they were "still on edge" and they emailed Kelly Hoffman about the status. Ms. Palmer testified that Kelly Hoffman replied that "no news was good news". Ms. Palmer did not state that Kelly Hoffman said the case was over but rather "to let sleeping dogs lie".

Ms. Palmer testified that she and her husband finally looked at the boxes when they received the Final Informal Decision dated May 30, 2017. Ms. Palmer testified that the remittances from 2008 and 2009 were missing. Ms. Palmer explained that the remittances are not documents created by Blue School, Inc. She testified that the remittances are documents that the Department created that would reflect what Blue School, Inc. billed. She testified that the remittances would not have the information from the daily attendance sheet.

The Hearing Officer carefully reviewed Blue School, Inc.'s claim of prejudice regarding the missing remittances with Ms. Palmer. As noted above, Ms. Palmer testified that DHHS Exhibit 28 was accurate. DHHS Exhibit 28 is a summary document showing the dates the children were not present and the amounts that Blue School, Inc. billed for when the children were not present.

The Hearing Officer questioned the importance of the remittances. Since the remittances would only show what Blue School, Inc. had already billed and since DHHS Exhibit 28 showed what Blue School, Inc. had billed, the Hearing Officer asked Ms. Palmer why the remittances were important. Ms. Palmer testified that Blue School, Inc. may have billed improperly. She suggested that Blue School, Inc. may have billed for a day when the child was not present but failed to bill when the child was present.

Ms. Palmer testified that after they opened the boxes in 2017 she called someone at the Department about the remittances. She did not call anyone at Program Integrity. Ms. Palmer was not clear regarding whom she called at the Department. She testified it may have been Jamie Boulet. She

testified that she asked for new copies and the Department reported that they did not have the information anymore.

As part of its argument regarding a claim of a violation of due process, Blue School, Inc. stated, "Given Attorney DeTroy's passing, Blue School requested a continuance of that hearing [the appeal hearing] until it could locate new counsel. This request was originally *denied*." See Exhibit HO-34. This statement is false. The appeal hearing was originally scheduled for November 16, 2017. Prior to November 16, 2017, Blue School, Inc. had not requested any continuances. Blue School, Inc. did not request a continuance at the beginning of the hearing. During the hearing, the Hearing Officer asked Blue School, Inc. if it wanted to request a continuance so that it could procure counsel. The Department did not object to the continuance but asked for assurance that Blue School, Inc. would actually procure counsel. Eventually, Blue School, Inc. asked for a continuance to find an attorney and it was granted. The Hearing Officer stressed to Amanda Palmer that Blue School, Inc. should not wait until the last minute to hire an attorney. See Exhibit HO-12.

The hearing was continued to January 11, 2018. See Exhibit HO-9. On January 2, 2018, Blue School, Inc. requested a continuance. Blue School, Inc. had not hired an attorney. It did not ask for the continuance to find an attorney. It asked for the continuance because Amanda Palmer needed to schedule a medical appointment for her son. The appointment had not been scheduled yet and there was no indication that it would actually conflict with the hearing. This request to continue was denied. See Exhibit HO-13. On January 5, 2018, Blue School, Inc. hired Jay McCloskey, Esq. to represent it and Atty. McCloskey requested a continuance. This continuance was granted. See Exhibits HO-14 and HO-15.

Blue School, Inc.'s request to continue the hearing scheduled for May 17, 2018 was granted. See Exhibit HO-24. On July 3, 2018, the hearing for September 20, 2018 was scheduled. See Exhibit HO-23. On July 13, 2018, Atty. McCloskey withdrew from representing Blue School, Inc. See Exhibit HO-24. Blue School, Inc. did not meet with its current counsel until September 7, 2018. See Exhibit HO-28. The Hearing Officer did deny the request to continue the hearing scheduled for September 20, 2018. However, at the hearing, the Hearing Officer offered to leave the record to allow additional witnesses to testify. Blue School, Inc. declined this offer. The Hearing Officer rejects Blue School, Inc.'s argument that a denial of a continuance violated due process.

In making its due process violation argument, Blue School, Inc. argued that there was undue delay causing prejudice and that the Department had destroyed exculpatory documents. There was a significant delay in this case. However, the Hearing Officer does not find the delay to be unreasonable. Based upon Kelly Johnson's testimony, the Hearing Officer finds that the HealthCare Crimes Unit requested Program Integrity to put its case on hold. This request makes sense. It is certainly possible that a parallel case/hearing could impact the development of a criminal case. More importantly, the Hearing Officer does not find that Blue School, Inc. suffered prejudice in its defense.

In claiming prejudice, Blue School, Inc. focuses a great deal of attention on the original recoupment amount of \$428,680.00. As noted above, the Department dropped its demand to \$285,980.00. As described above, the claim for \$285,980.00 is based only on billing when the children were not present. This amount also reflected all applicable reductions that the Department had previously offered in 2011. See Exhibit A-2. Amanda Palmer admitted that DHHS Exhibit 28 accurately reflected Blue School, Inc.'s billing for when the children were not present. Given this admission, there is no prejudice.

Blue School, Inc. claimed that it had failed to bill for services when the children were actually present. Blue School, Inc. has an obligation to bill correctly. Blue School, Inc.'s failure to bill MaineCare in a proper manner is not a defense to the Department's claim of overpayment. Such a claim should have been done in a different proceeding.

In any event, the deadline to file a claim for underpayments passed before the Notice of Violation was even issued. In both 2009 and today, MaineCare Benefits Manual, Chapter I, Section 1.12-1 required that if a provider believed there was an underpayment then the provider had to submit a request in writing to review the payments within 120 days of the remittance statement. If the request was not submitted within 120 days, the provider waives any claim. In *John F. Murphy Homes, Inc.*, 2017 ME 67, 158 A.3d 921, the Law Court discusses the necessity of the MaineCare provider using this process to make a claim for underpayment.

The Notice of Violation dated October 1, 2009 states, "The review examined your claims that were submitted for payment to the MaineCare Program for the period from January 1, 2008 through May 1, 2009." See Exhibit DHHS 3. The latest possible date for the remittance form would have been May 1, 2009. October 1, 2009 is more than 120 days after May 1, 2009. The deadline to submit underpayment claims had passed when the HealthCare Crimes Unit seized Blue School, Inc.'s records in October 2009.

The general deadline for filing claims has also passed. In 2009, providers had a one year deadline to submit claim for payment. MaineCare Benefits Manual, Chapter I, 1.10-2 has been amended to state, "The following time limits apply unless waived under special circumstances by the Department. Providers have one (1) year from the date services are provided to file a claim correctly with the Department, regardless of when eligibility is verified, except claims for services provided before September 1, 2010 must be filed correctly within one (1) year from the date services are provided or by January 31, 2011, whichever is sooner."

When the HealthCare Crimes Unit seized the Bangor records in October 2009, the general deadline for submitting claims would have passed for any services provided before October 1, 2008. There is no evidence that Blue School, Inc. ever requested an extension to submit additional claims. In fact, Amanda Palmer testified that after her meeting with James Fortin and the Department in October 2010 Kelly Hoffman told her that they had missed their window to submit claims.

Blue School, Inc.'s claim that it had a large amount of unbilled services was not strong. Blue School, Inc. billed for snow days and vacation periods. The Hearing Officer does not find Ms. Palmer's claim that they billed "for a Monday" but should have "billed for a Tuesday" to be compelling.

The Hearing Officer did not find Ms. Palmer to be a particularly credible witness. Ms. Palmer had difficulty in directly responding to questions. Ms. Palmer would often state that she had a document or email at home that she did not bring to the hearing. By September 20, 2018, the hearing itself had been pending for 10 months. If there was an important document, it should have been available at the hearing.

The Hearing Officer rejects Blue School, Inc.'s argument that the Department or the HealthCare Crimes Unit destroyed exculpatory evidence. The 2008 and 2009 remittances would not have contained exculpatory evidence. As stated many times, Amanda Palmer admitted that DHHS Exhibit 28 was accurate. At most, the remittance forms may have helped Blue School, Inc. to submit different claims to the Department.

It is not a foregone conclusion that the HealthCare Crimes Unit destroyed or lost the remittance forms. In its argument, the Department questions whether the 2008 and 2009 remittance forms were even taken. As noted by Ms. Palmer, the remittance forms were documents created by the Department. The Department had no need to seize them.

Ms. Palmer testified that they did not hear anything from the Department after the October 2010 meeting. However, James Fortin delivered one to two boxes of records to Kelly Hoffman in March 2011. Ms. Palmer did not state whether she ever spoke with Kelly Hoffman about these boxes. Ms. Palmer did not state that she ever looked at these boxes. It is certainly conceivable that the remittance forms may have been in the boxes delivered to Kelly Hoffman. No evidence was presented regarding what those boxes contained. No evidence was presented that Blue School, Inc. ever received these boxes from Kelly Hoffman.

Ms. Palmer testified that they received their records in 2015 but did not look at them. She testified that they placed them in the basement and left them there for two years. The remittance forms could have been lost by Ms. Palmer.

Blue School, Inc. asserted the equitable defenses of laches and estoppel. The Maine Law Court has stated, "Laches is negligence or omission seasonably to assert a right. It exists when the omission to assert the right has continued for an unreasonable and unexplained lapse of time, and under circumstances where the delay has been prejudicial to an adverse party, and where it would be inequitable to enforce the right." *Fisco v. Department of Human Services*, 659 A.2d 274, 275 (Me. 1995).

As noted above, the Hearing Officer has rejected the argument that the delay caused prejudice to Blue School, Inc. The Department had a valid reason for its delay. It was waiting for the criminal investigation to be completed. Also, the Department put Blue School, Inc. on notice when it issued the Notice of Violation dated October 1, 2009.

Laches and estoppel are equitable claims. A person claiming equity must come "with clean hands". See *Conners v. Conners Bros. Co.*, 110 Me. 428, 86 A. 843. Blue School, Inc. did not object to the delay. As described above, Blue School, Inc. failed to submit an underpayment. In 2015, Amanda Palmer spoke with Atty. Hoffman because she was "on edge" about the audit. Atty. Hoffman advised her to leave it alone stating "no news is good news" and "let sleeping dogs lie". Despite having the records since 2015, Ms. Palmer waited until 2017 to look at them. She did not request copies of the remittance forms from the Department until 2017. They may have been available in 2015. Certainly, Blue School, Inc. could have requested copies even earlier.

The Law Court has stated, "To prevail on an equitable estoppel claim against a government entity, the proponent of the claim must demonstrate by "clear and satisfactory" evidence that (1) the statements or conduct of a governmental official or agency induced the party to act, or here, to fail to act; (2) the reliance was detrimental to the party; and (3) the reliance was reasonable. *Dep't of Health & Human Servs. v. Pelletier*, 2009 ME 11, ¶ 17, 964 A.2d 630. See also *John F. Murphy Homes, Inc.*, 2017 ME 67, ¶ 23, 158 A.3d 921, 927.

Blue School, Inc. did not establish that the statements or conduct of a government official caused Blue School, Inc. not to act. The only statement that comes close is the letter dated September 15, 2015 from William Savage, AAG, the Director of the HealthCare Crimes Unit. In the letter, AAG Savage asks

what Blue School, Inc. wants to do with the seized records. No representation is made that the audit is being closed. No representation is even made that the criminal case is being closed. See Exhibit A-1. The HealthCare Crimes Unit is a unit of the Office of the Attorney General. Program Integrity is part of the Department of Health and Human Services. While part of the State of Maine, they are distinct entities. Blue School, Inc. was well aware that there was both a civil audit and a separate criminal matter.

The delay did not prejudice Blue School, Inc. as there is no dispute that they overbilled. It was not reasonable for Blue School, Inc. to conclude that the audit was over. In fact, Blue School, Inc. did not think that the audit was over given the fact that Amanda Palmer was "on edge" and decided to "let sleeping dogs lie". Equitable estoppel was not established.

For all of the above reasons, the undersigned Hearing Officer recommends that the Commissioner find that the Department was not correct when for the review period of 1/1/2008 through 5/1/2009, it determined that Blue School, Inc. owes \$428,680.00 in recoupment due to billing for services not provided; lack of documentation; and billing for non-covered services. The Hearing Officer recommends that the Commissioner find that for the review period of 1/1/2008 through 5/1/2009 Blue School, Inc. owes \$285,980.00 in recoupment due to billing for services not provided.

#### **MANUAL CITATIONS:**

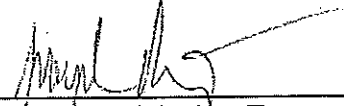
MaineCare Benefits Manual, Chapter I  
MaineCare Benefits Manual, Chapter II

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 TWENTY (20) 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.

THE INFORMATION CONTAINED IN THIS DECISION IS CONFIDENTIAL. *See, e.g.,* 42 U.S.C. section 1396a(a)(7), 22 M.R.S.A. section 42(2) and section 1828(1)(A), 42 C.F.R. section 431.304, MaineCare Benefits Manual, Ch.1, sec. 1.03-5. ANY UNAUTHORIZED DISCLOSURE OR DISTRIBUTION IS PROHIBITED.

DATED: October 16, 2018

SIGNED: \_\_\_\_\_

  
Joseph M. Pickering, Esq.  
Administrative Hearing Officer  
Division of Administrative Hearings

cc: Blue School, Inc. c/o Edmond Bearor, Esq., Rudman Winchell, P.O. Box 1401, Bangor, ME  
04402-1401  
Thomas Bradley, AAG, Office of the Attorney General  
Program Integrity, 221 State Street, Augusta

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DHHS Exhibits

- DHHS #1 Order of Reference
- DHHS #2 Fair Hearing Report Form dated August 31, 2017
- DHHS #3 Notice of Violation Letter dated October 1, 2009
- DHHS #4A Informal Review Request Letter dated November 18, 2009
- DHHS #4B Informal Review Request Letter dated December 11, 2009
- DHHS #4C Informal Review Request Letter dated February 1, 2010
- DHHS #4D Informal Review Request Letter dated March 29, 2010
- DHHS #4E Informal Review Request Letter dated April 30, 2010
- DHHS #4F Informal Review Request Letter dated July 27, 2010
- DHHS #5 Final Informal Review Decision letter dated May 30, 2017 with redacted spreadsheet.
- DHHS #6 Request for Administrative Hearing letter dated July 26, 2017
- DHHS #7 MaineCare Benefits Manual (MBM) Chapter I, effective December 7, 2007
- DHHS #8 MaineCare Benefits Manual (MBM) Chapter II Section 27 effective July 7, 2005
- DHHS #9 MaineCare Benefits Manual (MBM) Chapter III Section 27 effective July 7, 2005
- DHHS #10 Member Number 1 ( P.I. Spreadsheet
- DHHS #11 Member Number 1 Blue School Inc. Accounting Spreadsheet



- DHHS #12 Member Number 1 Blue School Inc. Attendance Sheets
- DHHS #13 Member Number 1 Blue School Inc. Child Inventory Form
- DHHS #14 Member Number 2 ( , P.I. Spreadsheet
- DHHS #15 Member Number 2 Blue School Inc. Accounting Spreadsheet
- DHHS #16 Member Number 2 Blue School Inc. Attendance Sheets
- DHHS #17 Member Number 2 Blue School Inc. Child Inventory Form
- DHHS #18 Member Number 3 P.I. Spreadsheet
- DHHS #19 Member Number 3 Blue School Inc. Accounting Spreadsheet
- DHHS #20 Member Number 3 Blue School Inc. Attendance Sheets
- DHHS #21 Member Number 3 Blue School Inc. Child Inventory Form
- DHHS #22 Member Number 4 P.I. Spreadsheet
- DHHS #23 Member Number 4 Blue School Inc. Accounting Spreadsheet
- DHHS #24 Member Number 4 Blue School Inc. Attendance Sheets
- DHHS #25 Member Number 4 Blue School Inc. Child Inventory Form
- DHHS #26 Member Number 5 ( P.I. Spreadsheet showing No Treatment Plan
- DHHS #27 Member Number 5 Blue School Inc. Attendance Sheet
- DHHS #28 Post Final Informal Review Decision Spreadsheet
- DHHS #29 Provider Agreement dated January 2, 2007
- DHHS #30 Acknowledgement of turnover of records dated October 9, 2015.
- DHHS #31 Healthcare Crimes Unit letter dated September 11, 2015