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:

Bruce Ross, DMD)
10 Knox Street) **FINAL DECISION**
Rumford, ME 04276)

This is the Department of Health and Human Services' Final Decision. The Recommended Decision of Hearing Officer Benedict, mailed October 30, 2017, and the responses and exceptions filed on behalf of Bruce Ross have 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 for the review period from February 01, 2008 through December 31, 2012, Bruce Ross, DMD, breached the terms of the MaineCare Provider/Supplier Agreement and/or the requirements of Section 1.03-3 for provider participation, as specified in the Final Informal Review Decision dated August 9, 2016, but I find that the Department failed to properly exercise its discretion in assessing a 20% penalty for Dr. Ross's violation of the signature requirement. When considering the various factors set forth in the MaineCare Benefits Manual, Chapter 1, section 1.19-3, it is clear that the penalty for the violation of the signature requirement should be *de minimis*. I conclude that in this case the penalty should be 1%. Accordingly, using a 1% penalty, the "overpayment" on reviewed claims is $3,870.53 which results in an error rate of 6.25% and, when that error rate is applied to the total claims paid ($687,547.09), the extrapolated recoupment amount is $42,971.69.

DATED 10/10/18 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: Christopher C. Taintor, Esq., Norman Hanson & DeTroy, LLC, P.O. Box 4600, Portland, ME 04112
Thomas Bradley, AAG, Office of the Attorney General, Augusta

Department of Health and Human Services
Maine People Living Safe, Healthy and Productive Lives

Paul R. LePage, Governor Ricker Hamilton, Commissioner

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Ricker Hamilton,
Commissioner
Department of Health and Human Services
11 State House Station • 221 State Street
Augusta, ME 04333

Date Mailed: OCT 30 2017

In the Matter of: Bruce Ross D.M.D.

ADMINISTRATIVE HEARING RECOMMENDED DECISION

An administrative hearing in the above-captioned matter was held on July 10, 2017, before Hearing Officer Miranda Benedict, Esq., at South Paris, 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 November 28, 2016. On November 14, 2016, Christopher Taintor, Esq., legal counsel for Dr. Ross, requested a continuance. There was no objection from the Department and the hearing was rescheduled. The hearing was then scheduled for January 30, 2017. The Department requested a continuance due to a scheduling conflict. There was no objection and the hearing was rescheduled. The hearing was rescheduled for April 10, 2017. However, the AAG assigned to appear for the Department was unavailable. The hearing was rescheduled for July 10, 2017.The hearing record was left open through August 14, 2017 to allow submission of written closing arguments. The hearing officer reopened the record on September 18, 2017 to request supplemental arguments. The supplemental arguments were received on September 29, 2017 and the record was closed.

Pursuant to an Order of Reference dated October 17, 2016 the issue presented *de novo* for hearing was,

> ***Was the department correct when it determined for the review period from 2/1/2008 through 12/31/2012, Bruce Ross, DMD breached the terms of the MaineCare Provider/Supplier Agreement, and/or the requirements of Section 1.03-3 for provider participation, as specified in the Final Informal Review Decision***

dated August 9, 2016, resulting in a recoupment of $216,371.06[1] owed to the department? See, HO-2.

APPEARING ON BEHALF OF THE APPELLANT

Bruce Ross, DMD
Maureen Leavett, Dental Hygienist
Jenny Herbert, Office Manager
Christopher Taintor, Esq.

APPEARING ON BEHALF OF THE DEPARTMENT

Janie Turner, CHP, II
Thomas Bradley, AAG

ITEMS INTRODUCED INTO EVIDENCE

Hearing Officer Exhibits

HO-1	Notice of Hearing and Scheduling Notices
HO-2	Order of Reference dated October 17, 2016
HO-3	Fair Hearing Report Form dated October 12, 2016
HO-4	Request for Administrative Hearing dated September 28, 2016
HO-5	Notice of Violation dated January 29, 2016
HO-6	Notice of Debt in Accordance with 22 MRS §1714-A
HO-7	Informal Review dated January 29, 2016
HO-8	Final Informal Review Decision dated August 9, 2016
HO-9	Letter from hearing officer to parties dated July 12, 2017
HO-10	Letter from hearing officer to parties dated September 18, 2017

Department Exhibits

Exhibit #1:	Order of Reference
Exhibit #2:	Notice of Violation Letter dated January 29, 2016 with attached recoupment spreadsheet; Notice of Debt; Notice of Appeal Rights
Exhibit #3:	Provider Response Letter to Notice of Violation and request for Informal Review dated March 18, 2016
Exhibit #4:	Final Informal Review Decision Letter dated August 9, 2016 with attached recoupment spreadsheet
Exhibit #5:	Request for Administrative Hearing from Provider dated September 28, 2016
Exhibit #6:	MaineCare Benefits Manual, Chapter I – Effective date: 12/12/2007
Exhibit #7:	MaineCare Benefits Manual, Chapter I – Effective date: 02/13/2011
Exhibit #8:	MaineCare Benefits Manual, Chapter II, Section 25 – Effective Date: 04/01/2007
Exhibit #9:	MaineCare Benefits Manual, Chapter II, Section 25 – Effective Date: 08/09/2010
Exhibit #10:	MaineCare Benefits Manual, Chapter III, Section 25 – Effective Date:

[1] After an informal review requested by Dr. Ross and performed by Herbert Downs, Director of the Department's Division of Audit, the Department reduced the recoupment sought to $173,536.88. See, DHHS-4. The hearing officer, with agreement of the parties, changed the OOR to indicated the actual recoupment of $173,536.88.

Exhibit #11: MaineCare Benefits Manual, Chapter III, Section 25 – Effective Date: 04/01/2007
Exhibit #12: MaineCare Benefits Manual, Chapter III, Section 25 – Effective Date: 11/01/2007
Exhibit #13: MaineCare Benefits Manual, Chapter III, Section 25 – Effective Date: 01/01/2010
Exhibit #14: Member Record – with related spreadsheet excerpt and member record 08/09/2010
Exhibit #15: Member Record – with related spreadsheet excerpt and member record
Exhibit #16: Member Record – with related spreadsheet excerpts and member record
Exhibit #17: Member Record – with related spreadsheet excerpt and member record
Exhibit #18: Member Record – with related spreadsheet excerpt and member record
Exhibit #19: Member Record - with related spreadsheet excerpt and member record
Exhibit #20: Member Record – with related spreadsheet excerpt and member record
Exhibit #21: Member Record – with related spreadsheet excerpts and member record
Exhibit #22: Member Record – with related spreadsheet excerpts and member record
Exhibit #23: Member Record – with related spreadsheet excerpt and member record
Exhibit #24: Member Record – with related spreadsheet excerpt and member record
Exhibit #25A: Member Record – with related spreadsheet excerpts and member record
Exhibit #25B: Excerpt from 2007 – 2008 Current Dental Terminology (CDT) code book
Exhibit #26: Member Record – with related spreadsheet excerpts and member record
Exhibit #27: MaineCare Provider/Supplier Agreement dated July 5, 2006
Exhibit #28: MaineCare/Medicaid Provider Agreement dated September 14, 2009
Exhibit #29 Closing Argument
Exhibit #30 Supplemental Argument

Appellant Exhibits

Exhibit 1: Patient Chart –
Exhibit 2: Patient Chart –
Exhibit 3: Patient Chart –
Exhibit 3-A: Patient Record
Exhibit 4: Patient Chart –
Exhibit 5: Patient Chart –
Exhibit 6: Patient Chart –
Exhibit 7: Patient Chart –
Exhibit 8: Patient Chart –
Exhibit 9: Patient Chart –
Exhibit 10: Patient Chart –
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Exhibit 19: Patient Chart –

Exhibit 20:	Patient Chart –
Exhibit 21:	Patient Chart –
Exhibit 22:	Patient Chart –
Exhibit 22-A:	Patient Record
Exhibit 23:	Patient Chart –
Exhibit 24:	Patient Chart –
Exhibit 25:	Patient Chart –
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Exhibit 27:	Patient Chart –
Exhibit 28:	Patient Chart –
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Exhibit 35:	Patient Chart –
Exhibit 36:	Patient Chart –
Exhibit 37:	Patient Chart -
Exhibit 38:	Patient Chart -
Exhibit 39:	Patient Chart -
Exhibit 39-A:	Patient Record
Exhibit 40:	Patient Chart -
Exhibit 41:	Patient Chart -
Exhibit 42:	Patient Chart -
Exhibit 43:	Patient Chart -
Exhibit 44:	Patient Chart -
Exhibit 45:	Patient Chart -
Exhibit 46:	Patient Chart -
Exhibit 47:	Patient Chart -
Exhibit 48:	Patient Chart –
Exhibit 49:	Patient Chart –
Exhibit 49-A:	Patient Record
Exhibit 50:	Patient Chart –
Exhibit 51:	Patient Chart –
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Exhibit 67-A:	Patient Record
Exhibit 68:	Patient Chart –
Exhibit 69:	Patient Chart –
Exhibit 70:	Patient Chart –
Exhibit 70-A:	Patient Record
Exhibit 71:	Patient Chart –
Exhibit 72:	Patient Chart –
Exhibit 73:	Patient Chart –
Exhibit 74:	Patient Chart –
Exhibit 75:	Patient Chart –
Exhibit 75-A:	Patient Record
Exhibit 76-A:	Patient Record
Exhibit 77:	Patient Chart –
Exhibit 78:	Patient Chart –
Exhibit 79:	Patient Chart –
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Exhibit 96:	Patient Chart –
Exhibit 97:	Patient Chart –
Exhibit 98:	Patient Chart –
Exhibit 99:	Patient Chart –
Exhibit 100:	Patient Chart –
Exhibit 101:	DHHS Request to Dr. Ross for Records (1/24/13)
Exhibit 102:	Health Management Systems Additional Records Request (7/25/14)
Exhibit 103:	Handwritten Note (undated)
Exhibit 104:	Email From Janie Turner to Denise Osgood Re Dental Case (6/27/16)
Exhibit 105:	Turner Note Re Meeting with Denise Osgood (6/30/16)
~~Exhibit 106:~~	~~Email From AAG Bradley to Christopher Taintor, Esq.~~

	~~Re: Signature Issue (11/15/16)~~[2]
Exhibit 107:	DHHS Final Decision and Administrative Hearing Recommendation (Bridges of Maine, LLC)
Exhibit 108:	DHHS Final Decision and Recommended Decision (Manna, Inc.)
Exhibit 109:	Maine Revised Statutes – Title 22, Health and Welfare, §42: Rules and Regulations
Exhibit 110:	Closing Argument
Exhibit 111:	Supplemental Argument
Exhibit 112:	Additional patients

RECOMMENDED DECISION:

The hearing officer recommends that the Acting Commissioner determine that the Department was correct when it determined for the review period from 2/1/2008 through 12/31/2012, Bruce Ross, DMD breached the terms of the MaineCare Provider/Supplier Agreement, and/or the requirements of Section 1.03-3 for provider participation, as specified in the Final Informal Review Decision dated August 9, 2016, resulting in a recoupment of $173,536.88 owed to the Department.

STANDARD OF REVIEW

The hearing officer reviews the Department's claim for recoupment against an approved MaineCare services provider *de novo*. DHHS Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § VII (C)(1); Provider Appeals, MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.21-1 (A). The Department bears the burden to persuade the Hearing Officer that, based on a preponderance of the evidence, it was correct in establishing a claim for repayment or recoupment against an approved provider of MaineCare services. 10-144 C.M.R. Ch. 1, § VII (B)(1), (2).

LEGAL FRAMEWORK

The Department administers the MaineCare program, which is designed to provide "medical or remedial care and services for medically indigent persons," pursuant to federal Medicaid law. 22 M.R.S. § 3173. *See also* 42 U.S.C. §§ 1396a, *et seq*. To effectuate this, the Department is authorized to "enter into contracts with health care servicing entities for the provision, financing, management and oversight of the delivery of health care services in order to carry out these programs." *Id.* Enrolled providers are authorized to bill the Department for MaineCare-covered services pursuant to the terms of its Provider Agreement, Departmental regulations, and federal Medicaid law. "Provider Participation," MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03. *See also* 42 C.F.R. § 431.107 (b) (state Medicaid payments only allowable pursuant to a provider agreement reflecting certain documentation requirements); 42 U.S.C. § 1396a (a)(27). Enrolled providers also "must ... [c]omply with requirements of applicable Federal and State law, and with the provisions of this Manual." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (Q). Enrolled providers are also required to maintain

[2] This document was objected to by the Department, and was subsequently removed from the hearing record.

records sufficient to "fully and accurately document the nature, scope and details of the health care and/or related services or products provided to each individual MaineCare member." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (M). "The Division of Audit or duly Authorized Agents appointed by the Department have the authority to monitor payments to any MaineCare provider by an audit or post-payment review." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.16. Pursuant to federal law, the Department is also authorized to "safeguard against excessive payments, unnecessary or inappropriate utilization of care and services, and assessing the quality of such services available under MaineCare." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.17. *See also* 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.18; 22 M.R.S. § 42 (7); 42 U.S.C. § 1396a (a)(27); 42 C.F.R. § 431.960. This includes the imposition of "sanctions and/or recoup(ment of) identified overpayments against a provider, individual, or entity," for any of 25 specific reasons for which it may including:

- Presenting or causing to be presented for payment any false or fraudulent claim for services or merchandise;
- Submitting or causing to be submitted false information for the purpose of obtaining greater compensation than that to which the provider is legally entitled;
- Failing to retain or disclose or make available to the Department or its Authorized Agent contemporaneous records of services provided to MaineCare members and related records of payments;
- Breaching the terms of the MaineCare Provider Agreement, and/or the Requirements of Section 1.03-3 for provider participation;
- Failure to meet standards required by State and Federal law for participation (e.g. licensure or certification requirements). See, MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.19-1 (D).

RECOMMENDED FINDINGS OF FACT:

1. Dr. Ross operates a dental practice in Rumford, Maine.
2. Dr. Ross has participated in the MaineCare Program as a dental provider for 29 years.
3. Dr. Ross' dental practice employs an Office Manager, Jennifer Herbert, and a Dental Hygienist, Maureen Leavitt.
4. Dr. Ross sometimes performs an examination of a patient at Ms. Leavitt's work station, which results in her being identified as the provider of the exam on the electronic records.
5. The Department performed a post-payment review, or audit, of Dr. Ross' claims to MaineCare for dental services from February 1, 2008, through December 1, 2012.
6. Based on a review of a sample consisting of the total claims for services to 100 MaineCare members within the audit time period, the Department issued a Notice of Violation dated January 29, 2016, seeking a recoupment of $216,371.06 out of the total MaineCare claims for that period of approximately $687,000.00.
7. Upon an informal review timely requested by Dr. Ross and performed by Hebert Downs, Director of the Department's Division of Audit, the Department reduced the recoupment sought to $173,536.88.
8. Dr. Ross timely requested an administrative hearing, which was held in South Paris, Maine on July 10, 2017.

9. Dr. Ross submitted electronic records to the Department, after the final review on or about November 2016.
10. The Department did not review the electronic records submitted by Dr. Ross.
11. The electronic records were admitted into the record, over the objection of the Department.

REASONS FOR RECOMMENDATION:

According to the Department, the recoupment was based upon several violations of the MaineCare Benefits Manual, and the breaching of Dr. Ross' MaineCare Provider Agreement.

> ***"The Department based its recoupment in part on an absence of legible documentation and a failure to sign medical records. The Department also identified inaccurate or duplicate billing, a failure to adequately document some specific services, and claims for services that did not occur. The basis for recoupment regarding each claim at issue was set forth by the Department in the spreadsheet attached to the Department's Final Informal Review Decision." See, DHHS-29.***

Dr. Ross argues that the Department failed to perform the audit in accordance with its own rules, and therefore the recoupment is invalid. Dr. Ross suggests that either the hearing officer remand the case back to the Department to perform the audit in accordance with the rules or to have the hearing officer perform her own independent review of the amount of the recoupment. In addition, Dr. Ross argues that the electronic records, not reviewed by the Department, but admitted into evidence at the hearing, along with the other documentation reviewed by the Department repairs any inadequacy of Dr. Ross' records.,

> ***"Dr. Ross respectfully submits that the action taken by the Department of Health and Human Services (hereinafter "DHHS" or "the Department") must be vacated or modified because it has violated the statute which governs the sanction process, as well as its own regulations, in several respects, and because it is contrary to the weight of the evidence.***
> ***The first and by far the most important issue in this proceeding is whether Dr. Ross should be penalized up to $137,509 for failing to create and present signed dental records. This issue, in turn, has two sub-parts:***
>
> > ***Whether Dr. Ross's admitted failure to provide DHHS with signed dental records within 30 days of the Department's request, or at any time before the Department rendered its "Final Informal Review Decision" (FIRD), precludes the Hearing Officer from considering them; and***
> >
> > ***Whether the later-produced electronic "Patient Charts" satisfy the law's signature requirement.***
>
> ***The second issue, which needs to be addressed only if "signatures" are found lacking, is whether the enormous penalty DHHS proposes to levy against Dr. Ross is warranted. This issue, like the first, can be broken down into two parts:***

Whether the Department has satisfied its burden of demonstrating that it complied with the law when it assessed the penalty; and

Whether the proposed penalty is unreasonable and excessive.

The third issue is whether DHHS is violating the law by proposing to recoup 100% of the payments it made to Dr. Ross for covered services he actually rendered to MaineCare members, basing its recoupment solely on documentation deficits, although the maximum recoupment allowed for deficient documentation is 20% of the sum paid.
The fourth issue presented for decision is whether DHHS seeks to recoup overpayments it has already recouped once.

Finally, there are miscellaneous charges which DHHS says were improperly paid because documentary support for them was absent. However, the electronic "Patient Charts" submitted at the hearing and the testimony of Maureen Leavitt establish that the services were in fact rendered." See, Ross-110.

Applicable rules and regulations

As a MaineCare provider of dental services, Dr. Ross is subject to certain obligations pursuant to the provider agreement, and portions of the MaineCare Benefits Manual. The Department laid out the pertinent regulations in its closing argument,

"Providers such as Dr. Ross are required to maintain and retain records "sufficient to fully and accurately document the nature, scope and details" of the health care services they provide to MaineCare members, as a condition of reimbursement. MBM Chapter I Section 1.03-3(M) (Dept. Exh. 6, at 10). Dr. Ross entered into Provider Agreements, in effect during the audit period, in which he agreed to maintain and retain records as required by Chapter I. (Dept. Exh. 27, at 2; Dept. Exh. 28, at 2.) In signing the Provider Agreements, Dr. Ross acknowledged that a failure to maintain required documentation could result in disallowance and recovery of MaineCare payments. (Dept. Exh. 27, at 3; Dept. Exh. 28, at 6.) Dr. Ross was required by rule to bill only for services actually provided. MBM Chapter I Section 1.03-3(J) (Dept. Exh. 6, at 10.) Services must be medically necessary in order to be reimbursable by MaineCare. MBM Chapter I Section 1.06-1 (Dept. Exh. 6, at 18.) The Department's Program Integrity unit based its recoupment decision on MBM Chapter I Section 1.19-1(G), breaching the terms of the MaineCare Provider Agreement and the requirements of Section 1.03-3 for provider participation (in particular Chapter I Section 1.03-3(J) and (M)) and Section 1.19-1(U), failure to repay or make arrangements to repay overpayments. (Dept. Exh. 6, at 10 and 52-53.)" See, DHHS-29.

Illegible Records

According to the Department, much of the medical documentation surveyed by the auditors was illegible. The Department argued that MaineCare policy requires that dental records be complete and legible, citing MBM Chapter II Section 25.06-1(A)(1).

According to the Department, this provision,

> ***"expressly requires that dental records must include "the essential details of the member's health condition and of each service provided...." and that "[a]ll entries must be signed, dated and legible." See, DHHS-29.***

In fact, the Department argued that the illegibility of the records amounted to 'no documentation'. The Department cited the testimony of Ms. Turner, the auditor, in support of that conclusion,

> ***"Ms. Turner testified that the lack of legible documentation was functionally equivalent to no documentation. For the purpose of verifying Dr. Ross' claims during the post-payment review, the illegible documentation served no function in discerning the service provided, the medical necessity of the service, or in the case of adults that the service was a covered service. Dr. Ross' on-hand interpretation of his illegible documentation is not a substitute for legible documentation to an auditor performing a post-payment review, just as it will not be to another dentist in possession of Dr. Ross' illegible record while subsequently treating that MaineCare member." See, DHHS-29.***

Because the Department determined that the illegible documentation resulted in 'no documentation', it determined that it was entitled to a 100% recoupment where Dr. Ross' MaineCare claims were so illegible as to provide no information regarding the medical necessity for these services or what services were delivered. Pursuant to what was formally Chapter I, §1.19-2, but is currently Chapter I, §1-20(H),

> ***Imposition of penalty due to lack of adequate documentation. When the Department proves by a preponderance of the evidence that a provider has violated MaineCare requirements because it lacks mandated records for MaineCare covered goods or services, the Department in its discretion may impose the following penalties:***
>
> > ***A penalty equal to one hundred percent (100%) recoupment of MaineCare payments for services or goods, if the provider has failed to demonstrate by a preponderance of the evidence that the disputed goods or services were medically necessary, MaineCare covered services, and actually provided to eligible MaineCare members.***

Dr. Ross argues that the Department exceeded its authority when it recouped at 100% for documentation that was determined by the Department to be illegible. According to Dr. Ross the rules reserve a 100% recoupment only when there the provider has failed to show, by a

preponderance of the evidence, that disputed goods or services were medically necessary, MaineCare covered services and actually provided to eligible MaineCare members. See, Chapter I, §1.19-2.

According to Dr. Ross, the electronic records he subsequently provided to the Department, along with his paper records, and his oral explanation at hearing reveal that, for the patients for whom a 100% recoupment was made, medically necessary MaineCare covered services were appropriately performed and appropriately billed for,

> ***"At the Formal Review Hearing that was held on July 10, 2017, in the course of Dr. Ross's testimony he referred to the charts for patients , and and he confirmed, based on his review of those charts, that the services for those patients with respect to which the Department had upheld 100% recoupments were in fact provided, that they were covered services, and that they were medically necessary.***
>
> ***To save time, the parties, through their respective counsel, stipulated that Dr. Ross would testify to exactly the same effect with regard to patients .***
> ***The Department did not stipulate that the services rendered were in fact medically necessary, but offered no testimony whatsoever to rebut Dr. Ross's offer of proof on this point.***
>
> ***Because the charges disallowed in whole by DHHS were for covered, medically necessary services actually provided by Dr. Ross's office, the recoupments in the chart above, which total $1,399.50, should be subtracted from the "overpayment" in DHHS Exhibit 4." See, Ross-110.***

There is no dispute that Dr. Ross did not provide the electronic patient records until November of 2016. There is also no dispute that the Department did not review them. At hearing, Dr. Ross requested that the hearing officer accept electronic records in regards to 100 separate patients. See, Ross-1 through Ross-100. The hearing officer had not been provided any notice that this request would be made. The hearing officer, compelled by time restraints, admitted them into the record over the objection of the Department. The hearing officer counseled the Department that it should argue how much evidentiary weight, if any the hearing officer should provide these records.

Dr. Ross argues that the hearing officer may review the electronic records as part of her decision making process, even if the Department chose not to review them, because the hearing officers' review is 'de novo',

> ***"Janie Turner testified that the Department refused to consider the electronic Patient Charts solely because they were offered after the close of the informal review process DHHS conducted. For the same reason the Department, presumably relying in part on the MaineCare rules, argues that Dr. Ross waived any right to present at the formal review hearing evidence which he failed to present at an earlier stage of the case.***

If this were an appellate proceeding the Department's position might have some merit. The Legislature has explicitly said, however, that this proceeding is de novo. 22 M.R.S.A. §42(7). "'De novo' is defined as 'anew, afresh: over again (a case tried de novo).'" H & H Oil Co. v. Dineen, 557 A.2d 604, 605 (Me. 1989) (quoting Webster's Third New International Dictionary, at 602 (1981)). The Law Court has explained:

> *When [an agency of government] holds a hearing de novo, it does not examine evidence presented to the decision maker or tribunal below, nor does it review the procedure below except to assure that the matter is properly before it. Instead, it looks at the substantive issues afresh, undertakes its own credibility determinations, evaluates the evidence presented, and draws its own conclusions. Thus, in the absence of an explicit ordinance creating a purely appellate review by the [agency], the function of the [agency] is to take evidence, make factual findings, and apply the laws and ordinances to the petition or application at issue, and to do so independently of the decision, if any, of a lower tribunal. Stewart v. Town of Sedgwick, 2000 ME 157, ¶ 7, 757 A.2d 773, 776.*

In short, whatever happened between Dr. Ross and DHHS before July 10, 2017 is immaterial. Insofar as this proceeding is concerned, it simply makes no difference whether Dr. Ross submitted all the evidence he should have submitted as soon as it was requested by DHHS. All that matters is what is before the Hearing Officer now." See, Ross-110.

The hearing officer has determined that the Department was correct when it established a 100% recoupment for the records that were illegible. The hearing officer agrees with the Department that the illegibility of the records rendered them indecipherable and hence did not reveal what services were provided and whether the services were medical necessary.

While the hearing officer agrees that her review is 'de novo', she does not agree that her review of the electronic records, when the Department did not review them, is permissible. Dr. Ross argues that the Department had the opportunity to review the electronic records and merely decided against doing so. However, Dr. Ross did not provide the electronic records until after the informal review. The evidence does show that the electronic records were in existence prior to the informal review. According to the MaineCare Benefits Manual, an appeal of an informal review "will be limited only to those issues raised during the informal process". See, Chapter I, §1.21(A). Therefore, the hearing officer is barred from reviewing the electronic records when the Department did not review them or cite them in the informal review.

In addition, while Dr. Ross testified at hearing as to several patients in this category (and was permitted to make an offer of proof in regards to others (See Ross-112)), the fact that, in order for the records to be legible required not only the review of the electronic records and his explanation, reveals that the documents submitted by Dr. Ross for the audit were deficient and violated both Chapter II, §25.06-1(A) and the MaineCare Provider Agreement. See, DHHS-28. According to the most recent agreement entered into by Dr. Ross and the Department requires that,

The Provider will maintain in a systematic and orderly manner, medical and financial records that are necessary to document full the extent, nature and cost of the services provided to Members receiving assistance under this Agreement, as required by the MBM an applicable professional standards. The records must be maintained in the form, if any, required by the Department. See, DHHS-28.

Lack of Required Signature

The Department determined that a 20% recoupment was appropriate where documentation lacked Dr. Ross' signature. According to the Department, while the lack of a signature violated the MaineCare Benefits Manual, a 20% recoupment was appropriate because the documentation did establish that a medically necessary MaineCare-covered service has been performed.

According to the Department,

> *"Significant documentation by Dr. Ross lacks the signatures that are required by MBM Chapter II Section 25.06-1(A)(1). Ms. Turner testified that without the signature, the Department lacks documentation of who performed the service and any verification by the actual provider of the service, the medical necessity of the service and that the provider was working within the scope of his or her license. Ms. Turner said that she nevertheless made assumptions at the time of audit from differences in handwriting as to who provided a service but that she since had become unsure those assumptions were correct." See, DHHS-29.*

The Department argues it was correct when it did not review the electronic records because Dr. Ross failed to provide them in a timely manner. In addition, the Department argues that the electronic records do not satisfy the rules because they were not integrated with the paper records, the records do not correctly identify the provider (Dr. Ross v. Ms. Leavitt, the dental hygienist). In anticipation of Dr. Ross' argument that the electronic records contains the requisite electronic signature, the Department argues that the electronic records submitted by Dr. Ross do not meet the requirements of the MaineCare Benefits Manual,

> *"the electronic records which Dr. Ross maintains are electronic signatures do not qualify for recognition by the Department as electronic signatures. The Department requires by rule that electronic records have specific safeguards and security measures in place such as passwords and that entries be noted by individual, date and time. A signature of record must be on file. MBM Chapter I Section 1.03-3(M). While Dr. Ross introduced oral evidence of a password requirement, Ms. Turner said the Department had not determined that the system had a password requirement or other security to ensure the validity of an electronic signature. No time is recorded on entries, and Dr. Ross never maintained that his office filed a signature on record." See, DHHS-29.*

Dr. Ross asserts that the electronic signature contained in the electronic records does qualify under the rules and regulations,

> *"The lion's share of the penalty DHHS proposes to levy against Dr. Ross is based on his alleged violation of the MaineCare Benefits Manual's requirement that all entries in a dental patient's chart be "signed, dated, and legible." Code Me. R. tit. 10-144 Ch. 101, Ch. II, §25.06-1 (DHHS Exhibit 8, at p. 32). See also id. §1.03-3(M) (DHHS Exhibit 6, at p. 10). ("Records must include, but are not limited to all required signatures . . . ."). That language plainly does not mean, however, that a provider must sign his or her entries in cursive script on a paper document. To the contrary, DHHS was required to accept Dr. Ross's electronic signature as the equivalent of a handwritten, paper signature.*
>
> *This is so because Maine has adopted the Uniform Electronic Transactions Act (UETA). The UETA provides, inter alia, that:*
>
> > *"An electronic record or electronic signature may not be denied legal effect or enforceability solely because it is in electronic form," and*
> >
> > *"If a law requires a signature, an electronic signature satisfies the law."*
>
> *10 M.R.S.A. §9407(1) & (4).*
>
> *Under the UETA, the term "electronic signature" means "an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." Me. Rev. Stat. tit. 10, § 9402(8). Thus, the UETA has been interpreted as validating a digital signature on a physician's report under the Social Security Act, where the signature appeared "in typed format at the bottom of the report." The court explained:*
>
> *Digital signatures are commonplace at this time, and often take the place of an ink signature. Indeed, the court takes judicial notice of its own CM/ECF procedures where important judicial documents, even the present motions before the undersigned, are accompanied by a /s/ or other type of digital signature. Johnson v. Astrue, 2009 WL 1748790, at *3 (E.D. Cal. June 18, 2009)(sic)*
>
> *The MaineCare Benefits Manual likewise expressly authorizes MaineCare providers to "sign" records electronically. The Manual provides, for example, that as long as a provider has (1) "safeguards and security measures in place that allow only authorized persons to enter information into electronic records," and (2) "[p]asswords or other secure means of authorization . . . that will identify the individual and the date and time of entry," "[s]uch identification will be accepted as an electronic 'signature.'"*
>
> *Notably, the rule in the MaineCare Benefits Manual which defines an acceptable electronic signature does not purport to be exclusive. In other words, the rule*

says what will "be accepted as an electronic 'signature.'" It does not say that any electronic signature which does not perfectly comply with the rule is necessarily deficient. Indeed, the MaineCare Manual could not limit the effectiveness of a signature, since "a regulation may not be interpreted in a manner that would make it inconsistent with the governing statute." Palmer v. Bath Iron Works Corp., 559 A.2d 340, 342 (Me. 1989). Because the Maine Legislature has enacted a law which contains a broad definition of "electronic signature," and has said that "if a law requires a signature, an electronic signature [as defined in the UETA] satisfies the law," DHHS could not defy the Legislature by enacting a more restrictive rule.

Furthermore, there is nothing in the law which explicitly requires that the person who "signs" an entry in a dental (or other electronic) record be the person who actually performed the service described in that entry. Where the evidence demonstrates that one provider witnessed or assisted another who actually provided the service, there is nothing to prevent the person who witnessed or assisted from originating the "symbol or process" that constitutes an "electronic signature" under the UETA. 10 M.R.S.A. §9402(8). Thus, it was permissible for Maureen Leavitt to make entries in the "Patient Chart" to record the fact that Dr. Ross had completed periodic evaluations, which she witnessed. Because Ms. Leavitt's digital "symbol or process" was "attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record," id., it satisfies the requirements of the law." See, Ross-110.

The hearing officer agrees with the Department that any 'electronic signature' that Dr. Ross used does not meet the specifications of the MaineCare Benefits Manual. According to Chapter I, §1.03-3(N), providers must adhere to certain requirements when using an electronic signature. The Department is correct that the electronic records do not necessarily identify the correct individual (there is no dispute that Dr. Ross examined the patient at the Dental Hygienist's work station), that the Department has no such signature on file, and there is no time indicated on the records. See Ross-1 through Ross-100. The regulation obligates the provider to,

> *Have safeguards and security measures in place that allow only authorized persons to enter information into electronic records. Passwords or other secure means of authorization must be used that will identify the individual and the date and time of entry. Such identification will be accepted as an electronic "signature." With security measures in place, limited access may be allowed for certain individuals for changes such as member demographic information. There shall be a signature of record on file.*

Other Billing Issues

The Department also asserted that it was correct for its recoupment for inaccurate billing for services, or billing for services already included as part of the reimbursement rate. According to the Department, MaineCare policy that regulates dental services prohibits billing separately for certain services. According to the Department, the survey of Dr. Ross' documentation

revealed that he had violated the MaineCare rules, when he erroneously billed separately for certain procedures,

> *"MaineCare rules did not provide for separate payment for oral hygiene instruction when billing for a prophylaxis. (Dept. Exh. 18.) The prophylaxis includes oral hygiene instruction. Payment was not provided for more than one pin in the same tooth (Dept. Exh. 17.) ; nor for a pulpotomy in conjunction with a root canal (Dept. Exh. 16.) ; nor for a sedative filling in conjunction with a pulpotomy (Dept. Exh. 19.) ; nor for radiographs when they are included in the rate for endodontic therapy (Dept. Exh. 25A) .*
>
> *Erroneous billings or billings for services not performed included a billing for a service not performed on the specified date (Dept. Exh. 20); billing for a tooth not the subject of the record (Dept. Exh. 20 and 24); billing for an oral examination that was not completed (Dept. Exh. 26), and billing for a fluoride treatment not performed (Dept. Exh. 15).*
>
> *Some billings lacked a documentation of medical necessity. These included the repetitive treatment for a tooth and for a refilling of a tooth because of a bleaching (Dept. Exh. 22), and an adult dental service that did not demonstrate urgency (Dept. Exh. 23)." See, DHHS-29.*

Dr. Ross argues that the Department has already recouped these funds,

> *"DHHS proposes to recoup several charges, each in the amount of $13.00, for oral hygiene instructions (Code D1330) because those instructions are not separately billable if given on the same day as prophylaxis. DHHS seeks to recoup those payments for the following patients on the following dates (lists patients totaling $325.00). These payments have already been recouped. Therefore, DHHS is barred from recouping them again, and from "extrapolating" additional overpayments for the same services.*
>
> *The testimony of Dr. Ross, Maureen Leavitt, and Jenny Hebert establishes the following:*
>
> > *DHHS previously identified overpayments which resulted from Dr. Ross's office billing for oral hygiene instructions given on the same day as prophylaxis.*
> >
> > *As soon as the billing error was identified, Dr. Ross's office stopped billing MaineCare for oral hygiene instructions.*
> >
> > *When the overpayments were identified Dr. Ross was given the choice of cutting a check to DHHS or having the amount of the overpayments subtracted from future payments.*

Dr. Ross chose to have DHHS recoup the overpayments from future payments.

DHHS did in fact recoup the overpayment in full.

Neither DHHS nor Dr. Ross has been able to produce a record of the earlier overpayment and recoupment. The testimony of Dr. Ross and his staff, though, is consistent, credible, and uncontradicted. Accordingly, the recoupments that DHHS proposes to make on account of oral hygiene instructions having been given on the same date as prophylaxis, which total $325.00, should be subtracted from the "overpayment" identified in DHHS Exhibit 4." See, Ross-110.

Dr. Ross also argued that he has met his burden of establishing that MaineCare-covered fluoride treatments which were not recorded in the paper chart were in fact performed,

"DHHS proposes to recoup payments it made for fluoride treatments which are not reflected in the paper record created by Dr. Ross's office. Maureen Leavitt testified, however, that fluoride treatments for several patients, although not documented in the paper record, were actually provided and were recorded in the electronic Patient Chart. Ms. Leavitt testified that this was true for the following patients (lists patients). Because the fluoride treatments listed above were actually provided and are documented in the electronic Patient Charts, the recoupments that DHHS proposes to make because they were not documented in the paper record, which total $60.00, should be subtracted from the "overpayment" identified in DHHS Exhibit 4." See, Ross-110.

Here, again Dr. Ross relies upon the electronic records not reviewed by the Department and the testimony at hearing to repair the deficiencies in his records. The hearing officer reiterates her determination that the review of Dr. Ross' records by the Department does not require review of documentation not submitted for the informal review as well as oral testimony. According to Chapter I, §1.18, the Office of Program Integrity is charged with assuring that providers adhere to the requirements of both its provider agreement and the MaineCare Benefits Manual. Both require that documents be legible and comprehensive. The hearing officer agrees that, at the time of the informal review, the Department was correct when it determined that the documents were deficient,

The Department and its professional advisors regard the maintenance of adequate clinical and other required financial and product-related records as essential for the delivery of quality care. In addition, providers should be aware that comprehensive records, including but not limited to: treatment/service plans, progress notes, product and/or service order forms, invoices, and documentation of delivery of services and/or products provided are key documents for post-payment reviews. In the absence of proper and comprehensive records, no payment will be made and/or payments previously made may be recouped. See, Chapter I, §1.18, MaineCare Benefits Manual.

Whether DHHS violated its own rules and statute in the sanctioning of Dr. Ross

On September 14, 2017, the hearing officer re-opened the record, in response to an argument asserted by Dr. Ross. The hearing officer directed parties to provide arguments as to whether the Department, in assessing the sanction against Dr. Ross, was required to assess specific factors.

According to the hearing officer's letter, Attorney Taintor had alleged in his closing argument that the Department did not follow the rules regarding the imposition of sanctions. Specifically Dr. Ross alleges that the Department did not follow the requirements under Ch. I, §1.19-3, MaineCare Benefits Manual. According to that rule,

> ***The decision to impose a sanction shall be the responsibility of the Commissioner of the Department of Health and Human Services, who may delegate sanction responsibilities to the Division of Audit, and the Director of MaineCare Services.***
>
> ***The following factors may be considered in determining the sanction(s) to be imposed:***
>
> *a. Seriousness of the offense(s);*
> *b. Extent of violation(s);*
> *c. History of prior violation(s);*
> *d. Prior imposition of sanction(s);*
> *e. Prior provision of provider education;*
> *f. Provider willingness to obey MaineCare rules;*
> *g. Whether a lesser sanction will be sufficient to remedy the problem; and*
> *h. Actions taken or recommended by peer review groups, other payors, or licensing boards.*

In his closing argument, Dr. Ross provided a partial transcript of Ms. Turner's testimony. Dr. Ross asserts that Ms. Turner's testimony evidences that she did not assess the factors as outlined under the rule, and therefore the sanction was invalid,

> ***"CT: . . . You said earlier that when you would have a record keeping issue that did not go to the issue of either coverage or medical necessity, you would recoup 20%?***
> ***JT: Yes.***
> ***CT: But 20% is not an automatic recoupment under the rules for poor record keeping is it? It's the maximum, right?***
> ***JT: It's what's in policy – I do know that on occasion there has been a lower amount but that's not anything that I would (inaudible).***

CT: What do you mean what's in policy?
JT: What?
CT: What do you mean when you say it's in policy? Is it written down somewhere?
JT: Yes, Mr. Bradley read it when we talked about the 20% penalty and the 100% recoupment, it's in Chapter 1.
CT: Okay let's take a look at that
JT: I think it's around 1.17 or 18.
CT: So, if you look at DHHS Exhibit 6, page 55
JT: Page 55 – I'm there
CT: . . . . Up at the top of the page, it says 1.19, Sanctions/Recoupments, continued.
JT: Yes.
CT: And those are the sections you are talking about that you testified about earlier with Mr. Bradley sub-sections G1 and 2.
JT: Yes.
CT: G2 doesn't say that the penalty shall be 20% if the provider is able to demonstrate medical necessity, covered services and eligibility, it says penalty not to exceed 20%.
JT: Correct.
CT: So you're not locked into 20%, right?
JT: It's what we usually do in our office – 20% and 100% - but as I said it has been known to be negotiated (inaudible).
CT: Who says that's what you usually do? Has there been . . . .
JT: I've been there 10 years.
CT: Has there been some edict from Denise Osgood (sic)
JT: No (sic)
CT: or from Herb Downs?
JT: No, we pretty much go with 20% and 100% - what's in the policy. And I see what you are saying that is says cannot exceed
CT: Okay (sic)
JT: So, it could be lower – I can't speak for other people, but my initial reviews are the 20 and 100 percent. I can't recall not doing that." See, Ross-110.

The hearing officer provided the parties until September 29, 2017 to provide written arguments. The arguments were received and the record was closed. Dr. Ross argued that the rules require that the Department assess the factors,

> *"As a starting point in the analysis of this question, the Hearing Officer should recognize that administrative agencies cannot exercise unfettered discretion to do whatever they think makes sense. Agencies are creatures of statute, and can do no more than the Legislature expressly empowers them to do.*
>
> *As a general proposition, moreover, when the Legislature delegates power to a state agency it must convey "'sufficient standards specific or generalized, explicit or implicit, to guide the agency in its exercise of authority, so that (1) regulation can proceed in accordance with basic policy determinations made by those who*

represent the electorate and (2) some safeguard is provided to assist in preventing arbitrariness in the exercise of power." Maine Sch. Admin. Dist. No. 15 v. Raynolds, 413 A.2d 523, 529 (Me. 1980). "The legislature has provided an administrative agency with adequate standards to guide its decisionmaking when 'the legislation clearly reveals the purpose to be served by the regulations, explicitly defines what can be regulated for that purpose, and suggests the appropriate degree of regulation.'" Northeast Occupational Exch., Inc. v. State, 540 A.2d 1115, 1116-17 (Me. 1988) (quoting Lewis v. State Dept. of Human Services, 433 A.2d 743, 748 (Me.1981)).

It is a well-established principle, constitutionally mandated, that in delegating power to an administrative agency, the legislative body must spell out its policies in sufficient detail to furnish a guide which will enable those to whom the law is to be applied to reasonably determine their rights thereunder, and so that the determination of those rights will not be left to the purely arbitrary discretion of the administrator.

Fitanides v. Crowley, 467 A.2d 168, 172 (Me. 1983) (citing Stucki v. Plavin, 291 A.2d 508, 510 (Me.1972)).

> *When the legislature fails to establish standards to govern agency action, "administrative officers [should] articulate the standards and principles that govern their discretionary decisions in as much detail as possible." Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C.Cir.1971). See SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) ("The function of filling in the interstices of the [governing statute] should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."). This is "no less than a matter of due process." Lower Main Street Assocs. v. New Jersey Housing and Mortgage Finance Agency, 553 A.2d 798 (N.J. 1989). "'[D]ue process means that administrators must do what they can to structure and confine their discretionary powers through safeguards, standards, principles and rules.' . . . This principle employs no balancing approach but simply holds that due process requires some standards, both substantive and procedural, to control agency discretion." Crema v. New Jersey Dep't of Envtl. Protection, 463 A.2d 910, 918 (N.J 1983) (quoting Historic Green Springs, Inc. v. Bergland, 497 F.Supp. 839, 854 (E.D.Va. 1980)).*

Here, the Maine Legislature has supplied only one specific "standard" to govern the assessment of a financial penalty for deficient record-keeping by a MaineCare provider. It has said that "[t]otal recoupment for defective records is warranted only when the provider has failed to demonstrate by a preponderance of the evidence that the disputed goods or services were medically necessary, MaineCare-covered goods or services and were actually provided to eligible MaineCare members." 22 M.R.S.A. §42(7)(H). Because the Legislature did not say anything about how DHHS should calculate penalties between 0 and 100%, an argument might plausibly be made that the statutory guidance is insufficient, and

the law therefore invalid, under the principles established in the cases cited above. Dr. Ross does not make that argument, however, because the Department itself has supplied the standards necessary to prevent its action from being truly arbitrary. The standards are the ones set forth in Ch. I, §1.19-3 of the MaineCare Benefits Manual.

In short, the entire administrative scheme is valid if, but only if, the Department is obligated to apply the criteria established by rule. If DHHS is not required to apply the standards the Department itself has adopted, the "determination of [Dr. Ross's] rights" would be "left to the purely arbitrary discretion of the administrator," which the Law Court has said is impermissible. See Fitanides v. Crowley, supra." See, Ross-111.

Dr. Ross argues too that it was Ms. Turner who was responsible for the decision regarding the sanction and Herbert Downs merely signed off on it. Dr. Ross argues that this violates the rule regarding the informal review since Ms. Turner was responsible for the audit decision, and apparently was responsible for the informal review as well,

"The MaineCare rules mandate that when a provider appeals from a decision penalizing him or recouping alleged overpayments, an informal review "will be conducted by the Director of MaineCare Services, or other designated Department representative who was not involved in the decision under review." Code Me. R. tit. 10-144 Ch. 101, §1.21-1 (DHHS Exhibit 6 at p. 64). That did not happen in Dr. Ross's case – or at least there is no evidence that it did, and there is lots of evidence that it did not." See, Ross-111.

The Department, for its part, argues that the Department has the discretion to apply the factors, but are not required to. The Department does concede that the record in this case does not establish whether the factors were applied by Herbert Downs, who would have reviewed Ms. Turner's work and issued the Informal Review. The Department also argues that the hearing officer has the discretion to recommend to the Commissioner that these factors be considered in evaluating the Department's determination. The Department then goes on to summarize how these factors, if applied, would have resulted in the same outcome,

"In this respect, the Hearing Officer may consider the evidence that Dr. Ross failed to sign medical records for numerous patients, going to the extensiveness of the violation; that testimony at hearing raised cause for concern about the extent to which Dr. Ross or his hygienist provided certain services, pertinent to the seriousness of the violation; that Dr. Ross' record-keeping was a prior concern to his licensing board, going to his history of record-keeping issues generally; that Dr. Ross was required to enroll in and did in fact receive the benefit of an educational course on record-keeping required by his licensing board, going to the prior provision of provider education; and that Dr. Ross has continued to shift responsibility for his noncompliance with MaineCare rules onto the Department, relevant to his willingness to obey MaineCare rules." See, DHHS-30.

The hearing officer agrees that the use of the factors is discretionary. In fact, the rule states, "The following factors may be considered in determining the sanctions". See, Chapter I, §1.19-3, MaineCare Benefits Manual (emphasis added). The hearing officer also finds that the record does not contain any evidence as to whether Mr. Downs reviewed the factors when he issued the Informal Review. In addition, there is no evidence to support Dr. Ross' contention that Mr. Downs merely signed off on Ms. Turner's audit, as there is no evidence of what was considered or not considered by Mr. Downs.

Availability of an Equitable Estoppel defense against the Department's recoupment claim

Dr. Ross finally argues that the Department should be 'equitably estopped' from arguing that 'the completion of a legally-defective informal review process bars Dr. Ross from presenting new, probative evidence',

> ***"It is both hypocritical and fundamentally unfair for DHHS to take the position that it can ignore the requirements of the informal review process while it penalizes Dr. Ross, a pro se litigant, for his failure to understand that his paper records would be insufficient to satisfy the Department's needs. Arguably, the Department's failure to perform the independent, unbiased review it was required by law to perform means that no "informal review," as that term is defined in the law, has even occurred."***

In accordance with the Department's administrative hearings regulations, the Hearing Officer has limited authority to address equitable estoppel issues. *See* 10-144 C.M.R. Ch. 1, § VII (B)(6). The "doctrine of equitable estoppel may prevent a government entity from discharging governmental functions or asserting rights against a party who detrimentally relies on statements or conduct of a government agency or official." *State v. Brown*, 2014 ME 79, ¶14, 95 A.3d 82, 87. However, equitable estoppel "should be carefully and sparingly applied, especially where application would have an adverse impact on the public fisc." *Mrs. T. v. Comm'r of Dep't of Health and Human Servs.*, 2012 ME 13, ¶10, 36 A.3d 888, 891 (*citation omitted*). "To prove equitable estoppel against a governmental entity, the party asserting it must demonstrate that (1) the statements or conduct of the governmental official or agency induced the party to act; (2) the reliance was detrimental; and (3) the reliance was reasonable." *Dep't of Health and Human Servs. v. Pelletier*, 2009 ME 11, ¶17, 964 A.2d 630, 635. *See also Mrs. T.*, 2012 ME 13, ¶9, 36 A.3d at 891 (party asserting equitable estoppel defense has the burden of proof). "Equitable estoppel requires misrepresentations, including misleading statements, conduct, or silence, that induce detrimental reliance." *Dep't of Human Servs. v. Bell*, 1998 ME 123, ¶8, 711 A.2d 1292, 1295. The "totality of the circumstances, including the nature of the government official or agency whose actions provide the basis for the claim and the governmental function being discharged by that official or agency" must be considered in determining whether governmental action should be equitably estopped. *Pelletier*, 2009 ME 11, ¶17, 964 A.2d at 636.

"Equitable estoppel based on a party's silence will only be applied when it is shown by clear and satisfactory proof that the party was silent when he had a duty to speak." *Bell*, 1998 ME 123, ¶8, 711 A.2d at 1295 (*citation omitted*). "Clear and satisfactory proof means clear and

convincing proof." *Littlefield v. Adler*, 676 A.2d 940, 942 (Me. 1996). The requirement of "clear and convincing evidence" is "an intermediate standard of proof lying between the preponderance and the reasonable doubt standards," where "[t]he factfinder must be persuaded, on the basis of all the evidence, that the moving party has proved his factual allegations to be true to a high probability." *Taylor v. Comm'r of Mental Health and Mental Retardation*, 481 A.2d 139, 154 (Me. 1984).

The hearing officer has determined that the criteria for equitable estoppel have not been met. There was no inducement to act by the Department, nor is there evidence that Dr. Ross relied to his detriment on the Department's alleged failure to inform Dr. Ross that he should have provided the electronic records prior to the informal review.

In addition, the hearing officer has determined that she does not have to make the determination as to whether equitable estoppel applies in this case, because the hearing officer does not find that the Department's action was in violation of its own rules, nor does the hearing officer find that the Department failed to conduct an independent informal review in this case.

In summary, the hearing officer recommends that the Commissioner determine that the Department was correct when it determined for the review period from 2/1/2008 through 12/31/2012, Bruce Ross, DMD breached the terms of the MaineCare Provider/Supplier Agreement, and/or the requirements of Section 1.03-3 for provider participation, as specified in the Final Informal Review Decision dated August 9, 2016, resulting in a recoupment of $173,536.88 owed to the Department.

MANUAL CITATIONS

- DHHS Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § VII (2014)
- MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101 (2014).

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: Oct. 27, 2017

Miranda Benedict, Esq.
Administrative Hearing Officer

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