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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IN THE MATTER OF:

Catherine Bunin-Stevenson, DMD)
93 Churchill Street) **FINAL DECISION**
Wiscasset, ME 04578)

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

The Recommended Decision of Hearing Officer Thackeray, mailed June 11, 2018 has been reviewed.

I hereby adopt the findings of fact and I accept the Recommendation of the Hearing Officer that for the review period of 1/1/2014 to 11/30/2015, the Department has correctly established and maintains a recoupment claim against Catherine Bunin-Stevenson, DMD, d/b/a Wiscasset Dental, PC, and Wiscasset Dental, LLC, in the amount of $14,410.84.

DATED: 8/10/18 SIGNED: Ricker Hamilton

RICKER HAMILTON, 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: Thomas Bradley, AAG, Office of the Attorney General
Janie Turner, DHHS/Program Integrity

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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Date Mailed: JUN 11 2018

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

In the Matter of:
Catherine Bunin-Stevenson, DMD
d/b/a Wiscasset Dental

NPI ID Nos. 1487070157
1568503977

ADMINISTRATIVE HEARING RECOMMENDED DECISION

An administrative hearing was convened in the above-captioned matter on March 5, 2018, before Hearing Officer Richard W. Thackeray, Jr., at Rockland, 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 record was left open through April 16, 2018, to allow submission of written closing arguments / post-hearing briefs.

Pursuant to an Order of Reference dated November 13, 2017, the issue presented *de novo* for hearing was whether the Maine Department of Health and Human Services ["Department"] was "correct when it determined that for the review period of 1/1/2014 through 11/30/2015, it determined that Catherine Bunin-Stevenson, DMD owes the department $14,488.80 for violations of the MaineCare Benefits Manual due to missing/inadequate documentation; Urgent Care guidelines not being met; inappropriate billing of x-rays; missing tooth numbers; repetitive/continuous billing of same service; exceeding limits; and dates of service not corresponding with documentation?" Ex. D-1.

APPEARING ON BEHALF OF THE APPELLANT

- Catherine Bunin-Stevenson, DMD, Esq.
- Lisa Simpson

APPEARING ON BEHALF OF THE DEPARTMENT

- Thomas C. Bradley, AAG
- Janie Turner

ITEMS INTRODUCED INTO EVIDENCE

Hearing Officer Exhibits

HO-1 "Notice of Hearing," dated November 15, 2017
HO-2 "Fair Hearing Report Form," dated October 30, 2017

Department Exhibits

D-1 "Order of Reference," dated November 13, 2017
D-2 "Notice of Violation," dated February 17, 2017
D-3 "Informal Review Request," dated April 20, 2017
D-4 "Final Informal Review Decision," dated August 25, 2017
D-5 "Hearing Request," effective date October 18, 2017
D-6 "Final Rule – Gen. Admin. Policies and Proc.," MaineCare Bens. Man., 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1 (eff. Jan. 1, 2014)
D-7 Final Rule, "Dental Services," MaineCare Bens. Man., 10-144 C.M.R. Ch. 101, sub-Chs. II & III, § 25 (eff. July 1, 2014)
D-8 Final Rule, "Dental Services," MaineCare Bens. Man., 10-144 C.M.R. Ch. 101, sub-Ch. II & III, § 25 (eff. Aug. 9, 2014)
D-9 "Treatment Records," Member
D-10 "Treatment Records," Member
D-11 "Treatment Records," Member
D-12 "Treatment Records," Member
D-13 "Treatment Records," Member
D-14 "Treatment Records," Membe
D-15 "Treatment Records," Member
D-16 "Treatment Records," Member
D-17 "Treatment Records," Member
D-18 "Treatment Records," Member
D-19 "Treatment Records," Membe
D-20 "Treatment Records," Member
D-21 "Treatment Records," Member
D-22 "Treatment Records," Member
D-23 "MaineCare/Medicaid Provider Agreement," dated April 30, 2014
D-24 "Post-Hearing Brief / Closing Argument," dated April 17, 2018

Appellant Exhibits

A-1 "Order of Reference," dated November 13, 2017 (**not admitted** / duplicative of Ex. D-1)
A-2 < blank >
A-3 "Email Correspondence," dated March 10, 2010 to March 17, 2010
A-4 Excerpt, "Dental Services," MaineCare Bens. Man., 10-144 C.M.R. Ch. 101, sub-Ch. III, § 25 (eff. July 1, 2014) (**not admitted** / duplicative of Ex. D-7)
A-5 "Composite Crowns – Information Sheet" (no date or source provided)
A-6 "Treatment Records," Member
A-7 "Treatment Records," Member
A-8 "Treatment Records," Member
A-9 < blank >
A-10 "Treatment Records," Member
A-11 "Treatment Records," Member

A-12 "Treatment Records," Member
A-13 "Treatment Records," Member
A-14 "Treatment Records," Member
A-15 "Treatment Records," Member
A-16 "Treatment Records," Member
A-17 "Treatment Records," Member
A-18 "Treatment Records," Member
A-19 "Treatment Records," Member
A-20 "Treatment Records," Member
A-21 "Treatment Records," Member
A-22 < blank >
A-23 < blank >
A-24 "Post-Hearing Brief," dated April 13, 2018

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 "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, § 1.03-8 (S). Enrolled providers must also maintain 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, § 1.03-8 (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 assess the quality of 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 including:

- 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 1.03-8 for provider participation;
- Over utilizing MaineCare by inducing, furnishing, or otherwise causing a member to receive service(s) or merchandise not otherwise required or requested by the member;
- Failure to meet standards required by State and Federal law for participation (e.g. licensure or certification requirements). ...

MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.20-1.

The Department bears the initial burden to prove "by a preponderance of evidence that a provider has violated MaineCare requirements because it lacks mandated records for MaineCare covered goods or services." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.19-2 (H). Once that threshold proof has been made, the Department is afforded discretion to recoup a penalty. The scope of that penalty, however, is limited by the degree to which the provider is able to demonstrate that the billed services were medically necessary, MaineCare covered services, and actually provided to eligible MaineCare members. *Id.* The regulations provide that, "[w]hen 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:

1. 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.
2. A penalty not to exceed twenty-percent (20%), if the provider is able 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. The penalty will be applied against each MaineCare payment associated with the missing mandated records.

10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.19-2 (H).

To investigate and establish a Section 1.19 sanction, the Department may employ "surveillance and referral activities that may include, but are not limited to:

A. a continuous sampling review of the utilization of care and services for which payment is claimed;

B. an on-going sample evaluation of the necessity, quality, quantity and timeliness of the services provided to members;

C. an extrapolation from a random sampling of claims submitted by a provider and paid by MaineCare;

D. a post-payment review that may consist of member utilization profiles, provider services profiles, claims, all pertinent professional and financial records, and information received from other sources;

E. the implementation of the Restriction Plans (described in Chapter IV of this Manual);

F. referral to appropriate licensing boards or registries as necessary; and

G. referral to the Maine Attorney General's Office, Healthcare Crimes Unit, for those cases where fraudulent activity is suspected.

H. a determination whether to suspend payments to a provider based upon a credible allegation of fraud.

10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.18.

RECOMMENDED FINDINGS OF FACT

1. In accordance with agency rules, the Catherine Bunin-Stevenson, DMD ["Dr. Stevenson"] was properly notified of the time, date, and location of the immediate proceeding.

2. For the period from January 1, 2014 to November 30, 2015, Dr. Stevenson provided dental services for MaineCare-eligible individuals either individually or as a partner and/or principal with Wiscasset Dental, PC, also known as Wiscasset Dental, LLC.

3. Effective April 30, 2014, Dr. Stevenson entered into a "Medicaid/Maine Health Program Provider/Supplier Agreement" with the Department, d/b/a Wiscasset Dental, PC, pursuant to which Dr. Stevenson's practice was able to continue receiving reimbursement from the Department for provision of covered dental and related services to enrolled members of the MaineCare program. Ex. D-23.

4. On or about January 7, 2016, the Department initiated a post-payment review of the billing claims and associated patient records for 22 identified MaineCare members who received dental services from Dr. Stevenson between January 1, 2014 and November 30, 2015.

5. On February 17, 2017, the Department issued a "Notice of Violation" against Dr. Stevenson, in which it alleged a total overpayment claim in the amount of $15,607.00, based on all violations identified for sanction by the Department within the reviewed records of the 22 identified MaineCare members. Each of the sanctioned violations were identified as being within one of the following categories:

- Missing / Inadequate Documentation

- Documentation did not reflect the presence of Adult Urgent Care guidelines
- Inappropriate billing of x-rays, based on the absence of interpretation/results in the x-ray documentation
- Documentation did not reflect tooth numbers on respective claim forms
- Repetitive or continuous billing of the same service
- Exceeding limits
- Dates of service billed did not correspond to documentation dates

Ex. D-2.

6. On April 21, 2017, Dr. Stevenson timely requested an informal review of the Department's "Notice of Violation," and more specifically alleged the following in response:

- Cases were mistakenly identified as missing documentation where patient records included the required documentation;
- Cases mistakenly identified as missing treatment plans did, in fact, have treatment plans;
- Documentation of patient-reported pain, in some instances, was listed on records with different dates than those identified by the Department, and using different notations than the reviewer may have been authorized to recognize;
- Alleged discrepancies between documentation and billing dates were mistakenly identified;
- Numerous, specific line-items identified on the Departmental spreadsheet as being sanctionable due to failure to meet adult urgent care guidelines were annotated by Dr. Stevenson as "agree"

Ex. D-3.

7. On August 25, 2017, the Department issued a "Final Informal Review Decision" against Dr. Stevenson, reflecting responses to the arguments raised by Dr. Stevenson in the "Request for Informal Review," dated April 21, 2017. The Department revised its findings with respect to several identified claims, and found that total overpayments were lower than the amount specified in the April 21, 2017 Notice of Violation. Accepted arguments from Dr. Stevenson all fell within the category of x-ray / radiograph documentation, or other documentation details that had been neglected during the initial post-payment review. The Department identified a recalculated recoupment claim amount of $14,488.80. Ex. D-4.

8. On October 18, 2017, Dr. Stevenson timely requested an administrative hearing. Ex. D-5.

9. After the parties presented their cases-in-chief at hearing, the Department stipulated to a reduction in the amount of its final recoupment demand to $14,410.84. Ex. D-24.

10. On March 17, 2010, Wiscasset Dental administrator Paula Jones sought the following email clarification from Dawn Sevigny, from the Department's Office of MaineCare services, as to the correct procedure for Wiscasset Dental to advise adult MaineCare members:

> If I understood you correctly, we are able to treat Mainecare adults on an emergency basis to erridicate (sic) pain and prevent imminent tooth loss without needing a referral from their PCP prior to seeing our dentist for examination, xrays and treatment. Furthermore, I understood from our conversation that when we exam an Adult Mainecare patient and we find that the patient's pain is steming (sic) from the need for 1) a Root Canal and/or 2) Extraction(s) and/or 3 fillings of cavities IN ORDER TO ERRIDICATE (sic) PAIN AND PREVENT IMMINENT TOOTH LOSS, we can schedule these as multiple visits, if needed, without worry that Mainecare will not cover our claims – as long as we are following the protocol as listed in the Mainecare Benefit Manual as of 1/1/2010. AND that PreAuthorizations are not required for a Root Canal.

Ex. A-3.

11. On March 17, 2010, Dawn Sevigny provided the following reply to Paula Jones's March 17, 2010 email: "You understood correctly. If I can be of any further assistance please do not hesitate to contact me." Ex. A-3.

12. For all claims so identified on the spreadsheet incorporated into the Final Informal Review Decision, dated August 25, 2017, Wiscasset Dental's documentation associated with dental services provided to adult MaineCare members did not demonstrate that the billed services were medically necessary to relieve pain, eliminate infection, or prevent imminent tooth loss.

13. For all claims so identified on the spreadsheet incorporated into the Final Informal Review Decision, dated August 25, 2017, Wiscasset Dental's claims for x-rays billed in addition to bills for underlying endodontic therapy treatment were either not medically necessary or MaineCare covered services.

14. For all claims so identified on the spreadsheet incorporated into the Final Informal Review Decision, dated August 25, 2017, Wiscasset Dental's documentation reflecting different dates of service from dates of billing were properly included in the Department's recoupment claim.

15. For all claims so identified on the spreadsheet incorporated into the Final Informal Review Decision, dated August 25, 2017, Wiscasset Dental's documentation failing to specify affected tooth numbers in relation to billed services was insufficient to demonstrate medical necessity.

RECOMMENDED DECISION

For the review period of January 1, 2014 to November 30, 2015, the Department has correctly established and maintains a recoupment claim against Catherine Bunin-Stevenson, DMD, d/b/a Wiscasset Dental, PC, and Wiscasset Dental, LLC, in the amount of **$14,410.84**.

REASONS FOR RECOMMENDATION

As noted above, the Department bore the burden at hearing to demonstrate by a preponderance of evidence that it correctly established the amount of its recoupment claim against Dr. Stevenson,

identified in its August 25, 2017 Final Informal Review Decision, and reduced by-stipulation post-hearing, in the amount of $14,410.84, for reasons supported by the MaineCare statutes and regulations.

As a threshold matter, it is necessary to address three matters raised by Dr. Stevenson before proceeding to the merits. First, Dr. Stevenson, moved at the outset for a ruling on the merits of her appeal, prior to the admission of any testimony from either party, with a subsequent right to an interlocutory appeal on any prospective, unfavorable decision by the hearing officer. Second, Dr. Stevenson, mid-way through the hearing, sought a ruling from the hearing officer to compel the Department's sole witness, Janie Turner, to disclose the names of any agencies, private attorneys, or other individuals consulted as a part of the Department's investigation of Dr. Stevenson's practice. Finally, Dr. Stevenson, in her post-hearing brief, moved for recusal of the hearing officer. Those preliminary matters are addressed in reverse order below.

Motion for Recusal of the Hearing Officer

Dr. Stevenson's motion for recusal is denied. The first of two grounds for the motion was Dr. Stevenson's belief that the hearing officer and Attorney Bradley have a personal relationship that precludes the hearing officer from impartially adjudicating the present appeal. The second of two grounds for Dr. Stevenson's motion was her mistaken belief that the hearing officer and counsel for the Department, Thomas Bradley, AAG, had conducted an *ex parte* meeting prior to the hearing's scheduled 9:00 a.m. start time, in a conference room adjacent to the assigned hearing room, and that the hearing officer discussed the substance of her case with Attorney Bradley prior to hearing.

First, the hearing officer is admittedly familiar with Attorney Bradley on a professional basis. The hearing officer routinely hears appeals of Departmental audits – of the kind at issue in the present appeal – and has presided over nearly a dozen such appeals during his tenure with the Office of Administrative Hearings ["OAH"]. Attorney Bradley has represented the Department in all but one of those appeals. Further, the hearing officer acknowledges that, prior to his tenure with the OAH he was employed by the Office of the Attorney General while Bradley was employed by the same office. The hearing officer and Attorney Bradley had different sets of responsibilities and maintained separate practices during their respective tenures with the Office of the Attorney General. While the hearing officer knows basic personal information about Attorney Bradley, it is no lesser or greater than what is known about any other attorney who so routinely appears before him at hearings. Maine's is a small bar, and it is especially small with respect to governmental law. Such knowledge does not form the basis for recusal or any legitimate charge against the hearing officer's impartiality.

Second, Dr. Stevenson specifically recounted the following about a series of mistakes made by the Rockland Departmental office's receptionist prior to the hearing on its scheduled date:

> It is also on the record of this hearing that Wiscasset Dental arrived 15 minutes prior to the hearing time, and upon the hearing state time coming and going was made to wait until 15 minutes after the hearing start time, when Wiscasset Dental asked why the receptionist was VERY clear that the hearing officer was meeting with the Department's witness and

> representative. Wiscasset Dental thought this was strange and odd and asked at least twice more and very specifically and was told by two different persons at the front the same story, which was that the hearing officer knew we were there but needed to meet with the Department alone first. When Wiscasset Dental inquired about this the hearing officer and counsel for the Department stated several times and on the record that the two separate receptionist (sic) were confused and there had been a "mix up". Moreover, the Hearing officer and Opposing counsel seem to know each other well enough that the hearing officer may not have been impartial as they called each other by first names and discussed family matters that would only be discussed with those whom a person had an intimate knowledge of. Wiscasset Dental is becoming very clear in this case that apparently this case does not follow the usual rules of either regular or Administrative Law and that the department's policy is that it may discuss its cases with private attorneys who have no connection to the State or this case whatsoever to try to impeach the integrity of the provider or practice, and the Hearing Officer is not impartial and may discuss the case prior to the hearing with opposing counsel.

Ex. A-24.

The hearing officer reserved a conference room – one adjacent to the hearing room – for the period before the 9:00 a.m. hearing, so that the Departmental representatives could meet with Dr. Stevenson, in hope that the two would prepare joint stipulations and identify potential areas of settlement. Attorney Bradley arrived shortly after 8:30 a.m. with his witness, and the hearing officer escorted them to the open conference room to wait until Dr. Stevenson arrived. Thereafter, the hearing officer asked the receptionist to immediately notify him upon Dr. Stevenson's arrival, so that she could be escorted to the conference room for a pre-hearing settlement conference with Attorney Bradley and his witness. Thereafter, the hearing officer waited alone in the hearing room until approximately 9:15 a.m., during which intervening period, he received no information from the receptionist that Dr. Stevenson had arrived and was waiting to be escorted back. Instead, the hearing officer at 9:15 a.m., per standard practice, returned to the lobby to determine whether Dr. Stevenson had ever checked-in with the receptionist. Dr. Stevenson had, in fact, arrived well-before 9:00 a.m., but was told by the receptionist that the hearing officer would be out for her as soon as he completed a meeting with Attorney Bradley – a meeting that never occurred. For reasons that the hearing officer cannot explain, the receptionist and her supervisor misunderstood his requests, causing Dr. Stevenson to unnecessarily wait from the time of her arrival until 15 minutes past the time when her hearing was scheduled to begin – all while the hearing officer waited alone in the hearing for a call announcing her arrival. The chain of events that took place was regrettable. The parties all collected in the hearing room shortly before 9:30 a.m., and the hearing officer advised the parties as to what had taken place before the hearing convened on the record.[1] As a result, no meaningful settlement discussion took place prior to hearing. Instead, Attorney Bradley waited for 30 minutes with his witness in one conference room, the hearing officer waited alone in the hearing room, and Dr. Stevenson waited with her witness in the lobby. The hearing officer regrets the delay and inconvenience for Dr. Stevenson. But the hearing officer denies Dr. Stevenson's assertions that any *ex parte* discussion took place between himself and Attorney Bradley, or

[1] Dr. Stevenson mistakenly asserted in her post-hearing brief that the hearing officer's explanation of the chain of events was "on the record." The hearing recorder was not started until 9:30 a.m., after the preliminary discussion about the receptionist's miscommunication took place.

that his impartiality was in any way impaired as a result of the 15 second escort of Attorney Bradley and his witness to the corner conference room.

The standard for recusal, set forth in the Department's Administrative Hearing Regulations, is as follows:

> 1. If a party files a timely charge of bias, prejudice or personal or financial interest, either direct or indirect, the hearing officer shall promptly determine whether it would be appropriate to recuse himself / herself from the hearing, said determination to be made a part of the record.
> 2. A hearing officer may also decide to recuse himself/herself absent a charge from a party if the hearing officer determines that he/she cannot under the circumstances be fair, impartial and unbiased; said determination and its basis shall be made upon the record or following consultation with the Chief Administrative Hearing Officer.

"The Hearing Officer – Recusal of the Hearing Officer," DHHS Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § V (C).

With respect to the prohibition against *ex parte* communication, the Administrative Hearing Regulations provide that:

> In any adjudicatory proceedings, no agency members authorized to take final action or presiding officers designated by the agency to make findings of fact and conclusions of law may communicate directly or indirectly in connection with any issue of fact, law or procedure, with any party or other persons legally interested in the outcome of the proceeding, except upon notice and opportunity for all parties to participate.

10-144 C.M.R. Ch. 1, § V (B)(1).

Surely, the absence of any bias on the part of the hearing officer is no more important than the absence of any appearance of bias. But that appearance must be objectively reasonable. With respect to judicial officers, Maine Code of Judicial Conduct Rule 2.11 provides that "A judge shall disqualify or recuse himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned ...." Me. R. Jud.C 2.11 (*emphasis added*). The duty of the judge, as is the duty of the hearing officer, is to "endeavor to fully disclose relevant relationships if the court has the impression that the relationship might reasonably cause the judge's impartiality to be questioned." *Charette v. Charette*, 2013 ME 4, ¶ 24, 60 A.3d 1264, 1271-72. The hearing officer did not receive word of Dr. Stevenson's concern about his impartiality until he read her post-hearing brief, and at no time prior did he have any impression that his professional familiarity with Attorney Bradley might reasonably cause his impartiality to be questioned. Had any such impression existed, it would have been disclosed. However, even if it had been, the hearing officer would have explained the limited extent of his relationship and familiarity with Attorney Bradley, and denied the motion to recuse during the hearing. Because it only comes post-hearing, the motion is denied here.

Evidentiary Ruling - Relevance

The second preliminary matter requiring some attention concerns Dr. Stevenson's request for a ruling from the hearing officer to compel the Department's sole witness, Janie Turner, to disclose the names of any agencies, private attorneys, or other individuals consulted as a part of the Department's investigation of Dr. Stevenson's practice. This effort took two forms. First, during the hearing, Dr. Stevenson asked the hearing officer to reconsider his ruling that sustained a Departmental objection to Dr. Stevenson's question on the basis of a lack of relevance. Second, in her post-hearing brief, Dr. Stevenson referenced the matter of the Department's responsiveness to a Freedom of Access Act ["FOAA"] request purportedly made to the Department in August 2017. Ex. A-24.

With respect to Dr. Stevenson's FOAA request, it must be noted that the OAH has no jurisdiction to rule upon or enforce FOAA requests, which are the exclusive province of the Maine Superior Court. 1 M.R.S. § 409. The hearing officer may construe the items that have been identified in a FOAA request as also raising discovery requests authorized by the Maine APA and the Department's Administrative Hearing Regulations. *See* 5 M.R.S. §§ 9057, 9060; 10-144 C.M.R. Ch. 1, § VI (H). However, such requests must be raised during the pre-hearing phase. Such requests cannot be given any practical effect if they are primarily raised in passing through a party's closing argument. Here, Dr. Stevenson mentioned requested documents during hearing, as a part of a general complaint of frustration with the Department rather than as any concerted request to have specific documents produced for the purpose of preparing her appeal. Absent from any of this was any specificity about the nature of the requested documents, never mind their purported relevance to her appeal of the Department's recoupment claim. Dr. Stevenson's foundation for the question was another set of allegations, for which no factual support had been otherwise offered into the record – i.e. that her practice had been the target of a concerted effort by the Department to punish practices seeking to provide non-emergency dental services to MaineCare-eligible adults, and because she was a minority business owner.[2]

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[2] The following colloquy took place during the hearing:

Bradley:	The objection is relevancy – whether she spoke to the Board of Dental Examiners or not is not relevant to the issue of the MaineCare rules and the recoupment … for purposes of overpayment
Hearing Officer:	Can you tell me, what is the … just lay a foundation for the question?
Stevenson:	Because part of the anonymous complaint, I believe, may have come from within DHHS, and at the time, there was another case involving several other dentists, with the Board of Dental Examiners. I have made a Freedom of … a FOAA request, and they were supposed to get back to me in six months. … DHHS still has not. And, in turn, before we even knew about this audit, my licensing board did, which, to me, even now, makes no sense unless my practice was being targeted as one of the only practices that would see MaineCare adults at that time.
Hearing Officer:	Can you tell me …. I understand how this could be good information for you to obtain, here, but can you please tell me how is this relevant to your appeal of this decision?
Stevenson:	Because if I haven't been … at the time, they had no records, no documentation, nothing. This information, I don't believe, and it's like … it's almost … quite frankly, being accused of a criminal act before anything has been proven. And there is nothing in my contract with DHHS that, other than checking on the status of my license or the other providers allows them to discuss the case with the Board. Because there's no finding.
Hearing Officer:	Is fraud in issue, here? Is there any allegation of fraud?

Had such a request been timely made to the hearing officer and a threshold allegation been raised as to the relevance of the requested documents, the hearing could have been continued for such time necessary for the Department to produce such documents and for Dr. Stevenson to review the same prior to hearing. Neither was made in this instance. Accordingly, the matter of the Departmental non-production of certain unspecified documents warrants no additional discussion here.

As to the hearing officer's sustaining of the Department's objection to Dr. Stevenson's line of questions to Ms. Turner, it remains undemonstrated that the identity of an anonymous complainant or communication between Division of Audit and other agencies about the billing practices of Wiscasset Dental bears any relevance to the sustainability of the Department's recoupment claim. This is not to say that Dr. Stevenson has no recourse for the alleged "targeting" of her practice – merely that the forum for presenting such claims is not a Departmental administrative hearing.

Motion for Judgment Prior to Commencement of Hearing Testimony

Lastly, some attention must be paid to Dr. Stevenson's preliminary motion for a dispositive ruling from the hearing officer on the basis of her opening statement and pre-hearing submission of proposed exhibits. Dr. Stevenson's proposed exhibits were received by the OAH on Friday, March 2, 2018, for presentation at hearing on the following Monday, March 5, 2018. The Department's proposed exhibits were received by the OAH on the morning of the hearing, Monday, March 5, 2018. Neither party objected to the timeliness of their respective sharing of proposed exhibits with each other prior to hearing, so any argument about the same is waived. The hearing officer finds no fault with the parties' timely submission of their proposed exhibits to the OAH.

Bradley:	There is no allegation of fraud in this case?
Hearing Officer:	Any other criminal … ?
Bradley:	There's … not in this case. No, I don't … I am not aware if there could be something else, somewhere else, but I am not aware of any allegation of fraud in connection with these billings. Now, I am speaking presently. Whether there was in the past, I have no idea, but that's irrelevant to whether the recoupment is owed for purposes of compliance with the MaineCare rules. I fully understand the Doctor having an interest in the issue, but it doesn't affect the outcome of this proceeding.
Stevenson:	Well, it would if, in fact, the anonymous tip was meant to shut my practice down on purpose.
Bradley:	No, I actually, I disagree, Mr. Hearing Officer. Whatever prompted the audit does not determine what the outcome of the audit is. What determines the outcome of the audit is the review of the medical records, and if the complaint had been that the Doctor had a nuclear bomb, and they decided to audit the records, the records would stand for themselves whether she had a nuclear bomb or not. So, it doesn't make any difference whether it was a licensing complaint, or whether any other provider was reviewed or not reviewed. She could be the only provider who provides services to adults in the State of Maine who is reviewed, but that doesn't negate … <interrupted>
Stevenson:	Not … who provides services to adults at that time. And … it could be inferred as discrimination, particularly because I'm a minority-owned business owner, and there is another case – I believe it was Ferguson, with a consent decree with the State of Maine – where they weren't providing the appropriate amount of access to adults with dental care in Maine. …

Hearing Record.

However, Dr. Stevenson moved at the outset for a ruling from the hearing officer on the merits of her appeal, prior to the admission of any testimony from either party, dismissing all portions of the Department's recoupment claim that derived from determinations by the Department that member records were insufficient to document medical necessity, MaineCare-coverability, and/or actual provision to a MaineCare member, and to do so prior to the admission of any testimony:

> If I recall, there is something in the Administrative Procedure (sic) Act that allows for a party to put forth essentially legal theories that would dispose of most of the case to the hearing officer prior to the hearing, and once the hearing officer hears them can decide to take time to look at them or proceed on. And I definitely would like to do that. ... Because I believe it would dispose of ... and I would ask for, I guess, a decision, as well, because it would dispose of many of the case – not all – but many of the issues in the chart. .... And I definitely would like a ruling on the theory, as well, and there is existing caselaw to substantiate through the First Circuit Court ...
>
> All of these things that the Department is looking for may be found, individually, in different parts of a chart. Again, you can't just take clinical notes in a member's chart or, what they call a member's record, alone. Because you have your chart, you have your consent form, you have your referrals. You have to be able to ... you also have to be able to read an x-ray, to see that there is decay there. If you can't read an x-ray, which, in fact, is a clinical review of some standard, you can't say whether there was infection or not. You have to be able to read that x-ray. And, legally, the only person in the State of Maine who can read an x-ray is a licensed dentist – that's the law.

Hearing Record.

The Department's Administrative Hearing Regulations contemplate some measure of pre-hearing practice, upon the hearing officer's own initiative or upon petition of either party, where necessary to serve the interests of justice or otherwise serve to aid in the proper and fair functioning of the hearing. 10-144 C.M.R. Ch. 1, § VI (G). These functions cannot be effectively served, however, unless the parties provide for sufficient time between the date of such petitions and the eventual hearing date. Here, the OAH circulated the Order of Reference, framing the hearing issues, on November 13, 2017. Between November 13, 2017 and March 2, 2018, no motions or petitions were presented to the hearing officer for consideration. Had stipulations as to the admissibility of the parties' respective exhibit sets been timely presented to the OAH along with some written motion for judgment upon the evidence akin to a Me. R. Civ. P. 56 motion,[3] the hearing officer could have timely received and responded to such motion. The parties failed to allow time for such a review here, nor were any joint stipulations of fact (demonstrating the absence of any genuine issues of material fact) made. Moreover,

[3] Dr. Stevenson characterized her motion as a "Motion to Dismiss," but the nature of her motion did not logically comport to any of the basis for such identified in Me. R. Civ. Pro. 12 (b), and specifically Rule 12(b)(6), where she, as the appellant is essentially the claimant, and the Department is the respondent. Me. R. Civ. P 12(b). However, the Rules of Civil Procedure have no specific application to administrative hearings convened under the APA, and any correlation drawn by the hearing officer is merely by way of attempting to determine a rational way to account for Dr. Stevenson's arguments in a fair manner. At most, her request appears to be a motion for judgment, based on an alleged inability by the Department to prevail on legal claims where the applicable facts are not in issue. Such a request is more akin to a Motion for Summary Judgment, under Rule 56, than a Motion to Dismiss for failure to state an actionable claim under Rule 12(b)(6).

neither party requested a continuance to allow the contemplation of such motions prior to moving forward with the hearing on March 5, 2018. Accordingly, Dr. Stevenson's request for such a preliminary ruling was denied at hearing, and, in light of the fact that the hearing officer convened the hearing, that request is now moot. Dr. Stevenson's arguments, however, are considered below, within the body of the substantive analysis and recommended conclusions of law.

"Documentation" Requirements

The primary sub-issue presented for resolution at hearing was whether the patient records presented by Wiscasset Dental supported the Departmental requirements that provider records be able to demonstrate that all reimbursed billing claims correspond to medical or dental services that were medically necessary, identified as "covered services" in the MaineCare Benefits Manual, and actually provided to MaineCare-eligible patients. The Department's position was that it correctly sanctioned Wiscasset Dental for failing to adequately document the medical necessity, MaineCare-coverability, and/or actual provision of a large set of reimbursement claims. Dr. Stevenson's position was essentially two-fold: that the records contained all the necessary information, and that the Department was barred from alleging that the records were flawed because no qualified dental professional reviewed the records.

All MaineCare provider billing flows from the statutory authorization to the Department 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" medical services programs for the medically indigent. 22 M.R.S. § 3173. Providers are expressly obligated to bill MaineCare for services in a manner that is consistent with the terms of its Provider Agreement, Departmental regulations, and federal Medicaid law. 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (eff. Jan 1, 2014). This requires providers to "[m]aintain and retain contemporaneous financial, provider, and professional 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," where such records "must include ... all required signatures, treatment plans, progress notes, discharge summaries, date and nature of services, duration of services, titles of persons providing the services, all service/product orders, verification of delivery of service/product quantity, and applicable acquisition cost invoices." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (M) (eff. Jan 1, 2014). "Providers must make a notation in the record for each service billed." *Id.*

Providers must also "make available, during regular business hours ... all records concerning the provision of health care services to MaineCare members, and all financial records of MaineCare members, to any duly authorized representative of DHHS," and "[m]aintain accurate, auditable and sufficiently detailed financial and statistical records to substantiate cost reports, negotiated rates, by report items, or any other fee for service rate for a period of at least five (5) years following the date of final settlement or established rate with the Department." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (M), (X) (eff. Jan 1, 2014). Dr. Stevenson's April 30, 2014 Provider Agreement also expressly bound

her to "maintain in a systematic and orderly manner, medical and financial records that are necessary to document fully the extent, nature and cost of the services provided to Members receiving assistance under this Agreement, as required by the MBM and applicable professional standards," and that "records must be maintained in the form, if any, required by the Department." Ex. D-23, p. 6. These requirements also include the acknowledgement that "[a]n overpayment from MaineCare may indicate that a provider has submitted bills and/or received payment to which he or she is not properly entitled." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.12-2 (eff. Jan 1, 2014). Through her Provider Agreement, Dr. Stevenson also specifically acknowledged that "failure to maintain the required documentation may result in sanctions set out in the MBM, including the disallowance and recovery by the Department of any amounts paid to the Provider for which the required documentation is not maintained and provided to the Department upon request." Ex. D-23, p. 7

For Section 25 Dental Services, the Departmental regulations provide that the following additional specificity is required with respect to patient records:

1. The record is to include the essential details of the member's health condition and of each service provided. All entries must be signed, dated, and legible.
2. The dental records corresponding to all services billed to the Department must include, but shall not be limited to:
   a. member's name and date of birth;
   b. medical history;
   c. pertinent findings on examination;
   d. all radiographs and the date on which they were taken;
   e. diagnosis of existing conditions;
   f. written treatment plan including all treatment necessary;
   g. date of each service;
   h. name of person performing the service if it is other than the billing dentist;
   i. description of all treatment;
   j. recommendations for additional treatment or consultations;
   k. medications administered or prescribed;
   l. supplies dispensed or prescribed; and
   m. tests prescribed and results.

10-144 C.M.R. Ch. 101, sub-Ch. II, § 25.06-1 (A) (eff. Jan. 1, 2014).

With respect to radiography / x-ray services, the Department provides a series of codes that are available for billing, all of which identify that "IMAGE CAPTURE WITH INTERPRETATION" is required for reimbursement, and that the code is usable "subject to the guidelines and limitations in MBM Chap II." 10-144 C.M.R. Ch. 101, sub-Ch. III, § 25, p. 2 (eff. Jan. 1, 2014).

As noted above, the Department was thereafter authorized to apply a tiered penalty schedule – 100 percent vs. 20 percent – based on its determination about the underlying MaineCare services as to

whether the provider had demonstrated 1). medical necessity of the underlying service, 2) that the service was a covered service, and 3) that the service had been actually provided to an eligible MaineCare member. 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.19-2 (G) (eff. Jan. 1, 2014).

The lynchpin of all arguments presented by Dr. Stevenson was that the Department is not entitled to any recoupment for alleged documentation failures by her practice where all the information she needed to provide for each patient's treatment history was contained within the documents provided, and that the Departmental auditor, Ms. Turner, merely did not know how and/or was not qualified to ascertain that information from the patient "charts." Dr. Stevenson specifically argued that the Department could not sanction her for x-rays or dental charts merely because the reviewing auditor was unable to (and unqualified to) interpret the x-rays and charts in the manner maintained in Wiscasset Dental's records system. Dr. Stephenson also specifically argued that the Department was barred from declaring that electronic billing records were not "treatment plans," where the dental services industry universally relies upon such records for billing.

The Department did not dispute that Ms. Turner holds no certification or licensure as a dentist or other dental professional trained in the interpretation of raw dental records. Nor did the Department dispute that the billing records were commonly used within the industry. The Department's argument was that, based on a preponderance of the evidence, the documentation received from Wiscasset Dental did not satisfy the documentation standards established by the governing regulations, the MaineCare Benefits Manual. The Department more specifically argued that many of Wiscasset Dental's records failed to include "a written treatment plan including all treatment necessary," which was not reflected by the "Eaglesoft" electronic dental records identified by Dr. Stevenson as comprising the affected patients' "Treatment Plans." *See* 10-144 C.M.R. Ch. 101, sub-Ch. II, § 25.06-1 (A)(2)(f).

"Treatment Plan" is not specifically defined either in Section 1 or Section 25 of the MaineCare regulations. *See generally* 10-144 C.M.R. Ch. 101, sub-Ch. I, §1; sub-Ch. II, § 25. Nevertheless, the documents identified as deficient by the Department in the category all failed to satisfy other descriptive criteria published in the MaineCare regulations requiring written explanation by the provider of the need for the billed services and their relationship to the patient's overall course of dental care, i.e. "medical necessity." Contracted providers agree to accept the requirements of the MaineCare regulations as a term for participation in the MaineCare reimbursement program. As noted, Chapter I, Section 1; Chapter II, Section 25; and the MaineCare provider's agreement establish a web of requirements that bind the provider to keep records and make them available to Departmental auditors in the manner dictated by the regulations and contract. The essence of this requirement is that the provider's records must be sufficient for a Departmental auditor – one who need not be trained or licensed as a dentist or other dental professional – to glean that the claimed services were 1) medically necessary, 2) identified as a "covered service" within Section 25, and 3) actually provided to a MaineCare-eligible patient. It is not a persuasive defense, therefore, for Dr. Stevenson to argue that proof can be found in the records if the Department only knew how to read the records the way a dentist does.

This also applies to Dr. Stevenson's arguments that the Departmental auditor cannot declare x-rays to be non-compliant with MaineCare documentation requirements because the auditor is not licensed to read x-rays. The regulations plainly require that it is the provider's obligation to expressly document interpretation of all applicable x-rays so that a Departmental auditor can understand how any particular x-ray demonstrates the medical necessity of a related dental procedure. Dr. Stevenson's argument – if only Ms. Turner were a dentist and had the training and licensure to allow her to identify tooth decay on an x-ray – ignores the plain language of the MaineCare regulations, which assigns that duty to the provider.

The Department sustained its threshold burden to demonstrate, by a preponderance of the evidence, that it correctly identified these violating the MaineCare requirements because the provider failure to produced mandated records for MaineCare covered goods or services. 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.19-2 (H). Thereafter, the burden shifted to Dr. Stevenson to demonstrate that the records were, in fact, contemporaneously maintained and sufficiently supported the medical necessity and coverability of the service in question. *Id.* Here, there is no proof that the claims in this category were, in fact medically necessary – merely that Ms. Turner is not a dentist, and therefore unable to make an independent interpretation from Dr. Stevenson's dental records whether there was any proof of medical necessity. This is not sufficient to counterweigh the Department's threshold showing. Accordingly, all claims identified by the Department for recoupment for reasons of MaineCare documentation requirements for x-ray interpretation and absence of treatment plans should be upheld.

Adult Urgent Care Guidelines

The second set of arguments raised by Dr. Stevenson related to the group of claims included by the Department in its recoupment claim, which identified dental care provided to adults without satisfying what were repeatedly referred to by both parties as the "urgent care guidelines."

Section 25 also provides that "covered services" are limited for most adults over age 21, specifically identified under Section 25.04. *See* 10-144 C.M.R. Ch. 101, sub-Ch. II, § 25.03 (comprehensive services only available for minors and adults residing in an Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF-IID)). Section 25.04 provides that "Adult dental care requirements provide for adults twenty-one (21) years of age or older limited to:

A. Acute surgical care directly related to an accident where traumatic injury has occurred. This coverage will only be provided for the first three months after the accident;
B. Oral surgical and related medical procedures not involving the dentition and gingiva;
C. Extraction of teeth that are severely decayed and pose a serious threat of infection during a major surgical procedure of the cardiovascular system, the skeletal system or during radiation therapy for a malignant tumor;
D. Treatment necessary to relieve pain, eliminate infection or prevent imminent tooth loss; and

E. Other dental services, including full and partial dentures, medically necessary to correct or ameliorate an underlying medical condition, if the Department determines that the provision of those services will be cost-effective in comparison to the provision of other covered medical services for the treatment of that condition.

10-144 C.M.R. Ch. 101, sub-Ch. II, § 25.04-1 (eff. Jan. 1, 2014).

"Standards of treatment to relieve pain, eliminate infection or prevent imminent tooth loss requires the dentist to document one or more of the following in the member's record:

A. documentation of the member's acute tooth pain or acute infection;
B. supporting radiographs (if pertinent);
C. documentation of any underlying medical condition that places the member at risk of imminent tooth loss; or
D. documentation of an accident where traumatic injury has occurred.

10-144 C.M.R. Ch. 101, sub-Ch. II, § 25.04-2 (eff. Jan. 1, 2014).

Testimony by the Departmental auditor, Ms. Turner, identified that the relevant reimbursement claims identified as subject to Departmental recoupment were deficient for the same set of reasons described in the previous section – namely, that the regulations require specific documentation in order to provide support for the medical necessity of adult dental care services on an urgent care basis, and that Wiscasset Dental's records did not include that documentation. In response, Dr. Stevenson argued that in all cases, supporting radiographs and tooth charts reflected notations and other information were present from which a dental professional could interpret the presence of acute tooth pain or infection, or imminence of tooth loss. Relatedly, Dr. Stevenson argued that notations of patient pain on one service date should be read in a way that satisfies the requirement to document acute tooth pain on a separate date of service.

First, the Department demonstrated that it correctly declined to accept Dr. Stevenson's proof of previously-identified tooth pain as justification for urgent adult dental care on a later date. The nature of "acute" pain not only contemplates spatial acuteness but temporal acuteness. Where a record reflects a notation of documented pain several months before a procedure, it cannot reasonably be said that the pain has been documented as temporally acute to the purportedly linked procedure. With respect to the larger sample of claims included in this category, Dr. Stevenson did not present any other affirmative proof that the documentation was contemporaneously produced and maintained, nor did she convincingly demonstrate that any of the radiographs, tooth charts, or other patient records provided adequate documentation to support findings that members had the requisite tooth pain, infection, or imminence of tooth loss to trigger the coverability of related dental care services. As such, it should be concluded that the Department sustained its burden to demonstrate by a preponderance of the evidence that it correctly identified specific claims to be recouped for failure to document coverability of adult urgent care dental services.

Billing for Repetitive Procedures

The Department identified several claims in its Final Informal Review Decision, dated August 25, 2017, as being subject to recoupment where they were identified as being repeat procedures and Wiscasset Dental provided no documentation to support the medical necessity of the repeat. At hearing and in closing, Dr. Stevenson did not come forward with evidence to counterweigh the Department's threshold showing that it correctly identified such claims as recoupable at 100 percent. Rather, she devoted her entire presentation to the position that the Department could have determined, on its own, that her records provided support for initial findings of medical necessity. The only testimony presented by Dr. Stevenson at hearing was that of Wiscasset Dental dental assistant Lisa Simpson, none of which provided any support for the proposition that any of the claims identified for recoupment by the Department were medically necessary other otherwise worthy of a sanction of less than 20 percent. Thus, the fact remained that the Department made a threshold showing that Wiscasset Dental failed to demonstrate the medical necessity and coverability of the identified, repeated procedures, and that Dr. Stevenson thereafter came forward with no new evidence from which it might be said that there was medical necessity. As such, it should be concluded that the Department sustained its burden to demonstrate by a preponderance of the evidence that it correctly identified specific claims to be recouped for failure to document the medical necessity of repeat procedures.

Availability of Equitable Estoppel as a Defense to the Department's Recoupment Claim

Dr. Stevenson also vaguely argued that the Department should be equitably estopped from maintaining recoupment against her for its reimbursement claims that were only made pursuant to advice sought and received from the Department's provider relations office about the procedure used to screen potential urgent dental care appointments with adults.

In accordance with the Department's administrative hearings regulations, the Hearing Officer has limited authority to address arguments raising the issue of equitable estoppel. 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. "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. v. Comm'r of Dep't of Health and Human Servs.*, 2012 ME 13, ¶10, 36 A.3d 888, 891 (*citation omitted*) (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 essence of Dr. Stevenson's equitable estoppel defense is Wiscasset Dental sought email advice from the Department about the proper procedure for screening adult MaineCare members for urgent care dental services, and relied on that advice to its detriment. The undisputed email correspondence in question took place in March 2010, and consisted of the following question from Wiscasset Dental administrator Paula Jones posed to Departmental provider relations specialist Dawn Sevigny:

> If I understood you correctly, we are able to treat Mainecare adults on an emergency basis to erridicate (sic) pain and prevent imminent tooth loss without needing a referral from their PCP prior to seeing our dentist for examination, xrays and treatment. Furthermore, I understood from our conversation that when we exam an Adult Mainecare patient and we find that the patient's pain is steming (sic) from the need for 1) a Root Canal and/or 2) Extraction(s) and/or 3 fillings of cavities IN ORDER TO ERRIDICATE (sic) PAIN AND PREVENT IMMINENT TOOTH LOSS, we can schedule these as multiple visits, if needed, without worry that Mainecare will not cover our claims – as long as we are following the protocol as listed in the Mainecare Benefit Manual as of 1/1/2010. AND that PreAuthorizations are not required for a Root Canal.

Ex. A-3.

It is also undisputed that Ms. Sevigny replied with the following statement: "You understood correctly. If I can be of any further assistance please do not hesitate to contact me." Ex. A-3. Dr. Stevenson did not specifically identify how Ms. Sevigny's statement reasonably induced Wiscasset Dental to act in such a way that it was later sanctioned by the Department. Dr. Stevenson's argument in this regard was wholly stated as follows:

> ... Wiscasset Dental Had (sic) contacted Mainecare on the very issue of what needed to be in the chart, the email that was submitted with the documents and shows this. Wiscasset Dental followed the guidelines set forth in that email. Thus, the doctrine of equitable estoppel applies here and prevents Mainecare from asserting recoupment from Wiscasset Dental, as Wiscasset Dental fundamentally relied on statements from Mainecare's own representative. This case law is from State v. Brown, 2014 ME 79, 14, 95 A.3d 82, 87.

Ex. A-24.

Dr. Stevenson bore the burden to demonstrate, to a high probability, that each of the elements of the equitable estoppel argument had been met. It is unclear from the record how Wiscasset Dental was induced by Ms. Sevigny's statement to act in any ways that led to the Department's establishment of specific sanctions. At most, it could be read as an abstract endorsement of Wiscasset Dental's ability to perform multiple adult urgent care dental procedures on a single patient, based on the identification of acute pain on the first of those multiple visits, and otherwise act in concert with the requirements of the MaineCare Benefits Manual. Dr. Stevenson did not identify specific patient instances in the record that clearly followed this course, and which were included in the Departmental recoupment claims. Dr. Stevenson did not show how Ms. Sevigny, by accepting the premise that Wiscasset Dental "follow[ ] the protocol as listed in the Mainecare Benefit Manual," that her blanket assent somehow could be misconstrued as authorizing Wiscasset Dental to perform adult urgent care dental services without any subsequent documentation of acute pain.

Dr. Stevenson did not carry her burden to demonstrate – to a high probability – that anything Ms. Sevigny said would be reasonably construed as inducing Wiscasset Dental to act outside of the way demanded by the MaineCare Benefits Manual. For this reason, the Department should not be equitably estopped from maintaining a recoupment claim against Dr. Stevenson in the manner urged by the appellant.

Departmental discretion to assess percentage-based sanctions

While not expressly raised by Dr. Stevenson in her Request for Informal Review, at hearing, or in her post-hearing brief, some discussion of the Departmental discretion to impose sanctions is warranted. "Issues that are not raised by the provider, provider applicant, individual, or entity through the written request for an informal review or the submission of additional materials for consideration prior to the informal review are waived in subsequent appeal proceedings." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.23-1. "The request for informal review may not be amended to add further issues." *Id.* While the Hearing Officer's authority in this matter is to conduct a de novo review of the matters in issue, the issues that are subject to that de novo review cannot be expanded beyond what was pleaded through the Final Informal Review Request. Accordingly, it should be concluded that Dr. Stevenson has waived this issue for appeal purposes.

Even if Dr. Stevenson had not waived this issue for failing to raise it in her Final Informal Review Request, it should still be concluded that the Department correctly assessed sanctions at 100 percent where 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," and imposed sanctions of 20 percent where provider is able to come forward, post-Notice of Violation, with evidence that "the disputed goods or services were medically necessary, MaineCare covered services, and actually provided to eligible MaineCare members." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.19-2 (H).

The Department, on its own initiative, reduced several claims from 100 percent to a 20-percent sanction, as a result of the Final Informal Review. Ex. D-4. Dr. Stevenson came forward with no additional evidence at hearing to support any conclusions that other sanctions should be reduced from 100 percent to 20 percent, nor did she argue that any such reduction was warranted. As noted, any such issues argued from this point forward should be deemed waived.

Based on the foregoing, the Hearing Officer respectfully recommends that it be concluded that, for the review period of January 1, 2014 to November 30, 2015, the Department has correctly established and maintains a recoupment claim against Catherine Bunin-Stevenson, DMD, d/b/a Wiscasset Dental, PC, and Wiscasset Dental, LLC, in the amount of **$14,410.84**.

MANUAL CITATIONS

- DHHS Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § VII (2016)
- MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101 (2014-current).

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: 6/07/2018

Richard W. Thackeray, Jr.
Administrative Hearing Officer

cc: Catherine Bunin-Stevenson, DMD,
Thomas Bradley, AAG, OFFICE OF THE ATTORNEY GENERAL, Augusta
Janie Turner, Program Integrity/Division of Audit, DHHS Augusta