

IN THE MATTER OF:

Inland Hospital)
c/o William Stiles, Esq.)
VerrillDana LLP) **FINAL DECISION**
One Portland Square)
Portland, ME 04112-0586)

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

The Recommended Decision of Hearing Officer LeBlanc, dated May 19, 2005 and the responses and exceptions filed by the Department have been reviewed.

I hereby adopt the Findings of Fact of the Hearing Officer. I also adopt the Hearing Officer's determination that the Department's interpretation of Section 45.03 of the MaineCare Manual regarding the calculation of prospective interim payments (PIP's) is correct. Specifically, the term "the most recent as-filed cost report", within the meaning of Section 45.03, means the most recently issued interim MaineCare Cost Report. This determination renders moot any controversy regarding retroactive application of the amended rule that clarified this issue.

For the reasons stated below, I decline to adopt the Hearing Officer's determination that the Department "could have, and should have, issued its Interim MaineCare Settlement Report for Inland Hospital's FYE September 28, 2002 in time to be used in the calculation of Inland Hospital's PIP for SFY 2005".

As noted in the Department's exceptions, neither the rules in place in April 2004, nor those adopted since then, impose a schedule or timetable upon the Department for issuing Interim MaineCare cost reports. The Department is entitled to exercise discretion in performing this administrative function and, as a practical matter, must be permitted to exercise discretion in order to manage budget constraints and competing priorities. The Department received Inland's As Filed Medicare Cost Report for its FYE September 2002 on April 18, 2003. Testimony at the hearing indicated that the Department began the process of calculating PIP's for SFY 2005 in late March of 2004, and the calculations were completed by the end of April, 2004. The calculations must be reviewed, and must be entered into the payment system at least here (3) weeks before the beginning of the state fiscal year (July 1). The SFY 2005 PIP calculated for Inland Hospital was based on the Final Cost Settlement Report for Inland Hospital's FYE September 2000, with an inflation adjustment of 16.4%. The Interim Maine Cost Report for Inland Hospital's FYE 2002 was issued on May 21, 2004.

I concur with the Department that given the absence of a regulatory or statutory schedule or timetable for issuing cost reports, the only issue is whether the Department acted arbitrarily or capriciously in calculating Inland Hospital's PIP for SFY 2005. No evidence was presented to indicate that the Department discriminated against Inland Hospital, or that the hospital was subjected to arbitrary or capricious treatment by the Department. The record indicates that the Department's treatment of Inland Hospital with respect to the calculation of its PIP for SFY 2005 was consistent with past practice and consistent with its treatment of the other 40 hospitals in Maine.

Therefore, for the above reasons I find that the Department's calculation of Inland Hospital's PIP for SFY 2005 was correct, and I decline to adopt the Hearing Officer's recommendation that the PIP should be recalculated.

DATED: 7/15/05 SIGNED: _____

JOHN R. NICHOLAS, 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 OFFICE 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: Brett Witham, Esq., Verrill Dana
Suzanne Pogue, Esq., VerrillDana
Thomas Bradley, AAG
Constance Warren, BMS



STATE OF MAINE
DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF ADMINISTRATIVE HEARINGS
11 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0011

JOHN ELIAS BALDACCI
GOVERNOR

JOHN R. NICHOLAS
COMMISSIONER

TO: John R. Nicholas, Commissioner
Department of Health and Human Services
221 State Street
11 State House Station
Augusta, ME 04333

In Re: Inland Hospital—Appeal of method by which SFY 2005 prospective interim payment (PIP) to Inland Hospital was calculated

RECOMMENDED DECISION

An administrative hearing was held on February 2, 2005, at Augusta, Maine in the case of Inland Hospital before Michael L. LeBlanc, Administrative Hearing Officer. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner, Department of Health and Human Services.

ISSUE PURSUANT TO ORDER OF REFERENCE:

Pursuant to an Order of Reference dated October 26, 2004, this matter was assigned by James D. Bivins, Esq., Chief Administrative Hearing Officer to the undersigned Hearing Officer to conduct an administrative hearing and to submit to the Commissioner written findings of fact and recommendations on the following issue:

Was the Department's method by which SFY 2005 prospective interim payments (PIP) to Inland Hospital calculated correctly pursuant to promulgated rules and Law? See, Exhibit DHHS-16.

APPEARING ON BEHALF OF APPELLANT:

Brett D. Witham, Esq.
Suzannah Pogue, Esq.
David Trunnell
Stephen Allen
Robert G. Boschen, Jr. (by telephone)

APPEARING ON BEHALF OF AGENCY:

Thomas C. Bradley, AAG
Susan MacKenzie
Constance Warren

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer Exhibits:

- HO-1. Notice of Hearing, dated 11/4/04
- HO-2. Motion in Limine Concerning the Proposed Appearance of Stephen Allen, dated 1/14/05
- HO-3. Response to Provider's Motion in Limine Concerning the Proposed Appearance of Stephen Allen, dated 1/18/05
- HO-4. Letter to parties from Hearing Officer LeBlanc, dated 1/21/05
- HO-5. Letter to Hearing Officer LeBlanc from Attorney Bradley with attachments, dated 1/20/05
- HO-6. Letter to Hearing Officer LeBlanc from Attorney Witham with attachments, dated 1/24/05
- HO-7. Summary of Public Comments, MaineCare Benefits Manual, Chapter III, Section 45, Hospital Services, Public Hearing: November 1, 2004

Department Exhibits:

- DHHS-1. Correspondence dated September 27, 2002, from Deborah Turner to Susan MacKenzie and enclosed Medicare Cost Report for Inland Hospital, fiscal year 2000
- DHHS-2. Correspondence dated January 23, 2003, from Marc A. Levy to Susan MacKenzie and enclosed Medicare Cost Report for Inland Hospital, fiscal year 2001
- DHHS-3. Correspondence dated April 16, 2003, from Marc A. Levy to Susan MacKenzie and enclosed Medicare Cost Report for Inland Hospital, fiscal year 2002
- DHHS-4. Medicare Cost Report for Inland Hospital, fiscal year 2003 (dated February 25, 2004)
- DHHS-5. Correspondence dated July 1, 2003, from John Bouchard to Administrator, Inland Hospital, with enclosed final audit settlement for fiscal year 2000
- DHHS-6. Correspondence dated May 7, 2004, from John Bouchard to Administrator, Inland Hospital, with enclosed interim audit settlement for fiscal year 2001
- DHHS-7. Correspondence dated June 11, 2004 from John Bouchard to Administrator, Inland Hospital, with enclosed revised interim audit settlement for fiscal year 2001
- DHHS-8. Notice to Interested Parties, December 3, 2004, from Christine Gianopoulos, and adopted Chapter III, Section 45, Principles of Reimbursement, Hospital Services, of MaineCare Benefits Manual
- DHHS-9. Chapter III, Section 45, Principles of Reimbursement, Hospital Services, of MaineCare Benefits Manual, with provisions effective January 28, 2004
- DHHS-10. Chapter III, Section 45, Principles of Reimbursement, Hospital Services, of MaineCare Benefits Manual, with provisions effective August 15, 2004
- DHHS-11. Correspondence dated July 2, 2004, from Robert G. Boschen, Jr. to David Trunnell with enclosed calculations
- DHHS-12. Correspondence dated July 13, 2004, from David Trunnell to Christine Zukas-Lessard with enclosed worksheets
- DHHS-13. Correspondence dated August 5, 2004, from Robert G. Boschen, Jr. to David Trunnell
- DHHS-14. Correspondence dated September 3, 2004, from William H. Stiles to John R. Nicholas
- DHHS-15. Fair Hearing Report Form dated October 20, 2004 referencing Inland Hospital
- DHHS-16. Order of Reference in the matter of Inland Hospital dated October 26, 2004
- DHHS-17. Department's closing arguments

DHHS-18. Department's rebuttal arguments

Appellant Exhibits:

- P-1. Inland Hospital's FY 2005 PIP Worksheet
- P-2. Inland Hospital's Request for Informal Review (with attachments), dated 7/13/04
- P-3. Department's Informal Review Decision, dated 8/5/04
- P-4. Inland Hospital's Request for an Administrative Hearing (with exhibits), dated 9/3/04
- P-5. April 28, 2004, Notice of State Rulemaking
- P-6. August 18, 2004, Notice of State Rulemaking
- P-7. October 13, 2004, Notice of State Rulemaking
- P-8. December 8, 2004, Notice of State Rulemaking
- P-9. MaineCare Benefits Manual, Ch. III, Sec. 45, effective January 28, 2004
- P-10. MaineCare Benefits Manual, Ch. III, Sec. 45, effective August 15, 2004
- P-11. MaineCare Benefits Manual, Ch. III, Sec. 45, October 13, 2004 Proposed Rules
- P-12. MaineCare Benefits Manual, Ch. III, Sec. 45, effective December 4, 2004
- P-13. 42 C.F.R. §413.64 – Medicare Regulations Related to PIP
- P-14. Applicable State Plan
- P-15. Detail of Inland Hospital's FY 2005 PIP based on FY 2003 'as filed' Medicare Cost Report
- P-16. Detail of Inland Hospital's FY 2005 based on FY 2002 Medicaid Settlement
- P-17. Inland Hospital's FY 2005 PIP based on FY 2002 Medicaid Settlement or FY 2003 "as filed" Medicare Cost Report
- P-18. Outpatient Services Analysis
- P-19. Correspondence from the Department dated July 18, 2002
- P-20. Email from the Department to Inland Hospital dated February 3, 2004
- P-21. Inland Hospital's FY 2001 Interim and Revised Interim Medicaid Settlements
- P-22. No Exhibit offered
- P-23. Inland Hospital's FY 2003 "as filed" Medicare Cost Report
- P-24. Inland Hospital's FY 2002 Interim Medicaid Settlement
- P-25. Sealed Exhibit containing patient identifying information
- P-26. Appellant's closing arguments
- P-27. Appellant's rebuttal arguments

RECOMMENDED FINDINGS OF FACT:

1. Notice of these proceedings was given timely and adequately. Inland Hospital made timely appeal.
2. Inland Hospital is an Acute Care Non-Critical Access Hospital, within the meaning of MaineCare Benefits Manual, Chapter III, Section 45.03. It is located in Waterville, ME.
3. The system used by the Department to reimburse provider hospitals for services provided to MaineCare eligible patients consists of three steps:
 - (a) First, the Department estimates the total amount of MaineCare reimbursement that it will ultimately be liable to pay to the hospital for that State Fiscal Year ("SFY"). The Department pays that amount to the provider hospital through fifty-two (52) equal weekly periodic interim payments ("PIP"). The SFY is July 1st through June 30th.

- (b) Second, after receipt of the provider's As Filed (but un-audited) Medicare Cost Report, the Department issues an Interim MaineCare Settlement Report based on the Medicare Cost Report and MaineCare claims information accumulated by the Department over that fiscal year. The Medicare Cost report must be filed by the provider hospital five months after the close of its fiscal year. When the Department issues its Interim MaineCare Settlement Report, the difference between the PIP and the interim settlement amount is settled.
- (c) Third, the Medicare program audits the As Filed Medicare Cost Report submitted by the provider hospital, and issues a Medicare Notice of Program Reimbursement and Audited Cost Report to the provider and to the Department. At this point, the Department issues a Final MaineCare Settlement Report, settling any differences between the final amount due and the interim settlement amount paid.
4. Inland Hospital's fiscal year ends with the last Saturday of September each year. Of the approximately forty-one (41) hospitals in Maine, approximately nine (9) others besides Inland Hospital have a fiscal year ending ("FYE") in September.
 5. The PIP for each of the forty-one (41) hospitals is determined and paid for the SFY.
 6. On or about July 2, 2004, the Department's Bureau of Medical Services notified Inland Hospital that its PIP for SFY 2005, would be \$2,795,520.00. To determine Inland Hospital's PIP for SFY 2005, the Bureau of Medical Services used data from the Department's Division of Audit's Final Cost Settlement Report dated July 1, 2003, for Inland Hospital's FYE September 30, 2000, which is based on the Medicare Audited Cost Report dated September 27, 2002.
 7. On or about July 13, 2004, Inland Hospital filed a request for an informal review, raising three (3) issues:
 - a. Whether the inpatient rate per discharge was calculated correctly in accordance with Section 45.03(A);
 - b. Whether the outpatient charges were calculated correctly in accordance with Section 45.03(B); and
 - c. Whether adjustments for inpatient capital costs, inpatient and outpatient physician, and inpatient and outpatient third party liability were calculated correctly in accordance with Section 45.03(C).
 8. In its informal review decision, dated August 5, 2004, the Department responded with respect to inpatient rate per discharge: *The Inpatient rate per discharge was calculated in accordance with the changes to the rules that are to be proposed and have been noticed proposed Rules issued in July of 2004. See, Exhibit P-3.* With respect to outpatient charges, and adjustments for inpatient capital costs, inpatient and outpatient physician, and inpatient and outpatient third party liability, the Department responded that policy had always been interpreted to mean it was to use the most recent available Interim MaineCare Settlement Report, which was for Inland Hospital's FYE September 30, 2000.
 9. The Department received Inland Hospital's As Filed Medicare Cost Report for its FYE September 29, 2001, on January 27, 2003. The Division of Audit issued its Interim

MaineCare Settlement Report on May 7, 2004, and a Revised Interim MaineCare Settlement Report on June 11, 2004.

10. The Department received Inland Hospital's As Filed Medicare Cost Report for its FYE September 28, 2002, on April 18, 2003. The Division of Audit issued its Interim MaineCare Settlement Report on May 21, 2004.
11. The Department received Inland Hospital's As Filed Medicare Cost Report for its FYE September 27, 2003, on March 23, 2004. The Division of Audit has not yet issued its Interim MaineCare Settlement Report.
12. The Department acknowledges that it made an error in the inpatient component of the PIP calculation for Inland Hospital's SFY 2005 in the approximate amount of \$168,000.00. According to Ms. Warren, the Department has notified Inland Hospital of the error and the Department's intent to correct the error.
13. The Department has delayed the issuance of at least some Interim MaineCare Settlement Reports because of budgetary constraints.

RECOMMENDED DECISION:

The Department's method by which SFY 2005 prospective interim payments (PIP) to Inland Hospital calculated **was not correct** pursuant to promulgated rules and Law. It is recommended that the Commissioner remand this matter back to the Bureau of Medical Services to recalculate Inland Hospital's SFY 2005 PIP based on the Interim MaineCare Settlement Report dated May 21, 2004, for Inland Hospital's FYE September 28, 2002. In doing its recalculations, it is recommended that it be done in accordance with the policy promulgated December 3, 2004.

REASON FOR RECOMMENDATION:

Interim MaineCare Settlement Report dated May 21, 2004

Inland Hospital argues that the PIP should be based on its As Filed Medicare Cost Report for its FYE September 27, 2003, that the Department received on March 23, 2004. This argument is based on MaineCare policy, Section 45.03(B), effective January 28, 2004, for the outpatient services component of PIP: *The MaineCare outpatient component of the PIP equals the lower of MaineCare outpatient costs or charges during the fiscal year for which the most recent as-filed cost report is available ...* (Underlining added.) It is the Department's position, and the testimony of its witnesses, that it has consistently interpreted this to mean the most recent Interim MaineCare Settlement Report. Inland Hospital argues this interpretation defies the plain meaning of the phrase "as-filed cost report," which has always been interpreted to mean As Filed Medicare Cost Report. The Hearing Officer is persuaded that for two reasons the term "the most recent as-filed cost report," within the meaning of §45.03, means the most recently issued interim MaineCare cost report. First, the Hearing Officer is persuaded by the credible testimony of the Department's witnesses that the term has always been interpreted so. Second, and more importantly, there is absolutely no dispute that, in order to accurately compute the PIP, the as-filed Medicare cost report must be revised using methodology essentially similar to that used to determine the interim MaineCare cost settlement report. Therefore, there is really no dispute that the work resulting in an interim MaineCare cost settlement report must be done in order to

determine the PIP. The only dispute is how soon after receiving the As Filed Medicare Cost Report the Department should be expected to issue the Interim MaineCare Settlement Report. Additionally, Section 45, as promulgated on October 13, 2004, changes the term “the most recent as-filed cost report” to “the most recent interim cost-settled report,” with the public comment that this change was not a change in policy but a clarification. Because of this, Inland Hospital’s argument that the As Filed Medicare Cost Report received by the Department on March 23, 2004, should have been used is rejected.

According to Constance Warren’s testimony, she began calculating the PIP for all forty-one (41) hospitals approximately the end of March 2004, and ended approximately the end of April 2004; that her work must be reviewed for accuracy prior to its finalization; and that the data for all forty-one (41) PIP’s must be input to the Department’s computer system three (3) weeks prior to July 1st each year. The Hearing Officer finds this testimony credible. However, for the reasons stated below, the Department’s argument that it could not use the Interim MaineCare Settlement Report dated May 21, 2004, to calculate Inland Hospital’s PIP for SFY 2005, is rejected.

According to Susan MacKenzie’s testimony, it takes the Division of Audit approximately four (4) to five (5) months to issue the Interim MaineCare Settlement Reports for all ten (10) hospitals that have an FYE September 30th. Since those hospitals’ As Filed Medicare Cost Reports for their FYE September 2003, were due by the end of February 2004, and the Hearing Officer accepts that the Bureau of Medical Services must begin the PIP during the end of March 2004, it is found reasonable that the Division of Audit could not produce the Interim MaineCare Settlement Reports for the hospitals’ FYE September 2003, in time to be used for the SFY 2005 PIP. However, the Department received Inland Hospital’s As Filed Medicare Cost Report for its FYE September 28, 2002, on April 18, 2003. Other than the possibility of intentional delay in issuing the Interim MaineCare Settlement Report for that year, there is only one (1) apparent reason the Department could not have issued its Interim MaineCare Settlement Report in time for the Bureau of Medical Services to use it by the end of March 2004, for Inland Hospital’s PIP for SFY 2005. If Ms. MacKenzie’s testimony that it takes four (4) or five (5) months to produce Interim MaineCare Settlement Reports for ten (10) hospitals is found credible, then by extrapolation it would take the Department from approximately sixteen (16) months to approximately twenty (20) months to complete the Interim MaineCare Settlement Reports for all forty-one (41) hospitals. If this is the case, then the Division of Audit will apparently be hopelessly mired until it receives more resources from the Legislature, and it is recommended that the Commissioner affirm the Department’s already issued PIP as the best that could have been accomplished. However, the Hearing Officer is persuaded that the Department could have, and should have, issued its Interim MaineCare Settlement Report for Inland Hospital’s FYE September 28, 2002, in time to be used in the calculation of Inland Hospital’s PIP for SFY 2005.

Policy Promulgated December 3, 2004

The Hearing Officer understands the retroactive portions of the Section 45 policy promulgated since the Department calculated the PIP’s for SFY 2005, to be policy intended to be used in calculating the Interim and Final MaineCare Settlement Reports. Otherwise, it must be interpreted as meaning the Department must recalculate all forty-one (41) PIP’s, which the Hearing Officer concludes is an unreasonable interpretation. However, if the Commissioner accepts the Hearing Officer’s recommendation of remand, the most recently promulgated policy should be followed.

The Department's position in its Informal Review Decision that it was using "changes in the rules that are proposed" is totally rejected. The Department cannot base its decisions on unpromulgated policy, even if it is in the process of being promulgated.

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS WITHIN TWENTY (20) DAYS OF RECEIPT OF THIS RECOMMENDED DECISION. THIS TIME FRAME MAY BE ADJUSTED BY AGREEMENT OF THE PARTIES. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE OFFICE OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

Dated: May 19, 20050

Signed: _____

Michael L. LeBlanc
Administrative Hearing Officer
Office of Administrative Hearings

cc: Inland Hospital, c/o William H. Stiles, Esq., VerrillDana, LLP, One Portland Square,
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