

Janet T. Mills
Governor

Jeanne M. Lambrew, Ph.D.
Commissioner



Maine Department of Health and Human Services
Commissioner's Office
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TTY: Dial 711 (Maine Relay)

IN THE MATTER OF:

John F. Murphy Homes, Inc.)
C/o Gerald F. Petruccelli, Esq.)
Petruccelli, Martin & Haddow, LLP) **FINAL DECISION**
P.O. Box 17555)
Portland, ME 04112-8555)

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

The Recommended Decision of Hearing Officer Strickland mailed July 23, 2021 has been reviewed.

I hereby adopt the findings of fact and I accept the Recommendation of the Hearing Officer that the Department's June 30, 2020 Final Informal Review Decision be modified to reflect that John F. Murphy Homes, Inc. is subject to recoupment of MaineCare payments in the total amount of \$82,531.94.

DATED: 7-10-21 SIGNED: *Jeanne M. Lambrew*
JEANNE M. LAMBREW, Ph.D., 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: William Logan, Esq., OMS

Janet T. Mills
Governor

Jeanne M. Lambrew, Ph.D.
Commissioner



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Jeanne M. Lambrew, Ph.D., Commissioner
Department of Health and Human Services
11 SHS, 109 Capitol Street
Augusta, ME 04333

DATE OF MAILING: **JUL 23 2021**

Re: John F. Murphy Homes, Inc. – Final Informal Review Decision

ADMINISTRATIVE HEARING RECOMMENDATION

An administrative hearing in the above-referenced matter was convened telephonically on May 12, 2021, before Hearing Officer Jeffrey P. Strickland. The hearing record was left open through June 9, 2021, for closing arguments. The Hearing Officer's jurisdiction was conferred under 5 M.R.S. § 9062 by the Commissioner, Department of Health and Human Services.

CASE BACKGROUND AND ISSUE:

John F. Murphy Homes, Inc., appeals the Department of Health and Human Services' Final Informal Review Decision dated June 30, 2020, concerning its Notice of Violation dated June 4, 2019. The Chief Administrative Hearing Officer's Order of Reference dated August 31, 2020, states the issue on appeal as follows:

Was the Department correct when for the review period of January 5, 2015 through November 30, 2016, it determined that John F. Murphy Homes owes the Department \$88,684.94 in recoupment due to: 1) non-compliance with the MaineCare Benefits Manual; 2) breach of the MaineCare Provider/Supplier Agreement; and/or 3) failure to repay overpayments or payments made in error as found in a Final Informal Decision dated June 30, 2020 and Corrected Notice of Violation dated June 4, 2019?

APPEARING ON BEHALF OF THE DEPARTMENT:

- William P. Logan, Esq.
- Katie Grotton, Program Integrity Analyst

APPEARING ON BEHALF OF APPELLANT:

- Gerald F. Petrucelli, Esq.
- Michelle Hathaway, Psy.D.

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer Exhibits:

H-1: The following items, collectively:

- Logan letter dated May 6, 2021.
- Logan letter dated May 6, 2021.
- Pineau letter dated May 6, 2021.
- Pineau letter dated April 28, 2021.
- Hearing notice dated January 26, 2021.
- Status conference notice dated January 26, 2021.
- Status conference notice dated October 27, 2020.
- Status conference notice dated September 1, 2020.
- Order of Reference dated August 31, 2020.
- Fair Hearing Report dated August 27, 2020.
- Email chain dated August 20, 2020.
- Hearing request dated August 18, 2020.
- Final Informal Review Decision dated June 30, 2020.
- Informal review request dated October 25, 2019.
- Corrected Notice of Debt dated June 5, 2019.
- Corrected Notice of Violation dated June 4, 2019.

H-2: The following items, collectively:

- Written stipulations of the parties dated May 5, 2021.
- Exhibit 1 (Members 17, 26, and 28 spreadsheet excerpt for DOS [REDACTED], 2015, to [REDACTED], 2016).

Department Exhibits:

- D-1: Order of Reference dated August 31, 2020.
- D-2: Notice of Violation dated June 30, 2020.
- D-3: Request for Informal Review dated October 25, 2019.
- D-4: Final Informal Review Decision dated June 30, 2020.
- D-5: Request for Administrative Hearing dated August 18, 2020.
- D-6: 10-144 C.M.R. Ch. 101, Chapter I (Effective January 1, 2014).
- D-7: 10-144 C.M.R. Ch. 101, Chapter I (Effective March 23, 2016).

- D-8: 10-144 C.M.R. Ch. 101, Chapter II, § 65 (Effective August 31, 2013).
- D-9: 10-144 C.M.R. Ch. 101, Chapter II, § 65 (Effective April 13, 2015).
- D-10: 10-144 C.M.R. Ch. 101, Chapter II, § 65 (Effective November 23, 2016).
- D-11: 10-144 C.M.R. Ch. 101, Chapter III, § 65 (Effective September 28, 2013).
- D-12: 10-144 C.M.R. Ch. 101, Chapter III, § 65 (Effective April 13, 2015).
- D-13: 10-144 C.M.R. Ch. 101, Chapter III, § 65 (Effective November 23, 2016).

D-14: The following items, collectively:

- Member 17 spreadsheet excerpt for DOS [REDACTED], 2015.
- Member 17 billing form for DOS [REDACTED], 2015.
- Member 17 interval recording sheet for DOS [REDACTED], 2015.
- Member 17 acquisition sheet for DOS [REDACTED], 2015.
- Member 17 individualized treatment plan dated [REDACTED] 2014.
- Mark Steege, Ph.D. letter dated [REDACTED] 2019.

D-15: The following items, collectively:

- Member 26 spreadsheet excerpt for DOS [REDACTED], 2015, to [REDACTED], 2015.
- Member 26 billing form for DOS [REDACTED], 2015, to [REDACTED] 2015.
- Member 26 interval recording sheet for DOS [REDACTED], 2015.
- Member 26 acquisition sheets for DOS [REDACTED], 2015, to [REDACTED] 2015.
- Member 26 individualized treatment plan dated [REDACTED], 2014.
- Harold Longenecker, Ph.D. letter dated [REDACTED] 2019.

D-16A: The following items, collectively:

- Member 28 individualized treatment plan dated [REDACTED] 2016.
- Member 28 behavior reports dated [REDACTED] 2016, through [REDACTED] 2016.
- Erin Beardsley, Psy.D. letter dated [REDACTED] 2019.

D-16B: The following items, collectively:

- Member 28 spreadsheet excerpt for DOS [REDACTED], 2016.
- Member 28 interval recording sheet for DOS [REDACTED] 2016.
- Member 28 acquisition sheet for DOS [REDACTED] 2016.
- Member 28 program book and progress review.

D-16C: The following items, collectively:

- Member 28 spreadsheet excerpt for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 billing form for DOS [REDACTED] 2016, to [REDACTED] 2016.

- Member 28 interval recording sheets for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 program book and progress review.

D-16D: The following items, collectively:

- Member 28 spreadsheet excerpt for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 billing form for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 interval recording sheets for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 program book and progress review.

D-16E: The following items, collectively:

- Member 28 spreadsheet excerpt for DOS [REDACTED] 2016.
- Member 28 billing form for DOS [REDACTED] 2016.
- Member 28 interval recording sheet for DOS [REDACTED] 2016.
- Member 28 program book and progress review.

D-16F: The following items, collectively:

- Member 28 spreadsheet excerpt for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 billing form for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 interval recording sheets for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 program book and progress review.

D-16G: The following items, collectively:

- Member 28 spreadsheet excerpt for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 billing form for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 interval recording sheets for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 program book and progress review.

D-16H: The following items, collectively:

- Member 28 spreadsheet excerpt for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 billing form for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 interval recording sheet for DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 program book and progress review.

D-17: MaineCare / Medicaid Provider Agreement dated November 12, 2009.

D-18: Email chain dated August 8, 2020, through September 23, 2020.

Appellant Exhibits:

A-1: The following items, collectively:

- Member 17 internal audit DOS [REDACTED] 2015.
- Member 17 interval recording sheet DOS [REDACTED] 2015.

- Member 17 individualized treatment plan dated [REDACTED] 2014.
- Member 17 functional behavior assessment dated [REDACTED] 2014.
- Member 17 comprehensive assessments dated [REDACTED] 2014, and [REDACTED] 2015.
- Member 17 psychological evaluation dated [REDACTED] 2013.
- Member 17 90-day ITP review dated [REDACTED] 2014.
- Mark Steege, Ph.D. letter dated [REDACTED], 2019.

A-2: The following items, collectively:

- Member 26 internal audit DOS [REDACTED] 2015, to [REDACTED] 2015.
- Member 26 interval recording sheets DOS [REDACTED] 2015, to [REDACTED] 2015.
- Member 26 individualized treatment plan dated [REDACTED] 2014.
- Member 26 90-day ITP review dated [REDACTED] 2015.
- Member 26 functional behavior assessments dated [REDACTED] 2013, and [REDACTED] 2016.
- Member 26 Spring Harbor Hospital behavior treatment plan dated [REDACTED] 2012.
- Member 26 comprehensive assessments dated [REDACTED] 2014, and [REDACTED] 2015.
- Harold Longenecker, Ph.D. letter dated [REDACTED] 2019.

A-3: The following items, collectively:

- Member 28 internal audit reports DOS [REDACTED] 2016; DOS [REDACTED] 2016, to [REDACTED] 2016; DOS [REDACTED] 2016, to [REDACTED] 2016; DOS [REDACTED] 2016; DOS [REDACTED] 2016, to [REDACTED] 2016; DOS [REDACTED] 2016, to [REDACTED] 2016; DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 interval recording sheets DOS [REDACTED] 2016; DOS [REDACTED] 2016, to [REDACTED] 2016; DOS [REDACTED] 2016, to [REDACTED] 2016; DOS [REDACTED] 2016; DOS [REDACTED] 2016, to [REDACTED] 2016; DOS [REDACTED] 2016, to [REDACTED] 2016; DOS [REDACTED] 2016, to [REDACTED] 2016.
- Member 28 individualized treatment plans dated [REDACTED] 2015, and [REDACTED] 2016.
- Member 28 90-day ITP reviews dated [REDACTED], 2016, and [REDACTED] 2016.
- Member 28 functional behavior assessments dated [REDACTED] 2011, and [REDACTED] 2016.
- Member 28 comprehensive assessments dated [REDACTED] 2014, through [REDACTED] 2015.
- Member 28 psychological evaluations dated [REDACTED] 2011, through [REDACTED] 2017.
- Erin Beardsley, Psy.D. letter dated [REDACTED] 2019.

A-4: Email chain dated July 10, 2020, through August 4, 2020.

FINDINGS OF FACT:

1. Appellant is an enrolled provider of MBM Section 65 Behavioral Health Services.
2. Member 17 is a young adult male with Autism Level 3 and seizure disorder with severe unpredictable behavioral issues including self-injury and physical aggression who receives Children's Behavioral Health Day Treatment Services under MBM Section 65.

3. Member 26 is an adolescent male with Autism Level 3 and seizure disorder with severe unpredictable behavioral issues including self-injury and physical aggression who receives Children's Behavioral Health Day Treatment Services under MBM Section 65.
4. Member 28 is an adolescent male with bipolar disorder and behavioral issues which include identified "interfering behaviors" of "faux sleep" and "attempted sleep" who receives Children's Behavioral Health Day Treatment Services under MBM Section 65.
5. On [REDACTED] 2015, Appellant provided Children's Behavioral Health Day Treatment – BHP Level, three units, to Member 17 to address potential self-injury and severe aggression immediately following a seizure using behavioral interventions that were specified in his ITP, documented in his interval recording sheet for the date in question, and not "custodial care."
6. On [REDACTED] 2015, Appellant provided Children's Behavioral Health Day Treatment – BHP Level, two units, to Member 26 to address potential self-injury and severe aggression immediately following a seizure using behavioral interventions that were specified in his ITP, documented in his interval recording sheet for the date in question, and not "custodial care."
7. Between [REDACTED] 2016, and [REDACTED] 2016, Appellant provided Children's Behavioral Health Day Treatment – BHP Level, 91 units, to Member 28 to address "interfering behaviors" of "faux sleep" and "attempted sleep" using behavioral interventions that were specified in his ITP, documented in his interval recording sheets for the dates in question, and not "custodial care."

CONCLUSIONS OF LAW:

1. Services billed by Appellant for Member 17 for DOS [REDACTED] 2015, (H2012, three units) were covered services; Appellant maintained and retained proper and comprehensive records of services provided to Member 17 for DOS [REDACTED] 2016.
2. Services billed by Appellant for Member 26 for DOS [REDACTED] 2015, (H2012, two units) were covered services; Appellant maintained and retained proper and comprehensive records of services provided to Member 26 for DOS [REDACTED] 2015.
3. Services billed by Appellant for Member 28 for DOS [REDACTED] 2016, to [REDACTED] 2016, (H2012, 91 units) were covered services; Appellant maintained and retained proper and comprehensive records of services provided to Member 28 for DOS [REDACTED] 2016, to [REDACTED] 2016.

RECOMMENDED DECISION:

The Hearing Officer recommends that the Commissioner MODIFY the Department's June 30, 2020, Final Informal Review Decision to reflect that Appellant is subject to recoupment of MaineCare payments in the total amount of \$82,531.94.

RATIONALE:

As a condition of program participation, MaineCare rules require enrolled providers to “Bill only for covered services” and to “Maintain 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.” 10-144 C.M.R. Ch. 101 (MaineCare Benefits Manual), Chapter I, § 1.03-8. “Covered Services” for the above purposes “must be medically necessary and described in the [MaineCare Benefits Manual].” § 1.06-1. “In the absence of proper and comprehensive records, . . . payments previously made may be recouped.” § 1.18.

MaineCare rules state that the Department may “monitor payments to any provider by an audit or post-payment review.” § 1.16. “If the Department has information that indicates that a provider may have submitted bills . . . and/or may have received payment for which he or she may not be properly entitled, the Department shall notify the provider” by means of a “Notice of Violation/Recoupment.” § 1.20-4. A provider must request an informal review and get a “Final Informal Review Decision” prior to requesting an administrative hearing. § 1.23-1. “The informal review will consist solely of a review of documents in the Department’s possession including submitted materials/documentation and, if deemed necessary by the Department, it may include a personal meeting with the provider or provider applicant to obtain clarification of the materials. 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. The request for informal review may not be amended to add further issues.” *Id.*

Appellant is an enrolled provider of Behavioral Health Services under Chapter II, § 65. “Covered Services” include Children’s Behavioral Health Day Treatment Services, defined as, “structured therapeutic services designed to improve a member’s functioning in daily living and community living” that are “determined to be medically necessary by Qualified Staff . . . and subsequently specified in the Individual Treatment Plan . . .” § 65.06-13. Per the rule, “Qualified Staff” for the latter purposes include certain specified clinicians (Psychologists, LCSW’s, LMSW’s, and LMFT’s). § 65.06-13.B. The rule further states, “This Qualified Staff must assume clinical responsibility for medical necessity and the ITP development.” And, “The Behavioral Health Day Treatment Services described below are covered when (1) provided in an appropriate setting as specified in the ITP, (2) supervised by an appropriate professional as specified in the ITP, (3) performed by a qualified provider, and (4) billed by that provider.” § 65.06-13. For these purposes, the services in question must be provided “in conjunction with an educational program in a School as defined in [§] 65.03-4⁽¹⁾” (*see id.*) by “qualified staff”

¹ Meaning, “a program that has been approved by the Department of Education, as either a Special Purpose Private School or a Regular Education Public School Program under 05-071 C.M.R., Chapter 101, §XII and 20-A MRSA §7204 (4), 7252-A and 7253,

that also include Behavioral Health Professionals. § 65.06-13.B. "Children's Behavioral Health Day Treatment – BHP Level" is billed under procedure code H2012 as hourly units. Chapter III, § 65. Additionally, "Services are provided based on time designated in the ITP but may not exceed six hours per day, Monday through Friday, up to five days per week." Chapter II, § 65.06-13. With regard to exclusions, "Non-Covered Services" include "custodial services," the latter being defined as "services, or components of services, of which the basic nature is to provide custodial care." Chapter II, § 65.07; Chapter I, § 1.06-4.

The disputed action is a Final Informal Review Decision issued pursuant to Chapter I, § 1.23-1, concerning a review of a Notice of Violation/Recoupment issued pursuant to Chapter I, § 1.20-4, wherein the Department determined that, based on a review of records for the period [REDACTED] 2015, through [REDACTED] 2016, Appellant had been overpaid a total of \$88,684.94.^{2,3} Based on the parties' written stipulations, Appellant disputes only \$5,742.80 of the overpayment; the associated claims are summarized in an attachment to the stipulations identified as "Exhibit 1." "Exhibit 1" reflects that the claims at issue comprise a total of 98 units billed under procedure code H2012 at \$58.60 per unit⁴ among three members. The members and dates of service are as follows: 1) "Member 17," three units (\$175.80) [REDACTED] 2015; 2) "Member 26," four units (\$234.40) [REDACTED] 2015, to [REDACTED] 2015;⁵ 3) "Member 28," 91 units (\$5,332.60) [REDACTED] 2016, to [REDACTED] 2016. Exh. H-2. The Final Informal Review Determination states the basis for recoupment as follows: "Billing for services when member is sleeping 100% recoupment stands, as you failed to demonstrate that the services billed were actually rendered to an eligible MaineCare member as described in the MBM, Chapter I, Section 1.20-2(H)." Exh. D-4.

Evidence presented at hearing largely comprises materials/documentation submitted by Appellant in connection with the informal review. Of these, BHP "interval recording sheets" reflect that the disputed payments were for services provided in connection with the activity "sleep," or "asleep," during periods of from one to five hours, between 8:30 a.m. and 3:00 p.m.

and 05-071 C.M.R., Chapter 101, § 12, or a program operated or contracted by the Child Development Services System [under] 20-A M.R.S.A. § 7001(1-A) that has enrolled as a provider and entered into a provider agreement, as required by MaineCare." *Id.*

² As stated in the Corrected Notice of Debt dated June 5, 2019, and Final Informal Review Determination dated June 30, 2020, the Department initially asserted an overpayment of \$1,251,989.00, and subsequently reduced that amount to \$88,684.94, based on "additional documentation and clarifications submitted" in connection with the informal review process. Exh. H-1.

³ The evidence shows that, in identifying the disputed portion of the total overpayment pending the immediate proceeding, the Department discovered an error in its previous calculation of overbilled units attributed to Member 28 for [REDACTED] 2016, to [REDACTED] 2016, by 9 units (\$527.40), in effect further reducing the asserted overpayment to \$88,157.54. Exh. H-2.

⁴ That amount (\$58.60) being the "maximum allowance per unit" applicable to the period in question. Chapter III, § 65.

⁵ Of the four units noted in "Exhibit 1" as billed for "sleeping hours" for Member 26 for DOS [REDACTED] 2015, to [REDACTED] 2015, the evidence shows that BHP services were provided during "sleeping hours" only from 9:45 a.m. to 12:00 p.m. on [REDACTED] 2015, meaning that \$117.20 (two units), and not \$234.40 (four units), were billed for "sleeping hours" for the DOS at issue. As Appellant acknowledged in its informal review submissions, however, the evidence shows that services were overbilled by two units (36 vs. 34) for the DOS at issue given the six-hour daily limit on services. Exh. D-15 (562 – 563); Exh. A-2 (26-001 – 26-004). Therefore, the asserted overpayment of \$88,157.54 includes a total of \$5,625.60 (96 units), and not \$5,742.80 (98 units), billed for "sleeping hours," leaving a balance of \$82,531.94 billed other than for "sleeping hours."

on the dates of service (DOS) at issue. The Department's witness Katie Grotton testified that OMS Policy Unit staff with whom she consulted had advised her that behavioral health services could not be billed for times when a member is sleeping. The evidence shows that Ms. Grotton's testimony is consistent with information provided by the OMS Policy Unit to Appellant on September 23, 2020, following the FIRD. Exh. D-18. Other informal review submissions included letters from supervising clinicians Drs. Mark Steege, Harold Longenecker, and Erin Beardsley, concerning medical necessity of services provided to Member 17, Member 26, and Member 28, respectively, on the DOS at issue. Exh. D-14 (560); Exh. D-15 (622 – 623); Exh. D-16A (698 – 699); Exh. A-1 (17-081); Exh. A-2 (26-118 – 26-119); Exh. A-3 (28-292 – 28-293). Relative to the latter, Ms. Grotton noted that the letters from Drs. Mark Steege and Harold Longenecker pertaining to Member 17 and Member 26 relate that the services in question were for "observational support" and/or to "monitor" those members; Ms. Grotton testified that the services in question are not MaineCare reimbursable, nor were they included in the members' treatment plans. Finally, Ms. Grotton testified that none of the members' treatment documentation ("progress notes") showed the services in question were provided while the members were asleep.

Upon review, the evidence shows that the 96 hourly units at issue were billed for "covered services," meaning services that were "medically necessary and described in the MaineCare Benefits Manual," and not for services "of which the basic nature is to provide custodial care" or that were otherwise "uncovered services." The evidence further shows that Appellant maintained/retained "contemporaneous" and such other required records as were "sufficient to fully and accurately document the nature, scope, and details" of the services "provided to each individual MaineCare member."

Appellant's witness Michelle Hathaway, Psy.D., testified concerning medical necessity and documentation sufficiency with respect to the services at issue. Dr. Hathaway testified that, while not involved as a clinician in behavioral treatment provided to Members 17, 26, and 28,⁶ as an administrator she was nevertheless familiar with their individual treatment needs due to the intensity of their "clinical challenges" and service coordination requirements. Broadly, Dr. Hathaway testified that the services provided to Members 17 and 26 during "sleep" on [REDACTED], 2015, and [REDACTED], 2015, respectively, were in both cases provided during the "recovery phase" immediately following a seizure, and that the services were necessary to address potential severe aggressive behaviors associated with same, while the services provided to Member 28 during "sleep" between [REDACTED], 2016, and [REDACTED], 2016, were necessary to address "faux sleep" and "attempted sleep" as an integral component of his ITP. Dr. Hathaway testified that handwritten notations in the members' interval recording sheets for the DOS at issue ("R+ P R" circled) indicated that behavioral interventions identified in the members' ITP's ("reinforcing, prompting, redirecting") were employed during the 15-minute intervals noted.

⁶ Members 17, 26, and 28, all of whom are male, were approximately [REDACTED] years of age, respectively, as of the DOS at issue.

Relative to Members 17 and 26, the evidence shows that BHP services were billed for Member 17 from 9:30 a.m. to 12:00 p.m. for ██████████ 2015, during the activity "asleep," and for Member 26 from 9:45 a.m. to 12:00 p.m. for ██████████ 2015, during the activity "sleep," ostensibly representing three units (\$175.80) and two units (\$117.20) overbilled for those DOS.⁷ Appellant's informal review request states that the services at issue were "considered recovery (as recommended by nursing and neurology staff) for documented seizure or suspected seizure activity," that "[r]ecovery periods [for seizures] are highly variable," and that "at times the student recovered immediately," while "[a]t other times, given the suspected severity of the neurological activity, the student experienced longer recovery times." Appellant's request further states that "seizure activity often causes behavioral and affect change, and necessitated that these students be monitored during the entirety of their recovery period by staff who were ready and able to implement a full behavior plan, including physical restraint, if necessary," that "the student exhibited severe aggressive behavior towards others, and could not be monitored by a nurse alone," and finally that "[g]iven the variation of their recovery periods, it was not considered appropriate to discontinue services during their sleep (recovery) time during the day as often times, following [their] recovery from medically significant events, they were able to return to their full program." Exh. D-3, 098 - 099.

Dr. Hathaway testified that Members 17 and 26 were both diagnosed as having autism Level 3 with developmental ages of 1.5 years and 2 years, respectively. Dr. Hathaway testified that both members were "extremely aggressive and volatile" and could not be left with non-BHP staff during the recovery phase immediately following a seizure. In particular, Dr. Hathaway testified that the members' recovery phases were of unpredictable duration, and that the afflicted member could suddenly "come to" at any time, placing an "untrained" (i.e., with respect to behavioral interventions specified in the members' ITP's) person at risk of physical injury.

In terms of documentation, both members' individualized treatment plans reflect that medically necessary services include continuous 2:1 BHP staffing across all activities due to their high potential for engaging in self-injurious behaviors and physical aggression toward others, which as described are both severe and unpredictable. Relative to the latter, both members' ITP's specify behavioral interventions that include awareness and avoidance of identified behavioral triggers, de-escalation measures, and use of protective equipment ("blocking pads") and physical restraint by four to six adults. Member 17's ITP notes that "[d]ue to the severity of his aggression he requires a restrictive placement and a positive behavior support plan which includes 2:1 staffing throughout his school day," that he "is currently staffed at a 2:1 ratio due to the intensity and unpredictability of his aggression," that "[o]nly experienced clinicians and well trained educational technicians will be working with" the member, and that staff will

⁷ According to Chapter I, § 1.03-8(j), "In cases where services provided include less than a whole unit of a service, the unit shall be rounded up only if equal or greater than fifty per cent (50%) of the unit of service, e.g. 1.5 units of service equals 2 units of service rounded up; 1.4 units of service equal 1 unit of service."

"continue to monitor for behavioral triggers for intense behavioral incidents." Member 26's ITP notes that the member "currently has his own classroom and requires 2:1 staffing throughout his day for his safety as well as the safety of those around him." In addition, both members' ITP's reference seizure disorder diagnoses and histories as well as seizure plans and procedures. Exh. A-1 (17-015, 17-026, 17-027, 17-029); Exh. A-2 (26-010, 26-039, 26-042, 26-043, 26-046).

As noted previously, evidence presented at hearing included letters from clinicians Drs. Mark Steege and Harold Longenecker concerning medical necessity of services provided to Members 17 and 26, respectively, on the DOS at issue. In sum, this evidence is consistent with Dr. Hathaway's testimony that the services at issue, which in both cases included monitoring and observation during recovery phases immediately following seizures, were necessary in order to address potential self-injurious and aggressive behaviors by those members at the time.

In the case of Member 28, the evidence shows that 91 units (\$5,332.60) were billed for BHP services provided during the activity "sleep" between [REDACTED] 2016, and [REDACTED] 2016. Appellant's informal review request states, "The student has a lengthy, documented history of a bi-polar presentation which causes him to be manic for extended periods of time. During his low periods, the student often struggled with insomnia at night, causing severe exhaustion during the day. In addition, when depressed, he would use "sleep" to escape from tasks/demands placed on him by the treatment team. This is well documented in multiple reports and treatment notes within his file. Over a two-year period, the treatment team specifically targeted these behaviors and gradually decreased periods of rest/sleep avoidance. This treatment package was supervised by a Psychologist and a BCBA who related his sleep as avoidant behavior directly attributed to his mental health needs. The student could be extremely aggressive when not allowed to sleep. This behavior was slowly and systematically shaped. Interrupting sleep required 3 to 4 staff at a time for prolonged periods of time. When allowed to sleep, as part of his treatment package, the student was supervised by BHPs well-trained in the use of the behavior plan and able to intervene with his severe aggressive and disruptive behavior, again, documented in the behavior plan."

Dr. Hathaway testified that Member 28 had presented with a "complex clinical picture" in that he would "sleep" both due to exhaustion associated with manic episodes and as an avoidance behavior, by engaging in "faux sleep" or "attempted sleep," when depressed. In addition, Member 28 when depressed was prone to "reactive" self-injurious and aggressive behaviors (i.e., when not permitted to sleep). Dr. Hathaway testified that these issues were the sole focus of Member 28's treatment team for many months, and that the successful treatment provided, which had been allowed at all times prior to the audit at issue, would have been impossible had Appellant not been permitted to bill for the services in question during that time.

In terms of documentation, Member 28's individualized treatment plan identifies "sleep" as an "interfering behavior" defined as follows: "Sleeping (sleep) – A period of rest in which [Member 28] is laying down (in the CDR, under his desk, or has his head on the table) with his

eyes closed. May also include pulling a hood/jacket/blanket over his head. [Member 28] has been recorded to sleep for an average of 106 minutes per day while in the school setting." Relative to behavioral interventions, "Specific Replacement Behaviors" and "Reactive Procedures" include, respectively, "Active Participation in academic or functional skill activity or task demand," and "If [Member 28] attempts to fall asleep or falls asleep during at [sic] any point, attempts to wake him up will be made at regular intervals (e.g. every 5 minutes)." Exh. A-3 (28-058 – 28-058). Member 28's ITP includes progress goals ("Measurable Goal Sixteen") at quarterly intervals from ██████████ 2016 through ██████████ 2017, according to the following format: "Objective 1: By ██████████ 2016, given a positive behavior support plan that outlines specific reinforcement procedures, [Member 28] will reduce the average duration of daily sleeping from 68 minutes to a quarterly average of no more than 50 minutes per day⁸) as measured by daily data collection." Exh. A-3 (28-068 – 28-069).

Other evidence presented at hearing included a letter from clinician Dr. Erin Beardsley concerning medical necessity of services provided to Member 28 on the DOS at issue. In sum, this evidence is consistent with Dr. Hathaway's testimony that the services at issue were necessary in order to address "interfering behaviors" identified in Member 28's ITP.

Based on the above, a preponderance of the evidence supports that the 66 units at issue were billed for medically necessary covered services otherwise meeting all applicable requirements for MaineCare reimbursement. The Department offers no tenable rationale for denying reimbursement for the services in question.

Again, the Department's position is that, based on guidance received from staff of the MaineCare Policy Unit in connection with the informal review, the rules prohibit reimbursement for Children's Behavioral Health Day Treatment Services delivered while a member is "sleeping." MaineCare Policy Unit guidance on this issue, as communicated to Appellant in an email dated September 23, 2020, is as follows: "It is ultimately impossible to provide mental health or rehabilitation services while a member is asleep regardless of the reason for sleep." Exh. D-18. Per the Department's witness Ms. Grotton, the Department's position concerning services for "observation" and "monitoring" is that these are also non-reimbursable under MaineCare.

MaineCare rules do not include a blanket exclusion from coverage regarding services provided to a member who is "sleeping," or services for "observation" and "monitoring." MaineCare rules do prohibit reimbursement for "custodial services," which could reasonably include any or all of the above scenarios depending on the specific circumstances. In this case, however, the services at issue cannot reasonably be considered "custodial services." In the first two instances (Members 17 and 26), the members were not simply "sleeping," but were recovering from a neurological event associated with an elevated and unpredictable risk of self-injury and

⁸ "Measurable Goal Sixteen" specifies further incremental reductions of "average duration of daily sleeping" to 30 minutes, 10 minutes, and 2 minutes ("Objective 2," "Objective 3," and "Objective 4," respectively) for remaining quarters.

severe aggression toward others. As such, Members 17 and 26's care needs at that point were not appreciably different than while fully conscious. In the third instance (Member 28), the activity of "sleep," meaning "faux," "attempted," or actual sleep, was itself the "interfering behavior" targeted by clinicians, while the behavioral interventions, which reportedly achieved their purpose, amounted to purposeful disruption of sleep with the goal of eliminating the interfering behavior.

In light of the above, the Department was not correct when, for the review period of [REDACTED] 2015, through [REDACTED] 2016, it determined that John F. Murphy Homes owed the Department \$88,684.94 as found in a Final Informal Decision dated June 30, 2020. Accordingly, the Hearing Officer recommends the Commissioner MODIFY the Department's June 30, 2020, Final Informal Review Decision to reflect that Appellant is subject to recoupment of MaineCare payments in the total amount of \$82,531.94.

RIGHT TO FILE EXCEPTIONS AND RESPONSES:

THIS IS A RECOMMENDED DECISION OF THE DIVISION OF ADMINISTRATIVE HEARINGS; THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER. PARTIES TO THIS RECOMMENDED DECISION MAY SUBMIT WRITTEN EXCEPTIONS AND RESPONSES TO THE DIVISION OF ADMINISTRATIVE HEARINGS PRIOR TO THE FINAL DECISION. EXCEPTIONS AND RESPONSES SHALL INCLUDE A CLEAR STATEMENT OF THE PARTY'S POSITION AND THE REASONS FOR IT, ANY ERRORS OR OMISSIONS MADE BY THE HEARING OFFICER, AND ANY LEGAL ARGUMENT THE PARTY WISHES TO MAKE. FACTUAL INFORMATION NOT PRESENTED AT HEARING NEED NOT BE CONSIDERED BY THE FINAL DECISION MAKER. EXCEPTIONS AND RESPONSES MUST BE RECEIVED BY THE DIVISION OF ADMINISTRATIVE HEARINGS BY MAIL, FAX, OR EMAIL WITHIN TWENTY (20) CALENDAR DAYS FOLLOWING THE DATE OF MAILING INDICATED IN THE UPPER RIGHT CORNER OF THE FIRST PAGE OF THIS RECOMMENDED DECISION. ANY PARTY SUBMITTING EXCEPTIONS AND RESPONSES MUST PROVIDE COPIES TO ALL OTHER PARTIES. A REASONABLE EXTENSION OF THE TWENTY-CALENDAR-DAY TIME LIMIT FOR SUBMITTING EXCEPTIONS AND RESPONSES MAY BE GRANTED BY THE CHIEF ADMINISTRATIVE HEARING OFFICER IF THE PARTIES ARE IN AGREEMENT TO THE EXTENSION OR FOR GOOD CAUSE SHOWN. 10-144 C.M.R. CH. 1, § VII(B)(5).

DATED: July 22, 2021

SIGNED: /s/ Jeffrey P. Strickland
Jeffrey P. Strickland, Esq.
Hearing Officer

cc: William P. Logan, Esq.
Gerald F. Petruccelli, Esq.