

Janet T. Mills
Governor

Jeanne M. Lambrew, Ph.D.
Commissioner



Maine Department of Health and Human Services
Commissioner's Office
11 State House Station
109 Capitol Street
Augusta, Maine 04333-0011
Tel.: (207) 287-3707; Fax: (207) 287-3005
TTY: Dial 711 (Maine Relay)

IN THE MATTER OF:

Ocean Way Mental Health Agency)
C/o Riley L. Fenner, Esq.) **FINAL DECISION**
97 India Street)
Portland, ME 04101)

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

The Recommended Decision of Hearing Officer Strickland mailed November 10, 2021 and the responses and exceptions submitted on behalf of Ocean Way Mental Health Agency have been reviewed.

I hereby adopt the findings of fact and I accept the Recommendation of the Hearing Officer that the Department was correct when for the review period of [REDACTED] 2016 through [REDACTED] 2018, it determined that Ocean Way Mental Health Agency owes the Department \$95,444.41 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 March 16, 2020 and Revised Notice of Violation dated February 11, 2019.

DATED: 12-21-21 SIGNED: 
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: Halliday Moncure, AAG, Office of the Attorney General

Janet T. Mills
Governor

Jeanne M. Lambrew, Ph.D.
Commissioner



Maine Department of Health and Human Services
Administrative Hearings
11 State House Station
109 Capitol Street
Augusta, Maine 04333-0011
Tel.: (207) 624-5350; Fax: (207) 287-8448
TTY: Dial 711 (Maine Relay)

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

DATE OF MAILING: November 10, 2021

Re: Ocean Way Mental Health Agency – Final Informal Review Decision

ADMINISTRATIVE HEARING RECOMMENDATION

An administrative hearing in the above matter was convened telephonically on July 12, July 13, and July 14, 2021, before Hearing Officer Jeffrey P. Strickland. The record was left open through August 20, 2021, for closing arguments. The Hearing Officer's authority was conferred under 5 M.R.S. § 9062 by the Commissioner, Department of Health and Human Services.

CASE BACKGROUND AND ISSUE:

Ocean Way Mental Health Agency appeals the Department of Health and Human Services' Final Informal Review Decision dated March 16, 2020, which determined that Appellant was subject to recoupment of \$95,444.41 in MaineCare payments made for services during the period [REDACTED] 2016, through [REDACTED] 2018. The Chief Administrative Hearing Officer's May 21, 2020, Order of Reference states the issue on appeal as follows:

Was the Department correct when for the review period of [REDACTED] 2016 through [REDACTED] 2018, it determined that Ocean Way Mental Health Agency owes the Department \$95,444.41 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 March 16, 2020 and Revised Notice of Violation dated February 11, 2019?

APPEARING ON BEHALF OF THE DEPARTMENT:

- Halliday Moncure, AAG
- Brendan Kreckel, AAG
- Shelly Hayward, Comprehensive Health Planner II, OMS
- William Logan, Esq., Director of Compliance, OMS

APPEARING ON BEHALF OF APPELLANT:

- Riley Fenner, Esq.

- Carlton Lewis, LCSW, former Coordinator of Treatment Practice, SAMHS
- Kelly Parnell, LCSW, Clinical Director, KEPRO
- Kathy Lavallee, Social Services Program Manager, OBH (formerly)
- Jeanette Knowlton, bookkeeper/billing clerk, OWMHA (formerly)
- Linda Santeramo, Quality Management Specialist, SAMHS (formerly)
- John Bonner, Field Services Manager, OBH (formerly)
- Carol Davis, RN, Health Services Consultant, DLRS
- Laurie Ryan, owner, OWMHA

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer Exhibits:

H-1: The following items, collectively:

- Order of Reference dated May 21, 2020.
- Fair Hearing Report Form dated May 14, 2020.
- Appellant's letter re request for administrative hearing and entry of appearance for Riley Fenner, Esq. dated May 11, 2020.
- Final Informal Review Decision dated March 16, 2020.
- Summary of MaineCare Title 19 Settlements – Invoice dated March 17, 2020.
- Email chain re "Informal Review Request" dated April 12, 2019, through April 12, 2019.
- Revised Notice of Violation dated February 11, 2019.
- Notice of Appeal Rights dated February 11, 2019.
- Notice of Debt in accordance with 22 M.R.S.A. § 1714-A dated February 11, 2019.
- Summary of MaineCare Title 19 Settlements – Invoice dated February 18, 2019.

H-2: The following items, collectively:

- Administrative Hearing reschedule letter dated April 7, 2021.
- Status Conference reschedule letter dated January 6, 2021.
- Administrative Hearing reschedule letter dated January 5, 2021.
- Status Conference reschedule letter dated December 8, 2020.
- Status Conference reschedule letter dated August 25, 2020.
- Status Conference reschedule letter dated June 25, 2020.
- Status Conference reschedule letter dated May 27, 2020.
- Notice of Administrative Hearing (undated).

H-3: The following items, collectively:

- Status Conference summary letter dated June 24, 2020.
- Status Conference summary letter dated August 20, 2020.

H-4: The following items, collectively:

- Department's prehearing brief dated July 24, 2020, with: Exhibit A – Lewis letter dated November 12, 2015; Exhibit B – Email re “Oceanway Manor” dated September 17, 2015; Exhibit C – Administrative Hearing Recommended Decision dated March 24, 2017; Exhibit D – Administrative Hearing Recommended Decision dated April 23, 2019; Exhibit E – Administrative Hearing Recommended Decision dated July 19, 2019; Exhibit F – Email chain re “policies” dated December 22, 2014, through September 28, 2015, Email chain re “Update” dated November 3, 2015, through November 12, 2015, Email chain re “Letter to Laurie Ryan, Oceanway” dated November 14, 2015, through November 16, 2015, Email chain re “APS 2nd letter” dated September 30, 2015, through November 16, 2015; Exhibit G – Petitioner's Brief, *OWMHA v. DHHS*, KNOSC-AP-19-22; Exhibit H – Respondent's Brief, *OWMHA*; Exhibit I – Respondent's Reply Brief, *OWMHA*.
- Appellant's prehearing brief dated July 24, 2020.
- Appellant's prehearing reply brief dated August 11, 2020.
- Department's prehearing reply brief dated August 13, 2020.
- Email chain re “pre-hearing requests” dated January 8, 2021, through January 11, 2021.

H-5: The following items, collectively:

- Subpoena re Jeanette Knowlton dated February 19, 2021.
- Subpoenas re Carlton Lewis dated March 11, 2021, and June 22, 2021.
- Subpoenas re Kelly Bickmore dated March 11, 2021, and June 22, 2021.
- Subpoenas re Kelly Parnell, LCSW dated March 11, 2021, and June 22, 2021.
- Subpoenas re Mary Tagney dated March 11, 2021, and June 22, 2021.
- Subpoenas re Linda Santeramo dated March 11, 2021, and June 22, 2021.

H-6: The following items, collectively:

- Email re “initial documents” dated June 24, 2020.
- Email re “DHHS Pre-Hearing Memo” dated July 24, 2020.
- Email re “Appellant's Prehearing Brief” dated July 24, 2020.
- Email re “Ocean Way Response Brief” dated August 11, 2020.
- Email re “DHHS Pre-Hearing Reply Brief” dated August 13, 2020.
- Email chain re “continuance of status conference” dated September 25, 2020.
- Email chain re “agenda for status conference” dated December 22, 2020, through December 29, 2020.
- Email chain re “Ocean Way Mental Health” dated March 8, 2021.
- Email re “DHHS exhibits and witness list” dated March 22, 2021.
- Email re “FINAL DHHS Exhibits” dated March 22, 2021.
- Email re “DHHS objections to OWMH exhibits” dated March 29, 2021.
- Email re “Ocean Way Mental Health Agency's Proposed Exhibits” dated March 29, 2021.
- Email chain re “Agreed to request for continuance of hearing” dated March 29, 2021, through April 1, 2021.

- Email chain re "additional DHHS exhibits" dated July 1, 2021.
- Email re "Ocean Way," "7.2.21 cvr ltr encl DHHS additional exhibits.pdf," and "6/29/21 FINAL TOC for DHHS exhibits (REVISED)" dated July 2, 2021.
- Email re "Ocean Way Updated Exhibit List and Exhibits" dated July 6, 2021.
- Email re "Ocean Way Mental Health Agency," "7.7.21 Request to withdraw and replace DHHS Ex. 53 (with header for email).pdf," and "7.7.21 Corrected DHHS Ex. 53.pdf" dated July 7, 2021.
- Email chain re "questions in prep for hearing" dated July 2, 2021, through July 9, 2021.

H-7: The following items, collectively:

- Department's letter re "DHHS proposed exhibits and witness list" dated March 22, 2021.
- Appellant's letter re "Request for Continuance of Hearing Regarding Ocean Way Mental Health Agency Scheduled for April 5-9, 2021, and April 12-13, 2021" dated March 29, 2021.
- Department's letter re "DHHS objections to OWMH proposed exhibits" dated March 29, 2021.
- Appellant's letter re "Request for Conference Regarding Ocean Way Mental Health Agency Hearing Scheduled for April 5-9, 2021, and April 12-13, 2021" dated March 31, 2021.
- Department's letter re "Appeal and Request for Hearing by Ocean Way Mental Health Agency Regarding Final Informal Review Decision dated March 16, 2020 [REDACTED]" and entry of appearance for Brendan Kreckel, AAC, dated June 30, 2021.
- Department's letter re "DHHS additional exhibits" dated July 2, 2021, and Exhibit List (Revised July 1, 2021).
- Department's letter re "DHHS withdrawal of exhibit 53 and submission of corrected version" dated July 7, 2021.

H-8: The following items, collectively:

- Email chain re "HO exhibits" dated July 22, 2021, through July 27, 2021.
- Email re "Ocean Way Closing Argument Brief" dated July 28, 2021.
- Email re "DHHS closing argument and requests" dated July 28, 2021.
- Hearing Officer's letter re Hearing Officer Exhibits dated July 30, 2021.

Department Exhibits:

- D-1: MaineCare/Medicaid Provider Agreement dated January 4, 2013.
- D-2: Disclosure of Ownership and Control Interest Statements dated February 25, 2013, and May 27, 2016.
- D-3: Mental Health Agency License dated August 20, 2016, through August 19, 2018.

- D-4: 10-144 CMR Ch. 101, Chapter I, § 1 (eff. 3/23/16).
- D-5: 10-144 CMR Ch. 101, Chapter I, § 1 (eff. 7/5/17).
- D-6: 10-144 CMR Ch. 101, Chapter I, § 1 (eff. 9/17/18).
- D-7: 10-144 CMR Ch. 101, Chapter II, § 17 (eff. 3/22/16) and Chapter III, § 17 (eff. 5/1/93).
- D-8: 10-144 CMR Ch. 101, Chapter II, § 17 and Chapter III, § 17, Emergency Rule (eff. 9/2/16).
- D-9: 10-144 CMR Ch. 101, Chapter II, § 17 and Chapter III, § 17 (eff. 2/26/17).
- D-10: 14-193 CMR Ch. 6, §§ C.3 – C.14 (eff. 10/20/93).
- D-11: PIU Workflow Notes dated August 16, 2018, through January 7, 2021.
- D-12: Record request letter dated August 30, 2018.
- D-13: Notice of Violation dated November 30, 2018; Notice of Debt dated November 30, 2018; USPS certified mail receipt dated December 3, 2018.
- D-14: Revised Notice of Violation dated February 11, 2019; Notice of Debt dated February 11, 2019; USPS certified mail receipt dated February 13, 2019.
- D-15: Request for Informal Review dated April 12, 2019.
- D-16: Final Informal Review Decision dated March 16, 2020, and attached redacted spreadsheet; USPS certified mail receipt dated February 13, 2019.
- D-17: Request for Hearing on Final Informal Review Decision dated May 11, 2020.
- D-18: Member 16 spreadsheet excerpt and provider records.
- D-19: Member 21 spreadsheet excerpt and provider records.
- D-20: Member 24 spreadsheet excerpt and provider records.
- D-21: Member 28 spreadsheet excerpt and provider records.
- D-22: Member 31 spreadsheet excerpt and provider records.
- D-23: Agreement to Purchase Services dated [REDACTED] 2015.
- D-24: Ryan/Gallagher/Davis email chain dated [REDACTED], 2014, through [REDACTED] 2015.

- D-25: Ryan/Lewis email dated [REDACTED] 2015, with attachment.
- D-26: Ryan/Davis email chain dated [REDACTED], 2015, through [REDACTED], 2015.
- D-27: Ryan/Lewis email chain dated [REDACTED], 2015, through [REDACTED], 2015.
- D-28: Ryan/Lewis email chain dated [REDACTED], 2015, through [REDACTED], 2015.
- D-29: Ryan/Lewis email dated [REDACTED], 2015, with attachment.
- D-30: Ryan/Davis email dated [REDACTED], 2015, with attachment.
- D-31: Ryan/Lewis/Davis email chain dated [REDACTED], 2015, through [REDACTED], 2015.
- D-32: Ryan/Lewis/Davis email chain dated [REDACTED], 2015, through [REDACTED], 2015.
- D-33: Ryan/Lewis/Davis email chain dated [REDACTED], 2015, through [REDACTED], 2015.
- D-34: Ryan/Lewis email dated [REDACTED] 2015.
- D-35: Ryan/Lewis email dated [REDACTED], 2015.
- D-36: Ryan/Lewis email chain dated [REDACTED], 2015, through [REDACTED], 2015.
- D-37: Ryan/Lewis/Davis email chain dated [REDACTED], 2015, through [REDACTED], 2015.
- D-38: Ryan/Knowlton/Patillo/Lavallee/Emerson email chain dated [REDACTED] 2016.
- D-39: Ryan/Hill/Bauss/Davis email chain dated [REDACTED], 2016, through [REDACTED], 2016.
- D-40: Ryan/Patillo email dated [REDACTED] 2016.
- D-41: Ryan/Bonner/Davis/Smyrski email chain dated [REDACTED] 2016, through [REDACTED] 2016.
- D-42: Appeal of KEPRO prior authorization denial dated [REDACTED], 2016.
- D-43: Section 17 clinician letter dated [REDACTED], 2016.
- D-44: Request for Informal Review dated November 1, 2016.
- D-45: Final Informal Review Decision dated December 22, 2016, and attached spreadsheet.
- D-46: Transcript of administrative hearing on Final Informal Review Decision dated December 22, 2016.

- D-47: Recommended Decision dated July 19, 2019.
- D-48: Final Decision dated September 12, 2019.
- D-49: Ocean Way Manor and Ocean Way Mental Health Agency v. DHHS, KNOSC-AP-19-22, Knox County Superior Court docket.
- D-50: Table of contents for certified record of Final Decision dated September 12, 2019.
- D-51: State of Maine v. Laurie Ryan, Docket No. KENCD-CR-2019-586, Kennebec County, Augusta, Unified Criminal Docket.
- D-52: State of Maine v. Laurie Ryan, Docket No. KENCD-CR-2019-586, Indictment.
- D-53: Revised redacted spreadsheet, Final Informal Review Decision dated September 12, 2019.
- D-54: State of Maine v. Laurie Ryan, Docket No. KENCD-CR-2019-586, Kennebec County, Augusta, Unified Criminal Docket.
- D-55: State's Discovery Index 6.1.21, State v. Laurie Ryan, Docket No. KENCD-CR-2019-586.
- D-56: Ocean Way Manor and Ocean Way Mental Health Agency v. DHHS, KNOSC-AP-19-22, Knox County Superior Court docket.
- D-57: Petitioners' Consented To Motion for Further Stay dated April 2, 2021.
- D-58: Respondent's Motion to Take Notice dated April 2, 2021.
- D-59: Respondent's Reply to Petitioners' Response to Respondent's Motion to Take Notice dated June 4, 2021.
- D-60: Order on Consented to Motion for Further Stay of Proceedings dated April 8, 2021.

Appellant Exhibits:

- A-1: Annotated Notice of Violation Spreadsheet submitted to DHHS on April 12, 2019.
- A-2: Member Record Set submitted to DHHS on April 12, 2019.
- A-3: Davis/Lewis/Kearns/Ryan email dated [REDACTED] 2015.
- A-4: [Omitted]
- A-5: [Omitted]

- A-6: Surveyor Notes Worksheet dated [REDACTED], 2015.
- A-7: Purported letter from Carlton Lewis to Laurie Ryan dated [REDACTED] 2015.
- A-8: Purchased Services Agreement dated [REDACTED] 2015.
- A-9: AMHI Consent Decree, Kennebec County Superior Court Docket No. 89-88.
- A-10: Transcript of October 27, 2016, recorded interview of Kelly Bickmore and Kelly Parnell.
- A-11: Transcript of November 3, 2016, recorded interview of Carlton Lewis.
- A-12: Transcript of January 19, 2017, recorded interview of Kathy Lavallee.
- A-13: Transcript of September 28, 2017, recorded interview of Sheldon Wheeler.
- A-14: Transcript of March 15, 2019, recorded interview of Carlton Lewis.
- A-15: Transcript of March 18, 2019, recorded interview of Carlton Lewis.
- A-16: Notice of Violation Spreadsheet describing and compiling value of "Non Billed" services.
- A-17: Respondent's Motion to Take Notice With Incorporated Memorandum of Law and Exhibits filed on behalf of the Department on April 2, 2021, *Ocean Way Manor and Ocean Way Mental Health Agency v. State of Maine Department of Health and Human Services*, Knox County Superior Court Docket No. AP-19-22.
- A-18: Ocean Way's Response to the Department's Motion to Take Notice filed May 24, 2021.

FINDINGS OF FACT:

1. Appellant is a former enrolled provider of MBM Section 17 Community Support Services.
2. On January 4, 2013, Appellant executed a MaineCare/Medicaid Provider Agreement with the Department wherein Appellant agreed 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 acknowledged that "failure to maintain all 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."
3. In a letter dated [REDACTED] 2015, Carlton Lewis advised that SAMHS had approved Appellant to "provide up to 20 hours of DLSS per day . . . for a 90 day period" to Member 24

beginning [REDACTED] 2015, and then to provide 14 to 16 hours of DLSS per day depending on Member 24's needs at that time as determined by SAMHS.

4. Carlton Lewis's letter dated [REDACTED] 2015, states that the services provided to Member 24 "will be documented in her file daily."

5. On August 30, 2018, the Department notified Appellant that it had been "selected by the Department of Health and Human Services, Program Integrity Unit, for a record review," and requested Appellant to "submit copies of your entire records including but not limited to: Comprehensive Assessments, Individualized Treatment Plans, Progress Notes, LOCUS and/or ANSA and Mental Health Diagnosis for all MaineCare Members served by your agency" during the review period [REDACTED], 2016, through [REDACTED], 2018.

6. On February 11, 2019, the Department issued a Revised Notice of Violation notifying Appellant that it had assessed total penalties of \$133,347.50 based on discrepancies and violations identified in its review.

7. On April 12, 2019, Appellant requested an informal review of the Department's February 11, 2019, Revised Notice of Violation.

8. On April 16, 2019, Appellant submitted 397 pages of materials in connection with its request for informal review of the Department's February 11, 2019, Revised Notice of Violation.

9. Materials submitted in connection with Appellant's request for informal review included an altered version of Carlton Lewis's letter dated [REDACTED] 2015; the altered version submitted by Appellant was dated [REDACTED] 2015, and did not include the requirement stated in the authentic version concerning daily documentation of services provided to Member 24.

10. On March 16, 2020, the Department issued a Final Informal Review Decision notifying Appellant that it had reduced total penalties assessed from \$133,347.50 to \$95,444.41.

11. Appellant lacked mandated records for Section 17 services reimbursed for Member 24 during the review period [REDACTED] 2016, through [REDACTED] 2018, in the total amount of \$76,401.23; \$24,447.30 of that amount was paid for services that were medically necessary.

12. Appellant lacked mandated records for Section 17 services reimbursed for other members during the review period [REDACTED] 2016, through [REDACTED] 2018, in the total amount of \$45,806.82; \$9,007.25 of that amount was paid for services that were medically necessary.

13. Appellant did not reasonably and detrimentally rely on misleading statements, conduct, or silence by the Department in failing to maintain mandated records for Section 17 services reimbursed for Member 24 during the review period [REDACTED] 2016, through [REDACTED] 2018.

CONCLUSIONS OF LAW:

1. The Department is not equitably estopped from recouping MaineCare payments made for services to Member 24 during the period [REDACTED], 2016, through [REDACTED] 2018.
2. Appellant is not willing to obey MaineCare rules.
3. Appellant is subject to recoupment of \$95,444.41 in MaineCare payments made for Section 17 services during the review period [REDACTED], 2016, through [REDACTED] 2018.

RECOMMENDED DECISION:

The Hearing Officer recommends that the Commissioner UPHOLD the Department's Final Informal Review Decision dated March 16, 2020.

RATIONALE:

MaineCare Benefits Manual Chapter I, Section 1, requires that participating providers "Bill only for covered services" and "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." § 1.03-8. MaineCare payments are subject to "post-payment review," and "In the absence of proper and comprehensive records, no payment will be made, and/or payments previously made may be recouped." §§ 1.16 and 1.18.

In imposing penalties due to lack of adequate documentation, "When the Department proves by a preponderance of the evidence that a provider has violated MaineCare requirements because it lacks mandated records for MaineCare covered goods or services, the Department in its discretion may impose . . . 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 . . . [or] 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." § 1.20-2. Factors that "may be considered in determining the sanction(s) to be imposed" include: "a. Seriousness of the offense(s); b. Extent of violation(s); c. History of prior violation(s); d. Prior imposition of sanction(s); e. Prior provision of provider education; f. Provider willingness to obey MaineCare rules; g. Whether a lesser sanction will be sufficient to remedy the problem; and h. Actions taken or recommended by peer review groups, other payers, or licensing boards." § 1.20-3.

Prior to imposing sanctions, the Department must issue a written "Notice of Violation" that includes the nature and dollar value of discrepancies or violations, computation method, and appeal process. § 1.20-4. Relative to the latter, "A provider or provider applicant must properly request an informal review and obtain a [final informal review] decision prior to requesting an administrative hearing." § 1.23-1(A). "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." § 1.23-1.

Appellant is a former provider of Community Support Services under Chapter II, § 17. The disputed action is a Final Informal Review Decision ("FIRD") issued on March 16, 2020, concerning a post-payment review of claims for Community Integration Services (§ 17.04-1) and Daily Living Support Services (§ 17.04-4) provided to 18 MaineCare members during the period [REDACTED] 2016, through [REDACTED] 2018, in the total amount of \$199,380.37. The FIRD at issue assessed total penalties of \$95,444.41, of which Appellant disputes all penalties attributed to "Member 24" (\$56,843.39)¹ and all 20% penalties attributed to other members (\$1,801.45).

On August 30, 2018, the Department notified Appellant that it had been "selected by the Department of Health and Human Services, Program Integrity Unit, for a record review," and requested Appellant to "submit copies of your entire records including but not limited to: Comprehensive Assessments, Individualized Treatment Plans, Progress Notes, LOCUS and/or ANSA and Mental Health Diagnosis for all MaineCare Members served by your agency" during the review period at issue. Appellant was notified of the Department's findings in its Revised Notice of Violation ("NOV") dated February 11, 2019,² and spreadsheet.³ Exh. D-12; Exh. D-14.

For purposes of Chapter I, Section 1, required records for Section 17 services include comprehensive assessments, individual support plans, and "[d]ocumentation of each service provided including the date of service, the type of service, the goal to which the service relates, the duration of the service, the progress the member has made towards goal attainment and the signature and credentials of the individual performing the service." Chapter II, §§ 17.08-1, 17.08-2, and 17.08-3. Per the NOV, discrepancies or violations identified by the Department included missing and deficient assessments, individual support plans, and daily progress notes,

¹ The parties variously assert that total penalties attributed to Member 24 are "[a]pproximately \$61,000" (Appellant) and \$57,459.41 (the Department); although the Hearing Officer is unable to reproduce either result from the consolidated spreadsheet (Exh. D-53), the exact amount is ultimately irrelevant in that the recommended decision concerns the entire recoupment amount of \$95,444.41.

² The Department's original "Notice of Violation," dated November 30, 2018, erroneously included information pertaining to MaineCare members not served by Appellant, and was therefore replaced by the "Revised Notice of Violation" dated February 11, 2019. Exh. D-13; Exh. D-14; Test. Shelly Hayward.

³ In lieu of the spreadsheets that were included with the NOV and FIRD, which identified members by name, the Department submitted a consolidated spreadsheet that identifies members by number (i.e., "Member 2," "Member 3," etc.). Exh. D-53. Test. Shelly Hayward.

billing for both services simultaneously for the same member/hours, billing for non-covered services, billing for services of providers lacking approved credentials, and billing for services not identified in the member's assessment. Other issues noted included assessments not identifying member's diagnosis, missing or illegible signatures and dates, provider credentials being omitted, and the same progress note being submitted multiple times with different dates. In most instances, 100% penalties were applied for the violations or deficiencies identified, with 20% penalties being applied only for progress notes that had illegible signatures or that did not fully support the units billed. The Department assessed total penalties of \$133,347.50, based on the above findings. Exh. D-53.

Appellant requested an informal review on April 12, 2019, and submitted 397 pages of materials on April 16, 2019. Among other items, the latter included an email from Carol Davis, Division of Licensing and Regulatory Services, to Carlton Lewis, Office of Substance Abuse and Mental Health Services, dated [REDACTED] 2015, and a purported letter from Mr. Lewis to Appellant dated [REDACTED] 2015. Exh. D-15; Exh. A-3; Exh. A-7.

Based on Appellant's request and the additional materials submitted, the Department reduced total penalties assessed from \$133,347.50 to \$95,444.41. The FIRD reads as follows: "Documentation and explanations provided with the request for informal review resulted in a reduction to the overpayment identified in the NOV and claim lines were reduced. Claims identified as overpayment due to missing documentation that has now been provided and accepted have had their overpayments reduced to zero. In the instances where no additional documentation was provided, no change was made to the overpayment. The overpayment remains for progress notes that identified non-covered services or notes that were not signed within the appropriate credentialing provisions. Documentation that was received and noted for clerical errors were reduced from a 100% to a 20% overpayment. Some overpayments were reduced based on the number of units that were overbilled for non-covered services." The FIRD additionally notes the following: "Included in your informal review request was a copy of a letter dated [REDACTED] 2015 from Substance Abuse and Mental Health Services and an email dated [REDACTED] 2015 from Division of Licensing [and] Regulatory Services for a member that you refer to as a contract. A contract does not supersede MaineCare policy and regulations for payment, therefore the overpayment amount did not change." Exh. D-16.

Appellant requested a hearing on May 11, 2020. The hearing was initially scheduled for July 20, 2020, and continued pending judicial review of the Commissioner's final decision dated September 12, 2019, concerning a post-payment review for the period April 1, 2015, through April 30, 2016. In pertinent part, the final decision at issue rejected Appellant's argument that the Department was equitably estopped from imposing penalties for Member 24 based on the aforementioned email and letter. Exh. H-4; Exh. A-3; Exh. A-7. Lacking the court's decision, the parties submitted briefs on this issue based on the Commissioner's final decisions concerning:

1) the termination of Appellant's MaineCare provider agreement, and 2) the suspension of MaineCare payments to Appellant based on a credible allegation of fraud, dated May 24, 2017, and September 12, 2019. The Hearing Officer found that the Commissioner's final decisions in those cases did not have preclusive effect relative to Appellant's equitable estoppel argument in the immediate case, and allowed evidence on this issue.

On March 31, 2021, the hearing was again continued following the Department's submission of new evidence supporting that the [REDACTED] 2015, letter was not authentic; based on this evidence, the undisputed authentic letter is dated [REDACTED] 2015. Appellant now argues that the Department is equitably estopped from recouping payments for Member 24 based on its reliance on the authentic version and "the Department's failure to conduct a meeting to review the level of services needed for Member 24 thereafter" as specified. Appellant additionally argues that the Department "should be required to provide a rationale for why the maximum 20% penalty was applied in all instances" and that "the factors required to be considered set forth in the Department's own regulations do not support imposition of the maximum 20% penalty in every instance of deficient documentation in this case." The evidence does not support either argument. In addition to the materials discussed previously, the evidence includes Ms. Davis's and Mr. Lewis's testimony, e-mail exchanges between Appellant, Mr. Lewis, Ms. Davis, and others, Appellant's written request for an informal review, Appellant's MaineCare Provider Agreement, and various other items.

The evidence shows that Member 24 resided in a waiver home owned and operated by Appellant for 15 years following her discharge from AMHI. Given her ineligibility for Section 21, the Department contracted with Appellant to provide residential services to Member 24 during that time. On [REDACTED] 2015, Carol Davis investigated a reported incident of Member 24 having engaged in "threatening behaviors" toward another resident. Appellant informed Ms. Davis at that time that she had met with Residential Treatment Program Manager Carlton Lewis on [REDACTED] 2015, and that Mr. Lewis "wants to try to move [Member 24] for daily living supports." Ms. Davis emailed Mr. Lewis on [REDACTED] 2015, and informed him that she had "substantiated [Appellant] with no violations at this point because the manager has taken steps to intervene to protect the other residents." Ms. Davis asked Mr. Lewis to respond as to when SAMHS would honor Appellant's "repeated requests" to provide her with funding for a van, "ADA accommodations in the bathroom due to the size of [Member 24]," and "extra staffing" for Member 24. Ms. Davis did not "require Member 24 to move" in connection with her activities, nor did she have the authority to do so. Exh. A-3; Exh. A-6; Test. Carol Davis.

On [REDACTED] 2015, Mr. Lewis met with Appellant at her office concerning moving Member 24 and transitioning to Section 17 services "beginning [REDACTED] 2015." Mr. Lewis subsequently emailed Appellant three draft versions of a letter outlining details of the proposed transition. Of the three, Appellant expressed agreement with the version dated

██████████ 2015, which reads, “Substance Abuse and Mental Health Services (SAMHS) has discussed this option with [Appellant] and with APS Healthcare to waive the amount of time required to provide DLSS to [Member 24]. SAMHS has authorized APS Healthcare to allow [Appellant] to provide up to 20 hours of DLSS per day to [Member 24] for a 90 day period to assist her in the transition then reevaluate. At the 90 day period, SAMHS will meet with [Appellant] and determine how many hours will need to be provided ongoing. The time may fluctuate from 14-16 hours per day depending on her needs in her living environment and the community. The ultimate goal will be for [Member 24] to level out at her baseline which may be between 14-16 hours per day of DLSS. At 90 Days, staff from SAMHS will meet with [Appellant] to determine the need and will authorize on a yearly basis the agreed upon amount of hours per day ongoing.” The letter additionally states, “The DLSS services for [Member 24] will be documented in her file daily [emphasis added].” Exh. D-27; Exh. D-29; Exh. D-35.

Following Mr. Lewis’s departure in ██████████ 2016, Appellant sent an altered version of the letter to Mr. Lewis’s successor Jasmil Patillo on ██████████ 2016, and to the Department’s Assessing Services Agency KEPRO on ██████████ 2016. The altered version of the letter, dated ██████████ 2015, describes a purported agreement between Appellant and SAMHS wherein SAMHS agreed to “pay for full renovations for [Member 24’s] new location per request of Carol Davis Division of Licensing and Regulatory Services to move out of 53 Granite St. location.” The altered version does not include the language of the ██████████ 2015, authentic version requiring daily documentation of “[t]he DLSS services for [Member 24].” Per his testimony, Mr. Lewis drafted the ██████████ 2015, authentic version and not the ██████████ 2015, altered version of the letter. Mr. Lewis testified that Member 24 had required up to 20 hours of Section 17 DLSS per day at the time that he drafted the letter, and that it was “possible” that she could have also required up to 20 hours of services per day following the initial 90-day period. Exh. D-40; Exh. D-42; Exh. D-35; Test. Carlton Lewis.

Relative to the first issue, “The activities of a governmental entity may be equitably estopped if the party asserting the doctrine... can prove ‘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.’” *Mrs. T. v. Commissioner of Dept. of Health and Human Services*, 2012 ME 13, ¶ 9 (quoting *Dept. of Health and Human Services v. Pelletier*, 2009 ME 11, ¶ 17). And, “As against the government, the doctrine of equitable estoppel ‘should be sparingly used.’” *Id.*, ¶ 10 (quoting *Mathieu v. Commissioner of Human Services*, 562 A.2d 686, 689). “Equitable estoppel requires a misrepresentation.” *Pelletier*, 2009 ME 11, ¶ 18, 964 A.2d 630, 636 (citing *Dept. of Human Services v. Bell*, 1998 ME 123, ¶ 8, 711 A.2d 1292, 1295). “A misrepresentation need not consist solely of an affirmative statement; it may arise through a combination of misleading statements, conduct, or silence.” *Id.* “An equitable estoppel defense that is based on reliance on the governmental agency’s silence must be proved by “clear and satisfactory” evidence.” *Id.*

As noted previously, Appellant argues that it “reasonably and detrimentally relied on” Mr. Lewis’s letter and “the Department’s failure to conduct a meeting to review the level of services needed . . . by continuing to provide and seek reimbursement for up to 20 hours of DLSS services per day for Member 24.” Appellant asserts that the services were medically necessary, per Mr. Lewis’s testimony, and, notwithstanding the letter’s purported authorization by SAMHS for APS Healthcare “to waive the amount of time required to provide DLSS,” were not subject to a specific daily time limit (e.g., 16 hours per day). Relative to the requirement that SAMHS and Appellant meet at 90 days and “determine how many hours will need to be provided ongoing,” Appellant asserts that the Department was responsible for ensuring that the meeting occurred, that staff were unaware of the letter following Mr. Lewis’s and others’ departure at that time, and that the meeting did not occur as a result. Appellant’s argument fails with respect to the requirement to show that the asserting party’s reliance on the agency’s “misleading statements, conduct, or silence” was “reasonable” for that party to prevail.

Chapter I, § 1.03-1 requires as a condition of participation that providers execute a Provider Agreement. According to the MaineCare/Medicaid Provider Agreement executed by Appellant on January 4, 2013, and the Department on January 22, 2010,

The Provider will 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. The records must be maintained in the form, if any, required by the Department.

And,

The Provider acknowledges that failure to maintain all 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.

Exh. D-1.

As discussed, discrepancies or violations identified by the Department per the NOV related to missing and deficient assessments, individual support plans, and daily progress notes, billing for both services simultaneously for the same member/hours, and other similar issues, some of which were ameliorated by materials submitted in connection with the informal review resulting in elimination or reduction of penalties as noted in the FIRD. Appellant does not materially dispute any of the discrepancies or violations noted in the NOV or FIRD, nor does Appellant’s argument explain how the discrepancies or violations are related to its reliance on Mr. Lewis’s letter or Ms. Davis’s email. While the letter clearly represents that Appellant may

“provide up to 20 hours of DLSS per day . . . for a 90 day period” beginning [REDACTED] 2015, and then 14 to 16 hours per day depending on Member 24’s needs as determined by SAMHS, it does not represent that Appellant can claim reimbursement for services that are not properly documented or is otherwise exempt from MaineCare participation requirements. And, in fact, Mr. Lewis’s letter specifically requires that the Section 17 DLSS services provided to Member 24 “will be documented in her file daily.” Exh. D-35.

Relative to the second issue, “The following factors may be considered in determining the sanction(s) to be imposed: a. Seriousness of the offense(s); b. Extent of violation(s); c. History of prior violation(s); d. Prior imposition of sanction(s); e. Prior provision of provider education; f. Provider willingness to obey MaineCare rules; g. Whether a lesser sanction will be sufficient to remedy the problem; and h. Actions taken or recommended by peer review groups, other payers, or licensing boards.” Chapter I, § 1.20-3. Sanctions subject to review at hearing include: 1) any “original” 20% penalties “that were imposed in the NOV” with respect to which Appellant argued “that a lesser penalty was appropriate based on the discretionary factors contained in the Department’s rules” in its written request for an informal review, and 2) any 20% penalties imposed following the request. Chapter I, § 1.23-1. *See also Palian v. Dept. of Health & Human Services*, 2020 ME 131, ¶ 23 – ¶ 25, 242 A.3d 164, 171 – 172 (where petitioner “did not argue that the Department abused its discretion by imposing the maximum sanction of 20%, as opposed to a lesser penalty, or by failing to consider the factors set out in [§ 1.20-3], . . . [t]he Commissioner . . . committed no legal error in accepting the presiding officer’s conclusion that Dr. Palian waived this issue by failing to raise it in his request for informal review”).

The consolidated spreadsheet shows that “original” 20% penalties assessed per the NOV and upheld per the FIRD total \$1,673.67, and that “new” 20% penalties assessed per the FIRD total \$5,017.24. Appellant’s written request for an informal review did not argue that a lesser penalty was appropriate with respect to “original” 20% penalties assessed per the NOV,⁴ therefore, per *Palian* and § 1.23-1, those penalties cannot be addressed in this proceeding. Relative to the \$5,017.24 total “new” 20% penalties assessed per the FIRD,⁵ the Department’s assessment of the maximum 20% penalty amount is appropriate from the standpoint of those factors that “may be considered in determining the sanction(s) to be imposed” per § 1.20-3 (“a. Seriousness of the offense(s); b. Extent of violation(s); c. History of prior violation(s); d. Prior imposition of sanction(s); e. Prior provision of provider education; f. Provider willingness to obey MaineCare rules; g. Whether a lesser sanction will be sufficient to remedy the problem; and h. Actions taken or recommended by peer review groups, other payers, or licensing boards.”).

⁴ Appellant’s April 12, 2019, written request for an informal review did not raise any issues other than that the Department’s original NOV dated November 30, 2018, included information for members not served by Appellant, which by then had already been addressed per the Department’s Revised Notice of Violation dated February 11, 2019. Exh. D-13; Exh. D-14; Exh. D-15.

⁵ Of the \$5,017.24 total “new” 20% penalties assessed per the FIRD, \$4,889.46 was attributed to Member 24 and the remaining \$127.78 was attributed to other members. Exh. D-53.

Having considered these, the Hearing Officer finds “b. Extent of violation(s)” and “f. Provider willingness to follow MaineCare rules” to be applicable. As previously discussed, “new” 20% penalties subject to review include those assessed per the FIRD (as opposed to those assessed per the NOV and upheld per the FIRD); all of the penalties at issue were originally assessed per the NOV as 100% penalties, and were subsequently reduced to 20% based on materials submitted with the request for informal review. Relative to “b. Extent of violation(s),” ISP’s and progress notes for the dates of service at issue exhibited multiple deficiencies (“ISP missing frequency,” “Progress Note indicates non-covered service,” and/or “Progress Note missing duration”) in nearly all cases. Exh. D-53. Relative to “f. Provider willingness to follow MaineCare rules,” materials submitted with the request also included falsified documentation amounting to an altered version of the letter from Carlton Lewis dated [REDACTED] 2015, wherein language in the authentic version requiring daily documentation of the services at issue had been removed. Exh. D-38. Given the above, and the egregiousness of Appellant’s conduct relative to factor “f. Provider willingness to follow MaineCare rules” in particular, the evidence supports imposition of the maximum 20% penalty amount with respect to the \$5,017.24 total “new” 20% penalties assessed per the FIRD.

In conclusion, the evidence does not support either that Appellant reasonably and detrimentally relied upon a misrepresentation by the Department in providing and billing for services to Member 24 or that the Department abused its discretion in imposing 20% penalties with respect to discrepancies and violations noted in connection with the FIRD. Otherwise, Appellant does not materially dispute any of the discrepancies and violations noted in the FIRD, all of which correlate with the penalties imposed.

In light of the above, the Department was correct when it determined that Appellant was subject to recoupment of MaineCare payments totaling \$95,444.41 for the review period of [REDACTED] 2016, through [REDACTED] 2018. Accordingly, the Hearing Officer recommends that the Commissioner resolve this matter in favor of the Department.

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: November 9, 2021

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

cc: Halliday Moncure, AAG
Riley L. Fenner, Esq.