STATE OF MAINE
DEPARTMENT OF HEALTH AND HUMAN SERVICES

In the Matter of: Planned Parenthood of Northern New England
(NPI 1578529350; Historical IDs 431964905 and 431964906)

CONSENT DECISION

The Commissioner's Final Decision, issued on October 29, 2021, remanded this matter for the limited purpose of resolving the uncertainty identified in footnote 2 of the September 17, 2021, Recommended Decision (p. 17), as follows:

> The hearing officer is unable to glean from the appellant's closing argument what it meant with regard to its declaration that it "does not challenge PI's legal basis" for recoupment of claims for all "RhoGAM injections directly related to performing a non-covered abortion," but without specifying which specific RhoGAM injection claims it meant to include within this declaration. Exh. HO-34. Counsel for PPNNE is respectfully asked to clarify this scope of this portion of its concession/declaration when presenting "Responses and Exceptions" to the Office of the Commissioner.

The parties, Planned Parenthood of Northern New England ("PPNNE") and the Office of MaineCare Services, Program Integrity Unit ("PI"), have conferred regarding the calculation of the additional recoupment consistent with the concession by PPNNE that the paid claims found in this audit for RhoGAM injections directly related to a non-covered abortion may appropriately be considered overpayments by MaineCare and refunded by PPNNE. Based on an exchange of data and review of records, the parties stipulate that the total overpayment due as a result of this audit – both for missing records and for RhoGAM claims as described above – is $6,368.33 for historical ID 431964906 and $48.32 for historical ID 431964905, for a total amount due of **$6,416.65.**

Accordingly, is **ORDERED that** the Final Decision in this matter is supplemented to reflect that the final result of this appeal is to reverse all overpayment amounts except those arising from missing documentation and from RhoGAM directly related to a non-covered abortion, such that the total overpayment due from PPNNE is **$6,416.65.**

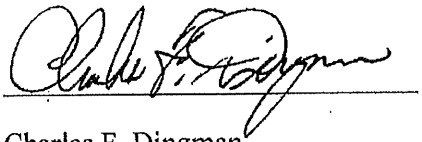
DATED: 2-24-22

SIGNED: Jeanne M. Lambrew

Jeanne M. Lambrew, Ph.D., Commissioner
Department of Health and Human Services

SEEN AND AGREED:

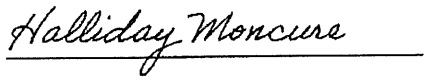
PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND

By: 

Dated: January 27, 2022

Charles F. Dingman
KOZAK & GAYER, P.A.
157 Capitol Street
Augusta, ME 04330

OFFICE OF MAINECARE SERVICES, PROGRAM INTEGRITY UNIT

By: 

Dated: January 27, 2022

Halliday Moncure
Office of Attorney General
6 State House Station
Augusta, ME 04333-0006

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:

Planned Parenthood of Northern New England)
C/o Charles F. Dingman, Esq.) **FINAL DECISION**
Kozak & Gayer)
157 Capitol Street, Suite 1)
Augusta, ME 04330)

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

The Recommended Decision of Hearing Officer Thackeray mailed September 17, 2021 and the responses and exceptions submitted on behalf of the Department have been reviewed. I have also reviewed the correspondence from Planned Parenthood of Northern New England's counsel dated October 6, 2021.

I hereby adopt the findings of fact and I accept the Recommendation of the Hearing Officer that the Department was not correct when it determined that, for the period of July 1, 2007 through August 31, 2010, Planned Parenthood of Northern New England owes the Department $25,454.84 on recoupment due to improper billing for abortion related ancillary services for non-covered abortions, and for missing documentation. The correct amount on recoupment is $3,034.39.

I am also ordering a limited remand for further hearing and decision on the limited issue identified by Hearing Officer Thackeray in footnote 2 of the Recommended Decision.

DATED: 10-29-21 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: Thomas Bradley, AAG, Office of the Attorney General
Valerie Hooper, Program Integrity/DHHS

Janet T. Mills
Governor

Jeanne M. Lambrew, Ph.D.
Commissioner

Maine Department of Health and Human Services
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11 State House Station
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Jeanne M. Lambrew, Ph.D., Commissioner
Department of Health and Human Services
11 State House Station • 109 Capitol Street
Augusta, ME 04333

Date Mailed: September 17, 2021

In the Matter of:
Planned Parenthood of Northern New England

Provider ID #s: 431964905
431964906

ADMINISTRATIVE HEARING RECOMMENDED DECISION

An administrative hearing was convened by videoconference in the above-captioned appeal on June 8, 2021, and June 10, 2021, before Hearing Officer Richard W. Thackeray, Jr. By special appointment, the Commissioner of the Maine Department of Health and Human Services conferred jurisdiction upon the hearing officer to adjudicate this appeal. Pursuant to an Order of Reference dated September 7, 2016, the issue presented *de novo* for hearing was whether the Maine Department of Health and Human Services ["Department"] was "correct when it determined, for the period of 7/1/2007 through 8/31/2010, Planned Parenthood of Northern New England ["PPNNE"] owes the Department $25,454.84 in recoupment due to improper billing for abortion related ancillary services for non-covered abortions, and for missing documentation?" Ex. HO-2. By joint motion of the parties, scheduling of the hearing was delayed (as described below). The hearing record was left open through July 28, 2021 for post-hearing briefs. The hearing record closed on July 28, 2021.

APPEARING ON BEHALF OF THE APPELLANT

- Charles F. Dingman, Esq., KOZAK & GAYER, P.A.
- Taylor D. Fawns, Esq., KOZAK & GAYER, P.A.
- Nicole Clegg, Senior VP of Public Affairs, Planned Parenthood of Northern New England
- Alison Bates, MSN, WHNP-BC, ANP-BC, Director of Medication Abortion, Sedation, and Ultrasound, Planned Parenthood of Northern New England
- Andrea Irwin, Executive Director, Mabel Wadsworth Women's Health Center (observing)
- Henry B. Barkley, KOZAK & GAYER, P.A. (observing)

APPEARING ON BEHALF OF THE DEPARTMENT

- Thomas C. Bradley, AAG
- Valerie Hooper, Program Integrity Manager, Office of MaineCare Services, DHHS
- Sarah McDevitt, Program Integrity Analyst, OMS, DHHS (observing)
- Lynn L. Grivois, RN, Program Integrity, OMS, DHHS (observing)

ITEMS INTRODUCED INTO EVIDENCE

Hearing Officer Exhibits

HO-1	"Fair Hearing Report Form," dated August 23, 2016, and attachments
HO-2	"Order of Reference," dated September 7, 2016
HO-3	"Notice of an Administrative Hearing," dated September 14, 2016
HO-4	"Continuance Request," dated November 28, 2016
HO-5	"Reschedule Notice," dated November 22, 2016
HO-6	"Scheduling Order," dated March 1, 2017, and "Continuance Request," dated February 21, 2017
HO-7	"Reschedule Notice," dated March 7, 2017
HO-8	"Request for Status Update," dated May 11, 2017, and "Responses"
HO-9	"Scheduling Notice," dated May 24, 2017
HO-10	"File Entry – Status Conference," dated September 25, 2017
HO-11	"File Entry – Status Update," dated April 24, 2019
HO-12	"Request for Status Update," dated September 23, 2019
HO-13	"Status Update," dated October 23, 2019
HO-14	"Scheduling Notice," dated October 30, 2019
HO-15	"Continuance Order," dated February 5, 2020
HO-16	"Request for Status Update," dated April 8, 2020, and "Response," dated April 10, 2020
HO-17	"Status Update," dated December 28, 2020
HO-18	"Scheduling Notice," dated January 7, 2021
HO-19	"File Entry – Status Conference," dated February 3, 2021
HO-20	"Scheduling Notice," dated February 9, 2021
HO-21	"Scheduling Notice," dated February 9, 2021
HO-22	"Exhibit Cover Letter," dated April 1, 2021
HO-23	"File Entry – Status Conference," dated April 8, 2021
HO-24	"Witness List," DHHS, dated May 13, 2021
HO-25	"Motion for Continuance," dated May 14, 2021
HO-26	"Response to Motion for Continuance," dated May 17, 2021
HO-27	"Order on Motion for Continuance," dated May 17, 2021
HO-28	"Motion and Order on Motion for Extension of Time," dated May 20, 2021
HO-29	"Witness List," PPNNE, dated May 25, 2021
HO-30	"Evidence Production Correspondence," June 3, 2021 to June 8, 2021
HO-31	"File Entry - Hearing," dated June 8, 2021
HO-32	"File Entry - Hearing," dated June 10, 2021
HO-33	"Post-Hearing Brief," DHHS, dated June 29, 2021
HO-34	"Response Brief," PPNNE, dated July 21, 2021 (with transcripts)

HO-35 "Reply Brief," DHHS, dated July 27, 2021

Department Exhibits

D-1 "Order of Reference," dated September 7, 2016
D-2 "Notice of Violation," dated October 7, 2015
D-3 "Request for Informal Review," dated December 11, 2015
D-4 "Final Informal Review Decision," dated June 10, 2016
D-5 "Request for Administrative Hearing," dated August 12, 2016
D-6 "Final Rule," effective date February 2, 2006
D-7 "Final Rule," effective date December 12, 2007
D-8 "Final Rule," effective date January 11, 2010
D-9 "Final Rule," effective date April 1, 1998
D-10 "Final Rule," effective date February 3, 2004
D-11 "Final Rule," effective date May 3, 2004
D-12 "Final Rule," effective date October 1, 2005
D-13 "Final Rule," effective date July 20, 2006
D-14 "Final Rule," effective date April 1, 2008
D-15 "Final Rule," effective date September 1, 2008
D-16 "Final Rule," effective date December 29, 2008
D-17 "Final Rule," effective date March 29, 2009
D-18 "Final Rule," effective date March 1, 2010
D-19 "Final Rule," effective date June 1, 2010
D-20 "Final Rule," effective date August 9, 2010
D-21 "Pub. L. 103-112 (103rd Congress), October 21, 1993 (excerpt)
D-22 "State Medicaid Manual," Health Care Financing Admin., § 4432 (eff. Aug. 1991)
D-23 "Record of Member – #1," with related spreadsheet
D-24 "Record of Member – #7," with related spreadsheet
D-25 "Record of Member – #10," with related spreadsheet
D-26 "Record of Member – #12," with related spreadsheet
D-27 "Record of Member – #14," with related spreadsheet
D-28 "Record of Member – #16," with related spreadsheet
D-29 "Record of Member – #17," with related spreadsheet
D-30 "Record of Member – #19," with related spreadsheet
D-31 "Record of Member – #49," with related spreadsheet
D-32 "Record of Member – #62," with related spreadsheet
D-33 "Record of Member – #63," with related spreadsheet
D-34 "Record of Member – #38," with related spreadsheet
D-35 "Record of Member – #75," with related spreadsheet

D-36 "Record of Member – #83," with related spreadsheet

D-37 "Record of Member – #93," with related spreadsheet

D-38 "Record of Member – #108," with related spreadsheet

D-39 "Record of Member – #117," with related spreadsheet

D-40 "Record of Member – #127," with related spreadsheet

D-41 "MaineCare/Medicaid Provider Agreement," dated November 30, 2009

D-42 "Transcript," Administrative Hearing (Day One), June 8, 2021

D-43 "Transcript," Administrative Hearing (Day Two), June 10, 2021

Appellant Exhibits

PP-1 "Patient Records' (unredacted)

PP-2 "Patient Records" (unredacted)

PP-3 Mixed Documents, re: "Issue #5"

PP-4 Mixed Documents, re: "Issue #6"

PP-5 "431964906 (2015) July 2007 to August 2010"

PP-6 "431964905 (2015) July 2007 to August 2010"

PP-7 "Record," In re: Family Planning Association of Maine," part one

PP-8 "Record," In re: Family Planning Association of Maine," part two

PP-9 "Record," In re: Family Planning Association of Maine," part three

PP-10 "FOAA file, 1 of 7"

PP-11 "FOAA file, 2 of 7"

PP-12 "FOAA file, 3 of 7"

PP-13 "FOAA file, 4 of 7"

PP-14 "FOAA file, 5 of 7"

PP-15 "FOAA file, 6 of 7"

PP-16 "FOAA file, 7 of 7"

PP-17 "Privilege Log"

PP-18 "Transcript," In re: Family Planning of Maine" (April 16, 2015)

PP-19 "Summary of Comments and Responses," Final Rule, "MaineCare Benefits Manual – Limited Family Planning Benefit," 10-144 C.M.R. Ch. X, § 4 (eff. Oct. 1, 2016)

PP-20 "Comments and Responses" (original), Final Rule, "MaineCare Benefits Manual – Limited Family Planning Benefit," 10-144 C.M.R. Ch. X, § 4 (eff. Oct. 1, 2016)

PP-21 "Emails," Beth Ketch, Pascale Desir, et al, April 2014; Feb. 2011; Jan. 2007; etc., and attachments

PP-22 "Emails," Patricia Duschuttle, Sarah Stewart, Beth Ketch, et al, April 2011; Feb. 2011; April 2005; etc., and attachments

PP-23 "Audit – N.Y. State Medicaid Program," Office of the Inspector General; U.S. Dep't of Health & Human Servs. (A-02-05-01009), dated July 19, 2007

PP-24 "Audit – N.Y. State Medicaid Program," Office of the Inspector General; U.S. Dep't of Health & Human Servs. (A-02-09-01015), dated September 18, 2009

PP-25 "Workflow Notes," through January 20, 2017

PP-26 "Workflow Notes," through September 12, 2017

PP-27 "Affidavit of Kathleen Brogan," *Fam. Planning Assn. of Me v. Mayhew*, Dock. No. KENSC-AP-15-0062 (Ken. Cty. Oct. 1, 2015)

PP-28 "Fair Hearing Report Form," dated August 23, 2016

PP-29 "Email," Beth Ketch, dated April 11, 2011

PP-30 "Email," Beth Ketch, dated April 11, 2011

PP-31 "Email," Patricia Duschuttle, dated April 11, 2011

PP-32 "Emails," Sarah Stewart, Patricia Duschuttle, Beth Ketch, dated April 20, 2011

PP-33 "Email – Listserv," Greg Nadeau, dated December 19, 2014

PP-34 "Emails," Greg Nadeau, Janie Turner, Beth Ketch, dated January 5, 2015

PP-35 "Email," Greg Nadeau, dated February 13, 2015

PP-36 "Patient Record," dated [redacted] 2008

PP-37 "Excerpt: State Medicaid Manual," § 4270 (eff. Sept. 1, 1988)

PP-38 "State Medicaid Director Letter," #14-003, ACA#31, dated April 16, 2014

PP-39 "State Medicaid Director Letter," #16-005, dated April 19, 2016

PP-40 "State Medicaid Director Letter," #16-008, dated June 14, 2016

PP-41 "Abortion Services for MaineCare Members Established; Maine State Services Manual," Dep't of Health & Human Servs., 10-144 C.M.R. Ch. 104, § 7 (eff. Dec. 17, 2019)

PP-42 "Order on Rule 80C Appeal," *Fam. Planning Assn. of Me v. Mayhew*, Dock. No. KENSC-AP-15-0062 (Ken. Cty. June. 21, 2017)

LEGAL FRAMEWORK

The hearing officer reviews a Departmental audit recoupment against an approved MaineCare services provider *de novo*. 22 M.R.S. § 42 (7)(D); "Administrative Hearing Regulations," Dept' of Health & Human Servs., 10-144 C.M.R. Ch. 1, § VII (C)(1) (eff. Jan. 23, 2006); "Gen. Admin. Policies & Proc.; MaineCare Benefits Manual," Dept' of Health & Human Servs., 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.21-1 (A) (eff. Sept. 17, 2018). The Department bears the burden to persuade that, based on a preponderance of the evidence, it was correct in establishing a claim for repayment or recoupment against an approved MaineCare provider. 10-144 C.M.R. Ch. 1, § VII (B)(1), (2). "The hearing officer shall … render a written recommendation based on the record and in accordance with applicable state and federal law, rule and regulation," and "provide a copy of the recommendation to the department and to the provider along with notice of the opportunity to submit written comments to the commissioner." 22 M.R.S. § 42 (7)(D). The Commissioner bears final authority to "adopt, adopt with modification or reject the recommendation of the hearing officer." 22 M.R.S. § 42 (7)(E).

The Department administers the MaineCare program, which is designed to provide "medical or remedial care and services for medically indigent persons," pursuant to federal Medicaid law. 22

M.R.S. § 3173. *See also* 42 U.S.C. §§ 1396a, *et seq*. To effectuate this, the Department is authorized to "enter into contracts with health care servicing entities for the provision, financing, management and oversight of the delivery of health care services in order to carry out these programs." *Id.* Enrolled providers are authorized to bill the Department for MaineCare-covered services pursuant to the terms of its Provider Agreement, Departmental regulations, and federal Medicaid law. 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03. *See also* 42 C.F.R. § 431.107 (b) (state Medicaid payments only allowable pursuant to a provider agreement reflecting certain documentation requirements); 42 U.S.C. § 1396a (a)(27). Enrolled providers also "must ... [c]omply with requirements of applicable Federal and State law, and with the provisions of this Manual." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (Q). Enrolled providers are also required to maintain records sufficient to "fully and accurately document the nature, scope and details of the health care and/or related services or products provided to each individual MaineCare member." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (M). "The Division of Audit or duly Authorized Agents appointed by the Department have the authority to monitor payments to any MaineCare provider by an audit or post-payment review." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.16. Pursuant to federal law, the Department is also authorized to "safeguard against excessive payments, unnecessary or inappropriate utilization of care and services, and assessing the quality of such services available under MaineCare." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.17. *See also* 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.18; 22 M.R.S. § 42 (7); 42 U.S.C. § 1396a (a)(27); 42 C.F.R. § 431.960. This includes the imposition of "sanctions and/or recoup(ment of) identified overpayments against a provider, individual, or entity," for any of 25 specific reasons for which it may including:

- Failing to retain or disclose or make available to the Department or its Authorized Agent contemporaneous records of services provided to MaineCare members and related records of payments;
- Breaching the terms of the MaineCare Provider Agreement, and/or the Requirements of Section 1.03-8 for provider participation;
- Failure to meet standards required by State and Federal law for participation (e.g. licensure or certification requirements). ...

MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.20-1 (eff. Sept. 17. 2018).

The Department bears the initial burden to prove "by a preponderance of evidence that a provider has violated MaineCare requirements because it lacks mandated records for MaineCare covered goods or services." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.20-2 (H). Once that threshold proof has been made, the Department is afforded discretion to recoup a penalty. The scope of that penalty, however, is limited by the degree to which the provider can demonstrate that the billed services were medically necessary, MaineCare covered services, and actually provided to eligible MaineCare members. *Id.* The regulations provide that, "[w]hen the Department proves by a preponderance of the evidence that a provider has violated MaineCare requirements because it lacks mandated records for MaineCare covered goods or services, the Department in its discretion may impose the following penalties:

1. A penalty equal to one hundred percent (100%) recoupment of MaineCare payments for services or goods, if the provider has failed to demonstrate by a preponderance of the evidence that the disputed goods or services were medically necessary, MaineCare covered services, and actually provided to eligible MaineCare members.

2. A penalty not to exceed twenty-percent (20%), if the provider is able to demonstrate by a preponderance of the evidence that the disputed goods or services were medically necessary, MaineCare covered services, and actually provided to eligible MaineCare members. The penalty will be applied against each MaineCare payment associated with the missing mandated records.

10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.20-2 (H).

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

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

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

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

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

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

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

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

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

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

"If the Department has information that indicates that a provider may have submitted bills and/or has been practicing in a manner inconsistent with the program requirements, and/or may have received payment for which he or she may not be properly entitled:

> the Department shall notify the provider of the discrepancies noted. The written notification shall be sent to the provider allowing at least sixty (60) calendar days from the date of the notice before the effective date of any further action or imposition of sanction pursuant to state and federal laws, unless the life and/or safety of the member is felt to be endangered which would be cause for immediate sanction, and shall set forth:
>
> A. The nature of the discrepancies or violations;
>
> B. The dollar value of such discrepancies or violations;
>
> C. The method of computing such dollar value may be from:
>
> 1. Extrapolation from a systematic random sampling of records,
>
> 2. A calculation from a selective sample of records, or
>
> 3. A total review of all records.
>
> D. Any further actions to be taken or sanctions to be imposed by the Department; and

E. Any actions required of the provider, and the right to request an informal review and administrative hearing, as set forth in Section 1.23. An adverse decision may be appealed pursuant to the procedures outlined in Section 1.23 of this Chapter. A request for review or proceedings there under, does not stay the sanction imposed by the Department.

10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.20-4.

"Any provider or provider applicant who is aggrieved by a Departmental action made pursuant to this Manual (excluding emergency terminations as referenced in Section 1.19-1-B) has sixty (60) calendar days from the date of receipt of that decision, to request an informal review." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.23-1. *See also* 22 M.R.S. § 42 (7)(A) (establishing the 60-day appeals window). An "informal review" will be conducted by the Director of MaineCare Services, or other designated Department representative who was not involved in the decision under review," and "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." *Id.* "The request for informal review may not be amended to add further issues." *Id.*

FACTUAL AND PROCEDURAL BACKGROUND

For all periods relevant to this proceeding, PPNNE has operated multiple health centers throughout Maine at which patients received a range of medical services, including but not limited to women's reproductive healthcare services, and specifically including abortion. For all periods relevant to this proceeding, PPNNE was contracted with the Department, pursuant to a "Medicaid/Maine Health Program Provider/Supplier Agreement," to receive Departmental reimbursement for the costs of approved medical and related services provided to enrolled MaineCare members.

On October 7, 2015, the Department's Division of Audit, Program Integrity Unit, issued a "Notice of Violation" against PPNNE, identifying a recoupment claim in the amount of $25,454.84 based on a post-payment review encompassing a period from July 1, 2007 to August 31, 2010. In the October 7, 2015 Notice, the Department alleged that PPNNE received MaineCare payments for services that were not reimbursable under the MaineCare program regulations and determined a recoupment amount based on an extrapolation/error rate-based multiplier derived in the manner dictated by MaineCare program regulations. Ex. D-2. The Notice included two claim sets collected from PPNNE, from claims universes maintained under two separate provider ID numbers. For ID #431964905, the Department performed a "line-by-line, complete record review" without any extrapolation, and determined that $556.30 in claims were mistakenly paid by MaineCare. Ex. D-4. For ID #431964906, the Department based its recoupment calculation on an extrapolation from a 100-claim sample, randomly selected from all claims paid during the identified period. Ex. D-4.

For the claims identified in ID #431964906, the Departmental extrapolation employed an error-rate of 34.02-percent, reflecting the ratio between the total of the allegedly erroneous payments in the sample ($2,546.29) and the total amount paid for all claims in the sample ($7,485.08). Ex. D-2. In the October 7, 2015 Notice of Violation, the Department observed that federal law barred Medicaid-reimbursement "for abortion services" except "if necessary to save the life of the mother, or of if the pregnancy is the result of an act or rape or incest," and that MaineCare regulations extended this reimbursement bar to "ancillary charges provided on the same day as the abortions." Ex. D-2. The Notice then referenced claim-by-claim notations in an attached spreadsheet that identified a range of "ancillary services related to a non-covered service," i.e. abortion, and imposed a 100-percent recoupment. Ex. D-2. Using the 34.02 percent error rate as a multiplier, the Department determined that, based on a total claims universe of $73,187.94 during the same period, it was appropriate to derive a penalty/recoupment claim for $24,898.54 for the analysis of ID #431964906 (i.e. $73,187.94 x 0.3402 = $24,898.54). Ex. D-2. Added to the ID #431964905 claim for $556.30, the Department established a total recoupment claim in the amount of $25,454.84. Ex. D-2.

On December 11, 2015, PPNNE provided notice of its Request for Informal Review, arguing that Departmental recoupment was not appropriate for any claims paid during the identified period, as detailed in its seven-page memorandum. Ex. D-3. On June 10, 2016, the Department provided notice of its Final Informal Review Decision, in which it responded to each of PPNNE's arguments raised in the informal review request and affirmed the previously identified recoupment claim amount of $25,454.84. Ex. D-4. On August 12, 2016, PPNNE timely requested an administrative hearing. Ex. D-5. In so doing, PPNNE narrowed the scope of its arguments by conceding that recoupment was appropriate with respect to $411.90, which represented the total amount identified for claims that the Department paid, but for which there was insufficient/missing documentation for the service. Ex. D-3; Ex. D-5. However, PPNNE re-stated the following theories from its Request for Informal Review in support of its general position that the Department was wrong to demand recoupment for the balance on the basis that the services in question were allegedly related to non-reimbursable abortions:

1. The extrapolation method used did not comport to the standard expressed in the regulations and "exaggerated" the error rate by splitting the applicable claims within the period based on the two provider numbers.
2. The Department failed to demonstrate that the sample randomly selected claims from within the complete claims universe, and accordingly, the sample cannot be deemed in compliance with the regulatorily-required method.
3. The Department provided informal guidance to abortion providers, including PPNNE, "throughout the Review Period" that "supported coverage of the services at issue in this audit" and which was "consistent with applicable law" that allowed for MaineCare coverage of such services.
4. The Department's conclusion ignored the "general principle" in federal law that "services 'associated' with a non-allowable abortion are *allowable* if they 'would have been performed on a pregnant woman regardless of whether she was seeking an abortion" and ignored "strong federal policies favoring nondiscriminatory coverage family planning service by State Medicaid programs ....'"

Ex. D-5.

Based on the hearing request, the Division of Administrative Hearings ["DAH"] issued an Order of Reference on September 7, 2016, framing the appeal issue as follows:

> Was the Department correct when it determined for the period of 7/1/2007 through 8/31/2010, Planned Parenthood of Northern New England owes the department $25,454.84 in recoupment due to improper billing for abortion related ancillary services for non-covered abortions, and for missing documentation?

Ex. HO-2.

DAH initially scheduled the matter for hearing on December 5, 2016. Ex. HO-3. PPNNE immediately provided notice to DAH that it had requested an expansive set of documents from the Department, first informally and then pursuant to a FOAA request, germane to its appeal. Ex. HO-4. Moreover, PPNNE provided notice that a parallel, but separate appeal involving an audit/recoupment claim against another women's health provider, Mabel Wadsworth Women's Health Center ["Mabel Wadsworth"], was also proceeding and would turn on resolution of a substantially similar set of issues – and that scheduling of the PPNNE should correspond with scheduling for Mabel Wadsworth. Ex. HO-4. The unopposed continuance request was granted, and the hearing was rescheduled for March 16, 2017. Ex. HO-5. On February 21, 2017, PPNNE advised that the Department had yet to comply with its discovery and/or FOAA request (which mirrored a similar request for Mabel Wadsworth) and requested a second continuance. Ex. HO-6. The hearing officer scheduled a joint status conference on the two appeals, where the two appellants shared counsel and the same Assistant Attorney General represented the Department in both matters to address the Department's responsiveness to the appellants' respective production requests. Ex. HO-7. As explained by joint stipulation of the parties, the Department did not – as of May 25, 2017 – comply with the production request and needed more time to produce the requested records. A new status conference was scheduled and convened on September 25, 2017. Ex. HO-10. At that conference, the parties jointly represented that it was appropriate to schedule a hearing in early 2018 and that the Department would likely have complied with the production request in time for such a date. Ex. HO-10.

No hearing was immediately scheduled, largely due to the parties' representations about developments in another case proceeding in court, in which a group of similarly situated women's reproductive healthcare providers and related parties sought injunctive relief and other remedies against the Department relating to MaineCare payment for abortion-related services. Ex. HO-11. The PPNNE appeal was thereafter held in abeyance through September 23, 2019, to allow the court action to proceed and the Department to respond to the production request. On October 23, 2019, the parties jointly advised that they did not view any issues raised in the court proceeding would be dispositive of those raised in the present appeal and that the Department expected to finally comply with the production requests by February 2020. Ex. D-13. Considerable, additional correspondence continued through the end of 2020, all of which reflected that the Department had not completed production of the requested documents and that the appeal needed to remain in abeyance until it did. Ex. HO-14 to Ex. HO-20. After a final status conference convened on April 8, 2021, the hearing was finally scheduled to convene over two days in early June 2021.

The hearing record was held open through July 27, 2021, allowing the Department to produce a revised recoupment claim, in line of representations made during the hearing, and for the parties to produce post-hearing briefs from the parties. In its initial closing brief, the Department presented a revised final recoupment claim, based on a reduced sample error-rate for ID #431964906. Ex. HO-33. Where the Department sought recoupment of $24,898.54 in its FIRD for #431964906, the Department now requested that a final figure of $23,416.54 be affirmed for that provider ID. Ex. HO-33. The Department specified that this reduction was calculated as follows:

> Upon recalculation by the Department, the overpayment sought for the non-extrapolated provider number 431964905 is reduced from $556.30 to $494.86. In the extrapolated recoupment (provider number 431964906), the error rate is reduced to 33.52 percent and the universe is reduced to $69,866.45, producing a recoupment of $23,415.54, for a total recoupment of $23,911.40. That is a reduction from $25,454.84 originally sought by the Department. See attached spreadsheets. The extrapolated recoupment also is corrected from what was anticipated at the time of hearing.

Ex. HO-33.

In response, PPNNE conceded that "claims for which no records were retrieved and the claims for services explicitly excluded from Medicaid coverage under federal law, i.e., RhoGAM injections directly related to performing a non-covered abortion" were appropriately identified for Departmental recoupment. Ex. HO-34. However, PPNNE challenged the Department's position that such claims should be "extrapolated to the universe of claims from which the audit sample was drawn," arguing instead that recoupment "should be confined to the claims actually audited." Ex. HO-34. The hearing record closed on July 27, 2021, and this recommended decision is now issued.

RECOMMENDED DECISION

The Department was **not correct** when it determined that, for the period of July 1, 2007 through August 31, 2010, Planned Parenthood of Northern New England owes the department $25,454.84 in recoupment due to improper billing for abortion related ancillary services for non-covered abortions, and for missing documentation.

RECOMMENDED FINDINGS OF FACT

1. In accordance with agency rules, the Planned Parenthood of Northern New England ["PPNNE"] was properly notified of the time, date, and location of the immediate proceeding.

2. PPNNE is a non-profit corporation that provides comprehensive reproductive health-related and primary care services, including family planning services and abortion services, to patients at 21 health centers located in Maine, New Hampshire, and Vermont (four of which are in Maine), annually serving between 12,000 and 14,000 patients in Maine.

3. For all times relevant to this proceeding, PPNNE was party to a "Medicaid/Maine Health Program Provider/Supplier Agreement" with the Department, through which PPNNE was authorized to

receive reimbursement from the Department for covered medical and related services provided to enrolled members of the MaineCare program.

4. The Department, through the Office of MaineCare Services ["OMS"], Program Integrity unit ["PI"], conducted an audit or post-payment review of PPNNE's claims for services provided to MaineCare members from July 1, 2007 through August 31, 2010 ["review period"].

5. On October 7, 2015, the Department issued a Notice of Violation to PPNNE with a total overpayment of $25,454.84, based on the post-payment review of claims submitted for MaineCare reimbursement under either of two provider ID numbers used by PPNNE during the review period: #431964905 and #431964906.

6. The Departmentally identified claims for which it sought recoupment fell into two general categories: services for which PPNNE was unable to provide supporting documentation / records and various other services for patients for whom the Department identified an intention or plan of the patient to undergo a non-covered abortion.

7. PPNNE timely requested an informal review of the Department's Notice of Violation.

8. On June 10, 2016, the Department issued a Final Informal Review Decision dated June 10, 2016, which did not reduce the amount of overpayment.

9. PPNNE timely requested an administrative hearing.

10. On June 29, 2021, the Department stipulated that it had reduced its total recoupment claim against PPNNE for both provider ID numbers to $23,911.40.

11. The Departmental regulations that were in effect from July 1, 2007 through August 31, 2010, provided that abortion services were not reimbursable through MaineCare except in cases where such a procedure was necessary to save the life of the mother, or where the pregnancy was the result of an act of rape or incest.

12. The Departmental regulations from July 1, 2007 through August 31, 2010 barred reimbursement for all services related to an underlying procedure for which reimbursement was not available.

13. In some of the claims for which the Department seeks recoupment, the service was provided in response to the MaineCare member seeking to terminate her pregnancy either by a surgical or a medication abortion. In a number of the claims, a surgical abortion was performed the same day as the service for which MaineCare was billed. In other claims, the documentation showed that MaineCare members asked about or expressed an interest in or desire to undergo an abortion, but in several other instances, the records relied upon by the Department do not show that the inquiring members subsequently underwent an abortion procedure.

14. None of the claims identified by the Department for recoupment related to an abortion that was eligible for MaineCare reimbursement because the procedure was necessary to save the life of the mother or because the pregnancy was known to have been the result of an act of rape or incest.

15. For all times relevant to this appeal, Maine's Title X subgrantor Family Planning Association of Maine, now known as Maine Family Planning, served as the lead provider, representing several other

women's health provider agencies including PPNNE in meetings with the Department and maintaining ongoing communication with the Department on behalf of similarly situated women's reproductive healthcare providers about appropriate MaineCare billing and record-keeping for family planning services, including abortions.

16. PPNNE regularly communicated with Maine Family Planning about information that agency received from the Department about matters relating to MaineCare reimbursement, billing, and other matters involving pregnancy care, including abortion services.

17. Through its proxy, Maine Family Planning, PPNNE relied upon informal communication from the Department for advisories as to which services were not MaineCare coverable based on interpretations or clarifications of the express terms of the MaineCare Benefits Manual.

18. On an unspecified date in April 1997, the Department's Director of Customer Service (later, Director of Policy and Provider Services) Beth Ketch, had a discussion with Evelyn Kieltyka of Maine Family Planning about MaineCare reimbursement for services that might be provided to patients who also underwent or might undergo abortions. During that discussion, Beth Ketch verbally advised Maine Family Planning administrators that services including, but not limited to, office visits, transvaginal ultrasounds, Rh blood testing, and evaluation and management services, were reimbursable by MaineCare, and provided Maine Family Planning with coding and advice for such services.

19. Between April 1997 and April 11, 2011, Beth Ketch did not affirmatively notify Maine Family Planning or PPNNE that her April 1997 oral guidance to Evelyn Kieltyka was no longer a correct representation of Departmental policy – i.e. that services including but not limited to office visits, transvaginal ultrasounds, Rh blood testing, and evaluation and management services were no longer MaineCare reimbursable when the pregnancy care patient inquired about or otherwise sought treatment that might lead to an abortion.

20. In response to a Departmental records request made to Maine Family Planning, Evelyn Kieltyka contacted Beth Ketch by telephone on April 11, 2011. Ms. Ketch acknowledged to Ms. Kieltyka that services including but not limited to office visits, transvaginal ultrasounds, Rh blood testing, and evaluation and management services provided to a pregnant woman had been MaineCare reimbursable, even if performed on the same day as an abortion. Ms. Ketch also told Ms. Kieltyka that the Department would issue written guidance to providers to clarify reimbursement newly understood limits related to services provided to a patient on the same day as an abortion.

21. On April 11, 2011, after speaking with Ms. Kieltyka, Beth Ketch emailed MaryAnn Anderson, a Departmental administrator, advising as to the following:

> We will be writing up a communication to send to providers that effective immediately, once a decision is made to have an abortion, any services including lab work and ultrasounds related to the abortion are not covered by MaineCare. Patty (Duschuttle) pulled the CFR and information related to an audit of New York. I told her it was not the Family Planning Agencies billing for this but the physician's office so it might not get picked up as FP services when they are looking at claims. We will get out the communication so the practice will stop. Thanks for bringing it to our attention.

Ex. A-29.

22. On April 11, 2011, Beth Ketch emailed a group of Departmental administrators, including MaryAnn Anderson, Sarah Stewart, and Patricia Duschuttle, advising as to the following:

> Program Integrity is looking at records and have found that we are paying for ultrasounds and blood work done prior to a member receiving an abortion. We gave providers information back in the early 90's that these services were covered but the abortion was not covered. I talked with Patty Duschuttle about this today and she pulled the CFR and we should not be covering any services that relate to the abortion. Moving forward we need to be sure that providers know that these types of services are not covered with Federal dollars. Can we get a list serve out that informs providers that once the decision is made to have an abortion, any services provided that relate to the abortion are not covered by MaineCare. This would include any blood test or ultrasounds performed prior to the abortion. The member would be financially responsible for these services and must be informed in advance that the service is not covered and they are responsible for payment if they choose to receive the service.

Ex. A-30; Ex. A-31.

23. Between April 11, 2011 and April 20, 2011, a group of Departmental MaineCare policy leaders comprised of Beth Ketch, Patricia Duschuttle, Sarah Stewart, and Linda Rindell, exchanged multiple emails discussing policy statements to be shared with MaineCare-enrolled family planning services providers, including PPNNE, and describing the importance of affirmatively notifying providers that Departmental policy had changed with respect to MaineCare coverage of "related services" after a patient decides to get an abortion. In the exchange, Ms. Lindell proposed including language in the statement that advised providers "If the abortion will not be covered by MaineCare, then any related services both prior to and following the abortion are also not covered. This includes blood tests, ultrasounds, or other tests." Also, within this exchange, Ms. Ketch emailed to the group, "We just need to be sure that providers know that going forward they cannot bill us for these services." Thereafter, Ms. Stewart emailed the group that a statement to providers would be "good to go out via listserv tomorrow or Friday." Ex. A-32.

24. At no time between April 11, 2011 and December 19, 2014 did the Department provide written guidance to any family planning / women's health services providers either by listserv or by direct communication to Maine Family Planning expressing that services including, but not limited to office visits, transvaginal ultrasounds, RhoGAM injections, Rh blood testing, and evaluation and management services were not covered under MaineCare if the patient decided to undergo an abortion.

25. On December 19, 2014, the Department issued a listserv communication to MaineCare providers that quoted preexisting rule language but added a version of language proposed by Linda Riddell 3½ years earlier in the administrative email exchange: "If the abortion will not be covered by MaineCare, then any related services both prior to and following the abortion are also not covered. This includes, but is not limited to: office visits, blood tests (RH screenings and associated prophylactic injections), ultrasounds, or other tests." Ex. A-33.

26. At all times between April 11, 2011 and December 19, 2014, Departmental administrators including, but not limited to Beth Ketch and Patricia Duschuttle, knew that Maine Family Planning, PPNNE, and other Maine family planning / women's health services providers continued to believe that pregnancy care services including but not limited to office visits, blood tests (RH screenings and

associated prophylactic injections), ultrasounds, or other tests were covered services under MaineCare, even if the patient had or would subsequently decide to undergo an abortion.

27. Rh factor screening and transvaginal ultrasounds are services that would be performed on pregnant patient regardless of whether that patient intends to undergo or actually undergoes an abortion procedure.

REASONS FOR RECOMMENDATION

As noted above, the Department finally reduced its recoupment claim from the amount identified in the Order of Reference. As a result, the matter presented for resolution is whether the Department correctly identified an amended recoupment claim of $23,911.40 against PPNNE, and if not, what (if any) amount is it entitled to recoup.

At the outset, it is appropriate to establish what amount of that claim PPNNE stipulates is correctly subject to recoupment. As noted, PPNNE conceded in its Request for Informal Review and Request for Hearing that recoupment was appropriate with respect to $411.90, which it alleged was proper for "claims for which no records were timely produced," that is "claims for which PI found no record support." Ex. D-3; Ex. D-5. The parties were asked to specify within their post-hearing statements their positions and, if possible, jointly stipulate as to the final amount, with respect to the two original provider ID numbers' claims sets and the various categorical sets (i.e. "lack of documentation" vs. "abortion-related"), that correctly reflected the ongoing disagreement between themselves.

The parties did not satisfy this request and, thus, there is no apples-to-apples view of what figure remains finally unresolved. The Department announced a newly reduced total sum, including a reduced, non-extrapolated claim, plus a newly extrapolated claim calculated based on a reduced error rate and applicable claims universe. Ex. HO-33. PPNNE, in its post-hearing statement, did not identify a final dollar amount for claims it conceded were appropriate for recoupment, instead conceding that that all paid claims for which there were "no records ... retrieved" and those "for services explicitly excluded from Medicaid coverage under federal law, i.e. RhoGAM injections directly related to performing a non-covered abortion" were correctly subject to recoupment while maintaining its broader objection to the extrapolation process employed by the Department. Ex. HO-34. The Department did not seek to resolve this disconnect in its reply statement. Ex. HO-35.

The Department's revised spreadsheet for Provider ID #431964905 identifies a final, non-extrapolated claim for $494.86, which specifically allowed (and thus, removed from the recoupment total) a single claim for $61.44 for "no records." Ex. HO-33. What remained – i.e. $494.86 – included 10 claims that the Department identified as being "related to a non-covered service," plus a single claim in the amount of $48.32 for "no records." Ex. HO-33. Based on PPNNE's categorical stipulation that it did not dispute the appropriateness of any claim maintained for services with no documentation / record support, it is found that the total amount disputed in the Provider ID #431964905 recoupment sum is $446.54 (i.e. $494.86 - $48.32).

The Department's revised spreadsheet for Provider ID #431964906 identifies a final, extrapolated claim for $23,416.54, which derived from a sample of $7,408.22 in paid claims against which the Department determined it paid $2,482.95 in error. Ex. HO-33. Dividing the total claims in the sample allegedly paid in error ($2,482.95) by total claims in the sample ($7,408.22), the Department determined a new "error rate" of 33.52 percent. Ex. HO-33. The Department then identified a "claims universe" for the period that included $73,187.94 and multiplied that figure by the new error rate (33.52 percent), producing the new recoupment claim for Provider ID #431964906 – i.e. $23,416.54. Ex. HO-33.

Of the $2,482.95 identified as errors for Provider ID #431964906, $302.14 was for claims maintained for services with no documentation/record support. Ex. HO-33. In its respective written arguments, PPNNE appears to argue that this sum should not be included in the extrapolation. Ex. HO-3; Ex. HO-5; Ex. HO-34. This argument is rejected. Departmental PI unit Manager Valerie Hooper testified as to the method by which the sample was selected, the error rate derived, and how the error rate was applied to the claims universe to identify a fairly extrapolated sum representing likely errors in the whole. Test. of Valerie Hooper. PPNNE produced no evidence at hearing casting doubt upon the Department's extrapolation process. In closing, PPNNE challenged the validity of the extrapolation process by contrasting it with what the federal government requires for Medicare-related audits. PPNNE has not carried its burden to persuasion to show that the Department wrongly characterized the nature and extent to which it is authorized by the Legislature and governed by the plain language of Chapter 1, Section 1 of the MaineCare Benefits Manual ["MBM"] to extrapolate a recoupment sum among many categories of claims in the manner it did in the present case. *See* 10-144 C.M.R. Ch. I, § 1.18 (C) (eff. Sept. 19, 2018) (assigning responsibility to conduct "surveillance and referral activities," including but not limited to "[a]n extrapolation from a random sampling of claims submitted by a provider and paid by MaineCare.").[1]

As noted, PPNNE categorically conceded that it does not dispute any claims for no documentation / record support. With respect to the claims Provider ID #431964906, this means that PPNNE does not dispute $302.14. It is unnecessary and inappropriate to remove this sum from the error rate calculation merely because PPNNE does not challenge its validity. However, it is appropriate to consider the meaning of this figure in light of: a) the total claims sample ($7,408.22) and b) the total claims universe ($73,187.94). The undisputed amount ($302.14) is 4.08 percent of the total claims sample ($7,408.22). PPNNE does not dispute the factual and legal basis for the $302.14 figure, and the Department's extrapolation process is sustainable as described. Therefore, applying this percentage (4.08 percent) to the total claims universe ($73,187.94), it can be inferred that PPNNE functionally concedes that it is responsible for a extrapolated sum of $2,986.07 in recoupment for "no documentation / records support" claims identified for Provider ID #431964906 (i.e. $73,187.94 x .0408 = $2,986.07). Adding this figure ($2,986.07) to the non-extrapolated sum representing "no documentation / records support" claims identified for Provider ID $431964905 ($48.32), it is reasonable to infer that PPNNE

[1] Several different versions of the various sections of the MaineCare Benefits Manual are applicable to different specific periods during which PPNNE provided services with claims that were included in the Department's recoupment claim. Where no substantive difference exists between the period-appropriate version of the applicable section and the one currently in effect, the hearing officer cites the current version. Where there are substantive differences, the hearing officer endeavors to cite the period-specific version.

has stipulated that it does not dispute the Department's right to recoup a sum of $3,034.39 for all services improperly paid due to no documentation / records support.

Therefore, the sum remaining in dispute is $20,877.01 (i.e. $23,911.40 finally claimed by the Department, minus $3,034.39 functionally conceded by PPNNE as appropriate, due to no documentation / records support). For the reasons that follow, the hearing officer respectfully recommends that the Commissioner reject the validity of the Department's claim for recoupment in any amount more than $3,034.39.[2]

Services related to non-covered abortion services

The disagreement at the heart of this appeal is quite simple. The Department argues that it is required by the plain language of its MaineCare regulations and federal requirements to recoup from PPNNE all payments made for services provided to PPNNE patients that were allegedly "related" to a non-covered abortion, chiefly divided into office visits and what it grouped together as "ancillary services related to a non-covered service." Ex. HO-33. The "ancillary services" broadly consisted of transvaginal ultrasounds, blood typing assays, and RhoGAM injections. Ex. HO-33. The Department essentially argues that "services related to an abortion" include all office visit charges, transvaginal ultrasounds, blood testing, and RhoGAM injections incurred by a patient who expresses interest in, plans to, and/or actually undergoes an uncoverable abortion procedure.

PPNNE argues that the Department should be barred from recouping payments made for such services during the review period for two essential reasons. First, PPNNE argues that the Department's argument relies upon a misrepresentation of the Department's established interpretation of MaineCare regulatory language that was employed during the review period, and that the Department changed this interpretation without notifying affected providers in the manner that had been customarily followed with previous guidance involving MaineCare coding and reimbursement. Second, PPNNE argues that, if it is concluded that the plain language of the applicable regulations requires recoupment, the Department should be equitably estopped from such recoupment where PPNNE reasonably relied upon Departmental silence and did so to its detriment.

The Department protests allegations that its interpretation of the two critical regulatory provisions at the heart of this appeal changed at some point after those provisions were enacted. As noted, the Department amended Section 90.05-2 of the MaineCare Benefits Manual in 1994 to expressly limit MaineCare coverability for abortion services to circumstances where "such procedure is necessary to save the life of the mother, or if the pregnancy is the result of an act of rape or incest." 10-144 C.M.R. Ch. 101, sub-Ch. II, §.90.05-2 (eff. May 16, 1994). More critically, the Department amended Section 90.07 of the MaineCare regulations in 2004 to include the following provision: "When MaineCare does not

[2] The hearing officer is unable to glean from the appellant's closing argument what it meant with regard to its declaration that it "does not challenge PI's legal basis" for recoupment of claims for all "RhoGAM injections directly related to performing a non-covered abortion," but without specifying which specific RhoGAM injection claims it meant to include within this declaration. Ex. HO-34. Counsel for PPNNE is respectfully asked to clarify this scope of this portion of its concession/declaration when presenting "Responses and Exceptions" to the Office of the Commissioner.

cover specific procedures, all services related to that procedure are not covered, including physician, facility, and anesthesia services." 10-144 C.M.R. Ch. 101, sub-Ch. II, § 90.07 (eff. May 3, 2004).

Based on the PPNNE's arguments raised on appeal, it is necessary to begin by reconciling two questions as to the Department's interpretation of the 2004-amended language in Section 90.07. First, does Federal law and/or guidance demand any conclusion about the scope of the Department's "related to" language, such as would have informed the Department's policy-based determinations about certain procedures' ineligibility for federal Medicaid matching funds due to being necessary to the performance of a medical (i.e. surgical or medication) abortion. Second, what does the evidence reflect about the manner in which the Department actually interpreted the meaning of its own regulatory language for the purpose of defining the same scope during the period from July 1, 2007 to August 31, 2010.

Federal law and guidance and the MaineCare Benefits Manual

The Medicaid Act requires participating states to include coverage within their State Medicaid Plans for "medical assistance ... with respect to pregnant women [for] prenatal care and delivery services." 42 U.S.C. § 1396a (10)(C)(iii)(II). However, Federal law prohibits federal Medicaid funds from being used to fund abortion procedures except in circumstances where the pregnancy resulted from rape or incest, or where the pregnancy poses a risk to the mother's life. Congress has repeatedly enacted this prohibition through provision attached every year since 1977 to appropriations bills for the U.S. Department of Health and Human Services' annual operating budgets – popularly referred to as the "Hyde Amendment." *See e.g.* Pub. L 103-112, § 509 (Oct. 21, 1993) ("None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest."). In 1994, the Department amended its Medicaid regulations to comply with the newly clarified Federal prohibition. 10-144 C.M.R. Ch. 101, sub-Ch. II, § 90.05-2(A) (eff. May 16, 1994).

There is no act of Congress that directly controls questions of "Federal Financial Participation" ["FFP"], i.e. reimbursement for services that are related to prohibited abortion procedures. The Centers for Medicare and Medicaid Services ["CMS"] has instead provided guidance to states defining these limits as follows:

1. Abortion Related Services for Which FFP is Not Available.--FFP is not available for the costs of medically induced/performed abortions where the life of the mother would not be endangered if the fetus were carried to term. FFP is therefore not available for the costs of services directly related to the performance of such abortions, as follows:
   - o Physician/surgical charges for performing the abortion. These charges include the usual, uncomplicated pre and post operative care and visits related to performing the abortion.
   - o Hospital or clinic charges associated with the abortion. This includes the facility fee for use of the operating room, supplies and drugs necessary to perform the abortion and charges associated with routine, uncomplicated pre and post operative visits by the patient.
   - o Physician charges for administering the anesthesia necessary to induce or perform an abortion.
   - o Drug charges for medication usually provided to or prescribed for the patient who undergoes an uncomplicated abortion. This includes routinely provided oral analgesics

and antibiotics to prevent septic complication of abortion, and Rho-GAM (an immune globulin administered to Rh-negative women who have an abortion).

- o Charges for histo-pathological laboratory tests performed routinely on the extracted fetus or abortion contents.
- o Charges for other laboratory tests performed prior to performing the nonmatchable abortion to determine the anesthetic/surgical risk of the patient (e.g., CBC, electrolytes, blood typing).

2. Abortion Related Services for Which FFP is Available.--FFP is available for the costs of all services related to an abortion where the physician has certified in writing to the Medicaid agency that in his/her professional judgment, the life of the mother would be endangered if the fetus were carried to term. FFP is also available for the costs of certain specific services associated with a non-Federally funded abortion if those services would have been performed on a pregnant woman regardless of whether she was seeking an abortion. Those services include:
   - o Charges for pregnancy tests which would have been performed whether or not the individual was seeking an abortion;
   - o Charges for tests to identify sexually transmitted diseases (e.g., chlamydia, gonorrhea, syphillis) and other laboratory tests routinely performed on a pregnant patient, such as Pap smear and urinalysis; and
   - o Charges for all services, tests and procedures performed post-abortion for complications of a non-Federally funded therapeutic abortion, including charges for a hospital stay beyond the normal length of stay for abortions and charges for services following a septic abortion, etc.

"State Medicaid Manual," Ctrs. for Medicare & Medicaid Servs., § 4432 (B) (eff. Aug. 1991) (*emphasis in original*). Ex. D-22.

The State Medicaid Manual is binding upon state Medicaid agencies (like the Department) but provides no private cause of action to providers against state Medicaid agencies. However, CMS guidance provides persuasive evidence as to the meaning of potentially ambiguous language published by state Medicaid agencies, inasmuch as state agencies are presumed to have the goal of remaining in CMS's good graces.

Because there is no basis for concluding that Federal law compelled the Department to administer the MaineCare program in such a way that barred reimbursement for all services provided to a patient who also receives an abortion procedure for which Federal payment is not allowed, where those services are not "directly related" to the abortion and the services are among those that "would have been performed on a pregnant woman regardless of whether she was seeking an abortion," any conclusion that MaineCare forbids payment for the kinds of services identified for recoupment in the Department's audit of PPNNE must be based on a conclusion that this policy decision was independently made by Department leadership. To determine whether Departmental policy in fact requires such a conclusion, we must first look to the plain language of the regulation. Only if the plain meaning of the regulation's language is ambiguous, is it appropriate to refer to other indicia of meaning.

The Hearing Officer's "decision must be based on the agency regulations and the evidence which is a matter of hearing record." 10-144 C.M.R. Ch. 1, § VII (B)(3). If the plain language of a regulation is unambiguous, the "unambiguous meaning" of its provisions is applied "unless the result is illogical or absurd." *Maine Today Media, Inc. v. State*, 2013 ME 100, ¶6, 82 A.3d 104, 108. As with statutory

interpretation, the language of an administrative regulation "should be construed to avoid absurd, illogical, or inconsistent results," and in light of the whole regulatory scheme "for which the section at issue forms a part so that a harmonious result ... may be achieved." *Dep't of Human Servs. ex rel. Hampson v. Hager*, 2000 ME 140, ¶21, 756 A.2d 489, 493. If a regulation "can reasonably be interpreted in more than one way and comport with the actual language ... an ambiguity exists." *Me. Ass'n of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶ 35, 923 A.2d 918, 928. If the plain language is ambiguous, i.e. "susceptible of different meanings," the provision's meaning must be viewed in terms of its history and regulatory intent. *Dep't of Human Servs. ex rel. Hampson*, 2000 ME 140, ¶21, 756 A.2d 489.

Section 90 of the MaineCare Benefits Manual ["MBM"] governs the provision of "Physician Services" through MaineCare, and with regard to the present dispute relevantly provides:

> In compliance with PL 103-112, the Health and Human Services Appropriations bill, reimbursement for abortion services will be made only if necessary to save the life of the mother, or if the pregnancy is the result of an act of rape or incest.
>
> Abortion services are covered only when performed in a licensed general hospital or outpatient setting, and when the following conditions are met:
>
> 1. A physician has found, and so certified in writing to the Department, that on the basis of his/her professional judgment an abortion is necessary to save the life of the mother; or the pregnancy is the result of an act of rape; or the pregnancy is the result of an act of incest.
> 2. If the abortion is performed in order to save the life of the member, the certification must contain written justification as to the necessity of the abortion procedure.
> 3. The certification must contain the name and address of the member.
> 4. The member's medical record shall be documented as to the circumstances of the abortion procedure.
>
> ...
>
> The physician's certification must be submitted to the Department. The member's medical record is not required for submission, however, it must be available for review by the Department, upon request.
>
> In compliance with federal requirements, the Department will reimburse for the procedure if the treating physician certifies that in his or her professional opinion, the member was unable for physical or psychological reasons to comply with established reporting requirements, if any, in cases of rape or incest.
>
> Although no payment can be made until the provider submits all required documentation to the Department, the provider should provide necessary medical services immediately as needed.

10-144 C.M.R. Ch. 101, sub-Ch. II, § 90.05-2 (A).

The regulations also provide that "[w]hen MaineCare does not cover specific procedures, all services related to that procedure are not covered, including physician, facility, and anesthesia services." 10-144 C.M.R. Ch. 101, sub-Ch. II, § 90.07.

During the entire PPNNE review period, Departmental regulations provided that abortion services were not reimbursable through MaineCare except in cases where such a procedure was necessary to save the life of the mother, or where the pregnancy was the result of an act of rape or incest.

Ex. D-9. *See* 10-144 C.M.R. Ch. 101, sub-Ch. II, § 90.05-2 (eff. May 16, 1994). Throughout the same period, Departmental regulations also included the provision that barred reimbursement for all services related to an underlying procedure for which reimbursement was not available. Ex. D-11. *See* 10-144 C.M.R. Ch. 101, sub-Ch. II, § 90.07 (eff. May 3, 2004).

Section 90.05-2 (A) is not at issue in the present appeal, nor is there any reasonable argument that its plain meaning is ambiguous. Section 90.07, however, merits a closer look. Merriam-Webster Online Dictionary relevantly defines "related to" as "to be connected with (someone or something)," and notes the phrase is "often used as (be) related to," with the example: "The exam questions are directly related to the readings." "Related To," Merriam-Webster Online Dictionary, *available at* http://www.merriam-webster.com/dictionary/related%20to (last visited Sept. 14, 2021).

Comparing the plain language of Section 90.07 ("... all services related to that procedure are not covered ...") with the correlated language in the State Medicaid Manual ("... FFP is therefore not available for the costs of services directly related to the performance of such abortions," but "FFP is also available for the costs of certain specific services associated with a non-Federally funded abortion if those services would have been performed on a pregnant woman regardless of whether she was seeking an abortion.") reflects a difference in the level of specificity, but not necessarily in meaning or intent. 10-144 C.M.R. Ch. 101, sub-Ch. II, § 90.07; "State Medicaid Manual," § 4432 (B). Since 1991, CMS has extended the reimbursement bar to those "costs of services directly related to the performance of such abortions," whereas the MaineCare Benefits Manual omitted the word "directly" from the otherwise generally applicable Section 90.07 provision. *Id.* (*emphasis in original*). In tandem with this, CMS has identified the contours of the "directly related" provision by specifically authorizing reimbursement for such related services as "would have been performed on a pregnant woman regardless of whether she was seeking an abortion." *Id.* Thus, Federal guidance cannot – in good faith – be referenced as a basis for applying an interpretation of MaineCare policy that bars MaineCare coverage for services provided to a pregnant woman that would have been performed upon her, whether or not she subsequently underwent an medical abortion procedure in a circumstance where there was no evidence of rape, incest, or a known threat to the pregnant woman's life. Federal guidance expressly allows states to extend coverage to such circumstances.

We must then analyze the MaineCare rule provisions in and of themselves. As noted, MaineCare rules were amended to bar coverage for all medical abortion procedures for circumstances whether there was no evidence of rape, incest, or a known threat to the pregnant woman's life in May 1994. Ex. D-9. Thereafter, the Department amended Section 90 in May 2004 to extend the coverage bar to all otherwise coverable services related to an uncovered service. Ex. D-11. From May 2004 through August 9, 2010, the Department adopted ten Final Rules amending some portion of Section 90, none of which changed either the abortion-specific provisions in Section 90.05-2 (A) or the "all services related to that procedure" provision of MBM Section 90.07. Ex. D-12; Ex. D-13; Ex. D-14; Ex. D-15; Ex. D-16; Ex. D-17; Ex. D-18; Ex. D-19; Ex. D-20.

Applying a plain meaning reading of Section 90.07's "related to" provision in the abortion context yields inevitable questions about where the limits lie – i.e. how should the Department or a

women's reproductive health care provider gauge whether a transvaginal ultrasound "relates to" an abortion absent other information about the patient's circumstances or other factors to be applied when making the determination? The same circumstance could reasonably yield both interpretations due to the lack of clarity in the regulatory language – that the same services could be deemed to "relate to" an abortion procedure and also be "unrelated to" an abortion procedure. Therefore, there is an ambiguity, and we must look at the history of the regulation and other evidence to identify the contours and parameters of the "related to" provision in the women's reproductive healthcare context.

Departmental internal communications clearly demonstrate that MaineCare policy leadership – as late as the morning of April 11, 2011 – not only believed that services like ultrasounds, office visits, blood testing, and RhoGAM injections were MaineCare coverable under the governing regulatory language without regard for their possible relationship to a patient's abortion, but also believed that the family planning services provider community understood such services to be MaineCare coverable without regard to a possible relationship to an abortion for which no MaineCare coverage was available. Ex. A-29; Ex. A-30; Ex. A-31; Ex. A-32. A preponderance of the evidence also supports a finding that the Department did not affirmatively correct this alleged misunderstanding on the provider community's part until December 19, 2014, when the Department finally delivered on its previously-planned intention to announce a new changed interpretation of the rule through a listserv to all MaineCare providers. Ex. A-18;[3] Ex. A-33; Test. of Nicole Clegg; Test. of Valerie Hooper.

More critically, the undisputed evidence reveals that, as of April 10, 2011, Beth Ketch notified emailed Program Integrity manager MaryAnn Anderson that women's reproductive healthcare providers needed to be notified "immediately" that "once a decision is made to have an abortion, any services including lab work and ultrasounds related to the abortion are not covered by MaineCare." Ex. A-29. Minutes later, Ms. Ketch advised a larger Departmental policy leadership team that "we should not be covering any services that relate to the abortion," that "[m]oving forward we need to be sure that providers know that these types of services are not covered with Federal dollars," and that women's reproductive healthcare providers needed to be immediately notified that "once the decision is made to have an abortion, any services provided that relate to the abortion are not covered by MaineCare." Ex. A-30.

All claims that the Department has identified for recoupment in the present matter were billed during a period from July 1, 2007 through August 31, 2010. The Department argued in its 2015 Notice of Violation, its 2016 FIRD, and now in 2021 that its policy throughout that period forbade MaineCare coverage for any physician's services provided for a patient who eventually decided to undergo an abortion procedure. Ex. D-2; Ex. D-4; Ex. HO-33. These interpretations are more expansive than Ms. Ketch and her MaineCare policy management team understood them to be – as of April 11, 2011 – at which time, Ms. Ketch articulated MaineCare policy as barring reimbursement for services provided to a reproductive healthcare patient "once the decision is made to have an abortion." Ex. A-30. However, Ms. Ketch's announcements about the need to newly articulate the meaning of published MaineCare

[3] This exhibit consists of a transcript from the administrative hearing, In re: Family Planning Association of Maine, Inc., convened on April 16, 2015. At that hearing, former FPAM (now "Maine Family Planning") Director of Clinical Services Evelyn Kieltyka testified extensively about her ongoing communication with Departmental administrators – chiefly, Beth Ketch and MaryAnn Anderson – concerning MaineCare billing and reimbursement.

policy on April 11, 2011, clearly reflects that prior to April 11, 2011, the accepted and applied meaning of MaineCare policy as written was something different. That is, prior to April 11, 2011, MaineCare policy as written was understood by Departmental policy leadership and the women's reproductive healthcare provider community to be what PPNNE has argued throughout this proceeding that it was.

It should be concluded that for all dates included in the review period for PPNNE – i.e. July 1, 2007 through August 31, 2010 – Departmental policy functionally mirrored the language of Section 4432 (B) of the State Medicaid Manual. Departmental policy barred MaineCare coverage for the costs of all services directly related to the performance of abortion procedures where the exclusions for rape, incest, and threats to pregnant women's lives did not apply. This specifically included, but was not limited to "[d]rug charges for medication usually provided to or prescribed for the patient who undergoes an uncomplicated abortion," including Rho-GAM injections administrated after an Rh-negative patient underwent an abortion." Ex. D-22 (*emphasis omitted*). This also specifically included, but was not limited to "the facility fee for use of the operating room, supplies and drugs necessary to perform the abortion and charges associated with routine, uncomplicated pre and post operative visits by the patient," except where those pre-operative visits are "services associated with a non-Federally funded abortion if those services would have been performed on a pregnant woman regardless of whether she was seeking an abortion." Ex. D-22 (*emphasis omitted*). Thus, all office visits (other than "the facility fee for use of the operating room ... necessary to perform the abortion" and "pre and post operative care and visits related to performing the abortion") were coverable under MaineCare, as were all transvaginal ultrasound services and other "laboratory tests routinely performed on a pregnant patient." Ex. D-22 (*emphasis omitted*).

The Department has argued in favor of the policy interpretation of Section 90.07 reflected by the reasoning expressed in the FIRD issued on June 10, 2016. That interpretation is not entitled to any deference by the hearing officer, as the Commissioner's appointed representative, and is received as argument on an equal plane with the argument advanced by PPNNE. *See Baffer v. Dep't of Human Servs.*, 553 A.2d 659, 663 (Me. 1989) (hearing officer's recommendation may not "defer to a purported exercise of discretion" by other staff within the Department where, in "exercising the authority of the Commissioner" after an administrative hearing, the hearing officer commands the Commissioner's discretion in executing the Department's final decision-making authority. Hearing officer bears the authority to include, as a recommendation, "that discretionary judgment call based on all the evidence available to him.") *See also Kane v. Comm'r of Dept. of Health and Human Servs.*, 2008 ME 185, ¶12, 960 A.2d 1196, 1200 (agency decision-maker's interpretation of ambiguous language is sustainable so long as the interpretation is both reasonable and within the agency's expertise).

The hearing officer recommends that the Commissioner adopt and apply the interpretation of Section 90.07 that Departmental MaineCare policy leaders articulated at all times during the PPNNE review period – i.e. July 1, 2007 to August 31, 2010. That is, during the period from July 1, 2007 to August 31, 2010, MaineCare coverage extended to women's reproductive healthcare services provided to a patient – including office visits, transvaginal ultrasounds, laboratory testing, and RhoGAM injections – so long as those services were not directly related to the performance of an uncovered abortion procedure, as detailed in Section 4432 (B) of the State Medicaid Manual.

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

If the Commissioner rejects the hearing officer's recommendation to adopt the interpretation of MaineCare policy for the PPNNE review period expressed above – i.e. that MaineCare coverage extended to all claims identified for recoupment in the Department's written closing argument, except for "directly related" RhoGAM injections and other claims stipulated to as appropriate by PPNNE – the hearing officer respectfully recommends that the Commissioner equitably estop the Department from enforcing any recoupment claim above and beyond the amount that PPNNE has stipulated is correctly owed.

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

"Equitable estoppel based on a party's silence will only be applied when it is shown by clear and satisfactory proof that the party was silent when he had a duty to speak." *Bell*, 1998 ME 123, ¶8, 711 A.2d at 1295 (*citation omitted*). "Clear and satisfactory proof means clear and convincing proof." *Littlefield v. Adler*, 676 A.2d 940, 942 (Me. 1996). The requirement of "clear and convincing evidence" is "an intermediate standard of proof lying between the preponderance and the reasonable doubt standards," where "[t]he factfinder must be persuaded, on the basis of all the evidence, that the moving party has proved his factual allegations to be true to a high probability." *Taylor v. Comm'r of Mental Health and Mental Retardation*, 481 A.2d 139, 154 (Me. 1984).

The undisputed testimony reflects that, throughout the review period, Maine's reproductive health provider community communicated with the Department through Maine Family Planning as lead provider of women's reproductive health services in the state. Test. of Nicole Clegg; Test. of Alison Bates. Since its establishment as a women's reproductive health services in Maine, PPNNE has specifically relied upon Maine Family Planning as its communication proxy with the Department for

advisories as to which services were not MaineCare coverable due to any reasons that interpreted or clarified the plain language of MaineCare Benefits Manual regulations. Ex. A-18; Test. of Nicole Clegg. There is no representation or suggestion from the Department that this inter-provider communications arrangement was unreasonable. On the contrary, a preponderance of the evidence reflects that the Department endorsed the arrangement, relying on Maine Family Planning to share oral guidance with other women's reproductive healthcare providers and employing a listserv with the same providers when written guidance was appropriate. As such, it should be concluded that it was reasonable for PPNNE to rely upon Maine Family Planning to share important policy-related information gleaned from oral communication with Beth Ketch and other members of her MaineCare policy leadership team.

In April 1997, the Department's director of policy, Beth Ketch, had a discussion with Evelyn Kieltyka of Maine Family Planning about MaineCare reimbursement for services that might be provided to patients who also underwent or might undergo abortions. Ex. A-18; Test. of Nicole Clegg. On that unspecified date in April 1997, Ms. Ketch verbally advised Evelyn Kieltyka that services including, but not limited to, office visits, transvaginal ultrasounds, Rh blood testing, and evaluation and management services, were reimbursable by MaineCare, and provided Maine Family Planning with coding and advice for such services. Ex. A-18; Test. of Nicole Clegg. At no point between April 1997 and April 11, 2011, did Beth Ketch affirmatively notify Maine Family Planning or PPNNE that her April 1997 guidance to Evelyn Kieltyka was no longer correct – i.e. that services including but not limited to office visits, transvaginal ultrasounds, Rh blood testing, and evaluation and management services were no longer MaineCare reimbursable when the pregnancy care patient inquired about or otherwise sought treatment that might lead to an abortion. Ex. A-18; Test. of Nicole Clegg.

PPNNE does not dispute that it billed MaineCare for the services itemized in the spreadsheets used to calculate the Department's recoupment claim, which chiefly included transvaginal ultrasounds, office visits, blood tests, and other evaluation and management services for patients with whom abortion services were discussed, planned, and in some cases performed. Undisputed testimony by PPNNE administrator Nicole Clegg and clinical director Alison Bates reflect that PPNNE continued to bill MaineCare for those services throughout the 2007 to 2010 review period because it believed the Department's April 1997 guidance authorized such billing practices. Test. of Nicole Clegg; Test. of Alison Bates. Thus, it should be concluded that the Department's statements or conducted induced PPNNE to bill MaineCare for all of the relevant services identified in the recoupment claim.

Ms. Ketch's sworn testimony in the administrative hearing convened in the matter of Family Planning Association of Maine, on April 16, 2015, reflects that she was aware of the arrangement providers like PPNNE had with Maine Family Planning, and that she understood her guidance to Maine Family Planning would be received by such providers as a reliable articulation of Departmental policy. Ex. A-18. In that hearing, Ms. Ketch responded to several questions with statements reflecting that she had vague memories about conversations with Evelyn Keiltyka between the 1990s and 2011. Ex. A-18. Ms. Ketch specifically acknowledged that she had "researched and could not find where" any corrective guidance "ever was sent out" to Maine Family Planning or to other providers in Maine's women's reproductive health provider community after she spoke with Ms. Keiltyka on April 11, 2011, despite

her extensive internal email communications with other Departmental administrators about the subject between April 11, 2011 and April 20, 2011. Ex. A-18. The bulk of Ms. Ketch's testimony concerned her recitation of specific rule language in effectives pursuant to each of the rulemaking changes to Section 90 from 1994 to 2011. Ex. A-18. However, the following exchange took place on cross examination of Ms. Ketch with counsel for the appellant with respect to her desire to provide guidance through a listserv with Maine's women's reproductive health provider community in April 2011:

> Q: Okay. And, again, the purpose of doing that (providing guidance on the listserv) in April 2011 was to let providers of abortion services know that the Department's position from that point forward would be that any related services prior to or following an abortion would not be covered.
>
> A: Yes.
>
> Q: Okay. I also – one thing I neglected to (indiscernible) on what's been marked as FPM Exhibit Number 5, in your email message to Loretta Wells, you say, (indiscernible) that message, "Moving forward, we need to be sure the providers know that these types of services are not covered with federal dollars"?
>
> A: Which one are you looking at?
>
> Q: I'm sorry, Number 5, FPM Number 5, that's your email to Loretta Wells?
>
> A: That's what's in the mail, yes.
>
> Q: Okay. And that's consistent with the subsequent email chain where there was a discussions (sic) about (indiscernible) list serve to clarify that for providers?
>
> A: Yes.

Ex. A-18.

In response to a follow-up question, Ms. Ketch testified that she believed the clarification was needed because of the "phone call I had with Evelyn," and that:

> it just seemed apparent that we needed to have a clarification, and I explained to Patty (Duschuttle) what the phone call had been, what the concerns were, and then that's when she went to research. And we had the discussion that, you know, based on the way the rule was written in the '90s it was understandable that they would have been given that guidance in the '90s.

Ex. A-18.

The evidence reflects a high probability that PPNNE expected Ms. Ketch to newly articulate the current billing restrictions to the women's reproductive healthcare provider community when and if the Department decided to change its policy interpretation. Thus, it should be concluded – to a high probability – that the Department was silent while possessing this knowledge and had a duty to correct what it believed was a mistaken impression held by the provider community.

PPNNE and other similarly situated healthcare providers had no reason to believe that the policy had changed, absent any affirmative representations by Ms. Ketch or other trusted Departmental policy leaders, and that it relied upon that silence as a basis for continuing to bill for transvaginal ultrasounds, office visits, blood testing, and other services identified in the recoupment claim due to being "related to" an uncovered abortion procedure. The "related to" language added to the regulation in May 2004

It cannot be disputed that, in light of the Department's recoupment claim for such services, PPNNE relied on the Department's silence to its detriment. The final question is whether such reliance was reasonable.

The Department argues that PPNNE's continued reliance on Ms. Ketch's informal guidance given to Ms. Kieltyka by Ms. Ketch in April 1997 was patently unreasonable, where the Department promulgated a substantive change to the governing rule in 2004 – adding the "related to" provision to Section 90.07. 10-144 C.M.R. Ch. 101, sub-Ch. II, § 90.07 (eff. May 3, 2004). According to the Department, PPNNE's argument ignores the agency's responsibilities under its MaineCare Provider Agreement with respect to the general obligation to directly monitor all changes to regulations that might affect its billing practices.

PPNNE does not suggest it was unaware of the changes to Section 90.07 that took place in May 2004. Rather, it argues that those changes were never understood to deem services considered standard pregnancy care (i.e. transvaginal ultrasounds, RhoGAM injections administered in settings other than post-abortion, and other laboratory testing) to be "related to" abortion care, such as might have required it to cease billing MaineCare for such services. Clearly, the testimony from Ms. Clegg and Ms. Bates reflects that this was never PPNNE's understanding. But more critically, evidence of internal email communication among the Department's MaineCare policy leadership team reflects that, prior to August 11, 2011, this was never the Department's understanding either.

On April 11, 2011, Ms. Ketch acknowledged to Ms. Kieltyka that services including but not limited to office visits, transvaginal ultrasounds, Rh blood testing, and evaluation and management services provided to a pregnant woman had been MaineCare reimbursable, even if performed on the same day as an abortion. Ex. A-18. Ms. Ketch also told Ms. Kieltyka that the Department would issue written guidance to providers to clarify reimbursement newly understood limits related to services provided to a patient on the same day as an abortion. Ex. A-18.

As noted above, Beth Ketch acknowledged to her Departmental MaineCare policy leadership team on April 11, 2011 that she believed that the Department had been mistakenly interpreting Federal guidance and published MaineCare regulations. Ex. A-29; Ex. A-30; Ex. A-31. On April 11, 2011, Ms. Ketch also represented to her policy leadership team how urgent it was to immediately notify the women's reproductive healthcare provider community that "effective immediately, once a decision is made to have an abortion, any services including lab work and ultrasounds related to the abortion are not covered by MaineCare ... so the practice (by providers, of billing MaineCare for such services) will stop." Ex. A-29. (*emphasis added*). On the same date, Beth Ketch emailed her MaineCare policy leadership team – specifically including MaryAnn Anderson, Sarah Stewart, and Patricia Duschuttle, as to the following:

> Program Integrity is looking at records and have found that we are paying for ultrasounds and blood work done prior to a member receiving an abortion. We gave providers information back in the early 90's that these services were covered but the abortion was not covered. I talked with Patty Duschuttle about this today and she pulled the CFR and we should not be covering any services relate that relate to the abortion. Moving forward we need to be sure that providers know that these types of services are not covered with

> Federal dollars. Can we get a list serve out that informs providers that once the decision is made to have an abortion, any services provided that relate to the abortion are not covered by MaineCare. This would include any blood test or ultrasounds performed prior to the abortion. The member would be financially responsible for these services and must be informed in advance that the service is not covered and they are responsible for payment if they choose to receive the service.

Ex. A-30; Ex. A-31.

Between April 11, 2011 and April 20, 2011, Departmental administrators Beth Ketch, Patricia Duschuttle, Sarah Stewart, and Linda Rindell exchanged multiple emails discussing policy statements to be shared with MaineCare-enrolled family planning services providers, including PPNNE, and describing the importance of affirmatively notifying providers that Departmental policy had changed with respect to MaineCare coverage of "related services" after a patient decides to get an abortion. Ex. A-32. In the exchange, Ms. Lindell proposed including language in the statement that advised providers "If the abortion will not be covered by MaineCare, then any related services both prior to and following the abortion are also not covered. This includes blood tests, ultrasounds, or other tests." Ex. A-32. Also within this exchange, Ms. Ketch emailed to the group, "We just need to be sure that providers know that going forward they cannot bill us for these services." Thereafter, Ms. Stewart emailed that a statement to providers would be "good to go out via listserv tomorrow or Friday." Ex. A-32.

The Department finally sent the discussed listserv on December 19, 2014[4] – 3½ years after the MaineCare Policy Leadership team discussed its urgency, but more critically for PPNNE's purposes, 4½ years after the last date in the review period, during which the Department identified recoupable billing claims made by PPNNE.

Where Beth Ketch acknowledged that the policy interpretation newly articulated the meaning of the "related to" provision to her leadership team on April 11, 2011, it logically follows that Ms. Ketch and her leadership team believed these claims were MaineCare coverable at all times prior to April 11, 2011 – including every date in the PPNNE review period. A preponderance of the evidence reflects that, at all times between April 11, 2011 and December 19, 2014, Departmental administrators including, but not limited to Beth Ketch and Patricia Duschuttle, knew that Maine Family Planning, PPNNE, and other Maine women's reproductive healthcare providers continued to believe that pregnancy care services including but not limited to office visits, blood tests (RH screenings and associated prophylactic injections), ultrasounds, or other tests were covered services under MaineCare, even if the patient had or would subsequently decide to undergo an abortion. Ex. A-18; Ex. A-29; Ex. A-30; Ex. A-31; Ex. A-32; Test. of Nicole Clegg. Thus, it is logical to extrapolate from this that the Department had the same notion about PPNNE's understandings on all dates from July 1, 2007 to August 31, 2010 – especially where, the evidence supports a finding that the MaineCare policy leadership team had the same understanding as to the meaning of those provisions themselves during that period.

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[4] On December 19, 2014, the Department finally issued a listserv communication to MaineCare providers that quoted preexisting rule language but added a version of language proposed by Departmental contract staff communications expert Linda Riddell 3½ years earlier in the administrative email exchange: "If the abortion will not be covered by MaineCare, then any related services both prior to and following the abortion are also not covered. This includes, but is not limited to: office visits, blood tests (RH screenings and associated prophylactic injections), ultrasounds, or other tests." Ex. A-18; Ex. A-33.

The Department was silent about any changes to Section 90 policy interpretation that might have been internally adopted from July 1, 2007 to August 31, 2010. Assuming it did adopt policy interpretation changes during that period, it had a duty to articulate those changes to PPNNE and other women's reproductive healthcare provider community, where it knew that such providers relied upon informal guidance and listserv communication with respect to its billing practices. PPNNE relied upon that silence as a basis for continuing to bill MaineCare for transvaginal ultrasounds, office visits, and laboratory tests where the patient had discussed an intention or plan to undergo an abortion procedure with PPNNE clinical staff. Doing so has subjected PPNNE to the detriment of being cited with a Notice of Violation and recoupment claim for applicable billing claims paid by the Department during the review period.[5] And where the evidence supports findings that both Departmental policy leaders and the regulated women's reproductive health providers themselves believed this to be the correct practice at all times during the review period, it should be concluded that PPNNE's reliance on the Department's silence was reasonable. Accordingly, the Department should be equitably estopped from enforcing a recoupment claim against PPNNE for any paid billing claims involving transvaginal ultrasounds, office visits, RhoGAM injections administered for non-abortion circumstances, or laboratory tests for a patient who also discussed an intention to have an abortion, planned to have an abortion, or actually underwent an abortion procedure during the period from July 1, 2007 to August 31, 2010.

Finally, it must be acknowledged that the hearing officer issues these recommendations in clear view of the Recommended Decision (amended/redacted) issued In re: Family Planning Association of Maine, on August 11, 2015, which is included in the present record by agreement of the parties. Ex. A-9. Then-Commissioner Mary C. Mayhew adopted the hearing officer's recommended findings of fact and conclusions on September 3, 2015, and the Maine Superior Court affirmed Commissioner Mayhew's Final Decision on a Rule 80C appeal on June 21, 2017. Ex. A-9; *Family Planning Ass'n of Me. v. Commissioner, Me. Dep't of Health & Human Servs.*, No. AP-15-0062, 2017 WL 3448992 (Me. Super. Ct. June 21, 2017). In that decision, the Commissioner determined that the appellant was subject to recoupment in the amount of $184,620.83 for the period of January 1, 2006 to August 31, 2010. Ex. A-9.

In the 2015 Maine Family Planning appeal, the hearing officer focused his analysis on the plain language of Section 90.07 of the MaineCare Benefits Manual and accepted the Department's argument that the "related to" provision was unambiguous. Ex. A-9. In that appeal, the appellant focused its arguments on roughly the same equitable estoppel theory described as the alternative basis for rejecting the present recoupment claim above, only secondarily arguing that MaineCare policy during the critical period actually allowed MaineCare coverage for the "ancillary services" in question. Ex. A-9. The hearing officer, as noted, functionally presumed that the services in question were "related to" non-coverable abortions. Ex. A-9. Thereafter, the hearing officer recommended rejection of the appellant's equitable estoppel claim and the conclusion that its reliance upon Beth Ketch's silence as a basis for continuing to bill for the identified services was unreasonable. Ex. A-9. In its Responses and Exceptions memorandum, the appellant shifted the focus from the equitable estoppel argument to the

[5] PPNNE did not allege any specific detriment either at hearing or in closing, i.e. that it could not find replacement revenue sources to fund the cost of providing services in lieu of MaineCare coverage. However, the hearing officer is satisfied that PPNNE has incurred costs above and beyond replacement service funding for attorneys fees and legal costs of litigating this appeal – if nothing else – that satisfy the "detriment" element of the equitable estoppel.

baseline policy interpretation argument – i.e. that the "related to" provision did not, in fact, extend the coverage bar to services of the kind identified in the Department's recoupment claim. Ex. A-9. These arguments, as noted, did not prevail upon Commissioner Mayhew, and thereafter, the Superior Court held that the Commissioner's final decision was supported by the substantial evidence in the record. Ex. A-9; *Family Planning Ass'n of Me.*, 2017 WL 3448992, at *5, 6 (Me. Super. Ct. June 21, 2017).

Details about the MaineCare policy leadership team's own discussions and representations about what Section 90.07 meant during the 2007 to 2010 period – roughly the same period at issue in the Maine Family Planning appeal – are clearer now than they were when the hearing officer reviewed the evidence in 2015. Further, the hearing officer acknowledges a key observation that he failed to make in 2015 – chiefly, that the phrase "related to" is sufficiently ambiguous that it is wrong to categorically exclude coverage for the types of services that the Department has identified for recoupment.

The hearing officer's recommended "decision must be based on the agency's regulations and the evidence which is a matter of hearing record." 10-144 C.M.R. Ch. 1, § VII (B)(3)(a). "Where the agency's regulations are ambiguous or silent on a point critical to a determination, reference to other sources of law for guidance in interpreting the agency's regulations is appropriate." 10-144 C.M.R. Ch. 1, § VII (B)(3)(b). "Such other sources of law may include, but are not necessarily limited to, State and Federal statutes, Federal regulations and State and Federal case law." *Id.* "The term regulation means:

1. The whole or any part of a regulation, standard, code, rule, or other agency statement of general applicability to an agency's operation including the amendment, suspension, or repeal of any prior regulation, that is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency or describes the procedures or practices of the agency.
2. Regulation does not include: Policies or memoranda concerning only the internal management of the agency or the State Government and are not judicially enforceable; advisory rulings; decisions rendered in adjudicatory proceedings; or any form or instruction or explanatory statement of policy that in itself is not judicially enforceable but is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties, or privileges.

10-144 C.M.R. Ch. 1, § IV (R). *See* 5 M.R.S. § 8002 (9) (statutory definition of "rule," nearly identical to the Department's regulatory definition of "regulation").

Thus, the hearing officer accepts that his own decision, issued in a case substantially similar to the present appeal, recommended different findings and conclusions than are recommended in the present decision. However, the hearing officer is not bound to follow previous recommended decisions, as there is no precedential basis for doing so. The hearing officer considers his previous decision as persuasive authority only, and in so doing, he is not persuaded that his previous decision requires him to apply the same reasoning to the present appeal. In short, the present appeal stands on its own.

For these reasons, the Hearing Officer respectfully recommends that the Commissioner conclude that the Department was **not correct** when it determined that, for the period of July 1, 2007 through August 31, 2010, Planned Parenthood of Northern New England owes the department $25,454.84 (adjusted by post-hearing stipulation to $23,416.54) in recoupment due to improper billing for abortion related ancillary services for non-covered abortions, and for missing documentation.

MANUAL CITATIONS

- "Administrative Hearing Regulations," Dep't of Health & Human Servs., 10-144 C.M.R. Ch. 1, § VII (eff. Jan. 23, 2006)
- "General Admin. Policies & Proc.; MaineCare Benefits Man.," Dep't of Health & Human Servs., 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1 (eff. Feb. 2, 2006, *et seq.*)
- "Physician Services.; MaineCare Benefits Man.," Dep't of Health & Human Servs., 10-144 C.M.R. Ch. 101, sub-Ch. II, § 90 (eff. Apr. 1, 1998, *et seq.*)

RIGHT TO FILE RESPONSES AND EXCEPTIONS

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS. ANY WRITTEN RESPONSES AND EXCEPTIONS MUST BE RECEIVED BY THE DIVISION OF ADMINISTRATIVE HEARINGS WITHIN FIFTEEN (15) CALENDAR DAYS OF THE DATE OF MAILING OF THIS RECOMMENDED DECISION.

A REASONABLE EXTENSION OF TIME TO FILE EXCEPTIONS AND RESPONSES MAY BE GRANTED BY THE CHIEF ADMINISTRATIVE HEARING OFFICER FOR GOOD CAUSE SHOWN OR IF ALL PARTIES ARE IN AGREEMENT. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE DIVISION OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. COPIES OF WRITTEN RESPONSES AND EXCEPTIONS MUST BE PROVIDED TO ALL PARTIES. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

CONFIDENTIALITY

THE INFORMATION CONTAINED IN THIS DECISION IS CONFIDENTIAL. *See* **42 U.S.C. § 1396a (a)(7); 22 M.R.S. § 42 (2); 22 M.R.S. § 1828 (1)(A); 42 C.F.R. § 431.304; 10-144 C.M.R. Ch. 101 (I), § 1.03-5. ANY UNAUTHORIZED DISCLOSURE OR DISTRIBUTION IS PROHIBITED.**

Dated: September 16, 2021

/s/ Richard W. Thackeray, Jr.
Richard W. Thackeray, Jr.
Administrative Hearing Officer

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