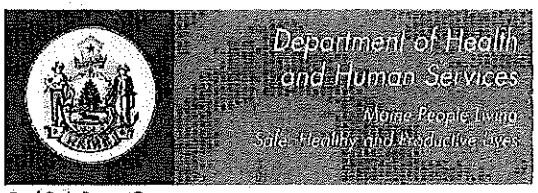

Paul R. LePage, Governor Ricker Hamilton, Acting Commissioner

Department of Health and Human Services
Commissioner's Office
221 State Street
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Augusta, Maine 04333-0011
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IN THE MATTER OF:

Schooner Retirement Community)
c/o William Stiles, Esq.)
Verrill Dana) **FINAL DECISION**
1 Portland Square)
Portland, ME 04112)

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

The Recommended Decision of Hearing Officer Benedict, mailed March 14, 2017, and the responses and exceptions filed by the parties have been reviewed.

I hereby accept the findings of fact but, for the reasons set forth below, I do NOT accept the Recommendation of the Hearing Officer that the Department was correct when, for fiscal years 2008, 2009 and 2010, it determined that Schooner Retirement Community, Inc. was overpaid $19,597.14 (2008), $18,460.36 (2009) and $13,532.64 (2010) due to it failing to obtain prior approval from the Department for asset additions in excess of the $35,000 threshold in Principle 20.5.

The undisputed facts of this case make it inequitable for the Department to disallow certain asset additions by Schooner during fiscal years 2008, 2009 and 2010:

- The Department had engaged in a prior practice of providing Principle 20.5 approval during the audit process and had granted Schooner's request for Principle 20.5 approval of assets acquired by Schooner during fiscal year 2007 during an audit that occurred in 2010;
- The Department substantially delayed the audit process for fiscal years 2008, 2009 and 2010 until, respectively, December 31, 2015, January 29, 2016 and March 31, 2016;
- Schooner requested Principle 20.5 approval during the audit process for fiscal years 2008, 2009 and 2010; and
- The disallowed assets were otherwise reasonable and appropriate.

Accordingly, I find that the Department was NOT CORRECT when, for fiscal years 2008, 2009 and 2010, it determined that Schooner Retirement Community, Inc. was overpaid $19,597.14 (2008), $18,460.36 (2009) and $13,532.64 (2010) and instead find that the Schooner's request for Principle 20.5 approval, submitted during the audit process for fiscal years 2008, 2009 and 2010, should be granted and, based on such Principle 20.5 approval, that revised audit reports for fiscal years 2008, 2009 and 2010 should be issued.

DATED: August 1, 2017 SIGNED: Ricker Hamilton

RICKER HAMILTON, ACTING 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: Henry Griffin, III, AAG, Office of the Attorney General
David Hellmuth, DHHS/Audit Supervisor

Department of Health and Human Services
Maine People Living Safe, Healthy and Productive Lives
Paul R. LePage, Governor Mary C. Mayhew, Commissioner

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Date Mailed: MAR 14 2017

Mary C. Mayhew, Commissioner
Department of Health and Human Services
11 State House Station
221 State Street
Augusta, ME 04333

In the Matter of: Schooner Retirement Community

ADMINISTRATIVE HEARING RECOMMENDED DECISION

An administrative hearing in the above-captioned matter was held on January 6, 2017, before Hearing Officer Miranda Benedict, Esq., at Lewiston, Maine. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner of the Maine Department of Health and Human Services.

The hearing was originally scheduled to be held on December 12, 2016. However, two of the Departmental witnesses did not appear due to storm conditions. William Stiles, Esq., on behalf of Schooner Retirement Community, objected to a reschedule because he and his witnesses were prepared to go forward. The hearing officer determined that the hearing should be rescheduled. The hearing was held on January 6, 2017. The hearing record was left open until January 20, 2017 to provide an opportunity for the parties to submit closing arguments. The arguments were submitted. In AAG Leighton's submission, he noted that the wrong version of 20.5, Principles of Reimbursement for Residential Care Facilities was cited at hearing. See DHHS-2. The hearing officer provided William Stiles, Esq. the opportunity to respond. Attorney Stiles responded on February 6, 2017. See Schooner-19.[1] The record was closed.

Pursuant to an Order of Reference dated September 14, 2016, the issues presented *de novo* for hearing,

> ***Was the Department correct when for fiscal years 2008, 2009, and 2010, it determined that Schooner Retirement Community, Inc., was overpaid $19,597.74 (2008); $18,460.36 (2009)and $13,532.64 (2010), due to exceeding the $35,000.00 threshold for asset additions, without first obtaining prior approval from the department, and due to the department's allocation of depreciation on non-allowable assets? See HO-2.***

[1] According to the Department, and not disputed by Schooner, Principle 20.5, Principles of Reimbursement for Residential Care Facilities-Room and Board Costs, included an additional word 'aggregate'. This was not the version of the Principle cited at hearing. The hearing officer agrees with Schooner that the additional word does not alter the meaning of the Principle for the purposes of the hearing. See DHHS-2 and Schooner-19.

APPEARING ON BEHALF OF THE APPELLANT:
William Stiles, Esq.
Tammy Brunetti, Principal at BerryDunn
Diane Day, Director of Finance and Human Relations, Schooner Retirement Community

APPEARING ON BEHALF OF THE DEPARTMENT:
Christopher Leigton, AAG
Stephen Baird, Auditor
David Hellmuth, Audit Supervisor

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer Exhibits:
HO-1 Notice of Hearing dated September 20, 2016
HO-2 Order of Reference dated September 14, 2016
HO-3 Fair Hearing Report Form dated August 22, 2016
HO-4 Request for Administrative Hearing dated August 22, 2016
HO-5 Letter from hearing officer to parties dated December 15, 2016
HO-6 Scheduling Letter dated December 14, 2016
HO-7 Letter from hearing officer to parties dated January 10, 2017
HO-8 Letter from hearing officer to parties dated January 23, 2017

Department Exhibits:
DHHS-1 Cost Report for Multi-Level PNMI Appendix C Case Mix, Schooner Retirement Community Inc. for calendar year 2008
DHHS-2 Closing Argument

Appellant Exhibits:

Schooner-1	Audit Report 2008
Schooner-2	Request for Informal Review 2008
Schooner-3	Final Informal Review Decision 2008
Schooner-4	Audit Report 2009
Schooner-5	Request for Informal review 2010
Schooner-6	Final Informal Review Decision 2009
Schooner-7	Audit Report 2010
Schooner-8	Request for Informal Review 2010
Schooner-9	Final Informal Review Decision 2010
Schooner-10	Applicable principles as effective in 2008, 2009, and 2010
Schooner-11	Copy of emergency legislation increasing threshold to $350,000.00
Schooner-12	Copy of new principles raising threshold to $350,000.00
Schooner-13	Listings of Assets Disallowed 2008, 2009, and 2010
Schooner-14	McMillin Memo
Schooner-15	Audit Report 2007
Schooner-16	22 MRS §41-B
Schooner-17	Copy of applicable provision of PRM
Schooner-18	Closing Argument

RECOMMENDED FINDING OF FACTS:

1. Schooner Retirement Community operates a continuing care facility on a campus in Auburn, Maine.
2. This campus includes the Seville Unit which is a 37 bed Residential Care Facility.
3. The Seville Unit receives reimbursement from the Maine Department of Health and Human Services for the services that it provides to MaineCare members pursuant to regulations adopted by the Department.
4. As a MaineCare provider, Schooner Retirement Community is required to file a cost report with the Department of Health and Human Services, Division of Audit at the end of each fiscal year.
5. Schooner Retirement Community timely filed a cost report with the Department for the fiscal year January 1, 2008 through December 31, 2008.
6. On December 31, 2015, the Department issued an Audit Report Transmittal for the fiscal year January 1, 2008 through December 31, 2008 indicating an overpayment of $19,597.74.
7. Schooner Retirement Community timely filed a request for an Informal Review.
8. On June 24, 2016, the Department issued the Final Informal Review Decision upholding the audit report finding that resulted in an overpayment of $19,597.74.
9. Schooner Retirement Community Inc. timely filed a cost report with the Department for the fiscal year January 1, 2009 through December 31, 2009.
10. On January 29, 2016 the Department issued an Audit Report Transmittal for the fiscal year January 1, 2009 through December 31, 2009 indicating an overpayment of $18,460.83.
11. Schooner Retirement Community timely requested a Final Informal Review.
12. On June 24, 2016, the Department issued a Final Informal Review Decision upholding the audit report finding that resulted in an overpayment of $18,460.36.
13. Schooner Retirement Community timely filed a cost report with the Department for the fiscal year January 1, 2010 through December 31, 2010.
14. On March 31, 2016, the Department issued an Audit Report Transmittal for the fiscal year January 1, 2010 through December 31, 2010 indicating an overpayment of $13,532.64.
15. Schooner Retirement Community timely requested a Final Informal Review.
16. On June 24, 2016 the Department issued a Final Informal Review Decision upholding the audit report finding that Schooner Retirement Community was overpaid $13,532.64.
17. During the 2007 audit, Schooner requested approval and Jack McMillin from Elder Services, DHHS granted approval for paving, building improvements, and the purchase of laundry equipment and a lawn mower.

STANDARD OF REVIEW

The hearing officer reviews the Department's claim for recoupment against an approved MaineCare services provider *de novo*. DHHS Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § VII (C)(1); Provider Appeals, MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.21-1 (A). The Department bears the burden to persuade the Hearing

Officer that, based on a preponderance of the evidence, it was correct in establishing a claim for repayment or recoupment against an approved provider of MaineCare services. 10-144 C.M.R. Ch. 1, § VII (B)(1), (2).

LEGAL FRAMEWORK:

The Department administers the MaineCare program, which is designed to provide "medical or remedial care and services for medically indigent persons," pursuant to federal Medicaid law. 22 M.R.S. § 3173. *See also* 42 U.S.C. §§ 1396a, *et seq.* To effectuate this, the Department is authorized to "enter into contracts with health care servicing entities for the provision, financing, management and oversight of the delivery of health care services in order to carry out these programs." *Id.* Enrolled providers are authorized to bill the Department for MaineCare-covered services pursuant to the terms of its Provider Agreement, Departmental regulations, and federal Medicaid law. "Provider Participation," MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03. *See also* 42 C.F.R. § 431.107 (b) (state Medicaid payments only allowable pursuant to a provider agreement reflecting certain documentation requirements); 42 U.S.C. § 1396a (a)(27). Enrolled providers 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.

RECOMMENDED DECISION:

The hearing officer recommends that the Commissioner find that the Department was correct when for fiscal years 2008, 2009, and 2010, it determined that Schooner Retirement Community, Inc., was overpaid $19,597.74 (2008); $18,460.36 (2009) and $13,532.64 (2010), due to exceeding the $35,000.00 threshold for asset additions, without first obtaining prior approval from the department, and due to the department's allocation of depreciation on non-allowable assets

REASONS FOR RECOMMENDATION:

According to the Department, all three overpayments levied against Schooner Retirement Community ("Schooner") are a result of the facility's failure to obtain prior written approval for asset acquisitions exceeding the $35,000.00 threshold referenced in Principle 20.5, Principles of Reimbursement for Residential Care Facilities-Room and Board Costs.

At the time of the cost reports were submitted, Principle 20.5 read as follows[2],

> ***For all proposed new construction, acquisitions or renovations involving capital expenditures in the aggregate of $35,000.00 or more in one fiscal year, providers must submit plans, financial proposals, and projected operating costs to the Department for approval in order for costs to be reimbursed. A provider shall not separate costs into components, such as land, land improvements, buildings, building improvements, or moveable equipment, to evade the cost limitations that require prior approval. See Principles of Reimbursement for Residential Care Facilities-Room and Board Costs.***

The Department argues that Schooner was well aware of this obligation because Schooner had requested prior approval for acquisitions during the 2007 audit process. See Schooner-14. The Department also argues that its interpretation of Principle 20.5 should be accorded deference and its interpretation is the logical and reasonable one.

According to Schooner, the disallowed assets all represented necessary and appropriate updates to the facility which has been in operation for 20 years. Schooner argues that there is no evidence that these acquisitions were inappropriate or unnecessary.

Schooner also argues that the Department's interpretation of the rule is not consistent with the plain language of the rule, nor it is consistent with the Department's historical interpretation of that regulation. In fact, according to Schooner, this 'new interpretation' is a violation of Maine Law. According to Schooner, the Department had routinely granted authorization under Principle 20.5 during the audit process.

Schooner argues that the failure of the Division of Audit to timely issue the Audits for the fiscal years 2008-2010 meant that Schooner was injured by the Department's stringent interpretation of the rule. According to Schooner, had the Division of Audit timely processed the audit, the disallowed expenditures may have been approved during the audit process as Schooner argues the Department historically did. And since Schooner reasonably relied on the historic process, Schooner argues that equitable estoppel applies and the hearing officer should rule in Schooner's favor.

The Department rejects Schooner's argument the Department unlawfully changed its interpretation of the rule. The Department also finally rejects Schooner's argument that the theory of equitable estoppel applies in this case.

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[2] Effective 2011, the threshold was substantially increased to $350,000.00.

Principle 20.5 is applicable to the disallowed acquisitions and therefore Schooner Retirement Community was obligated to request prior authorization for the acquisitions.

According to the Department, Principle 20.5 applies to the disallowed acquisitions,

> ***"The fact that such purchases were capped at $35,000.00 absent approval suggests that the Legislature was interested in capturing things smaller than new buildings or complete renovations." See DHHS-2.***

The Department also argues that even if Schooner acquisitions did not constitute new construction, 'acquisitions and renovations clearly encompass the disallowed assets in question including $49,401.94 in flooring, $5,978.76 in plumbing and $35,872.17 in cabinets.' See DHHS-2 and Schooner-13.

The Department argues that Schooner was well aware that the disallowed acquisitions required prior approval because Schooner asked for prior approval for similar acquisitions in 2007. According to evidence submitted by Schooner, during the 2007 fiscal year audit, Schooner requested approval during the audit process and Jack McMillin from Elder Services, DHHS granted approval of paving, building improvements, and the purchase of laundry equipment and a lawn mower. See Schooner-14.

Finally, citing *Becker v. Bureau of Parks & Lands*, 2005 ME 120, ¶ 2, 886 A.2d 1280, 1281, the Department argues that the Department's interpretation of Principle 20.5 is reasonable and should be accorded deference,

> ***"We give considerable deference to an agency's interpretation of its own internal rules, regulations, and procedures and will not set it aside, unless the rule or regulation plainly compels a contrary result." Fryeburg Health Care Ctr. v. Dep't of Human Servs., 1999 ME 122, ¶ 7, 734 A.2d 1141, 1143–44."***

Schooner argues that Principle 20.5 relates to projects that 'create a new building, acquire a building or otherwise substantially change the layout of an existing building', and the acquisitions in this case are not such large infrastructure changes. According to Schooner Principle 20.5 does not cover the routine and much needed repairs and updates to a 20 year old facility.

Schooner argues that the Department's own witness, Stephen Baird, Auditor, testified at hearing that the disallowed acquisitions, in and of themselves, were reasonable and appropriate.

According to Schooner, it was the Department's inaccurate interpretation of the Principle 20.5 that resulted in the disallowed acquisitions. According to Schooner,

> ***"The Department's witness acknowledges that the Department's audit adjustments were based solely on Principle 20.5. He suggested that the work 'approval' in Principle 20.5 should be interpreted as 'prior written approval' and that such Principle 20.5 Approval must be obtained before the assets are***

purchased. Because Schooner failed to obtain prior written approval before it purchased the Disallowed Assets, the Department's witness contended that the adjustments to depreciation must be held." See Schooner-18. (emphasis in the original).

Schooner argues that the Department's position that principle 20.5 requires prior written approval is not in accordance with legal interpretation of rules and regulations. Schooner argues that within the regulation are other principles that do explicitly required 'prior written approval'. See Principle 20.21(E)(4), Principles of Reimbursement for Residential Care Facilities-Room and Board Costs. According to Schooner, Principle 20.5 was deliberately written without such a requirement. Principle 20.21(E)(4) applies to energy efficient improvements by a facility. At the time of the audits in question, that Principle required that

If the total expenditures exceed $35,000.00 then the prior approval for such expenditure must be received in writing from the Department.

The hearing officer has determined Principle 20.5 is applicable to the disallowed acquisitions and therefore Schooner was obligated to request prior authorization for the acquisitions. The hearing officer agrees with the Department that Principle 20.5 does cover the items in question. The hearing officer agrees that the threshold of $35,000.00 existing at the time was chosen to capture the smaller renovations. If the legislature had envisioned only large purchases or new construction, the threshold would have been much higher.

In addition, Principle 20.5, while not explicitly requiring written prior approval, requires that the provider submit 'plans, financial proposals, and projected operating costs to the Department for approval in order for costs to be reimbursed.' The hearing officer has determined that Principle 20.5 requires the facility to submit plan, financial proposals and projected operating costs which, by definition, means that the facility must provide written plans prior to the Department granting such approval.

According to the Department,

The plain language of this Principle speaks to the necessity of obtaining approval prior to their purchase, delivery and incorporation of depreciable items into the facility in order to consider them reimbursable by the Department. As noted by Audit Supervisor Steve Baird at the hearing, the Principle speaks to 'plans, 'financial proposals' and projected operating costs, all of which by their own terms are preliminary to any future project or improvement to a facility. Indeed the sentence begins with the words (f)or all proposed..., language which is broad in its scope and clearly references actions prior to actual construction, acquisition or renovation." See DHHS-2.

Lastly, Schooner is correct that Principle 20.21(e)(4) does require 'written prior approval'. However, this principle does not require that the facility necessarily must request prior approval in writing. Rather, it requires that the Department issue its prior approval in writing.

The Department's interpretation of Principle 20.5 has not changed and is not in violation of Maine law.

Schooner argues that the Department has changed its interpretation of Principle 20.5 and such a change, without notice, is contrary to Maine law. According to Schooner's argument prior to 2011, the Department routinely granted authorization of acquisitions subject to Principle 20.5 during the audit process, as opposed to requiring a facility to request approval prior to submitting the cost report.

The hearing officer agrees with Schooner that there was evidence presented at hearing that MaineCare Program personnel did grant authorization for acquisitions during the audit process. There is no dispute that Jack McMillin, Elder Services, DHHS granted approval for acquisitions similar to the ones at issue here during Schooner's 2007 audit process. See Schooner-14. In addition, Ms. Brunetti, Principal at BerryDunn, testified that she had experienced such an approval process and had requested approval during the 2008-2010 audits. Upon questioning by the hearing officer, Ms. Brunetti testified that she had not received any response to those requests.

According to Schooner, this change in interpretation without proper notice is a violation of Maine law.

Pursuant to 22 MRS§ 41-B, Auditing and Adjusting of Health Care and Community Service Provider Costs, if the Division of Audit revises its interpretation of a rule that would negatively impact a provider's allowable costs, the Division of Audit must notify the facility. In addition, the Division of Audit may only apply its new interpretation to cost reports or audits that occur after the Division of Audit provides such notice. According to 22 MRS§ 41-B,

> ***This section governs the rules of the department and the practices of its auditors in interpreting and applying those rules with respect to payments for providers under the MaineCare program and payments by the department under grants and agreements audited pursuant to the Maine Uniform Accounting and Auditing Practices Act for Community Agencies.1. Revised audit interpretations to be applied prospectively. Whenever the department's auditors revise an interpretation of a rule, agreement, circular or guideline in a manner that would result in a negative adjustment of a provider's or agency's allowable costs, the revised interpretation may be applied only to provider or agency fiscal years beginning after the date of the examination report, audit report or other written notification in which the provider or agency receives direct notice of the revised interpretation. For the fiscal year to which the report containing the revised interpretation applies, and any subsequent fiscal year ending prior to the issuance of the revised interpretation, the cost that is the subject of the revised interpretation must be considered allowable to the extent that it was allowable under the interpretation previously applied by the Office of Audit for MaineCare and Social Services, referred to in this section as "the office of audit." This subsection does not prohibit the office of audit from applying an adjustment to a fiscal year solely because that cost was not disallowed in a prior year. M.R.S.A. tit. 22, § 41-B.***

The hearing officer finds that the Department's interpretation of Principle 20.5 has not changed. The hearing officer does agree that the evidence shows that Mr. McMillan routinely granted approval for acquisitions during the audit process until his retirement in 2011. In fact, Mr. McMillan did so for Schooner during its 2007 audit. See Schooner-14. However, Mr. McMillan was employed by Elder Services, DHHS. He was not employed as an auditor nor was he even employed by the Division of Audit. There is no evidence that the Division of Audit had, or currently has any control of the approval process of those items subject to Principle 20.5. The evidence demonstrates that it is MaineCare Program personnel who have the authority to grant or deny such approval. When Mr. McMillin granted approval of certain acquisitions during the 2007 audit, the Division of Audit performed its work in accordance with Mr. McMillin's directive. There was no such approval granted by the MaineCare Program personnel during the 2008-2010 audit, and therefore the Division of Audit performed its function with no such approval granted.

According to the Department,

> ***"The actions of Mr. McMillan are more properly characterized as a practice, one that was followed by Schooner and possibly others despite the risks involved. According to the testimony, this practice ended with the retirement of Mr. McMillan. What is also clear from the testimony is that the Department's auditors were not in agreement with this practice, and, indeed, have never varied from their reading that Principle 20.5 requires prior approval. Thus, Schooner's attempt to characterize this situation as one where the Division of Audit was revising its interpretation, and so violating 2 (sic) MRS §41-B is simply incorrect. See DHHS-2.***

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

Schooner also argues that the application of 20.5 to the audits in question is not in line with the Department's historical application. According to Schooner, the Department routinely granted approval for acquisitions covered under Principle 20.5 during the audit process.

Citing *State v. Brown*, 2014 ME 79, ¶ 14, 95 A.3d 82, 87–88, Schooner argues that equitable estoppel applies in this case,

> ***To prove equitable estoppel against a governmental entity, the party asserting it must demonstrate that (1) the governmental official or agency made misrepresentations, whether by misleading statements, conduct, or silence, that induced the party to act; (2) the party relied on the government's misrepresentations to his or her detriment; and (3) the party's reliance was reasonable. Pelletier, 2009 ME 11, ¶ 17, 964 A.2d 630; Kittery Retail Ventures, LLC v. Town of Kittery, 2004 ME 65, ¶ 34, 856 A.2d 1183; *88 Dep't of Human Servs. v. Bell, 1998 ME 123, ¶ 8, 711 A.2d 1292.***

According to Schooner the first element is met because the Department, in accordance with its historical conduct, granted approval in accordance with Principle 2.05 during the 2007 audit. This audit was conducted in 2010. Schooner relied upon the Department's historical conduct when asking for approval during the audit process for fiscal years 2008 through 2010 which occurred in 2015-2016. Had the Department timely processed the audit reports, presumably such audits would have taken place when Mr. McMillin was still employed by the Department, and, in accordance with its historical conduct, would have processed the request pursuant to Principle 20.5 during the audit process. Because the Department had 'changed its interpretation', Schooner's reliance on the Department's historical conduct was to its detriment since the Department, once Mr. McMillin retired in 2011, did not grant approval during the audit process.

The Department argues that equitable estoppel does not apply to this case. According to the Department,

> ***"In the present case we have a sophisticated business reading a Principle that states that prior approval is needed in order the Department to recognize the purchase of depreciable assets over a $35,000.00 limit. The argument presumably being advanced by Schooner is that somehow they were entitled to rely upon the practice of Mr. McMillin to approve such requests after the fact." See DHHS-2.***

According to the Department, Principle 20.5 is clear upon its face. The Department also argues that nothing prevented Schooner from requesting prior approval and there was "nothing reasonable in a belief that waiting was the best business strategy for securing approval of hundreds of thousands of dollars in acquisitions and renovations." See DHHS-2.

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 hearing officer has determined the equitable estoppel does not apply to this case. First and foremost, it was not reasonable of Schooner to rely on the past practices of MaineCare Program personnel to approve acquisitions during the audit process when the Principle in question requires prior approval. And as discussed earlier in the Recommended Decision, the hearing officer has determined that Principle 20.5 did require, by its very language, prior approval for acquisitions that exceeded $35,000.00. The delay in the processing of the cost reports was exceptional. The 2008 cost report was not processed until 2015. However, the delay in the processing does not necessarily injure Schooner. Schooner seems to suggest that if Mr. McMillin had been able to review the cost reports, he would have granted approval for the acquisitions in question. Despite the finding that the acquisitions were reasonable and necessary does not guarantee that he would have granted approval.

In addition, the application of equitable estoppel to a government agency has been held to only be carefully and sparingly applied especially where application would have an adverse impact on the public. As the Law Court pointed out in Dep't of Health & Human Services v. Pelletier, 2009 ME 11, ¶ 17, 964 A.2d 630, 636,

> ***"When reviewing an equitable estoppel defense, we consider '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.' Kittery Retail Ventures, 2004 ME 65, ¶ 34, 856 A.2d at 1194 (quotation marks omitted)." Dep't of Health & Human Services v. Pelletier, 2009 ME 11, ¶ 17, 964 A.2d 630, 636***

The Department was correct when it allocated the depreciation associated with the non-allowable assets to a cost center

Schooner disputed the Department's allocation of depreciation on the non-allowable assets to a non-reimbursable cost center.

According to their argument, exemplified by a February 8, 2016 letter from Tammy Brunetti, CPA, BerryDunn,

> ***"Nonallowable depreciation is not considered a cost center per the Provider Reimbursement Manual and should not draw costs away from the residential care unit through the allocation of overhead. For example, depreciation related to countertops added to the residential care unit and utilized to assist in providing services to and care for residents in that unit were disallowed because they exceed the $35,000.00 threshold. This depreciation should not draw overhead costs away from the residential care unit for the next 20 years (the state determined useful life). This asset is used to provide care to residents in the residential care unit and does not utilized any accounting, administrative or other general service costs. Drawing overhead away from the residential care unit for twenty years for an asset purchased in 2008 and used in the residential care unit is not consistent with the Principles of Reimbursement or the Medicare Provider Reimbursement Manual." See Schooner-2.***

The Department characterizes Schooner's position as one where the Division of Audit should ignore the overhead associated with depreciable assets, even if disallowed. According to the Department,

> ***"To begin, one of the key concepts promoted by Mr. Baird[3] was the reality that there is always overhead attached to depreciable assets. As explained by Mr. Baird at hearing, whether an item is deemed allowable or nonallowable, there is overhead connected to them. Overhead takes the form of the time and cost associated with planning for the asset, an employee has to order the asset; the asset has to be accounted for; and someone has to plan for eventual replacement. Thus, the audit has to recognize the existence of these assets." See DHHS-2.***

Schooner contends that the Department's action in accounting for the depreciation of the disallowed costs is contrary to the applicable rules. However, neither at hearing nor in the documents submitted, does Schooner identify the applicable principle that would forbid the action. The hearing officer agrees that the depreciation associated with the non-allowable assets must be accounted for. As pointed out by Schooner, the Department never alleged that the disallowed costs were not necessary or inappropriate, just that Schooner had failed to abide by Principle 20.5 and request prior authorization if the cost exceeded $35,000.00. For example, if new flooring had been purchased for the Seville unit, and all or a portion of the cost was disallowed, an employee needed to have determined that the replacement flooring was needed and where, an employee must order the flooring, and the installment. In addition, the facility must plan for the flooring's eventual replacement.

In conclusion, the hearing officer recommends that the Commissioner find that the Department was correct when for fiscal years 2008, 2009, and 2010, it determined that Schooner Retirement Community, Inc., was overpaid $19,597.74 (2008); $18,460.36 (2009) and

[3] The Department's witness, Auditor, Division of Audit

$13,532.64 (2010), due to exceeding the $35,000.00 threshold for asset additions, without first obtaining prior approval from the department, and due to the department's allocation of depreciation on non-allowable assets.

MANUAL CITATIONS

- DHHS Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § VII (2014)
- MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101 (2014).
- Principles of Reimbursement for Residential Care Facilities-Room and Board Costs (cit)

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: 3.13.17

Miranda Benedict, Esq.
Administrative Hearing Officer

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