



Department of Health
and Human Services

Maine People Living
Safe, Healthy and Productive Lives

Paul R. LePage, Governor

Mary C. Mayhew, Commissioner

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

IN THE MATTER OF:

SeniorsPlus)
c/o Michael Poulin, Esq.)
Skelton, Taintor & Abbott) **FINAL DECISION**
95 Main Street)
Auburn, ME 04210-5856)

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

The Recommended Decision of Hearing Officer Benedict, mailed February 16, 2016 has been reviewed and the responses and exceptions filed on behalf of SeniorsPlus have been reviewed.

I hereby adopt the findings of fact and I accept the Recommendation of the Hearing Officer that the Department was correct when it determined that for the fiscal year ending June 30, 2009, Agreement OES-9-351, SeniorsPlus failed to follow the cost sharing settlement method as illustrated in the agreement pro forma, thereby owing the Department \$1,108,787.00 in reimbursement. The Department was correct to require that SeniorsPlus return \$437,007.00 to the Department because SeniorsPlus had admitted that the \$437,007.00 is an overpayment for the 2009 contract.

DATED: 4/13/16 SIGNED: Mary C. Mayhew
MARY C. MAYHEW, 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: Jane Gregory, AAG, Office of the Attorney General
Anthony Madden, Deputy Director, Division of Audit



Department of Health
and Human Services

Maine People Living
Safe, Healthy and Productive Lives

Faul R. LaPage, Governor

Mary C. Mayhew, Commissioner

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

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

FEB 16 2016

Date Mailed

ADMINISTRATIVE HEARING RECOMMENDATION

An administrative hearing was held on November 16, 2015 in Lewiston, Maine in the case of the Seniors Plus, before Miranda Benedict, Esq., Hearing Officer. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner, Department of Health and Human Services (DHHS). The parties requested additional time to submit closing arguments. The arguments were received by January 5, 2016 and the record was closed.

The hearing was originally scheduled to be held on January 8, 2015. However, the parties requested a continuance because the parties were in negotiations. The rescheduling request was granted. The hearing was rescheduled to be held on February 23, 2015. The parties requested that the February 23, 2015 be used as an opportunity to hold a pre-hearing conference. The request was granted and a pre-hearing conference was held on that date. The hearing was then set to be held on June 23 and 24, 2015. The parties jointly requested a reschedule. The parties then provided dates when legal counsel and witnesses would be available for dates in October and November 2015.

ISSUE PURSUANT TO ORDER OF REFERENCE:

Pursuant to an Order of Reference dated May October 22, 2014, this matter was referred to the Office of Administrative Hearings for a Hearing Officer to conduct an administrative hearing and to submit to the Commissioner written findings of fact and recommendations on the following issue:

Was the Department correct when it determined that for the fiscal years ended 6/30/10 and 6/30/11, Seniors Plus failed to follow the cost sharing settlement method as illustrated in the agreement pro forma, thereby owing the department(sic) \$1,108,787 in reimbursement; also, what is the impact, if any as a result of the department's alleged failure to issue a written decision on Seniors Plus' appeal of the 6/28/13 Examination report within 60 days following the receipt of the appeal letter? See HO-2.

The parties agreed that the second issue in regards to the Department's failure to issue a written decision in a timely fashion was no longer an issue on appeal.

At the pre-hearing conference, Seniors Plus raised an additional issue that it argued should be part of the Order of Reference. According to Seniors Plus, payments totaling \$473,004.00 made by the

Department to Seniors Plus in 2009 were actually payments for services provided under the 2008 Contract, and should be removed from the settlement of the 2009 Contract.

In determining whether to include this issue, the hearing officer reviewed the governing rule. According to the governing regulation, the Order of Reference is limited to the issue decided in the Informal Review,

If the community agency wishes to proceed further in its appeal, it may appeal to the DHHS Office of Administrative Hearings by submitting a notice of appeal in writing within sixty (60) days of receiving the decision from the Director of the Division of Audit. The issue(s) on appeal will be limited to what was raised at the Step a appeal. The hearing will be an Order of Reference appeal hearing. The hearing officer will issue a recommended decision to the Commissioner, who will issue a final decision. See .04(C)(1), Maine Uniform Accounting and Auditing Practices for Community Agencies (MAAP).

The Informal Review, in question, dated August 8, 2014 states the issue thusly,

"You state that you don't agree with the Department's settlement in which the use of the cost based settlement to offset/share allowable cost of het HBC program from income generated from other programs (mainly MaineCare). Additionally, you feel that there is a payment calculation error in the amount that the Department reports that Senior Plus received for the OES-09-351 HBC program in the amount of \$473,003." See HO-4.

The Informal Review identifies a dispute with the cost settlement methodology and, the alleged payment calculation error in the amount of \$473,003.00.

The Department argued that the 2008 Contract cannot be litigated now, as Seniors Plus accepted the audit of the 2008 Contract on November 18, 2011, and that the sixty day appeal period, pursuant to MAAP, has long since passed. According to the Department,

"Allowing evidence on the 2008 Contract is an end run around those appeal regulations; it would allow any provider appeal rights for any contract year, even when the provider did not follow the appeal procedures. It would render the appeal regulation meaningless." See HO-13.

The hearing officer agrees with the Department. The hearing officer is bound by the regulations, including MAAP. According to MAAP, Seniors Plus had the opportunity to initiate the first level of appeal 60 days after it had received the Department's Examination Report of the 2008 Contract. See .04(C)(1). The hearing officer has determined that the appeal period for the 2008 contract has long since passed. According to the Department, and not disputed by Seniors Plus, the audit for that contract was accepted by Seniors Plus on November 18, 2011. See HO-13, Attachment 7. Seniors Plus did not appeal that audit.

The hearing officer asked the parties to submit briefs to address, among other things, an Order of Reference that would accurately address the issues at hearing. See HO-7. The hearing officer has determined that the Department's suggested Order of Reference complies with the regulation and identifies the issue correctly. The Department suggested an Order of Reference which does provide

the ability of Seniors Plus to litigate the issue of the overpayment of \$437,008.00 without litigating the 2008 contract.

Seniors Plus objected to both the initial Order of Reference as well as the current proposed Order of Reference. According to Seniors Plus, it had clearly delineated the issues on appeal in its appeal letter. According to Seniors Plus, the issues on appeal should have been,

1. ***“That \$670,645 of the claimed overpayment was in error because DHHS improperly applied cost-based reimbursement methodology to the contract which was not intended to be cost-settled, and further applied Maine Care revenues and expense from other programs in conducting a settlement of this contract that did not include any MaineCare revenue.***
2. ***That \$437,008 of the claimed overpayment was in error because the DHHS audit included that amount as revenue received for services provided under this contract when that amount represented reimbursement for services provided during the previous fiscal year (ending June 30, 2008) under a different contract.” See Senior Plus-2.***

The hearing officer will be recommending to the Commissioner in this Recommended Decision that she adopt the following Order of Reference,

Was the Department correct when it determined that for the fiscal year ending June 30, 2009, Agreement OES-9-351, Seniors Plus failed to follow the cost sharing settlement method as illustrated in the agreement pro forma, thereby owing the Department \$1,108,787.00 in reimbursement? Is the Department correct to require that Seniors Plus return \$437,007.00 to the Department because Seniors Plus has admitted that the \$437,007.00 is an overpayment for the 2009 Contract?

APPEARING ON BEHALF OF SENIORSPLUS:

Michael Poulin, Esq.
Dianna Scully

APPEARING ON BEHALF OF AGENCY:

Jane Gregory, AAG
Tony Madden, Deputy Director, Division of Audit, DHHS
Doreen McDaniel, Assistant Director of OADS
Ingrid Diamond, Community Resource Manager, Office of Elder Services

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer:

HO-1 Notice of Hearing dated October 30, 2014
HO-2 Order of Reference dated October 22, 2014
HO-3 Fair Hearing Report Form dated October 10, 2014
HO-4 Informal Review dated August 8, 2014

- HO-5 Seniors Plus request to appeal Informal Review dated October 2, 2014
- HO-6 Corrected Hearing Notice dated December 1, 2014
- HO-7 Letter from hearing officer to parties dated February 23, 2015
- HO-8 Letter from hearing officer to parties dated April 9, 2015
- HO-9 Letter from hearing officer to parties dated May 5, 2015
- HO-10 Scheduling Notice dated September 15, 2015
- HO-11 Emails regarding witnesses dated March 27 and March 31, 2015
- HO-12 Proposed witness list and evidence from DHHS
- HO-13 Legal Brief submitted by DHHS dated March 25, 2015 with attachments
- HO-14 Legal Brief submitted by Seniors Plus dated March 25, 2015
- HO-15 Pre-hearing Brief submitted by DHHS dated March 25, 2015
- HO-16 Pre-hearing Brief submitted by Seniors Plus dated March 25, 2015
- HO-17 Letter from hearing officer to Attorney Poulin dated November 18, 2015
- HO-18 Letter from AAG Gregory, dated June 9, 2015 with joint request to rescheduling hearing scheduled to be held on June 23 and June 24, 2015
- HO-19 Letter from hearing officer to parties dated November 18, 2015
- HO-20 Letter from hearing officer to parties dated November 30, 2015
- HO-21 Emails in regards to transcription and scheduling of written closing arguments.

Department of Health and Human Services exhibits

- DHHS-1 Maine Uniform Accounting and Auditing Practices for Community Agencies (MAAP) effective December 16, 2006
- DHHS-2 OMB Circular A-110
- DHHS-3 OMB Circular A-122
- DHHS-4 DHHS/Seniors Plus Agreement OES-09-251
 - a. OES-9-351 for period July 1, 2008 through June 30, 2009
 - b. December 19, 2008 DHHS letter to Seniors Plus: Notice of Disencumbrance
 - c. #OES-09-351A, Amendment, increasing the dollar amount of Agreement
 - d. #OES-09-351B, Amendment, extending termination dated to January 31, 2010
 - e. #OES-09-351C, Amendment, extending termination dated May 31, 2010, also increasing dollar amount of Agreement
 - f. #OES-09-351D, Amendment, extending termination dated to June 30, 2010, also increasing dollar amount of Agreement
- DHHS-5 Seniors Plus Financial Report, June 30, 2010 including Schedule of Agreement Operations, and Agreement Settlement For Agreement OES-09-351D
- DHHS-6 DHHS EXAMINATION REPORT TRANSMITTAL, dated June 28, 2013, for the Fiscal Year ending June 30, 2010 and 2011, with attachments
- DHHS-7 August 12, 2013 Seniors Plus letter, appealing the June 28, 2013 Audit Transmittal
- DHHS-8 August 8, 2014 DEPARTMENT APPEAL DECISION
- DHHS-9 October 2, 2014 Seniors Plus (Attorney M. Poulin) letter appealing the August 8, 2014 Decision
- DHHS-10 June 24, 2008, 3:03 PM, email from Doreen McDaniel to Ingrid LaPointe, forwarding Debra Parry email to Ingrid LaPointe and Doreen McDaniel, of June 28, 2008, 12:21 pm, with three pages of attachment
- DHHS-11 October 20, 2008 Invoice, Seniors Plus, for Agreement OES-09-351, in the amount of \$738,574.—signed by Seniors Plus, Debra Parry

- DHHS-12 February 24, 2009, Invoice, Seniors Plus, for Agreement OES-09-351, in the amounts of \$691,942 and \$141,467.37 (Total of \$833,409.37) signed by Seniors Plus Debra Parry
- DHHS-13 Department Work paper regarding the Department's record of payments for Agreement OES-09-351
- DHHS-14 Closing Argument dated January 5, 2016

Seniors Plus Exhibits

- Seniors Plus-1 Offer of Proof
- Seniors Plus-2 Closing Argument

RECOMMENDED FINDINGS OF FACT:

1. Seniors Plus is a private non-profit corporation registered to do business in the state of Maine.
2. Seniors Plus is also known as Elder Independence of Maine.
3. On July 1, 2008, Seniors Plus entered into a contract with the State of Maine, Department of Health and Human Services.
4. Seniors Plus agreed to provide home care coordination, in-home service provider billing, compliance audits, and to recoup overpayments from providers.
5. The Contract Number was OES-09-351, with effective dates of July 1, 2008 to June 30, 2009. The total agreement amount was \$8,862,884.00.
6. On or about December 19, 2008, the State of Maine, Division of Purchased Services, issued a Notice of Disencumbrance to Seniors Plus for the 2009 Contract, reducing the total Agreement amount by \$186,528.00.
7. On March 4, 2009, The Department and Seniors Plus amended the 2009 Contract to increase the total Agreement amount to \$8,928,679.37.
8. The Contract Number was changed to OES-09-351A.
9. No other changes were made to the 2009 Contract at that time.
10. On June 11, 2009, The Department and Seniors Plus amended the 2009 Contract to increase the total Agreement amount to \$13,297,945.37 and change the termination dated to January 1, 2010.
11. The Contract Number was changed to OES-09-351B.
12. No other changes were made to the Contract at that time.
13. On February 1, 2010, the Department and Seniors Plus amended the 2009 Contract to increase the total Agreement amount to \$16,766,325.37 and amended the termination date to March 31, 2010.
14. The contract Number was changed to OE-9-351C
15. No other changes were made to the Contract at that time.
16. The 2009 Contract was further amended to increase the total Agreement amount to \$17,336,325.00 and to change the termination dated to June 30, 2010.
17. The Contract Number was changed to OES-09-351D.
18. No other changes were made to the 2009 Contract.
19. The term of the 2009 Contract was from July 1, 2008 through June 30, 2010 in the amount of \$17,336,325.00.
20. The terms of the 2009 Contract provided that the 'funds provided under this Agreement to community agencies for social services are subject to the audit requirements contained in the Maine Uniform Accounting and Auditing Practices for Community Agencies (MAAP)'.

21. MAAP rules require certain procedures to be taken by both the agency and the Department at the termination of the contract.
22. Pursuant to those rules, Seniors Plus submitted contract closeout documentation to the Department.
23. Pursuant to those rules, the Department conducted an audit of the 2009 Contract and issued an Examination Report Transmittal on June 28, 2013.
24. As a result of that audit, the Department determined that Seniors Plus had been overpaid \$1,108,787.00.

RECOMMENDED DECISION:

The hearing officer recommends that the Commissioner find that the Department was correct when it determined that for the fiscal year ending June 30, 2009, Agreement OES-9-351, Seniors Plus failed to follow the cost sharing settlement method as illustrated in the agreement pro forma, thereby owing the Department \$1,108,787.00 in reimbursement.

The hearing officer recommends that the Commissioner find that the Department was correct to require that Seniors Plus return \$437,007.00 to the Department because Seniors Plus has admitted that the \$437,007.00 is an overpayment for the 2009 Contract.

REASONS FOR RECOMMENDATION:

Cost Sharing Methodology

The contract between DHHS and Seniors Plus is subject to the audit requirements contained in the Maine Uniform Accounting and Auditing Practices for Community Agencies (MAAP) and Federal OMB Circular 1-110. See DHHS-4a. Pursuant to the 2009 Contract and MAAP, following the end of the 2009 Contract term, Seniors Plus submitted contract closeout documentation to the Department. See DHHS-4. The Department conducted an audit of the 2009 Contract and issued its Examination Report Transmittal on June 28, 2013. According to the Report, and subsequent findings, the Department alleged that Seniors Plus has been overpaid \$1,108,787.00. See DHHS-6. According to the Report,

"The Report indicates one finding: non-compliance with MAAP regarding settlement methodology indicated on the Pro Forma." See DHHS-6.

The report goes on to explain,

"The Agreement Settlement Form (ASF) for agreement OES-09-351 was not prepared consistent to the settlement methodology indicated on the Pro-Forma ASF specified on Rider F-1 in the agreement. MAAP Section 2.D.2 states: The form and method of agreement settlement referenced in the agreement Contract Compliance Rider will be used to determine the final settlement. We have prepared the settlement consistent to the settlement methodology for OES-09-351 on Exhibit A-1. The effect of the adjustments is to increase the amount due to the Department by \$1,108,186. In the future, we recommend that the agency follow the settlement methodology illustrated in the agreement." See DHHS-6.

Seniors Plus responded that it disagreed with the Department's findings. Specifically, it argued that the contract in question is made up of three separate programs and each of those programs has an individual settlement payment method. Seniors Plus listed three separate methods, cost based, unit cost/fee for services settlement, and provider payments. Seniors Plus objected to the Department's use of the cost based settlement being applied to the entire Seniors Plus budget, specifically to the HCCA Fee Unit Service (Home Care Coordinating Agency). Seniors Plus also alleged that payments totaling \$437,003.00 from the Department to Seniors Plus should have been eliminated from the 2009 cost settlement. According to Seniors Plus, the payment was for services provided by Seniors Plus under an earlier contract period. See DHHS-7.

Offer of Proof submitted by Seniors Plus

There was a significant amount of evidence and testimony that Seniors Plus had determined was necessary to their case that the hearing officer had determined was not relevant. The hearing officer excluded evidence as to the nature of services provided by Seniors Plus under the Fiscal Year 2009 contract, specifically evidence as to the intention of the individuals who negotiated and drafted the contract as to how the services were to be reimbursed. See Seniors Plus-1.

The hearing officer disallowed the evidence because the 2009 Contract speaks for itself, and does not require any parol evidence for interpretation. According to the contract itself,

"This document contains the entire Agreement of the parties and neither party shall be bound by any statement or representation not contained therein." See DHHS-4, Rider B p. 6

It is settled law that the fact finder not look beyond the four corners of a contract so long as the contract is clear and unambiguous. The hearing officer does not find any ambiguity in the 2009 Contract. It is a contract that had been in effect for two years. There was no evidence of misunderstanding on the part of the parties until now.

In addition, this appeal is in regards to the decision by the Division of Audit. None of the individuals who were involved in the audit of this contract were party to the negotiations and the hearing officer fails to see how any evidence of the negotiations would be germane to their audit functions. The hearing officer did provide the opportunity for Seniors Plus to provide a written offer of Proof as to this issue. This offer of proof is part of the hearing record. See Seniors Plus-1.

The offer of proof suggested that the parties who negotiated the contract had never contemplated that the Home Based Care component of the contract (EIM HCCA Fee program) was to be subjected to a cost settlement methodology,

"under which the total operating expenses of SP would be allocated among various programs and that SP would be reimbursed based on some adjusted allocation of its total operating expenses." See SeniorPlus-1.

The hearing officer also disallowed documentary evidence that Seniors Plus claimed would have supported the offer of proof, specifically emails regarding the 2008 contract.

The hearing officer has determined that the Department is correct that Seniors Plus failed to use the cost sharing methodology required by the MAAP rules and the 2009 Contract when it calculated its closeout.

The issue rests in whether or not the Elder Independence of Maine HCCA Fee Program was rightfully settled using the cost settlement methodology or if it should have been settled using a service unit cost settlement.

According to the 2009 Contract, EIM Direct Services Program was to be settled by the cost sharing methodology and that the EIM HCCA Fee program was to be settled using fee for service unit cost settlement. See DHHS-4, Rider F-2. However the 2009 Contract Pro Forma ASF for the EIM direct services dictates that all of the service revenue and expenses would be included in the cost sharing. The 2009 Contract Pro Forma ASF included the HCCA fee unit services. See DHHS-4, Rider F-1.

According to the MAAP rules effective at the time, Department agreements with community agencies,

Should follow the cost sharing and matching methodology described in the agreement and as reflected in the pro forma Agreement Settlement Form included in the agreement document. See .04(B)(3)(a).

In addition,

All categories of revenue contained in the agreement budget shall be considered available for cost sharing unless their exclusion is specifically noted in the pro forma ASF. See.04(B)(3)(b).

Here, the HCCA fee unit services were not specifically excluded in the pertinent pro forma ASF. As the Department noted, these services were expressly included in the cost sharing methodology per the ASF.

Seniors Plus also disagrees with the Department's use of the words 'cost settling' or 'cost based'. According to Seniors Plus, these terms are distinguished from the term 'cost sharing' as used in the 2009 Contract.

According to Seniors Plus, cost sharing

"refers to sharing costs between or among multiple revenue sources whether there is more than once source of revenue in a program." See Seniors Plus-2.

According to Seniors Plus, cost sharing cannot be applied to HCCA Fee for Service, since that program is 100% stated funded, therefore there are no costs to be shared. Seniors Plus asserts that the lack of agreement as to what the terms 'cost settling', 'cost based', and 'cost sharing, points to an ambiguity in the contract for which parol evidence should have been allowed to explain the intent of the parties.

DHHS, on the other hand, asserts that the three terms are the same. According to the Department,

"If a MAAP program is 'cost settled' or settled via 'cost sharing', then the actual revenues and expenditures attributable to each program are reported to the Department whereby they are subject to a series of adjustments to determine if there is any money due to the Department or to the provider." See DHHS-14.

According to the testimony of Tony Madden, Deputy Director, Division of Audit, DHHS, these terms mean the same thing and are used interchangeably. Mr. Madden would not agree with the definition of cost sharing as proposed by Seniors Plus.

The hearing officer does note that neither party provided any rules nor regulations that define cost settled or cost sharing.

The hearing officer has determined that the Department is correct that Seniors Plus failed to use the cost sharing methodology required by the MAAP rules and the 2009 Contract when it calculated its closeout. The plain reading of the contract supports the Department's contention that all of Seniors Plus' budget was to be 'cost settled'. Seniors Plus did not provide a foundation for its interpretation of cost sharing. In addition, this argument is inconsistent with its other argument that the EIM HICCA Fee program should not have been 'cost settled', but rather settled using a service unit cost settlement.

Payments Totaling \$437,008 by the Department to Seniors Plus in 2009

Offer of Proof by Seniors Plus

Here too Seniors Plus sought to introduce evidence that the hearing officer disallowed. Seniors Plus argues that payments totaling \$437,008.00 DHHS made to Seniors Plus in 2009 was actually payment due for prior contract. Therefore, Seniors Plus sought to introduce evidence in regards to the 2008 contract. As discussed above, the hearing officer determined that allowing this evidence would essentially permit Seniors Plus to provide evidence of a contract and settlement that Seniors Plus had already agreed to.

The offer of proof suggested that the disallowed evidence would have shown that there were oral agreements between the Department and Seniors Plus regarding the extension of services when funds had been exhausted. Specifically Seniors Plus sought to show that the Office of Elder Services had agreed that a payment from the Department to Seniors Plus of \$437,008.00 provided in 2009 was to be applied to the 2008 contract.

Seniors Plus concedes that it did agree to the settlement of the 2008 Contract. However, Seniors Plus argues that, at the time the 2008 Contract was settled in 2011, there was no underpayment or overpayment to dispute,

"As Seniors Plus has repeatedly noted, since Seniors Plus by 2011 had received all the payments that were due to it under the 2008 contract, there was nothing to appeal from the 2008 settlement as there was no overpayment or underpayment for that contract. This is because the underpayment had been paid in full during fiscal 2009, long before the 2008 contract settlement was completed." See Seniors Plus -2.

According to Seniors Plus, it was common practice for DHHS to allow Seniors Plus to continue providing services to clients under the HBC program when contract funds were exhausted near the end of the a contract year, and that DHHS would agree to pay for those services from appropriations in the next fiscal year. According to Seniors Plus, this is what happened with the 2008 Contract. Again, Seniors Plus had sought to have evidence presented regarding the 2008 contract which would have evidenced this practice.

The Department argues that when Seniors Plus raised the issue of the \$437,008.00, it essentially admitted that it had received an overpayment for 2009, and it should be returned.

The hearing officer has determined that the Department provided sufficient evidence to show that the payments totaling \$437,008.00 were made in 2009 as part of the 2009 contract. The Department submitted invoices for the separate payments of \$141,467.73 and \$295,540.51. See DHHS-12 and DHHS-11. In addition, Ingrid Diamond, who was the Department Agreement Administrator for the 2009 Contract testified that she signed both invoices, and approved them for payment for services rendered for the 2009 Contract.

Finally, Seniors Plus' independent auditor, Macdonald Page, in compliance with MAAP conducted an audit of the 2009 Contract. Mr. Page certified that the revenues Seniors Plus included in its 2009 Contract closeout document as 2009 Contract revenue, was accurate and in accordance with MAAP. See DHHS-5. Both the Department and Seniors Plus identified that total revenue for the 2009 contract as \$87,261,617.00 which included the payments of \$141,467.73 and \$295,540.51.

It was Seniors Plus, itself, that identified the payments of \$141,467.73 and \$295,540.51 as surplus for the 2009 contract.

“See (see exhibit B) in the State calculation of total payments they include two payments \$295,540.51 (See exhibit C) and \$141,467.37 (See exhibit D) in the settlement for 7/01/08 -6/30/2010. These two payment (sic) are for 7/01/07-6/30/2008 settlement and should be removed from this settlement.” See DHHS-7.

The hearing officer agrees with the Department that to allow Seniors Plus to retain the 'self-identified' overpayment in a contract year-without any requirement of a settlement for the MAAP contract would be contrary to MAAP.

Estoppel

According to the Administrative Hearing Regulations

If a claimant raises constitutional or estoppel issues, these issues shall be addressed in accordance with these rules, provided that the hearing officer shall consult with the Chief Administrative Hearing Officer prior to rendering a final or recommended decision. See §VII(B)(6).

Seniors Plus explicitly raised the issue of estoppel. According to Seniors Plus,

“Seniors Plus contends that DHHS is estopped by its representations and promises to Seniors Plus upon which Seniors Plus relied to its detriment by continuing to provide

services based on assurances by DHHS that Seniors Plus would be paid.” See Senior Plus-2.

The hearing officer presumes that Seniors Plus is raising this issue based upon its offer of proof that there were oral agreements between the Department and Seniors Plus regarding the extension of services when funds had been exhausted. Specifically Seniors Plus sought to show that the Office of Elder Services had agreed that a payment from the Department to Seniors Plus of \$437,008.00 provided in 2009 was to be applied to the 2008 contract.

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. See *State v. Austin*, 2016 ME 14, ¶ 9.

"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).

Seniors Plus has failed to meet the final element—that its reliance was reasonable. The hearing officer finds that it was not reasonable for Seniors Plus to rely on alleged oral representations by someone in the Department that contradicted or was not in accordance with the MAAP rules or the Contract.

In conclusion, the hearing officer recommends that the Commissioner find that the Department was correct when it determined that for the fiscal year ending June 30, 2009, Agreement OES-9-351, Seniors Plus failed to follow the cost sharing settlement method as illustrated in the agreement pro forma, thereby owing the Department \$1,108,787.00 in reimbursement.

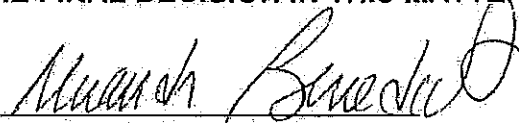
The hearing officer also recommends that the Commissioner find that the Department was correct to require that Seniors Plus return \$437,007.00 to the Department because Seniors Plus has admitted that the \$437,007.00 is an overpayment for the 2009 Contract.

Manual Citation

Maine Uniform Accounting and Auditing Practices for Community Agencies (MAAP) effective December 16, 2006

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS. ANY WRITTEN RESPONSES AND EXCEPTIONS MUST BE RECEIVED BY THE OFFICE OF ADMINISTRATIVE HEARINGS WITHIN TWENTY (20) 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 OFFICE 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.

DATED 2-12-10

SIGNED: 
Miranda Benedict, Esq.
Hearing Officer

cc: Jane Gregory, Esq.
Michael Poulin, Esq.