

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:

Fryeburg Family Dental)
c/o Bernadette Kozak) **FINAL DECISION**
PO Box 523)
Fryeburg, ME 04037)

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

The Recommended Decision of Hearing Officer Benedict mailed September 2, 2022 has been reviewed.

I hereby adopt the findings of fact and I accept the Recommendation of the Hearing Officer that the Department was correct when for the review period of July 1, 2016 through January 31, 2019, it determined that Bernadette Kozak, IPDH/PHS d/b/a Fryeburg Family Dental owes the Department \$11,687.00 in recoupment due to: 1] non-compliance with the MaineCare Benefits Manual; 2] breach of the MaineCare Provider/Supplier Agreement; and/or 3] failure to repay overpayments or payments made in error as found in a Final Informal Decision dated February 23, 2022 and Notice of Violation dated February 18, 2021.

DATED: 9-26-22 SIGNED: 
JEANNE M. LAMBREW, Ph.D., COMMISSIONER
DEPARTMENT OF HEALTH & HUMAN SERVICES

YOU HAVE THE RIGHT TO JUDICIAL REVIEW UNDER THE MAINE RULES OF CIVIL PROCEDURE, RULE 80C. TO TAKE ADVANTAGE OF THIS RIGHT, A PETITION FOR REVIEW MUST BE FILED WITH THE APPROPRIATE SUPERIOR COURT WITHIN 30 DAYS OF THE RECEIPT OF THIS DECISION.

WITH SOME EXCEPTIONS, THE PARTY FILING AN APPEAL (80B OR 80C) OF A DECISION SHALL BE REQUIRED TO PAY THE COSTS TO THE DIVISION OF ADMINISTRATIVE HEARINGS FOR PROVIDING THE COURT WITH A CERTIFIED HEARING RECORD. THIS INCLUDES COSTS RELATED TO THE PROVISION OF A TRANSCRIPT OF THE HEARING RECORDING.

cc: William Logan, Esq., OMS

Janet T. Mills
Governor

Jeanne M. Lambrew, Ph.D.
Commissioner



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

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

Date Mailed: September 2, 2022

In the Matter of: Fryeburg Family Dental

Provider ID No. 1538541727

RECOMMENDED DECISION

Hearing Officer Miranda Benedict, Esq. conducted an administrative hearing in the above-captioned matter held on August 12, 2022. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner of the Maine Department of Health and Human Services. Prior to the hearing, a case management conference was held on June 27, 2022 and a status conference was held on August 2, 2022.

Pursuant to an Order of Reference dated April 21, 2022, the issue presented *de novo* for hearing is,

Was the Department correct when for the review period of July 1, 2016 through January 31, 2019, it determined that Bernadette Kozak, IPDH/PHS d/b/a Fryeburg Family Dental owes the Department \$11,687.00 in recoupment due to: 1] non-compliance with the MaineCare Benefits Manual; 2] breach of the MaineCare Provider/Supplier Agreement; and/or 3] failure to repay overpayments or payments made in error as found in a Final Informal Decision dated February 23, 2022 and Notice of Violation dated February 18, 2021? See, HO-3.

APPEARING ON BEHALF OF THE APPELLANT

Bernadette Kozak, IPDH (Independent Practice Dental Hygienist), PHS (Public Health Dental Hygienist)

APPEARING ON BEHALF OF THE DEPARTMENT

William Logan, Esq., MaineCare Services
Shelly Hayward, Program Integrity Analyst II, MaineCare Services

ITEMS INTRODUCED INTO EVIDENCE

Hearing Officer Exhibits

- HO-1 Notices of Hearing, Scheduling Notices for Case Management and Status Conference
- HO-2 Fair Hearing Report Form dated April 8, 2022
- HO-3 Order of Reference dated April 21, 2022
- HO-4 Letters from Hearing Officer to Parties

Department Exhibits

- DHHS #1 MaineCare Provider Agreement, March 17, 2010
- DHHS #2 MaineCare Benefits Manual, CH I, Section 1, effective 3/23/2016
- DHHS #3 MaineCare Benefits Manual, CH I, Section 1, effective 7/5/2017
- DHHS #4 MaineCare Benefits Manual, CH I, Section 1, effective 9/17/2018
- DHHS #5 MaineCare Benefits Manual, CH II, Section 25, effective 7/1/2014
- DHHS #6 MaineCare Benefits Manual, CH III, Section 25 Allowances for Dental Services, effective 7/1/2014
- DHHS #7 Notice of Violation (NOV), Notice of Debt (NOD) and Notice of Appeal (NOA) letters February 18, 2021 including certified mail receipt
- DHHS #8 NOV spreadsheet (redacted) February 18, 2021¹
- DHHS #9 Informal Review Request dated March 18, 2021
- DHHS #10 Final Informal Review Decision (FIRD), February 23, 2022 including certified mail receipt
- DHHS #11 Request for Administrative Appeal of FIRD, April 4, 2022
- DHHS #12 Health PAS Claim example Spreadsheet Lines 68-69
- DHHS #13 Health PAS Claim example Spreadsheet Lines 534-535
- DHHS #14 Health PAS Claim example Spreadsheet Lines 1404-1405

Appellant Exhibits

- Fryeburg Dental-1
 - Current Dental Terminology (CDT)
 - Newspaper Articles
 - Duplicates of DHHS exhibits

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

¹ The Department's Exhibit List includes this endnote attached to DHHS-8: To protect MaineCare members' confidential information, neither the NOV nor the FIRD herein include the original spreadsheets that were issued to Fryeburg Family Dental. Instead, a redacted version of the spreadsheet has been included. A member key identifying each MaineCare member along with the non-confidential identifying number associated with all claims on the FIRD's redacted spreadsheet shall be provided separately.

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).

Of issue in this case is the legal obligation of enrolled MaineCare providers to follow all state and federal rules, specifically those related to billing. Pursuant to the rules, enrolled providers are required to utilize the methods and procedures contained in the applicable regulations(s) and billing instructions issued by the Department, to comply with requirements of applicable Federal and State law, and to comply with all other applicable chapters and sections of the MaineCare Benefits Manual. *See*, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (L)(R)(BB)

The Department has the authority to audit and to sanction providers who do not comply with the rules.

“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:

- Presenting or causing to be presented for payment any false or fraudulent claim for services or merchandise;
- Submitting or causing to be submitted false information for the purpose of obtaining greater compensation than that to which the provider is legally entitled;

- 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 1.03-3 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, § 1.19-1 (D).

RECOMMENDED DECISION

The Department was correct when for the review period of July 1, 2016 through January 31, 2019, it determined that Bernadette Kozak, IPDH/PHS d/b/a Fryeburg Family Dental owes the Department \$11,687.00 in recoupment due to: 1] non-compliance with the MaineCare Benefits Manual; 2] breach of the MaineCare Provider/Supplier Agreement; and/or 3] failure to repay overpayments or payments made in error as found in a Final Informal Decision dated February 23, 2022 and Notice of Violation dated February 18, 2021.

RECOMMENDED FINDINGS OF FACT

1. Ms. Kozak is licensed as an IPDH (Independent Practice Dental Hygienist), and a PHS (Public Health Dental Hygienist).
2. Ms. Kozak has been an approved MaineCare Provider since 2010, pursuant to a signed MaineCare Provider Agreement.
3. The CDT (Current Dental Technology) code D1110 is the billing code for prophylaxis.
4. The CDT code D1330 is the billing code for dental hygiene instruction.
5. MaineCare rules prohibit the separate billing of prophylaxis (D1110) and dental hygiene instruction (D1330) if performed on the same day.
6. From July 1, 2016 through January 31, 2019, prophylaxis was reimbursed at a rate of \$40.00 for each procedure.
7. From July 1, 2016 through January 31, 2019, dental hygiene instruction was reimbursed at a rate of \$13.00 for each procedure.
8. From July 1, 2016 through January 31, 2019 Ms. Kozak completed a prophylaxis and a dental hygiene instruction, on the same day, a total of 899 times.
9. As a result of billing error, MaineCare was over charged \$11,687.00, or \$13.00 for each of the 899 dental hygiene instructions.

REASONS FOR RECOMMENDATION

The sanction, in this case, ‘forfeiture’, taken by the Department is focused on one specific dental coding error. Pursuant to the MaineCare Benefits Manual II §25, the covered service of prophylaxis and oral hygiene instructions to a member are not independent services, if provided

on the same day. If performed on the same day, the rules require that the two separate services be billed as one service. 10-144 C.M.R. Ch. 101, sub-Ch. 25 § 25.03.

According to the Department, Ms. Kozak billed MaineCare for the two separate dental procedures when the rules require that the procedures be billed as one service, if provided on the same day. The Department argues that, as a Maine care provider, Ms. Kozak had assumed responsibility for complying with all state and federal rules, which includes billing procedures. As a result of her breach of the Mainecare rules, the Department argues that it is has the authority to sanction her, specifically that the Department has the right to require her to forfeit all payments for the billing of dental hygiene.

Ms. Kozak does not dispute that she billed incorrectly during the time period. She acknowledges that MaineCare policy prohibits the billing of these procedures separately when completed on the same day. She did not dispute the sanction amount.

Ms. Kozak's written response to the Informal Final Review argues that the monetary sanction will force her to no longer serve MaineCare beneficiaries, especially children. According to her, she is the only dental hygienist provider within 25 miles who will accept Maine care payment for child patients. See, DHHS-1. Ms. Kozak raised other arguments at hearing, specifically whether the State of Maine, MaineCare Services, had the legal authority to 'alter' CDT, a copyrighted coding system. However, the rules confine the appealable issues to those raised in the Final Informal Review, and therefore, all subsequent arguments, will not be addressed in this Recommended Decision.²

The hearing officer recommends that the Commissioner uphold the Department's action in this case. The Department has shown, by a preponderance of the evidence, that, as a MaineCare provider, Ms. Kozak was responsible to knowing the coding protocol, and for utilizing it in accordance with the rules. The evidence shows that as a MaineCare provider, she signed a provider agreement, which obligates her to do so.

The Provider Contract, signed by the Department and Ms. Kozak on March 17, 2010 obligates Ms. Kozak, not only to submit bills in accordance with "methods and procedures contained in the applicable regulations(s) and billing instructions issued by the Department", but to seek out assistance if unclear as to the procedures,

"The Provider is also responsible for requesting instruction or training, available from the Department, if uncertain as the application of these regulations and procedures." See, DHHS-1.

The evidence shows that MaineCare rules require that prophylaxis and dental hygiene instruction be coded as one service when completed on the same day. 10-144 C.M.R. Ch. 101, sub-Ch. 25 § 25.03. The evidence shows that Ms. Kozak did not code correctly in 889 cases, and separately billed for dental hygiene instruction. See, DHHS-8. At \$13.00 a piece, the

² 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. 10-144 C.M.R. Ch. 101, sub-Ch. 1, § 1.23. See, also DHHS-10.

overpayment amount totaled \$11,687.00. See, DHHS-10. Under the rules, the Department is authorized to sanction Ms. Kozak under the rules.

The Department may impose the following sanctions against providers, individuals or entities based on the grounds specified in Section 1.20-1, in accordance with applicable state and federal rules and regulations. Sanctions may include the “Forfeiture of any payment for services, supplies or goods, associated with grounds for sanctioned providers”. 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.20.

In this case, that meant a forfeiture of the \$13.00 in reimbursement that Ms. Kozak received as a result of separately billing for dental hygiene instruction. The Department determined that Ms. Kozak had been overpaid \$13.00 for a total of 889 separate instances, resulting in the total of \$11,687.00 for the period July 1, 2016 through January 31, 2019. The hearing officer has reviewed the Department’s calculations and have determined that the forfeiture figure is correct.

The hearing officer recommends that the Commissioner determine that the Department was correct when for the review period of July 1, 2016 through January 31, 2019, it determined that Bernadette Kozak, IPDH/PHS d/b/a Fryeburg Family Dental owes the Department \$11,687.00 in recoupment due to: 1] non-compliance with the MaineCare Benefits Manual; 2] breach of the MaineCare Provider/Supplier Agreement; and/or 3] failure to repay overpayments or payments made in error as found in a Final Informal Decision dated February 23, 2022 and Notice of Violation dated February 18, 2021.

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).

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 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 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: August 30, 2022

S/Miranda Benedict
Miranda Benedict, Esq.
Administrative Hearing Officer
Division of Administrative Hearings

cc: William Logan, Esq.
Bernadette Kozak, IPDH, PHS, PO Box 523, 19 Portland Street, Fryeburg, Maine 04037