

Janet T. Mills
Governor



Maine Department of Health and Human Services
Commissioner's Office
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Augusta, Maine 04333-0011
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Jeanne M. Lambrew, Ph.D.
Commissioner

IN THE MATTER OF:

Residential and Community Support Services)
C/o Kelly McDonald, Esq.)
Murray, Plumb & Murray) **FINAL DECISION**
P.O. Box 9785)
Portland, ME 04101-5085)

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

The Corrected Recommended Decision of Hearing Officer Bloom mailed November 1, 2022 and the responses and exceptions submitted by the Department and Residential and Community Support Services have been reviewed.

I hereby adopt the findings of fact and I accept the Recommendation of the Hearing Officer that the Department was correct when for the period of January 1, 2018 through October 31, 2019 it determined that Residential and Community Support Services owes the Department \$30,233,828.03 in recoupment due to non-compliance with the MaineCare Benefits Manual, breach of the MaineCare Provider/Supplier Agreement, and/or failure to repay overpayments or payments made in error as found in a Final Informal Review Decision dated March 4, 2021 and Notice of Violation dated March 13, 2020.

DATED: 1-12-23 SIGNED: 
JEANNE M. LAMBREW, Ph.D., COMMISSIONER
DEPARTMENT OF HEALTH & HUMAN SERVICES

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

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

cc: Halliday Moncure, AAG
Shannon Collins, AAG

Janet T. Mills
Governor

Jeanne M. Lambrew, Ph.D.
Commissioner



Maine Department of Health and Human Services
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DATE MAILED: November 1, 2022

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

In Re: RCSS - Appeal of Final Informal Review dated March 4, 2021

CORRECTED RECOMMENDED DECISION

On April 11, 12, 13 and 14, 2022, Hearing Officer Annalee Bloom, Esq., held a *de novo* administrative hearing via video conference in the case of Residential and Community Support Services. The Commissioner of the Department of Health and Human Services conferred jurisdiction to the Hearing Officer by special appointment. The Hearing Officer left the record open until May 27, 2022, for the parties to submit written arguments. On May 6, 2022, RCSS requested an extension of the deadline. The extension was granted until June 17, 2022 at 5:00 p.m. Both parties submitted their closing arguments, however, the Department's antivirus software blocked RCSS's e-mailed brief. RCSS's argument was received by regular mail on June 22, 2022, and the record closed. On August 17, 2022, the Hearing Officer re-opened the record and requested both parties to brief the issue of whether the Department had authority to address equitable estoppel. The briefs were provided, and the record finally closed on September 6, 2022.

The Decision After Hearing issued on October 5, 2022. This Corrected Decision is based on the Responses and Exceptions filed by the Department which noted clerical errors in the initial Decision After Hearing. The Hearing Officer has made some of the clerical corrections suggested by the Department. On October 27, 2022, the Hearing Officer wrote to counsel for RCSS to determine their position regarding the reference to Section 85 of the MaineCare Benefits Manual that was included in the Recommended Decision and that the Department requested be deleted. RCSS responded on November 1, 2022, indicating that they agreed with the Department. Therefore, the reference to Section 85 of the MaineCare Benefits Manual has been deleted from the Recommended Decision and the language has been modified to be consistent with the question presented by the Order of Reference.

In their Exceptions and Responses, the Department noted that the Hearing Officer made a factual error in the substantive portion of the Recommended Decision. In their letter dated November 1, 2022, RCSS agrees that the Summary of Findings was not sent to RCSS. Additionally, after review of the testimony, the Hearing Officer agrees. Therefore, the first sentence of the second

substantive paragraph on page 10 of the Recommended Decision has been revised in this Corrected Decision.

Although this Corrected Decision includes an Exception and Response period it is not intended to extend the period for Exceptions and Responses beyond the initial period provided for in the Recommended Decision.

FACTUAL BACKGROUND AND ISSUE:

On or about March 13, 2020, the Department of Health and Human Services, Division of Audit, Program Integrity (the "Department") issued Residential and Community Support Services (RCSS) a Notice of Violation pursuant to MaineCare Benefits Manual Chapter I, Section I.18. The Department sought recoupment of \$30,233,828.03 for MaineCare claims paid between January 1, 2018 through October 31, 2019. In response, RCSS requested an Informal Review on or about June 29, 2020. On or about March 4, 2021, the Department notified RCSS, through a Final Informal Review Decision that it was upholding the recoupment amount of \$30,233.828.03 for MaineCare claims paid between January 1, 2018, and October 31, 2019.

On or about April 30, 2021, RCSS requested an administrative hearing. Pursuant to an Order of Reference dated May 10, 2021, this matter was assigned by Joseph M. Pickering, Esq., Chief Administrative Hearing Officer to the undersigned 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 for the period of January 1, 2018 through October 31, 2019, it determined that Residential and Community Support Services owes the Department \$30,233,828.03 in recoupment due to : 1) non-compliance with the MaineCare Benefits Manual; 2) breach of the MaineCare Provider/Supplier Agreement; and/or 3) failure to repay overpayments or payments made in error as found in a Final Informal Decision dated March 4, 2021 and Notice of Violation dated March 13, 2020?

APPEARING ON BEHALF OF APPELLANT:

Kelly McDonald, Esq
Alley Tozier, Esq.
Christine Tiernan, CEO of RCSS
Peter Auger
Angie Marquis

APPEARING ON BEHALF OF AGENCY:

Halliday Moncure, AAG
Shannon Collins, AAG
William Logan, Esq., Director of Compliance for MaineCare Services
Susan Gregoire, Comprehensive Health Planner I
Alexander Netten, Program Manager for Maine Background Check Center
Harry Tobey (rebuttal), OADS

Katie Grotton, Program Integrity, observing
Shannon Gifford, Program Integrity, observing
Michael Dunn, AAG, observing

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer Exhibits:

- HO-1. Letter scheduling Case Management Conference for February 18, 2022
- HO-2. Letter scheduling Case Management Conference for February 23, 2022
- HO-3. Entry of Appearance from Shannon Collins, AAG
- HO-4. Letter scheduling hearing for March 7, 2022 through March 11, 2022
- HO-5. E-mail communication about continuance
- HO-6. Status Conference Order dated September 21, 2021
- HO-7. Letter scheduling hearing for December 13, 2021 through December 17, 2021
- HO-8. Case Management Conference Order dated June 14, 2021
- HO-9. Letter scheduling Case Management Conference for September 14, 2021
- HO-10. Letter scheduling Case Management Conference for June 14, 2021
- HO-10A. Order of Reference dated May 10, 2021
- HO-11. Fair Hearing Report Form dated May 7, 2021
- HO-12. Notice of Violation dated March 13, 2020
- HO-13. Request for Informal Review dated June 29, 2020
- HO-14. Final Informal Review Decision dated March 4, 2021
- HO-15. Request for Administrative Hearing dated April 30, 2021
- HO-16. Status Conference Order dated September 21, 2021
- HO-17. E-mail re: continuance
- HO-18. E-mail re: HO exhibit list
- HO-19. Hearing Officer Response to request for HO exhibit list
- HO-20. E-mails reference exhibits
- HO-21. Cover letter and witness list from Department
- HO-22. RCSS request for video recording
- HO-22A. Pre-Hearing Order dated February 22, 2022
- HO-23. Cover letter for Department's exhibits dated February 22, 2022
- HO-24. Letter scheduling Status Conference dated February 23, 2022
- HO-25. E-mails re: continuance dated February 24, 2022
- HO-26. E-mail from Hearing Officer dated February 28, 2022 and response from AAG Moncure dated March 1, 2022
- HO-27. Pre-Hearing Order dated March 4, 2022
- HO-28. Letter scheduling telephonic hearing dated March 14, 2022
- HO-29. Letter scheduling video hearing dated March 14, 2022
- HO-30. Pre-Hearing Memorandum from RCSS dated March 21, 2022
- HO-31. Pre-Hearing Memorandum from Department dated March 21, 2022
- HO-32. Pre-Hearing Order dated April 1, 2022
- HO-33. Letter from Department dated April 4, 2022
- HO-34. RCSS Objection to exhibits dated April 4, 2022
- HO-35. Letter from RCSS dated April 6, 2022

- HO-36. Pre-Hearing Order date April 7, 2022
- HO-37. E-mail from Department dated April 7, 2022
- HO-38. Letter from Department dated April 8, 2022
- HO-39. E-mail from Department dated April 8, 2022
- HO-40. Stipulations
- HO-41. E-mail from Department dated April 14, 2022, update of exhibits
- HO-42. Letter from Department with additional exhibits dated April 14, 2022
- HO-43. Letter from Hearing Officer dated August 17, 2022 re-opening record
- HO-44. Department's objection to RCSS's "late filed" closing brief dated June 22, 2022
- HO-45. E-mail from Hearing's Unit to RCSS
- HO-46. Department's withdrawal of objection to RCSS "late filed" closing brief dated June 22, 2022
- HO-47. Exceptions and Responses from Department
- HO-48. Exceptions and Responses from RCSS
- HO-49. Letter from Hearing Officer to RCSS dated October 27, 2022
- HO-50. Response from RCSS dated November 1, 2022

Department's Exhibits:

- DHHS-1. MaineCare Provider Agreement, Aug. 16, 2019
- DHHS-2. Disclosure of Ownership and Control Interest Statement, Sept. 18, 2019
- DHHS-3. 10-144 C.M.R. Ch. 101 (MaineCare Benefits Manual), Chapter I, Section 1 (eff. July 5, 2017)
- DHHS-4. MaineCare Benefits Manual, Chapter I, Section 1 (eff. Sept. 17, 2018)
- DHHS-5. MaineCare Benefits Manual, Chapter II, Section 21 (eff. Mar. 5, 2017)
- DHHS-6. MaineCare Benefits Manual, Chapter II, Section 21 (eff. Dec. 24, 2017)
- DHHS-7. MaineCare Benefits Manual, Chapter III, Section 21 (major substantive rule) (eff. Sept. 6, 2017)
- DHHS-8. MaineCare Benefits Manual, Chapter III, Section 21 (major substantive rule) (eff. June 1, 2018)
- DHHS-9. MaineCare Benefits Manual, Chapter III, Section 21 (major substantive rule) (eff. July 20, 2019)
- DHHS-10. 10-144 C.M.R. Ch. 60, Maine Background Check Center (MBCC) Rule (eff. Oct. 17, 2018)
- DHHS-11. MBCC Provider User Manual, Version 1, January 2017
- DHHS-12. MBCC Stakeholder Meeting, Power Point Slides, Sept. 14, 2016
- DHHS-13. MBCC handout for attendees of Stakeholder Meeting, Sept. 14, 2016
- DHHS-14. MBCC website screen shots, Feb. 10, 2022
- DHHS-15. OADS Guidance to Providers for Conducting an APS Check, Aug. 4, 2018
- DHHS-16. Workflow Notes, August 27, 2021
- DHHS-17. Complaint, April 23, 2019
- DHHS-18. Complaint, April 26, 2019
- DHHS-19. Complaint, May 21, 2019
- DHHS-20. Complaint, July 12, 2019
- DHHS-21. Record Request, Oct. 24, 2019, and Certified Mail Receipt (Oct. 26, 2019)
- DHHS-22. Copy of UPS package from RCSS, Nov. 18, 2019, encl. documents responsive to

- Record Request, including executed Certificate of Authenticity, Nov. 15, 2019, and RCSS Employee Roster, November 18, 2019
- DHHS-23. S. McDevitt Summary of Findings, March 6, 2020
- DHHS-24. Notice of Violation, March 13, 2020, including employee spreadsheet, redacted claims spreadsheet and Certified Mail Receipt (March 16, 2019)
- DHHS-25. RCSS FIRD Request and employee spreadsheet, June 29, 2020
- DHHS-26. Final Informal Review Decision (FIRD), March 4, 2021, including employee spreadsheet and Certified Mail Receipt
- DHHS-27. RCSS Administrative Hearing Request, April 30, 2021
- DHHS-28. Letter from H. Moncure, AAG, to Kelly McDonald, Esq., Feb. 9, 2022
- DHHS-29. MBCC RCSS Facility Application Report (as of Feb. 10, 2022)
- DHHS-30. Email from Jonah Howard, DHHS Financial Service Center, to William Logan, Director of Compliance, OMS, Feb. 15, 2022
- DHHS-31. Complete Employee Records from RCSS: Adigbo, Ouleli
- DHHS-32. Complete Employee Records from RCSS: Bahouamio, Davien
- DHHS-33. Complete Employee Records from RCSS: Hirwa, Antoine Marius Isingizwe
- DHHS-34. Complete Employee Records from RCSS: Ininahazwe, Arsene
- DHHS-35. Complete Employee Records from RCSS: Ishema, Richard Aime
- DHHS-36. Complete Employee Records from RCSS: Mohamed, Binto
- DHHS-37. Complete Employee Records from RCSS: Nsuele, Celeste
- DHHS-38. Complete Employee Records from RCSS: Ntigura-Kwizera, Pacifique
- DHHS-39. Complete Employee Records from RCSS: Osman, Mohamed
- DHHS-40. Complete Employee Records from RCSS: Isimbi, Sylvie
- DHHS-41. Complete Employee Records from RCSS: Gebreyewhans, Naod
- DHHS-42. October 27, 2020 - January 2022 DHHS Overall Organizational Chart OADS and Crisis Services
- DHHS-43. DHHS April 6, 2022, Global Employees Spreadsheet (inc. RCSS Exh.5 info and DHHS responses)
- DHHS-44. MaineCare Benefits Manual, Chapter II, Section 21 (eff. Sept. 1, 2014)
- DHHS-45. Closing Argument
- DHHS-46. Response re: equitable estoppel

Appellant's Exhibits:

- RCSS-1. withdrawn
- RCSS-2. withdrawn
- RCSS-3. 22 M.R.S. §§ 9052, 9053, 9054
- RCSS-4. withdrawn
- RCSS-5. Employee Spreadsheet
- RCSS-6. withdrawn
- RCSS-7. Emails
- RCSS-8. Summary of amounts spent on MBCC searches
- RCSS-9. MBCC Employee Form
- RCSS-10. MBCC Website
- RCSS-11. Report on background check pilot project
- RCSS-12. Excluded by Hearing Officer
- RCSS-13. Deliberately Omitted

RCSS-14. Excluded by Hearing Officer
 RCSS-15. Excluded by Hearing Officer
 RCSS-16. Excluded by Hearing Officer
 RCSS-17. Excluded by Hearing Officer
 RCSS-18. J. Agbo; MBCC check
 RCSS-19. A. Ahmed; time log
 RCSS-20. M. Alaari; First Aid/CPR Certificate
 RCSS-21. S. Amisi; time log
 RCSS-22. E. Ayurambi; First Aid/CPR Certificate
 RCSS-23. M. Barahiraje; time log
 RCSS-24. A. Bucyana; time log
 RCSS-25. T. Diemba; First Aid/CPR Certificate
 RCSS-26. J. Eldridge; First Aid/CPR Certificate; course transcript
 RCSS-27. H. Esmaeel; time log
 RCSS-28. Y. Fazili; CPR Certificate
 RCSS-29. E. Gahurarura; course transcript; MBCC check
 RCSS-30. J. Gassinga; First Aid/CPR Certificate
 RCSS-31. E. Habarurema; First Aid/CPR Certificate
 RCSS-32. M. Hill; First Aid/CPT Certificates
 RCSS-33. S. Kabananda; First Aid/CPR Certificates
 RCSS-34. R. Kaze; First Aid/CPR Certificate
 RCSS-35. D. Kazirukanyo; First Aid/CPR Certificate
 RCSS-36. E. Lako; CPR Certificate
 RCSS-37. S. Lamour; MBCC check
 RCSS-38. V. Lufumbo; course transcript
 RCSS-39. A. Mbuyamba; MBCC check
 RCSS-40. A. Migisha; First Aid/CPR Certificate
 RCSS-41. Y. Mpundu; MBCC check
 RCSS-42. A. Murekatete; First Aid/CPR Certificate
 RCSS-43. J. Ndayishimiye; First Aid/CPR Certificate
 RCSS-44. A. Ndjoli; CPR Certificate
 RCSS-45. S. Ndzomali; First Aid/CPR Certificate
 RCSS-46. O. Nkundabagenzi; First Aid/CPR Certificate
 RCSS-47. C. Nsuele; DSP Certificate; First Aid/CPR Certificate
 RCSS-48. C. Nyinawumuntu; DSP Certificate
 RCSS-49. J. Peterkin; course transcript
 RCSS-50. H. Qeyle; First Aid/CPR Certificate
 RCSS- 51. J. Shaka; CPR Certificate
 RCSS-52. Closing Argument
 RCSS-53. Response re: equitable estoppel

STIPULATED FINDINGS OF FACT:

1. The claims review period at issue in this matter is January 1, 2018 – October 31, 2019.
2. During the claims review period, RCSS received \$30,233,828.03 in MaineCare reimbursement from DHHS.
3. RCSS has been a MaineCare provider since December of 2013.
4. At all relevant times, RCSS had a MaineCare Provider Agreement (MCPA) with DHHS. RCSS executed multiple MCPAs during the claims review period, as follows:

- A. MaineCare Provider Agreement, Nov. 29, 2017
- B. MaineCare Provider Agreement, March 14, 2018
- C. MaineCare Provider Agreement, May 3, 2018
- D. MaineCare Provider Agreement, May 14, 2018
- E. MaineCare Provider Agreement, July 3, 2018
- F. MaineCare Provider Agreement, July 30, 2018
- G. MaineCare Provider Agreement, Aug. 23, 2018
- H. MaineCare Provider Agreement, Sept. 11, 2018
- I. MaineCare Provider Agreement, Oct. 16, 2018
- J. MaineCare Provider Agreement, Dec. 11, 2018
- K. MaineCare Provider Agreement, Jan. 10, 2019
- L. MaineCare Provider Agreement, March 19, 2019
- M. MaineCare Provider Agreement, May 8, 2019
- N. MaineCare Provider Agreement, June 6, 2019
- O. MaineCare Provider Agreement, Aug. 16, 2019

5. The MCPAs are materially the same, except:
 - A. Additions of enrolled service locations.
 - B. The May 16, 2018 MCPA and the MCPAs thereafter, during the claims review period, deleted language that formerly appeared in Section D(3)(C) regarding liability for debts owed to the provider.
 - C. The October 16, 2018 MCPA and the MCPAs thereafter during the claims review period contain different language under Section A (11) (State Employees not to benefit/Conflict of Interest).

6. At all relevant times, RCSS had Disclosure of Ownership and Control Interest Statements (DOCIS) on file with DHHS. There were multiple DOCIS in effect during the claims review period, as follows:

1. Disclosure of Ownership and Control Interest Statement, Oct. 18, 2016
2. Disclosure of Ownership and Control Interest Statement, July 11, 2018
3. Disclosure of Ownership and Control Interest Statement, Aug. 1, 2018
4. Disclosure of Ownership and Control Interest Statement, Aug. 25, 2018

5. Disclosure of Ownership and Control Interest Statement, Oct. 10, 2018
6. Disclosure of Ownership and Control Interest Statement, Dec. 2, 2018
7. Disclosure of Ownership and Control Interest Statement, Dec. 21, 2018
8. Disclosure of Ownership and Control Interest Statement, Feb. 14, 2019
9. Disclosure of Ownership and Control Interest Statement, Feb. 20, 2019
10. Disclosure of Ownership and Control Interest Statement, April 10, 2019
11. Disclosure of Ownership and Control Interest Statement, May 14, 2019
12. Disclosure of Ownership and Control Interest Statement, June 14, 2019
13. Disclosure of Ownership and Control Interest Statement, Sept. 18, 2019

7. All DOCIS are materially the same except:

- A. The October 18, 2016, DOCIS reflects (i) the following five (5) owners of RCSS: Christine Tiernan; Claudia Stanley; Henry Jere; Mister Nyetera; Assumani Rashindi; and (ii) for “type of entity” RCSS checked, “other.”
- B. The July 11, 2018, DOCIS and each DOCIS thereafter during the claims period reflect: (i) the following three (3) owners of RCSS: Christine Tiernan; Claudia Stanley; and Mister Nyetera; and (ii) for “type of entity” RCSS checked, “corporation.”

8. RCSS provides residential and support services to adult individuals with physical, emotional, and intellectual disabilities.

RECOMMENDED FINDINGS OF FACT:

1. All stipulated findings as outlined above.
2. Notice of these proceedings was given in a timely and adequate manner. Residential and Community Support Services made a timely appeal.
3. All of RCSS’s clients are MaineCare recipients.
4. In August 2019, the Department started an audit of RCSS for MaineCare claims paid between January 1, 2018 through October 31, 2019.
5. The MaineCare rules require RCSS to complete a criminal background check, an Adult Protective Services check, and a Child Protective Services check of all providers considered as DSPs.
6. During the audit period, RCSS failed to complete all mandatory background checks on 100 percent of their “DSP” employees. All employees that were billed as DSPs were missing Child Protective Services (CPS) background checks.
7. The MaineCare rules and the provider contracts did not incorporate or anticipate the use of the Maine Background Check Center (MBCC).
8. During the audit period, RCSS submitted and was paid for claims when its employees were

not qualified to perform the services.

9. During the audit period, RCSS was reimbursed for claims that were not “medically necessary” as defined by the MaineCare rules.

10. During the audit period, RCSS failed to maintain and retain complete and accurate records for their employees.

9. The Department did not provide false or misleading information to RCSS regarding the MBCC.

10. The MBCC did not perform Adult Protective Services (APS) background checks or CPS background checks.

11. RCSS did not rely on the MBCC doing APS checks or CPS background checks.

12. During the audit period, the Department paid RCSS \$30,233,828.03 for MaineCare claims for which it was not entitled.

RECOMMENDED DECISION:

The Department was correct when for the period of January 1, 2018 through October 31, 2019 it determined that Residential and Community Support Services owes the Department \$30,233,828.03 in recoupment due to 1) non-compliance with the MaineCare Benefits Manual 2) breach of the MaineCare Provider/Supplier Agreement; and/or 3) failure to repay overpayments or payments made in error as found in a Final Informal Decision dated March 4, 2021 and Notice of Violation dated March 13, 2020.

BACKGROUND/PROCEDURAL HISTORY:

Residential and Community Support Services (RCSS) is a MaineCare authorized entity pursuant to Section 1.02-4 of the MaineCare Benefits Manual. RCSS has been a MaineCare provider since 2013 and has had numerous contracts for the provision of MaineCare services over the years. RCSS provides services in many locations across Maine. The services reimbursed during the time period associated with this case were for Direct Support Professionals (DSPs) pursuant to Home and Community Based Services, Section 21 of the MaineCare Benefits Manual. From January 1, 2018 through October 31, 2019, RCSS and the Department had a binding contract for MaineCare services.

The Department (Program Integrity-the Division of Audit) is responsible for oversight of all MaineCare Providers pursuant to the Maine Care Benefits Manual Section 1.16 and 1.18. These sections provide as follows:

1.16 AUDITS

The Division of Audit, Program Integrity Unit, or duly Authorized Entities appointed by the Department have the authority to monitor payments to any MaineCare provider by an audit or post-payment review.

1.18 PROGRAM INTEGRITY

The Program Integrity Unit, Division of Audit, or the Department's Authorized Entity, or any combination of the three (3) entities, is responsible for surveillance and referral activities that may include, but are not limited to:

- A. A continuous sampling review of the utilization of care and services for which payment is claimed;
- B. An on-going sample evaluation of the necessity, quality, quantity and timeliness of the services provided to members;
- C. An extrapolation from a random sampling of claims submitted by a provider and paid by MaineCare;
- D. A post-payment review that may consist of member utilization profiles, provider services profiles, claims, all pertinent professional and financial records, and information received from other sources; (emphasis added)**
- E. The implementation of the Restriction Plans (described in Chapter IV of this Manual);
- F. Referral to appropriate licensing boards or registries as necessary;
- G. Referral to the Maine Attorney General's Office, Healthcare Crimes Unit, for those cases where fraudulent activity is suspected; and
- H. A determination whether to suspend payments to a provider based upon a credible allegation of fraud.

The Department and its professional advisors regard the maintenance of adequate clinical and other required financial and product-related records as essential for the delivery of quality care. Comprehensive records, including but not limited to: treatment/service plans, progress notes, product and/or service order forms, invoices, and documentation of delivery of services and/or products provided are key documents for post-payment reviews. In the absence of proper and comprehensive records, no payment will be made and/or payments previously made may be recouped.

Maine Care Benefits Manual Section 1.16 and 1.18.

On October 24, 2019, Sarah McDevitt, from the Program Integrity Unit of the Office of MaineCare Services, sent RCSS a Record Request. Ex. DHHS-21. The Record Request asked for RCSS's entire records, including but not limited to:

- Employee Records, including all background checks, date of birth, date of hire, and if applicable, date of termination.

- Documentation of Employee certifications and trainings, including Certified Residential Medication Aide (CRMA) and Direct Support Professional (DSP) certificates as well as transcripts from the College of Direct Supports.

In response, RCSS submitted documentation to Program Integrity that contained records for 344 of 367 employees. Ex. DHHS-21. The records submitted by RCSS showed that only 47% of the employees had criminal background checks. Two of the employees had Adult Protective Services checks and none of the employees had Child Protective checks. Employees were also missing required training in CPR and first aid. Test. S. Gregoire and Ex. DHHS-22.

The Program Integrity Unit prepared a Summary of Findings for their internal use. Test. W. Logan and S. Gregoire. The Summary of Findings was not sent to RCSS. Stip. of parties. On March 13, 2020, a Notice of Violation was sent to RCSS by the Program Integrity Unit. Ex. DHHS-24. The Notice of Violation sought a 100% recoupment of MaineCare payments for the audit period of January 1, 2018 through October 31, 2019; a total of \$30,233,828.03. By letter dated June 29, 2020, RCSS requested an informal review of the Notice of Violation. Ex. DHHS-25.

The Hearing Officer reviews the Department's claim for recoupment against a MaineCare provider *de novo*. 10-144 C.M.R. Ch.1, § VII(C)(1); 10-144 C.M.R. Ch. 101, Ch. I § 1.21-1(A). The Department bears the burden to persuade the Hearing Officer that, based on the preponderance of the evidence, it was correct in establishing a claim for recoupment against a MaineCare provider. 22 M.R.S. § 42 (7)(H); 10-144 C.M.R. Ch.1, §VII (B), (2).d.

In their request for informal review of the Notice of Violation (NOV) RCSS argued:

The Notice of Violation should be set aside in its entirety because:

1. RCSS relied on statements from the Department of Health and Human Services ("DHHS" or the "Department") assuring RCSS that the background checks performed through the Maine Background Check Center included APS and CPS checks;
2. RCSS's employees have completed all or substantially all of the training required;
3. RCSS has provided all of the documentation required; and
4. Because the Department has received tens of millions of dollars of value through the services provided by RCSS to its clients, it is inequitable and an act of bad faith to seek to recoup the fees paid in their entirety. Ex. HO-13.

The Final Informal Review Decision (FIRD) was issued on March 4, 2021 and upheld the NOV. Ex. HO-14. RCSS filed this appeal. Ex. HO-15.

LEGAL ANALYSIS

The MaineCare Benefits Manual limits RCSS's arguments on appeal to those raised at the Final Informal Review stage. The MaineCare Benefits Manual specifically states that any matter not

presented at the FIRD stage cannot be presented at appeal. “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. The request for informal review may not be amended to add further issues.” MaineCare Benefits Manual, Ch. I Sec. 1.23-1. Some testimony and argument presented by RCSS at the hearing arguably exceeded the scope of the four specific rationale for denial of the FIRD as outlined above. The Hearing Officer will address only the four arguments raised in the request for informal review. To the extent RCSS’s arguments at hearing or in their closing argument exceeded the scope of the arguments presented at the FIRD stage, they are not addressed in this recommended decision.

In the *Palian* decision, the Law Court specifically found that the appellant was strictly limited to positions raised at the Final Informal Review stage.

In his written request for an informal review, Dr. Palian argued that certain sanctions for improper or inadequate documentation were incorrectly imposed, but he did not argue that the Department abused its discretion by imposing the maximum sanction of 20%, as opposed to a lesser penalty, or by failing to consider the factors set out in the Manual. See 10-144 C.M.R. ch. 101, ch. I, §1.20-3(A)(1).¹⁴ In other words, he argued only that no penalty should have been imposed, not that a lesser penalty was appropriate based on the discretionary factors contained in the Department's rules. The Commissioner, therefore, committed no legal error in accepting the presiding officer's conclusion that Dr. Palian waived this issue by failing to raise it in his request for informal review.

Palian v. Dep't of Health and Hum. Servs., 2020 ME 131, 242 A.3d 164.

The arguments presented by RCSS are addressed in the order they were presented for the FIRD. The language has been modified somewhat for purposes of this recommended decision.

I. Did the Department of Health and Human Services assure RCSS that the background checks performed through the Maine Background Check Center included APS and CPS checks; and if so, was RCSS justified in relying on such statements? Should the Department be precluded from 100 percent recoupment based on the doctrine of equitable estoppel?

RCSS claims to have relied on statements from the Department of Health and Human Services (“DHHS” or the “Department”) assuring RCSS that the background checks performed through the Maine Background Check Center (MBCC) included Adult Protective Services checks (APS) and Child Protective Services (CPS) checks. RCSS argues that they were informed that the Maine Background Check Center provided all the necessary background checks for DSPs. The Department presented Alexander Netten, the Program Manager for the Maine Background Check Center (MBCC) to testify about the establishment of the MBCC. The intention of the MBCC is to have a centralized system to provide background checks for the Department. The MBCC was established by statute and was **intended** to include Adult Protective Substantiations as well as Child Protective Substantiations. Title 22 M.R.S. § 9051 *et seq.* The Maine Background Check Center (“MBCC”) Act was implemented effective October 15, 2015 (P.L. 2015, c. 299, § 25), and the MBCC first began operations for public use in early 2017. Test. A. Netten. As an

employer of “direct access workers” per the MBCC authorities, RCSS was allowed to begin using the MBCC system in February of 2018, although it did not actually start using MBCC until March 23, 2018. Ex. DHHS-29. Test. A. Netten. The plan was for the MBCC to perform APS and CPS checks, but it never has. Mr. Netten testified regarding guidance that was provided to providers. He stated that providers were never told that MBCC was doing APS and CPS checks. The only communication in that regard was that it was aspirational that the center would do those checks in the future. The center still does not do APS or CPS checks. Test. A. Netten and Test. W. Logan. The only way to obtain APS substantiation information is through OADS and the only way to obtain a CPS substantiation is through the Office of Child and Family Services.

Christine Tiernan, the Chief Executive Officer of RCSS, testified on behalf of RCSS. In October 2014, Ms. Tiernan emailed James Martin, then-director of OADS, to ask if there is a process to check whether new hires have been substantiated by DHHS, and “should no longer be working with this population”. The e-mail correspondence is contained in RCSS’s exhibit 7 (which was not produced until the hearing stage). Mr. Martin asked if she was looking for child protective or adult protective checks. Ms. Tiernan responded that she wanted information about APS checks. She further said that RCSS wanted to “make sure we are doing due diligence in our hiring practices. Our clients are pretty intense and can be very behaviorally challenging so we would like to make sure we are taking every precaution with the teams that we are building and putting on the floor.” Mr. Martin informed Ms. Tiernan that she should contact Harry Tobey at OADS for more information about how to do APS checks. Ms. Tiernan’s emails reflect that as of October 2014 she had knowledge that Section 21 requires criminal background checks, APS and CPS checks. Additionally, in the e-mail she expressed the importance of knowing the employee’s background prior to having them work with the clients.

Ms. Tiernan testified that she then contacted Harry Tobey, of OADS, about the necessary background checks for DSPs. Ms. Tiernan stated that Mr. Tobey told her that Maine was developing a background check center (Maine Background Check Center or MBCC) and that it was going to be a “one stop shop” for background checks so that employers would all conduct their background checks the same. Upon questioning from the Hearing Officer, Ms. Tiernan testified that from April to October of 2014, RCSS did no background checks at all. Ms. Tiernan also testified that Mr. Tobey told her not to worry about the background checks because no one was doing them correctly. Ms. Tiernan also testified that she was previously employed by another Section 21 provider, Granite Bay. Ms. Tiernan testified that she was “invited to leave” her job at Granite Bay based in part on disagreements she had with management about her serious safety concerns for the individuals who were served by Granite Bay. Ms. Tiernan stated that, following this experience, she wanted to do things differently with RCSS and implement “best practices” to support the individuals served.

Mr. Tobey testified as a rebuttal witness for DHHS. Mr. Tobey has been an administrative assistant for OADS for 30 years. In 2014, one of Mr. Tobey’s job responsibilities included working with Section 21 and other providers to do the APS background checks; he did that work for 12-15 years. Mr. Tobey notified employers/providers regarding whether he found any APS substantiations, or if he did not find any substantiations. Mr. Tobey was also available to answer questions of providers about the APS background checks and if providers had questions about

matters outside his responsibilities, he referred them elsewhere. Based on his experience and job responsibilities, Mr. Tobey knew that Section 21 providers had to do APS background checks.

Mr. Tobey testified that he remembered two or three phone conversations with Christine Tiernan. Mr. Tobey testified that Ms. Tiernan first called him, identified RCSS as a Section 21 provider and stated she wanted to check on licensing and certification requirements. Mr. Tobey responded that that was not part of his job responsibilities at OADS, but that he would seek more information for Ms. Tiernan and call her back. He remembered these conversations with Ms. Tiernan, in part, because he had to go upstairs to the Division of Licensing and Certification (“DLC”), where he obtained information about the DLC’s database, the CNA & DCW registry. When Mr. Tobey spoke to Ms. Tiernan the second time, he reported what he learned from DLC. During the second conversation, Ms. Tiernan asked about APS checks, and Mr. Tobey explained that he does the APS checks; what information is needed to do the APS checks; and that RCSS could send requests for APS checks directly to Mr. Tobey via an email.

Mr. Tobey contradicted the material portions of Ms. Tiernan’s testimony about their conversations. In his role as an administrative assistant for OADS, and the person who did the APS background checks, Mr. Tobey had some familiarity with the MBCC, which was part of the DLC and still in development (MBCC was not enacted via statute until October 2015). Test. H. Tobey. He testified that he would send people with questions about the MBCC to speak with someone at DLC. Mr. Tobey understood that child protective checks were done separately through children’s services, and if providers had questions about the CPS checks he would send them to OCFS.

Mr. Tobey testified that he did not tell Ms. Tiernan that “no providers were doing background checks,” nor did he advise that RCSS did not have to do any background checks. His testimony, in fact, was that it was “**not possible**” that he said that no providers were doing checks properly. Instead, he explained to Ms. Tiernan the process to complete APS checks. At some point, Ms. Tiernan contacted Mr. Tobey to obtain APS checks.

The MBCC was introduced to providers gradually. It became accessible to RCSS in February of 2018. RCSS was sent the MBCC Provider User Manual (Ex. DHHS-11). Test. A. Netten. Ms. Tiernan also testified that she had a phone call with a male from MBCC who told her that there were glitches in the system and that they should not use the system for their background checks until April or May. Ms. Tiernan could not recall with whom she spoke.

The MBCC searches for criminal background checks, OIG, Maine excluded providers, National and Maine sex offender registries, and complaints on the Certified Nursing Assistants and Direct Care Workers registries. Ex. DHHS -10 (MBCC Rule); Ex. DHHS-11 (MBCC Provider User Manual); Test. A. Netten. The MBCC application documents clearly list the five registries that are included and are similarly clear that MBCC does not include APS or CPS background checks.

RCSS argues that the doctrine of equitable estoppel applies to the circumstances of this case. The requirements for proof of equitable estoppel against a government entity are set forth by the Law Court in *Dept. of Human Servs. v. Pelletier*, (964 A.2d 630) (Me. 2009).

Equitable estoppel precludes a party "from asserting rights which might perhaps have otherwise existed, . . . against another person who has in good faith relied upon such conduct and, has been led thereby to change his position for the worse, and who on his part acquires some corresponding right." *Waterville Homes, Inc. v. Maine Dep't of Transp.*, 589 A.2d 455, 457 (Me. 1991) (quotation marks omitted); accord *City of Auburn v. Desgrosseilliers*, 578 A.2d 712, 714 (Me. 1990). Equitable estoppel may be applied to the activities of a governmental official or agency in the discharge of governmental functions. *F.S. Plummer Co. v. Town of Cape Elizabeth*, 612 A.2d 856, 860 (Me. 1992). 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. *Tarason v. Town of S. Berwick*, 2005 ME 30, ¶ 15, 868 A.2d 230, 234; *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 34, 856 A.2d 1183, 1194, cert. denied, 544 U.S. 906, 125 S.Ct. 1603, 161 L.Ed.2d 279 (2005). An equitable estoppel defense that is based on reliance on the governmental agency's silence must be proved by "clear and satisfactory" evidence. *Bell*, 1998 ME 123, ¶ 8, 711 A.2d at 1295; *Desgrosseilliers*, 578 A.2d at 715 n. 4. 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).

Section 21 requires providers to complete various background checks on DSPs, including: a criminal background check; an **APS check**; and a **CPS check**; the rule has never specifically required use of the MBCC. (emphasis added) MBM, Ch. II, Sec. 21.10-1(D) and (E); 21.10-8. RCSS has been subject to Section 21 since its inception in 2013, it should have been completing all of these background checks on its DSPs even prior to the time it started using the MBCC (Feb. 2018). When Christine Tiernan was questioned about this, she gave conflicting testimony. She admitted to the Hearing Officer that RCSS did no background checks between April and October of 2014, but it is unclear whether RCSS did any background checks at all from 2014 until 2018.

RCSS's argument per the FIRD Request was that it was told "in 2016" by an unknown individual from DHHS that the MBCC included APS and CPS checks. DHHS-25 and DHHS Pre-Hearing Memo. The evidence presented at hearing was materially different than the initial arguments. At the hearing, Ms. Tiernan testified that Harry Tobey advised Ms. Tiernan in October 2014 that RCSS need not do any checks at all; and RCSS believed that APS and CPS checks were included in the CNA and DCW registry check that is within the MBCC, since CNA/DCW checks include substantiations. Both of these new positions are contradicted by evidence in the record.

RCSS began using the MBCC in February of 2019. However, RCSS was also contacting the Department to do APS checks. Ms. Tiernan testified that they did this in circumstances where they were concerned that there may have been a problem with a certain employee. That it was not uncommon for employees to work for more than one agency and that sometimes agencies shared information. Her testimony led the Hearing Officer to believe that there was an occasional APS check that was done sometime after the MBCC review. However, a review of

DHHS Exhibit 43 (the compilation) shows that there were many APS checks performed and that most of them were contemporaneous with the Maine Background Center checks. This evidence completely contradicts Ms. Tiernan's testimony that she thought APS checks were included in the MBCC checks. In most instances where APS checks were done by RCSS, the Department obtained that information from OADS and not from RCSS. This is further evidence that RCSS did not have adequate record keeping. The Hearing Officer finds Ms. Tiernan's testimony regarding the conversations with Mr. Tobey to not be credible. Although a number of years have passed, Mr. Tobey had a rather good recollection of the conversations. Ms. Tiernan also alleged she had a conversation with a male employee of MBCC in December 2017, who purportedly advised her that it would be "one stop shopping," and that RCSS should wait a couple months after they were onboarded to the MBCC before doing any checks due to glitches in the system. RCSS provided no documentation or other evidence to verify this allegation, and the MBCC Program Manager, Alex Netten, testified that no MBCC employee would have so advised.

When doing a MBCC background check for an employee, the MBCC provides a required release of information form. Ex. RCSS-9. In relevant part, the form states,

You must authorize a release of information relevant to your background, including your criminal history records and any substantiation for child or adult abuse. This information will be sent to the Maine Background Check Center and other Federal or State agencies as needed to investigate your background. The comprehensive background check includes, without limitation, searches of Federal and State criminal history repositories, public registries and databases relevant to health or child care services, and state-maintained databases for abuse and neglect substantiated findings.

RCSS argues that the language of the release form put them on notice that the MBCC was going to include APS and CPS substantiation searches and that they, therefore did not need to perform these checks themselves. The form does provide for the release of APS and CPS substantiations. The legislation establishing the MBCC anticipates that the MBCC would be doing these background checks. However, the MBCC does not yet provide for APS and CPS checks. RCSS is aware of this. The background checks provided by the MBCC to RCSS outline what resources are checked and do not include APS or CPS. RCSS has requested APS checks simultaneously with requesting the MBCC check which negates any argument that they relied on the MBCC to provide those checks.

On August 17, 2022, the Hearing Officer re-opened the record in this matter for the parties to brief whether the Department has the authority to address the equitable estoppel argument. Footnote 1 in *DHHS v. Fagone*, 188 A. 3d 865 (Me. 2018) cites to *Berry v. Board of Trustees of Maine State Retirement System* (663 A.2d 14, 19 (Me. 1995) for the proposition that administrative agencies may not apply equitable doctrines absent statutory authorization. Counsel for both parties submitted written arguments in support of the Department being able to consider the equitable estoppel argument.

The Assistant Attorney General, representing the Department, argued that the holding is not that all administrative agencies lack authority to determine equitable estoppel claims but that only the particular agency lacked the authority. The Court, in *Palian*, clearly expressed that it was appropriate (and did so) for the Department to address equitable estoppel in a MaineCare

recoupment context. In *Fagone*, the Law Court held that equitable arguments were immaterial to child support determinations and that it was appropriate for the Hearing Officer not to address them. *Fagone* has not been applied to situations other than child support. Likewise, the decision in *Berry* was that the Board of Trustees of the Maine State Retirement System did not have jurisdiction to apply equitable estoppel to its decisions. The decision in *Berry* was based on the laws governing the State Retirement System. In *Palian* and *Mrs. T. v. Com'r of Dep't of Health & Hum. Servs.*, 2012 ME 13, the Law Court held that it was appropriate for the Hearing Officer to address the equitable estoppel issues. The Department argued that these decisions are on point and support the Department's ability to address equitable estoppel in this case. Counsel for RCSS agreed.

The applicable laws give the Department the authority to address equitable estoppel in this situation. The authority of the Department to conduct administrative hearings in matters such as this case is governed by the Maine Administrative Procedure Act (MAPA) 5 M.R.S. §§9051 et seq. Additionally, Title 22 M.R.S. §42 grants the Department broad rule making authority. A hearing officer must conduct a hearing on a recoupment appeal de novo on "all issues raised" by the provider. The Department's Administrative Hearing regulations expressly provide that a hearing officer may address estoppel issues. "If a claimant raises constitutional or estoppel issues, these issues shall be addressed in accordance with these rules provided the hearing officer shall consult with Chief Administrative Hearing Officer prior to rendering a final or recommended decision." 10-144-C.R.R.R. ch. 1, §VII(B)(6)(2006). Given the aforementioned caselaw and legal authority, the Hearing Officer recommends that the final decision address the equitable estoppel argument and deny the argument based on the following reasoning:

Mr. Tobey's testimony was credible. It was also consistent with the MaineCare rules, official guidance, and other DHHS witnesses' explanations for how Section 21 providers conduct APS and CPS background checks. Providers must go through OADS and OCFS directly to obtain APS and CPS checks, respectively. Test. W. Logan, Test. A. Netten. Section 21.10-8 states: "The provider shall contact child and adult protective services (including OADS and the Office of Child and Family Services) units within state government to obtain any record of substantiated allegations of abuse, neglect or exploitation against an employment applicant before hiring same." Ex. DHHS-6.

RCSS failed to conduct CPS checks on any of its 347 employees. When questioned by the Hearing Officer, Ms. Tiernan conceded this and stated that she thought RCSS did not have to do any CPS checks. Test. Tiernan. The Hearing Officer also questioned Ms. Marquis about how, given that she was employed by OCFS for four years, she had no knowledge about how one would do a CPS check, and why she failed to contact anyone within OCFS with questions. No reasonable explanation was given.

Both Mr. Tobey and Mr. Logan explained the APS check process, which has always required providers to complete checks directly through OADS. Test. H. Tobey; Test. W. Logan. For example, on August 4, 2018, OADS issued guidance to all Section 18, 20, 21 and 29 providers, instructing them to send an email to "APSCheck.DHHS@maine.gov" to conduct APS checks. Ex. DHHS-15; Test. W. Logan. RCSS argued there is no proof that RCSS actually received the guidance. Test. Tiernan. If RCSS did not sign up to receive such guidance from OADS, RCSS

may not have received the email. Exhibit DHHS-15 is relevant because it is further proof of DHHS's consistent guidance to providers about how to do an APS check. As a Section 21 provider, it is the responsibility of RCSS to be knowledgeable of Department practices and to ensure it is complying with all necessary requirements. Ms. Tiernan testified that rather than contacting a division within the Department directly responsible for a function such as background checks, she would simply ask "someone she knew" a question and then rely on their answers, regardless of whether they were an authority on that subject matter or not. Test. C. Tiernan. Additionally, the record reflects that, during a six-month period (February 2019-August 2019), RCSS in fact completed 31 separate APS checks by sending emails to APSCheck.DHHS@maine.gov. The evidence of the 31 APS checks undermines RCSS's arguments that it thought MBCC included APS checks; it did not receive the OADS guidance and was unaware of how to complete APS checks; and it thought the CNA & DCW registry included APS checks.

RCSS's arguments about the scope of the MBCC and what Section 21 requires for background checks are unfounded, and many were waived because they were not raised in the FIRD Request. Importantly, there is no credible explanation for why RCSS failed to do any background checks at all for 97 of its 347 employees, which amounts to 28% of its workforce. *See Ex.* DHHS-43; Test. Sue Gregoire. At the NOV stage, this number was higher: 51% of RCSS's employees lacked any background checks. *Ex.* DHHS-3 and 4. Since that time, RCSS provided additional documentation (with the FIRD Request and its exhibits for this hearing) to show that it satisfied some of the background check requirements. If further proof of compliance exists, RCSS should have produced it to DHHS, and DHHS would have reviewed and accepted it if possible. *See AngleZ Behavioral Health Servs.*, 2020 ME ¶ 25 (if provider possessed more evidence that would rebut DHHS assertions, it could have presented it, but failed to do so).

Even if RCSS's claims about the Department's supposed misrepresentations on the scope of MBCC checks were believed by the Hearing Officer, and RCSS could show it relied on them, such reliance was unreasonable. As a MaineCare provider, RCSS is **expressly responsible for understanding and applying applicable regulations and requirements for proper billing.** The provider is also responsible for requesting instruction or training, available from the Department, if uncertain as to the application of these regulations and procedures. MCPA, *Ex.* DHHS-1, Sec. D(1)(e) (emphasis added). *See also, Palian*, 2020 ME at ¶ 16 (citing MCPA language, above; provider knew or should have known the MaineCare requirements and that his claims were subject to audit).

Upon cross examination, however, both RCSS witnesses testified that they found the MaineCare rules "complicated," "poorly written," "internally inconsistent," and that RCSS had difficulties understanding the requirements. Test. Tiernan, Test. Marquis. Ms. Tiernan further stated that, "no provider had any idea what they were doing in background checks. That it was very unclear." When questioned about whether Section 21.10-8 (Background Check Criteria) reflects the background check requirements, Ms. Tiernan stated, "...I don't think this document is a clear document, and unfortunately leaves a lot of interpretation to the reader." Test. Tiernan (re-cross). Despite this, RCSS never contacted OMS for guidance on these MaineCare requirements. *Id.*

RCSS did not show by clear and satisfactory evidence that it met the strict requirements for prevailing on an equitable estoppel argument against RCSS. *See Pelletier*, 2009 ME 11. ¶17; *John F. Murphy Homes, Inc. v. State*, 2017 ME 67, ¶¶23, 24, 158 A.3d 921 (reliance on isolated statements by two state employees more than a decade prior was unreasonable as a matter of law). The Department should not be equitably estopped from seeking the 100 percent recoupment proposed in this case. RCSS failed to prove that the Department made statements that the MBCC provided background checks for Adult Protective Services and Child Protective Services. RCSS failed to prove that they relied on any statements or conduct of the department to their detriment. They have failed to prove that any such reliance was reasonable. Based on the totality of the circumstances, their argument must be denied.

II. Did RCSS's employees complete all or substantially all of their required training? If so, does that preclude the Department from recouping the requested funds?

The MaineCare payments received by RCSS were based on billing for Direct Support Professionals (DSP). The MaineCare Benefits Manual sets for the training requirements to be certified as a DSP. The rule that was in place during the audit period is as follows:¹ Ex. DHHS D-6.

21.10-1 Direct Support Professional (DSP)

The following requirements apply to DSPs:

- A. DSPs must successfully complete the Direct Support Professional curriculum as adopted by DHHS, or demonstrated proficiency through DHHS's approved Assessment of Prior Learning, or has successfully completed the Maine College of Direct Support within six (6) months of date of hire.
 - a. Prior to providing services to a Member alone, a DSP must complete the following four modules from the College of Direct Support, including computer based and live sessions:
 - 1. Introduction to Developmental Disabilities
 - 2. Professionalism
 - 3. Individual Rights and Choice
 - 4. Maltreatment
 - b. Documentation of completion must be retained in the personnel record.
- B. DSPs must complete the following Department-approved trainings, within the first six (6) months from date of hire and thereafter every thirty-six (36) months;
 - 1. Reportable Events System (14-197 C.M.R. ch. 12) and Adult Protective Services System (14-197 C.M.R. ch. 12)
 - 2. Regulations Governing Behavioral Support, Modification and Management for People with Intellectual Disabilities or Autism in Maine (14-197 C.M.R. ch. 5)
 - 3. Rights and Basic Protections of a Person with an Intellectual Disability or Autism (34-B M.R.S. §5605).

¹ The Department provided a copy of the rule that was in effect during the audit period. There were revisions to Section 21 during the audit period, but the Hearing Officer is not aware of any that changed the DSP qualification requirements. The current rule is worded differently, but it is not substantially different than what is outlined in this recommended decision. There was no dispute at the hearing regarding the provisions of the rule.

4. DSPs, regardless of capacity and prior to provision of service to a Member, must be trained upon hire and annually thereafter on the Global HCBS Waiver Person Centered Planning and Settings Rule, Maine Care Benefits Manual, Chapter 1, Section 6;
 - C. DSPs must have a background check consistent with Section 21.10-10;
 - D. DSPs must have an adult protective and child protective record check;
 - E. DSPs must be at least eighteen (18) years of age;
 - F. DSPs must have graduated from high school or acquired a GED;
 - G. DSPs must have current CPR and First Aid Certification;
 - H. A DSP is legally authorized to assist with the administration of medication if the DSP is certified as a Certified Nursing Assistant-Medications (CNA-M); as a Certified Residential Medication Aide (CRMA), or a Registered Nurse (RN), or otherwise has been trained to administer medications through a training program specifically for Family-Centered or Shared Living model homes and authorized, certified, or approved by DHHS;
 - I. A DSP who also provides Work Support- Individual or Work Support-Group must have completed the additional employment modules in the Maine College of Direct Support in order to provide services;
 - J. A DSP who also provides Career Planning must successfully complete Maine's "Direct Support Professional Curriculum," or the "Maine College of Direct Support" program and additional employment modules, or the College of Employment Services Certificate, as follows:
 - a. Employment Specialist National (ACRE approved) Certification may be substituted for CDS and employment modules as it is a higher level of staff certification;
 - b. Additional 12 hours of Career Planning and Discovery provided through Maine's Workforce Development System (www.employmentformewds.org) for either the Direct Support Professional or the Employment Specialist;
 - c. An additional 6 hours annually of DHHS approved continuing education;
 - K. A DSP who provides Employment Specialist Services must hold a Certificate of completion of State of Maine Employment Curriculum for Employment Support Personnel and successfully complete Maine's "Direct Support Professional Curriculum" or the "Maine College of Direct Support" program and additional employment modules;
 - a. Employment Specialist National (ACRE approved) Certification may be substituted for CDS and employment modules as it is a higher level of staff certification;
 - L. A DSP who provides Crisis Intervention Services must have behavioral intervention training on approved behavioral interventions procedures (e.g., MANDT);
 - M. All new staff or subcontractors must complete the Maine College of Direct Support within six (6) months of actual employment, calculated from their date of hire. Evidence of date of hire and enrollment in the training must be documented in writing in the employee's personnel file or a file for the subcontractor.
Services provided during this time are reimbursable as long as the documentation exists in the personnel file;
 - N. A person who provides Direct Support must be a DSP regardless of his or her status as an employee or subcontractor of an agency; and
 - O. A DSP can supervise another DSP.
- MaineCare Benefits Manual, Chapter II, §21.10-1(eff. Dec.24, 2017).

Section 21 imposes these requirements for an individual to qualify as a DSP and to render covered MaineCare services to the Section 21 population. The Hearing Officer has reviewed all the information regarding RCSS's employees as summarized in DHHS Exhibit 43. The evidence reflects numerous examples of violations related to lack of First Aid/CPR Certification and DSP certifications. A review of the first 58 employees on the list shows that 21 are either lacking one of the certifications (CPR or First Aid) or the certifications were obtained late. Ms. Gregoire

also testified for the Department regarding the lack of this training documentation. The MaineCare rule is clear that CPR and First Aid Certification are required prior to hire. Final DSP certification can be completed within six months of hire.

RCSS argued that based on the rule's formatting, the "six-month language" at the end of Sec. 21.10-1 applies to all DSP requirements, including background checks, First Aid and CPR Certification, and DSP certification. Test. C. Tiernan, Test. A. Marquis. The provision states, in relevant part:

All new staff or subcontractors shall have six (6) months from their date of hire **to obtain DSP certification.** (emphasis added). Evidence of date of hire and enrollment in the training must be documented in writing in the employee's personnel file or a file for the subcontractor. Services provided during this time are reimbursable as long as the documentation exists in the personnel file.

The provision's clear language reflects that it applies solely to DSP certification. Other provisions of the rule similarly reflect that providers must satisfy the majority of the rule's requirements prior to employment as a DSP.

At the hearing, RCSS also argued that because Section 21.10-1(D) inaccurately references "21.10-10" and not 21.10-8 (Background Check Criteria), RCSS need not follow Sec. 21.10-8 for its DSPs to qualify under Section 21. This typo appears in both versions of the Section 21 rules from 2017 (Ex. DHHS-5 and 6), but the reference is accurate in the rule from 2014 (Ex. DHHS-44). When questioned by the Hearing Officer about this issue, Ms. Tiernan conceded that the Section 21.10-8 requirements were applicable to RCSS, regardless of the typo. This concession also negates RCSS's "six-month language" argument. It is clear to the Hearing Officer that the reference to 21.10-10 instead of 21.10-8 is a typographical/clerical error and therefore, rejects RCSS's argument on this point.

100 percent of the individuals identified as DSPs did not meet the mandatory requirements of Section 21. Their services were, therefore, not "medically necessary" or MaineCare covered services as defined in Chapter 1, Section 1.02-4(E.) of the MaineCare Benefits Manual. To be considered medically necessary, the services must be provided by enrolled providers and within the scope of their licensure or certification and performed within the regulations of the Manual. Because the individuals billed as DSPs did not meet the requirements of Section 21, their services were not reimbursable and, therefore, the Department is entitled to recoup 100 percent of the MaineCare payments to RCSS.

III. Did RCSS provide all of the documentation required? If so, does that preclude the Department from a 100% recoupment?

Section 1.20-2 of Chapter 1 of the MaineCare Benefits Manual provides the rules for sanctions and recoupments in MaineCare matters. Paragraph 1.20-2(H.) states that the Department can impose a penalty due to lack of adequate documentation. When the Department proves by a preponderance of the evidence that a provider has violated MaineCare requirements because it lacks mandated records for MaineCare covered goods or services, the Department in its discretion may impose the following penalties: 1. A penalty equal to one hundred percent

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

As stated in Part II of this Recommended Decision, RCSS failed to prove that the services provided were medically necessary or MaineCare covered services. None of the providers met the requirements of a DSP pursuant to Section 21 of the MaineCare Benefits Manual.

Pursuant to the MaineCare Provider agreement and the MaineCare rules, RCSS was required to retain and provide documentation to Program Integrity upon request. All MaineCare providers must maintain and retain records reflecting compliance with the MBM and accurately documenting the services provided to MaineCare members for a minimum of five years. Section 21 providers must also retain evidence of date of hire and enrollment in training in the DSP's personnel file. MBM, Ch. I, Sec. 1.03-8(M). Additionally, Section 21 providers must retain evidence of date of hire and enrollment in training in the DSP's personnel file. Ex. DHHS-6, (MBM, Ch. II, Sec. 21.10-1(J)). The MaineCare Provider Agreement between RCSS and the Department states that failure to maintain all required documentation may result in sanctions set out in the MBM, including the disallowance and recovery by the Department of any amounts paid to the Provider for which the required documentation is not maintained and provided to the Department upon request. Ex. DHHS-1. (MCPA, Sec. C(3)(c)); *Palian*, 2020 ME 131, ¶ 14. At the time of the FIRD request, RCSS conceded that it failed to satisfy various MaineCare document retention requirements. Ex. DHHS-25. In the FIRD request, RCSS stated that "it does not have access to all documents that demonstrate completion of certain training requirements." Id. The Record Request clearly required RCSS to submit "entire records" for employees and subcontractors employed anytime on or after January 1, 2018. Ex. DHHS-21.

Ms. Tiernan testified that, while she was responsible for RCSS's compliance with MaineCare rules, she was not involved in ensuring MaineCare record retention requirements were satisfied. Ms. Tiernan testified that although she met with others multiple times, she did not personally compile or review the RCSS documents produced for the Department. Ms. Tiernan did not review either set of documents (RCSS or DHHS) prior to the hearing. This lack of personal knowledge undermines her testimony about any of the documentation. On cross examination, Ms. Tiernan admitted that RCSS did not retain all documentation to reflect that RCSS satisfied the Section 21 background check requirements. At each step of the proceedings in this matter, RCSS produced additional documents. Additionally, RCSS purportedly misconstrued the document request to only apply to those hired on or after January 1, 2018, and not to those employed during that time. Therefore, the full scope of non-compliance is not known.

Each time it entered into a new provider agreement, RCSS certified to DHHS that none of its employees are: (i) sanctioned or excluded under Medicaid or other federal programs; (ii) subject to criminal conviction or disciplinary action; or (iii) are **otherwise prohibited from providing services to MaineCare** members. Where RCSS documentation reflects that it failed to complete all required background checks on numerous employees, it violated these terms of the provider agreement. Numerous employees of RCSS lacked the necessary requirements to provide

reimbursable services as DSPs. This information was not made known to the Department when the provider agreements were signed.

Where RCSS documentation reflects that it failed to complete all required background checks on numerous employees, it violated these terms of the MCPA. Because RCSS cannot prove that it satisfied these requirements through documentation, it is subject to recoupment of the MaineCare reimbursement it received during the claims review period. *See, Palian v. DHHS*, 242 A.3d 164 (ME 2020) ME at ¶¶ 16-18. There is no dispute regarding the total paid to RCSS via MaineCare for the audit period. RCSS was paid a total of \$30,233,828.03, all for services that did not meet the definition of “medically necessary”.

IV. Is it inequitable and an act of bad faith for the Department to seek a 100 percent recoupment? (unjust enrichment)

To the extent that this argument involves equitable estoppel, the Hearing Officer has already addressed equitable estoppel above. RCSS also argues that the Department should be barred from recouping any amount of MaineCare reimbursement based on unjust enrichment. “Unjust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship, but when, on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay...” *Paffhausen v. Balano*, 1998 ME 47, ¶6, 708 A.2d 269. As set forth in the FIRD and the DHHS Pre-Hearing Memo, the existence of a contract between RCSS and DHHS is fatal to the assertion of unjust enrichment. *York Cty. v. Property Info Corp.*, 2019 ME 12, ¶ 26, 200 A.3d 803 (contractual relationship “precludes availability of any recovery in equity for unjust enrichment.”); *see also, Bircumshaw v. State*, 194 Wash. App. 176, 205-206 (Ct. App. Wash. 2016) (Medicaid provider argued that the state would be unjustly enriched if it recouped overpayment because services were rendered; unjust enrichment claim failed in part due to Medicaid provider agreement).

There is no dispute that the MCPA is an enforceable contract between the Department and RCSS. RCSS has not alleged that this contract is somehow invalid or unenforceable. The MCPA describes in detail the rights and obligations of each of the parties. Of particular importance to this proceeding, RCSS agreed that:

The Provider will adhere on a continuing basis to all applicable Federal and State laws and regulations related to licensing, accreditation, certification and registration and to adhere to other professional standards governing medical care and services, as well as policies and procedures set forth in the MBM, as these may be amended from time to time. MCPA, Sec. A(6)(a)).

The MCPA also governs how state and federal Medicaid reimbursement is provided by the Department: The Department will reimburse the Provider for MaineCare services provided to Members following the provisions of the MBM. Reimbursement is contingent on the Provider’s, its agents’ and employees’ compliance with the applicable Federal and State Medicaid laws and regulations, the MBM, and the terms and conditions of this Agreement...*Id.* (MCPA, Sec. D(1)); *see also, Doane v. Dep’t of Health and Human Servs.*, 2017 ME 193, ¶ 21 (the MCPA is conditioned on compliance with the MaineCare Benefits Manual).

RCSS received over 30 million dollars of MaineCare reimbursement during the audit period. In support of the unjust enrichment argument, counsel for RCSS reviewed with Ms. Tiernan the definition of “Direct Supports” in Section 21.02-11, asserting that these services were provided by RCSS. Test. C. Tiernan. However due to the lack of compliance, RCSS did not actually provide the covered services (as defined by state and federal Medicaid law) for which it was reimbursed. Section 21 requires that, to be covered, a DSP must perform these services. Because none of the DSPs employed by RCSS were qualified to be DSPs, RCSS did not provide MaineCare covered services as required to receive and retain reimbursement from the Department under Section 21. The Department has already reimbursed the federal government for its share of the funds that were overpaid to RCSS (the federal financial participation), in the amount of approximately \$19.5M. Ex. DHHS-30, Test. W. Logan Test.

For all of the above reasons, the undersigned Hearing Officer recommends that the Commissioner find that Department was correct when for the period of January 1, 2018 through October 31, 2019 it determined that Residential and Community Support Services owes the Department \$30,233.828.03 in recoupment due to 1) non-compliance with the MaineCare Benefits Manual 2) breach of the MaineCare Provider/Supplier Agreement; and/or 3) failure to repay overpayments or payments made in error as found in a Final Informal Decision dated March 4, 2021 and Notice of Violation dated March 13, 2020.

MANUAL CITATIONS:

MaineCare Benefits Manual

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.

THE INFORMATION CONTAINED IN THIS DECISION IS CONFIDENTIAL. See, e.g., 42 U.S.C. section 1396a(a)(7), 22 M.R.S.A. section 42(2) and section 1828(1)(A), 42 C.F.R. section 431.304, MaineCare Benefits Manual, Ch.1, sec. 1.03-5. ANY UNAUTHORIZED DISCLOSURE OR DISTRIBUTION IS PROHIBITED.

DATED: November 1, 2022

SIGNED: /s/ Annalee Bloom, Esq.
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Administrative Hearing Officer
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