



Paul R. LePage, Governor

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DATE MAILED: **MAR 23 2016**

OK
5-26-16
JB

In Re: Trade Winds Health Swim & Tan, Inc.—Appeal of Final Informal Review dated August 29, 2014

RECOMMENDED DECISION

On March 3, 2016, Hearing Officer Joseph Pickering, Esq. held a *de novo* administrative hearing at Rockland, Maine in the case of Trade Winds Health Swim & Tan, Inc. By special appointment, the Commissioner of the Department of Health and Human Services conferred jurisdiction to the Hearing Officer. The Hearing Officer left the record open until March 17, 2016 for the parties to submit written arguments, which both parties did.

FACTUAL BACKGROUND AND ISSUE:

On or about May 2, 2013, the Department of Health and Human Services, Division of Audit, Program Integrity (the "Department") notified Trade Winds Health Swim & Tan, Inc. that based upon improper billing and inadequate records it sought a recoupment of \$130,675.18 for MaineCare claims paid between January 1, 2007 through December 31, 2009. In response, Trade Winds Health Swim & Tan, Inc. provided additional information and comments. On or about August 29, 2014, the Department notified Trade Winds Health Swim & Tan, Inc. that it was reducing the recoupment amount to \$122,953.83 for MaineCare claims paid between January 1, 2007 through December 31, 2009.

On or about November 3, 2014, Trade Winds Health Swim & Tan, Inc. appealed. Pursuant to an Order of Reference dated April 22, 2015¹, this matter was assigned by James D. Bivins, 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 1/1/07 through 12/31/09, it determined that Trade Winds Health Swim and Tan, Inc. (Provider #128010000) owes the department \$122,953.83 in recoupment due to non-compliance with Chapter I, Section 1.03 (M) and Chapter II, Section 85.04, 85.07, and 85.09 of the

¹ The Division of Audit did not notify the Administrative Hearings Unit of the request for hearing until April 21, 2015. In the Fair Hearing Report Form, the Division of Audit stated that the hearing was requested on April 16, 2015. However, this is clearly inaccurate as the request for hearing is date stamped by the Department on November 3, 2014. See Exhibit HO-3 and Exhibit D-8.

MaineCare Benefits Manual; specifically, for treatments provided with no physician orders, or no plan of care signed and dated by a physician, or no documentation that the duration of service was the units of service billed, or that the servicing provider on the bill performed that service, or that the patient met the MaineCare guidelines that would allow for the services rendered?

APPEARING ON BEHALF OF APPELLANT:

Michael Morrison

APPEARING ON BEHALF OF AGENCY:

Thomas Bradley, AAG
Eileen Downs

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer Exhibits:

- HO-1. Notice of Hearing dated 04/30/2015
- HO-2. Order of Reference dated 04/22/2015
- HO-3. Fair Hearing Report dated 04/16/2015
- HO-4. Appeal
- HO-5. DHHS letter dated 08/29/2014
- HO-6. DHHS letter dated 05/02/2013
- HO-7. CPT letter received 07/08/2013
- HO-8. Letter of Thomas Bradley, AAG dated 05/14/2015
- HO-9. Notice of Hearing dated 05/19/2015
- HO-10. Continuance dated 07/24/2015
- HO-11. Notice of hearing dated 07/28/2015
- HO-12. Notice of hearing dated 10/13/2015
- HO-13. Letter of Richard Thackeray, Jr. dated 12/31/2015
- HO-14. Letter of Thomas Bradley, AAG dated 01/07/2015
- HO-15. Continuance request dated 01/11/2016
- HO-16. Letter of Thomas Bradley, AAG dated 01/20/2016
- HO-17. Notice of hearing dated 01/27/2016
- HO-18. Letter of Joseph Pickering, Esq. dated 01/29/2016
- HO-19. Continuance dated 02/03/2016
- HO-20. Notice of hearing dated 02/10/2016
- HO-21. Letter of Joseph Pickering, Esq. dated 02/17/2016

Department Exhibits:

- D-1. Order of Reference dated 04/22/2015
- D-2. Fair Hearing Report Form dated 04/16/2015
- D-3. Request for records letter dated 03/05/2010
- D-4. Expanded request for records letter dated 08/02/2010
- D-5. Notice of violation letter dated 05/02/2013 with attachment
- D-6. Informal review request letter received 07/08/2013
- D-7. Final Informal Review Decision letter dated 08/29/2014 with attachment

- D-8. Administrative hearing request letter received on November 3, 2014
- D-9. MaineCare Benefits Manual, Chapter I—Effective date 02/02/2006
- D-10. MaineCare Benefits Manual, Chapter I—Effective date 12/12/2007
- D-11. MaineCare Benefits Manual, Chapter II, Section 85—Effective date 02/01/2005
- D-12. MaineCare Benefits Manual, Chapter III, Section 85—Effective date 02/01/2005
- D-13. MaineCare HCFA-1500 Billing instructions (Revised 11/02), cover page and instructions for line 25 (K): Servicing Provider
- D-14. CMS/HCFA 1500 Claim Form Instructions for MaineCare covered services (Revised 08/25/2009), introduction and instructions for line 24 (J) Rendering Provider
- D-15. Progress note Member #16 (06/26/2009)
- D-16. Progress note Member #14 (01/02/2008)
- D-17. Progress note Member #11 (08/01/2008) and latest plan of care (01/17/2008)
- D-18. Progress note Member #9 (07/18/2008) and latest plan of care (06/17/2008)
- D-19. Progress note Member #4 (05/22/2007) and latest plan of care (07/25/2006)
- D-20. Progress note Member #23 (02/28/2008)
- D-21. Department's Brief

Appellant Exhibits:

- A-1. Trade Winds Reply Letter—Response to notice of violation
- A-2. Victor Petrowsky—Physical Therapist Assistant License
- A-3. Appellant's Brief

RECOMMENDED FINDINGS OF FACT:

1. Notice of these proceedings was given in a timely and adequate manner. Trade Winds Health Swim and Tan, Inc. made a timely appeal.
2. Trade Winds Health Swim and Tan, Inc. provides physical therapy services.
3. Trade Winds Health Swim and Tan, Inc. treats MaineCare members.
4. In August 2010, the Department started an audit of Trade Winds Health Swim and Tan, Inc. for MaineCare claims paid between January 1, 2007 through December 31, 2009.
5. The audit consisted of a sample of 59 MaineCare claims paid from January 1, 2007 through December 31, 2009.
6. Trade Winds Health Swim and Tan, Inc. waived the issue of whether the sample was a random sample by failing to raise it during the Informal Review Process.
7. During the audit period, the Department paid Trade Winds Health Swim and Tan, Inc. a total of \$158,875.60 for its MaineCare claims.
8. For the sample, the Department paid Trade Winds Health Swim and Tan, Inc. a total of \$2,624.80 for MaineCare claims.
9. During the audit period, Trade Winds Health Swim and Tan, Inc. submitted and was paid for claims that exceeded limits.

10. During the audit period, Trade Winds Health Swim and Tan, Inc. billed excessive units.
11. During the audit period, Trade Winds Health Swim and Tan, Inc. submitted and was paid for claims when it did not have a signed plan of care.
12. During the audit period, Trade Winds Health Swim and Tan, Inc. failed to maintain and retain complete and accurate records that supported services billed.
13. For the Final Informal Review, the Department found that a total of \$2,031.24.00 should be recouped from the sample.
14. The Final Informal Review was accurate.

RECOMMENDED DECISION:

The Department was correct when for the period of 1/1/07 through 12/31/09, it determined that Trade Winds Health Swim and Tan, Inc. (Provider #128010000) owes the department \$122,953.83 in recoupment due to non-compliance with Chapter I, Section 1.03 (M) and Chapter II, Section 85.04, 85.07, and 85.09 of the MaineCare Benefits Manual; specifically, for treatments provided with no physician orders, or no plan of care signed and dated by a physician, or no documentation that the duration of service was the units of service billed, or that the servicing provider on the bill performed that service, or that the patient met the MaineCare guidelines that would allow for the services rendered.

REASON FOR RECOMMENDATION:

Trade Winds Health Swim & Tan, Inc. argued that the audit process itself was faulty and it had objections to specific findings by the Department. The Hearing Officer will first address the issues with the audit process.

MaineCare Benefits Manual, Chapter I, Section 1.18 states:

The Program Integrity Unit, Division of Audit and/or the Department's Authorized Agent are responsible for surveillance and referral activities that may include, but are not limited to: ...

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

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. In addition, providers should be aware that 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.

At the hearing, Trade Winds Health Swim & Tan, Inc. disputed whether the sample was truly random. In its notice of violation, the Department claimed that the sample was random as picked

by a computer program. See Exhibit D-5. Eileen Downs testified for the Department. Ms. Downs testified that she is an auditor. She testified that the Department uses a computer program to pick random samples. Ms. Downs also testified that she became involved with the case after the sample was expanded i.e. after the random sample was drawn. Ms. Downs did not have firsthand knowledge regarding the sampling process.

The Hearing Officer does not fault the Department for failing to provide a witness with firsthand knowledge regarding the selection of the audit sample. When Trade Winds Health Swim & Tan, Inc. requested an informal review and provided additional information, it did not raise as an issue whether the sample was truly random. See Exhibit A-1. MaineCare Benefits Manual, Chapter I, Section 1.21-1 states, "Issues that are not raised by the provider, 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." Since the issue of whether the audit sample was truly random was not raised at the informal review, it is waived. If Trade Winds Health Swim & Tan, Inc. had raised it as an issue, then the Department would have been on notice that it should call a witness with firsthand knowledge. The Hearing Officer is not making a finding of whether the audit sample was truly random. Rather, the Hearing Officer is finding that the issue was waived.

Trade Winds Health Swim & Tan, Inc. also argued that the Informal Review was not conducted in accordance with the MaineCare Benefits Manual. Since Trade Winds Health Swim & Tan, Inc. could not have raised this issue before the Informal Review, it is not waived. Trade Winds Health Swim & Tan, Inc. argued that Eileen Downs was involved in both the initial audit and the informal review. Ms. Downs testified that she was involved in the original audit and the informal review. She testified that Herbert Downs (no relation) signed the Informal Review to show that he agreed with it. Regarding an informal review of an audit, MaineCare Benefits Manual Chapter I, Section 1.21-1 states, "This review will be conducted by the Director of MaineCare Services, or other designated Department representative who was not involved in the decision under review." Trade Winds Health Swim & Tan, Inc. argued that Ms. Downs should not have been involved in the informal review as she conducted the earlier audit. Trade Winds Health Swim & Tan, Inc. argued that no recoupment should be required given this violation of the MaineCare Benefits Manual. See Exhibit A-3.

Herbert Downs is the Director for the Division of Audit. No testimony was presented that Mr. Downs was involved in the initial audit. Based upon Ms. Downs' testimony, it appears that Herbert Downs adopted and approved the informal review. It is more questionable whether Mr. Downs conducted the informal review. Ms. Downs' testimony suggests that she conducted the informal review under Mr. Downs' supervision. Even if the informal review was not conducted in accordance with the MaineCare Benefits Manual, Trade Winds Health Swim & Tan, Inc. did not identify any prejudice that resulted. The informal review did make an adjustment. See Exhibit D-7. More importantly, the Hearing Officer conducts a de novo review in which the Hearing Officer is not bound by decisions previously made by the Department. See Administrative Regulation. The Law Court has stated prejudice must be identified to reverse based upon a procedural unfairness. See Hopkins v. Department of Human Services, 2002 ME 129, 802 A.2d 999. Since no prejudice was identified and since the de novo review by the Hearing Officer would erase any previous prejudice, the Hearing Officer will not reverse on the basis of a possible violation of the MaineCare Benefits Manual.

The Department sought an overpayment for a number of different reasons. These reasons included: 1) excessive visits; 2) lack of signed plan of care; and 3) excessive units billed.

The MaineCare Benefits Manual imposes limits on physical therapy services. There are greater limits on physical therapy services for adults, who are 21 years or older. During the period at issue, MaineCare Benefits Manual, Chapter II, Section 85.04 stated:

Adult members (age twenty-one (21) and over) must have rehabilitation potential documented by a physician or PCP. Adult members are specifically eligible only for: 1. Treatment following an acute hospital stay for a condition affecting range of motion, muscle strength and physical functional abilities; and/or; 2. Treatment after a surgical procedure performed for the purpose of improving physical function; and/or; 3. Treatment in those situations in which a physician or PCP has documented that the patient has at some time during the preceding thirty (30) days, required extensive assistance in the performance of one or more of the following activities of daily living: eating, toileting, locomotion, transfer or bed mobility; and/or 4. Medically necessary treatment for other conditions including maintenance, subject to the limitations in Section 85.07.

MaineCare Benefits Manual, Chapter II, Section 85.07-3(C) limits billing for services provided under MaineCare Benefits Manual, Chapter II, Section 85.04(4) to one visit per condition. Trade Winds Health Swim & Tan, Inc. had numerous incidents of providing more than one visit for services to adults that could not be billed under Section 85.04(1)-(3). See Exhibit D-7. Trade Winds Health Swim & Tan, Inc. argued that the services were medically necessary and that the physicians believed that the services were medically necessary. See Exhibit A-1. The Hearing Officer does not doubt that the services were likely medically necessary. However, the MaineCare Benefits Manual is quite clear that there are billing restrictions on the amount of physical therapy services. Section 85.04 is clear that medically necessary treatment is subject to the limitations of Section 85.07, which only allows one session to be billed.

The MaineCare Benefits Manual requires that physical therapy providers keep records for each MaineCare member. The records must include the physician's or primary care provider's orders. The records also must include a plan of care signed and dated by the physician or primary care provider every three months. See MaineCare Benefits Manual, Chapter II, Section 85.09-2 and Section 85.02-4.

The Department sought recoupment where Trade Winds Health Swim & Tan, Inc. did not have a signed plan of care or the plan of care was more than three months old. Trade Winds Health Swim & Tan, Inc. made a few arguments regarding these issues. For some of the clients, Trade Winds Health Swim & Tan, Inc. argued that the clients were under the age of 21 years and that the services were medically necessary. Trade Winds Health Swim & Tan, Inc. argued that it thought that the same restrictions did not apply to clients under the age of 21 years. Although MaineCare does provide more physical therapy services for persons under the age of 21 years, a signed plan of care by a physician or primary care provider is still required. See MaineCare Benefits Manual, Chapter II, Section 85.09-2 and Section 85.07-1.

In some cases, Trade Winds Health Swim & Tan, Inc. argued that the services were medically necessary but the physician failed to sign the plan of care. Or, Trade Winds Health Swim & Tan, Inc. argued the referral should constitute a plan of care. The rule is clear that the plan of care must be signed by the physician or primary care provider. As Ms. Downs testified, there is a difference between a referral and a plan of care. A referral by a physician results in an evaluation by the physical therapist, which MaineCare covers. See MaineCare Benefits Manual, Chapter II, Section 85.06-1. After the evaluation occurs, the physician and the physical therapist then agree on a plan of care, which outlines the medically necessary services that will be

provided. See MaineCare Benefits Manual, Chapter II, Section 85.09-2. The referral does not constitute a plan of care.

The Department also sought recoupment for excessive units billed. The Hearing Officer has carefully reviewed the materials submitted. For most of the claims for excessive units billed, there was an additional issue of no plan of care or only one service was allowed to be billed under MaineCare Benefits Manual, Chapter II, Section 85.07-3(C). See Exhibit D-7. For the other cases, Trade Winds Health Swim & Tan, Inc. admitted it could not show that it billed properly. See Exhibit A-1. Exhibit D-20 contains the only example where the only issue was excessive units and Trade Winds Health Swim & Tan, Inc. contested the billing issue. Trade Winds Health Swim & Tan, Inc. argued that the time in was 2:00 p.m. and the time out was 2:50 p.m. but it could possibly read 2:30 p.m. See Exhibit A-1 and Exhibit D-20. The Department had only allowed two units to be billed as opposed to four units. See Exhibit D-7. The Department argued that the time out was 2:30 p.m. The Hearing Officer finds that the time out was 2:30 p.m. In reviewing the handwriting, the numbers look like 2:30. This is further supported by the fact that directly below the therapist wrote time for a different session, which was 8:55 in and 9:40 out. The numeral 5 in the "8:55" looks completely different than the middle numeral in the time out that Trade Winds Health Swim & Tan, Inc. claims was 2:50 and the Department contends was 2:30. See Exhibit D-20.

In its notice of violation, the Department also alleged that Trade Winds Health Swim & Tan, Inc. had billed under the wrong provider's name. See Exhibit D-7. Trade Winds Health Swim & Tan, Inc. argued that sometimes billing was done under the name of a different physical therapist in the office but that all physical therapists were MaineCare approved providers. The Department subsequently argued that in all cases where billing occurred under the wrong name there were other issues such as no plan of care or only one service was allowed to be billed under MaineCare Benefits Manual, Chapter II, Section 85.07-3(C). See Exhibit D-21. After reviewing the materials, the Hearing Officer agrees with the Department so the Hearing Officer will not address the issue of billing under the wrong name.

Regarding recoupment due to a sanction, MaineCare Benefits Manual, Chapter I, Section 1.19-2(G) states:

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

The Hearing Officer finds that the 100% recoupment applies to those services provided in excess of the one service allowed under MaineCare Benefits Manual, Chapter II, Section 85.07-3(C).

Since MaineCare specifically limited the physical therapy services to one service, the excess services provided are not MaineCare covered services.

The Hearing Officer finds that the 100% recoupment applies to the services provided whether there was no plan of care. The Hearing Officer finds that Trade Winds Health Swim & Tan, Inc. has not shown by a preponderance of evidence that the services were medically necessary. The signature of the physician on the plan of care is evidence of the physician's opinion that the services are medically necessary. Trade Winds Health Swim & Tan, Inc. did not provide to the Hearing Officer any evidence on why the services were medically necessary beyond a narrative response. See Exhibit A-1. Trade Winds Health Swim & Tan, Inc. did not provide any medical records to the Hearing Officer.

The Hearing Officer finds that the 100% recoupment applies when there was excess billing. Since the services were not actually provided, there should be 100% recoupment.

At the hearing, Trade Winds Health Swim & Tan, Inc. questioned the recoupment for Patient #2. The original payment amount was \$43.20 for four units. The Department found that only three units should have been paid. \$43.20 divided by four equals \$10.80. However, the Department sought a recoupment of \$17.28. The Department explained that there were two issues with Patient #2. There was no dated plan of care and there was the excessive billing. Trade Winds Health Swim & Tan, Inc. noted that the plan of care was faxed so it showed the approximate date of the plan of care. The Department accepted this argument but imposed the 20% recoupment for the lack of date. \$10.80 times 3 times equals \$32.40. 20% of \$32.40 equals \$6.48. \$6.48 plus \$10.80 equals \$17.28. The Hearing Officer finds that the Department correctly calculated the recoupment for Patient #2.

For the Final Informal Review, the Department determined an error rate of 77.39%. The Department found that a total of \$2,031.24 should be recouped from the audit sample. For the audit sample, a total of \$2,624.80 had been paid by MaineCare. \$2,031.24 divided by \$2,624.80 is 0.77386. The Department rounded up to 77.39%. The total amount of MaineCare claims paid during the audit period was \$158,875.60. \$158,875.60 times 0.7739 equals \$122,953.83 (rounded up). See Exhibit D7.

In reviewing all of the materials, the Hearing Officer finds that the Department correctly calculated the recoupment amount for the audit sample. The Department's calculations in determining the final recoupment amount are correct.

Trade Winds Health Swim & Tan, Inc. argued that the MaineCare billing program should have rejected claims that were not authorized. Trade Winds Health Swim & Tan, Inc. noted that other health insurance company billing programs allow for rejection of claims so that a recoupment would not occur years down the road. Trade Winds Health Swim & Tan, Inc. questioned the fairness of going after providers years after the claims were submitted and approved. The MaineCare Benefits Manual specifically authorizes the Department to conduct audits and to seek recoupment for any overpayments identified through the audit process. See MaineCare Benefits Manual, Chapter 1, Section 1.12, Section 1.16, Section 1.17, Section 1.18, and Section 1.19.

Trade Winds Health Swim & Tan, Inc. also argued that it could not afford to pay the recoupment and that it would likely lead to bankruptcy. As noted above, the MaineCare Benefits Manual authorizes the Department to seek overpayments. The MaineCare Benefits Manual does not

state that a provider's inability to pay is a defense to an overpayment. Trade Winds Health Swim & Tan, Inc. also requested a payment plan. The issue for the hearing was determining the amount of the overpayment. The Hearing Officer does not have authority to make recommendations regarding a payment plan.

For all of the above reasons, the undersigned Hearing Officer recommends that the Commissioner find that the Department was correct when for the period of 1/1/07 through 12/31/09, it determined that Trade Winds Health Swim and Tan, Inc. (Provider #128010000) owes the department \$122,953.83 in recoupment due to non-compliance with Chapter I, Section 1.03 (M) and Chapter II, Section 85.04, 85.07, and 85.09 of the MaineCare Benefits Manual; specifically, for treatments provided with no physician orders, or no plan of care signed and dated by a physician, or no documentation that the duration of service was the units of service billed, or that the servicing provider on the bill performed that service, or that the patient met the MaineCare guidelines that would allow for the services rendered.

MANUAL CITATIONS:

MaineCare Benefits Manual, Chapter I
MaineCare Benefits Manual, Chapter II

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(n)(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: March 22, 2016

SIGNED: _____

Joseph M. Pickering /Esq.
Administrative Hearing Officer
Division of Administrative Hearings

cc: Trade Winds Health Swim & Tan, Inc., 2 Park Drive, Suite 102, Rockland, ME 04841
Thomas Bradley, AAG, Office of the Attorney General
Eileen Downs, Program Integrity