



**Department of Health
and Human Services**

*Maine People Living
Safe, Healthy and Productive Lives*

Paul R. LePage, Governor

Mary C. Mayhew, Commissioner

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

In the Matter of: Family Planning Association of Maine

Provider ID No. 105650000

AMENDED ADMINISTRATIVE HEARING RECOMMENDED DECISION (REDACTED)

An administrative hearing in the above-captioned matter was held on April 16, 2015, before Hearing Officer Richard W. Thackeray, Jr., at Augusta, Maine. The Hearing Officer’s jurisdiction was conferred by special appointment from the Commissioner of the Maine Department of Health and Human Services. The hearing record was left open through May 8, 2015, to allow submission of written closing arguments. Thereafter, the hearing record was re-opened through June 22, 2015, with parties specifically requested to brief the hearing officer on the availability of specific legal theories and remedies that had been previously referenced but insufficiently developed.

Pursuant to an Order of Reference dated February 24, 2015, the issues presented *de novo* for hearing were whether the Maine Department of Health and Human Services [“Department”] was “correct when it determined, for the period of 1/1/2006 through 8/31/2010, Family Planning Association of Maine [“FPAM”] was overpaid \$184,620.83 due to uncovered abortion related ancillary charges; E/M coding issues; Depo-Provera billed above acquisition cost; documentation does not support level of services billed; and lack of documentation for services billed?” Ex. HO-2.

APPEARING ON BEHALF OF THE APPELLANT

- Taylor D. Fawns, Esq.
- Evelyn Keiltyka, Senior VP of Services, Family Planning Association of Maine
- George Hill, CEO, Family Planning Association of Maine
- Kate Brogan, VP of Public Affairs, Family Planning Association of Maine
- Amy Black

APPEARING ON BEHALF OF THE DEPARTMENT

- Thomas C. Bradley, AAG
- Greg Nadeau, Program Manager, OMS Program Integrity, Division of Audit, Augusta
- Beth Ketch, Director of Customer Service, DHHS, Augusta
- Janie Turner, OMS, Division of Audit, Augusta

ITEMS INTRODUCED INTO EVIDENCE

Hearing Officer Exhibits

- HO-1: "Notice of an Administrative Hearing," dated February 25, 2015
- HO-2: "Order of Reference," dated February 24, 2015
- HO-3: "Fair Hearing Report Form," dated February 20, 2015
- HO-4: "Request for Supplemental Argument," dated June 5, 2015

Department Exhibits

- D-1: "Order of Reference," dated February 24, 2015
- D-2: "Notice of Violation," dated June 24, 2011
- D-3: "Final Rule," effective date July 1, 2004
- D-4: "Final Rule," effective date October 14, 2005
- D-5: "Final Rule," effective date January 11, 2006
- D-6: "Final Rule," effective date February 2, 2006
- D-7: "Final Rule," effective date December 12, 2007
- D-8: "Final Rule," effective date January 11, 2010
- D-9: "Final Rule," effective date April 1, 1998
- D-10: "Final Rule," effective date February 3, 2004
- D-11: "Final Rule," effective date May 3, 2004
- D-12a: "Final Rule," effective date October 1, 2005
- D-12b: "Final Rule," effective date July 20, 2006
- D-13: "Final Rule," effective date April 1, 2008
- D-14: "Final Rule," effective date September 1, 2008
- D-15: "Final Rule," effective date December 29, 2008
- D-16: "Final Rule," effective date March 29, 2009
- D-17: "Final Rule," effective date March 1, 2010
- D-18: "Final Rule," effective date June 1, 2010
- D-19: "Final Rule," effective date August 9, 2010
- D-20: 42 C.F.R. § 441.200-441.208; 457.440-457.490
- D-21: "State Medicaid Manual," Health Care Financing Adm'n, § 4432 (with fwd. and TOC)

- D-22: "Request for Informal Review," dated August 31, 2011
- D-23: "Receipt of Informal Review Request," dated August 30, 2011
- D-24: "Final Informal Review Decision Letter," dated October 8, 2014, with attached spreadsheet
- D-25: "Record of Member – D [REDACTED] A [REDACTED]," with related spreadsheet
- D-26: "Record of Member – A [REDACTED] M [REDACTED] A [REDACTED]," with related spreadsheet
- D-27: "Record of Member – S [REDACTED] C [REDACTED]," with related spreadsheet
- D-28: "Record of Member – C [REDACTED] E [REDACTED]," with related spreadsheet
- D-29: "Record of Member – L [REDACTED] G [REDACTED]," with related spreadsheet
- D-30: "Record of Member – D [REDACTED] H [REDACTED]," with related spreadsheet
- D-31: "Record of Member – R [REDACTED] W [REDACTED]," with related spreadsheet
- D-32: "Making An Appointment," Family Planning Association
- D-33: "Aspiration Abortion – What happens during the abortion visit," FPAM
- D-34: "Making an Appointment – What is the cost for the abortion," FPAM
- D-35: "Request for Administration Hearing," dated December 5, 2014
- D-36: "MaineCare/Maine Health Program Provider/Supplier Agreement," dated November 4, 2003
- D-37: "MaineCare/Maine Health Program Provider/Supplier Agreement," dated July 3, 2006
- D-38: "MaineCare/Maine Health Program Provider/Supplier Agreement," dated February 24, 2010
- D-39: "Closing Argument," Dep't of Health and Human Services, dated May 8, 2015
- D-40: "Supplemental Argument," Dep't of Health and Human Services, dated June 22, 2015

Appellant Exhibits

- FPAM-1: "MaineCare/Maine Health Program Provider/Supplier Agreement," dated July 1, 1997
- FPAM-2: "Request for Informal Review," dated August 23, 2011
- FPAM-3: "Correspondence, Documents," between FPAM and Dep't of Health and Human Services
- FPAM-4: "Email Chain," Beth Ketch and MaryAnn Anderson, April 11, 2011 .
- FPAM-5: "Email Chain," Beth Ketch, Patricia Dushuttle, Loretta A. Wells, April 11, 2011
- FPAM-6: "Email Chain," Patricia Dushuttle, Sarah Stewart, Beth Ketch, April 20, 2011
- FPAM-7: "Re: Elective Abortions and Related Services"
- FPAM-8: "Closing Argument," FPAM, dated May 8, 2015
- FPAM-9: "Supplemental Argument," FPAM, dated June 22, 2015

STANDARD OF REVIEW

The hearing officer reviews the Department's claim for recoupment against an approved MaineCare services provider *de novo*. DHHS Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § VII (C)(1); Provider Appeals, MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.21-1 (A). The Department bears the burden to persuade the Hearing Officer that, based on a preponderance of the evidence, it was correct in establishing a claim for repayment or recoupment against an approved provider of MaineCare services. 10-144 C.M.R. Ch. 1, § VII (B)(1), (2).

LEGAL FRAMEWORK

The Department administers the MaineCare program, which is designed to provide "medical or remedial care and services for medically indigent persons," pursuant to federal Medicaid law. 22 M.R.S. § 3173. *See also* 42 U.S.C. §§ 1396a, *et seq.* To effectuate this, the Department is authorized to "enter into contracts with health care servicing entities for the provision, financing, management and oversight of the delivery of health care services in order to carry out these programs." *Id.* Enrolled providers are authorized to bill the Department for MaineCare-covered services pursuant to the terms of its Provider Agreement, Departmental regulations, and federal Medicaid law. "Provider Participation," MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03. *See also* 42 C.F.R. § 431.107 (b) (state Medicaid payments only allowable pursuant to a provider agreement reflecting certain documentation requirements); 42 U.S.C. § 1396a (a)(27). Enrolled providers also "must ... [c]omply with requirements of applicable Federal and State law, and with the provisions of this Manual." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (Q). Enrolled providers are also required to maintain records sufficient to "fully and accurately document the nature, scope and details of the health care and/or related services or products provided to each individual MaineCare member." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (M). "The Division of Audit or duly Authorized Agents appointed by the Department have the authority to monitor payments to any MaineCare provider by an audit or post-payment review." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.16. Pursuant to federal law, the Department is also authorized to "safeguard against excessive payments, unnecessary or inappropriate utilization of care and services, and assessing the quality of such services available under MaineCare." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.17. *See also* 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.18; 22 M.R.S. § 42 (7); 42 U.S.C. § 1396a (a)(27); 42 C.F.R. § 431.960. This includes the imposition of "sanctions and/or recoup(ment of) identified overpayments against a provider, individual, or entity," for any of 25 specific reasons for which it may including:

- Presenting or causing to be presented for payment any false or fraudulent claim for services or merchandise;
- Submitting or causing to be submitted false information for the purpose of obtaining greater compensation than that to which the provider is legally entitled;
- Failing to retain or disclose or make available to the Department or its Authorized Agent contemporaneous records of services provided to MaineCare members and related records of payments;

- Breaching the terms of the MaineCare Provider Agreement, and/or the Requirements of Section 1.03-3 for provider participation;
- Failure to meet standards required by State and Federal law for participation (e.g. licensure or certification requirements). ...

MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.19-1 (D).

The Department bears the initial burden to prove “by a preponderance of evidence that a provider has violated MaineCare requirements because it lacks mandated records for MaineCare covered goods or services.” 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.19-2 (G). Once that threshold proof has been made, the Department is afforded discretion to recoup a penalty. The scope of that penalty, however, is limited by the degree to which the provider is able to demonstrate that the billed services were medically necessary, MaineCare covered services, and actually provided to eligible MaineCare members. *Id.* The regulations provide that, “[w]hen 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.

10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.19-2 (G).

To investigate and establish a Section 1.19 sanction, the Department may employ “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;
- E. the implementation of the Restriction Plans (described in Chapter IV of this Manual);
- F. referral to appropriate licensing boards or registries as necessary; and

- G. referral to the Maine Attorney General's Office, Healthcare Crimes Unit, for those cases where fraudulent activity is suspected.
- H. a determination whether to suspend payments to a provider based upon a credible allegation of fraud.

10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.18.

FACTUAL AND PROCEDURAL BACKGROUND

In April 1997, FPAM started providing abortion services at its facility on Gabriel Drive, in Augusta, Maine. Effective July 1, 1997, FPAM entered into a "Medicaid/Maine Health Program Provider/Supplier Agreement" with the Department, through which FPAM first became able to receive reimbursement from the Department for provision of approved medical and related services to enrolled members of the MaineCare program. Ex. FPAM-2. FPAM renewed its MaineCare Provider Agreement on November 4, 2003; on April 28, 2006; and on November 4, 2009. Ex. D-36; Ex. D-37; Ex. D-38.

On or about November 15, 2010, the Department's MaineCare Program Integrity Unit requested from FPAM ten records of MaineCare claims submitted for reimbursement. On April 11, 2011, the Department requested another 100 claims from FPAM from the period of 2006 to 2010.

On June 24, 2011, the Department issued a Notice of Violation against FPAM alleging *inter alia* that FPAM had been overpaid MaineCare billing claims totaling \$188,354.73 based on an approved sampling process into the records of the 100 randomly selected members who received transvaginal ultrasound procedures through FPAM. Ex. D-2. The Notice of Violation specifically alleged four sets of violations:

- Billing abortion related ancillary services for non-covered abortions;
- Improper coding for E/M ("evaluation and management") services billed;
- Depo-Provera billed above acquisition cost;
- No documentation for services billed.

Ex. D-2. On August 23, 2011, FPAM timely requested an informal review of the Department's June 24, 2011 Notice of Violation, outlining specific disputes as to the Department's central findings, arguing that:

- Ancillary services provided on the same day as non-covered abortion procedures are reimbursable under state and federal authority;
- Abortion patients were correctly coded as "new patients," even if they were established patients of the independent FPAM family planning practice;
- FPAM's Depo-Provera records demonstrate billing at acquisition cost;

Ex. FPAM-2.

The Department acknowledged receipt of FPAM's informal review request on August 30, 2011, and undertook its review over the course of the ensuing three years. Ex. D-23; Ex. D-24. On October 8,

2014, the Department issued a Final Informal Review Decision, amending several specific findings included in the June 24, 2011 Notice of Violation, reducing the original recoupment amount to \$184,620.83, and affirming the central finding that FPAM was subject to such recoupment because it received MaineCare payments for non-covered abortion-related services. Ex. D-24. Specifically, the Final Informal Review Decision reflected:

- No changes to recoupment claims for abortion-related services billed;
- No changes to recoupment claims for new/established patient E/M coding;
- Recoupment claims reduced for properly billed Depo-Provera claims;
- Recoupment claims reduced to reflect properly billed ultrasound procedure;
- No changes to recoupment claims for failure to properly document providers' identities.

Ex. D-24. The Final Informal Review Decision also noted that:

... the original recoupment amount of \$188,354.73 has been reduced to \$184,620.83. With the above adjustments, the overpayment now totals \$11,285.67 for the sampled records resulting in an error rate of 89% ($\$11,285.67 - \text{overpayments} \div \$12,634.93 - \text{paid amount}$). The total amount paid by MaineCare for members that received an ultrasound and other services on the same date of services was \$207,439.13. Applying the 89% error rate to the total amount paid results in the \$184,620.83 overpayment ($\$207,439.13 \times 89\% = \$184,620.83$).

Ex. D-24.

On December 5, 2014, FPAM timely requested an administrative hearing. Ex. D-35. The present hearing followed.

RECOMMENDED DECISION

The Department was **correct** when it determined, for the period of January 1, 2006 through August 31, 2010, Family Planning Association of Maine was overpaid \$184,620.83 due to uncovered abortion related ancillary charges; E/M coding issues; Depo-Provera billed above acquisition cost; documentation does not support level of services billed; and lack of documentation for services billed.

RECOMMENDED FINDINGS OF FACT

1. In accordance with agency rules, the Family Planning Association of Maine ["FPAM"] was properly notified of the time, date, and location of the immediate proceeding. Ex. HO-1.

2. FPAM, now known as "Maine Family Planning," is a Maine non-profit corporation that provides family planning services to individuals at 18 facilities throughout Maine. In April 1997, FPAM started providing abortion services at its facility on Gabriel Drive, in Augusta. At that time, FPAM operated a single facility and did not provide any medical or support services other than those required as an incident to the provision of abortion services. Ex. FPAM-8.

3. Effective July 1, 1997, FPAM entered into a “Medicaid/Maine Health Program Provider/Supplier Agreement” with the Department, through which FPAM became able to receive reimbursement from the Department for provision of covered medical and related services to enrolled members of the MaineCare program. FPAM renewed its MaineCare Provider Agreement on November 4, 2003; on April 28, 2006; and on November 4, 2009. Ex. FPAM-2; Ex. D-36; Ex. D-37; Ex. D-38.
4. Prior to entering into its Medicaid/MaineCare Provider Agreement with the Department in 1997, FPAM administrators Evelyn Kieiltyka and Amy Black met with the Department’s provider relations representative, Beth Ketch, to discuss which of FPAM’s services would be reimbursable under MaineCare and which billing codes should be used when submitting reimbursement claims. The FPAM administrators expressly identified that most, if not all of services for which FPAM would seek reimbursement were ancillary to the provision of abortions or abortion-related services.
5. Prior to FPAM entering into its Medicaid/MaineCare Provider Agreement with the Department, Beth Ketch verbally advised the FPAM administrators that abortion-related services including, but not limited to, related office visits, trans-vaginal ultrasounds, Rh blood testing, RhoGAM injections, and evaluation and management services, were reimbursable by MaineCare, and provided FPAM with coding and billing guidance related to the provision of such services.
6. The Departmental regulations that were in effect on July 1, 1997, provided that abortion services were not reimbursable through MaineCare except in cases where such a procedure was necessary to save the life of the mother, or where the pregnancy was the result of an act of rape or incest.
7. The Departmental regulations that were in effect on July 1, 1997, did not include the express provision that barred reimbursement for all services related to an underlying procedure for which reimbursement was not available. The provision effecting this limitation was appended to the Departmental regulations, effective May 3, 2004.
8. Between May 3, 2004 and August 9, 2010, the Department ten times amended Section 90 of the MaineCare Benefits Manual through the formal rulemaking process established by the Maine Administrative Procedures Act, 5 M.R.S. §§ 8051-8074. No changes have been made to the abortion services-specific language of MBM Section 90.05-2 (A) since May 16, 1994. No changes have been made to the “all services related to that procedure” provision of MBM Section 90.07 since May 3, 2004.

REASONS FOR RECOMMENDATION

As noted above, the Department bore the burden at hearing to demonstrate by a preponderance of evidence that it correctly established the recoupment claim of \$184,620.83 against FPAM for reasons supported by the MaineCare statutes and regulations. At hearing, the Department described the process by which it employed random sampling of FPAM’s billing claims to investigate and establish that FPAM was incorrectly reimbursed for certain medical and related procedures provided for its patients. Test. of Greg Nadeau. As a result, the Department identified four general categories of violations that

were included as bases for recoupment from FPAM. Ex. D-39. Chiefly, the Department alleged that recoupment was warranted for all billed services that were related to an underlying non-covered abortion. Second, the Department alleged that FPAM improperly coded several billed procedures as “new patient” visits that should have been billed using a lower rate code for established patient visits. Third, the Department alleged that a selection of the billing claims were subject to recoupment because FPAM failed to provide adequate documentation to demonstrate that the billed services were reimbursable by MaineCare. Finally, the Department alleged that a single recoupment claim was presented because the billed service was duplicative and therefore not medically necessary.

FPAM did not dispute the Department’s extrapolation method or penalty determinations made pursuant to 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.19-2 (G). FPAM’s focused its arguments against the chief allegation in the Department’s Final Informal Review Decision, that is, that the Department correctly included in its recoupment claim all previously billed services for procedures related to a non-covered abortion. The bulk of this decision concerns this central disagreement, but to the extent that FPAM renewed its secondary disputes, they are addressed below.

Availability of MaineCare reimbursement for services related to non-covered abortions

The essence of FPAM’s argument at hearing concerned the Department’s determination that recoupment was appropriate for all billed services that related to non-covered abortions. Section 90 of the MaineCare Benefits Manual [“MBM”] provides:

In compliance with PL 103-112, the Health and Human Services Appropriations bill, reimbursement for abortion services will be made only if necessary to save the life of the mother, or if the pregnancy is the result of an act of rape or incest.

Abortion services are covered only when performed in a licensed general hospital or outpatient setting, and when the following conditions are met:

1. A physician has found, and so certified in writing to the Department, that on the basis of his/her professional judgment an abortion is necessary to save the life of the mother; or the pregnancy is the result of an act of rape; or the pregnancy is the result of an act of incest.
2. If the abortion is performed in order to save the life of the member, the certification must contain written justification as to the necessity of the abortion procedure.
3. The certification must contain the name and address of the member.
4. The member’s medical record shall be documented as to the circumstances of the abortion procedure.

...

The physician's certification must be submitted to the Department. The member’s medical record is not required for submission, however, it must be available for review by the Department, upon request.

In compliance with federal requirements, the Department will reimburse for the procedure if the treating physician certifies that in his or her professional opinion, the member was unable for physical or psychological reasons to comply with established reporting requirements, if any, in cases of rape or incest.

Although no payment can be made until the provider submits all required documentation to the Department, the provider should provide necessary medical services immediately as needed.

10-144 C.M.R. Ch. 101, sub-Ch. II, § 90.05-2 (A). The regulations also provide that “[w]hen MaineCare does not cover specific procedures, all services related to that procedure are not covered, including physician, facility, and anesthesia services.” 10-144 C.M.R. Ch. 101, sub-Ch. II, § 90.07.

On July 1, 1997 – when FPAM became an enrolled MaineCare provider – Departmental regulations provided that abortion services were not reimbursable through MaineCare except in cases where such a procedure was necessary to save the life of the mother, or where the pregnancy was the result of an act of rape or incest. Ex. D-9. See 10-144 C.M.R. Ch. 101, sub-Ch. II, § 90.05-2 (eff. May 16, 1994). However, Departmental regulations did not, at that time, include the provision that barred reimbursement for all services related to an underlying procedure for which reimbursement was not available. Ex. D-9. See 10-144 C.M.R. Ch. 101, sub-Ch. II, § 90.07 (eff. May 16, 1994). On May 3, 2004, the Department adopted a final rule amending Section 90 that eliminated coverage for any services provided to a member that were “related to” an a non-covered service. Ex. D-11. See 10-144 C.M.R. Ch. 101, sub-Ch. II, § 90.07 (eff. May 3, 2004). Thereafter, through August 9, 2010, the Department adopted ten Final Rules amending some portion of Section 90, none of which effected changes to either the abortion-specific provisions in Section 90.05-2 (A) or the “all services related to that procedure” provision of MBM Section 90.07. Ex. D-12a; Ex. D-12b; Ex. D-13; Ex. D-14; Ex. D-15; Ex. D-16; Ex. D-17; Ex. D-18; Ex. D-19.

The Department demonstrated that all of the Final Rules amending the relevant terms of Section 90 were properly noticed and otherwise comported to the strictures of the Maine Administrative Procedures Act, 5 M.R.S. §§ 8051-8074. The Department then demonstrated that FPAM had an express obligation under its MaineCare Provider Agreement and the corresponding requirements of the Departmental regulations to provide and bill for services in keeping with all service-specific requirements of the MaineCare Benefits Manual. Ex. FPAM-1; Ex. D-36; Ex. D-37; Ex. D-38. See 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (R).¹

FPAM did not allege any notice issue or other procedural infirmity with the Section 90 Final Rule adopted by the Department, effective May 3, 2004, that added language making a “non-covered service” any procedure or service related to a non-covered service. Nor did FPAM successfully allege any circumstances such as might have relieved it from the duty to remain abreast of changes to the MaineCare Benefits Manual and all other changes to applicable Medicaid laws. As such, it is concluded that any such argument is waived for the purpose of this proceeding. Instead, FPAM first focused on the Department’s Final Informal Review Decision, which stated:

Although federal regulations may allow for federal financial participation for some related services reimbursement, Maine does not choose to cover any additional or ancillary services

¹ “Enrolled providers must ... [c]omply with requirements of applicable Federal and State law, and with the provisions of this Manual.” *Id.*

as stated in the above MaineCare rules and regulations. Therefore, the ancillary charges provided on the same day as the abortions are not considered covered services by MaineCare.

Ex. D-24; Ex. FPAM-8. FPAM then argued that no language in the governing federal regulations “prohibits state Medicaid agencies from reimbursing providers for abortion procedures that fail to meet federal eligibility requirements or, more importantly for purposes of this appeal, for ancillary services rendered on the same day as an abortion procedure.” Ex. FPAM-8. Finally, FPAM argued that the ancillary or related services – i.e. trans-vaginal ultrasound, Rh blood testing, RhoGAM injections, office visits – “are distinct from an actual abortion procedure and, as discussed, are services that meet the standard of care for any pregnant woman whether she carries the pregnancy to term or terminates it at some point.” Ex. FPAM-8.

While FPAM is correct in its observation that “there is no reference to ‘same day’ in the regulations cited by the Division of Audit in its Decision,” the Department’s passing use of “same day” is merely a reference to the actual regulatory standard employed in its decision. And it should be noted that the MaineCare program is administered in the manner established by the MaineCare Benefits Manual. The MaineCare Benefits Manual incorporates the procedural requirements approved by the federal government in its State Medicaid Plan, follows from the informal guidance and formally adopted regulations published by the Centers for Medicare and Medicaid Services [“CMS”], and comports to all requirements imposed by the Medicaid Act. However, FPAM’s argument about the lack of any federal regulatory abortion reimbursement prohibition fails to focus on the correct inquiry with respect to the federal-state partnership central to the Medicaid program. The Department has demonstrated that its regulatory provisions – those deeming certain abortions and all services reasonably construed as “related to” the same abortions are “non-covered services” – are consistent with the requirements of federal Medicaid law. FPAM provided no evidence to the contrary.

Finally, the Department provided evidence that its audit process was able to differentiate between the listed services – i.e. trans-vaginal ultrasound, RH blood testing, RhoGAM injections, and office visits – when they were provided by FPAM in connection with an abortion visit and when provided by FPAM in connect with a MaineCare-coverable service. Test. of Greg Nadeau. Testimony presented for FPAM did not contradict the Department’s contention that it correctly distinguished abortion-related services from those services provided ancillary to other, coverable women’s reproductive health procedures. Test. of Evelyn Kieltyka; Test. of Amy Black. In as much as there is no dispute as to the provision of the identified trans-vaginal ultrasounds, blood typing tests, RhoGAM injections, and abortion-related office visits by FPAM or that the same were provided ancillary to non-covered abortions, it is concluded that the Department corrected determined that those related services were “non-covered services” for the purposes of establishing a recoupment claim for the same.

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

FPAM’s primary argument against the Department’s recoupment claim flowed from informal guidance FPAM administrators allegedly received from Departmental officials at the time of its initial enrollment with MaineCare. Ex. FPAM-8. As FPAM alleged in its closing argument, “FPAM had

every reason to believe that MaineCare understood the program and benefits that it administers, and FPAM's reliance on MaineCare's own interpretation of the regulations governing it, as well as the specific guidance MaineCare had provided to FPAM, was entirely reasonable." Ex. FPAM-8. FPAM additionally noted, "When FPAM applied to become a provider under the program, it had every reason to believe that it was entitled to rely on the guidance provided by officials employed within the MaineCare program and, in fact, it did so rely." Ex. FPAM-9.

In accordance with the Department's administrative hearings regulations, the Hearing Officer has limited authority to address equitable estoppel issues. *See* 10-144 C.M.R. Ch. 1, § VII (B)(6). The "doctrine of equitable estoppel may prevent a government entity from discharging governmental functions or asserting rights against a party who detrimentally relies on statements or conduct of a government agency or official." *State v. Brown*, 2014 ME 79, ¶14, 95 A.3d 82, 87. However, equitable estoppel "should be carefully and sparingly applied, especially where application would have an adverse impact on the public fisc." *Mrs. T. v. Comm'r of Dep't of Health and Human Servs.*, 2012 ME 13, ¶10, 36 A.3d 888, 891 (*citation omitted*). "To prove equitable estoppel against a governmental entity, the party asserting it must demonstrate that (1) the statements or conduct of the governmental official or agency induced the party to act; (2) the reliance was detrimental; and (3) the reliance was reasonable." *Dep't of Health and Human Servs. v. Pelletier*, 2009 ME 11, ¶17, 964 A.2d 630, 635. *See also Mrs. T.*, 2012 ME 13, ¶9, 36 A.3d at 891 (party asserting equitable estoppel defense has the burden of proof). "Equitable estoppel requires misrepresentations, including misleading statements, conduct, or silence, that induce detrimental reliance." *Dep't of Human Servs. v. Bell*, 1998 ME 123, ¶8, 711 A.2d 1292, 1295. The "totality of the circumstances, including the nature of the government official or agency whose actions provide the basis for the claim and the governmental function being discharged by that official or agency" must be considered in determining whether governmental action should be equitably estopped. *Pelletier*, 2009 ME 11, ¶17, 964 A.2d at 636.

"Equitable estoppel based on a party's silence will only be applied when it is shown by clear and satisfactory proof that the party was silent when he had a duty to speak." *Bell*, 1998 ME 123, ¶8, 711 A.2d at 1295 (*citation omitted*). "Clear and satisfactory proof means clear and convincing proof." *Littlefield v. Adler*, 676 A.2d 940, 942 (Me. 1996). The requirement of "clear and convincing evidence" is "an intermediate standard of proof lying between the preponderance and the reasonable doubt standards," where "[t]he factfinder must be persuaded, on the basis of all the evidence, that the moving party has proved his factual allegations to be true to a high probability." *Taylor v. Comm'r of Mental Health and Mental Retardation*, 481 A.2d 139, 154 (Me. 1984).

As noted above, the Department was authorized to reimburse providers for services "related to" all abortions through May 3, 2004, the effective date for the provision barring coverage of services related to a non-covered abortion. FPAM alleged that "shortly after it began providing abortion services" in April 1997 and for the ensuing "several months," FPAM administrators Evelyn Kieltyka and Amy Black engaged in a dialogue with the Department's provider relations representative Beth Ketch, which included the specific guidance that trans-vaginal ultrasounds, Rh blood testing, and E/M services could be billed to MaineCare and instructions for proper coding of such procedures, even where

related to a non-covered abortion. Ex. FPAM-8; Test. of Evelyn Kieltyka; Test. of Amy Black; Test of Beth Ketch. FPAM did not specifically allege any other verbal or informal guidance from Ms. Ketch or other Departmental official after May 3, 2004, about the reimbursability of services related to non-covered abortions. Thus, FPAM's argument appears to be that its officials detrimentally relied upon Ms. Ketch's subsequent silence – i.e. failure to affirmatively correct her informal, verbal guidance to FPAM – with regard to changes in MaineCare policy that took effect on May 3, 2004.

FPAM's evidence is persuasive that Ms. Ketch represented to FPAM administrators, during the pre-May 3, 2004 period, that MaineCare would cover billed services related to abortions, even where those abortions were not, in and of themselves, MaineCare-covered services. Moreover, FPAM has sustained its burden to demonstrate that its administrators relied upon Ms. Ketch's pre-May 3, 2004 statements; that they relied upon Ms. Ketch's post-May 3, 2004 silence on the MaineCare policy change with respect to abortion-related services; and that this reliance was detrimental. However, FPAM has not sustained its burden to demonstrate that its reliance on Ms. Ketch's silence, post-May 3, 2004, was reasonable.

Here, FPAM argued that the informal guidance given to Ms. Kieltyka and Ms. Black by Ms. Ketch in 1997 continued to be binding upon the Department, despite intervening rulemakings that substantially changed the way MaineCare identified reimbursable services related to the provision of abortion services. By FPAM's logic, Ms. Ketch needed to informally retract her informal guidance, despite the fact that MaineCare already formally amended its policy pursuant to the Maine Administrative Procedures Act rulemaking process. This logic contradicts the plain terms of FPAM's MaineCare provider agreement as well as the simpler logic that government contractors have a responsibility to monitor changes to the regulations that govern its billing practices. As such, it is concluded that FPAM has not shown, to a high probability, that its reliance on Ms. Ketch's silence was reasonable.

FPAM further alleged that evidence of internal confusion among OMS staff suggests a basis for invalidating the application of a formally promulgated regulation – that the Department should be estopped from enforcing a duly adopted rule because email transcripts demonstrate either confusion or ineffective communication among OMS staff over current reimbursement policy. FPAM cannot prevail with this argument without producing evidence of direct guidance from Departmental staff specifically telling FPAM that abortion-related services remained reimbursable, expressly contradicting the plain language of the regulations. No evidence of written guidance was produced at hearing, and while Ms. Kieltyka testified that she thought she continued to receive such assurance from Ms. Ketch or other staff, she could not be certain. Test. of Evelyn Kieltyka. Instead, FPAM relied heavily on internal correspondence between 2005-2011, demonstrating a lack of common awareness among various Departmental employees and contract officials over whether services related to non-covered abortions were eligible for MaineCare reimbursement. Ex. FPAM-3, pp. 82-108. However, FPAM did not present any evidence of affirmative communication from Departmental officials to FPAM or other abortion services providers suggesting that they could bill for services related to non-covered abortions after May 3, 2004. Ms. Ketch testified that she did not believe she gave any such guidance or advice to

FPAM, other than her concession that “in the 90s ... I had no reason to doubt that that might have happened.” Test. of Beth Ketch. FPAM, therefore, has not sustained its burden of proof with respect to affirmative statements made by Ms. Ketch or other unspecified Departmental officials during any of the period following May 3, 2004, in which MaineCare policy forbade reimbursement for services related to a non-covered abortion. Accordingly, FPAM cannot maintain an equitable estoppel defense against the Department’s recoupment claim for MaineCare reimbursements for services related to non-covered abortions.

Other arguments

FPAM argued that the Department failed to demonstrate the legal sufficiency of its process for differing coding treatment of E/M services based on the MaineCare member’s status as a new or established patient. At hearing, Program Integrity program manager Greg Nadeau testified about the process by which MaineCare treats office visits where both reimbursable services and non-covered services are provided. Test. of Greg Nadeau. Further, the Department demonstrated that adjustments to the initial recoupment claim were made in response to FPAM’s request for informal review, many of which resulted from the finding that certain excluded service claims were coverable at a reduced rate. Ex. 22; Ex. D-24; Test. of Greg Nadeau. It is concluded that the Department sustained its burden to demonstrate that it correctly calculated the recoupment amounts for differently treated E/M and related office visits.

Moreover, the Department sustained its burden to demonstrate that it correctly included within its recoupment claim those services for which FPAM did not produce Departmentally requested “contemporaneous financial, provider, and professional records sufficient to fully and accurately document the nature, scope and details of the health care and/or related services or products provided to each individual MaineCare member.” 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (M).

Finally, it is concluded based on the parties’ representations at hearing and respective written closing arguments that preliminary disagreements over the amounts billed for Depo-Provera injections were resolved prior to hearing. As such, no determination with respect to these issues is necessary.

Therefore, the Hearing Officer recommends that it be concluded that the Department was **correct** when it determined, for the period of January 1, 2006 through August 31, 2010, Family Planning Association of Maine was overpaid \$184,620.83 due to uncovered abortion related ancillary charges; E/M coding issues; Depo-Provera billed above acquisition cost; documentation does not support level of services billed; and lack of documentation for services billed.

MANUAL CITATIONS

- DHHS Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § VII (2014)
- MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101 (2014).

RIGHT TO FILE RESPONSES AND EXCEPTIONS

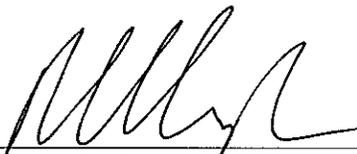
THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS. ANY WRITTEN RESPONSES AND EXCEPTIONS MUST BE RECEIVED BY THE DIVISION OF ADMINISTRATIVE HEARINGS WITHIN FIFTEEN (15) CALENDAR DAYS OF THE DATE OF MAILING OF THIS RECOMMENDED DECISION.

A REASONABLE EXTENSION OF TIME TO FILE EXCEPTIONS AND RESPONSES MAY BE GRANTED BY THE CHIEF ADMINISTRATIVE HEARING OFFICER FOR GOOD CAUSE SHOWN OR IF ALL PARTIES ARE IN AGREEMENT. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE DIVISION OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. COPIES OF WRITTEN RESPONSES AND EXCEPTIONS MUST BE PROVIDED TO ALL PARTIES. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

CONFIDENTIALITY

THE INFORMATION CONTAINED IN THIS DECISION IS CONFIDENTIAL. See 42 U.S.C. § 1396a (a)(7); 22 M.R.S. § 42 (2); 22 M.R.S. § 1828 (1)(A); 42 C.F.R. § 431.304; 10-144 C.M.R. Ch. 101 (I), § 1.03-5. ANY UNAUTHORIZED DISCLOSURE OR DISTRIBUTION IS PROHIBITED.

Dated: 8/11/15



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Administrative Hearing Officer

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