

TO: John R. Nicholas, Commissioner
Department of Human Services
221 State Street
11 State House Station
Augusta, ME 04333

In Re: Pathways Inc–Appeal Of Reallocation Of General And Administrative Cost During The Maine
Care Day Habilitation Audit For Fiscal Year Ending June 30, 2003

RECOMMENDED DECISION

An administrative hearing was held on October 3, 2005, at Lewiston, Maine in the case of Pathways Inc. before Miranda Benedict, Hearing Officer. The Hearing Officer’s jurisdiction was conferred by special appointment from the Commissioner, Department of Health and Human Services. The record was kept open until October 24, 2005 to afford the parties an opportunity to submit closing arguments. Arguments were received by that date and the record was closed.

ISSUE PURSUANT TO ORDER OF REFERENCE:

Pursuant to an Order of Reference dated December 1, 2003, this matter was referred to the Office of Administrative Hearings for a Hearing Officer to conduct an administrative hearing and to submit to the Commissioner written findings of fact and recommendations on the following issue:

Was the Department correct when it reallocated general and administrative costs during the Maine Care Day Habilitation audit for Pathways, Inc. for fiscal year ending June 30, 2003??

APPEARING ON BEHALF OF APPELLANT:

Michael Packard
Paul Bouchard
Robert Provenchur

APPEARING ON BEHALF OF AGENCY:

Jane Gregory
Mike Lamerou, Audit Supervisor

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer Exhibits:

- HO-1. Rescheduling Notice dated August 10, 2005 and Notice of Hearing dated August 3, 2005
- HO-2. Order of Reference dated August 1, 2005
- HO-3. Hearing Report dated August 1, 2005
- HO-4. Acknowledgment of Request for Hearing dated July 26, 2005
- HO-5. Request for Hearing dated July 21, 2005
- HO-6. Letter from Mr. Packer to Mr. Downs dated September 21, 2005
- HO-7. Closing Argument submitted by Pathways, Inc.
- HO-8. Closing Argument submitted by the Office of The Attorney General dated October 24, 2005

Department Exhibits:

- DHS-1. MaineCare Benefits Manual, Chapter III, Section 50
- DHS-2. MaineCare Benefits Manual, Chapter III, Section 50, with Amendments up to April 1989
- DHS-3. MaineCare Benefits Manual, Chapter III, Section 50, with Amendments up to April 1988
- DHS-4. MaineCare Benefits Manual Chapter III Section 24
- DHS-5. Medicare Provider Reimbursement Manual section 2150
- DHS-6. Pathways Inc. Cost Report for period July 1, 2002 to June 30, 2003
- DHS-7. Audit Report dated April 15, 2005
- DHS-8. Request for Informal Review dated May 9, 2005
- DHS-9. Final Informal Review Decision dated June 20, 2005
- DHS-10. Request for Hearing dated July 21, 2005
- DHS-11. Agreement to Purchase Services dated July 1, 2002
- DHS-12. Medicaid/Maine Health Program Provider/Supplier Agreement January 10, 1997

RECOMMENDED FINDINGS OF FACT:

A. Background

1. Notice of these proceedings was given timely and adequately. Pathways Inc. made timely appeal.
2. Pathways, Inc. is a private non-profit corporation that provides several different kinds of services, only one of which is a Day Habilitation program.
3. The Day Habilitation program, called “Personal and Social Development”, is the only MaineCare program run by Pathways and is the only program that was the subject of the audit and this appeal.
4. As a Maine Medicaid Day Habilitation Provider, Pathways Inc. is required to file a cost report with the Department of Human Services, Division of Audit (the “Division of Audit”) at the end of its fiscal year.
5. On September 25, 2003 Pathways filed a Cost Report for Day Habilitation Services for the Fiscal Year Ending June 30, 2003.
6. On April 15, 2005 The Division of Audit filed an Audit Report Transmittal for Pathways Day Habilitation services for the Fiscal Year Ending June 30, 2003 indicating an overpayment of MaineCare payments by \$15,628.00.
7. On May 9, 2005 Pathways requested an informal review of the April 15, 2005 Audit Report Transmittal.
8. The Final Informal Review Decision dated June 20, 2005 upheld the audit report finding that resulted in an overpayment of \$15,628.00.
9. On July 21 2005 Pathways appealed the June 20, 2005 Final Informal Review Decision and requested an administrative hearing.

RECOMMENDED DECISION:

The Hearing Officer recommends that the Commissioner find that the Department was correct when it reallocated general and administrative costs during the Maine Care Day Habilitation audit for Pathways, Inc. for fiscal year ending June 30, 2003

REASON FOR RECOMMENDATION:

In its 2003 cost report, Pathways had used a general and administrative allocation of 19.91% which meant that 19.91% of its general and administrative costs would be charged against its Day Habilitation program. The Department, in its audit, used an allocation of 12.53%. The difference in allocation percentages resulted in Pathways, Inc. being overpaid by MaineCare a total of \$15,628.00.

Rules governing the allocation of costs for a Day Habilitation provider are contained in three separate rules. *Chapter III, Section 24, Day Habilitation Services for Persons with Mental Retardation, MaineCare Benefits Manual* directs providers to *Section 50 of the Manual, Intermediate Care Facilities for the Mentally Retarded*, for guidance on the method of cost allocation. According to Section 50, subsection 4, “Cost reports for day habilitation services shall be used by providers and filed in accordance with the requirements of the *Principles of Reimbursement for Intermediate Care Facilities for the Mentally Retarded, Principle 2040*”. According to *Principle 2040*, “A determination of whether or not a cost is allowable and interpretations of definitions, not specifically detailed in these Principles, will be based on *Medicare Provider Reimbursement Manual (HIM-15)* guidelines and the Internal Revenue guidelines in effect at the time of such determination.”

It is the Medicare rule that contains the substantive guidance. The rule in question, *Section 2150 of the Medicare Provider Reimbursement Manual*, addresses the cost allocation of ‘chain operations.’ Pathways Inc. is an umbrella organization that provides several different social services. According to the Department, Pathways Inc. constitutes a chain operation because it either ‘consists of a group of two or more health care facilities which are owned, leased, or through any other device, controlled by one organization or because it is a business organization which is engaged in other activities not directly related to health care.’ *Section 2150*. Pathways Inc.’s programs include a preschool program, a supportive employment program, and an extended employment program.

According to *2150.3(D) Medicare Provider Reimbursement Manual*, “In each home office there will be a residual amount, or ‘pool’ of costs incurred for general management or administrative services which cannot be allocated on a functional basis.” The rule continues by advising which allocation method will be used depending upon the make up of the chain operation. According to the Department, based upon the make up of Pathways, Inc., total costs were initially used as the basis of allocation of general management or administrative services yielding a general and administrative allocation of 10.3%. However, a recalculation was done after Pathways informed the Department that the Day Habilitation program was very labor intensive. The Department changed their allocation process based upon the direction by the Medicare Provider Reimbursement Manual. According to *2150.3(D)(2)(b), Medicare Provider Reimbursement Manual*, “If evidence indicates that the use of a more sophisticated allocation basis would provide a more precise allocation of pooled home office costs to the chain components, such a basis can be used...” The Department utilized an allocation method based on total wages costs which yielded 12.53%.

Pathways, Inc. argued that their allocation method has been consistent throughout their 30-year history with the Department, and that the 2003 audit reflects an improper and unfair deviation from the standards they had been operating under. They also argued that a Departmental auditor had ‘approved’ their allocation method. Unfortunately, under the rules, past history does not necessarily predict the future audit process. Further, Departmental auditors cannot authorize deviations from the proscribed rules.

Past practices do not guarantee future actions. While the Department argues that they enforced the applicable regulations to Pathway’s 2003 audit and there is nothing in the record that suggests they did not, this failure to enforce does not prevent them from enforcing them in the future. According to *Chapter III, Section 50, Intermediate Care Facilities for the Mentally*

Retarded “The failure of the Department to insist, in any one or more instances, upon the performance of any of the terms or conditions of these principles, or to exercise any right under these Principles, or to disapprove of any practice, accounting procedure or item of account in any audit, shall not be construed as a waiver of future performance of the right.”

Pathways, Inc. argues that the prior approval for a different allocation basis is a ‘mere technicality’, and that even if it is a substantive rule, they have already obtained the approval from a Departmental auditor. As to the latter allegation, the authority to set rates and determine allowable costs rests only with the Director, Division of Audits. *Chapter III, Section 24, subsection 3020, Day Habilitation Services for Persons with Mental Retardation, MaineCare Benefits Manual*. Further, the Hearing Officer finds that the regulations are fairly detailed regarding the approval process and represent a formal process that must be followed before any changes in audit practices are made. *2150.3(D)(2)(b) Medicare Provider Reimbursement Manual* details the approval process “...intermediary approval must be obtained before any substitute basis can be used. The home office must make a written request with its justification to the intermediary responsible for auditing the home office cost for approval for the change no later than 120 days after the beginning of the home office accounting period to which the change is to apply”. Only when this process is followed and approval is obtained will the change be applied to the accounting period for which the request was made and to all subsequent accounting periods.

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS WITHIN TWENTY (20) DAYS OF RECEIPT OF THIS RECOMMENDED DECISION. THIS TIME FRAME MAY BE ADJUSTED BY AGREEMENT OF THE PARTIES. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE OFFICE OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

Dated: December 20, 2005

Signed: _____
Miranda Benedict, Esq.
Hearing Officer

cc: Pathways, Inc.
Herbert Downs, Assistant Director, Division of Audit
Jane Gregory, AAG, Department of the Attorney General