



**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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IN THE MATTER OF:

Cedars Nursing Care Center)
James Watson, CFO) **FINAL DECISION**
630 Ocean Avenue)
Portland, ME 04103)

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

The Recommended Decision of Hearing Officer Longanecker, mailed July 17, 2012 and the responses and exceptions filed on behalf of Cedars Nursing Care Center have been reviewed.

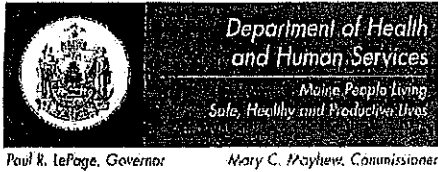
I hereby adopt the findings of fact and I accept the Recommendation of the Hearing Officer that the Department was not correct when it determined for fiscal years ending 4/30/07 and 4/30/08 that Cedars Nursing Care Center should not be allowed interest and amortization expense. The Department was correct when it determined for fiscal year ending 4/30/08 that Cedars Nursing Care Center should not be allowed Administrator-in-Training costs.

DATED 12/18/12 SIGNED: 
MARY C. MAYHEW, 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: Jane Gregory, AAG, Office of the Attorney General
William Stiles, Esq., Verril Dana, LLP, One Portland Square, Portland, ME
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TO: Mary C. Mayhew, Commissioner
Department of Health and Human Services
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DATE MAILED: **JUL 17 2012**

In Re: Cedars Nursing Care Center
Final Informal Review Decision for the Fiscal Years Ended 4/30/07 and 4/30/08

RECOMMENDED DECISION

An administrative hearing was held on March 5, 2012, at Portland, Maine in the case of Cedars Nursing Care Center before Hearing Officer Tamra A. Longanecker. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner, Department of Health and Human Services.

The record was left open for the parties to submit written closing arguments, which were received and made part of this record. The record closed on April 2, 2012.

FACTUAL BACKGROUND AND ISSUE:

On April 28, 2009, the Department of Health and Human Services, Division of Program Integrity ("the Department") notified Cedars Nursing Care Center ("Cedars") that it had filed its Audit Report Transmittal for Cedars' fiscal year ending 2007 and fiscal year ending 2008. Specifically, the Audit Report for fiscal year ending 2007 indicated an underpayment of MaineCare payments during this period in the amount of \$113,782.71. The Audit Report for fiscal year ending 2008 indicated an underpayment of MaineCare payments during this period in the amount of \$114,332.45. Both audit reports disallowed both interest expense and amortization expense related to a new HUD loan. The audit report for fiscal year ending 2008 disallowed all Administrator-in-Training ("AIT") costs. On June 23, 2009, Cedars requested informal reviews of both audit reports¹.

The Department issued a Final Informal Review Decision on August 21, 2011 for the fiscal years ended 4/30/07 and 4/30/08. The Final Informal Review Decision upheld the Department's initial decision to disallow both interest expense and amortization expense related to the new HUD loan and all AIT costs.

On August 21, 2011, the Department issued Revised Audit Report Transmittals for both Fiscal years ending 4/30/07 and 4/30/08. Specifically, the Revised Report for fiscal year ending 4/30/07 indicated an overpayment

¹ The Audit Reports also disallowed Management Fees Expense for FYE 4/30/07 and 4/30/08. However, the Department agreed with the Provider that these management fees should be added back to routine costs. Therefore, the management fees are no longer an issue.

of MaineCare payments in the amount of \$2,228.74. The Revised Report for fiscal year ending 4/30/08 indicated an overpayment of MaineCare payments in the amount of \$3,135.85.

On September 22, 2011, Cedars, through its attorney, filed a request for an administrative hearing. Pursuant to an Order of Reference dated October 17, 2011, 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 fiscal years ending 4/30/07 and 4/30/08 it determined that Cedars Nursing Care Center should not be allowed interest expense, authorization expense and AIT costs as explained in its Final Informal Review Decision of August 21, 2011?

At hearing, the parties agreed that the issue should be amended as follows:

Was the Department correct when:

- (a) for fiscal years ending 4/30/07 and 4/30/08 it determined that Cedars Nursing Care Center should not be allowed interest expense, amortization expense, and*
- (b) for the fiscal year ending 4/30/08 it determined that Cedars Nursing Care Center should not be allowed Administrator-in-Training costs,*

as explained in its Final Informal Review Decision of August 21, 2011?

APPEARING ON BEHALF OF CLAIMANT:

William H. Stiles, Esq.
John Watson, CFO, Cedars Nursing Care Center
Brett Seekins, Senior Manager

APPEARING ON BEHALF OF THE DEPARTMENT:

Jane Gregory, AAG
David Hellmuth, Audit Manager MaineCare
Eleanor Plaisted Pass, Auditor

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer Exhibits:

- HO-1: Notice of Hearing, dated January 17, 2012.
- HO-2: Emails dated January 9, 2012 and January 10, 2012 re: continuance.
- HO-3: Gregory email dated October 27, 2011.
- HO-4: HO Bickerman letter dated October 21, 2011.
- HO-5: Notice of Hearing dated October 20, 2011.

- HO-6: Order of Reference dated October 17, 2011.
- HO-7: Fair Hearing Report Form dated September 29, 2011.
- HO-8: Stiles letter dated September 22, 2011 with enclosure.
- HO-9: Agreed upon issue(s) for hearing.

Department Exhibits:

- DHHS-1: *MaineCare Benefits Manual, Ch. III, Section 67* (Principles of Reimbursement for Nursing Facilities), effective October 12, 2005.
- DHHS-2: *MaineCare Benefits Manual, Ch. III, Section 67* (Principles of Reimbursement for Nursing Facilities), effective November 14, 2007.
- DHHS-3: *Cedars Nursing Care Center, Cost Report for Nursing Facilities*, For the period 5/1/06 to 4/30/07.
- DHHS-4: *Cedars Nursing Care Center, Cost Report for Nursing Facilities*, For the period 5/1/07 to 4/30/08.
- DHHS-5: *DHHS Audit Report Transmittal* dated April 28, 2009, for Cedars Nursing Care Center for period May 1, 2006 through April 30, 2007.
- DHHS-6: *DHHS Audit Report Transmittal* dated April 28, 2009, for Cedars Nursing Care Center for Period May 1, 2007 through April 30, 2008.
- DHHS-7: *June 23, 2009 Cedars Nursing Care Center request for informal review.*
- DHHS-8: *August 21, 2011 DHHS Final Informal Review Decision* for Cedars Nursing Care Center for FYE 4/30/07 and 4/30/08.
- DHHS-9: *DHHS REVISED Audit Report Transmittal* dated August 21, 2011, for Cedars Nursing Care Center for period May 1, 2006 through April 30, 2007.
- DHHS-10: *DHHS REVISED Audit Report Transmittal* dated August 21, 2011, for Cedars Nursing Care Center for period May 1, 2007 through April 30, 2008.
- DHHS-11: *September 22, 2011 Cedars Nursing Care Center request for administrative hearing.*
- DHHS-12: *September 27, 2005 Cedars letter to DHHS Michael Mathieu, with one page attachment.*
- DHHS-13: *October 11, 2005 letter from DHHS Michael Mathieu to John Watson, Cedars.*
- DHHS-14: *May 1, 2006 letter from DHHS Michael Mathieu to John Watson, Cedars.*

DHHS-14a: *April 27, 2006 Cedars letter to DHHS Michael Mathieu, with one page attachment (with handwritten notes).*

DHHS-15: *DHHS 2007 Work Papers, W/P 12-1.*

DHHS-16: *DHHS 2008 Work Papers, W/P 12-1.*

DHHS-17: *DHHS 2008 Work Papers, W/P 12-refi-compare.*

DHHS-18: *DHHS 2008 Work Papers, regarding refinancing.*

DHHS-19: *DHHS 2007 Work Papers, W/P 13-1, Summary of Depreciation Expense.*

DHHS-20: *DHHS 2008 Work Papers, W/P 13-1, Summary of Depreciation & Amortization.*

DHHS-21: *DHHS 2007 Work Papers, W/P 15, Summary of Central Office Costs.*

DHHS-22: *DHHS 2008 Work Papers, W/P 15, Summary of Central Office Costs.*

DHHS-23: *DHHS 2008 Work Papers, W/P 16-4, Administrator-in-Training Wages.*

DHHS-24: *DHHS Work papers, page 42, Cedars Nursing Care Center DEPRECIATION EXPENSE REPORT.*

Claimant Exhibits:

C-1: Request for Informal Review and Attachments.

C-2: Cedars Rate Letter 2007.

C-3: Cedars Rate Letter 2008.

C-4: Cedars Shortfall.

C-5: Cedars Unfunded MaineCare.

C-6: Cedars CMI.

Other documents in the record:

Longanecker letter dated March 8, 2012.

Closing arguments of both parties.

RECOMMENDED FINDINGS OF FACT²:

1. Cedars Nursing Care Center is a nursing facility and Maine Medicaid ("MaineCare") provider.
2. Nursing facilities, including Cedars, that serve MaineCare recipients, are subject to Department regulations and reimbursement provisions, contained in the MaineCare Benefit Manual, Ch. III, Section 67, Nursing Facilities Principles of Reimbursement, 10-144, C.M.R., ch. 101. *See*, exhibit DHHS-2.
3. Nursing facilities must submit cost reports to the Department within five months of the end of their fiscal years. *See*, exhibit DHHS-2.
4. The Department's Division of Audit conducts an audit of the nursing facility's cost report, determines the allowable costs and determines the settlement amount either due to, or from, the nursing facility. *See*, exhibit DHHS-2.
5. On August 3, 2007, Cedars filed its cost report with the Department for its fiscal year ending April 30, 2007. On or about June 18, 2008, Cedars filed its cost report with the Department for its fiscal year ending April 30, 2008. *See*, exhibit DHHS-3 and DHHS-4.
6. On April 28, 2009, the Division of Audit filed its Audit Report Transmittals for Cedars' fiscal year ending 2007 and fiscal year ending 2008. *See*, exhibit DHHS-5 and DHHS-6.
7. On June 23, 2009, Cedars appealed the Division of Audit's Audit Report for its 2007 and 2008 fiscal years. *See*, exhibit DHHS-7.
8. On August 21, 2011, the Division of Audit filed its Final Informal Review Decision for the Cedars 2007 and 2008 Fiscal year appeal, agreeing in part with Cedars. *See*, exhibit DHHS-8. On that same date the Division of Audit filed a revised Audit Report Transmittal for Cedars 2007 fiscal year and for Cedars 2008 fiscal year. *See*, exhibit DHHS-9 and DHHS-10.
9. Cedars appealed the Final Informal Review Decision on September 22, 2011. *See*, exhibit DHHS-11.

Interest and Financing Costs

10. Under Ch. II, Section 67, the Department reimburses nursing facilities for allowable room and board incurred by MaineCare residents. One such allowable cost is "necessary and proper interest on both current and capital indebtedness..." *See*, exhibit DHHS-2.
11. The Principles contain an express provision on refinancing:

Refinancing. Any refinancing of property mortgages or loans on fixed assets must be prior approved by the Department. If prior approval is not obtained any additional interest costs or finance charges will not be allowed. *See*, exhibit DHHS-2.

² The hearing officer agrees with the proposed findings contained within the Background sections of the Department's closing argument and has submitted them in this recommendation for the Commissioner's consideration.

12. In 2005 Cedars had in place a Maine Health and Higher Education Facilities Authority (MHHEFA) financing, with a 30 year bond financing at an effective interest rate of 6.01%, with an expiration date of 2023. *See*, exhibit DHHS-12.
13. On September 27, 2005, Cedars wrote to the Department, asking it to approve a HUD refinancing of 35 years, "at a slightly lower rate...", *Id.* Cedars attached a spreadsheet indicating that the HUD refinancing would be 5.25%. *Id.* Cedars explained it needed the HUD loan in order to improve its cash flow, lower its annual debt service and also to obtain the funding for it to redesign its ambulance entrance. *Id.*
14. On October 11, 2005, the Department responded, conditionally approving the refinancing. The Department stated:

Referencing the information you have furnished, the Department approves the refinancing. However, this approval is contingent on the fact that the interest expense will be calculated on the lesser of the historical amortization schedules or the refinanced interest expense, resulting in no increased cost to the MaineCare program as a result of this refinancing. *See*, exhibit DHHS-13.
15. On April 27, 2006, Cedars wrote to the Department to update it on the HUD refinancing. According to this letter, Cedars hoped to close with HUD by mid-May 2006. The interest rate was now 5.6%. Cedars expressly stated in writing that it understood that the approval of the new loan would be conditional. Cedars wrote:

...I understand that the condition in your October 11 letter will remain in effect, namely that "allowable interest expense will be calculated on the lesser of the historical amortization schedules of the refinanced interest expense, resulting in no increased cost to the MaineCare program as a result of this refinancing." *See*, exhibit DHHS-14a.
16. The Department responded on May 1, 2006, confirming "that our original approval granted October 11, 2005 for this project is still in effect." *See*, exhibit DHHS-14.
17. The Department disallowed the "additional" costs of the HUD refinancing. The Department determined that the MHHEFA loan would have been paid off in 2023, and the HUD loan will be paid off in 2041. this carries the loan out an additional 18 years. The Department calculated that the additional interest costs of the HUD load would approximate \$3,878,968. *See*, exhibit DHHS-8.
18. For FY 2007, the Department reimbursed \$290,827 and disallowed \$48,645 of interest on long-term debt. *See*, exhibit DHHS-9 (Schedule F, line 20). Included as part of the \$48,645 was a disallowance of the HUD mortgage insurance costs ("MIP" costs), of \$42,886. *See*, exhibit DHHS-5.
19. For FY 2008, the Department reimbursed \$274,019 and disallowed \$45,853 of interest on long-term debt. *See*, exhibit DHHS-10 (Schedule F, line 20). Included as part of the \$45,853 disallowed, was a disallowance of \$35,294 MIP insurance. *See*, exhibit DHHS-6. Cedars appealed \$5,940 in HUD amortization costs for both FY 2007 and 2008.
20. For both years, the Department reimbursed the MHEFFA "authority fee" charges connected to the MHHEFA loan of \$6,725. *See*, exhibit DHHS-16.

21. Department witness Ellen Pass testified that, in order to analyze whether the HUD refinancing costs were "additional" she compared the HUD costs to the MHHEFA costs. She estimated the MHHEFA total interest expense through the end of the loan using MHHEFA documents. See, exhibit DHHS-15. It shows the allowed MHHEFA expense amounts specific to each April 30th fiscal year, in column 12, for FY 2007 it shows \$287,350 and for FY 2008 it shows \$277,525, and the total net amount of \$3,008,281.66.

According to Ms. Pass's testimony, MHHEFA issues letters every six months (January to June, and July to December) to its borrowers. These letters show the expenses due. The amounts shown for six (6) months are divided by 6 to determine the monthly amounts. These letters are the documents used to verify MHHEFA expenses. The Department matches the expenses to the audit period. A proration of costs are done to match to Cedars April 30th year end. The Department reimburses for Interest expense, MHHEFA authority fees and offsets against those costs, any income Cedars earned on fund invested. (Principle 44.5.3(2) requires that interest cost be reduces by investment income). The principal payment is not reimbursed as this is in essence reimbursed through depreciation expense on assets. Examples of MHHEFA letters issued by USBank are in DHHS-15.

The US Bank letters stopped because the MHHEFA loan was paid off, and therefore, as Ms. Pass testified, an estimate calculation was necessary. The Department used the MHHEFA interest amortization table (DHHS-15, p. 12-7) and the USBank letters (DHHS-15 p.12-10) to create estimates for future periods. The estimate summary (DHHS-15 p.12-3) breaks out the interest to match Cedars' specific year end and adds the authority fees and reduces it by estimated income earned, that would have been derived from funds invested per MHHEFA requirements, at a rate of 1.5% (DHHS-15 p. 12-3-a).

Administer in Training ("AIT")

22. The Principles also provide that the reasonable salary costs of an Administrator in Training are allowable, provided that the Department prior approves, in writing. DHHS Exhibit 2, Principle 44.8 provides, in relevant part:

Administrator in Training. The reasonable salary of an administrator in training will be accepted as an allowable cost for a period of six (6) months provided there is a set policy, in writing, stating the training program to be followed, position to be filled, and provided that this individual obtain an administrator's license and serve as an administrator of a facility in the State of Maine. **Prior approval in writing, from the Department, must be issued in advance of the date of any salary paid to an administrator in training...**(emphasis added).

The regulations define "Department" as Department as used throughout these principles is the State of Maine Department of Health and Human Services." *DHHS Exhibit -2, Principle 13. See, exhibit DHHS-2.*

23. Cedars produced as proof of Department prior approval of the administrator in training a letter sent to Angela P. Hunt, from the State of Maine Department of Professional and Financial Regulation, Nursing Home Administrator Licensing Board, dated September 28, 2007. The letter stated in relevant part:

At its September 28, 2007 meeting, the Nursing Home Administrators Licensing Board approved your application for the Administrator-in-Training (AIT) program pending receipt of a more detailed AIT training program. Specifically, the training program submitted requires more detailed information regarding the completion checklist.

...Upon receipt of the amended AIT training program your AIT registration will be reviewed and approved by board staff... See, DHHS-23 and C-1, App. F.

24. The Department disallowed \$44,966 in AIT wages, and \$13,275 in AIT benefits and taxes. See, exhibit DHHS-10, Schedule F, lines 28 and 29.

RECOMMENDED DECISION:

The hearing officer respectfully recommends that the Commissioner find

- (a) that the Department was not correct when it determined for fiscal years ending 4/30/07 and 4/30/08 that Cedars Nursing Care Center should not be allowed interest and amortization expense.

and,

- (b) that the Department was correct when it determined for the fiscal year ending 4/30/08 that Cedars Nursing Care Center should not be allowed Administrator-in-Training costs.

REASON FOR RECOMMENDATION:

I. Interest and Amortization expense for fiscal years ending 4/30/07 and 4/30/08

Rules:

The relevant regulations include the MaineCare Benefits Manual, Chapter III, Section 67 Principle 44.5, which states:

44.5.1 Principle. Necessary and proper interest on both current and capital indebtedness is an allowable cost.

[...]

44.5.3 Necessary. In order to be considered "necessary, interest must:

- (1) Be incurred on a loan made to satisfy a financial need of the provider. Loans which result in excess funds or investments would be considered unnecessary; and
- (2) Be reduced by investment income except where such income is from gifts, whether restricted or unrestricted, and which are held separate and not

commingled with other funds. Income from funded depreciation is not used to reduce interest expense.

- (3) Proper. Proper requires that interest:
 - (a) Be incurred at a rate not in excess of what a prudent borrower would have had to pay in the money market existing at the time the loan was made.
 - (b) Be paid to a lender not related through control or ownership, or personal relationship to the borrowing organization.
- (4) Refinancing. Any refinancing of property mortgages or loans on fixed assets must be prior approved by the Department. If prior approval is not obtained any additional interest costs or finance charges will not be allowed. (emphasis added).

In this case, Cedars refinanced with a HUD loan. Prior to doing so, Cedars requested prior approval by the Department and received a "conditional" approval. Specifically, the Department approved the refinancing "contingent on the fact that the interest expense will be calculated on the lesser of the historical amortization schedules or the refinanced interest expense, resulting in no increased cost to the MaineCare program as a result of this refinancing". In its Final Informal Review Decision, the Department disallowed any "additional" interest and amortization costs related to the HUD loan and allowed only interest and amortization costs associated with the previous MHHEFA loan.

Department Arguments:

In its closing argument, the Department argues that the "additional" interest and amortization costs related to the HUD loan were properly disallowed. The Department did reimburse the costs associated with the previous MHHEFA loan, as it determined that those costs were less than that of the HUD loan. In support of its position, the Department cites, in part, the requirement of Principle 44.5.3(4) which states that "any refinancing of property mortgages or loans on fixed assets must be prior approved by the Department". The Department argues that the prior approval was contingent on the fact that there be no increased cost to the MaineCare program as a result of this refinancing. Since the refinancing created an increased cost, the Department believes it correctly disallowed the additional costs.

More specifically, the Department argues:

The underlying purpose of the prior approval requirement is to ensure that the Department is not responsible for a provider's imprudent refinancing decision, and also to ensure Department responsibility to the public sic. As Ms. Pass testified at hearing, the Department's long-standing policy has been to not approve refinancing of mortgages if that refinancing adds any interest cost or amortized finance charges, that otherwise the Department would not have to reimburse. This policy is, of course, identical to the articulated policy in the regulation [Principle 44.5.3(4)] that if a refinancing is not prior approved, "any additional interest costs or finance charges will not be allowed. " This is an eminently reasonable and appropriate interpretation by an agency which is charged with subsidizing the reasonable medical care of eligible Medicaid recipients, not the complete expenses of provides. Following the Cedars' argument to its logical conclusion, the Department would be required to reimburse an endless number of refinancing for 50, 60, 100 years, which would mean that the Department would be paying the same or higher interest expenses forever. Isn't this similar to the

recent "real estate bubble" where homeowners were endlessly refinancing homes, extending out the years of their mortgages, lowering their monthly payments and using the money for vacations and other luxuries? That is all fine and good for individual homeowners, but the Department has a responsibility to the public fisc and the federal government to keep a tight rein on welfare expenditures.

The Department urges the Hearing Officer to follow the long-standing principle of statutory construction "that a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." *Busic v. United States*, 446 U.S. 398, 406 (sup. Ct. 1980), cited by *Civil Service Com'n v. South Portland*, 667 A.2d 599, 601 (Me. 1995) (general provision affects only those cases within its general language that are not within the provisions of the specific provision, the result is that the specific provision controls). Here, the Hearing Officer should determine that the refinancing principle should take precedence over the more general principles. The Department's interpretation as to refinancing is that the refinancing provision controls, and the Department will only approve refinancing to the extent that any additional costs of the refinancing are not reimbursable. Even if the Hearing Officer determines that the loan was "proper", the loan still must meet the refinancing provision and receive prior approval.

Cedars argues that the Department had no legal authority to place a condition on its prior approval of the HUD refinancing, yet points to no legal authority for its position. There is nothing in the regulations that prohibit conditional approvals. Furthermore, conditional approvals are entirely consistent with the regulation which states that if not prior approved, additional refinancing interest costs and other costs will not be reimbursed. As this case demonstrates, Cedars worked on the refinancing deal for at least seven months, and during that period the rate changed. When Cedars wrote to the Department in April 2006, it hoped to close on the refinancing within two weeks. The Department would not have the time and staff available to review complex closing documents and issue an up or down approval. Michael Mathieu for the Department simply stated the Department's position to approve the refinancing on the condition that the costs not exceed the costs the Department was already reimbursing.

Claimant Arguments:

Claimant argues that the HUD loan interest is "necessary" and "proper" and is therefore an "allowable" cost. In its closing argument, Claimant specifically explains that it satisfies the criteria of Principle 44.5.3 as follows:

- (1) The interest was incurred on a loan made to satisfy a financial need of the provider. "As Mr. Watson explained, Cedars was facing significant financial losses following changes to the Department's reimbursement policies³, and the HUD loan was necessary financially to improve cash flow (i.e., the ability to pay its bills currently). Furthermore, Cedars borrowed just enough from HUD to pay off the MHHEFA loan and to complete patient care related capital improvements (the ambulance entrance). Accordingly, the HUD loan did not "result in excess funds or investment".
- (2) There is no dispute that the HUD loan interest was "reduced by investment income...".
- (3) Mr. Watson explained that the HUD rate was below the then current prime lending rates, therefore the HUD loan interest was "incurred at a rate not in excess of what a prudent buyer would have had to pay in the money market existing at the time the loan was

³ While discussing her training, Ms. Pass stated that sometimes she feels like "the rug has been pulled out from under her," following changes to the Department's reimbursement policy. See, Cross Examination.

made". And, there was no relationship between Cedars and HUD other than as borrower and lender.

- (4) "The Department did not offer any evidence or testimony explaining why the HUD loan interest was not "necessary" or "proper," and its own exhibits provide support for Cedars' position. ...Ms. Pass acknowledged that Mr. Mathieu granted approval for the HUD loan, and that he would not have done so if the interest expense was not necessary and proper."

Claimant argues that the plain language of the applicable regulation does not allow the Department to condition approval. Specifically, Cedars argues in its closing (in part):

Although the Department attempted to apply a condition to its approval, the plain language of the regulation does not allow the department to condition its approval in this manner. The Department suggests that because subsection 44.5.3.4 is "silent" with respect to conditional approval, it may freely apply any condition it wishes. However, the plain language of the regulation as a whole dispels such a suggestion.

First, the MaineCare nursing facility principles, as constructed, contain many limits, caps and ceilings. Department Exhibits 1 and 2. If the Department intended MaineCare to limit allowable interest expense for refinanced debt, it would have stated this intention clearly as it did with direct care cost, routine costs, and the administrative and management ceiling.

Second, when reviewing a request for prior approval, the Department cannot simply invent criteria to guide its review. Instead, it must apply the applicable principles of reimbursement. The only relevant principle of reimbursement is found at Section 44.5.1, which clearly states that "[n]ecessary and proper interest...is an allowable cost." Accordingly, the only basis upon which to deny a request for prior approval would be if the interest did not meet the definition of "necessary" and "proper" as those terms are defined in the applicable regulations. As discussed in section IV.A.1 above, the record clearly demonstrates that the interest was both necessary and proper. The fact that the Department granted approval of the request provides additional support. Indeed, why would the Department approve a loan that was not necessary or proper? And if the Department has no basis upon which to disallow the associated interest expense, there can be no basis upon which to "condition" the approval.

Third if the Department intended to limit facilities to one loan only ever, and to disallow all additional interest expense and financing cost for subsequent loans, its duly enacted regulation would have said so. But that is not what the regulation says. It says that "[i]f prior approval is not obtained any additional interest costs or finance charges will not be allowed." Thus, it may be true that if the Department does not grant a prior approval request, it may limit the additional interest costs. However, interpreting this language to allow the exact same result when prior approval has been obtained tortures the plain meaning of the regulation.

In reality, the Department's position does not rely on the plain language of the regulation as a justification for the conditional approval, but instead relies on a statement in Mr. Mathieu's letter – "resulting in no increased cost to the MaineCare program as a result of this refinancing." ... However, as Ms. Pass acknowledged, this phrase does not appear anywhere in the regulations, and therefore cannot form the basis for a condition. In fact, there is no remotely similar language in the regulation that could reasonably be interpreted as supporting this outcome. Furthermore, the record does not contain any memoranda or other interpretative guidance that would support such an interpretation, and

Ms. Pass specifically denied relying upon anything other than Exhibits 1 and 2 when issuing the Reports for FY 2007 and FY 2008. Finally, the Department has offered no evidence that Mr. Mathieu, a financial analyst, has the authority to unilaterally adopt official Department policy. Of course, even assuming that the Department had offered Mr. Mathieu's testimony and proof that he can unilaterally create official Department policy, that alleged "policy" would contradict the plain language of the applicable regulation adopted pursuant to notice and comment rulemaking.

Claimant further argues that the Department's interpretation leads to an "absurd" result. Specifically, Claimant notes, in part:

...the Department's interpretation means that a facility has only one chance to get a mortgage loan, and it must live with that decision forever. This would be true, even if (as in this case) the refinancing is necessitated by changes to MaineCare reimbursement policy made after the original loan was established.

Finally, the Department's interpretation suggests that it may apply whatever criteria it wishes when reviewing a request for prior approval. Allowing the Department to ignore its duly enacted regulations and make up the rules as it goes along violates concepts of due process and fundamental fairness. It also invokes the notion of "double secret probation" of Animal House fame.

An approved request must have a different outcome as a denied request, and the outcome should not violate the exact governing principle adopted through and comment rule-making. The Department cannot be allowed to base the outcome on unstated criteria, or limit a facility to only a single loan ever. Because the Department's interpretation does all of these things, it leads to an absurd result. It also violates every known rule of statutory and regulatory construction.

[...]

The Provider contends that the plain language of the applicable regulation, read as a whole, unambiguously supports the Provider's position. Here, the regulation simply requires prior approval. The regulation does not specify criteria for prior approval beyond the principles set forth in subsection 44.5.1, and does not on its face permit conditional approval. Accordingly, the Department's attempt to condition the approval using unstated criteria must fail. Indeed, as the Law Court recently explained, "[s]tatutes and regulations, not unwritten agency customs and practices, must inform..." agency decision-making. Tenants Harbor, 2011 ME at ¶15.

Recommendation

The hearing officer is persuaded by Claimant's arguments. The record supports that the interest associated with the HUD loan was necessary and proper and therefore both the interest and amortization expense were allowable costs. And, as explained above in Cedars' closing argument, the regulation, read as a whole, does not support the Department's position that it could condition the approval of the refinancing.

II. Administrator-In-Training cost

Principle 44.8 provides, in relevant part:

Administrator in Training. The reasonable salary of an administrator in training will be accepted as an allowable cost for a period of six (6) months provided there is a set policy, in writing, stating the training program to be followed, position to be filled, and provided that this individual obtain an administrator's

license and serve as an administrator of a facility in the State of Maine. **Prior approval in writing, from the Department, must be issued in advance of the date of any salary paid to an administrator in training...**(emphasis added).

The regulations define "Department" as **Department** as used throughout these principles is the State of Maine Department of Health and Human Services." *DHHS Exhibit -2, Principle 13. See, exhibit DHHS-2.*

In this case, there is no dispute that Cedars hired Ms. Hunt to replace an administrator who was leaving the facility. Ms. Hunt did seek prior approval for the AIT program; however, she sought this approval from the Department of Professional and Financial Regulation, Nursing Home Administrators Licensing Board and not the Department of Health and Human Services. In all other respects, she satisfied the principle in that she completed the required training program and within one year of completing her exam, she became a full-time administrator.

The Department argues that the above regulations could not be any clearer. Specifically, "Cedars' argument fails because it did not receive prior approval from the Department of Health and Human Services for AIT costs, as required by the regulations. Furthermore, the AIT individual, the September 28, 2007 letter from the Nursing Home Administrators Licensing Board addressed to the AIT applicant Angela Hunt did not actually approve her AIT license. Rather, it stated that the Licensing Board required 'more detailed information.'" *See, Dep't closing, p. 9.*

Claimant argues: "In a classic case of 'gotcha,' the Department disallowed the AIT cost because Cedars allegedly sought prior approval from the wrong 'Department.' Of course, at the hearing, the Department did not identify any harm from this innocent error, and could not identify a substantive provision that Cedars failed to satisfy. In the words of Ms. Pass, she simply looked into the file and didn't find the letter to the DHHS." *See, Cedars closing, p. 8.*

Recommendation

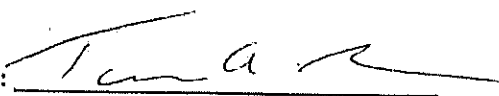
The hearing officer is persuaded by the Department. The regulation is clear that the Department of Health and Human Services must approve any request for AIT costs. Because this was not done in this case, it correctly disallowed the costs.

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,

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DATED: 7/16/12

SIGNED: 
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