

Janet T. Mills
Governor

Jeanne M. Lambrew, Ph.D.
Commissioner



Maine Department of Health and Human Services
Commissioner's Office
11 State House Station
109 Capitol Street
Augusta, Maine 04333-0011
Tel.: (207) 287-3707; Fax: (207) 287-3005
TTY: Dial 711 (Maine Relay)

IN THE MATTER OF:

Dignity Care, LLC)
Marc Farrar, CEO) **FINAL DECISION**
PO Box 3291)
Brewer, ME 04412)

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

The Recommended Decision of Hearing Officer Diebold, mailed October 23, 2019 and the responses and exceptions filed on behalf of Dignity Care have been reviewed.

I hereby adopt the findings of fact and I accept the Recommendation of the Hearing Officer that the Department was correct when it determined that Dignity Care, LLC must reimburse the Department \$10,350.90 because it billed MaineCare for services provided by an excluded individual.

DATED: 11-26-19 SIGNED: Jeanne M. Lambrew
JEANNE M. LAMBREW, Ph.D., COMMISSIONER
DEPARTMENT OF HEALTH & HUMAN SERVICES

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

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

cc: Margaret Machiaek, AAG, Office of the Attorney General
Katherine Wadley, DHHS/Program Integrity

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Commissioner



Maine Department of Health and Human Services
Administrative Hearings
11 State House Station
109 Capitol Street
Augusta, Maine 04333-0011
Tel.: (207) 624-5350; Fax: (207) 287-8448
TTY: Dial 711 (Maine Relay)

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

DATE MAILED: **OCT 23 2019**

In Re: Dignity Care, LLC

RECOMMENDED DECISION

On 9/17/2019, Hearing Officer Thomas Diebold, Esq. held an administrative hearing at Bangor, Maine in the case of Dignity Care, LLC. By special appointment, the Commissioner of the Department of Health and Human Services conferred jurisdiction to the Hearing Officer. The record closed on 10/1/2019.

FACTUAL BACKGROUND AND ISSUE:

Dignity Care, LLC provides in-home care and offers services under various programs, including MaineCare.

On 2/28/2019, the Department determined through a Final Informal Review Decision that Dignity Care, LLC had violated applicable MaineCare rules regarding billing for an excluded provider and a recoupment of \$10,350.90 was identified. Dignity Care, LLC submitted a timely appeal. Pursuant to an Order of Reference dated 5/28/2019, Administrative Hearing Officer Thomas Diebold was assigned to conduct an administrative hearing and to submit to the Commissioner written findings of fact and recommendations on the following issue:

- (1) Was the Department correct when for the review period of August 8, 2016 through July 17, 2017, it determined that Dignity Care, LLC owes the Department \$10,350.90 in recoupment due to: 1) non-compliance with the MaineCare Benefits Manual; 2) breach of the MaineCare Provider / Supplier Agreement; 3) failure to repay overpayments or payments made in error; and / or 4) failure to abide by the provisions of 42 C.F.R. §1000 et. Seq. pertaining to the exclusion of individuals and entities as found in a Final Informal Decision dated February 28, 2019 and Notice of Violation dated October 22, 2018?*

APPEARING ON BEHALF OF APPELLANT:

Marc Farrar, CEO

APPEARING ON BEHALF OF AGENCY:

Katherine Wadley
Valerie Hooper
Margaret Machaiek, AAG

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer Exhibits:

- HO-1. Order of Reference dated 5/28/2019
- HO-2. Fair Hearing Report Form prepared 5/16/2019 with Notice of Violation and Final Informal Review Decision
- HO-3. Prehearing Conference notice dated 5/29/2019
- HO-4. Prehearing Conference notice dated 6/7/2019
- HO-5. Entry of Appearance by Margaret Machaiek, AAG dated 7/30/2019
- HO-6. Prehearing Order dated 8/8/2019
- HO-7. Letter to Administrative Hearing Unit dated 8/23/2019
- HO-8. Stipulations *In re: Dignity Care, LLC*
- HO-9. Closing Statement by Dignity Care
- HO-10. Closing Statement by Department dated 10/1/2019

Department Exhibits:

- D-1. MaineCare Regulations effective 1/1/2014
- D-2. MaineCare Regulations effective 3/23/2016
- D-3. MaineCare Regulations effective 7/5/2017
- D-4. MaineCare Regulations effective 9/17/2018
- D-5. Federal Regulations 42 C.F.R. § 1000.10.10
- D-6. Final Informal Review Decision 2/28/2019
- D-7. Spreadsheet
- D-8. Notice of Violation dated 10/22/2018 with spreadsheet
- D-9. Consent Agreement for Voluntary Surrender
- D-10. Exclusion letter dated 9/2/2014
- D-11. Portal printout dated 12/16/2014
- D-12. Federal exclusion letter dated 12/31/2014
- D-13. Federal reinstatement letter dated 11/16/2016
- D-14. Portal printout dated 7/27/2017
- D-15. Provider Agreement
- D-16. Letter to Katherine Wadley and Valerie Hooper dated 8/1/2017
- D-17. Email to Valerie Hooper dated 9/18/2017

Appellant Exhibits:

- A-0. Letter to Katherine Wadley dated 12/14/2018
- A-1. Letter to Rhonda Farrar dated 7/7/2017 enclosing audit results
- A-2. Letter to Marcia Smith dated 11/1/2018 requesting information

- A-3. Consent Agreement for Probation
- A-4. Letter to Marc Farrar dated 7/27/2017 enclosing audit results
- A-5. National Practitioner Data Bank search results dated 11/16/2016
- A-6. Letter to Katherine Wadley dated 8/1/2017
- A-7. Letter to MaineCare Manager of Program Integrity dated 9/15/2017
- A-8. Handwritten letter from client

STIPULATIONS:

1. The Department is the single state agency responsible for administering the state's Medicaid program, "MaineCare," pursuant to federal and state statutes and administrative regulations. 22 M.R.S. §§ 10, 12, 3173; MBM Ch. I, § 1.02; 42 U.S.C. §§ 1396 et. Seq.; 42 C.F.R. § 431.10.
2. The Department's Program Integrity Unit is responsible for surveillance and referral activities as set forth in the MaineCare Benefits Manual ("MBM"), Ch. I, § 1.18.
3. At all times relevant to this appeal, Dignity Care, LLC was a MaineCare provider pursuant to MBM, Ch. I and a MaineCare Provider Agreement dated January 21, 2016.
4. Dignity Care, LLC's MaineCare Provider Agreement requires compliance with the MBM.
5. The MBM requires any entity that furnishes, or arranges for the furnishing of, health-related services for which it claims payments under any plan or program established under Title V or Title XX of the *Social Security Act* to abide by the provisions of 42 C.F.R. 1000, *et seq.*, pertaining to the exclusions of individuals and entities from participation in Medicare or MaineCare and ensure that excluded individuals or entities are not employed or utilized to provide services, receive payments, or submit claims, to the MaineCare Program. MBM Ch. I, § 1(5)(c)(Y).¹
6. Melissa Meister was excluded from participation in MaineCare effective December 16, 2014.
7. On August 8, 2016, Dignity Care, LLC, hired Melissa Meister to work as a Personal Care Aid.
8. Melissa Meister remained employed at Dignity Care, LLC, until she was terminated on July 17, 2017.

¹ The current citation for the stipulated reference is 10-144 C.M.R. Ch. 101, sub-Ch. I, §1.03-8(Y), which in full states:

Abide by the provisions of 42 C.F.R. 1000, *et seq.*, pertaining to the exclusions of individuals and entities from participation in Medicare or MaineCare and ensure that excluded individuals or entities are not employed or utilized to provide services, receive payments, or submit claims, to the MaineCare Program. Excluded provider information can be referenced at the Health and Human Services Office of Inspector General web site: <http://exclusions.oig.hhs.gov> and the Division of Audit, Program Integrity Unit web site: <https://mainecare.maine.gov/mhpviewer.aspx?FID=MEEEX>.

9. During the time Melissa Meister was employed at Dignity Care, LLC, she held a probationary nursing license.
10. Melissa Meister remained MaineCare-excluded until she was reinstated on January 30, 2019.
11. Dignity Care received no further communication regarding overpayments following August 6, 2018 until it received the Notice of Violation dated October 22, 2018.

RECOMMENDED FINDINGS OF FACT:

1. The parties to this proceeding agreed on the record to the Stipulations set forth above, and they are adopted in full here as Findings of Fact. In addition, the Hearing Officer makes these additional findings of fact:
2. Notice of these proceedings was given in a timely and adequate manner.
3. Dignity Care, LLC received \$10,350.90 from MaineCare for services provided by an excluded provider, Melissa Meister.

RECOMMENDED DECISION:

The Department was correct when it determined that Dignity Care, LLC must reimburse the \$10,350.90 because it billed MaineCare for services provided by an excluded individual.

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).

REASON FOR RECOMMENDED DECISION:

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., and Stipulation 1. To accomplish 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 "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, § 1.03-8 (S).

“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 assess the quality of 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, § 1.20. This includes the imposition of “sanctions and/or recoup(ment of) identified overpayments against a provider, individual, or entity,” for specified reasons, which include:

- Breaching the terms of the MaineCare Provider Agreement, and/or the Requirements of § 1.03-8 for provider participation, 10-144 C.M.R. Ch.101 sub-Ch. I § 1.20-1(G);
- Failure to repay or make arrangements to repay overpayments or payments made in error, 10-144 C.M.R. Ch.101 sub-Ch. I § 1.20-1(U);
- Failure to abide by the provisions of 42 C.F.R. §1000 et seq., pertaining to the exclusion of individuals and entities, 10-144 C.M.R. Ch.101 sub-Ch. I § 1.20-1(Y);

Provider participation requirements are spelled out in § 1.03-8(Y), which states in part that providers must:

Abide by the provisions of 42 C.F.R. 1000, *et seq.*, pertaining to the exclusions of individuals and entities from participation in Medicare or MaineCare and ensure that excluded individuals or entities are not employed or utilized to provide services, receive payments, or submit claims, to the MaineCare Program. Excluded provider information can be referenced at the Health and Human Services Office of Inspector General web site: <http://exclusions.oig.hhs.gov> and the Division of Audit, Program Integrity Unit web site: <https://mainecare.maine.gov/mhpviewer.aspx?FID=MEEEX>.
See also Stipulation 5.

At its core, this case is straightforward: Dignity Care, LLC employed a MaineCare excluded individual and then billed MaineCare \$10,350.90 for her services. This Dignity Care, LLC cannot do under the MaineCare provider rules, and therefore the recoupment is appropriately sought by the Department.

In its defense, Dignity Care, LLC notes Ms. Meister’s exclusion under MaineCare was based on her exclusion from the federal listing with the Office of Inspector General, which was in turn based on the consent order by which Ms. Meister’s professional license was suspended in 2014, which was in turn based on criminal charges relating to substance abuse and theft from a patient. See Exhibits D-9, D-10, D-11, D-12, and Stipulation 6². Her license was subsequently restored,

² While this appears to be Dignity Care, LLC’s argument, the sequence is actually not quite correct. Meister’s professional license was suspended on 8/4/2014, she was notified she was state-excluded from MaineCare on 9/2/2014 (subject to a delay for the appeal period), and then federally listed in 12/2014. While federally listed, the

and Ms. Meister was removed as an excluded individual on the federal listing on 11/16/2016, and therefore, Dignity Care, LLC argues, it is axiomatic that she should also have been removed from the MaineCare listing maintained by Program Integrity, since her MaineCare exclusion was based on the federal listing exclusion. See Exhibit D-13.

In Dignity Care, LLC's description, the issue becomes more Kafka-esque because Ms. Meister wrote to Program Integrity on 3/2/2016 and again on 9/15/2017 claiming that she met the criteria for reinstatement on the federal listing, and therefore she requested reinstatement into the MaineCare program. See Exhibit A-7. It appears Ms. Meister did not receive a response either time. While representatives from Program Integrity denied having received these requests, Dignity Care, LLC noted Program Integrity's own standard regarding notice, which is that a mailed document is presumed received. Test. of Valerie Hooper and Katherine Wardwell.

Dignity Care, LLC further notes, correctly, that there is no question of fraud, abuse or waste, or that the services were not actually provided, and that the original basis of Ms. Meister's listing as an excluded individual was ameliorated by her 11/16/2016 reinstatement on the federal listing and restoration of her professional license. Dignity Care, LLC observed that other audits, including by Elder Independence of Maine ("EIM"), an auditing consultant hired by the Department, found no deficiencies in Dignity Care, LLC operations. The Hearing Officer notes that the audit referral to Program Integrity came from EIM on 7/17/2017 because EIM identified that Dignity Care, LLC was billing direct services for an excluded provider. Test. of Katherine Wardwell.

Expressed more bluntly, Dignity Care, LLC essentially argues that the Department has an affirmative obligation to integrate other agency and authorities' findings into the MaineCare exclusion listings, and individuals should be presumed removed from the excluded listing because the Department unreasonably failed to proactively update the MaineCare excluded listing. In other words, if the Department based its suspension on the underlying licensing suspension and the federal exclusion listing, then once those barriers are cured, the Department should automatically reinstate excluded individuals like Ms. Meister – and they should be presumed reinstated if their services were billed (as here).

However, these arguments are fundamentally flawed. First, there is no such requirement in the MaineCare rules. Program Integrity maintains the listing of excluded individuals, and once someone is excluded, they remain excluded until they are removed by Program Integrity. 10-144 C.M.R. Ch. 101, sub-Ch. I, §1-03(8)(Y) and §1-21(A). Individuals must request reinstatement by the Department. Id. It may be the Department could integrate exclusion listing management with findings of external authorities, if it chose to allocate more resources to do so, but there is no requirement that listings get automatically updated based on actions by other agencies and other authorities. When Ms. Meister was notified of her exclusion by the Department on 9/2/2014 she was also explicitly advised that, "This exclusion continues until the Department

state could not unlist her. Ms. Meister was reinstated federally on 11/16/2016, but she remained state excluded because state exclusion runs indefinitely. See Exhibits D-9 through 14. Dignity Care, LLC argues that the state exclusion started 12/16/2014 based on Exhibit D-11. This is what is reflected in D-11, but it is inescapable that the 9/2/2014 notice to Ms. Meister began the exclusion, subject to an appeal period. The 9/2/2014 notice stated that the Department will "apply this exclusion upon the end of your 60 day period for appeal or upon the conclusion of your appeal, whichever is later." See Exhibit D-10.

reinstates you.” See Exhibit D-10 (emphasis in original). Ms. Meister was provided appeal rights with the 9/2/2014 notice, which were not exercised.

Second, when Ms. Meister first contacted Program Integrity on 3/2/2016 to request reinstatement, she was still an excluded individual on the federal listing, and thus ineligible for consideration. See Exhibit D-12 and 10-144 C.M.R. Ch. 101, sub-Ch.1 §1.03-8(Y). She remained excluded on the federal listing until 11/16/2016. See Exhibit D-13. Dignity Care, LLC hired Ms. Meister on 8/8/2016 while she was an excluded individual under federal and state rules. See Exhibit A-1 and Stipulation 7. Dignity Care, LLC billed MaineCare for Ms. Meister’s services performed from 11/28/2016 through 7/16/2017. See Exhibits D-7 and D-16. At all times while Dignity Care, LLC was billing for Ms. Meister’s services, Ms. Meister was still listed by the Department as an excluded individual, where she remained until 1/30/2019. Stipulation 10. Verification of the listing is a simple task, and only requires accessing a link identified within the rules. 10-144 C.M.R. Ch. 101, sub-Ch. 1, §1.03-8(Y). The requirements of the Provider Agreement include “compliance with applicable Federal and State Medicaid laws and regulations, the MBM, and the terms and conditions of this Agreement...” See Exhibit D-15.

Therefore, Dignity Care, LLC was on notice that Ms. Meister was excluded, and the rules were quite clear that billing for her services was prohibited. Dignity Care, LLC created its own Kafka-esque world by failing to ensure Ms. Meister was reinstated with the one authority responsible for the reinstatement. Dignity Care, LLC appears to acknowledge this requirement in its closing argument when it noted that, “To ensure that this interpretation was accurate, I spoke with an OIG representative who indicated that Ms. Meister still needed to apply for reinstatement with the State.” See Exhibit HO-9. Dignity Care, LLC’s reliance on Ms. Meister’s 3/2/2016 letter to the Department is misplaced because, as noted above, Ms. Meister was not eligible for reinstatement at that time (or for 8 more months), and by the time Ms. Meister submitted another request on 9/15/2017, the services in question had already been performed and billed to MaineCare.

Having established that Dignity Care, LLC billed for services of an excluded individual, the issue then becomes identifying the appropriate recoupment. Ms. Meister’s actual hours and customers billed for MaineCare services were identified to the Department based on a spreadsheet provided by Dignity Care, LLC. Test. of Valerie Hooper and Exhibits D-7 and D-16. Accordingly, primary information was available, and there was no need to rely on other permitted, but imprecise methods of calculating overpayments. Dignity Care, LLC billed MaineCare for services provided by Ms. Meister to MaineCare members. The Department provided testimony, supported by the spreadsheet in Exhibit 7, that MaineCare actually paid \$10,350.90 for Ms. Meister’s services to Dignity Care, LLC, listed in the column “Amount Over Paid” on Exhibit 7. See also Exhibit 16.

Dignity Care, LLC does not actually contest how the sum in Exhibit 7 was identified but instead argued that other amounts were identified previously – even though raw data had been provided. See Exhibit HO-9. That may be, but it is clear that other amounts identified were based on incomplete information, and that once better information relating to Ms. Meister’s actual time was analyzed, the precise amount paid for Ms. Meister’s services could be identified. The Hearing Officer is persuaded the Department has done so. The Notice of Violation dated

10/22/2018, and the Final Informal Review Decision dated 2/28/2019 both clearly identify the recoupment as \$10,350.90. See Exhibits HO-2 and HO-3.

For all of the above reasons, the undersigned Hearing Officer recommends that the Commissioner find that the Department was correct when for the review period of 8/24/2016 through 7/15/2017, it determined that Dignity Care, LLC owes \$10,350.90 in recoupment because it billed for an excluded MaineCare provider.

MANUAL CITATIONS:

MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. 1

DHHS Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § VII (C)(1)

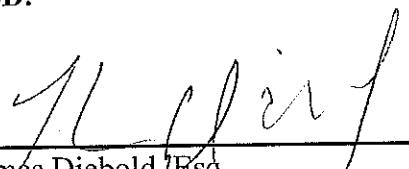
42 C.F.R. 1000, *et seq*

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS. ANY WRITTEN RESPONSES AND EXCEPTIONS MUST BE RECEIVED BY THE DIVISION OF ADMINISTRATIVE HEARINGS WITHIN TWENTY (20) CALENDAR DAYS OF THE DATE OF MAILING OF THIS RECOMMENDED DECISION. A REASONABLE EXTENSION OF TIME TO FILE EXCEPTIONS AND RESPONSES MAY BE GRANTED BY THE CHIEF ADMINISTRATIVE HEARING OFFICER FOR GOOD CAUSE SHOWN OR IF ALL PARTIES ARE IN AGREEMENT. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE DIVISION OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. COPIES OF WRITTEN RESPONSES AND EXCEPTIONS MUST BE PROVIDED TO ALL PARTIES. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

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

DATED: 10/23/2019

SIGNED: _____


Thomas Diebold, Esq.
Administrative Hearing Officer
Division of Administrative Hearings

cc: Marc Farrar, CEO
Margaret Machiaek, AAG
Katherine Wadley