STATE OF MAINE BUSINESS AND CONSUMER COURT

Cumberland, ss.

JOHN F. MURPHY HOMES, INC.,

Plaintiff

v. Docket No. BCD-CV-13-47

STATE OF MAINE,

Defendant

DECISION AND JUDGMENT

Plaintiff John F. Murphy Homes, Inc. (JFMH), a provider of educational and medical services to children, has brought suit against the State of Maine for damages based on the State's failure, over a period of years, to pay JFMH the full amounts due to JFMH for services covered under the State's MaineCare program. The State defends based on JFMH's failure to present its underpayment claims in the manner required by the parties' contracts, among other defenses.

Defendant State of Maine has moved for summary judgment. Oral argument on the motion was held December 8, 2015. For the reasons stated below, Defendant's Motion for Summary Judgment is granted.

I. Background

At all times relevant to this case, JFMH has operated a facility known as The Margaret Murphy Children's Center (the "Center"). (S.M.F. ¶ 1.) At all such times, The Center has been approved by Maine's Department of Education ("DOE") as a Special Purpose Private School and is approved by Maine's Department of Health and Human Services ("DHHS") as a

provider of Day Habilitation Services under the State's Medicaid program, which is known as MaineCare and is administered by DHHS. (*Id.* ¶ 2.)

1. *The MaineCare Provider Reimbursement Framework*

The state regulations governing the MaineCare program are found at 10-144 C.M.R. ch. 101, and collectively comprise the MaineCare Benefits Manual. The Manual was previously known as the Maine Medical Assistance Manual. The MaineCare regulations incorporate federal law requiring that providers such as JFMH execute agreements with the State: "Consistent with 42 CFR §431.107, the Provider understands and agrees that an executed Provider Agreement by and between the Provider and MaineCare is mandatory for participation or continued participation in the MaineCare Program." 10-144 C.M.R. ch. 101, ch. I, Section 1, § 1.03-1(A).

JFMH has entered into at least three Provider Agreements with DHHS: one in 1998, one in 2001, and one in 2009.[1] (Ketch. Aff. ¶¶ 5-9 and Exs. A, B and C thereto.) The Agreements executed by JFMH in 1998 and 2001 provided in pertinent part that JFMH "shall provide services…in accordance with provisions contained herein [as well as provisions] [i]n the *Maine Medical Assistance Manual*, in the [Maine Health Program] Rules, in *Title XIX of the Social Security Act*, and in all other applicable laws, rules and regulations of the Department, State of Maine, or of the U.S. Department of Health and Human Services." (Ex. A, ¶ 2 and Ex. B, ¶ 2 to Ketch Aff.) (emphasis in originals.)

The 1998 and 2001 Provider Agreements also say that "[t]he content of this Agreement is based upon Federal and State statutes and regulations pertaining to the provisions of health services under the *Title XIX Medicaid Program/MHP*. (Ex. A, ¶ 3 and Ex. B, ¶ 3 to Ketch Aff.) (emphasis in originals.)

[1] The copy of the 2001 Provider Agreement attached to Ms. Ketch's affidavit is not signed by DHHS.

The Provider Agreement executed by JFMH in 2009 states, in pertinent part: "As a condition of participation or continued participation as a provider in MaineCare, the Provider agrees to comply with the provisions of the Federal and State laws and regulations related to Medicaid [and] the provisions of the MaineCare Benefits Manual ("MBM"), 10-144 C.M.R. Ch. 101…." (Ex. C, ¶ 1 to Ketch Aff.)

2. *The State's Seed Payment Obligation*

Generally speaking, under the MaineCare program, the federal government pays approximately two-thirds of the amount due in the form of Medicaid funds, and the State pays the remaining third. (*See id.* ¶ 3.) The State portion of the funds used to pay MaineCare providers is referred to as "Seed" for purposes of this discussion. (*Id.* ¶ 4.)

For purposes of this case, it is established that the State did not pay Seed to JFMH throughout the period for which JFMH claims reimbursement in this case-- fiscal years 2001-10 and most of fiscal year 2011. Andrew Cowan, a certified public accountant and the chief financial officer of JFMH since October 2012, has analyzed the pertinent documents and data and demonstrated that the State failed to pay Seed to JFMH for approximately ten years, beginning in 2001 and ending in 2011.[2] (*Id.* ¶ 24; Opp. to A.S.M.F. ¶ 24; Cowen Aff. ¶ 1.)

Exactly why no Seed was paid to JFMH is not clear in the record. The State issued Certificates of Public Expenditures ("CPE") that represented that Seed was being paid to providers of MaineCare services such as JFMH. Nancy Connolly, director of the State Agency Client Program for DOE, oversaw the special education needs of children eligible for MaineCare services from providers such as JFMH. (Opp. to A.S.M.F. ¶ 26; Connolly Dep 10:23-11:6.) When asked about the Seed that the State had repeatedly and incorrectly certified was being paid, she testified it was "phantom Seed" or "paper Seed," which she said represented

[2] Mr. Cowan's work also demonstrated that the Seed was not paid to four special purpose private school providers other than JFMH. (Ex. C to A.S.M.F., Cowan Aff. ¶¶ 12, 14-16 and Exs. 1-5.)

in-kind services. (Connolly Dep. 15:21-16:11; 21:4-14; 22:1-21; 29:9-30:20.) Perhaps the most accurate answer to the question why the State was not, in fact, paying Seed while certifying that it was paying appears in Ms. Connolly's answer to an email message dated October 26, 2011, asking her "to explain Seed money and the status of Seed money for this school year…in 200 words or less." Her response to the question was, "Cluster%^$#." (A.S.M.F. ¶ 29).

Had the State been paying Seed to JFMH all along, it could have passed the State's cost of Seed along to the local government entities and others that were referring children through DOE for educational and medical services.

2. *JFMH JFMH's History of MaineCare Billing and Payments*

Through the Center, JFMH serves students referred for services by the DOE, public school districts, or parents and guardians. (S.M.F. ¶ 9.) In most cases, students at the Center receive educational and medical services. (*Id.* ¶ 10.) For educational services, the DOE establishes a tuition rate on an annual basis. (*See id.* ¶ 11; Opp. S.M.F. ¶ 11.) The tuition rate is calculated by the DOE based on a Cost Accounting and Rate Establishment system ("CARES") report completed by JFMH documenting its costs in providing educational services. (S.M.F. ¶ 12.) DOE required JFMH to complete and submit a CARES report each year during the ten-year period at issue in this case. (*Id.* ¶ 13.)

During that period, Scott Sawyer, the former Chief Financial Officer at JFMH, prepared the CARES reports submitted by JFMH. The forms used for the CARES reports contained a place in which the Seed amount could be shown on the form. (*See* Sawyer Dep., 70:14-71:20) (discussing how DOE's form requires the Seed amount).

However, when Mr. Sawyer completed CARES reports on behalf of JFMH, he backed out the Seed amount from the tuition calculation and thus did not include the Seed amount in

the CARES forms for most, if not all, of the approximately ten years at issue.[3] (*See id.*) As discussed in greater detail below, Mr. Sawyer explained that he decided not to include the Seed amount in the calculations shown in JFMH's CARES submittals to the State, based on telephone conversations with State employees. (*Id.* 71:21-73:16.)

For educational services provided to a child, JFMH bills the DOE, a public school district, or a parent or guardian, depending on the circumstances of the child's placement at the Center. (S.M.F. ¶ 16.) However, nearly all of the medical services JFMH provides to students, including services known as Day Habilitation Services, are funded through MaineCare, which is administered by DHHS, not the DOE. (Opp. S.M.F. ¶ 17.) For Day Habilitation Services, it is DHHS that establishes the reimbursement rate pursuant to the MaineCare Benefits Manual. (S.M.F. ¶ 18.) The Manual requires JFMH to submit claims for payment for Day Habilitation Services to DHHS, rather than DOE. (*Id.* ¶ 19.)

For the fiscal years ranging from 2001 through 2010 and the first two months (July and August of 2010) of fiscal year 2011, MaineCare's approved reimbursement rate for Day Habilitation Services for JFMH was $271.13 per day per student. (*Id.* ¶ 20-21.) The rate then changed to $58.60 per hour. (*Id.* ¶ 22.) From fiscal year 2001 into fiscal year 2011, JFMH submitted claims to DHHS for Day Habilitation Services at the approved rate, but JFMH received only the federal portion of the rate—it did not receive the State's Seed. (*Id.* ¶ 23; Opp. S.M.F. ¶ 23.) For fiscal year 2002, for example, JFMH submitted claims to DHHS for Day Habilitation Services in the amount of $709,005 and DHHS paid only $436,548 based on the federal matching rate then in effect and did not pay the Seed. (S.M.F. ¶ 24.)

[3] Andrew Cowan, the chief financial officer of JFMH since October 2012, asserts that the State's template for the CARES reports for rate calculation for fiscal years 2003-2005 did not ask any information about Seed. (Ex. B to Opp. S.M.F., Cowan Aff. ¶ 4.)

Each time MaineCare processed and paid a claim submitted by JFMH, it sent JFMH a remittance statement. (*Id.* ¶ 26.) Eight examples of such statements are attached as Exhibits A through H to the Affidavit of Stefanie Nadeau. These remittance statements show both the amounts billed by JFMH and the amounts paid, thereby making obvious the difference between the two. (*Id.* ¶ 27; Opp. S.M.F. ¶ 27; Exs. A-H to Nadeau Aff.)

The remittance statements from 2004 do not include an explanation for why the "net paid" amount is different from the "total allowed" amount. (Exs. A & B to Nadeau Aff.) The remaining remittance statements contain codes for every adjustment the State made in what it was paying JFMH. (*See* Exs. C-H to Nadeau Aff.) In these statements, Seed is not mentioned explicitly, but the remittance statements make reference to "contractual adjustment" or "[c]harge exceeds fee schedule/maximum allowable or contracted/legislated fee arrangement." Other possible adjustments are flagged in other terms, such as those for "duplicate claim/service," "the time limit for filing has expired," or "prior processing information appears incorrect. (*See id.*)

All eight of the remittance statements attached to Ms. Nadeau's affidavit demonstrate that JFMH was paid substantially less by the State than it had billed for Day Habilitation Services. (Exs. A-H to Nadeau Aff.) Although the remittance statements do not make it explicit, the parties appear to agree that the discrepancy between the amount billed by JFMH to MaineCare and the amount paid was generally due to the omission of the Seed amount. (*See id.*; S.M.F. ¶ 23.)

For purposes of the present motion, the parties agree that $4.6 million represents the difference between what JFMH billed for Day Habilitation Services and what it was paid for the period from April 10, 2007 through March 31, 2011. (*Id.* ¶ 8; Opp. to A.S.M.F. ¶ 8.) For purposes of the present motion, approximately $3,728,000 represents the difference between

what JFMH billed for Day Habilitation Services and what it was paid for the period from 2001 to April 10, 2007. (A.S.M.F. ¶ 9; Opp. to A.S.M.F. ¶ 9.)

3. *The Conversations About Seed Being in the Tuition*

After JFMH received the first Remittance Statement from the State, Mr. Sawyer, JFMH's chief financial officer at the time, spoke by telephone with two State employees (one of whom was named Tom Coulombe) regarding why JFMH was not being paid the full amount it had submitted for payment. Exactly in what State office these employees worked is not clear in the record. In any event, Mr. Sawyer was told by both employees that the State's Seed payment was included in the DOE's tuition rate. (A.S.M.F. ¶ 10-13.) Specifically, Mr. Sawyer testified that the second State employee explained "to some degree how he was going to calculate the rate and it's fuzzy, it was a long time ago, but I think he said something like we take your actual costs, the rate that you're running, whatever it could calculate to be, and then he figures out an adjustment for the Seed. So that was my indication to believe that the tuition is in there coupled with the person who told me that to begin with." (Sawyer Dep. 72:5-13.) Although the State objects that the evidence does not support the assertion, it does not dispute, at least for purposes of summary judgment, that Mr. Sawyer spoke with a second person at DHHS to question how the Seed gets paid and that this person told Mr. Sawyer the Seed is in the tuition amount (*Id.* ¶¶ 12-13; Opp. to A.S.M.F. ¶¶ 12-12.)

Mr. Sawyer did not testify that either of the State employees who told him that Seed was "in the tuition" directed him to back out Seed from the tuition cost calculations in the CARES reports he submitted. That evidently was a step he decided to take.

Mr. Sawyer believes that Mr. Coulombe, one of the individuals at DHHS with whom he says he spoke, did his best to explain honestly how the payment process worked and that he was not trying to hide anything or confuse Mr. Sawyer. (S.M.F. ¶ 57.) Mr. Sawyer does not

believe that anyone from the State knowingly misled him about anything. (*Id.* ¶ 58.) Mr. Sawyer further believes that everyone at DHHS thought the Seed was included in the tuition rate. (*Id.* ¶ 59.) Similarly, Michelle Hathaway, director of the Margaret Murphy Children's Center, does not believe that anyone from the State lied to her or misled her about anything relating to Seed. (*Id.* ¶ 60.) At the time of his deposition, Peter Kowalski, JFMH's Chief Executive Officer for more than thirty years, also believed that no one from the State lied to him about Seed. (Kowalski Dep. 111:21-25.)

4. *The Administrative Review Procedure for Provider Claims of Underpayment*

Stefanie Nadeau, the director of the Office of MaineCare Services within DHHS, asserts, without contradiction in this record, that JFMH never requested that DHHS review any of the payments in which MaineCare paid only the federal government's share of the amount billed—not the Seed. (Nadeau Aff. ¶ 19.)

At all relevant times, the MaineCare regulations have provided the following process for challenging "Underpayment":

> If a provider believes an underpayment has been made for covered services rendered, based upon policy and procedures as described in this Manual, the provider should accept and cash the check issued for the services provided. The provider must request a review of payments, using the MaineCare Adjustment Request form, within one hundred and twenty (120) days of the remittance statement date or waive any right to a review of that payment.

10-144 C.M.R. ch. 101 § 1.12. *See also* 10-144 C.M.R. ch. 101, § 1.12-3 ("Providers have one hundred twenty (120) days from the date of the remittance statement to submit the MaineCare Adjustment Request form.").

The regulations make it clear that the 120-day review procedure is both mandatory and applicable to underpayments—as an example of an adjustment request subject to the mandatory procedure, the regulations make reference to a provider "requesting additional funds on a previously paid claim." 10-144 C.M.R. ch. 101, § 1.12-3.

At all relevant times, JFMH was aware of the procedure for contesting an underpayment. The Remittance Statements that accompanied MaineCare payments to JFMH during 2004 expressly provide on their last page that "ADJUSTMENTS MUST BE REQUESTED WITHIN 120 DAYS OF THE DATE OF YOUR REMITTANCE STATEMENT." (*Id.*) The Remittance Statements from 2005 onward do not refer to a 120-day deadline.[4] (A.S.M.F. ¶ 4.). Even so, Mr. Sawyer on behalf of JFMH was aware that MaineCare had rules and regulations regarding billing and that JFMH had to comply with said rules and regulations. (*Id.* ¶¶ 41-42.) Mr. Sawyer knew that there was a process that had to be followed to challenge the complete or partial rejection of a bill, and he used that process on a number of occasions. (S.M.F. ¶ 47.) Mr. Sawyer understood that if a bill was not paid to JFMH's satisfaction, there were rules that governed JFMH's ability to challenge the amount paid. (*See* Sawyer Dep. 44:25-45:3.)

5. *JFMH's Knowledge That It was Not Being Paid Seed*

Although JFMH had been told that the tuition payment included Seed, it was obvious throughout the years in question that this was not in fact the case. The parties agree that the tuition rates for JFMH, set by DOE, never included the correct amount of Seed for the year in question. (A.S.M.F. ¶ 25.) Mr. Sawyer testified at his deposition that he was able to recognize, based on comparing the CARES reports with the amount actually paid, that the DOE tuition rate was not high[illegible] enough to include Seed." (Sawyer Dep. 23:21-24:10.)

Similarly, Mr. Kowalski, JFMH's Chief Executive Officer, saw that the tuition rate was obviously never high enough to cover the Seed portion. (Kowalski Dep. 36:1-19; 36:1-37:23,

[4] The State objects that other Remittance Statements not proffered as evidence could contain language regarding the 120-day deadline, but subject to that objection, does not dispute, for purposes of summary judgment, that the remittance statements from 2005 onward do not contain language noting the 120-day deadline.

26:4-27:2.) He also testified, however, that until approximately 2010 or 2011, his involvement with the issue of Seed and billing was on the macro level and that he did not have any involvement with issue until JFMH engaged counsel regarding the issue. (Kowalski Dep. 26:25-28:11.) Once Mr. Kowalski did look into the matter in 2010 or 2011, it was apparent to him that the tuition payments JFMH had received did not include the Seed. (S.M.F. ¶ 54; Opp. S.M.F. ¶ 54.)

Despite the fact that it was obvious throughout the years in question that JFMH was not being paid Seed, JFMH does not acknowledge learning that the State was not paying Seed until sometime in 2011, after the State had announced that DHHS would begin paying the full rate under MaineCare. (A.S.M.F. ¶¶17-18.) The State's announcement that it would begin paying the full rate prompted JFMH to hire legal counsel to look into what exactly had been paid previously and by whom. (*Id.* ¶ 19.) JFMH's legal counsel had communications with the State in an attempt to resolve this matter outside of court, from May 2011 until July 13, 2011, when the State notified JFMH that it was terminating its discussions. (*Id.* ¶ 20.)

II. Standard of Review

"Summary judgment is properly granted if the record reflects that there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law." *Angell v. Hallee*, 2014 ME 72, ¶ 16, 92 A.3d 1154 (quotation omitted). "A fact is material if it has the potential to affect the outcome of the suit, and a genuine issue of material fact exists when a fact-finder must choose between competing versions of the truth, even if one party's version appears more credible or persuasive. *Id.* (quotation omitted). However, a genuine issue of material fact does not exist when one version is only supported by evidence that is "merely colorable, or is not significantly probative[.]" *Bouchard v. American Orthodontics*, 661 A.2d 1143, 1144-45 (Me. 1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50

(1986)). Similarly, summary judgment is warranted against a party when their version of the truth is based on conjecture or speculation. *See Stanton v. University of Maine System*, 2001 ME 96, ¶ 6, 773 A.2d 1045. While speculation is not permitted, the nonmoving party is accorded "the full benefit of all favorable inferences that may be drawn from the facts presented. *Curtis v. Porter*, 2001 ME 158, ¶ 9, 784 A.2d 18 (quotation omitted).

III. Analysis

JFMH has framed its cause of action against the State in terms of several alternate theories of liability: contract, quantum meruit, unjust enrichment and violation of federal and state law regarding the State's obligation to pay seed. The State denies it is liable to JFMH on any of these grounds.

As to JFMH's contract claim, a contractual duty to pay can constitute a waiver of sovereign immunity. *See Knowlton v. Attorney General*, 2009 ME 79, ¶13, 976 A.2d 973, *quoting Profit Recovery Group, USA, Inc. v. Comm'r, Dep't of Admin. & Fin. Serv.*, 2005 ME 58, ¶ 28, 871 A.2d 1237 ("a general statute allowing the State to enter into contracts implies a waiver of sovereign immunity by the Legislature when the State is sued for breach of that contract"). However, the State asserts that JFMH's contract claim is barred by JFMH's failure to invoke and exhaust the procedure contained in the MaineCare regulations and incorporated by reference into the Provider Agreements between JFMH and the State, that requires a MaineCare provider claiming to have been underpaid to seek administrative review within 120 days of the alleged underpayment. To this argument, JFMH responds with the assertion that the State is equitably estopped to argue that JFMH's failure to seek administrative review bars JFMH from recovery.

This analysis addresses those issues first, and then addresses the State's arguments as to JFMH's other theories of liability.

1. *JFMH's Failure to Exhaust The Administrative Review Procedure*

The State argues that because JFMH failed to seek administrative review of the payment amount in accordance with the MaineCare regulations, JFMH's action is barred by the doctrine of exhaustion of administrative remedies. The doctrine of exhaustion of administrative remedies holds that a party must pursue all administrative remedies available to them prior to seeking review by the Court. *Levesque v. Eliot*, 448 A.2d 876, 878 (Me. 1982). As a matter of policy, the Court will decline to review a matter prior to review by the administrative body having jurisdiction over, and expertise in, the matter. *Id.* An exception to the doctrine of exhaustion of administrative remedies is "[w]here the administrative agency is not empowered to grant the relief sought and it would be futile to complete the administrative appeal process." *Churchill v. S. A. D. # 49 Teachers Assocs.*, 380 A.2d 186, 190 (Me. 1977).

Each of the Provider Agreements JFMH executed in 1998, 2001 and 2009, included statements incorporating the MaineCare regulations. (SMF ¶¶ 5-6). The pertinent MaineCare regulation has, at all relevant times, required MaineCare providers to seek review of any "Underpayment" according to the following procedure:

> If a provider believes an underpayment has been made for covered services rendered, based upon policy and procedures as described in this Manual, the provider should accept and cash the check issued for the services provided. The provider must request a review of payments, using the MaineCare Adjustment Request form, within one hundred and twenty (120) days of the remittance statement date or waive any right to a review of that payment.

10-144 C.M.R. ch. 101 § 1.12.

According to the State, because JFMH's claims in this case are that JFMH was underpaid, its contracts with the State required JFMH to seek review within 120 days of the remittance payment at issue or "waive any right to review of that payment." The State asserts that JFMH's admitted failure to seek review of payments within 120 days means that JFMH is barred from seeking relief by means of the claims asserted in this case.

JFMH disagrees, arguing that it is not barred from seeking damages in this case for a number of reasons. JFMH argues that the administrative review procedure does not apply to its claims; that any review by DHHS would have been futile; and that the State is estopped from claiming that JFMH failed to exhaust administrative remedies because of misrepresentations made by representatives of the State.[5] These three contentions are addressed in the order just framed.

Applicability of the Procedure: JFMH argues that the term "underpayment" as found in 10-144 C.M.R. ch. 101 § 1.12. does not include a situation in which the provider is repeatedly paid only a portion of an approved claim, but is meant to address situations in which a provider requests changes and the changes are not approved, or in the alternative, situations in which a provider is paid the incorrect amount on a one time basis. There is no support in logic or etymology or the applicable MaineCare regulations for JFMH's argument that the regulations apply to some forms of "underpayment" but not others.

Where the regulation is unambiguous, the court looks to the plain language of the regulation. *Cobb v. Bd. of Counseling Profs. Licensure*, 2006 ME 48, ¶ 13. "Underpay" is defined as "to pay less than what is normal or required." Underpay, *Miriam-Webster Dictionary*, 2015. According to the plain language of the regulation, JFMH's claim that the State failed to pay Seed is plainly a claim of underpayment—payment of less than what was required. The MaineCare regulation in question does not differentiate among varieties of "underpayment".

The regulation also does not make the process for requesting administrative review depend on the amount of underpayment or whether there was notice to the provider of the

[5] JFMH also contends that the current case can be distinguished from caselaw presented by Defendant. The caselaw referred to hales from Massachusetts, Indiana, and New Mexico. The Court reviews the cases presented for the persuasive purposes that they was presented. The Court is not bound to follow previous rulings of other jurisdictions and therefore does not reach JFMH's contentions of distinguishing facts and how these facts may affect the application of the caselaw.

underpayment. In fact, to construe the regulation to require that the provider have actual knowledge—as opposed to being on constructive notice—of an underpayment in order for the 120-day review deadline to apply would effectively be to negate the deadline entirely. Therefore, the plain language of the regulation means that a provider who claims not to have received full payment has to request review by DHHS through the procedure and within the time period laid out in 10-144 C.M.R. ch. 101 § 1.12.

JFMH's Futility Argument: JFMH's second objection to the State's argument that JFMH's failure to request review bars its claims here is that review of the payments by DHHS would have been futile. Where administrative review would not be able to provide a remedy, a party is not held to exhaust administrative remedies. *Churchill*, 380 A.2d at 190. JFMH argues that the dispute concerning payment of claims is not with DHHS only but with the State of Maine more generally. The reason JFMH argues that the claim is against the State rather than DHHS is because JFMH attests that it was informed that the "Seed was in the tuition" and therefore believed that the shortfall came from failure of the DOE to pay the full contract amount. JFMH thus argues that any administrative process by DHHS could not provide remedy for DOE shortfalls in payment.

However, it is undisputed that the State's Seed obligation relates to Medicaid payments to providers through the MaineCare program, which is administered and funded through DHHS, not DOE. Thus, any claim that the State failed to pay Seed should have been directed to DHHS, not DOE. There is no indication in this record that DOE ever underpaid JFMH.[6]

As to JFMH's contention that administrative review would have been futile because JFMH was misled into believing that the Seed was "in the tuition," that contention does not

[6] The State points out that, had JFMH brought the Seed issue to DHHS's attention in a timely manner, the tuition rate would, in fact, have been adjusted upward so as to shift the State's cost of paying Seed onto the sending schools. Defendant's Reply at 4 n.5.

support a claim that administrative review would have been futile. Rather, it relates to JFMH's estoppel argument for why the 120-day review procedure mandated by the MaineCare regulations does not bar its claims. That argument is discussed in detail below.

Thus, as to JFMH's futility argument, there appears no reason whatever that, had JFMH exercised its right to request review of the underpayment as provided in the MaineCare regulations, the claims it is making now could not have been addressed administratively by DHHS.[7]

JFMH's Equitable Estoppel Argument: JFMH contends that, even if it would otherwise have been required to pursue the administrative review procedure contained in the MaineCare regulations, the State is estopped from asserting failure to exhaust that procedure as a bar to JFMH's claims, because of misrepresentations made by representatives of DHHS. JFMH claims that two different State employees—one from DHHS and the other from DOE—responded to Mr. Sawyer's questions regarding why JFMH had received less than the "allowed" claim by informing Sawyer that the "Seed was in the tuition". JFMH claims that these statements led it to believe that the DOE had failed to provide the full tuition amount rather than that DHHS had failed to provide the Seed amount.

The State in its reply brief characterizes what JFMH labels as an estoppel argument as being, in fact, a fraudulent concealment argument, because it involves alleged concealment of a fact as opposed to a cause of action. However, the court does not view the equitable estoppel doctrine quite so narrowly.

Equitable estoppel "[i]nvolves misrepresentations, including misleading statements, conduct, or silence, that induce detrimental reliance." *Cottle Enters. v. Town of Farmington*, 1997

[7] At oral argument, JFMH suggested that administrative review would have been futile because the issues raised by JFMH's claims are so complicated as to be beyond the practical capacity of DHHS to deal with. The court does not accept this argument.

ME 78, n. 6, 693 A.2d 330. The party asserting estoppel must show that it relied upon the misleading statement, action, or inaction; that the reliance was reasonable; and that the reliance caused the party to act to it's own detriment. *Roberts v. Maine Bonding & Casualty Co.*, 404 A.2d 238, 241 (Me. 1979). Once shown, "estoppel bars the assertion of the truth by one whose misleading conduct has induced another to act to his detriment in reliance on what is untrue." *Anderson v. Commissioner of Dep't of Human Services*, 489 A.2d 1094, 1099 (Me. 1985).

There are limitations to the application of equitable estoppel to governmental officials and agencies. "Depending on the totality of the particular circumstances involved, which will include the nature of the particular governmental official or agency acting and of the particular governmental function being discharged as precipitating particular considerations of public policy, equitable estoppel may be applied to activities of a governmental official or agency in the discharge of governmental functions." *Maine School Administrative Dist. v. Raynolds*, 413 A.2d 523, 533 (Me. 1980).

The Law Court recently framed the burden of proving equitable estoppel against a government entity as follows:

> To prove equitable estoppel against a governmental entity, the party asserting it must demonstrate that (1) the governmental official or agency made misrepresentations, whether by misleading statements, conduct, or silence, that induced the party to act; (2) the party relied on the government's misrepresentations to his or her detriment; and (3) the party's reliance was reasonable. When reviewing a defense of equitable estoppel against a governmental entity, we consider the totality of the circumstances, including the nature of the particular governmental agency, the particular governmental function being discharged, and any considerations of public policy arising from the application of estoppel to the governmental function.
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> *State v. Austin*, 2016 ME 14, ¶9, 2016 Me. LEXIS 14, at (Jan. 19, 2016), *quoting State v. Brown*, 2014 ME 79, ¶ 14, 95 A.3d 82.

JFMH claims that it reasonably relied upon the assurances of DHHS representatives that the Seed was included in the tuition reimbursement, leading JFMH to decide not to seek

administrative review from DHHS to JFMH's detriment. Mr. Sawyer's account of the conversations he asserts he had with Tom Coulombe and another State employee must be viewed in a light most favorable to JFMH, meaning that it is taken as true for purposes of the State's motion for summary judgment.

JFMH claims that because Mr. Sawyer reasonably relied upon statements by DHHS representatives in making the decision not to seek administrative review by DHHS, the State is estopped from enforcing the doctrine of exhaustion of administrative remedies.

The State responds with several points.

First, it questions how JFMH can be said to have assumed that it was being paid Seed if Seed was backed out of the CARES reports that JFMH periodically submitted to DHHS. The court agrees with the State's point—in fact, it is somewhat of a mystery as to why Mr. Sawyer elected to respond to what he claims to have been told about the Seed being in the tuition by "backing out" Seed from the cost figures contained in the CARES reports. Nothing in his recounting of the conversations with the two State employees indicates that either of them directed him to back out Seed.

Second, the State notes that, by JFMH's own admission, it was obvious that the tuition rate did not include Seed. Again, the State's point is well-supported in the record: Mr. Kowalski, Mr. Sawyer and Mr. Cowan all are on record as saying essentially that it is obvious from the amounts that JFPH was being paid for tuition that the payments did not include Seed.

Third, the State points out that JFMH's delay in asserting these claims has in fact prejudiced the State because the State is, at this point, not able to shift the cost of paying Seed onto the sending schools, as it claims it could have done had JFMH raised the issue at the time of the underpayments at issue.

The State's points are all well taken. However, because this case is before the court on summary judgment, and because the reasonableness of a party's acts and omissions is usually for the factfinder to decide, the State can obtain summary judgment only if the facts, and the inferences to be drawn from them, viewed objectively and in a light most favorable to JFMH, could not, under any reasonable view of those facts, support the application of equitable estoppel against the State in this case.

JFMH's brief embraces this point and, in fact, goes so far as to say, "[e]quitable [e]stoppel is intrinsically the sort of issue that cannot be resolved on summary judgment if we are to take seriously the idea that there must be no genuine dispute as to any material fact." JFMH's Opp. to Defendant's Motion for Summary Judgment, at 12. However, there is precedent for the grant of summary judgment when the party's alleged detrimental reliance is so unreasonable as to be unreasonable as a matter of law.

In *Hanusek v. Southern Maine Medical Center*, a case in which the plaintiffs claimed that the defendant should be equitably estopped from raising the statute of limitations as a bar, the Law Court decided that the defendant was entitled to summary judgment because the plaintiffs' forbearance to bring suit, allegedly in reliance on a threat made by an employee of defendant, was "not reasonable as a matter of law." 584 A.2d 634, 637 (Me. 1990). The court explained its analysis in detail:

> For purposes of estoppel, misrepresentations that induce others not to take action can constitute acts on which people reasonably rely to their detriment. The inaction alleged to result from this threat, however, is unreasonable as to its duration and scope. This is not the case of a misleading statement made shortly before the expiration of the limitations period prompting a brief delay in bringing suit. The statement here was made on the day after the alleged negligence that gave rise to the claim for malpractice and nearly three years prior to any action taken by the Hanuseks. In addition, the Hanuseks made no attempt to confirm the validity of the nurse's statement with anyone from the hospital, such as an administrator or a physician. Moreover, the Hanuseks relied on the single statement of the nurse to refrain for nearly three years not only from filing suit, but also from consulting privately and confidentially with an

> attorney. The forbearance of the Hanuseks was not reasonable as a matter of law. Because the action was not commenced within the statutory period, and because there is an insufficient basis to apply estoppel to prevent SMMC from asserting the statute of limitations defense, SMMC is entitled to summary judgment.
>
> 584 A.2d at 637.

The *Hanusek* decision stands for the proposition that a party's reliance can be so unreasonable "in duration and scope" as to render it objectively unreasonable as a matter of law. Here, JFMH's reliance was equal in scope and even longer than the plaintiffs' reliance in *Hanusek*. JFMH delayed acting for 10 years, based on undocumented telephone conversations with State employees. Like the plaintiffs in *Hanusek*, JFMH "made no attempt to confirm the validity" of what it was being told over the telephone. It was obvious to those at JFMH when they looked at the data that the tuition payments JFMH was receiving were not high enough to include Seed. JFMH's reliance for 10 years on an obviously incorrect premise is difficult to explain, except as credulous.

Another point that merits mention, given that equitable estoppel is an equitable doctrine, is that JFMH's delay in asserting its underpayment claims means that the State has lost, as to the years at issue, the ability to pass through to the sending schools the State's cost for Seed. Thus, the equities of the situation are by no means entirely with JFMH.

For these reasons, the court concludes that JFMH's reliance was unreasonable as a matter of law, i.e., that there is no reasonable interpretation of the undisputed facts, even viewed in a light most favorable to JFMH, that allows for the conclusion that JFMH reasonably relied for 10 years on plainly incorrect advice given by two State employees over the telephone. Accordingly, the court concludes that, as in *Hanusek*, the element of reasonable reliance that is essential to equitable estoppel has not been shown, even on a prima facie basis. It follows that the State is not equitably estopped to assert JFMH's failure to exhaust the

administrative review process mandated by the MaineCare regulations as a bar to its claims in this case. JFMH's failure to seek administrative review of the underpayments at issue bars recovery on the basis of JFMH's contracts with the State.

2. *JFMH's Alternate Theories of Liability and the State's Response*

The inquiry now turns to whether JFMH's failure to pursue administrative review operates as a complete bar to its cause of action, or whether it may still pursue its claims under a different theory of liability.

The State asserts that JFMH's exclusive remedy for underpayment was through the MaineCare administrative review procedure. Specifically, the State contends that the State is immune by virtue of sovereign immunity; that there is no private cause of action for underpayment of Medicaid reimbursement amounts provided for in either federal or state law, and that JMFH's contract and quasi-contract claims are in part time-barred.

JFMH's Common Law Claims for Quantum Meruit and Unjust Enrichment: The fact that JFMH's entitlement to MaineCare reimbursement was the subject of the express contracts reflected in the Provider Agreements, standing alone, might justify denying recovery on the alternative grounds of quantum meruit and unjust enrichment. However, the law allows for exceptions to the general rule that the existence of an express contract precludes recovery in quantum meruit or for unjust enrichment, so the State's sovereign immunity argument needs to be considered.

The starting point for any discussion of sovereign immunity in Maine is the precept that "'[t]he immunity of the sovereign from suit is one of the highest attributes inherent in the nature of sovereignty' and can only be waived by 'specific authority conferred by an enactment of the Legislature.'" *Knowlton v. Attorney General*, *supra*, 2009 ME 79 at ¶ 12, 976 A.2d 973 (*quoting Drake v. Smith*, 390 A.2d 541, 543 (Me. 1978)). As noted previously, however, the

Legislature's enactment of statutory authority to enter into contracts is deemed a waiver of sovereign immunity to the extent of liability assumed by the State under contracts awarded pursuant to that authority. *See Knowlton v. Attorney General*, 2009 ME 79 at ¶13, 976 A.2d 973; *Profit Recovery Group, USA, Inc. v. Comm'r, Dep't of Admin. & Fin. Serv.*, 2005 ME 58, ¶ 28, 871 A.2d 1237. Thus, the State can be deemed to have waived liability to the extent of its duty to pay JFMH under the Provider Agreements.

But the State's contractual duty to pay defines the extent of the waiver of immunity as to JFMH's damages claim. The Provider Agreements all required JFMH to present claims of underpayment through the MaineCare administrative review procedure, meaning that the State's contractual duty to pay does not extend to claims not presented in that manner. Thus, the State has not waived its sovereign immunity to suit under JFMH's implied contract/quantum meruit or unjust enrichment theories.

To date, no act of the Maine Legislature has explicitly waived sovereign immunity such as to allow "the state to be sued on quantum meruit or other quasi-contractual theories in its own courts." *Beech Hill Hosp., L.L.C. v. State*, No. CV-03-265, 2004 WL 960018, at *4 (Me. Super. Mar. 11, 2004). *See also Jordan v. Boothbay Region Refuse Disposal Dist.*, 656 A.2d 740, 742 (Me. 1995) (leaving open the question of "whether the Tort Claims Act affords a governmental entity immunity to suits for unjust enrichment.") Accordingly, the State is entitled to summary judgment on JFMH's alternate theories of quantum meruit and unjust enrichment.

No Federal or State Private Right of Action: JFMH has made at least a *prima facie* showing that the State's failure to pay Seed funds (as opposed to "phantom Seed") was a violation of federal and possibly state law as well. What JFMH has not shown is that there is any statutory right of action entitling it or any other MaineCare provider to sue for damages based on the State's violations of law. Any constitutional argument for a private right of

action is foreclosed by the fact that the MaineCare regulations afford an adequate remedy for underpayment.

This conclusion makes it unnecessary to address the State's fallback argument that the six-year statute of limitations bars claims accruing more than six years before JFMH filed its complaint.

III. Conclusion

Of the various theories of liability advanced by JFMH JFMH, the only one on which the State could potentially be liable is that based on the express contracts reflected in the Provider Agreements between JFMH and the State. The court concludes that JFMH's recovery on the basis of express contract is barred by its failure to invoke and exhaust the mandatory administrative review procedure contained in the State's MaineCare regulations and incorporated by reference in the Provider Agreements.

IT IS ORDERED: Defendant's Motion for Summary Judgment is hereby granted. Judgment on the Complaint is hereby awarded to Defendant State of Maine. Defendant is also awarded its recoverable court costs as the prevailing party.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Decision and Judgment by reference in the docket.

Dated January 29, 2016

_____/s_____
A. M. Horton
Justice, Business and Consumer Court