

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

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| In the Matter of the Appeal of | : | |
| | : | |
| The New Jewish Home, Manhattan | : | Decision Without |
| Provider #00316761 | : | Hearing Pursuant to |
| | : | 18 NYCRR 519.23 |
| | : | |
| from a determination to recover Medicaid Program | : | |
| overpayments. | : | #17-6148 |
| | : | |

Before: John Harris Terepka
Administrative Law Judge

Held at: Submitted on papers
Record closed May 8, 2020

Parties: New York State Office of the Medicaid Inspector General
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JURISDICTION

The New York State Department of Health (the Department) acts as the single state agency to supervise the administration of the Medicaid Program in New York State. 42 USC 1396a; PHL 201(1)(v); SSL 363-a. The New York State Office of the Medicaid Inspector General (OMIG), an independent office within the Department, is responsible for the Department's duties with respect to the prevention, detection and investigation of fraud and abuse in the Medicaid Program and the recovery of improperly expended Medicaid funds. PHL 31.

The OMIG issued a final audit report for The New Jewish Home, Manhattan (the Appellant) in which the OMIG concluded that the Appellant had received Medicaid Program overpayments. The Appellant requested a hearing pursuant to SSL 22 and former Department of Social Services (DSS) regulations at 18 NYCRR 519.4 to review the overpayment determination. The Appellant subsequently requested that this appeal be decided without a hearing pursuant to 18 NYCRR 519.23.

RECORD

Appellant I: December 20, 2019 request for decision without hearing, with:
Affirmation of Michael A. Berlin
Exhibits A-D.

OMIG I: February 18, 2020 reply, with:
Exhibits 1-11.

Appellant II: March 5, 2020 response.

OMIG II: May 1, 2020 response.

SUMMARY OF FACTS

1. The New Jewish Home, Manhattan is a residential health care facility (RHCF), or nursing home, in New York City. It is licensed under PHL Article 28 and enrolled as a provider in the Medicaid Program.

2. Auditors from the OMIG reviewed the capital portion of the Appellant's Residential Health Care Facility cost reports (RHCF-4) for the period January 1, 2011 through December 31, 2014. These reported costs were the basis for the capital portion of the Appellant's January 1, 2013 through December 31, 2016 Medicaid reimbursement rates. (Exhibit A.)

3. By final audit report dated July 11, 2019, the OMIG identified several property expense disallowances and advised the Appellant of its determination to recover Medicaid Program overpayments in the amount of \$512,030. (Exhibit A.)

4. In this appeal, the Appellant challenges property expense disallowance 1, "related company expense disallowances" in the amount of \$362,553, and property expense disallowance 4, "working capital interest expense disallowance" in the amount of \$60,716. (Appellant I, page 1; Exhibit A, attachment C.)

5. The related company expense disallowances are for depreciation and rental expenses for offsite administrative offices. New Jewish Home, which owns the Appellant and other nursing homes and operates various other health care and social services programs, established Jewish Home Lifecare, Corporate Services Inc. in July 2009 as a "home office" to provide administrative services for facilities that were under its ownership. The Appellant moved some administrative functions out of its nursing home and into this "home office." (Appellant I, page 2.)

6. The working capital interest expense disallowance is for interest payments in 2016 on a line of credit. The line of credit was payable "on demand" and amortization of the principal amount was not required or paid. (Exhibit A, attachment C; Exhibit 9; Appellant I, page 14.)

ISSUE

Has the Appellant established that the OMIG's audit report property expense disallowances 1 and 4 are not correct?

APPLICABLE LAW

A residential health care facility can receive reimbursement from the Medicaid Program for costs that are properly chargeable to necessary patient care. 10 NYCRR 86-2.17. Allowable costs can include a component for capital costs such as, in this case, depreciation and rental, and necessary interest on current and capital indebtedness. 10 NYCRR 86-2.10(a)(9), 86-2.20(a). Allowable costs shall not include expenses or portions of expenses which are determined by the commissioner not to be reasonably related to the efficient production of service because of either the nature or amount of the particular item. 10 NYCRR 86-2.17(d).

The facility is reimbursed by means of a per diem rate set by the Department on the basis of costs reported by the facility. 10 NYCRR 86-2.10. A facility's rate is provisional and the costs it reports are subject to audit. If an audit identifies an overpayment the Department can retroactively adjust the rate. SSL 368-c; 10 NYCRR 86-2.7; 18 NYCRR 517.3(a). The Department may then require the repayment of any amounts not authorized to be paid under the Medicaid Program. 18 NYCRR 504.8, 518.1. If the Department determines to recover an overpayment, the facility has the right to an administrative hearing at which the facility has the burden of showing that the

determination of the Department was incorrect and that all costs claimed were allowable. 18 NYCRR 519.18(d)(1).

DSS regulations pertinent to this hearing are found at 18 NYCRR Parts 517, 518 and 519, and address the audit, overpayment and hearing aspects of this case. Also pertinent are DOH regulations at 10 NYCRR Part 86-2 (reporting and rate certifications for RHCfs). Unless otherwise provided in Part 86-2 or in accordance with specific determination by the commissioner, allowable costs are determined by the application of the principles of reimbursement developed for determining payments under the Medicare Program. 10 NYCRR 86-2.17(a). These are primarily found at 42 CFR Chapter IV, and in the Medicare Provider Reimbursement Manual (PRM-1).

DISCUSSION

According to the Appellant:

A decision without hearing is appropriate because there are no unresolved issues of material fact. Determining whether administrative services provided offsite to the Facility and whether interest relating to a line of credit are reimbursable requires only an examination of the relevant rules and regulations. (Appellant I, page 2.)

The Appellant asked that this appeal be decided on papers submitted pursuant to 18 NYCRR 519.23. The parties submitted briefs and exhibits in support of their positions. The Appellant having failed to meet its burden of proving the OMIG audit determinations to disallow these reported costs were incorrect, audit disallowances 1 and 4 are affirmed.

Property expense disallowance 1: Related Company Expense.

In July 2009 The New Jewish Home, which owns the Appellant, established Jewish Home Lifecare, Corporate Services, Inc. as a home office to provide administrative services across its various facilities that offer health care, therapeutic and

social work programs and services. (Appellant I, page 2.) Some of the Appellant's administrative functions that had been housed at the nursing home were moved to the home office building. (Appellant I, pages 2-3; Exhibit C, page 2.)

The Appellant subsequently reported depreciation and rental expenses related to the home office building on its 2011 through 2014 cost reports. The reported property costs were included in the calculation of its reimbursement rate. In this audit, the OMIG determined the costs should not have been included in the calculation of the rate, and so recalculated the Appellant's reimbursement to determine the overpayment.

The OMIG determined that the Appellant's unilateral decision to report over \$362 thousand in additional real property costs for an offsite building housing administrative services that had been housed in the nursing home building, without obtaining approval from the Department for the additional costs, was not shown to be reasonably related to the efficient production of service.

The Appellant claims that the relocation of some administrative functions to a home office resulted in a more efficient delivery of service and a reduction in overall spending. (Appellant I, pages 3&11; Exhibit C, page 2.) The Appellant offered no evidence to show that the relocation resulted in efficiencies, reduced spending, or effected a net savings to the Medicaid Program, nor has it explained why, if it was more economical to relocate these functions, it is seeking several hundred thousand dollars in additional reimbursement from the Medicaid Program as a result.

The Appellant instead bases its appeal of this audit finding, and its request for a decision without hearing, entirely on a claim that no unresolved material issue of fact is

involved and that establishing its entitlement to these costs “requires only an examination of the relevant rules and regulations.” (Appellant I, page 2.)

According to the Appellant:

[T]here is no regulation, statute or even guidance in place during the time period of the audit that requires a facility to notify or gain approval prior to moving its administrative services outside of the nursing home. Further, any reasonable interpretation of law holds that these administrative costs are reimbursable regardless of whether they are undertaken within or outside the facility. (Appellant II, page 1.)

This is a generally accurate statement, as far as it goes; but nothing in the OMIG’s audit disallowance is inconsistent with it. The issue is not whether the Appellant was entitled to move some administrative functions offsite or whether it is entitled to reimbursement for those administrative functions. The issue is whether the Appellant is entitled to reimbursement for the additional property costs it reported after moving administrative functions offsite.

The Appellant’s arguments rely on attempts to 1) confuse certificate of need (CON) requirements with Medicaid reimbursement requirements; 2) confuse administrative services costs with property costs; and 3) confuse Medicaid’s payment of a provisional rate subject to audit with notice issues.

1. The Appellant accurately points out that it was not required to obtain a certificate of need (CON) pursuant to PHL Article 28 and 10 NYCRR Part 710 to relocate administrative services offsite. With its response to the draft audit report, it produced a November 16, 2017 letter from the Department’s Division of Planning and Licensure, advising it that a CON application is not necessary because: “Off-site administrative space for a nursing home is not subject to CON.” (Exhibit C, attachment 2; Appellant I, page 9.)

The OMIG agrees that a CON application was not required for the Appellant's relocation of administrative offices. (OMIG I, page 10.) The Department's November 16, 2017 determination advising that a CON application was not required did, however, go on to advise the Appellant:

Additionally, we reached out the [sic] Office of Health Insurance Programs regarding Ms. Anna Rizzo's concern about reimbursement implications of not submitting a CON. According to Cynthia Treis, regardless of a CON submission, there is no reimbursement for real property leases entered into after March 10, 1975. Ms. Treis did indicate, however, that the facility must notify the OHIP they stop [sic] using the administrative space in a nursing home as the original CON had allocated administrative space within the building. I suggest you reach out to OHIP with any further concerns you have on this matter. (Exhibit C, attachment 2.)

While a CON was not required to move the administrative services to a separate building, that did not mean the Medicaid Program would be required to reimburse an additional \$362 thousand in reported property costs incurred as a result of the move. The OMIG determination that the Appellant was required to seek approval for reimbursement of property costs attributable to offsite space not already recognized in its CON is correctly based on 10 NYCRR 86-2.17(a)&(d), 86-2.19(f) and regulations regarding allowable property costs and revisions in certified rates, not on PHL Article 28, 10 NYCRR 401.3 and 10 NYCRR Part 710 requirements for CON approval.

2. According to the Appellant: "Nothing in the PRM-1 prohibits the reimbursement of administrative services simply because they are provided from an offsite location." (Appellant II, page 7.) Pointing out that administrative services provided offsite are reimbursable (Appellant I, pages 10-11; Appellant II, page 6) does not answer the question whether the additional property costs that result from moving those services to a separate building are reimbursable. There is no disallowance in this

audit of the Appellant's costs for administrative services or personnel at either the nursing home or the home office. (OMIG I, pages 13&20; OMIG II, pages 3-4.) It is only the additional property costs associated with housing administrative services offsite that are at issue.

The Appellant's denial that the services provided by the home office are duplicative of the administrative services provided onsite (Appellant I, page 13) also confuses administrative with property costs. The audit disallowance is for failure to "demonstrate the relationship to patient care for depreciation and rental expenses on the building." (Exhibit A, attachment C, *emphasis added*.) The duplication is not in the functions being carried out at the two locations. It is in the property costs associated with an additional building when the Appellant was already being reimbursed in its rate for housing these administrative services in its existing building.

It is undisputed that the Appellant's existing CON included an allocation of office space within the nursing home for the administrative functions it moved to the home office. The Appellant acknowledged that after moving administrative services out of the nursing home it was able to "reconfigure" the nursing home space and use it for other purposes. (Appellant I, page 11; Exhibit C, page 2.) Because it continued to be reimbursed for property costs for the nursing home building and that office space within it, the Appellant's reimbursement rate already included provision for property costs associated with the administrative services provided in the home office. The Appellant has failed to explain how recognizing an additional \$362 thousand in property costs for the offsite space would not result in Medicaid paying twice for the same function.

The Appellant is arguing that because it incurred property costs in connection with allowable administrative services, and because property costs are reimbursable, it is necessarily entitled to reimbursement for these reported property costs. If the Appellant's argument that it is entitled as a matter of law to reimbursement for these costs is credited, it could move into any number of offsite offices for the housing of administrative services, and claim reimbursement for all of those property costs without any showing that they were reasonable or necessary, on the grounds that the space was used to provide reimbursable administrative services.

In addition to 10 NYCRR 86-2.17(a)&(d), the audit report cites 10 NYCRR 86-2.19(f)(1), which provides:

In the event that a residential health care facility is sold or leased or is the subject of any other realty transaction, the capital cost component of such rate shall be considered to be continuing with the same force and effect as though such sale, lease or other realty transaction has not occurred.

The Appellant claims that this regulation "has no bearing here" because the facility was not "sold or leased." The Appellant offered no explanation or authority for its assertion that "is the subject of any other realty transaction" must mean "a facility is sold or leased to *another* provider." (Appellant I, page 12; Appellant II, page 8.)

The Appellant's insistence that it is "merely moving administrative services offsite to another one of its locations" (Appellant II, page 8) does not acknowledge the real reason for the disallowance, which is that it is seeking Medicaid reimbursement for additional property costs for this other location. With the expression "another one of its locations" the Appellant elides a significant distinction, for Medicaid reimbursement purposes, between Appellant The New Jewish Home, Manhattan on the one hand and New Jewish Home/Jewish Home Lifecare, Corporate Services Inc. on the other. The

home office is not “another one of” The New Jewish Home, Manhattan’s locations. It is a Jewish Home Lifecare, Corporate Services Inc. property for which the Appellant is seeking additional Medicaid reimbursement in its nursing home rate.

Incurring additional real property costs for an offsite building as a result of moving administrative functions to that offsite building is a realty transaction for this nursing home for which a change in the capital component of its rate is not permissible. 10 NYCRR 86-2.19(f)(1). While the Appellant further claims that it “is not challenging the rates in the Final Report, so a citation to the regulation governing computation of the capital cost rate is irrelevant” (Appellant I, page 12), it is challenging the OMIG’s calculation of “the capital cost component of such rate,” which is precisely what this regulation is about.

The OMIG’s determination, on audit, that the Department must review and approve reimbursement for offsite property not already recognized in the CON is a rational application of the principle that allowable costs shall not include expenses determined by the commissioner not to be reasonably related to the efficient production of service. 10 NYCRR 86-2.17(d).

3. The Appellant argues that it was deprived of due process rights because it was not on appropriate notice that these costs would not be reimbursed. (Appellant I, pages 7-8.) The Appellant also claims that it provided the Department with “constructive notice” of the existence of the home office because the Appellant reported these costs on its cost reports and was paid for them. (Appellant I, pages 9-10.) These arguments are contrary to and attempt to circumvent the entire reimbursement and audit process. Medicaid calculates and pays a rate on the basis of costs reported by the provider. That

rate remains provisional subject to subsequent audit to determine whether the reported costs are substantiated, accurately and properly reported, and allowable. 18 NYCRR 517.3(a)(2), 518.1(c).

[The Appellant] knew, or should have known, that any payment certified by the Department was wholly inchoate until such time as the audit of cost reports, upon which the reimbursement rates were based, was performed and completed. Cortlandt Nursing Home v. Axelrod, 66 N.Y.2nd 169, 495 N.Y.S.2nd 927 (1985).

The Appellant's disagreement with the OMIG's application of Medicaid reimbursement rules in this audit disallowance does not establish that the OMIG retroactively set or changed a policy or rule. The Appellant has not identified any occasion or manner in which the OMIG has announced, interpreted or applied regulations or policies inconsistently with its disallowances in this case.

If the post-payment audit determination is based on a rational and reasonable interpretation of the regulations the Appellant has not been deprived of any due process or notice rights. The OMIG's determination on audit that the additional property costs reported for the home office are not reimbursable is rational, consistent with and supported by reimbursement regulations, and it is affirmed.

Property expense disallowance 4: Working Capital Interest Expense.

The Appellant's 2014 RHCF-4 cost report stated: "On October 1, 2013, the Home obtained a revolving loan... in the amount of \$5,000,000 with... interest... The loan is due on demand with no expiration date." (Exhibit 9.) The OMIG disallowed interest on this line of credit that the Appellant reported as working capital interest expense. (Exhibit A, attachment C.)

Necessary interest on both current and capital indebtedness is an allowable cost for RHCFs. 10 NYCRR 86-2.20(a). The OMIG disallowed these interest payments

because there was no substantiation that any principal payments were required or were ever made. The audit report stated:

Interest is allowable on current indebtedness; however, a non-amortizing loan is not current. In addition, it has been determined by the Commissioner that interest expense [sic] related to working capital loans that are considered "interest only" are not reimbursable for Medicaid purposes. (Exhibit A, attachment C.)

The Provider reported working capital interest for a line of credit and showed no evidence that principal payments were made during the life of the loan... Since the loan was non-amortizing and interest only, it is not regarded as current indebtedness, and therefore the reported interest is not recognized for Medicaid reimbursement. (Exhibit A, attachment E.)

The authority cited in the audit report for this disallowance is 10 NYCRR 86-2.17(a)&(d), 86-2.20, 451.71, and PRM-1 202.1.

10 NYCRR 86-2.17(a)&(d) are general provisions about allowable costs. 10 NYCRR 86-2.20(a) provides that "necessary interest on both current and capital indebtedness is an allowable cost." 10 NYCRR 451.71 defines "current liability" as a short-term debt that is to be paid within a relatively short period, usually one year or less or at least within the business cycle of an enterprise. PRM-1 202.1 states:

Interest on current indebtedness is the cost incurred for funds borrowed for a relatively short term, usually for 1 year or less. Current borrowing is usually for purposes such as working capital for normal operating expenses. Interest on capital indebtedness is the cost incurred for funds borrowed for capital purposes, such as the acquisition of facilities, equipment, and capital improvements...

The Appellant mischaracterizes the Department's position to be that "payments of interest are allowable only if they are made together with payments on principal." (Appellant I, page 15; Appellant II, page 10.) It suggests that the PRM-1 provides to the contrary, authorizing reimbursement for "interest only loans" by stating:

Various methods of identifying and accounting for interest costs are used. *These include periodic cash payments of interest with or without repayment of all or part of the loan...* PRM-1 202.1 (emphasis supplied). (Appellant I, page 15.)

This PRM-1 provision simply describes methods of identifying interest costs, not whether they are allowable. The more pertinent PRM-1 language is:

To be allowable under the Medicare program, interest must be:

- Supported by evidence of an agreement that funds were borrowed and that payment of interest and repayment of the funds are required;
- Identified in your accounting records;
- Related to the reporting period in which the costs are incurred; and
- Necessary and proper for the operation, maintenance, or acquisition of your facilities.

To support the existence of a loan, have available a signed copy of the loan contract which contains the pertinent terms of the loan such as amount, rate of interest, method of payment, due date, etc. Where the lender does not customarily furnish a copy of the loan contract, correspondence from the lender stating the pertinent terms of the loan, such as amount, rate of interest, method of payment, due date, etc., is acceptable. PRM-1 202.1.

The Appellant offered no documentation to show a method of repayment or due date for repayment of any of the borrowed funds, nor were these issues addressed in “the basic financial terms of the loan [that] were disclosed in the notepad [Exhibit 9] submitted as part of the 2014 cost report.” (Appellant I, page 15; Exhibit C, page 7.)

The Appellant points out that it reported this interest in accordance with generally accepted accounting principles (GAAP). (Appellant I, page 7.) The issue is not reporting or accounting, it is reimbursement. Following GAAP in cost reporting does not obviate the Medicaid reimbursement principle that a provider is entitled to reimbursement only for costs “properly chargeable to necessary patient care.” 10 NYCRR 86-2.17.

The OMIG concluded that the working capital line of credit in this case is not reimbursable by Medicaid as either current or capital indebtedness. It is not capital indebtedness because it does not qualify as such under 10 NYCRR 86-2.20(e). It is not current indebtedness under 10 NYCRR 451.71 and PRM-1 202.1 because it is not to be paid within a year or any other relatively short period. (OMIG I, page 24.) The

Appellant's argument that "by being due on demand, the line of credit constitutes a 'short-term debt'" (Appellant II, page 11) is not persuasive. The outstanding balance of \$3,228,837 at the end of 2013 rose to \$3,548,706 by the end of 2014. (Exhibit 9.) There is no evidence that any principal payments were ever demanded, let alone made or required to be made within a relatively short period or even at all. As the OMIG points out, "Medicaid could be reimbursing an interest expense indefinitely without any reduction of the outstanding balance or final payoff date." (OMIG I, page 22; OMIG II, page 2.)

As with the related company expense disallowance, the Appellant has not identified any occasion or manner in which the OMIG has announced, interpreted or applied regulations or policies inconsistently with this audit finding. As with the related company expense disallowance, the Appellant's suggestion that the Department's provisional reimbursement of a reported but unaudited cost means it was allowable is incorrect. (Appellant I, pages 15-16; Exhibit C, pages 7-8.)

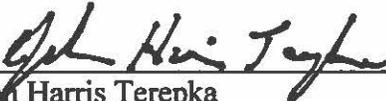
The audit determination is that with no obligation to pay back principal within any stated time period, and no evidence payments of principal were ever made, this indebtedness is not supported by evidence "that payment of interest and repayment of the funds are required." The interest is not reimbursable as it was not paid on either current or capital indebtedness. The audit disallowance is rational and consistent with the applicable regulations and it is affirmed.

DECISION:

The OMIG's audit report property expense disallowances 1 and 4 are affirmed.

This decision is made by John Harris Terepka, Bureau of Adjudication, who has been designated to make such decisions.

DATED: Rochester, New York
May 11, 2020



John Harris Terepka
Bureau of Adjudication