

cc: Ms. Daniels Rivera by Scan
Ms. Mailloux by Scan
Ms. Bordeaux by Scan
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SAPA File



Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, MD, MPH
Commissioner

JOHANNE E. MORNE, MS
Executive Deputy Commissioner

September 23, 2025

CERTIFIED MAIL/RETURN RECEIPT

Elliott Smeltzer, Esq.
NYS Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204

David Berov, LNHA
New Surfside Nursing Home, LLC
d/b/a Premier Nursing & Rehab Center
of Far Rockaway
21-41 New Haven Avenue
Far Rockaway, New York 11691

Dov Ringel, CPA
Joshua Leiner, CPA
Martin Friedman and Company
2600 Nostrand Avenue
Brooklyn, New York 11210

RE: In the Matter of New Surfside Nursing Home, LLC

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter.

If the appellant did not win this hearing, the appellant may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the appellant wishes to appeal this decision, the appellant may wish to seek advice from the legal resources available (e.g. the appellant's attorney, the County Bar Association, Legal Aid, OEO groups, etc.). Such an appeal must be commenced within four (4) months after the determination to be reviewed becomes final and binding.

Sincerely,

A handwritten signature in black ink that reads "Natalie J. Bordeaux".

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: cmg
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

COPY

In the Matter of the Appeal of

New Surfside Nursing Home, LLC
Medicaid Provider #00309724 (NF)
02700883 (ADHC)

from a determination to recover Medicaid
Program overpayments.

DECISION
AFTER
HEARING

Audit No. 19-7065

Before: Kathleen Dix
Administrative Law Judge

Hearing date: May 21, 2025
By WebEx Videoconference
Record closed August 12, 2025

Parties: NYS Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204
By: Elliott Smeltzer, Esq.

New Surfside Nursing Home, LLC
d/b/a Premier Nursing and Rehab Center of Far Rockaway
21-41 New Haven Avenue
Far Rockaway, New York 11691
By: David Berov, LNHA – Administrator; and
By: Dov Ringel, CPA
Joshua Leiner, CPA
Martin Friedman and Company
2600 Nostrand Avenue
Brooklyn, New York 11210

JURISDICTION

The New York State Department of Health (the Department) acts as the single state agency to supervise the administration of the Medical Assistance (Medicaid) Program in New York State. 42 USC 1396a; Public Health Law (PHL) § 201(1)(v); Social Services Law (SSL) § 363-a. The New York State Office of the Medicaid Inspector General (OMIG), an independent office within the Department, is authorized to investigate and pursue civil and administrative enforcement actions to recover improperly expended Medicaid funds. PHL §§ 31-32.

The OMIG determined to recover Medicaid Program overpayments from New Surfside Nursing Home, LLC (the Appellant) for the rate period January 1, 2015 through December 31, 2018. The Appellant requested this hearing pursuant to SSL § 145-a and former Department of Social Services (DSS) regulations at 18 NYCRR 519.4 to review the overpayment determination.

HEARING RECORD

OMIG Witnesses: Jesse Chai, Audit Manager

OMIG Exhibits: A, D, F, H, I, K, L, M, N, O, P, R, U, V, X, Y, Z, Aa, Ab, Ac, Ad

Appellant Witnesses: None

Appellant Exhibits: None

A transcript of the hearing was made. (Transcript [T.] pages 1 - 60.) The record closed on August 12, 2025. The OMIG submitted a post-hearing brief; the Appellant made a closing statement at the hearing.

FINDINGS OF FACT

1. At all times relevant hereto, the Appellant was a proprietary residential health care facility (RHCF), or nursing home, and also operated an Adult Day Health Care (ADHC or "day care") facility in Far Rockaway, New York. The Appellant is licensed under PHL Article 28 and enrolled as a provider in the Medicaid Program. (Exhibit I; Tr. 9.)

2. The Appellant receives a daily rate for each Medicaid recipient occupying a bed in its nursing home and receiving services at its day care facility. (Exhibit I; Tr. 8, 17, 46-47.)

3. In October 2019, the OMIG commenced an audit of the capital portion of the Appellant's RHCF cost reports for each of the calendar years 2013 through 2016. These cost reports (form RHCF-4) are the basis for the capital component of the Appellant's nursing home and day care daily Medicaid rates for the period January 1, 2015 through December 31, 2018. (Exhibit A; OMIG's brief, page 2; T. 20-21.)

4. On April 10, 2024, the OMIG issued a draft audit report (DAR) which identified seven categories of disallowances for claimed property expenses for the nursing home and the day care, and proposed to recover an estimated Medicaid overpayment of \$590,906. The DAR advised the Appellant, pursuant to 18 NYCRR 517.5, that it was entitled to submit objections to the proposed action, which objections were required to include any additional material or documentation that the Appellant wished to be considered. (Exhibit F; Tr. 22-24.)

5. On June 6, 2024, the Appellant timely submitted its objections to the DAR. (Exhibits G, H; Tr. 24-26.)

6. On August 20, 2024, the OMIG issued a final audit report (FAR) which

advised the Appellant that upon review of its response to the DAR, it had reduced the overpayment to \$537,006. (Exhibit I; Tr. 26.)

7. By letter dated October 10, 2024, the Appellant requested this hearing to review the determination and findings set forth in the FAR. (Exhibit J.)

8. The property expense disallowances in question, disallowance number 2 regarding return of equity and disallowance number 3 regarding real estate taxes, relate to a parking lot in back of, and a building adjacent to, the facility, which were purchased in 1999. (T. 14-16; OMIG brief page 3; Exhibit H, bates page 38-39; Exhibit J.)

ISSUE

Was the OMIG's determination to disallow return of equity and real estate tax expenses associated with an adjacent building and a parking lot behind the Appellant's facility correct?

APPLICABLE LAW

Residential health care and adult day health care facilities can receive reimbursement from the Medicaid Program for costs that are property chargeable to necessary patient care. 10 NYCRR 86-2.17. As a general rule, these kinds of costs are reimbursable if they are actually incurred, and the amount is reasonable. Allowable costs shall not include expenses or portions of expenses reported by individual residential health care facilities 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).

Facilities are eligible for reimbursement by payment of a Medicaid daily rate billable for resident beds occupied by, and day services rendered to, Medicaid recipients. 10

NYCRR 86-2.10. The per diem rate is established by the Department's Bureau of Nursing Home and Long-Term Care Rate Setting in a computation that reflects costs reported by the facility annually in a cost report (form RHCF-4). 10 NYCRR 86-2.2.

A facility's basic rate is comprised of four separate and distinct cost components: (a) direct; (b) indirect; (c) noncomparable, and (d) capital. 10 NYCRR 86-2.10(b)(1)(ii). The capital component of the rate is facility-specific, and includes depreciation, return of equity, leases and rentals, interest on capital debt, real estate taxes and the costs of major moveable equipment. 10 NYCRR§ 86-2.10(a)(9)&(g), § 86-2.19, § 86-2.20, § 86-2.21 and § 86-2.22. Operating and capital (property) costs are reimbursed in separate components of the facility's rate. 10 NYCRR 86-2.10(a)(7), (b) & (g).

Providers are required to maintain and produce contemporaneous records demonstrating their right to payment for six years from the date the care or services were furnished, and to produce those records upon request by the Department. 18 NYCRR 504.3(a). A facility's rate of payment is provisional and subject to audit. 10 NYCRR 86-2.7. The Department may adjust a payment rate retroactively if an audit determines that costs were inaccurately or improperly reported or are otherwise not includible in the Medicaid rate. SSL § 368-c; 10 NYCRR 86-2.7; 18 NYCRR 517.3. Upon completion of an audit, the Department may require the repayment of any amounts not authorized to be paid by the Medicaid Program. 18 NYCRR 518.1.

If the Department determines to recover an overpayment, the facility has the right to an administrative hearing. 18 NYCRR 519.4. At the hearing, 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. Pertinent Medicaid cost reporting requirements are found in DOH regulations at 10 NYCRR Part 86-2.

DISCUSSION

The OMIG presented the audit file and summarized the case, as required by 18 NYCRR 519.17. The Appellant is contesting disallowances in two categories of expenditures included in its 2013-2016 cost reports as property expenses for both the nursing home and the day care. The audit report sets forth these disallowances as follows:

2. RETURN OF EQUITY DISALLOWANCES

The real property historical costs and cumulative real property reimbursement that were used to calculate the return of equity were adjusted to reflect audited amounts. The land and property that is not located where the nursing home is located were removed from the historical costs. In addition, the Provider incorrectly capitalized costs that should have been expensed as operating costs because they were for repairs or maintenance. These expenditures should have been expensed in accordance with Generally Accepted Accounting Principles and the guidelines and definitions included in the RHCf Accounting and Reporting Manual. Furthermore, the interest of financing a lease on fixed assets is not allowable in the rate. Consequently, disallowances were necessary (see Attachment E for details).

Regulations: 10 NYCRR Sections 86-2.21, 86-2.4, 451.181, 451.230, and 458.5, RHCf Accounting and Reporting Manual¹

3. REAL ESTATE TAX DISALLOWANCES

Providers receiving payments on the basis of reimbursable costs are required to provide adequate cost data based on financial and statistical records that can be verified on audit.

¹ The language of the disallowances for the nursing home and the day care were identical except that the disallowance for the day care included the additional reference "and 458.5, RHCf Accounting and Reporting Manual". See, Exhibit I, Attachment C, bates page 122 and Exhibit I, Attachment D, bates page 122 for the comparison.

Cost data must be current, accurate, and in sufficient detail. Audited real estate taxes varied from the real estate tax allowed in the promulgated rate, resulting in disallowances. **Regulations: 10 NYCRR Section 86-2.17(a), PRM-1 Sections 2300 & 2304**

The disallowances in question both relate to a parking lot in back of the nursing home and a building, a house, which is adjacent to the facility; the building is used for storage and staff housing. (T. 15-16; OMIG brief page 3; Exhibit H, bates page 38-39; Exhibit J.) The Appellant purchased the building and parking lot in 1999. (T. 14; Exhibit H, bates page 38.)

The OMIG contends that the building and parking lot were removed from the Appellant's historical costs based upon 10 NYCRR 86-2.21(f)(3) which states "[the] capital cost component shall not be affected by any [sale], lease, or transfer occurring after March 10, 1975". The OMIG asserts that the properties could only have been included in its capital costs if the Appellant had applied for and obtained approval from Department to include the 1999 transaction in its historical cost. The Appellant never supplied any documentation to prove this happened, and failed to show that the building or parking lot costs were properly chargeable to necessary patient care. Thus, the OMIG contends, the removal of the costs for the building and parking lot from the Appellant's historical costs is correct and is supported by 10 NYCRR 86-2.21(f)(3) and rate setting methodology. (OMIG brief page 8-9; citations omitted.)

The Appellant contends that the cost of the building and lot are properly includible in its historical costs because there has been no question that they were used for healthcare as part of the nursing home; and were acquired because it needed the space "to be able to effectively give patient care" (T. 13-16.) The Appellant claimed that when

it purchased the building and parking lot in 1999 it is “sure that the administration at that point received approval procedures from the Department of Health.” It presented no documentation to show any such Department approval was ever given. (T. 14; Exhibit H, bates page 38.)

The Appellant asserted that it had been audited in the past, identifying Audit Nos. 11-3732 and 14-2363, both conducted after the purchase in 1999, and that in neither audit was the question of the validity of the use of the property for nursing home purposes raised. (T. 13, 15, 54.) The Appellant asserts that when OMIG audits an entity “all the schedules are audited and reviewed by the auditors . . . they audit all the items related to that property reimbursement . . . a capital portion audit would audit all of the different parts of the capital reimbursement for the entity.” (T. 51-52.) Thus, it argues, that during the prior audits, when the OMIG’s auditors reviewed historical costs and did not make any adjustments, there was “a de facto recognition of historical costs” because “the earlier auditors did not address it and accepted it.” (T. 56.)

The Appellant also now argues that because the adjacent properties were purchased 26 years ago it is difficult and “pretty ridiculous,” to ask a facility, to keep records for twenty-five years, “with everything that goes on in a nursing home, with all the paperwork”. (T. 14, 54.) The Appellant argues that the “de facto recognition” of the prior audits is “a stronger support [for including the properties in the Appellant’s historical costs] than having a piece of paper [from] twenty-five years ago,” *i.e.*, records documenting the Department’s approval regarding the acquisition of the properties. (T. 56.)

The Appellant’s contentions that it should not be required to keep documentation from 1999 misrepresents the nature of the audit disallowance and the Appellant’s

responsibility. When providers voluntarily enroll in the Medicaid Program they agree to maintain records documenting entitlement to payment. 18 NYCRR § 517.3(a)(1). As a cost based provider the Appellant was required to keep for six years the documentation showing the costs it reported in its 2013-2016 cost reports were allowable. This means it was required to document Department approval to include the building and parking lot acquired after 1975 in its historical costs as long as those costs continued to be reported on those cost reports for inclusion in its Medicaid rate. (OMIG brief pages 11-12, citations omitted.)

Prior audits: Regarding the Appellant's contention that previous OMIG audits had accepted and therefore constituted Department approval of the disallowed historical costs, and in accordance with the request of the ALJ, the OMIG submitted documentation of the two prior audits identified by the Appellant, *i.e.*, Audit Nos. 11-3732 and 14-3263, in Exhibits U, V, X², Y, Z, Aa, Ab, Ac, and Ad, which are accepted and made part of the hearing record.

In Audit No. 11-3732, the audit worksheet for the calculation of the return of equity notes that for the rate year 2006 (cost year 2004) "[t]he historical costs and accumulated reimbursement . . . *have not been audited by the OMIG.*" (Exhibit Ab, bates page 317; OMIG brief pages 5-6; *emphasis added.*) As the historical costs as reported to rate setting in cost year 2004 were not audited no audit adjustment was made to the Appellant's return of equity for rate year 2006. (Exhibit Ab, bates page 318.) However, in Audit No. 11-3732 disallowances were made for leasehold improvement costs, return *on* equity and real estate taxes associated with the building adjacent to the nursing home "used to house

² No Exhibit "W" was submitted.

nurses from Philippines.” (Exhibit U, bates pages 240, 243; Exhibit V, bates page 247; Exhibit X, bates pages 281, 284, *emphasis added*.) The Appellant objected to those disallowances stating that it “pays well below market value in nurses’ hourly cost but must subsidize their living expenses.” (Exhibit V, bates page 247.) The Appellant’s objection was not accepted, and the disallowances remained the same in the FAR. (Exhibit X, bates pages 275, 277, 281, 284.) No appeal was taken from the FAR. (OMIG brief page 7.) These disallowances are entirely consistent with the disallowances now under review in this hearing.

Consequently, the records show that no determination was made in Audit No. 11-3732 which recognized and accepted the costs of adjacent building and parking lot as part of the Appellant’s historical costs, nor that the leasehold improvement costs and taxes associated with the adjacent building and parking lot were allowed as property expenses in the Appellant’s Medicaid rate.

Audit No. 14-3263 (Exhibit Ac) was discontinued in a letter dated January 26, 2017, as a result of the then recently executed (March 2016) Universal Settlement between New York State and the Appellant. (Exhibit Ad.) Thus, as the audit was discontinued, there was no determination made which recognized and accepted the costs of adjacent building and parking lot as part of the Appellant’s Medicaid rate. (Exhibits Ac and Ad; OMIG brief pages 7-8.)

CONCLUSION

The Appellant has failed to meet its burden of proving that it obtained Department approval for inclusion of the adjacent building and parking lot costs as allowable historical costs in the Appellant’s Medicaid rate, or that its reported real estate and tax costs were

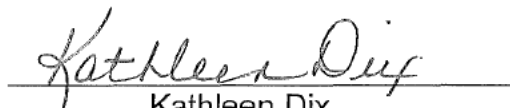
properly chargeable to necessary patient care. The Appellant also failed to prove its claim that two prior audits resolved those issues in its favor.

DECISION

The OMIG's determination to disallow return of equity and real estate tax expenses associated with adjacent building and parking lot was correct and is affirmed.

This decision is made by Kathleen Dix, Bureau of Adjudication, who has been designated to make such decisions.

DATED: Menands, New York
September 22, 2025


Kathleen Dix
Administrative Law Judge

To: Elliott Smeltzer, Esq.
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