STATE OF NEW YORK
DEPARTMENT OF HEALTH

In the Matter of the Appeal of a rate audit conducted by the OFFICE OF MEDICAID INSPECTOR GENERAL pursuant to the official compilation of the Codes, Rules, and Regulations of the State of New York, Parts 517 and 519

Decision After Hearing

- Vs. -

Rate Audit # 09- 2552

SUSQUEHANNA NURSING & REHABILITATION CENTER,

Appellant

Before: David A. Lenihan
Administrative Law Judge

Held at: New York State Department of Health
433 River Street
Troy, New York 12180
June 8, 2011
Record closed August 15, 2011

Parties: New York State Department of Health
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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 pursuant to Social Services Law § 363-a. The New York State Office of the Medicaid Inspector General (OMIG) is an independent office within the Department, responsible for the Department's duties with respect to the recovery of improperly expended Medicaid funds pursuant to Public Health Law § 31.

The OMIG in this case issued a final audit report for Susquehanna Nursing and Rehabilitation Center (the Appellant) in which the OMIG concluded that the Appellant had received Medicaid program overpayments. The Appellant requested this hearing pursuant to Social Services Law § 22 and Department of Social Services regulations at 18 NYCRR 519.4 to review the Department's determinations. Evidence was received. Testimony was taken under oath. A transcript of these proceedings was made.

The entire record was considered in reaching this decision.

FINDINGS OF FACT

An opportunity to be heard having been afforded the parties and evidence having been considered, it is hereby found:

1. Susquehanna Nursing and Rehabilitation Center (hereinafter "Susquehanna," "Facility," or "Appellant") is a skilled nursing facility located in Johnson City, New York. The Facility is licensed under Article 28 of the New York State Public Health Law. The Facility participates in the New York State Medical

Assistance Program under Provider # [redacted] (old number) and Provider # [redacted] (new number) and has been enrolled in Medicaid as a skilled nursing facility since at least 1978.

2. By notice of a draft report of findings, dated November 1, 2010, the Department determined that the Appellant was given overpayments totaling some $352,268. (Department Exhibit 3)

3. By notice of a final audit report of findings, dated March 8, 2011, the Department adjusted the initial findings and determined that the Appellant was given overpayments totaling some $327,416. (Department Exhibit 5)

4. The Facility responded to the initial Draft Report on December 6, 2010, challenging four findings: the housekeeping rental equipment reclassification from capital to operating costs; the recalculation of the traceback percentage for adult day care usage; the disallowance of patient room's cable/satellite costs; and the disallowance of the lab/x-ray costs. (Department Exhibit 4)

5. The OMIG considered each of the arguments and all of the documents submitted by the Provider in response to the Draft Audit Report before issuing the Final Audit Report (hereinafter "Final Report") on March 8, 2011. (See OMIG Exhibit 5) There were no changes between the Draft Report and the Final Report other than a reduction in the estimated overpayment of $24,852. (Department Exhibit 5)

6. The audit in this case was done at the facility in April of 2009 on two separate weeks, three or four days on each occasion. (T. 86-87)

7. The primary contact at the facility during the audit was Bernadette Brinsko. (T. 87)

8. Ms. Brinsko, the controller of the facility, was cooperative with the auditors and provided them certain requested materials. (T. 87, 123)

9. The OMIG conceded that the facility established the second and third prongs of the three prong test under the Provider Reimbursement Manuel (hereinafter "PRM"), PRM 2806.3 (B). (T. 92)

10. The one concern the OMIG had was with the first prong of the above test that required the facility to establish that it had possession, use and enjoyment of the rented cleaning equipment. (T. 92)

11. The facility hired a house cleaning company, called Matrix, from whom the facility rented cleaning equipment, during the audit period. (T. 125, 136)

12. Matrix had a full cleaning staff on the job at the facility from 8 am until 4 pm and then one person working at the facility until 11 pm. (T. 125, 136)

13. The auditors did not speak to house keeping to determine service hours or who provided housekeeping services when the company was not on site. (T. 94)

14. The auditors were provided invoices for the house keeping services and rental of the equipment. (T. 94)

15. Ms. Brinsko looked for the written contract with the cleaning company, but was not able to find one and none was ever produced. (T. 95)

16. During the audit, Ms. Brinsko told the auditors that the facility had full use and enjoyment of the equipment which was kept at the facility. (T. 97-98)

17. There was, according to the hearing testimony, no restriction on the use made of the equipment by the facility and the facility had and made full use of the equipment. (T. 136)

18. The rented cleaning equipment at issue in this case was kept at the facility in different rooms, but primarily on the first floor. (T. 125, 136)

19. During the audit period, the facility had access to the rented cleaning equipment when the Matrix personnel were on site and when they were not on site. (T. 126)

20. The cleaning equipment was accessible using a master key. (T. 126)

21. The facility administrator, director of nursing, the director plant operations and maintenance staff all had master keys to have access to the cleaning equipment.(T. 126)

22. The dining, nursing, maintenance and administrative staffs at the facility all had reason to and did in fact use the cleaning equipment on a regular and routine basis. (T. 126)

23. The cleaning equipment was used by dining, nursing, maintenance and administrative staff when cleaning offices, cleaning workstations, cleaning routine spills in dining hall. This equipment was also used when toilets and bathtubs overflowed, when there were floods or spills of water or other substances. In addition, the equipment was used for cleaning when residents were moved from one room to another or when deep cleaning was done using the equipment. (T. 126-127,137-141)

24. Ms. Brinsko provided the auditor, Mr. Cullen, with a list of equipment that was picked up by Matrix when the contract for Matrix' services ended. (T. 129)

25. There was an auditorium at the facility long before it was used for adult day care. (T. 98)

26. The audit gave no credit for the use of the auditorium by the residents during the hours that it was not being used as a day care. (T. 100)

27. The auditorium was used by adult day care from 7:30 am until 3 pm five days a week. (T. 132)

28. When not in use by adult day care, the auditorium was used for a variety of purposes by the facility and residents, including, employee gatherings, family parties, holiday parties, Mother's Day celebration, Father's Day celebration, birthday parties, anniversaries, church services, private gatherings and overflow for activities in the dining hall. (T. 131-133, 145-147)

29. A calendar of activities was kept for the auditorium by the Activities Director, but this calendar was thrown out at the end of the month and not kept as a record of the activities. (T. 146)

30. Informal events were not placed on the calendar, but facility members and residents were always and regularly using the room for various activities. (T. 148)

31. Whenever people asked if there was a room they could use or if a family asked where they could go to talk or gather, they were directed to the auditorium. (T. 148)

32. The auditorium was the only room in the building that could be used by groups and afforded some privacy, and was really the only place for people to gather, have parties or just some privacy to talk. (T. 149-150)

33. Full use was made of the auditorium when it was not being used by the adult day care. (T. 150)

34. There are residents at the facility that cannot ambulate. (T. 102)

35. It would not have been possible for those non-ambulatory individuals to view a television in a common area. (T. 102-103)

36. The auditors made no effort to determine whether or not the cable and satellite services were provided solely for the personal comfort of the residents. (T. 104-105)

37. The facility had very limited if no television service without cable or satellite service. (T. 107, 124, 142)

38. Besides the fact that it would be cruel not to provide the residents with working televisions, the cable and satellite service was provided so that the residents could be stimulated, given a home-like setting and to comply with personal preferences and Department of Health rules and regulations. TV service was provided to comply with family desires, for quality of care issues and to allow some dignity for the residents. (T. 122-124)

39. The rate sheet with which OMIG found an issue was prepared and issued by the Bureau of Long-Term Care Reimbursement (hereinafter "BLTCR".) and not the facility. (T. 107)

40. The Facility reported $6,291 of laboratory service expense and $20,457 of radiology expense on their Residential Health Care Facility (hereinafter " RHCF) Cost Reports as they are required to list all costs, but Susquehanna coded these expenses as fee-for service, to be billed by the person or group that provided the service.

41. On the RHCF-4 page entitled "Part I-1, Patient Services Provided," (page 9) Susquehanna reported that the clinical laboratory and diagnostic radiology services were

billed directly to the DOH by the professional or organization rendering the service, also known as a fee-for-service system of reimbursement. See (T. 78-85; OMIG Ex. 7)

42. Based upon the above information from Susquehanna, the BLTCR did not check the boxes related to laboratory and x-ray costs under "Ancillaries included in the rate" on the first page of the rate sheets for the facility, which means the costs are not to be included in the calculation of the facility's per diem rate. (See T. 79- 85; 0MIG Ex. 10A - 10H)

43. Mistakenly, BLTCR then included the expenses listed for laboratory and x-rays when it used the facility's costs to calculate the per diem rate. As these costs should not be included in the per diem based upon this information reported by Susquehanna and determined by the BLTCR, OMIG auditors reasonably concluded it was a mistake when the costs were actually included in the per diem rate.

44. Susquehanna reported these laboratory/x-ray costs as Medicare Part A specific expenses (see T. 113-114), and therefore would be reimbursed through Medicare Part A.

45. The costs of the laboratory and x-ray costs were included in the per diem by mistake, after BLTCR determined they were not to be included.

ISSUES

1) Whether the reclassification of the housekeeping rental equipment from capital costs to operating costs by the OMIG auditors was proper;

2) Whether the recalculation of the square footage allocated to the Adult Day Care area for the traceback percentage was proper;

3) Whether the disallowance for cable/satellite television costs provided to patients' rooms by OMIG auditors was proper; and

4) Whether the disallowance of laboratory/x-ray costs by OMIG auditors based upon rate sheets from BLTCR was proper.

ANALYSIS AND CONCLUSIONS

As is set forth in Section 363 of the Social Services Law, the legislature established the Medicaid Program "to operate in a manner which will assure a uniform high standard of medical assistance throughout the state." Pursuant to SSL 364, the Department of Social Services (DSS) is responsible for auditing payments to providers of care, services and supplies under the Medicaid Program. The functions of the former DSS with regard to the Medicaid Program have been transferred to the Department of Health. Chapter 436 Laws of 1997.

DSS regulations most pertinent to this hearing decision are at 18 NYCRR Parts 504 (medical care-enrollment of providers), 515 (provider sanctions), 516 (monetary penalties) 517 (provider audits), 519 (provider hearings), and 540 (authorization of medical care). Also pertinent are the provisions of the Medicaid Management Information Services (MMIS) Provider Manual. The MMIS Manual is distributed to all providers and includes, among other things, billing policies, procedures, codes and instructions.

Medicaid providers are required, as a condition of their enrollment in the program, to prepare, maintain and furnish to the Department upon request, contemporaneous records demonstrating their right to receive payment from the Medicaid

Program and fully disclosing the nature and extent of the care, services and supplies they provide. The information provided in relation to any claim for payment must be true, accurate and complete. This documentation must be kept for six years. (See 18 NYCRR 504.3(a) & (h), 517.3(b), 540.7(a) (8))

A person is entitled to a hearing to have the Department's determination reviewed if the Department imposes a sanction or seeks to impose a penalty. (See 18 NYCRR 519.4) At the hearing, the Appellant has the burden of showing that the determination of the Department was incorrect and of proving any mitigating factors affecting the severity of any sanction imposed. (See 18 NYCRR 519.18(d))

At the present hearing, the Department presented the audit file and summarized the case, as is required by 18 NYCRR 519.17. The Department presented documents (Exhibits 1- 11) and a witness: Kevin Cullen. Mr. Cullen is employed by the OMIG as an Associate Medical Facilities Auditor. (Transcript, pages 17-122) The Appellant also presented documents (Exhibits A-G) and three witnesses: Bernadette Brinsko, Robert Shiptenko and Dawn Cerreto. Ms. Brinsko was the business manager and controller of the Facility. (Transcript, pages 122 - 134) Mr. Shiptenko was the plant operations director for the facility. (Transcript pages 135 - 142) Ms. Cerreto is the activities director for the facility. (Transcript pages 143- 151)

For the sake of clarity, the four issues in this case will be separately addressed and discussed.

Issue I:

The Classification of Housekeeping Equipment Rental Expenses

The first issue to be addressed is whether the OMIG properly reclassified the housekeeping equipment rental expenses from capital costs to operating costs. The significance of this distinction is that the deduction for operating cost is subject to a cap, whereas capital costs are not. It would thus be to the facility's economic advantage to have these rental costs deemed capital costs and not operating costs. (See T. 35)

Under 18 NYCRR 86-2.17(a), allowable costs to be reimbursed "shall be determined by the application of principles of reimbursement developed for determining payments under title XVIII of the Federal Social Security Act (Medicare) program," unless provided for in subpart 86-2 or by a specific determination by the commissioner. The Provider Reimbursement Manuel (hereinafter "PRM"[1]-1 § 2806.3(B)) details the requirements for a provider to be reimbursed for capital costs associated with rental equipment depreciation when a supplying organization is not related to the provider, as is the case here, interpreting the regulations found at 42 C.F.R. §413.130(h)(2). Allowable costs under Medicaid reimbursement must be reasonably related to the

[1] The PRM-l is a manual published by the United States Department of Health and Human Services' Centers for Medicare and Medicaid Services (hereinafter "HHS CMS"), providing guidelines and polices to implement Medicare regulations, including those found in Title 42 of the Code of Federal Regulations (hereinafter "C.F.R.") Part 413 regarding the principles of reasonable cost reimbursement. PRM-l § 2806.3(B) interprets the regulations found at 42 C.F.R. 413. 130(h)(2). The United States Supreme Court has held that the PRM-l is an interpretive rule issued by an agency to inform the public of the agency's construction of its statutes and regulations related to reimbursement for costs. See Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99-100 (1995). As the forward to the PRM-l recognizes, this interpretation of the regulations does not have the force and effect of a statute and are not accorded the weight of a law in the adjudicatory process, but are given deference as the agency's interpretation of its own regulations. See id. OMIG follows the PRM-l when New York State regulations are silent on the issue.
(See T. 49-50).

efficient production of service including both the nature and amount of the particular item. See 10 NYCRR 86-2.17(d).

The record shows that Susquehanna engaged the company Matrix to provide housekeeping services and equipment, which was stored on Susquehanna's premises. (See OMIG Ex. 8; T. 125-128; 136-142). The equipment rental cost was $3,900 per month (see OMIG Ex. 8); and in testimony, the equipment mentioned included mops, brooms, plungers, and other small cleaning equipment. (See T. 125-128; 136-142) A listing of equipment rented under the contract was asked for and according to the OMIG auditor's testimony, was never provided. (See T. 61-62).

The PRM – 1 § 2806.3(B) sets out a three prong test to determine if a provider may list its rental equipment as a capital cost on its RHCF-4: (1) the capital-related equipment is rented or leased by the facility so that the facility has the possession, use, and enjoyment of the equipment; (2) the equipment is located on the provider's premises; and (3) the capital-related portion of the charge is separately specified in the charge to the provider.

There was no dispute at the hearing about the fact that Susquehanna met the second and third prongs of the test in that the rented housekeeping equipment is located on Susquehanna's premises (see T. 125; 136-137) and the rental equipment charge is separate on the monthly bill (see OMIG Ex. 8; T. 61-62). However, the pivotal point in this case is that the OMIG has contended that Susquehanna has failed to demonstrate that the facility has the possession, use, and enjoyment of the equipment under a true lease or rental agreement and therefore failed to meet the first prong of the test.

The record and testimony at the hearing shows that Susquehanna does not maintain its own housekeeping staff nor does it list any housekeeping expenses, other than the expenses paid to Matrix under the contract, on its RHCF-4 cost reports. (See T. 54) OMIG's determination that the capital expenses would be attributable to Matrix and not the Facility is reasonable regardless of the fact that Susquehanna satisfies prongs 2 and 3 of the test and the expense should therefore be reclassified as an indirect operating expense.

At the hearing, there was considerable discussion about the example provided in the text of PRM-1 § 2806.3 (B) Example 2. The OMIG has contended that the situation in Example 2 is quite similar to the present case, in that the facility contracts with an outside, unrelated provider, to furnish housekeeping services; the housekeeping equipment is stored on the facility's premises; and the services are segregated from the rental equipment on the bill. The PRM-1 concludes that this is not a true lease or rental agreement as the facility does not have the use or enjoyment of the rental equipment and it is merely on the facility property for the use of the contracted staff to fulfill its responsibilities under the contract. Example 2 in PRM-l §2806.3(B) clearly demonstrates that merely segregating out the rental equipment expenses from the services on the monthly bill is not sufficient to classify this as the Facility's capital expenditure. The OMIG auditors asked for the contract between Susquehanna and Matrix numerous times, which Susquehanna failed to produce. (See T. 61-62.) I find that the auditors justifiably concluded that the contract would not support Susquehanna's contentions with respect to the rental equipment.

On cross-examination, the OMIG auditor was asked if he had been given the contract. He said he was told that the Appellant could not find the contract. (T. 95) The Appellant has now asked the auditors to accept oral testimony and documentation in the form of sworn statements and affidavits, provided by Susquehanna in response to the exit conference and Draft Report respectively, as proof that a bona fide rental agreement exists between the Facility and Matrix.

In this case, we are looking at a monthly expense for rental equipment of some $3,900. I find that this is not a paltry sum and the answer that the Appellant cannot find the justifying contract is simply not acceptable to a reasonable person. The OMIG was correct in its contention that this failure to produce the contract established that the Appellant failed to meet its burden to demonstrate that it met the first prong of the test set forth in the PRM-l or that the expense was properly considered a capital expense.

In their post-hearing brief, the facility attorneys argued that the staff, nurses and maintenance personnel had possession and did use the cleaning equipment even when the cleaning company had personnel on site. Furthermore, the facility attorneys contend that there were tasks that the cleaning company did not do such as deep cleaning the resident rooms that needed to be performed by various staff nurses and maintenance personnel from the facility.

It was noted by the facility attorneys that the relevant rule, PRM-1 2806.3 (B) provides that the facility can include housekeeping rental as a capital cost where the equipment is (1) rented by the facility so that the facility has possession and use of the equipment, (2) the equipment is located in the facility and (3) the capital-related portion of the charge is separately specified in the charge to the provider. There was

no dispute about the fact that the facility met the last two prongs of the test. According to the facility attorneys, the OMIG case is deficient because it merely asserts that the facility failed to demonstrate that it made use of the equipment sufficient to be allowed to take the rental as a capital cost. I don't find that to be the case.

While it is true that the OMIG did not contest or otherwise offer contrary proof on use, I find that it did not have to do so. The burden in this case was on the Appellant and the facility did not provide a contract with the cleaning company or a list of the equipment rented. It is noted that there was some testimony by two witnesses for Susquehanna that its staff occasionally used the brooms, mops, and plungers stored by Matrix on the property as needed. (see T. 125-128; 136-142) This testimony does not support the Facility's contention that Susquehanna directly rented the equipment pursuant to a lease or rental agreement, such that it could be considered a capital expense. It is certainly reasonable to conclude that the occasional use, mainly after hours of Matrix staff, of brooms, mops, and plungers (see T. 126-128; 136-139) does not begin to justify a capital expenditure of $3,900 per month purportedly incurred as a standalone equipment rental expense.

In the absence of a contract establishing an actual equipment rental agreement between the Facility and its vendor, Matrix, the equipment costs have been properly reclassified as indirect operating expenses. The indirect component includes costs indirectly associated with patient care but essential to overall operation, e.g., fiscal services costs, administrative costs, plant operation and maintenance, with the exception of utilities, real estate and occupancy taxes. (See 10 NYCRR 86-2.10(d); T. 35:11-16)

The housekeeping services provided by Matrix were properly reported as an operating expense and therefore the auditors reasonably concluded that the equipment rental should also be included in operating expenses, notwithstanding the segregation of the two on the monthly bill. The OMIG auditors correctly concluded that the equipment rental costs, while actually incurred and valid expenses, were part and parcel of the overall service agreement under which Matrix provided housekeeping services. Therefore these costs were reclassified.

The facility attorneys made a strong argument for the allowance of the rental equipment as a capital cost, including testimony tending to minimize the role of the cleaning company at the facility showing that it was on site for only a limited amount of time during the day with only limited responsibilities. However, a closer analysis of the facts belies this assertion and casts significant doubt on the assertions made by the facility. The amount of money paid to the cleaning company, Matrix, was not insignificant. According to the record as shown in Exhibit 8, the monthly rental cost claimed for this cleaning equipment, such as mops, brooms, and plungers was some $3,900 per month .

As part of their job, the auditors asked for some proof of this significant monthly expense such as a rental contract which would specify what was costing some $3,900 a month or $46,800 a year. It would stand to reason, that such a significant expense would be documented in the records of the facility. At the hearing, it was pointed out that the auditors deemed this rental expense exorbitant (T. 61) and asked for verification in the form of a written contract to justify this allowance. I find it highly significant that a copy of this contract was never produced.

It should be noted by way of clarification that when the OMIG reclassified the housekeeping rental equipment from capital to indirect operating costs it was not a disallowance of the costs as the Appellant has argued.

The record herein shows that this reclassification was done because the Facility could not produce documentation that they had the use, possession and enjoyment of the rented equipment under a lease agreement. Whether or not the Facility produced a list of equipment returned to Matrix at the end of the contract, the fact is the document is not in the file and an additional copy was never produced even after it was requested on several occasions by the OMIG auditors.

It is uncontested that the contract with Matrix was never produced and while the Facility states there is no contract other than the monthly invoices, this information is contrary to the requirements for reimbursement. It is noted that Federal regulations require certain language in this type of contract if the facility wants to be reimbursed for Medicare and by extension under 10 NYCRR 86-2.17(a), Medicaid. A contract for services or equipment that costs more than $10,000 per twelve month period is required to have a clause that "allows the Comptroller General of the United States, HHS, and their duly authorized representatives access to the subcontractor's contract, books, documents, and records until the expiration of four years after the services are furnished under the contract or subcontract." (See 42 C.F.R. 420.302(b)

In this case, the monthly invoice for services and equipment (see OMIG Exhibit 8) is for over $10,000 and would require the clause if the Facility wanted to

be reimbursed for any costs under the contract. (See 42 C.F.R. 420.302(c) - the prohibition against Medicare reimbursement)

In conclusion, I find that Susquehanna failed to meet its burden to show the OMIG's actions were incorrect. As the costs were incurred, they are properly an indirect operating cost and should be allowed as such. Accordingly, I affirm the OMIG determination to reclassify the housekeeping rental equipment expenses from capital costs to indirect operating costs and find that this action should be upheld.

Issue II

The Allowance for the Use of the Auditorium

This issue, as it was framed at the hearing, is whether the OMIG Auditors properly recalculated the adult daycare facility square foot traceback percentage. Regulations provide that, pursuant to 10 NYCRR 86-2.17(a), allowable costs shall be properly chargeable to necessary patient care.

The OMIG has maintained, that, since Adult Daycare patients are not nursing home patients, the costs associated with the Adult Daycare are not considered necessary patient care and are therefore not allowed in the Medicaid per diem for the skilled nursing facility. It is noted that Adult Daycare has its own reimbursement system under Medicaid. (T. 70)

It was pointed out at the hearing that Susquehanna reported that only 178 square feet of space was used for the adult daycare in Schedule J of the RHCF-4 after prorating it based upon the hours of operation and days open. (See OMIG Ex. 7; T. 67-68)

Upon questioning this figure, as the room is much larger at approximately 1,200 square feet, the OMIG auditors were informed that the 178 square foot number was based upon 1986 operations and not current, 2005, operations. (See T. 68-69)

The hearing testimony shows that the primary function of the auditorium was for the Adult Daycare facility, and therefore documentation of its use by nursing home staff or residents was needed to prorate the area. It was explained at the hearing that OMIG auditors will prorate the adult daycare space when there is documented use of the adult daycare area by nursing home patients or staff. (See T. 69) It was further explained that the OMIG auditors will consider logs or accounts of the usage of the space as documents to demonstrate a reason to prorate the space.

In their post hearing brief the facility attorneys contended that the testimony from the Facility Controller and the Activities Director should, by themselves, establish that the room was used extensively by the residents after the adult day care hours during the week and on the weekends. (See T. 122 to 152) While it is true that both Ms. Brinsko and Ms. Cerreto, stated , under oath, that the auditorium was used for all sorts of resident gatherings, both formal and Informal, this testimony does not, all by itself, satisfy the accounting requirements for the proration of this space.

Ms. Cerreto, the Activities Director of the Facility, did testify that she kept a calendar of formal activities in the room, and they included parties, church services and a myriad of other events for the residents. Ms. Brinsko and Ms. Cerreto both noted that the room was the only place where residents could meet with family members or gather in groups, because there are no other large meeting room (that

provide any real privacy) in the facility. This made the auditorium a very popular spot for residents and their families to meet to visit and spend time together. The auditorium also functioned as an overflow area for the dining hall, such that residents went in the room if the dining hall was full.

The testimony did show that the auditorium was used on a regular and routine basis by the residents whenever it was not being used by the adult day care program. The facility attorney argued that the OMIG did not contest or otherwise offer contrary proof on use of the auditorium. However, once again I note that the burden of proof in this case was not on the OMIG and there was no demand on the OMIG to provide logs as alternative proof of use in the auditorium.

A review of the record in this case shows that Susquehanna provided no documentation regarding the use of the space by the nursing home, other than vague claims in affidavits from staff that the space was used by nursing home staff or patients and their families for gatherings, which OMIG respectfully contends are insufficient to demonstrate the space was used for more than the adult daycare. (See OMIG Ex. 2 and Ex. 4; T. 71-73)

Susquehanna's own witness, Ms. Dawn Cerreto, the Activities Director, even testified to the fact that although she prepared and kept calendars with certain nursing home events scheduled in the adult daycare room, she never provided them to the auditors. (See T. 146-151) I find that, without proper documentation as to the use of the space, the OMIG's auditors' determination not to prorate the adult daycare space at the Facility was reasonable.

Ms. Cerreto testified that since the activities that went on in this room were not part of the medical record, the log was thrown out at the end of the month. (T. 146) While it is reasonable to assume a proper and potentially verifiable use of this space, accounting rules mandate a verifiable paper trail to substantiate a claimed deduction of this magnitude.

As with the issue of the equipment rental, the Facility again failed to meet its burden to show that the OMIG's determination was incorrect and that the costs claimed were allowable. Without something more than vague and unverified references to when the space was used by nursing home staff or residents, the OMIG cannot properly allow costs not related to nursing home patient care in the per diem reimbursement rate. Accordingly, on review of the testimony and record in this case, I find that the OMIG recalculation of the adult daycare square footage was proper. In addition, I also find the resulting changes to the traceback based on the square footage to be correct, and therefore I conclude that the audit findings should be upheld

Issue III

Payment for Cable and Satellite Television

The Third issue in this case is whether the OMIG auditors properly excluded cable/satellite TV costs as capital rental costs. As was the case with the equipment rental issue, the PRM-l is controlling when New York State regulations are silent on Medicaid reimbursement of costs. Under PRM-1 § 2106.1 which interprets the regulation at 42 C.F.R. § 413.9, the full cost of items or services like televisions, including cable or

satellite. In this case the OMIG determined that the TVs located in the patient rooms were furnished solely for the personal comfort of the patients and were thus deemed not allowable costs to be reimbursed by the Medicare, or correspondingly, the Medicaid system.

On review, I find that, under the unique facts of this case, the TV services were not provided solely for the personal comfort of the patients, but rather out of social and geographic necessity due to the poor TV reception in the area. The unrefuted testimony at the hearing establishes that standard TV reception, without cable, would be so poor as to be unacceptable in this day and age as it would diminish the quality of life.

It is noted that numerous decisions by the Provider Reimbursement Review Board[2] (hereinafter "PRRB") have held that television costs related to television in a patient's room are not reimbursable under Medicare. See, e.g., St. Joseph Medical Center, PRRB No. 81-D13 (198 l) In the *St. Joseph* case, the provider argued that television allows the patient to maintain his or her orientation and contact with reality thereby preventing feelings of isolation and should be included as allowable costs. In the *St. Joseph* case, television related costs were held to be not allowable under PRM-1 2106.1. The PRRB also held television costs are not related to patient care.). Also to be noted is the similar cases of Presbyterian Hospital of Dallas, PRRB No. 79-D9 (1979) aff'd Presbyterian Hospital of Dallas v. Harris. Medicare & Medicaid Guide (CCH) 1980 MED-GUIDE-TB P 30,581 (NDTX Dallas Div.1980); and Western Medical Center,

[2] The PRRB is the adjudicatory body of the HHS CMS, established under 42 U.S.C. § 1395oo(a), and therefore is the body that providers appeal to when they disagree with a reimbursement determination at the federal level. To this end, the PRRB interprets the PRM-1 and 42 CFR Part 413.

PRRB No. 84-D57 (1984). It should be noted that these decisions are also applicable to the Medicaid system as they are interpretations of the regulations and policies related to reimbursement under Medicare, which is incorporated under 10 NYCRR 86-2.17(a).

Notwithstanding the above case law and marking the distinction that this is a New York matter that brings into play New York regulations, the attorneys for Susquehanna have made a compelling argument why, in this case, cable/satellite television costs should be allowed. The Appellant's attorneys have pointed out that there are numerous other regulations that skilled nursing homes are obliged, by law in this state, to be in compliance with. The Appellant's attorneys have contended that their patients would suffer without cable/satellite TV since the facility is located in a rural area without any other way to stay connected with the outside world. (See T. 123-124, 142, and 144-145)

The OMIG is charged with auditing facilities based upon the reimbursement regulations. As New York State Medicaid regulations are silent on this, the PRM-1 is controlling. PRM-l § 2106.1 does not make exceptions for rural areas. In addition, the PRRB has held that televisions costs associated with televisions in patients' rooms are considered for the personal comfort of the patient and therefore not related to patient care. (See St. Joseph Medical Center, PRRB No. 8l-D13 (1981)

Notwithstanding the above provisions, I find that the quality of life regulations in this state call for a different conclusion in this case and a change in the interpretation of the approach to TV that should be employed. It is noted that under 10 NYCRR 415.1(a) 5 the facility is obliged to care for its residents in a manner that promotes the enhancement of each resident's quality of life and further provides that nursing homes should be viewed as homes as much as medical institutions, with the resident's

psychosocial needs deserving a prominence at least equal to medical condition; that clinical interventions for the nursing home resident must be part of a comprehensive approach planned and provided by an interdisciplinary care team, with the participation of the resident, rather than through a physician-directed acute care orientation.

This particular regulation goes on to provide the following:

"The facility shall promote care for residents in a manner and in an environment that maintains or enhances each resident's dignity and respect in full recognition of his or her individuality in a safe, clean, comfortable and **homelike environment**." (emphasis added)

The record shows that the OMIG disallowed the costs of cable/satellite television in patient rooms under PRM 2 106.1 which excludes from allowable costs "[t]he full costs of items or services such as telephone, television, and radio which are located in patient accommodations and which are furnished solely for the personal comfort of the patients.

It is noted that the Appellant had cable service into 2005 and then converted to satellite service. It was argued at the hearing that Cable and Satellite television in the facility are not luxury items nor were they furnished solely for the personal comfort of the residents. It was pointed out that in-room cable or satellite television is required in order for the Appellant to comply with its responsibilities under New York State Minimum Standards for Nursing Homes. (See 10 NYCRR Part 415)

I agree with the Appellant's argument that, in this case, Satellite television is not a luxury item because the facility is located in a rural area in the Southern Tier where, only three (3) analog channels can be received, and unreliably so at that, according to the

credible and unrefuted testimony at the hearing. It is also noted that cable and satellite television are standard in this community because of the poor analog signal reception and the limited choice of channels. In addition, such TV service is required in each patient room in order for SNRC to provide services that comply with the requirements of the New York State Department of Health ("DOH').

DOH regulations contain numerous requirements that the facility must foster the highest practicable quality of life for residents, must recognize the individuality of residents, protect and promote their right of self-determination and foster their highest possible level of independence. (See 10 NYCRR 415, 1(a) (2) and (5) (2)) Each resident comes to the nursing home with unique life experiences, values, attitudes and desires, and a practicable quality of life, the individuality of the nursing home resident must be recognized, and the exercise of self-determination protected and promoted, by the operator and staff of the facility.

The regulations, and in particular, 10 NYCRR 415.5, demand that the facility care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life. Based on these regulations, I find that, in the present culture, the quality of life requirement of the regulations necessarily entails the provision of at least basic television service and the record in this case makes it quite clear that such service is only possible through cable or satellite in the Southern Tier Area.

The record in this case shows that in 2005 the Appellant began emphasizing rehabilitation services. This attracted a younger cohort of patients who were admitted from the community where they had cable or satellite TV service. It appears that these

patients were and are well aware of their surroundings, and were and are interested in and capable of identifying chosen activities, including television channel choices, and did not and do not want to be cut off from media communication and stimulus normally available to them in their own homes and workplaces.

I conclude that the unique facts and geography of this case require reimbursement of the costs of cable television in SNRC resident rooms as a cost related to patient care. It is noted that the PRM 2102 provides that "Costs related to patient care include all necessary and proper costs which are appropriate and helpful in developing and maintaining the operation of patient care facilities and activities." Necessary and proper costs related to patient care are usually costs which are common and accepted occurrences in the field of the provider's activity.

In order for the Appellant to be reimbursed for its costs of providing high quality of care to its patients in compliance with the law, the costs of cable and satellite television in patient rooms should be allowed. Therefore, the determination of the OMIG in this regard should be reversed.

Issue IV

Allowances for Laboratory and X-Ray Services

The fourth and final issue in this case is whether the OMIG auditors properly determined that laboratory X-Ray costs were not allowable and therefore had to be removed from the per diem rate.

Pursuant to 10 NYCRR 86-2.17(d), costs not reasonably related to efficient production of services because of the nature or amount of expense are not allowable. The Facility reported $6,291 of laboratory service expense and $20,457 of radiology expense on their Residential Health Care Facility Report (hereinafter "RHCF-4") as they are required to list all costs. It is noted that Susquehanna coded these expenses as fee-for-service, to be billed by the person or group that provided the service. These expenses are not reasonably related to the efficient production of services because they were not related to the care of Medicaid patients and therefore were not allowed.

On the RHCF-4 page entitled "Part I-1, Patient Services Provided," Susquehanna Reported that the clinical laboratory and diagnostic radiology services were billed directly to the DOH by the professional or organization rendering the service, also known as a fee-for-service system of reimbursement. See T. 78-85 and OMIG Ex. 7. Based upon this information from Susquehanna, the BLTCR did not check the boxes related to laboratory and x-ray costs under "Ancillaries included in the rate" on the first page of the rate sheets for the facility, which means the costs are not to be included in the calculation of the facility's per diem rate. (See T. 79- 85 and OMIG Ex. 1OA – 10 H)

Mistakenly, the BLTCR then included the expenses listed for laboratory and x-rays when it used the facility's costs to calculate the per diem rate. As these costs should not be included in the per diem based upon this information reported by Susquehanna and determined by the BLTCR, the OMIG auditors reasonably concluded it was a mistake when the costs were actually included in the per diem rate.

In their post hearing brief, the facility attorneys argued that this is an issue where the facility submitted information to the Bureau of Long-Term Care Reimbursement ("BLTCR") during the audit years, and the BLTCR made a decision about how laboratory and x-ray services would be reimbursed to the facility. There was no dispute about the fact that the BLTCR made a mistake in this case. It was contended by the facility that the OMIG is now second-guessing BLTCR and disallowing the expenses from the facility. I don't find that to be the case. I find instead that what has happened here is the correction of a mistake, something that the OMIG auditors are obliged to do.

At the hearing, the testimony from the auditor was that OMIG was now correcting the BLTCR and disallowing the payments to the facility. The auditor admitted that the decision to allow the expense was entirely that of another government agency and that the facility was not at all at fault.

It was argued by the facility attorneys that this disallowance is completely unfair and that the facility simply did as was asked and now is being penalized these many years later by a decision made by BLTCR. It is true that this was a decision that the BLTCR was allowed to make under the prevailing rules and properly made at the time but it is not true that to correct this mistake is now unfair. In fact, it would be

unfair not to correct the mistake because that would result in a double payment because to allow laboratory and x-ray costs in the per diem rate calculations would lead to multiple reimbursements for the same expenses. If the resident receiving the laboratory or x-ray expense was a Medicaid patient, the vendor of the services would bill the Medicaid program directly as a fee-for-service basis and no expense would be incurred by the facility. Yet, the costs would be in the per diem and the facility would be being paid for these expenses it did not incur.

Additionally, Susquehanna reported these laboratory/x-ray costs as Medicare Part A specific expenses (see T. 113-114), and therefore would be reimbursed through Medicare Part A. This would also lead to the facility being reimbursed by two different programs for the same expenses: first, the facility would be reimbursed through the Medicare system, as these are Medicare Part A reported expenses, and second, the facility would be reimbursed for these expenses a second lime in the per diem rate it receives for its Medicaid patients. Therefore, the OMIG auditors reasonable determined that the costs needed to be removed from the rate calculations.

It is noted that there are the following provisions in the regulations: "Any rate of payment certified or established by the commissioner of the [DOH] or any other official or agency responsible for establishing such rates will be constructed to represent a provisional rate until an audit is performed and completed..." (See 18 NYCRR 517.3(a)(1)) This provision should also be noted; "Until an audit is performed or the time for an audit runs out, all reimbursement of claims or per diems is provisional." (See T. 116; 18 NYCRR 517.3(a) (l) and "Overpayments include any amount not authorized to be paid even when payment resulted from a mistake." (See 18 NYCRR 5 18.1(c))

The costs of the laboratory and x-ray costs were included in the per diem by mistake, after the BLTCR determined they were not to be included. At the hearing, counsel for Susquehanna referenced 10 NYCRR 86-2.10(f) as a basis for including laboratory and x-ray costs in the per diem. (See T. 16 and T. 108-109) This part of the regulation lists the types of non-comparable costs to be included in the per diem rate. While 86-2.10(f)(2) does list laboratory and x-ray costs as costs to be included as non-comparable costs, 86-2.1 0(f)(l) limits non-comparable costs to those costs that are first allowable. These regulations must be read in order and together, not as if each existed in a vacuum. Since at this Facility, laboratory and x-ray costs are not allowable costs per the BLTCR, the costs are not to be included in the per diem. (See OMIG Ex. 1OA through I0 H)

Susquehanna offered neither testimony nor documents to dispute OMIG's determination and they therefore failed to meet their burden of demonstrating OMIG's determination was incorrect. Accordingly, I find that the OMIG determination was correct and that it should be upheld.

CONCLUSION

The evidence adduced at this hearing demonstrates that Susquehanna did not meet its burden as required by 18 NYCRR Section 519.18 (d) in issues I, II and IV. The regulations provide that the Appellant must show by a preponderance of the evidence that the determinations of the OMIG were incorrect. The OMIG audit adjustments, subsequent re-calculated rates and determination that the Facility received Medicaid overpayments, in those three issues, is justified under NY and Federal regulations and was proven by testimony and documented evidence. The determination of the OMIG as set forth in the Final Report should be affirmed for issues I, II, and IV.

As for issue III, the Department's determination to recover alleged Medicaid overpayments for cable and satellite television from the Appellant is reversed for the reasons set forth herein.

DECISION: The Department's determination to recover on Issues I. II, and IV is affirmed. The Department's determination to recover on Issue III is reversed. This decision is made by David A Lenihan, Bureau of Adjudication, who has been designated to make such decisions.

DATED: Troy, New York
October _____, 2011

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David Lenihan
Bureau of Adjudication