

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

In the Matter of the Appeal of	:	
	:	
<b>Baptist Health Nursing and Rehabilitation Center,</b>	:	<b>Decision</b>
Appellant,	:	
	:	Audit#: 15-5227
from a determination by the NYS Office of the	:	
Medicaid Inspector General to recover Medicaid	:	
Program overpayments.	:	
	:	

Before:	Jeanne T. Arnold Administrative Law Judge
Held via:	Cisco WebEx Videoconference
Hearing Date:	August 15, 2024 The record closed October 15, 2024
Parties:	New York State Office of the Medicaid Inspector General 800 North Pearl Street Albany, New York 12204 By: Min Ji Kim, Esq. 90 Church Street, 14 <sup>th</sup> Floor New York, New York 10007  Baptist Health Nursing and Rehabilitation Center 297 North Ballston Avenue Scotia, New York 12302 By: John F. Darling, Esq. Bond, Schoeneck & King 350 Linden Oaks, Third Floor Rochester, New York 14625

### **JURISDICTION**

The New York State Department of Health (Department) acts as the single state agency to supervise the administration of the Medical Assistance (Medicaid) Program in New York. 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 Baptist Health Nursing and Rehabilitation Center (Appellant) for the rate period January 1, 2012 through December 31, 2014. The Appellant requested a hearing pursuant to Department of Social Services (DSS) regulations at 18 NYCRR 519.4 to review the OMIG's determination.

### **HEARING RECORD**

OMIG witnesses: Christine Crouch, Chief Medical Facilities Auditor

OMIG exhibits: 1 – 14

Appellant witnesses: [REDACTED], former Chief Financial Officer (2021-2024)

Appellant exhibits: A-I

A transcript of the hearing was made. (T 1-94.) Each party submitted a post-hearing brief.

### **SUMMARY OF FACTS**

1. The Appellant is a 262-bed residential health care facility (RHCF), or nursing home, located at 297 N. Ballston Avenue in Scotia, New York. It is licensed under Article 28 of the PHL, organized as a not-for-profit corporation, and enrolled as a Medicaid provider.

2. During the 1980s, the Appellant, formerly known as the Baptist Retirement Center, was leasing the building of its then 160-bed facility from individuals doing business in the limited partnership known as the Highland Retirement Center.

3. On December 31, 1990, the Appellant applied to the Department for a Certificate of Need (CON), under Project Number 900697. That application was for construction of an 82-bed addition, purchase of real estate “and finance via FHA mortgage.” (Appendix A to Appellant’s brief.)

4. On February 27, 1991, after its CON application had been submitted, the Appellant signed a purchase agreement with the Highland Retirement Center (the Purchase Agreement) for “all of the land upon which the Appellant’s skilled nursing and health related facility is located and the vacant adjacent land of approximately 1.3 acres which adjoins the parcel upon which the Appellant’s facility is situated” together with “all buildings and improvements thereon and fixtures that constitute real property.” (Exhibit I, pp 1-2.)

5. As part of the Purchase Agreement, the Appellant agreed to obtain a mortgage to pay the unpaid principal balance, as of the closing date, of the Highland Retirement Center’s 1976 mortgage against the property of original principal amount of \$3,422,000. (Exhibit I, p 6.) The Purchase Agreement also contemplated, among other things, that the Appellant would pay to the seller “\$1,256,288 with this principal amount being paid over a period of three hundred seventy-four (374) months with interest at sixteen (16) percent per annum.” (Exhibit I, p 5.) The amounts owed were to be secured with a security interest as a separate document, subordinate to any mortgage or security interest granted to a construction lender or to a lender of permanent financing relating to the eighty-two (82) bed addition and work performed pursuant to the prior-submitted CON application. (Exhibit I, pp 7-8.)

6. On March 30, 1994, the security interest of the Highland Retirement Center as contemplated in the Purchase Agreement, was obtained by mortgage note, providing for negative amortization, directly from the Highland Retirement Center for a sum of \$1,291,157.44 with interest at the rate of 16 percent per year until the debt is paid in full (the Highland Mortgage). (Exhibit H.) The Department did not approve the Highland Mortgage.

7. The Appellant obtained a CON from the Department on February 15, 1995, regarding Project 900697. (Exhibit 3, p 27; Exhibit E.) Although the Appellant submitted approval for the building purchase of \$4,510,819, the CON approved \$0 but indicated that the “building purchase will be allowed based on the MATP [Mortgage Approved Transfer Price] as determined by Long Term Care reimbursement. The MATP previously has been estimated at \$3,203,174.”

8. In April 2012, the Appellant, with Department approval, paid off its two existing FHA-insured mortgage loans, totaling approximately \$4.36 million with interest of 6.2% with remaining terms of 6 and 7 years, with an M&T bank loan of 6 years and interest rate at 4.0%. (Exhibit 3, pp 31-33.)

9. By letter dated October 16, 2015, the OMIG informed the Appellant that it would conduct an audit of the Appellant’s records that support the capital portion of its Report of Residential Health Care Facility (RHCF-4) cost reports for the 2010-2012 calendar years. RHCF-4 cost reports are submitted annually. The specific RHCF-4 cost reports being audited were used to determine the capital portion of the Appellant’s daily rate from the Medicaid Program for the period January 1, 2012 through December 31, 2014. (Exhibit 1.)

10. On December 5, 2022, the OMIG issued a draft audit report (DAR) which identified disallowances for claimed property expenses and proposed to recover an estimated Medicaid overpayment of \$564,381. 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 2.)

11. On March 2, 2023, the Appellant submitted its objections to the DAR. (Exhibit 3.)

12. On June 21, 2023, the OMIG issued a final audit report (FAR), which advised the Appellant that, after review of the Appellant's objections and supporting documentation, the OMIG had adjusted its findings and determined to reduce the overpayments to \$436,453. (Exhibit 4.) The OMIG disallowed mortgage expense costs including all interest paid in accordance with the Highland Mortgage. (Exhibit 4, p 107-108.)

13. On July 12, 2023, the Appellant requested this hearing to review the findings set forth in the FAR. (Exhibit 5.)

14. The parties having resolved all other findings in the FAR, and the only audit determination remaining for resolution in this hearing decision is the Highland Mortgage expense disallowance. (Exhibit 4 p 101; T 10, 13.)

### **ISSUE**

Was the OMIG's determination to disallow the Highland Mortgage interest correct?

### **APPLICABLE LAW**

Residential health care facilities (also referred to as nursing homes in other applicable state regulations) are eligible for payment of a Medicaid daily rate billable for resident beds occupied by Medicaid recipients. 10 NYCRR 86-2.10. The Department's Bureau of Long Term Care Reimbursement (BLTCR) sets rates for each residential health care facility by using the information that the facility submits 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, leases and rentals, and interest on capital debt. 10 NYCRR 86-2.10(a)(9)&(g), 86-2.20, and 86-2.21.

A facility's rate of payment is provisional and subject to audit. 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.

A Medicaid provider is entitled to a hearing to review the OMIG's final determination to require repayment of any overpayment. 18 NYCRR 519.4. The Appellant has the burden of establishing that the OMIG's determination was incorrect and that all costs claimed were allowable. 18 NYCRR 519.18(d).

### **DISCUSSION**

At the hearing, the OMIG presented the audit file and summarized the case, as required by 18 NYCRR 519.17. The Appellant is contesting disallowance 2, and specifically the mortgage interest reported on the Highland Mortgage. (Exhibit 9, p 196-201; Exhibit H.)

The reviewable issue in this proceeding is whether the OMIG properly disallowed the Highland Mortgage interest expenses that the Appellant claimed during the audit period. The OMIG disallowed the expenses because the loan was not approved by the Department. The OMIG points out that the Appellant's unsubstantiated claims that the Department was aware of and approved the loan also are implausible, because the loan terms were well more than what a prudent borrower would have had to pay in the money market at the time the loan was made. (T 27, 29-38; Exhibit 4, p 107.)

To be considered as allowable in determining reimbursement rates, costs shall be properly chargeable to necessary patient care. 10 NYCRR 86-2.17(a). Allowable costs shall not include expenses or portions of expenses reported by 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). To be considered an allowable cost, debt generating interest shall be incurred to satisfy a financial need, and the interest expense shall be at a rate not in excess of what a prudent borrower would have had to pay in the money market at the time the loan was made. 10 NYCRR 86-2.20(b). "Interest on capital indebtedness, as defined in 86-2.21(a)(1) of this Subpart. . . is an allowable cost if the debt generating the interest is approved by the commissioner, incurred for authorized purposes, and the principal of the debt does not exceed either the approval of the commissioner or the cost of the authorized purposes." 10 NYCRR 86-2.20(e).

Capital indebtedness is defined, in relevant part, as all debt obligations of a facility that are: found by the commissioner to be reasonable, necessary and in the public interest with respect to the facility in accordance with standards set forth in section 86-2.21(e)(3)(ii) of this Subpart. 10 NYCRR 86-2.21(a)(1)(iii). The standards set forth in 10 NYCRR 86-2.21(e)(3)(ii), in relevant part, require a reasonable interest rate and amortization schedule. 10 NYCRR 86-2.21(e)(3)(ii)(b)(2)(3).

**The Appellant did not prove that the Department approved the Highland Mortgage and, therefore, it is not recognized for reimbursement.**

The OMIG determined not to recognize the interest on the Highland Mortgage for reimbursement because the Appellant never presented proof that the Highland Mortgage was approved by the Department. The Appellant argues that because the Appellant's CON application for Project No 900697 was approved, this necessarily required that the Highland Mortgage was



approved; however, the specific CON application for Project No 900697 was submitted prior to the Purchase Agreement (Exhibit I) and, therefore, the Appellant did not prove that the Purchase Agreement -- and the Highland Mortgage agreement contemplated therein -- was ever part of the CON process.

There is no dispute that the record is devoid of any documentary proof that the Department approved the Highland Mortgage. The Appellant's own witness, former Chief Financial Officer (CFO) [REDACTED] acknowledged both that Department approval is necessary for mortgages to be reimbursed by Medicaid and that the OMIG auditors requested documentation of approval, but after searching and combing "the best that I could do is the certificate of need." (T 81, 85.) Yet CFO [REDACTED] testified with certainty, to the contrary, that the Department approved the Housing and Urban Development (HUD) loans in writing because "all your T's need to be crossed and your I's dotted in order for them to move forward" with such loans. (T 85.)

CON applications are required for Medicaid reimbursement for "the construction, establishment, change in the establishment, merger, acquisition, elimination or substantial reduction, expansion, or addition of a hospital service or health-related service of a hospital." PHL § 2802-b(a). Proposals requiring a CON application include construction, addition or replacement proposals involving a total project cost more than \$6 million for non-hospital facilities. 10 NYCRR 710.1(c)(1)(vi). The CON dated February 15, 1995, relied on by the Appellant, approved costs for renovations to the facility, not for the purchase or for any particular financing for the purchase of the building. (Exhibit 3, p 30.) Indeed, the CON explicitly denied the submitted expense of \$4,510,819 for the purchase of the building and approved \$0, noting "[t]he building purchase will be allowed based on the MATP [Medicaid Approved Transfer Price] as determined by Long Term Care Reimbursement." (Exhibit 3, p 27; T 32.)



The MATP is determined when there is a transfer of a medical facility from one owner to a new owner. (T 33-34.) The BLTCR calculates a Medicaid-allowable transfer price based on the reported building assets and depreciation. (T 33-34.) The MATP includes the cost of the building and fixed assets. It is not an approval of financing for the purchase. (T 42.)

There are additional reasons why the Appellant's claim that it disclosed and obtained Department approval of the Highland Mortgage is not consistent with the evidence. The Purchase Agreement from February 1991 between the Highland Retirement Center and the Appellant notes that although the Appellant would deliver a mortgage note at the time of closing, it would be subordinate to the existing first mortgage and the "permanent financing relating to the eighty-two (82) bed addition and work performed on the one hundred sixty (160) bed facility *as part of the eighty-two (82) bed Certificate of Need application.*" (Exhibit I pp 7-8 [emphasis supplied]). The CON application for Project Number 900697, received by the Department on December 31, 1990, included "construction of an 82 bed addition, purchase [of] real estate and *finance via FHA* [Federal Housing Administration, which is a part of the HUD]," including the permanent financing. It contains no mention of a private mortgage note which was not entered into by the Highland Retirement Center and the Appellant until March 30, 1994. (Appellant's Brief, Appendix A [emphasis supplied].) The Schedule of Certified Costs for CON 900697 was approved by the Department in the amount of \$6,848,317; this amount included \$0 for the building's purchase. As the OMIG auditor testified, the CON was for renovations, and no dollar amount was approved for building purchase costs. (T 42.) CFO [REDACTED] testified that the CON included an addition to the building and the building's purchase (T 76) but did not claim that it included financing of the purchase.

A provider requires separate approval from DOH for a loan or mortgage note even when there is a CON and MATP. (T 35-36, 42-43, 65, 81, 85, 91.) *See* 10 NYCRR 86-2.20(e). Providers “have to either email the Department of Health or send them a letter with back up documentation for the mortgage” and usually there are “many schedules that are included to request approval for any mortgage that is going to be reimbursed in the rate.” (T 36, 57.) The Appellant submitted no documentation that it ever attempted to get or received Department approval for the Highland Mortgage. (T 36, 42, 65.)

The Department’s approval of a mortgage would include a review of the interest rate and amortization schedule to discern whether the loan was prudent or creating excess debt for the Facility. The principal amount of the Highland Mortgage loan increased for the first year and a half from 1.2 to 1.4 million dollars. (T 29-31.) Interest expense for all residential health care facilities is considered an allowable cost only when it is “at a rate not in excess of what a prudent borrower would have had to pay in the money market at the time the loan was made.” 10 NYCRR 86-2.20(b). The OMIG auditor testified that the average commercial interest rate at the time the loan was made was approximately nine percent, whereas the interest rate of the loan at issue was 16 percent. (T 37.) Further, there was already a mortgage regarding the purchase of the building from the 1970s that was reimbursed by Medicaid and to allow the Highland Mortgage would be a duplication of reimbursement and a waste to the Medicaid Program. (T 38, 43.) CFO [REDACTED] admitted that the Appellant did not provide evidence that it attempted to use the prudent buyer principle at the time it signed the Highland Mortgage. (T 84.) While the Appellant argues that it is incumbent on the Department to establish “generally accepted business, accounting, professional” practices (18 NYCRR 519.18[d]), that is not the issue. The issue is that the Department could not

even consider any such practice because it was never consulted concerning the loan itself and the proposed interest rate of 16 percent.

The OMIG auditor indicated that she believed the average commercial interest rate at the time of the Highland Mortgage was nine percent, and the Appellant offered no proof that it sought a loan from someone other than the prior owner at a more reasonable rate than the sixteen percent dictated in the Mortgage note signed in 1994, three years after agreed to by a Purchase Agreement signed in 1991 and three years after the CON application the Appellant relies on as proof of the Department's approval of the loan. CFO [REDACTED] was unable to produce evidence that the Appellant attempted to find a more reasonable rate because "it was well before [her] time" and she "was unable to produce that documentation." (T 84.) The Appellant offered no proof that the Department in fact approved of what appears to be an imprudent financing arrangement.

**The Appellant did not prove that the Department implicitly approved the Highland Mortgage interest expense by its periodic rate setting or by the OMIG's prior audits.**

The Appellant asserts that the Department's BRHCR recognized the Highland Mortgage by previously reimbursing the reported interest. The Appellant also argues that the mortgage interest should continue to be allowed because it has been listed as a capital cost on all their reports since 1995. (T 65.)

While interest is reported on RHCF-4 cost reports, interest rates are not. The RHCF-4 cost reports produced as part of this audit show combined interest rates paid on several mortgages. (Exhibit 12.) The RHCF-4 cost reports for 2010, 2011, and 2012, which are the ones at issue, contain one line titled "Interest – Mortgage(s)" with reported interest in each year of \$494,773, \$457,207 and \$373,072 respectively. (Exhibit 12, pp 457-459.) The reports do not differentiate what amount of interest is being paid on each mortgage or, indeed, whether there is even more than one mortgage.

The only proof the Appellant has that interest rates are reported is the testimony of CFO [REDACTED] who took over as liaison on the current audit sometime after she became CFO in April 2021. (T 71.) She testified that she reviewed previous cost reports, that the reported mortgage interest remained consistent, that she followed suit in the reports she completed, and that she is not aware of any adjustments that have been made to the Highland Mortgage since it was reported. (T 73-76.) “It clearly states in the Medicaid cost reports that it was a 16 percent interest, because there’s a - - a line within the Medicaid cost report that requests that information. So I remained steady with the way that it had been reported previously.” (T 74.) She did not identify the “line within the Medicaid cost report that requests that information” or where the Appellant’s cost reports submitted for the audit reported the 16 percent interest rate and admits that she did not provide any such cost reports to the OMIG during the audit. (T 79-81.)

The Appellant asserts that because it has reported the Highland Mortgage interest on past cost reports the Department’s rate setters have somehow implicitly approved the Highland Mortgage and its interest rate by setting the Appellant’s capital rate with its inclusion and, therefore, for OMIG to now exclude the interest would be to substitute its judgment for that of the rate setters. The Appellant’s argument attempts to confuse the role of the OMIG and the Department rate setters. In *Atlanticare Management, LLC v Ives* (212 AD3d 132, 140 [3d Dept 2022]), the court addressed this issue and held that OMIG must assure that its adjustments to certain rate periods conform to the methodology employed by the Department in calculating the nursing home’s rates. *However, where the Department had not decided whether to recognize or not to recognize a certain mortgage, there was no DOH methodology for OMIG to follow.* Where “the record is devoid of any evidence that [the Appellant] sought approval from [the Department] for [a] financing arrangement at any point before or after it became effective, .... OMIG’s



justification in the DAR and FAR for disallowing the mortgage-related costs during the period in which the [ ] loan was the effective financing arrangement based upon a lack of [the Department's] approval for that arrangement is supported by substantial evidence." 212 AD3d at 141-142.

The OMIG is not reversing a judgmental determination by the Department (Appellant Brief, p 15) because the audit record was devoid of proof that the Department previously recognized the Highland Mortgage. The rate setting was based on the Appellant-reported combined interest that did not differentiate between mortgages. The Appellant offered no evidence to meet its burden of proving the Department was specifically aware of and approved for reimbursement the terms of the Highland Mortgage as distinguished from the other financing. (*Compare Daleview Nursing Home v Axelrod*, 62 NY2d 30, 34 [1984][cited by Appellant Brief, p 15].)

The only proof the Appellant offered at all that distinguished the Highland Mortgage was in the working papers of an OMIG auditor who was the liaison on this audit prior to CFO [REDACTED]. The papers were from 2016 and were in a shared documents folder. (T 72-73; Exhibits C, D.) That auditor passed away and auditor Crouch testified that his work product was unreviewed. (T 61-62.)

Rates are provisional until an audit is performed and completed. 10 NYCRR 86-2.7(a). (*See also* T 48-49.) The Appellant contends that because OMIG auditors never questioned the Highland Mortgage loan interest, even after conducting prior audits of the Appellant's capital costs in 2008 and 2011, this means that the interest paid from the Highland Mortgage was approved. The Appellant did not provide documentation to the OMIG concerning previous audits because CFO [REDACTED] did not have "all of the documentation on those." (T 83-84.) No evidence was

provided to show that the prior audits reviewed or addressed the Highland Mortgage. (T 52, 65; Exhibits F, G.)

Even if an expense is allowed in a previous audit, it can be disallowed in a future audit because OMIG auditors are looking only at the specific time period they are auditing. OMIG auditor Crouch testified that if anything was missed on a prior audit, it would be adjusted regardless on a current audit simply because each audit stands on its own. (T 64-65.)

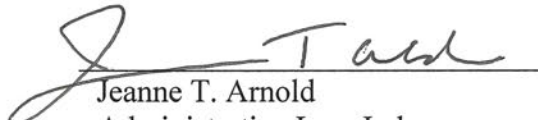
Estoppel is not available against a governmental agency in the exercise of its governmental functions and any exception made to that rule is of “very limited application” that is “addressed to an unusual factual situation.” *Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33 (1984) (compare *Forest View Nursing Home v Perales*, 195 AD2d 916 [3d Dept 1993] [where a party to a Medicaid rate audit was barred by the doctrine of collateral estoppel where a specific issue had been finally determined during a prior audit, a rate appeal, and a legal proceeding]).

This is not “an unusual factual situation” because the Appellant did not prove that the Department was ever even cognizant of the Highland Mortgage. The Appellant has failed to meet its burden to prove that the OMIG’s disallowance was incorrect.

### **DECISION**

The OMIG’s determination to disallow mortgage interest associated with the Highland Mortgage was correct and is affirmed.

DATED: January 31, 2025  
Rochester, New York

  
Jeanne T. Arnold  
Administrative Law Judge

To: Min Ji Kim, Esq.  
[Minji.Kim@omig.ny.gov](mailto:Minji.Kim@omig.ny.gov)  
New York State Office of the Medicaid Inspector General  
90 Church Street, 14<sup>th</sup> Floor  
New York, New York 10007

John F. Darling, Esq.  
[darlinj@bsk.com](mailto:darlinj@bsk.com)  
Bond, Schoeneck & King  
350 Linden Oaks, Third Floor  
Rochester, New York 14625