

Mr. Terepka (1copy) Hard Copy  
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Ms. Bordeaux by Scan  
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## Department of Health

**KATHY HOCHUL**  
Governor

**JAMES V. McDONALD, M.D., M.P.H.**  
Commissioner

**JOHANNE E. MORNE, M.S.**  
Executive Deputy Commissioner

July 10, 2024

**CERTIFIED MAIL/RETURN RECEIPT**

Min Ji Kim, Esq.  
NYS Office of the Medicaid Inspector General  
90 Church Street  
New York, New York 10007

Matthew J. Leonardo, Esq.  
Hinman Straub PC  
121 State Street  
Albany, New York 12207

**RE: In the Matter of Bushwick Center for Rehabilitation and Health Care**

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 blue 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  
  
**Bushwick Center for Rehabilitation &  
Health Care**  
Medicaid Provider #01113235,  
  
from a determination to recover Medicaid Program  
overpayments:

Decision After  
Hearing

#19-5171

Before: John Harris Terepka  
Administrative Law Judge

Hearing date: April 17, 2024  
By videoconference  
Record closed June 28, 2024

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

The New York State Department of Health (the Department) acts as the single state agency to supervise the administration of the Medicaid Program in New York State. 42 USC 1396a; Public Health Law 201(1)(v); 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. PHL 31.

The OMIG issued a final audit report for Bushwick Center for Rehabilitation & Health Care (the Appellant) which concluded that the Appellant had received Medicaid Program overpayments. 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**

The OMIG presented one witness, audit supervisor Babu Jacob; and documents (Exhibits 1-14, 17-19). The Appellant relied on the OMIG's witness and documents. A transcript of the hearing was made. (Transcript, pages 1-99.) The record closed with the submission of post-hearing briefs on June 28, 2024.

### **SUMMARY OF FACTS**

1. Appellant Bushwick Center for Rehabilitation & Health Care is a proprietary residential health care facility, or nursing home, in Brooklyn, New York and is enrolled as a provider in the Medicaid Program. In addition to the nursing home, it operates three adult day health care (ADHC) programs.

2. In August 2019, the OMIG commenced an audit of the Appellant's reported costs for the capital component of its Medicaid reimbursement rate for the period January 1, 2014 through December 31, 2018. The Appellant's Medicaid

reimbursement during this period for the capital component of its rate was based upon its cost reports for the period January 1, 2012 through December 31, 2016. (Exhibit 12.)

3. On May 22, 2023, the OMIG issued a final audit report (#19-5171) that identified several disallowances of reported property costs. The OMIG advised the Appellant that these findings had resulted in a determination to recover Medicaid Program overpayments in the amount of \$1,353,722. (Exhibit 3.) By letter dated July 19, 2023, the Appellant requested this hearing to review the determination. (Exhibit 4.)

4. Final audit report findings at issue in this hearing are:

2 (b). Real estate tax disallowance (Nursing Facility)

The Provider's real estate tax expense included taxes for offsite parking lots. Parking lot rental is considered a real property lease, and real property leases entered into after March 10, 1975 are not reimbursable. Therefore, real estate tax expenses associated with the parking lots were disallowed.

Regulations: 10 NYCRR Sections 86-2.17(a)&(d) & 86-2.21(f)(3).

4 (b). Moveable equipment rental disallowance (Nursing Facility, ADHC 1, ADHC 3)

The laundry and linen service expense cost center should be charged with all the direct expenses incurred in providing laundry and linen services for nursing home use. Consequently, all appropriate laundry and linen expenditures should be reported with the laundry and linen operating expense category. The Provider's reported rental expense included laundry equipment that was part of a service agreement with an unrelated company. Equipment rentals that are part of a service agreement are not considered a true lease or rental agreement and should not be included in the property component of the rate. The equipment represents a capital cost to the vendor and not to the Provider. Consequently, laundry equipment expense that was included in the Provider's laundry service agreement was disallowed from the property component.

Regulations: 10 NYCRR Sections 86-2.17(a) & 455.9, PRM-1 Sections 2806.1(c) & 2806.3(b).

(Exhibit 3, Bates pages 201, 203.)

**ISSUE**

Has the Appellant established that the OMIG's final audit report property expense disallowances 2(b) and 4(b) were not correct?

**APPLICABLE LAW**

A residential health care facility (RHCF) can receive reimbursement from the Medicaid Program for costs that are properly 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. Reimbursable costs include operating expenses such as employee wages and benefits for administration and patient care, supplies, maintenance and utility costs. 10 NYCRR 86-2.10(a)(7). They can also include property costs such as depreciation, leases and rentals, insurance and necessary interest on both current and capital indebtedness. 10 NYCRR 86-2.10(a)(9), 86-2.19, 86-2.20, 86-2.21. 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).

The facility is reimbursed by means of a per diem rate established by the Department in a rate setting computation that reflects costs reported by the facility. PHL 2808; 10 NYCRR 86-2.10. Operating and property costs are reimbursed in separate components of the facility's rate. 10 NYCRR 86-2.10(a)(7),(b)&(g).

A facility's rate is provisional and subject to audit. The facility is required to prepare and to maintain contemporaneous records demonstrating its right to receive payment; to keep all records necessary to disclose the nature and extent of services furnished; and to furnish records to the Department upon request. 18 NYCRR 504.3(a).

If an audit identifies errors in reported costs, the Department can retroactively adjust the facility's rate. SSL 368-c; 10 NYCRR 86-2.7; 18 NYCRR 517.3. The Department may then require the repayment of any amounts not authorized to be paid under 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. Specific Medicaid reimbursement rules pertinent to this hearing are addressed by Department of Health regulations at 10 NYCRR Part 86-2, which concerns reporting and rate certifications. Also applicable, unless otherwise provided in Part 86-2, are the principles of reimbursement developed for determining payments under the Medicare Program. 10 NYCRR 86-2.17(a). These are primarily found at 42 CFR chapter IV, and in the Medicare Provider Reimbursement Manual, Part 1 (PRM-1).

### DISCUSSION

Because this was an audit of the nursing home and three ADHC programs, which received separately calculated rates, the audit report allocated the disallowances among those programs. The allocation of costs between the programs is not at issue and need not be addressed in this decision. Two disallowance categories remain in dispute, Adjustments 2(b) and 4(b). (Transcript, pages 13-14; Exhibit 16.)

It is not in dispute whether the disallowed costs were incurred in the amounts reported. The issue is whether they can properly be recognized as capital costs on the 2012-2016 cost reports. The capital component of a facility's rate is calculated on a two-year lag, which means in this case the Appellant's 2012 to 2016 property costs were used to determine the capital component of its rate from 2014 to 2018. (Exhibit 3, Bates page 193; Transcript, pages 17-18.) The cost, or "base" year used to determine the operating component of its rate was 2007. (Transcript, pages 37, 85-86.) The OMIG's determination is that the costs at issue are not allowable for inclusion in the capital component of the rate.

Adjustment 2(b): Real estate tax.

The Appellant leased several offsite parking lots and made lease payments to the owner. Real estate taxes on the lots were billed to and paid by the owner. (Exhibit 8; Transcript, page 31.) The Appellant reported an amount of its lease payments equal to the real estate taxes paid by the owner of the lots as property costs to the Appellant. (Exhibit 7; Transcript, pages 25-28.)

Parking lot rental is a real property lease, and the capital cost component of a rate shall not be affected by any lease occurring after 1975. 10 NYCRR 86-2.21(f)(3). The parking lots were not owned by the Appellant nor were the parking lot leases included in approved historical costs recognized for capital reimbursement under 10 NYCRR 86-2.21. (Transcript, pages 24-25, 90-91, 94.)

The Appellant points out, without even mentioning when this occurred, that there was a change in its operator requiring Department Certificate of Need (CON) approval. It claims that "the facility sale that was approved by the state included all parking



locations.” (Exhibit 2, Bates page 26; Appellant brief, page 13\*.) The Appellant failed to come forward with any evidence that CON approval of a new owner addressed the manner in which costs for “parking locations” could be reimbursed, let alone that it specified any cost associated with leasing offsite parking lots was approved for capital reimbursement contrary to 10 NYCRR 86-2.21(f)(3).

The Appellant never obtained approval for these costs as capital costs through a rate appeal pursuant to 10 NYCRR 86-2.13&14. (Transcript, page 25.) The Appellant’s accusation “[i]t beggars belief” that the OMIG did not in some way further investigate a speculative objection to the audit finding for which the Appellant brought forward no evidence during the audit or even at this hearing, has the burden of proof wrong. (Transcript, pages 95-96; Appellant brief, page 13.) The burden of proof was on the Appellant, not the OMIG, to establish the capital costs it reported were allowable. 18 NYCRR 519.18(d)(1).

The Appellant also asserts that the City of New York mandates hospitals and related facilities to have parking spaces. (Transcript, page 93; Appellant brief, page 13.) Its argument misrepresents both facts and law in claiming:

This parking space mandate requires not only Bushwick to maintain such spaces, but in addition, to pay real estate taxes on the property... Provider is legally required to maintain such spaces and pay real estate taxes on them. (Appellant brief, page 13.)

A requirement that a nursing home have parking spaces is not a requirement that the nursing home pay real estate taxes. Taxes did have to be paid, but not by the Appellant, which only leased the spaces. It was the property owner/lessor, not the Appellant, that was billed for and required to pay them. (Exhibit 8.)

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\* The Appellant’s brief was unpaginated. Page numbers 1-14, by actual page count, are used herein.

The Appellant's arguments are unsupported by evidence and do not explain why, contrary to the express provisions of 10 NYCRR 86-2.21(f)(3), parking lot leases entered into after 1975 should be reimbursed as capital costs or why taxes paid by the lessor of the lots should be reimbursed as capital costs of the Appellant.

Adjustment 4(b): Moveable equipment rental.

The Appellant's laundry and linen service was provided by Confidence Management Systems (CMS), an unrelated third-party provider of laundry service. During the cost years 2012-2016, the Appellant had two written agreements with CMS. One was a service agreement under which, for a monthly fee, CMS was to be the "exclusive provider... responsible for providing [Appellant] all necessary Laundry Services, supplies and equipment." (Exhibit 10, page 1.) Under the other agreement CMS leased to the Appellant, for a monthly payment, washers and dryers owned by CMS but installed at the Appellant's facility. (Exhibit 9.) CMS remained responsible for all maintenance and repairs. (Exhibit 9, point 5.)

The Appellant reported the monthly equipment lease payments, but not the monthly service agreement fee, as property costs on its 2012-2016 cost reports. (Exhibit 6, Bates pages 232, 239, 246, 253, 260; Transcript, pages 53, 64-65.) The OMIG disallowed the lease payments as property costs on the grounds that they were operating costs for laundry and linen, reimbursed in the direct component of the Appellant's operating rate. (Transcript, pages 32-35.)

Equipment rental that is part of a service agreement with an unrelated company is not includable in the property component of the rate because it is a capital cost to the vendor, not the provider. PRM-1 2806.1(C), 2806.3(B). The OMIG concluded that the

equipment in this case was part of the Appellant's service agreement with CMS. (Transcript, page 33.) While the equipment was located on the premises it was not for the use of the Appellant, it was for the use of CMS staff which provided "all necessary Laundry services, supplies and equipment." (Exhibit 10, page 1; Transcript, page 68.) In the OMIG's view, the Appellant did not have, as PRM 2806.1(C) requires, "possession, use and enjoyment" of the equipment. (Transcript, pages 60-63, 80, 85.)

According to the Appellant, the laundry equipment met PRM-1 2806.3(B) "Costs of Supplying Organizations" requirements because: (1) it was leased; (2) it was located at the premises; and (3) it was separately specified in the charges from the lessor. (Transcript, page 82; Exhibit 17; Appellant brief, pages 4-5.) The Appellant argues these criteria were met because there was a lease, the equipment was at its facility, and a separate charge was specified for it. The Appellant also pointed out that its facility staff were not explicitly prohibited under its agreements with CMS from using it. (Transcript, pages 72-74.)

The Appellant fails to mention that PRM-1 2806.3(B) immediately goes on to offer two examples illustrating the application of these three criteria to the distinction between a capital-related cost and a service-related cost for equipment leased from a supplying organization not related to the provider: 1) A telephone company's lease of its phones and switchboard equipment to be used by a hospital in conjunction with its telephone service can be a capital-related cost. 2) A cleaning service's charges for both housekeeping service and for the rental of equipment kept at the hospital for the use of the cleaning service staff is not, because the hospital does not have "possession, use and enjoyment" of the equipment. The facts in this case are clearly closer to the latter.

The OMIG relies on the more directly pertinent provisions of PRM-1 2806.1(C), “Costs included in Capital-Related Costs,” which state that “leased or rented” means “that is, the provider has the possession, use and enjoyment” of the equipment. PRM-1 2806(C) also lists factors weighing in favor of treating an agreement as a lease, and not a purchase of services, to include:

- The agreement is memorialized in one document rather than in two or more documents (for example, one titled a “Lease Agreement” and one titled “Service Agreement”);
- The document memorializing the agreement is titled a “Lease Agreement”. If one or more of the documents memorializing the agreement are titled “Service Agreements”, this would indicate a purchase of services;
- ...
- The provider furnishes any supplies required to be used with the equipment.

The Appellant entered into two separately documented agreements with CMS. (Exhibits 9, 10.) One of the documents is titled “Services Agreement.” That agreement states “CMS will be responsible for providing Client all necessary Laundry Services, supplies and equipment.” These factors all support the OMIG’s determination that the entire cost was for a purchase of services. (Transcript, pages 34, 65-66.)

The Appellant argues, as evidence that CMS had given over possession of the equipment to the Appellant, that under the lease agreement paragraph 4 the Appellant was responsible for availability of electric, gas and water hookups necessary to operate the machines. (Appellant brief, page 4.) The Appellant does not mention the more relevant paragraph 5 of that same agreement, which leaves all maintenance and repairs, responsibility for and control of the equipment itself, in CMS’ hands:

Lessor, at its own expense, shall furnish any and all parts and labor required to keep the equipment in good mechanical and working order... From time to time, at Lessor’s sole option, Lessor may replace the Equipment with other equipment

of comparable size and suitability. Lessee will not make any changes in the Equipment without Lessor's prior written consent. (Exhibit 9, paragraph 5.)

While the Appellant also points out that paragraph 7 of the lease agreement stated: "The lessee shall use the Equipment in a careful manner and only in connection with the normal operation of its usual activities" (Exhibit 9, paragraph 7), the Appellant did not explain what "normal operation of its usual activities" required its "possession, use and enjoyment" of these laundry machines for some other purpose than the "all necessary Laundry Services" it had engaged CMS to perform. (Transcript, page 95.)

The Appellant points out that PRM-1 2806.1(C) also states the list of factors "represents guidelines, rather than an absolute checklist of factors evidencing a lease agreement," but its claims that the OMIG has ignored these guidelines repeatedly misrepresent the OMIG's position:

OMIG has taken the position that the existence of two agreements ipso facto invalidates the Provider's ability to seek reimbursement for the cost of leasing equipment...

In fact, according to the OMIG's interpretation of the PRM-1, the existence of any service agreement necessarily precludes capital reimbursement for the rental of capital equipment...

[T]he OMIG's position [is] that the existence of two agreements necessarily constitutes a disallowance... OMIG has relied exclusively on one sentence of the PRM-1, to the exclusion of all other guidance on this issue... (Appellant brief, pages 5, 6, 8.)

Nowhere did the OMIG assert that the existence of two agreements mandates disallowance. To the contrary, during cross examination by the Appellant the OMIG auditor readily agreed that it does not:

Q. So the part of the PRM 1 that you relied on, right, at least a part of your argument for disallowance, is that there's two agreements. The PRM 1 itself says that those are guidelines, right, not mandates, correct?

A. Yes. (Transcript, pages 77-78.)

The OMIG's determination is that in this case the disallowance was appropriate, and that what the Appellant invokes as "all other guidance on this issue" supports that determination. The Appellant has failed to establish that the OMIG's application of the PRM-1 2806.1(C) guidelines is inconsistent with the disallowance or is an unreasonable exercise of its authority to determine allowable costs. 10 NYCRR 86-2.17(d).

The Appellant had reason, beginning in 2012, to seek recognition of laundry costs in the capital rather than the operating component of its rate. The Appellant itself claims:

[T]here was in fact a change in the operating component of the rate. January 1, 2012 was the effective date for statewide pricing, the new rate methodology for the operating component. (Appellant brief, page 9.)

The capital component of a facility's rate is set primarily on the basis of reported costs, while as the Appellant itself points out, during the rate years under review operating rates reflected statewide pricing not tied as closely to the facility's reported costs. (Transcript, pages 71, 86.) PHL 2808; 10 NYCRR 86-2.10. For this reason, reporting costs previously reimbursed in the operating component of the rate as property costs, could increase the Appellant's reimbursement in the 2014-2018 rate years.

The Appellant's 2007 base year cost report included the entirety of its laundry service as operating costs (under the columns for salaries & wages, employee benefits, supplies & material, and purchased and contracted services). (Exhibit 6, Bates page 225; Transcript, pages 50-52.) The Appellant only began reporting a property cost for laundry service in 2012. Its 2012-16 cost reports began to include, under the "deprec. leases & rentals" column, the \$49,647 per year that was disallowed in this audit. (Exhibit 6, Bates pages 232, 239, 246, 253, 260; Transcript, page 53; Appellant brief, page 2.)

The OMIG pointed out, however, that the Appellant did not report, as required, any change in the allocation of costs for laundry and linen service between the 2007 base year cost report for operating costs and the cost reports for the years under review. (Transcript, pages 43-44, 55-56; OMIG brief, page 9.)

Schedule 8E of each cost report specifically asked if there had been such a change, asking: "Does facility have a change in rendered services between the operating base and current cost report (ie Laundry and Linen on site to Contracted Laundry offsite)." The Appellant answered "no" in each year. (Exhibit 6, Bates pages 229, 236, 243, 250, 257; Transcript, page 56.) Had it reported a change, and that laundry service previously reported and reimbursed entirely as an operating cost now also included a property component, the Department's rate setting process could have considered the effect of the change and whether to adjust operating and capital reimbursement accordingly. (Transcript, pages 42-46; OMIG brief, pages 9-10.) This was not done, and so when this audit revealed the Appellant's failure to report the change it made the adjustment to correct it.

The Appellant's attempts to argue that it was not required to report any change on Schedule 8E significantly confuse and misrepresent both facts and law by asserting:

The Provider could not report changes to the 2007 base year because those changes were new in 2012... The Provider did not report a change to the operating rate because it was new at the same time the rate methodology was new. (Appellant brief, page 10.)

The Appellant was not being asked to report "changes to the 2007 base year." It was asked to report, on Schedule 8E, "Does facility have a change in rendered services between the operating base and current cost report." Furthermore, a provider does not report "a change to the operating rate." It reports, on a cost report, changes to services

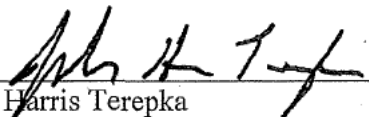
and costs for those services. It is the Department that changes a rate, as necessary to reflect reported changes to services and costs and the allocation of those costs between the operating and capital components of the rate. The Appellant was required to but did not report on Schedule 8E that while the entire cost of its laundry service was reported and allowed in 2007 as an operating cost and continued to be reimbursed as such thereafter, as of 2012 it was also claiming a laundry service cost for capital reimbursement.

The OMIG correctly determined, in accordance with its prospective reimbursement methodology, that the Appellant's laundry service continued to be reimbursed in the operating portion of the rate, and that the inclusion of the equipment lease in property costs for the years under audit resulted in duplicate reimbursement. (Transcript, pages 41-42; OMIG brief, pages 9-10, *citing* Daughters of Sarah Nursing Home, DOH administrative hearing decision issued July 19, 2004.) The Appellant has failed to meet its burden of proving the OMIG's application of PRM-1 2806.1&3 was incorrect.

**DECISION:** Property expense disallowances 2(b) and 4(b) are correct and are affirmed.

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

DATED: Rochester, New York  
July 10, 2024

  
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John Harris Terepka  
Administrative Law Judge