

cc: Ms. Daniels Rivera by Scan  
Ms. Mailloux by Scan  
Ms. Bordeaux by Scan  
Ms. Marks by Scan  
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# Department of Health

KATHY HOCHUL  
Governor

JAMES V. McDONALD, MD, MPH  
Commissioner

JOHANNE E. MORNE, MS  
Executive Deputy Commissioner

May 29, 2025

**CERTIFIED MAIL/RETURN RECEIPT**

Enoch Kun, Esq.  
NYS OMIG  
800 North Pearl Street  
Albany, New York 12204

Care & Comfort Associates, Inc.  
1546 Ocean Avenue, Suite 5  
Bohemia, New York 11716-1916

Empire State Ambulance Corporation  
10 South White Street  
Poughkeepsie, New York 12601

Richard Harrow, Esq.  
O'Connell & Aronowitz  
54 State Street  
Albany, New York 12207

**RE: In the Matter of Empire State Ambulance Corporation**

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,

Natalie J. Bordeaux  
Chief Administrative Law Judge  
Bureau of Adjudication

NJB:nm  
Enclosure

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

COPY

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In the Matter of the Appeal of

**Empire State Ambulance Corporation :**  
Medicaid Provider #02991808

from a determination to recover Medicaid  
Program overpayments.

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**DECISION  
AFTER  
HEARING**

**Audit No. 2017Z31-013T**

Before: Matthew Hall  
Administrative Law Judge

Hearing dates: November 16, 2022 and April 10, 2024  
By WebEx Videoconference  
Record Closed: August 20, 2024

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

The OMIG determined to recover Medicaid Program overpayments from Empire State Ambulance Corporation (Appellant) and its named affiliate, Care & Comfort Associates, Inc. (Care and Comfort). The Appellant requested a hearing pursuant to SSL § 145-a and former Department of Social Services (DSS) regulations at 18 NYCRR 519.4 to review the overpayment determination. (Exhibit 8.)

## **HEARING RECORD**

OMIG Witnesses:	Emily Amiccuci, Manager, System Match and Recovery
OMIG Exhibits:	1-20
Appellant Witnesses:	Andrea Tucker, OMIG Auditor Joseph Zupnik, former CEO Empire State Ambulance Corporation Mordy Flam, Esq.
Appellant Exhibits:	A-I <sup>1</sup>

The hearing was held via WebEx videoconference. A transcript of the hearing was made. (Transcript [Tr.] 11/16/22 pages [p.] 1-186, and 4/10/24 p. 1-102.) Each side submitted one post-hearing brief.

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<sup>1</sup> The Appellant submitted these exhibits to the ALJ who heard this matter. It is not clear from the record whether these exhibits were entered into evidence. However, the only Appellant exhibits referenced in this decision are duplicates of OMIG's exhibits, thus, there is no prejudice to the OMIG by including these exhibits in the record.

### **SUMMARY OF FACTS**

The salient facts of this matter are not in dispute. The OMIG reviewed the Appellant's Medicaid claims for transportation services paid from January 1, 2012 through December 31, 2015 and issued a draft audit report (DAR) dated December 19, 2017 identifying overpayments to the Appellant. Pursuant to 18 NYCRR 517.5, the draft audit report offered the Appellant an opportunity to submit arguments and documents in response to the proposed audit findings. (Exhibit 1.)

Thereafter, on February 13, 2018, the OMIG issued a revised draft audit report (RDAR) which amended the audit period to March 1, 2012 through December 31, 2015 and offered the Appellant an opportunity to submit arguments and documents in response to the proposed audit findings. (Exhibit 3.)

On February 20, 2018, Mordy Flam, Esq. emailed Andrea Tucker, the OMIG's auditor, and, *inter alia*, advised that he represented the Appellant, Empire State Ambulance Corporation, Draft Audit Report 2017Z31-13T. On March 22, and April 30, 2018 Ms. Tucker granted Mr. Flam's requests for extensions of time for the Appellant to respond to the RDAR. In letters dated April 30, 2018 and May 2, 2018 respectively, the Appellant advised the OMIG that both Mordy Flam and Gregory Smith, Esqs. had been retained to represent it with respect to Audit number 2017Z31-013T. On May 29, 2018, Ms. Tucker granted Mr. Smith's request for a further extension of time for the Appellant to respond to the RDAR to June 30, 2018. On June 25, 2018 Mr. Smith emailed Ms. Tucker requesting another extension of time for the Appellant to respond to the RDAR and Ms. Tucker extended the RDAR response time to July 30, 2018. (Exhibits 5; 19; 20 - bates pages 2684, 2702, 2705, 2712, 2713, 2717, 2726, 2727, 2756 and 2757; B, C, F.)

Although it had granted the Appellant until July 30, 2018 to respond to the RDAR, on July 17, 2018, the OMIG issued a final audit report (FAR) to the Appellant seeking Medicaid overpayments of \$336,811.13, inclusive of interest. The FAR stated that the draft audit findings were unchanged because the Appellant had not submitted any response to the draft audit report. The FAR was mailed to the Appellant's former business address and the OMIG neither copied Mr. Flam or Mr. Smith on the FAR, nor did it send a copy to the Appellant at its then current business address. (Exhibit 6.)

### **ISSUES**

Was the OMIG's determination to issue the Final Audit Report prior to July 30, 2018 a violation of the Appellant's due process rights?

### **DISCUSSION**

The threshold issue for the hearing herein is the Appellant's claim that the OMIG violated 18 NYCRR 517.5 and 519.18 and deprived it of its due process rights by issuing the FAR on July 17, 2018, prior to the date that the OMIG had granted it to submit a written response to the RDAR.

The Appellant maintains that it timely sought and obtained an extension of time to respond to the RDAR, and was deprived of its right to submit a response by the OMIG's premature issuance of the FAR. (Appellant brief, p. 2-3.) The Appellant asserts that the OMIG's failure to allow it to submit a timely written response was a substantive procedural error which foreclosed it from adequately presenting its defense and precluded it from submitting additional evidence at the subsequent hearing, which error cannot now be remedied. The Appellant requests that the audit be dismissed. (Appellant brief, p. 2.)

The OMIG does not dispute the timeline of events prior to issuing the FAR. The

OMIG asserts that it audits by Provider ID number, that the Appellant, Empire State Ambulance Corporation, was a single corporation, which had two Provider ID numbers, # 02991808 and # 01580510, and in this audit, OMIG audited Provider ID number 02991808. (Tr. 11/16/22, p. 86-88; Tr. 4/10/24 p. 9-10.) The OMIG concedes that “[o]n June 25, 2018, Mr. Smith requested an extension of time to respond to the Revised Draft Audit Report and [the] OMIG granted the extension until July 30, 2018.” (OMIG brief, p. 3-4.) However, the OMIG asserts that on July 9, 2018 it determined, without consulting with the Appellant, that Mr. Flam and Mr. Smith were not representing Provider ID number 02991808, the subject of this audit, and therefore the extension of time given to Mr. Smith was not given to the entity being audited. (OMIG brief, p. 3-4; Exhibit 19; Tr. 11/16/2022 p. 172-175.) The OMIG asserts, therefore, that it complied with regulatory requirements when issuing the FAR because “no evidence shows that OMIG granted an extension to the Provider” or “the representative of Provider ID number 02991808.” (OMIG brief, p. 12.) The OMIG requests that its determination to recover Medicaid overpayments be affirmed “as the Provider did not address the merits of the audit findings” at the hearing. (OMIG brief, p. 13.)

The OMIG’s argument, however, is fundamentally confused because the extension of time to respond to the RDAR was not given to Mr. Smith, who made the request on the Appellant’s behalf. The extension of time to respond was given to the Appellant, the entity being audited.

The RDAR was issued under Audit number 2017Z31-013T, to Provider ID number 02991808. All of the emails from Mr. Flam and Mr. Smith referenced the Appellant and Audit number 2017Z31-13T as the subject of their representation, and Mr. Flam’s March

21, 2018 and April 30, 2018 emails both additionally referenced "Provider ID # 02991808 . . . in connection with Audit # 2017Z31-013T" as the subject of his representation. The April 30 and May 2, 2018 letters of representation notified the OMIG that Mr. Flam and Mr. Smith, Esqs. had been retained with respect to "Revised Draft Audit Report # 2017Z31-013T; Empire State Ambulance Corporation." These letters were on the Appellant's letterhead and were signed on behalf of the Appellant by Jospeh Zupnik, as Chief Executive Officer of the Appellant. The plain language of all of these communications is clear that the Appellant and Provider ID number 02991808 were represented by Mr. Flam and Mr. Smith with respect to *this* audit, 2017Z31-013T. (Exhibits 3; 5 – bates pages 2664-2665; 20; B; C.)

Despite all of these communications, on July 9, 2018 the OMIG decided that that Mr. Flam and Mr. Smith did not represent the Appellant with respect to this audit of Provider ID number 02991808, rather they represented Mr. Zupnik, who according to the OMIG, was not associated with Provider ID number 02991808. (Tr. 11/16/22 162, 165, 166-176; Tr. 4/10/24, p. 67; Exhibits 10; 11; 12.) The OMIG's story, however, is contradicted by the testimony of its own auditors, Emily Amiccuci, Manager, Systems Match and Recovery, and Andrea Tucker, Auditor, who each acknowledged that the OMIG received notification that Mr. Flam and Mr. Smith, Esqs. had been retained by the Appellant with respect to this audit. (Tr. 11/16/22 p. 139; Tr. 4/10/24, p. 68.)

The OMIG's motive behind its decision to ignore the Appellant's representation and send the FAR out before the July 30, 2018 date is unclear, but it's decision to do so was intentional. From February 2018 through June 2018, extensions of time to respond to the RDAR had been granted to the Appellant at the requests of both Mr. Flam and Mr.



Smith. Notably, at the time of the June 25, 2018 extension, the OMIG admittedly believed that Mr. Flam and Mr. Smith represented the Appellant regarding this audit, as it has asserted, and the evidence established, that it was not until July 9, 2018 that the OMIG “determined” that Mr. Flam and Mr. Smith represented “a different provider ID number.” (OMIG brief, p. 3-4; Exhibit 19; Tr. 11/16/2022 p. 173-175.) Therefore, the OMIG’s assertion that on June 25, 2018, it gave the extension to Mr. Smith on behalf of Mr. Zupnik, individually, or to a different Provider ID number, but not to the Appellant, is not worthy of belief. If the OMIG was not extending the time to respond to the RDAR in audit 2017Z31-013T, then what RDAR was it granting an extension of time to respond to?

#### Due Process

“[D]ue process is a flexible constitutional concept calling for such procedural protections as a particular situation may demand.” *LaRossa, Axenfeld & Mitchell v Abrams*, 62 N.Y.2d 583, 588 (1984) (citations omitted). It is well settled that the procedural processes set forth in the regulatory and statutory authority to audit Medicaid providers affords “all the process that . . . [is] due”. See, *Medicon Diagnostic Laboratories, Inc. v. Perales*, 74 N.Y.2d 539, 544 (1989); see also, *Daniel v. NYS Department of Health, et. al.*, No. 21-CV-4097, 2022 WL 21781460, at p. 11 (EDNY August 24, 2022). Thus, whether a due process violation was had in this case depends on whether the OMIG followed its own regulatory audit process. It did not.

The audit process includes a draft audit report and final audit report. The draft audit report must advise the provider of the basis and legal authority for the proposed action, contain a clear statement of the action to be taken, and afford the provider an opportunity to respond to the proposed action. 18 NYCRR § 517.5(a)&(b). *Before the Department*

*issues a final audit report, it must consider the objections, any supporting documents and materials submitted, the draft audit report, and any additional material which may become available.* 18 NYCRR § 517.6(a). (*Emphasis added.*) The final audit report requiring the repayment of overpayments or restitution constitutes a final determination. 18 NYCRR § 519.3(b). See, Matter of Chelsea Express Transportation, Inc., Audit number 11-5528, NYSDOH, May 24, 2019, ALJ William J. Lynch

Despite all evidence to the contrary, the OMIG unilaterally decided that Mr. Flam and Mr. Smith did not represent the Appellant, and it chose to surreptitiously send out the FAR to the Appellant's former, and then defunct, business address before the Appellant's time to respond had expired. The OMIG neither copied Mr. Flam or Mr. Smith on the FAR, nor sent a copy to the Appellant at its then current business address. These actions can only be interpreted as a deliberate attempt to avoid contact with Mr. Flam, Mr. Smith, and Mr. Zupnik and to ignore the OMIG's agreement to extend time for the Appellant to respond to this audit. Though the reasons that the OMIG took this course of action are not adequately explained in the record, the proffered excuses are unsubstantiated and disingenuous.

The OMIG's actions failed to afford the Appellant an opportunity to respond to the RDAR as required by 18 NYCRR 517.5(a)&(b), and consequently, failed to consider the Appellant's objections, supporting documents and materials before the issuance of the FAR as is required by 18 NYCRR 517.6(a). The OMIG's failure to follow its regulatory process violated the Appellant's due process rights to defend itself in this audit.

### **DECISION**


The OMIG's determination to issue the Final Audit Report prior to the expiration of

the extension of time granted to the Appellant to file a response to the Revised Draft Audit Report violated its regulatory obligations pursuant to 18 NYCRR 517.5(a)&(b) and 517.6(a) and deprived the Appellant of its due process rights given therein.

The OMIG's determination to recover overpayments relating to disallowed transportation claims in the amount of \$336,811.13, inclusive of interest, in Final Audit Report number 2017Z31-013T is REVERSED. Any withhold by the OMIG regarding this overpayment shall be repaid with all deliberate speed.

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

**DATED:** Menands, New York  
May 29, 2025

  
Kathleen Dix  
Administrative Law Judge

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