STATE OF NEW YORK
DEPARTMENT OF HEALTH

In the Matter of the Request of **KIDDIN' AROUND TOWN, INC.** Provider ID #02428715 for a hearing pursuant to Part 519 of Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) to review a determination to recover Medicaid overpayments.	:	**Decision After Hearing** Audit #2017Z31-106V

Before: Kimberly A. O'Brien
Administrative Law Judge

Held at: New York State Department of Health
90 Church Street
New York, New York 10007

Parties: New York State Office of the Medicaid Inspector General
90 Church Street
New York, New York
By: Phillip Hoffman Esq.

Salvatore Mongiovi, President
Kiddin' Around Town, Inc.
1115 Frost Lane
Peekskill, New York 10566-1903
By: Donald Lee Singer Sr. Esq.
74 Cordwood Road
Cortlandt Manor, New York 10567

Dates of Hearing: January 24, 2019 and February 24, 2019

Briefs Submitted June 10, 2019

JURISDICTION

The Department of Health (Department) acts as the single state agency to supervise the administration of the medical assistance program (Medicaid) in New York State pursuant to Public Health Law (PHL) § 201(1)(v) and Social Services Law (SSL) § 363-a. The Office of the Medicaid Inspector General (OMIG), an independent office within the Department, has the authority pursuant to PHL §§ 30, 31 and 32, to pursue administrative enforcement actions against any individual or entity that engages in fraud, abuse, or unacceptable practices in the Medicaid program, and to recover improperly expended Medicaid funds.

Kiddin' Around Town, Inc. (Appellant) is enrolled as a Medicaid fee for service provider. The OMIG issued a determination seeking recoupment of payments made by Medicaid, and the Appellant requested a hearing pursuant to SSL § 22 and the former Department of Social Services (DSS) regulations at 18 NYCRR § 519.4.

APPLICABLE LAW

DSS regulations generally pertinent to this hearing decision are: 18 NYCRR §504 (enrollment of providers), 18 NYCRR Part 505 (medical care) in particular §505.10 (transportation for medical care and services), 18 NYCRR Part 517 (provider audits), 18 NYCRR Part 518 (recovery and withholding of payments or overpayments), 18 NYCRR Part 519 (provider hearings), and 18 NYCRR Part 540 (provider documentation).

The New York State Medicaid program issues Medicaid Management Information Systems (MMIS) provider manuals, which are available to all providers and include billing policies, procedures, codes, and instructions. Medicaid also issues a monthly Medicaid Update with additional information, policy, and instructions, www.emedny.org. By enrolling, providers agree to comply with these official directives. 18 NYCRR § 504.3(i).

To receive payment for services to Medicaid recipients, a provider must be lawfully authorized to provide the services on the date the services are rendered. A transportation service and its drivers must comply with all requirements of the New York State Department of Transportation and Department of Motor Vehicles, and the transportation service must ensure that all ambulette drivers are qualified under Article 19-A of the Vehicle Traffic Law. An ambulette service operating in New York City has the additional requirement of being licensed by the New York City Taxi and Limousine Commission. 18 NYCRR § 505.10(e)(6).

As a condition of their enrollment, Medicaid providers agree to submit claims on officially authorized claim forms in a manner specified by the Department and to ensure that the information provided in relation to any claim is true, accurate and complete. Fee-for-service providers must prepare and maintain contemporaneous records demonstrating their right to receive payment, and their records are subject to audit for six years. 18 NYCRR §§ 504.3(a)&(h), 517.3(b), 540.7(a)(8). Payment to a provider of ambulette services will only be made for services documented in contemporaneous records in accordance with section 18 NYCRR§§ 504.3, 505.10(e)(8).

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). The final audit report requiring the repayment of overpayments or restitution constitutes a final determination. 18 NYCRR § 519.3(b).

If an audit reveals an overpayment, the Department may require repayment of the amount determined to have been overpaid. 18 NYCRR §§ 504.8(a)(1), 518.1(b). An overpayment includes any amount not authorized to be paid under the Medicaid program, whether paid as the result of inaccurate or improper cost reporting, improper claiming, unacceptable practices, fraud, abuse, or mistake, 18 NYCRR § 518.1(c).

If the Department requires repayment, a provider is entitled to a hearing to review the Department's determination, 18 NYCRR § 519.4. At the hearing, a Department representative must present the audit file and summarize the case including a brief description of the facts, evidence, and reasons for supporting the action, 18 NYCRR §§ 519.17(a) & 519.17(b)(3). The Appellant has the burden of showing that the Department's determination was incorrect and that all claims submitted and denied were due and payable under the program, 18 NYCRR § 519.18(d). An Appellant may not raise issues regarding any new matter not considered by the Department upon submission of objections to a draft audit or notice of proposed agency action, 18 NYCRR § 519.18(a). The decision after hearing must be supported by substantial evidence, 18 NYCRR § 519.18(h).

ISSUE

Was OMIG's determination to recover Medicaid payments to Appellant in the amount of $410,146.74 correct?

FINDINGS OF FACT

1. At all times relevant hereto, Appellant, Salvatore Mongiovi, President, Kiddin' Around Town, Inc., 1115 Frost Lane, Peekskill, New York 10566, was enrolled as a provider of transportation services in the New York State Medicaid program [Ex. 1].

2. On February 13, 2018, OMIG issued a Draft Audit Report (DAR) to Appellant for the period March 1, 2012 through December 31, 2015 (audit period) with attachments containing only the claims that met the audit criteria comprising the overpayment amount [Ex. 2, Ex. 3, and Ex. 12]. The audit was not an onsite/field review of Appellant's records, it was a "*system match audit*" which consists of a computer review of the data on each and every claim billed by Appellant and paid by the Medicaid Program for the audit period [Ex. 1; Tr. 25-29, 33-37, 88-90, 95].

3. The DAR arose out of a large post payment system match project of transportation providers. The project contains four different audit findings and each finding has different criteria. Two of the four audit findings were made against Appellant including: "*Finding 2*- unqualified or disqualified drivers;" and "*Finding 3*- transportation for ambulette services with incorrect/missing vehicle license plate for dates of service" within the audit period [Ex. 1, Ex. 4; Tr. 29-39, 45- 46, 49-58, 66].

4. The OMIG provided Appellant with two attachments to the DAR including a list of thousands of claims concerning "*Finding 2*- unqualified or disqualified drivers" that encompasses all the claims within the audit period where the driver (indicated by license number) listed on the claim was unqualified or disqualified/not connected with Appellant at the time the service was provided [Ex. 2, Ex. 5, Ex. 16 & Ex. 17]. License number [redacted] (*Maharaj*) is associated with almost all the claims and the license [redacted] (*Wiggins*) appears on no more than a few claims [Tr. 37, 73-77, 96, 102-104,105-108,124-141,169]. The second attachment is a one-page list of eight claims concerning *Finding 3*, where each of the eight claims contain blank/missing vehicle license plate for dates of service [Ex. 3].

5. Appellant responded to the DAR by letter on February 28, 2018, without any accompanying documentation. Appellant states that there was an "*administrative error*" "*a driver*

who left our employ was inadvertently left on our weekly medicaid (sic) form electronically submitted to Computer Science Corporation" [Ex. 13, Tr. 258].

6. Mr. Singer, Appellant's Counsel, responded to the DAR by letter on March 23, 2018, without any accompanying documentation. He reiterated that Appellant made an administrative error and asserted that all the services billed were provided [Ex. 13].

7. On May 1, 2018, Mr. Singer, Appellant's Counsel, emailed the auditor, Ms. Valerio, and attached New York State Department of Motor Vehicles (DMV) "Article 19-A Bus Driver Add /Drop Acknowledgement Reports," and an "Excel Spreadsheet" / "matrix" created by Appellant which list recipient names, date range of services provided, driver names and driver license numbers [Ex.14; Tr. 157-159, 164-169, 173-179].

8. On May 8, 2018, the OMIG issued the Final Audit Report (FAR) that contains the same findings as the DAR and the same attachments. The overpayment concerning "*Audit Finding 2*- unqualified or disqualified drivers" is $365,001.50, "*Audit Finding 3* - transportation for ambulette services with incorrect /missing vehicle license plate for dates of service" is $401.90, accrued interest is $44,666.05, and the total overpayment is $410,146.74 [Ex. 1- 6, 11 & 12, 13, 14, 17; Tr. 50-69, 86-88, 99-101, 148-149, 179, 184-187].

DISCUSSION

OMIG presented the audit file and summarized the case, as is required by 18 NYCRR § 519.17. OMIG presented documents (Exhibits1-14,16&17) and called two witnesses. Appellant, Salvatore Mongiovi, President of Kiddin Around Town testified on his own behalf.

Christina Farrell is a Management Specialist 2 and data analyst supervisor of the *Business Intelligence Recovery Unit* at OMIG. She testified about her involvement with the data extraction

for the Appellant's system match audit that was part of a transportation project where a claim to claim review of four audit findings was made for each audited provider. The audit data was extracted from the Medicaid Data Warehouse (*MDW*), which contains the Appellant's claims data for the entire audit period. The data for each of the findings is separately extracted from the *MDW* because each of the findings has separate criteria for whether the claims will be allowed or disallowed. The audit revealed that an overpayment was made to Appellant concerning *Audit Finding 2* and *Audit Finding 3*, and no overpayment was revealed for *Audit Finding* 1 and *Audit Finding* 4.

Audit Finding 2- unqualified or disqualified drivers

Each provider claim submitted for ambulette transportation services must include license number of the driver and plate number of the vehicle used to transport the recipient [Transportation Policy Manual Guidelines Versions 2011-1 through 2014-1; The DOH Medicaid Update of November 2004, Vol. 19, No.11].

Ms. Farrell extracted the data for *Audit Finding 2*, driver license numbers. She then provided that data to the *System Match Recovery Unit* to access the DMV system to confirm whether the individual drivers were qualified and connected to the Appellant at the time the service was provided. Ms. Farrell was then given the DMV data, date ranges where the drivers listed on the claims were not connected to the Appellant *"unqualified/ disqualified*," and identified the claims in the audit period where a driver was not connected to Appellant on the date of service [Tr. 48-49].

Emily Amiccuci is a Management Specialist 2 in the *System Match Recovery Unit* at OMIG and supervised the auditor Patrizia Valerio. *Audit Finding 2* pertains to unqualified or disqualified driver pursuant to DMV 19-A. Appellant's drivers must be qualified under Article

19-A of the Vehicle Traffic Law at the time the service is provided [Tr. 146]. Driver Maharaj's license number was on almost all the audit claims, and "*two claims*" contained Driver Wiggins license number [Tr. 105-107]. The *Audit Finding 2* claims were disallowed because the license number for these drivers appears on claims when these "*two drivers (Maharaj & Wiggins) were unauthorized to drive for Mr. Mongiovi* (Appellant)" [Tr. 148, 178, 183]. The OMIG may recoup overpayments as the result of mistake [Tr. 207- 208]. In limited instances the auditor has "*discretion"* not to seek to recoup overpayments/ remove from the audit mistakes regarding driver information. These instances are when there is enough information on the submitted claim to "*reasonably ascertain who the driver was,*" such as transposed or incomplete license numbers [Tr. 209-210]. In this case, there is no issue in identifying the driver license on the claims and the auditors have no discretion to remove from the audit a "*wrong driver*" [Tr. 214-216].

Ms. Amiccuci testified that providers are required "*to prepare and maintain contemporaneous records, that the information provided in relation to any claim shall be true accurate and complete, and to comply with the rules, regulations, and official directives of the Department*" [Tr. 145]. The "*Medicaid transportation manual policy guideline*s" require among other things that each claim contains the driver's license of the driver providing the service, and the rules and regulations require that the driver listed on the claim is 19-A qualified at the time the service is provided [Tr. 144 -148].

Appellant's response to the DAR included an explanation of alleged administrative errors made on electronic claims; and a one page excel spread sheet created by Appellant that lists recipients, a range of service dates for each recipient, and a list of drivers who purportedly provided the services to each of the listed recipients. Appellant also provided DMV driver add drop reports for drivers that are not the subject of the audited claims. These reports show only a

driver's *"first day of their connection or disconnection*" and not that the drivers Appellant listed, *"such as Marcus and Martucci,*" were qualified on the specific date that the services were provided [Tr. 181-183].

In her duties as a supervisor Ms. Amiccuci reviewed the audit file with the auditor Ms. Valerio, and reviewed Appellant's response to the *DAR* before she signed and issued the *FAR*, 18 NYCRR § 517.6 [*See* Ex. 11, 13 & 14]. Ms. Amiccuci testified that it was readily apparent to her and Ms. Valerio that Appellant's response had nothing to do with the drivers (*Maharaj & Wiggins*) that are the subject of the disallowed claims in *Audit Finding 2* [Tr. 206, 213-217]. Even if the Appellant had provided specific information about the "*new driver*" on each claim, the claims would be disallowed because the Appellant was required to provide "*documentation to support the driver(s) he originally billed for, not new drivers*" [Tr. 218].

Appellant, Salvatore Mongiovi, has been the owner of Kiddin Around Town for approximately fifteen years and testified on his own behalf. Mr. Mongiovi testified that he operates a small business and is responsible for "*hiring, firing, payroll and billing*" [Tr. 239-241]. He makes weekly electronic claims using the "*ePACES*" system administered by the "*Computer Science Corporation*" [Tr. 247-250]. Mr. Mongiovi said he had no prior notice of the audit, and he received the DAR in February 2018 [Tr. 255-256].[1]

Mr. Mongiovi testified that "*two unintentional mistakes"* that were "*computer entry errors*" were repeated over thousands of claims and led to *Audit Finding 2* [Tr. 261-263, 291]. He does not dispute that in [redacted] 2013 driver [redacted] was no longer working for Appellant and

[1] In "Appellant's Closing Memorandum," paragraph 10, Appellant argues that "*inadvertent entry two times of incorrect driver's numbers*" could have easily been corrected if the *"audit system had alerted the provider"* and "*would have given notice of intent to audit.*" In paragraph 11, Appellant cites and conflates 18 NYCRR 517.2(b) and 18 NYCRR 517.3 (c) to erroneously conclude that "*a 60-day notice*" of intent to audit is required.

not connected/qualified [Tr. 246-247]. Mr. Mongiovi contends that he did not remove [redacted] driver's license number from the ePACES system and replace it with the driver license number for [redacted] and that the computer program continued to automatically insert the driver [redacted] license number on the claims [Tr. 250-255]. Mr. Mongiovi asserts that his explanation of the "*computer entry errors*" is supported by the "*excel spread sheet /matrix"* [2] he created, and that his response to the DAR shows that Appellant is entitled to payment for the claims in *Audit Finding 2* [Tr. 271-276; Appellant's Closing Memorandum at paragraph 2].

The Department has a legitimate interest in ensuring that providers submit properly completed claims for the services that are provided to Medicaid recipients, and the Appellant agreed to provide true, and accurate and complete information in relation to its claims in the manner specified by the Department as a condition of enrollment and pursuant to the regulations.

At hearing, Appellant has the burden of showing that "the determination of the department was incorrect," 18 NYCRR § 519.18(d)(1). Pursuant to 18 NYCRR 504.3(a) and 540.7(a)(8), Appellant was required to produce for audit appropriate contemporaneous documentation demonstrating its right to payment including valid driver documentation for each of the disallowed claims. Appellant failed to produce for audit appropriate contemporaneous documentation including valid driver license documentation for each of the disallowed claims in *Audit Finding 2*. The Department's determination to recover overpayments concerning *Audit Finding 2* is affirmed.

Audit Finding 3 - transportation for ambulette services with incorrect/missing driver's license number for dates of service.

Ms. Farrell testified that the criteria for data she extracted from the *MDW* for *Audit Finding 3* concerned only claims with incorrect or missing information. In this case there were

[2] Mr. Mongiovi' s testimony about the "*computer entry errors*" conflicts with his own "*excel spread sheet /matrix*" [Tr. 289-315].

eight claims that contained missing/blank license information, and there was no need for additional analysis or involvement by the *System Match Recovery Unit* [Tr. 55-58]. Ms. Amiccuci agreed that as to *Audit Finding 3* no further input or analysis was required because each of the eight extracted claims showed that the information was left blank [Tr. 150-151]. Mr. Mongiovi conceded that "*we failed to enter a driver number and a plate number due to the fact I thought that the ride was a livery ride, and livery rides do not require the information to be inputted*" [Tr. 263].

At hearing, Appellant has the burden of showing that "the determination of the department was incorrect," and demonstrate its right to payment, 18 NYCRR § 519.18(d)(1). The Appellant omitted the required information on each of the claims and failed to produce for audit appropriate contemporaneous documentation including valid driver license documentation for each of the eight disallowed claims in *Audit Finding 3*. The Department's determination to recover overpayments concerning *Audit Finding 3* is affirmed.

DECISION

The Department's determination to recover overpayments concerning *Audit Finding 2* and *Audit Finding 3*, and accrued interest is affirmed. This decision is made by Kimberly A. O'Brien who has been designated to make such decisions.

DATED: November 19, 2020
Albany, New York

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Kimberly A. O'Brien
Administrative Law Judge