

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

In the Matter of the Appeal of	:	
	:	
Affinity Skilled Living and Rehabilitation Center	:	Decision After Hearing
	:	
from a determination to recover Medicaid Program overpayments	:	Audit Number: 16-5898
	:	

Before: Natalie J. Bordeaux
Administrative Law Judge

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

Hearing Date: July 17, 2019
The record closed on October 10, 2019

Parties: New York State Office of the Medicaid Inspector General
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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. PHL § 201(1)(v); 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 Affinity Skilled Living and Rehabilitation Center (Appellant) for the rate period January 1, 2012 through December 31, 2015. The Appellant requested a hearing pursuant to Social Services Law § 22 and Department of Social Services (DSS) regulations at 18 NYCRR § 519.4 to review the OMIG's determination.

FINDINGS OF FACT

1. At all times relevant hereto, the Appellant was a residential health care facility (RHCF) licensed under Article 28 of the Public Health Law and enrolled as a Medicaid provider. The Appellant possesses 280 beds for residents and is located in Oakdale, New York. (Exhibit 2.)
2. The Appellant receives a daily rate for each Medicaid recipient occupying a bed in its facility. (Exhibits 1, 3, 5, 6, 11.)
3. Auditors from the OMIG reviewed the capital portion of the Appellant's Report of Residential Health Care Facility (RHCF-4) cost reports submitted annually for the 2010-2013 calendar years. The capital costs claimed in the RHCF-4 forms 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, 2015. (Exhibits 1 and 3.)

4. On May 24, 2017, the OMIG issued a draft audit report to the Appellant which identified six categories of disallowances for claimed property expenses and proposed to recover an estimated Medicaid overpayment of \$2,866,063. The draft audit report 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 1.)

5. On June 21, 2017, the Appellant submitted its objections to the draft audit report. (Exhibit 2.)

6. On August 29, 2017, the OMIG issued a final audit report, which advised the Appellant that it had adjusted its findings based upon the Appellant's objections and determined to reduce the overpayments \$2,578,990. (Exhibit 3.)

7. On September 18, 2017, the Appellant requested this hearing to review the OMIG's findings set forth in the final audit report. (Exhibit 4.)

8. The parties having resolved all other findings in the final audit report, the only disallowances remaining for resolution in this hearing decision involve the Appellant's purchase of 280 televisions for residents' private accommodations:

Property Expense Disallowance 4: Moveable Equipment Depreciation Disallowance
Property Expense Disallowance 6b: Sales Tax Disallowance

ISSUE

Has the Appellant established that the OMIG's audit disallowances of costs for depreciation and sales tax associated with television equipment are not 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 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)(i). The capital component of the rate is facility-specific, and includes depreciation, interest expense for capital indebtedness, and the costs of moveable equipment. 10 NYCRR §§ 86-2.10(a)(9)&(g), § 86-2.19, § 86-2.20, § 86-2.21 and § 86-2.22.

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 such adjustment is warranted. 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); SAPA § 306(1).

To be considered as allowable in determining reimbursement rates, costs shall be properly chargeable to necessary patient care. Except as otherwise provided in 10 NYCRR Subpart 86-2, allowable costs shall be determined by the application of the principles of reimbursement developed for determining payments under title XVIII of the Federal Social Security Act (Medicare) Program. 10 NYCRR § 86-2.17(a).

The Provider Reimbursement Manual (PRM-1) prepared by the Centers for Medicare and Medicaid Services (CMS) offers detailed explanations regarding provider payments under the Medicare Program. As an overall principle, PRM-1 advises that all payments to providers of services must be based on the reasonable cost of services covered under title XVIII of the Social Security Act and related to the care of beneficiaries. Section 2102.1 of the PRM-1 explains that the stated objective of provider reimbursement under the Medicare Program is that “the costs for individuals covered by the program are not borne by others not so covered and the costs for individuals not so covered are not borne by the program.”

Reasonable costs include all necessary and proper costs incurred in rendering the services, subject to principles relating to specific items of revenue and cost. PRM-1 § 2100. The 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 (full costs include costs both directly associated with personal comfort items or services plus an appropriate share of indirect costs) are not includable in allowable costs of providers under the Medicare Program. However, the costs of televisions are included in allowable costs where furnished to the general patient population in areas other than patient accommodation, e.g., day rooms, recreation rooms, waiting rooms, etc. PRM-1 § 2106.1.

DISCUSSION

At the hearing, the OMIG presented the audit file and summarized the case, as required by 18 NYCRR § 519.17. In addition, the OMIG presented documents (Exhibits 1 – 16) and called one witness, Babu Jacob, Chief Medical Facilities Auditor. (T 24-57.) The Appellant presented two witnesses: (1) [REDACTED], Nurse Consultant (T 58-104); and (2) Stephanie Malone, Administrator (T 104-62). The documents presented by the Appellant at the

hearing (Exhibits A-C) were marked for identification purposes only. Each side submitted one post-hearing brief.

The disallowances at issue involve the Appellant's reporting of costs for 280 televisions as capital costs for moveable equipment. (T 37-40, 49.) The OMIG disallowed these costs after determining that the televisions were placed in private rooms solely for the personal comfort of the residents. (Exhibits 1 and 3; T 44-45, 47-48.) PRM-1 § 2106.1 explicitly advises that costs associated with televisions in patient rooms furnished solely for the personal comfort of the patient are not reimbursable.

As an initial matter, it is noted that the Appellant seeks reimbursement of costs for all 280 televisions intended for all 280 resident beds in the facility, even though Medicaid recipients comprise approximately 85% of the facility's residents. Remaining beds are occupied by private pay residents. (T 110; Exhibits 1-3, 5-6, 8-9.) Costs incurred by the facility for non-Medicaid recipients are not properly chargeable to the Medicaid Program. Costs incurred by the facility for services not covered by the Medicaid Program, even when provided to Medicaid recipients, are not chargeable to the Medicaid Program, either. PRM-1 § 2102.1. These principles are consistent with the description of covered services available to Medicaid recipients (and Medicaid recipients only) set forth in 18 NYCRR § 505.1.

The Appellant contends that section 2106.1 of the PRM-1 applies to Medicare only. (Exhibit 2; T 21-22.) 10 NYCRR § 86-2.17(a) explicitly states that Medicare reimbursement principles apply except as otherwise provided in 10 NYCRR Subpart 86-2. Thus, in the matter at hand, Medicare reimbursement principles are controlling.

The Appellant also argues that Chapter 21 of the PRM-1 ("Cost related to patient care") relied upon by the OMIG is inapplicable since this chapter describes costs of services and not the

costs of moveable equipment. (Appellant brief, p. 4.) Section 2106 of the PRM-1 specifically references the “full costs of items or services such as telephone, television and radio which are located in patient accommodations [emphasis added].”

The Appellant cites an ALJ determination rendered in Susquehanna Nursing and Rehabilitation Center, Audit # 09-2512, pertaining to the cost of cable/satellite television services (not the equipment). In that determination, the ALJ referenced section 2106 of the PRM-1 and noted that the CMS Provider Reimbursement Review Board has held repeatedly that the costs of televisions in patient rooms are not related to patient care. The cited decision offers no support for the Appellant’s contentions.

The Appellant presented no evidence to establish that any facility residents required televisions in their rooms for medical reasons. At the hearing, the Appellant requested additional time to compile and submit documentation regarding “patients who specifically require televisions.” A provider is required to submit, with its response to the draft audit report, any additional documentation the provider wishes to be considered in support of objections to the audit findings. 18 NYCRR § 517.5(c). An appellant may not raise any new matter at the hearing not considered by the auditors upon submission of objections to a draft audit or notice of proposed agency action. 18 NYCRR § 519.18(a). Due to the Appellant’s failure to submit such information for consideration by the OMIG prior to issuance of the final audit report, the Appellant’s request to submit additional documentation was denied. (T 163-64.)

The Appellant argues that it is required by regulations at 10 NYCRR Part 415 to provide private televisions to residents as part of a “homelike” environment. Specifically, the Appellant cites 10 NYCRR § 415.1(a)(5), which provides, in pertinent part, 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.” The Appellant further asserts that it must provide residents with “lodging that is ‘properly outfitted’” pursuant to 10 NYCRR § 415.26(i)(1)(vii)(c). At the hearing, Ms. Malone opined that such a setting should include pleasant décor, televisions, phones, a favorite quilt, and possibly, a resident’s own furniture. (Exhibit 2; T 118.)

Applicable Medicaid reimbursement guidance for residential health care facilities is set forth in 10 NYCRR Subpart 86-2 and in the PRM-1. The general guidelines in Part 415 regarding minimum standards for patient care do not override reimbursement rules that specifically state that televisions in private rooms are not reimbursable.

Furthermore, the Part 415 provisions to which the Appellant refers do not support its position. Residential health care facilities operating in the State of New York are advised that “lodging; a clean, healthful, sheltered environment, properly outfitted” is considered basic and must be made available to all residents. 10 NYCRR § 415.26(i)(1)(vii)(c). No provision within 10 NYCRR Part 415 requires the installation of a television for each resident’s individual use as a homelike environment or properly outfitted lodging. To the contrary, 10 NYCRR § 415.26(h)(5)(vi)(c)(2) explicitly permits nursing homes to charge residents when such an amenity is requested.

At the hearing, Ms. Malone expressed discomfort with charging Medicaid residents for the televisions in their rooms when private pay residents receive this service free of charge. (T 120-21.) She did not explain in what sense the service is “free of charge” when provided to a private pay resident. The Appellant’s discomfort with charging residents for amenities does not justify charging the Medicaid Program for their cost instead. Nursing homes are authorized to charge residents’ funds for televisions and radios provided for personal use if requested by the

resident and payment is not made by Medicare or Medicaid. 10 NYCRR § 415.26(h)(5)(vi)(c)(2).

The Appellant's June 21, 2017 response to the draft audit report stated:

The televisions in the patient rooms are a necessity. The facility would receive a deficiency on survey should they not be provided for the patients [sic] comfort and use. We feel that the provision of these televisions for patient use is a matter of patient care as well as a patient rights issue. (Exhibit 3; T 50, 69.)

Consistent with the Appellant's response to the draft audit report, the Appellant's witnesses both testified that televisions for private patient accommodations are necessary for patient care and present a "patient rights issue".¹ (T 68-72, 117; Exhibit 2.) The Appellant also contends that any failure to provide televisions to residents receiving Medicaid would be viewed as "discriminatory" by the Department during a survey because private pay residents are given televisions for individual use. (Exhibit 2.) This hearing record is devoid of credible support for the Appellant's contention that the Department ever has or ever will take the position that allowing residents private televisions, when they are willing and able to pay for them, is "discriminatory" against other residents.

██████████, the Appellant's expert witness, has assisted several nursing homes with nursing home surveys conducted by the Department. She acknowledged that no deficiency cited in a survey of the facility would specify the absence of televisions in the rooms of Medicaid recipients, when private pay residents' rooms have televisions, as the basis for the citation. ██████████ then claimed that a facility survey would note deficiencies in the "dignity," "resident rights" and "quality of life" categories for a nursing home that fails to afford Medicaid residents equal

¹ When asked to approximate the percentage of residents who had a medical need for television pursuant to their care plan, Consultant ██████████ estimated that at least 90% of facility residents would have a medical need for this device. (T 72.) This estimate offers some acknowledgement that the facility's broad inclusion of costs in RHCF-4 forms for its overall purchase was inaccurate, even by the Appellant's witness' standard.

access to televisions. (T 72-73, 101-02.) However, she was unable to identify a nursing home that had ever been cited with a survey deficiency based on the presence or absence of televisions in private rooms. (T 77, 89.)

██████████ pointed out that the Minimum Data Set (MDS), a component of the clinical assessment of nursing home residents, includes specific questions regarding how residents prefer to spend their leisure time and said that most, if not all, residents respond that they enjoy watching television. (T 73-74.) The Appellant has addressed this resident preference by installing televisions in common areas, including day rooms. The Appellant's response to the draft audit report identified the items included in its television purchases intended for placement in the facility's day rooms, common areas frequented by multiple residents at a time. (Exhibit 2.) The OMIG audit team accordingly recognized and allowed these costs as reimbursable. (Exhibit 3.)

According to Ms. Malone, care plans for certain residents may include the provision of a television as an intervention. She claimed that Department auditors would cite the Appellant for failing to give a television to a resident if it was noted in a care plan as a means of addressing issues identified during the assessment process. (T 109-13.) The Appellant did not produce a single resident care plan that included such a provision. Ms. Malone's testimony, like that provided by ██████████, was mainly speculative, particularly when she placed equal weight upon concerns raised regarding the facility's provision of hot and cold water and a resident's family complaining that the middle of a television screen shows "static". (T 112-13.)

The categories evaluated during surveys are described by the Department in a publicly-accessible webpage entitled, "About Nursing Home Reports", located at https://www.health.ny.gov/facilities/nursing/about_nursing_home_reports.htm#request_survey.

Surveyors evaluate whether residents receive care and treatment without discrimination, not whether they receive a television. Dignity is a component of the “resident rights” deficiency category, a category which is described in pertinent part as evaluating “dignity and respect and a comfortable living environment; quality care and treatment without discrimination...participation in organizations and activities of your choice.” “Quality of life” is not a deficiency category. While a nursing home survey may cite a facility for a deficiency in “quality of care”, that category “addresses how well the facility renders services provided and supervised by nursing staff,” a description inapplicable to the presence of televisions. No information was provided by the Appellant to show a connection between nursing services and the presence of televisions.

The contention that a surveyor would find the absence of private televisions for residents, or televisions for at least 85% of residents, as a violation of dignity is groundless. Nor has the Appellant established that residents’ access to televisions in common recreational locations, as opposed to televisions in their private quarters, somehow inhibits their participation in activities of their choosing. To the contrary, based upon the information provided by the Appellant’s witnesses, the availability of televisions in all common areas would seem to ensure that residents were able to watch television if they so choose. The facility contains at least 8 dining room areas where televisions are installed and approximately 40 residents may gather at one time, along with one smaller dining area that accommodates a maximum of 20 residents. Additionally, the Appellant has installed televisions in its smaller dayrooms (quantity not specified at the hearing), which may comfortably accommodate 10 wheelchaired residents. (T 146-47.) While claims by the Appellant’s witnesses that residents disagree over programming (be it genre or spoken language) are plausible, these claims do not justify reimbursement for the cost of 280 personal

televisions by the Medicaid Program when no medical need has been shown for each resident to receive such equipment. (T 70-71, 114-15.)

The Appellant has offered no factual or legal basis to establish that the OMIG's determination was incorrect. The OMIG auditors reviewed the information submitted by the Appellant and were willing to adjust and eliminate disallowances based upon information showing the propriety of expenditures and costs in accordance with reimbursement guidelines. As Ms. Malone conceded, any equipment medically required by a resident would be documented in the resident's chart. (T 128.) Yet, the Appellant failed to offer any documentation that would support its reimbursement claim for the cost of 280 individual televisions for all facility residents (private pay and Medicaid residents combined).

The Appellant's assertions directly contravene applicable regulations and controlling reimbursement principles. There is a distinction between a business decision to provide enhanced amenities and the benefits afforded under the constraints of a government-run program tasked with ensuring quality care in a fiscally responsible manner. The Medicaid Program cannot authorize and provide for indirectly what it is unable to provide directly. The OMIG's determination to disallow costs associated with televisions in resident rooms is sustained.

DECISION

Property expense disallowance 4 is affirmed.

Property expense disallowance 6(b) is affirmed.

DATED: October 30, 2019
 Menands, New York

_____/s/_____
Natalie J. Bordeaux
Administrative Law Judge