

**STATE OF NEW YORK  
DEPARTMENT OF HEALTH**

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In the Matter of the Request of :  
: **Decision**  
**ST. BARNABAS HOSPITAL** :  
Medicaid ID # 00243361 :  
:   
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. : **Audit #09-4099**  
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Before: Denise Lepicier  
Administrative Law Judge

Parties: New York State Office of the Medicaid Inspector General  
217 Broadway, 8<sup>th</sup> floor  
New York, New York 10007  
By: Ricja Rice, Esq.

St. Barnabas Hospital  
4422 Third Avenue  
Bronx, New York 10457  
By: Lourdes Martinez, Esq.  
Garfunkel Wild, P.C.  
111 Great Neck Road  
Great Neck, New York 11021

## **JURISDICTION**

The Department of Health (“Department”) acts as the single state agency to supervise the administration of the Medicaid program (“Medicaid”) in New York State. Public Health Law (“PHL”) § 201(1)(v), Social Services Law (“SSL”) § 363-a. Pursuant to PHL §§ 30, 31 and 32, the Office of the Medicaid Inspector General (“OMIG”), an independent office within the Department, has the authority 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.

OMIG determined to seek restitution of Level I Comprehensive Outpatient overpayments made by Medicaid to St. Barnabas Hospital (“the Hospital”), also known as the Fordham-Tremont Community Mental Health Center. (OMIG A, ex. 1, 2 & 3) The Hospital requested a hearing pursuant to SSL § 22 and the former Department of Social Services (“DSS”) regulations at 18 NYCRR § 519.4 to review the determination. The OMIG requested a determination that the Hospital is not entitled to a hearing because they did not make a timely hearing request. The parties submitted documents and agreed to have this issue decided on papers. (OMIG A; Hospital I, II & III)

## **FINDINGS OF FACT**

1. At all times relevant to this proceeding, the Hospital (the Fordham-Tremont Community Mental Health Center), was enrolled as a provider in the Medicaid program.

2. By final audit report dated August 21, 2013, OMIG notified the Hospital that OMIG determined to seek restitution of Medicaid overpayments in the amount of \$5,384,053.36. (OMIG A, ex. 3)

3. The final audit report advised the Hospital that it had the right to challenge the determination by requesting a hearing within sixty days of the date of the final audit report. (OMIG A, ex. 3, p. 3-4)

4. The Hospital made a request for a hearing by letter dated January 7, 2014. (OMIG A, ex. 7)

5. By letter dated January 22, 2014, OMIG requested a determination as to the timeliness of the Hospital's request for a hearing. (OMIG A, ex. 8)

### **APPLICABLE LAW**

A person is entitled to a hearing to have the Department's determination reviewed if the Department requires repayment of an overpayment. 18 NYCRR § 519.4. To request a hearing, any clear, written communication to the department by or on behalf of a person requesting review of a department's final determination is a request for a hearing if made within sixty days of the date of the department's written determination. 18 NYCRR §519.7(a).

### **DISCUSSION**

The crux of the Hospital's argument that its request for a hearing was timely is that an OMIG employee told the lawyer for the Hospital that the time for requesting a hearing to review the final audit report was tolled. More specifically, on September 6,

2013, an attorney for the Hospital contacted a member of the OMIG audit staff by email and asked “[W]hile I know that we have sixty days to appeal, I wanted to confirm that our on going [sic] settlement discussions are tolling [the] sixty days” to appeal.<sup>1</sup> The auditor replied by email stating, “I spoke with my Bureau manager who agrees that our on-going settlement discussions are tolling the 60 day appeal window.” (Hospital II, ex. B; OMIG A, ex.5) On November 20, 2013, the auditor contacted the attorney stating, “I have been instructed to advise you that the sixty (60) day window for notifying the OMIG, in writing, of your request for an administrative hearing for the above audit commenced as of November 14, 2013, the date the OMIG requested that you facilitate a hardship request . . . .” (Hospital I, ex. B: OMIG A, ex. 6)

The regulation governing the request for a hearing to review a determination clearly states that the request must be made within sixty days of the date of the written determination. 18 NYCRR § 519.7(a). Since the determination was dated August 21, 2013, the time for requesting a review hearing ran out on October 20, 2013. The Hospital’s request was dated January 7, 2014.

The Hospital’s argument is essentially that because an OMIG employee told them their time to request a hearing was tolled that they were entitled to rely on that representation. The final audit report, however, contains the following paragraphs, in relevant part:

You have the right to challenge this action and determination by requesting an administrative hearing within sixty (60) days of the date of this notice. . . .

If you wish to request a hearing, the request must be submitted in writing to:

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<sup>1</sup> There is no evidence to suggest that this subject had previously been discussed by the parties.

General Counsel  
Office of Counsel  
New York State Office of the Medicaid Inspector General  
800 North Pearl Street  
Albany, New York 12204

Questions regarding the request for a hearing should be directed to Office of Counsel, at (518) 408-5845.

(OMIG A, ex. 3, p. 3-4) Three paragraphs later the following sentence appears:

Should you have any questions, please contact Mr. Thomas Barone at 518-486-7200 or through email at [Thomas.Barone@omig.ny.gov](mailto:Thomas.Barone@omig.ny.gov).

(OMIG A, ex. 3, p. 4)

It has previously been held that the request for a hearing to review a final audit report is jurisdictional and may not be waived. In the Matter of West Midtown Medical Group, Inc., decision on motion 11/19/2010, p. 4 (Horan, J.). See, Strack v. Perales, 151 A.D.2d 903, 542 N.Y.S.2d 876 (3d Dept. 1989) (time limit to request a fair hearing is jurisdictional). It was error for whoever made the decisions that the auditor relayed to assert that the time limitation was tolled. That time is governed by regulations that have been authorized by the legislature. SSL §§ 20(3)(d), 34(3)(f) and 363-a(2). Moreover, case law makes clear that the errors of a State employee cannot bind the state when law mandates the employee is wrong.

In a case where the former Department of Social Services, which was in charge of Medicaid payments to providers at the time, acting through a contractor, had not required transportation providers to seek prior approval for transportation claims in contravention of regulation before delivering services, the Court of Appeals found that the DSS could be found neither to be estopped from requiring compliance with the regulation, nor to have ratified the prior practice. In the Matter of New York State Medical Transporters

Association, Inc., et al. v. Perales, 77 N.Y.2d 126, 564 N.Y.S.2d 1007 (N.Y., 1990). The

Court stated:

We have repeatedly made clear that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties (citations omitted). Among other reasons, to permit estoppel against the government “could easily result in large scale public fraud.” (Citations omitted.) While we have not absolutely precluded the possibility of estoppel against a governmental agency, our decisions have made clear that it is foreclosed “in all but the rarest cases.” (Citations omitted.)

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No doubt recognizing the difficulty of their estoppel claim, petitioners advance the closely related doctrine of ratification, contending that respondent knew of its agent’s practice, accepted the benefits, and is therefore bound (citations omitted). For much the same reason, that contention must also fail.

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[P]etitioners’ arguments suffer from an even more fundamental flaw. Illegal contracts are not generally enforceable (citations omitted) – a rule that applies as well to ratification. A principal cannot ratify an agent’s act that the principal itself could not have authorized (citations omitted).

Petitioners’ argument is that respondent ratified its agent’s act excusing compliance with the legal requirement that approval be obtained before transportation services are rendered. Neither the statute nor the regulation which imposes the requirement (citations omitted) gives respondent discretion to excuse that legal requirement, and respondent thus could not ratify the fiscal agent’s practice of excusing compliance with the law.

Id. at 5-7.<sup>2</sup> See also, In the Matter of Mayflower Nursing Home v. Office of Health Systems Management of the Department of Health, 88 A.D.2d 192 (3d Dept. 1982)

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<sup>2</sup> While the Hospital does not raise a ratification argument, the reasoning the Court employs in rejecting a ratification argument is applicable to this case. An OMIG employee may not waive a time requirement stated in regulation which provides a party with a hearing to review a final determination.

(errors by State employees could not bind the State or prevent recoupment of unauthorized overpayments), aff'd 59 N.Y.2d 935, 466 N.Y.S.2d 299 (N.Y. 1983); In the Matter of Sunset Nursing Home v. DeBuono, 24 A.D.3d 927, 805 N.Y.S.2d 471 (3d Dept. 2005) (where Department conforms practice to existing regulations, government agency cannot be prevented from discharging statutory duties even when there has been a prior different practice of allowing essentially unauthorized appeals); Press v. State of New York, 45 A.D.2d 397, 357 N.Y.S.2d 920 (3d Dept. 1974) (“Errors by State employees cannot bind the State or prevent recoupment of unauthorized payments.”).

Despite the clear admonition in the Final Audit Report to address questions about the hearing to Counsel’s Office, the Hospital’s law firm, an experienced health law firm, asked a member of the audit department to confirm that “ongoing settlement discussions are tolling [the] sixty days” to request a hearing to review the audit. It is uncontested that the OMIG auditor was a non-lawyer. (OMIG A; Hospital I & II) A lawyer should not rely on the legal interpretation of a non-lawyer with respect to the law.

The Hospital’s Final Audit Report was dated August 21, 2013. Sixty days from the date of this report was October 20, 2013. 18 NYCRR § 519.7(a). The Hospital sent its request for a hearing on January 7, 2014. The Hospital’s request was too late.

**DECISION:**

St. Barnabas Hospital's request for a hearing concerning a final audit report issued by OMIG was not timely. The Hospital will not be granted a hearing. This decision is made by Denise Lepicier, who has been designated to make such decisions.

DATED:

May 23, 2014

New York, New York

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Denise Lepicier  
Administrative Law Judge