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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 1, 2024

**CERTIFIED MAIL/RETURN RECEIPT**

Dionne Wheatley, Esq.  
NYS OMIG  
800 North Pearl Street  
Albany, New York 12204

Thomas S. D'Antonio, Esq.  
Ward Greenberg  
1800 Bausch & Lomb Place  
Rochester, New York 14604

**RE: In the Matter of United Hebrew Geriatric Center**

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**

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In the Matter of the Appeals of

**United Hebrew Geriatric Center,**

Appellant

from a determination by the NYS Office of the  
Medicaid Inspector General to recover Medicaid  
Program overpayments.

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**DECISION**

Audit #: 18-6029

Decision pursuant to 18 NYCRR § 519.23

Administrative Law Judge: Natalie J. Bordeaux

Parties:

New York State Office of the Medicaid Inspector General  
800 North Pearl Street  
Albany, New York 12204  
By: Dionne Wheatley, Esq.

United Hebrew Geriatric Center  
391 Pelham Road  
New Rochelle, New York 10805  
By: Thomas S. D'Antonio, Esq.  
Ward Greenberg  
1800 Bausch & Lomb Place  
Rochester, New York 14604

## **BACKGROUND**

United Hebrew Geriatric Center (Appellant) requested a hearing pursuant to Social Services Law § 145-a and Department of Social Services regulations at 18 NYCRR § 519.4 to appeal a determination by the Office of the Medicaid Inspector General (OMIG) to offset the Appellant's reported interest expense with investment income based upon findings set forth in a July 18, 2022 final audit report.

The audit reviewed the Appellant's records that support the capital portion of its Report of Residential Health Care Facility (RHCF-4) cost reports for the calendar years January 1, 2011 through December 31, 2015, which are the basis for the capital portion of the Appellant's January 1, 2013 through December 31, 2017 Medicaid rates. By letter dated August 9, 2022, the Appellant requested a hearing to contest the overpayment determination. A hearing was scheduled and rescheduled multiple times at the parties' request, most recently, for February 7, 2024.

By email dated January 31, 2024, the parties requested a decision without a hearing, contending that the Appellant's challenge of the OMIG's determination to offset the Appellant's interest expense claimed in its 2015 RHCF-4 cost report with the investment income it received that year from selling an investment property was purely a legal issue. On March 18, 2024, the parties submitted a stipulated statement of facts, along with joint exhibits (A-K). Each party submitted a brief to support its position, and the record closed June 28, 2024.

## **ISSUE**

Was the OMIG's determination reduce the Appellant's interest expense reported in its 2015 cost report by investment income of \$211,566 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)(ii). The capital component of the rate is facility-specific, and includes depreciation and interest on capital debt. 10 NYCRR §§ 86-2.10(a)(9)&(g), § 86-2.19, § 86-2.20, § 86-2.21 and § 86-2.22.

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 costs deemed allowable under the Medicare Program.

Necessary interest on both current and capital indebtedness is an allowable cost for all residential health care facilities. 10 NYCRR § 86-2.20(a). For rate years beginning on or after January 1, 1994, for all residential health care facilities, investment income reported for the same year used to compute capital cost reimbursement for a facility's rate shall reduce the interest expense allowed for reimbursement. 10 NYCRR § 86-2.20(c)(3). Investment income for offset is the aggregate net amount realized from all investments of patient care funds in non-patient care related activities and may include dividends, interest, rental income, operating profits and

losses, interest earned on temporary investment of withholding taxes, as well as gains and losses on sale or disposition of investments. 10 NYCRR § 86-2.20(c)(1); PRM-1 § 202.2(C).

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 costs were inaccurately or improperly reported or are otherwise not includible in the Medicaid rate. 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).

Either party may request that an appeal from an OMIG determination be decided without a hearing when no unresolved material issue of fact is involved in the case and the only questions presented are questions of the OMIG's application of the law or its regulations. A request for a decision without a hearing must be accompanied by sufficient information to permit a determination of whether any unresolved material issue of fact exists and should contain a full and clear statement of the issue and the party's position on the issue. 18 NYCRR § 519.23(a).

### **DISCUSSION**

The parties agree that there are no unresolved material issues of facts in the case and that the only question presented involves the OMIG's application of the law, specifically regarding the determination to use the Appellant's investment income to offset its interest expense reported in its 2015 RHCF-4 cost report, and applied for the 2017 rate period.

The Appellant purchased the property at issue, described as an “improved property with a single-family home” adjacent to the Appellant’s campus, on November 17, 1999. (Exhibits E, F.) On January 30, 2007, the Appellant transferred its property to the UGC Foundation, Inc., an organization which the Appellant acknowledges is an organization related to the Appellant. (Exhibit G.) In March 2015, the Appellant sold the property to an unaffiliated entity for a net profit, or gain, in the amount of \$211,566. (Exhibit H.)

The Appellant contends that the gain on the property sale was not realized by the Appellant, but rather by the UGC Foundation, Inc., and as such should not be recognized as income. (Appellant’s June 27, 2024 Reply Letter, pp. 1-3.) Where an asset is sold or otherwise disposed of by a related organization, any gain or loss realized by the related party must be included in the provider’s cost. PRM-1 § 1011.3.

While the Appellant utilized patient care funds to acquire the property, it never used the property for patient-related services. (Parties’ Stipulated Facts, p. 4.) The amount netted as a result of the property’s ultimate sale was therefore properly classified by the OMIG as investment income pursuant to 10 NYCRR § 86-2.20(c)(1) and PRM-1 § 202.2(C).

The Appellant does not dispute the requirement in 10 NYCRR § 86-2.20(c) that investment income reported for the same year used to compute capital cost reimbursement for a facility’s rate shall reduce the interest expense allowed for reimbursement. (Exhibits B, D.) However, it argues that pursuant to PRM-1 § 130, its gain resulting from the sale of the property, a depreciable asset, cannot be recognized, as it occurred after December 1, 1997. (Exhibit D; Appellant’s Reply Letter, pp. 2-4.)

Depreciation is the amount which represents a portion of an asset’s cost or other basis allocable to a period of operation. Depreciable assets are those in which a provider has an

economic interest through ownership (regardless of the manner in which they were acquired), and include buildings, building equipment, major moveable equipment, minor equipment, and land improvements. Land is not depreciable. PRM-1 § 104.

10 NYCRR § 86-2.20(c)(1) explicitly identifies funded depreciation, along with qualified pension funds, trustee malpractice insurance funds, and instances where income from gifts or grants is restricted by donors as the only types of investment income that do not offset interest expense. There is no evidence to establish that the Appellant's gain from the sale of its investment property falls within any of those categories. Funded depreciation, a category only relevant to the Appellant's contention because it contains the word "depreciation," involves the setting aside of cash in amounts equal to annual depreciation. The Appellant has not asserted that its investment income should be classified as a set-aside for annual depreciation costs. Instead, it claims that because the investment income at issue stemmed from the sale of depreciable investment property, any income on the sale cannot be recognized and is protected from offset against the interest expense identified in its 2015 cost report. That assertion is not supported by applicable law.

The principles of provider cost reimbursement dictate that payment for services should include depreciation on all depreciable type assets that are used to provide services to beneficiaries. PRM-1 § 100. The Appellant's gain at issue resulted from selling investment property and is unrelated to patient care. No provision in the PRM-1 dictates that neither gain nor loss is recognized on the sale of assets unrelated to patient care, regardless of whether those assets are depreciable or not.

For changes of ownership of a facility as an ongoing operation on or after December 1, 1997, no gain or loss on depreciable assets is recognized on the sale. PRM-1 § 104.14(B).



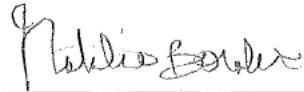
However, the Appellant's investment property consisted of a private home and land that was not used for patient services.

The Appellant has failed to establish that the OMIG's determination was not correct. The OMIG's determination is sustained.

**DECISION**

The OMIG's determination reduce the Appellant's interest expense reported in its 2015 cost report by investment income of \$211,566 is affirmed.

Dated: June 28, 2024  
Menands, New York



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Natalie J. Bordeaux  
Administrative Law Judge