Transitional Servs. of N.Y. for Long Is., Inc. v New York State Off. of Mental Health
2019 NY Slip Op 33122(U)
October 18, 2019
Supreme Court, Suffolk County
Docket Number: 32928/2009
Judge: Sanford Neil Berland

SHORT FORM ORDER

INDEX NO.: 32928/2009

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

TRANSITIONAL SERVICES OF NEW YORK FOR LONG ISLAND, INC.,

Petitioners,

-against-

THE NEW YORK STATE OFFICE OF MENTAL HEALTH, MICHAEL HOGAN, Commissioner, MARTHA SCHAFER HAYES, Deputy Commissioner, and THE NEW YORK STATE DEPARTMENT OF HEALTH,

Respondents.

ORIG. RETURN DATE: March 2, 2016
FINAL RETURN DATE: January 9, 2018
MOT. SEQ. #: 004-MD; CASEDISP

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Upon reading and filing the following papers in this action: (1) Order to Show Cause and Petition; (2) Notice of Amended Petition; (3) Verified Answer by Respondent; (4) Respondent's Return; (5) Affidavit in Opposition to Article 78 Petition by Respondent; (6) Affidavit of Bruno Laspina in Further Support of Petitioner's Petition; and (7) Affirmation of Roy Breitenbach in Support of Petition, it is

ORDERED that the Petition (motion sequence #004) is hereby denied and the proceeding is dismissed.

Petitioner, Transitional Services of New York For Long Island, Inc. ("TSLI"), is a private, not-for-profit corporation that provides community-based residential and psychosocial rehabilitation services, housing and care to individuals with mental illnesses. This is the fourth proceeding that TSLI has brought seeking to challenge the application to it of the "Exempt Income Policy" (the "EIP") that the New York State Office of Mental Health ("OMH") employs to recoup a portion of the funding – equivalent to half of the so-called "Medicaid-exempt income" – that is received by entities that provide programs that are funded, licensed, regulated or otherwise overseen by OMH. By contracting with OMH in connection with the services they provide, those entities, including TSLI, are able, among other things, to receive a portion of their overall funding through Medicaid, and they participate in a mandatory annual budget process

overseen by OMH. At least one purpose of the OMH budgeting process is to ensure that participating entities – which are eligible to receive funding from a number of public and private sources – have sufficient resources available to them during each fiscal year to carry on their programs. TSLI maintains that by imposing a budgeting formula that assumes stated annual occupancy and collection rates – as high as 88% and 85%, respectively, in some years, lower in others - that is significantly lower than the occupancy rate that TSLI actually experiences each year – approximately 99% – OMH deliberately underestimates TSLI's revenue for the year and, thus, creates an ostensibly artificial quantum of "Medicaid exempt income" for TSLI, thereby maximizing the amount of provider income OMH can recapture. In each of the fiscal years at issue in this proceeding - during which OMH required the use of this budgetary process - TSLI's estimated and budgeted "other source" income – that is, client fees, SSI, Medicaid reimbursement for services actually rendered, gifts and grants – was sufficient to meet TSLI's expected allowable annual operating expenses, and therefore TSLI did not receive "State aid" for its programs under the applicable State aid funding statute, Mental Hygiene Law §41.44. Because, in its view, the only legitimate purpose of recapturing exempt income is to allow the State to recover at least a portion of the State aid funding that the participating provider received but ultimately did not require to meet its budgeted annual operating expenses – thus rationalizing such recapturing as simply requiring the provider to disgorge a portion of the excess State aid it received – TSLI maintains that as it received no State aid during the fiscal period that is at issue, utilizing a budgeting formula that applies a counter-factual occupancy and collection rate that deliberately understates TSLI's anticipated Medicaid revenue and then, as a result of that understated estimate[1], requiring it to relinquish to OMH amounts that were properly billed to and

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[1] In a letter dated July 13, 2009, OMH informed providers, among other things, that starting January 1, 2010 for upstate and Long Island providers (and July 1, 2010 for New York City providers):

> OHM will be simplifying the process . . . adjusting the budgeted models to more accurately reflect current occupancy levels. This will result in a lower Medicaid rate, offset by a change in OMH's policy allowing providers to retain 100 percent of the Medicaid income above the budgeted model. This will ensure that providers receive the full fiscal benefit for increasing occupancy levels and also eliminate the need to track exempt income liabilities for accounting purposes, a longstanding concern expressed by many providers.

In the same letter, OMH also announced that it was "officially waiving all exempt income liabilities for the period 1996 through 2002" and that providers that had already paid those liabilities would have the amounts so paid credited against "future exempt income collections." A few days later, in a letter dated July 16, 2009, OMH repeated, in summary form, the substance of its July 13, 2009 letter, informed

paid to it by Medicaid, and not by OMH – is fiscally unfair and irrational, beyond OMH's statutory authority and contrary to the terms of the contractual arrangement between TSLI and OMH, and, therefore, arbitrary and capricious. The respondents disagree, arguing, among other things, that they are statutorily authorized to adopt and apply regulations that allow OMH to capture a portion of a regulated provider's overall or other revenue for any annual period in which the reimbursement the provider has actually received in the form of Medicaid reimbursements exceeds the amount of Medicaid reimbursement OMH had estimated as a component of the provider's OMH-approved "Gross Income Net" – or "GIN" - budget for that annual period.

One of the principal anomalies in the OMH budgetary process that was utilized during the period relevant to the current proceeding – which is highlighted by the rationale offered by the respondents for allowing OMH to capture a portion of a regulated provider's "excess" or "exempt" Medicaid income whether or not State aid has been granted in order to enable the provider to close a projected budgetary shortfall in the affected annual period, and which in large measure is the source of the dispute between the parties – is that a provider's Medicaid-reimbursable daily bed-rate for a given annual period is calculated by spreading the provider's projected applicable annual costs against the estimated occupancy and collection rates for the facility in question. Because elements of the provider's annual costs that are factored into the daily bed rate calculation do not vary in direct proportion to the level of occupancy, an estimated occupancy rate that is lower than the occupancy rate that actually occurs yields a higher than actual daily bed rate for purposes of Medicaid reimbursement. The result is that over the course of the year, the provider bills to and collects from Medicaid an aggregate amount of Medicaid reimbursement that, together with the provider's revenue from other sources, including client fees, federal SSI payments and grants and gifts – yields a total amount of income that exceeds the provider's budgeted allowable costs. To the extent that this conservative budgeting methodology, by limiting the consequences of potential fiscal underperformance by the provider in a given budgetary period, can be viewed as serving the stated statutory goal of administering state aid to "community residences for the mentally ill" according to OMH "guidelines . . . designed to enable the effective and efficient operation of such residences . . . ." (MHL § 41.44[c]), it is salutary. As discussed below, however, the same statute does not permit OMH to provide state aid that exceeds a community residence's "net operating costs" (*id.*).

Prior to 1992, community residential programs for the mentally ill in New York did not receive Medicaid reimbursement, and OMH provided state aid to fill in what would otherwise be

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providers of its planned three-year time line for the collection of "exempt income" for the period 2003 through 2008, and enclosed worksheets showing amounts due for 2003 and 2004 and credits for exempt income payments that had been made in prior years.

gaps in their funding. In 1992, OMH received approval from the federal government to permit certain residential programs – in particular, those with fewer than 17 beds, the threshold at which residential facilities are deemed by the federal government to be "institutions for mental diseases" – to bill Medicaid for "restorative services" provided to clients in community residential programs[2]. In 1995, when OMH first issued guidelines aimed at allowing it to recoup from qualified service providers an amount equal to 50 percent of each provider's Medicaid exempt income, it relied upon the authority granted to the Commissioner of Mental Health under Mental Hygiene Law Article 41, apparently including what is now § 41.44[c], to "provide state aid to local governments and to voluntary agencies in an amount not to exceed one hundred percent of net operating costs of community residences for the mentally ill" and the statute's direction that "[t]he commissioner shall establish guidelines for determining the amount of state aid provided pursuant to this section," including guidelines "for retention and use of income exceeding the anticipated amount . . . ." (*Id.*) (emphasis added). In 2002, OMH revised its recoupment policy, announcing that the provider's retained 50 percent share in one program would be applied to defray expenses beyond budget in another program without reducing the 50 percent share that OMH was entitled to recoup. Litigation followed, including, in 2004, the first proceeding filed by TSLI, ***Transitional Servs. of N.Y. for Long Is., Inc. v. New York State Off. of Mental Health***, Index No. 04-12114 [Sup. Ct., Suffolk County], in which TSLI challenged, among other things[3], OMH's deduction from TSLI's current Medicaid allowances of amounts purportedly attributable to excess Medicaid income received by TSLI for the years 1999 through 2002[4]. The Supreme Court (Costello, J.) found, as here pertinent[5], that "[t]here is neither a rational basis nor statutory authorization for the recovery of earned revenue from legitimately

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[2] To implement that change, beginning on April 1, 1992, New York's Commissioner of Mental Health promulgated, on an emergency basis, a new set of regulations, embodied in 14 NYCRR Part 593, entitled *Medical Assistance Payments for Community Rehabilitation Services Within Residential Programs for Adults and Children and Adolescents*. One stated purpose of the new regulations was to establish "standards for reimbursement under the medical assistance program for community rehabilitation services provided by residential programs for adults with mental illness and children and adolescents with serious emotional disturbance" (14 NYCRR § 593.1[a]).

[3] In that proceeding, TSLI also challenged OMH's disallowance of expenses related to certain staff housing it maintained.

[4] OMH sought recovery of a total of $563,820, 50% of the total "Medicaid excess" for the period based upon a desk audit conducted by OMH.

[5] Supreme Court also "annulled, vacated and set aside" OMH's reduction - "without basis or a hearing" - of reimbursements previously granted TSLI for costs of supervisory staff apartments, as "irrational, arbitrary, capricious and contrary to law" (*id.* at 4).

appropriated provider funds for allowable costs under the OMH Spending Plan Guidelines (14 NYCRR 593.9, 593.8)," and "vacated annulled and set aside" OMH's attempt to recover the amounts at issue through deductions from TSLI's ongoing Medicaid Payments "as unreasonable, arbitrary, capricious and contrary to law" (***Transitional Servs. of N.Y. for Long Is., Inc. v. New York State Off. of Mental Health***, *supra*, Memorandum Decision dated March 31, 2005, at 3). The Second Department, however, disagreed and reversed that part of Supreme Court's ruling, holding that

> [T]he recoupment policy was contained in OMH's guidelines, which were issued pursuant to Mental Hygiene Law § 41.44(c), and the petitioner agreed to the guidelines. Furthermore, the recoupment policy serves a valid purpose, as it effectively allows OMH to recoup an overpayment of state funds. Thus, OMH's determination dated January 26, 2004, which was based on the recoupment policy's application, had a rational basis, and therefore, should not have been annulled . . . .

(***Transitional Services of New York for Long Is., Inc. v New York State Off. of Mental Health***, 44 AD3d 673, 675-76 [2d Dept 2007] (citation omitted). Leave to appeal was granted (*see* 11 NY3d 713 [2008]), but after OMH informed TSLI and other providers that it was "officially waiving all exempt income liabilities for the period 1996 through 2002," and that providers that had already paid those liabilities would have the amounts so paid credited against "future exempt income collections" (letter dated July 13, 2009 (*see* footnote 1, *supra*)), the Court of Appeals granted OMH's motion to dismiss as moot[6] TSLI's cross appeal from the Appellate Division's holding in favor of OMH's recoupment policy (***Transitional Services of New York for Long Is.,***

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[6] In support of its motion to dismiss TSLI's appeal, OMH argued that notwithstanding its stated intention to pursue its exempt income recoupment policy for years 2003 through 2009, because "TSLI's claims concern only years 1999 through 2002," OHM's waiver of exempt income liabilities for those years and crediting of amounts paid for prior years (for which, as it admitted, TSLI was also seeking redress) gave "TSLI all of the relief it could receive on its cross-appeal" (***Transitional Services of New York for Long Is., Inc. v New York State Off. of Mental Health***, OMH Motion to Dismiss Cross-Appeal, Memorandum of Law at 5 and 1, respectively), and, therefore, there was "no longer a live dispute between OMH and TSLI about the excess Medicaid income policy" (*id.*, at 5), rendering TSLI's cross-appeal moot (*id.*). Thus, although maintaining that the fact that the "excess Medicaid income policy will remain in effect for the years 2003 through 2009" was insufficient to "create a present live controversy between the parties," OMH necessarily – and explicitly – conceded that "[i]f and when TSLI contests a repayment claim for any other year, then the issue of the policy's validity may be presented for judicial review" (*id.*).

Inc. v New York State Off. of Mental Health, 13 NY3d 810 [2009]).[7] Thus, although the Court of Appeals had indicated – by granting TSLI leave to appeal – that the Appellate Division's reversal of the Supreme Court's order invalidating OMH's recoupment policy, at least in the circumstances presented by TSLI, merited review, the issues raised by TSLI with respect to that policy were not addressed by the Court of Appeals[8]. Similarly, although TSLI also brought an action in federal District Court, in 2013, pursuant to 42 USC § 1983, alleging that OMH's recoupment policy violated the anti-factoring provision of the Medicaid Act, 42 USC § 1396[a][2], that action was dismissed on the grounds that Section 1396[a][2] confers no private right of action and that the conduct about which TSLI was complaining was not, in any event, encompassed by the statute; the District Court, explicitly, did "not pass on the overall lawfulness of the State's efforts to recapture TSLI's Medicaid income" (***Transitional Services of New York for Long Is., Inc. v New York State Off. of Mental Health***, 91 F Supp 3d 438, 445 [EDNY 2015]).

Thus, the upshot of the lengthy, and arguably complex, history of TSLI's effort to defeat OMH's recoupment efforts is that TSLI was relieved of any repayment obligation for the period involved in the 2004 litigation – 1999 through 2002 – and received credit for amounts it may have paid or been assessed in prior years. The only outcome ultimately adverse to it was the narrow ruling in the federal District Court action it brought in 2013 pursuant to 42 USC § 1983, that OMH's recoupment policy does not run afoul of the Medicaid anti-factoring statute, 42 USC § 1396[a][2], a statute that does not in any event, as the District Court held, create a private right

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[7] The Court of Appeals did, however, decide OMH's appeal from the portion of the Appellate Division's decision that held that Supreme Court had annulled OMH's denial of reimbursement for the rental cost of the staff apartments, holding that

> It was not irrational or unreasonable for OMH to determine that, for reimbursement purposes, under the Mental Hygiene Law and the regulations promulgated thereunder (see Mental Hygiene Law § 41.38; 14 NYCRR 595.12), the expenses TSLI incurred in leasing residential apartments it used as offices must be accounted for as operating costs rather than as housing costs.

Transitional Services of New York for Long Is., Inc. v New York State Off. of Mental Health, 13 NY3d 801, 802 [2009].

[8] In 2006, after Justice Costello ruled in its favor in the 2004 action but before the Appellate Division, Second Department rendered partial reversal of that ruling, TSLI filed another action in this court, seeking to enjoin OMH from collecting the amounts it was contesting in its earlier-filed action. However, after the Appellate Division reversed so much of his prior decision and order as had invalidated OMH's recoupment policy, Justice Costello granted OMH's motion to dismiss TSLI's injunction action.

of action. Thus, to the extent that OMH contends that TSLI's current claims are wholly precluded by the prior litigation between the parties, its reasoning is patently fallacious and its contention utterly meritless. First, with respect to the 2004 action, both as a practical matter, but also de jure, TSLI was the prevailing party in that litigation with respect to the propriety of OMH's recoupment policy, as the outcome, as OMH represented to the Court if Appeals when it moved that court – successfully – to dismiss TSLI's appeal to that court as moot, was that TSLI achieved "all of the relief it possibly could . . . ."[9] once OMH relinquished any claim to recoupment for the years at issue in that litigation. Second, not only was the Appellate Division's ruling in the 2004 action rendered nugatory by virtue of OMH's reversing course and affording TSLI all of the relief it was seeking with respect to that issue, the conceded mooting by OMH of TSLI's appeal from that ruling and, consequently, of TSLI's claims concerning the recoupment policy in that action, necessarily vitiated any direct or collateral preclusive effect that ruling might otherwise have had, as an action ultimately deemed moot can have no res judicata or collateral estoppel effect (*see* ***Farkas v New York State Dept. of Civ. Serv.***, 114 AD2d 563, 565 [3d Dept 1985], *favorably cited by* ***Ricatto v Mapliedi***, 133 AD3d 737, 738 [2d Dept 2015]). For the same reasons, the dismissal of the 2006 injunction action, which simply applied the ultimately moot 2007 Second Department ruling with respect to OMH's recoupment policy, is also necessarily without preclusive effect.

Nonetheless, the Second Department's 2007 decision in the 2004 action does continue to articulate governing authority on the precise legal issues that it addressed: that the then-existing OMH guidelines embodying OMH's recoupment policy had been "issued" pursuant to Mental Hygiene Law § 41.44[c] and, therefore, did not lack statutory authorization, and that OMH's implementation and application of that policy, at least for the period 1999 through 2002, had a rational basis (*See also* ***Assn. for Community Living, Inc. v New York State Off. of Mental Health***, 92 AD3d 1066, 1067 [3d Dept 2012], *lv. to appeal den.*, 19 NY3d 815 [2012].) That decision did not, however, address explicitly and as a matter of law TSLI's contention in the current action that the recoupment sought by OMH for years subsequent to 2002 is inconsistent with the terms of the recoupment policy as articulated in the guidelines. Specifically, TSLI argues that neither the guidelines nor, for that matter, the contract into which it annually enters with OMH provide "that any portion of Medicaid revenues are subject to recapture by OMH in the event actual Medicaid revenues exceed projected Medicaid revenues." Rather, TSLI contends, the guidelines "provide that 50% of the amount of actual Medicaid revenues that exceed projected Medicaid revenues may be *exempted* from being included in the calculation to determine whether any funds are subject to recapture by OMH" (emphasis added). According to TSLI, the guidelines permit only the recapture by OMH of funds "that were actually provided by OMH to TSLI to bridge an anticipated shortfall," and as TSLI had no projected shortfall and therefore received no such funding directly from OMH, "OMH should not be allowed to recapture funds" that it never provided to TSLI.

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[9] *See* footnote 6, *supra*.

There are two significant impediments to TSLI's contention. The first stems from the language of the relevant guidelines. First, although TSLI's claimed interpretation is not wholly inconsistent with OMH-required reporting procedures (*see* **New York State Budget and Claiming Manual, Appendix Q**, *Guidelines for OMH Residential Exempt Income*, "Medicaid Exempt Income," face page (June 1, 2005)[10]), and at least one of the stated objectives of the policy - to afford providers that generate Medicaid exempt income with a quantum of funds "to enhance programming efforts and to directly improve the quality of life of residents" (*id.*, at 9, "Community Residences Funding and Policy Guidelines," I. Medicaid-Related Information, C. Exempt Income Policy for Medicaid, ¶3) – the language of the applicable guideline is precise that "[a]gencies may retain as exempt income 50 percent of all Medicaid income in excess of the fiscal model income expectation" as set forth in the agencies' respective "GIN" budgets (*id.*, at 10 (emphasis added)), and that "[c]ollection of excess Medicaid for Department of Health is not to be commingled with *State Aid Funds*. This process will be followed up by a letter from the bureau of Contracts and Claims indicating when and where to send these funds" (*id.*, at 10 (italic in original)). OMH represents that these provisions have been part of the applicable guidelines throughout the relevant period and incorporated by reference during that time in provider contracts, including those with TSLI. Although TSLI takes issue with OMH's incorporation in gross of the guidelines, many of which have no application to it, and both disagrees with OMH's interpretation of those provisions that articulate and implement the recoupment policy and disputes OMH's authority to adopt and enforce them, it does not cite to any different or differently worded provisions in the guidelines to support its alternative interpretation. Nor does it offer any explanation for how it could reasonably have harbored any expectation that its interpretation of the guidelines was correct and could be made to govern OMH's application of its recoupment policy when OMH had repeatedly made clear in direct communications with providers that it intended to recoup half of each provider's Medicaid exempt, or excess, income, or, for that matter, why it continued to renew its contractual arrangement with OMH in the face

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[10] In pertinent part, this section of Appendix Q provides

> . . . As noted in the CR Contract Policy and Guidelines, exempt income has been defined as being that amount by which actual income received exceeds the amount of the Fiscal Model with 50 percent of all Medicaid income in excess of the Fiscal Model expectation,[sic] to be applied against budgeted Gross Budget Expenses; and 50 percent of that amount to be excluded from application against budgeted Gross Budget Expenses in determining net deficit (and is retained by the service provider). . . .

of OMH's repeatedly stated intention to recoup such amounts based upon its interpretation of the guidelines[11].

Second, as was noted when the court denied TSLI's motion, *inter alia*, for leave to amend its petition a second time to allege that the statute of limitation would bar recoupment claims against it for 2005 and earlier periods, and for partial summary judgment on that ground (Decision and Order dated December 17, 2013 (Martin, J.)), in 2010 – that is, after the Court of Appeals had dismissed TSLI's cross-appeal in the 2004 litigation as moot – the Legislature, in order to "clarify the Office of Mental Health's authority with regard to the recovery of overpayments made to certain community residences and family based treatment programs" and to facilitate "the recovery of $4.5 million of overpayments in 2010-11" (Introducer's Memorandum in Support, 2010 S8169 (emphasis supplied)), enacted L. 2010 ch. 111, Part D, which authorized OMH, as applicable to providers that operate, as does TSLI, outside the City of New York, for the period January 1, 2003 through December 31, 2009, to

> recover funding from community residences and family-based treatment providers licensed by the office of mental health, consistent with contractual obligations of such providers, and notwithstanding any other inconsistent provision of law to the contrary, in an amount equal to 50 percent of the income received by such providers which exceeds the fixed amount of annual Medicaid revenue limitations, as established by the commissioner of mental health.

(*Id.*, § 1 (emphasis supplied).[12] TSLI alleges, and the respondents do not dispute, that during the years relevant to the current action, TSLI's revenue consisted entirely of amounts received from

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[11] One possible explanation, of course, is that while pursuant to the recoupment policy as applied by OMH, TSLI would be required to relinquish half of any excess Medicaid income it would be generating by achieving occupancy and collection rates higher than projected by its GIN budget, it would be retaining the balance with only limited restrictions on how the retained amounts could be applied. (*See* **New York State Budget and Claiming Manual, Appendix Q**, *Guidelines for OMH Residential Exempt Income*, "Medicaid Exempt Income," *supra*, at 9, "Community Residences Funding and Policy Guidelines," I. Medicaid-Related Information, C. Exempt Income Policy for Medicaid, ¶3.)

[12] Similar provisions have been enacted in subsequent years, including L. 2013 ch. 56, Part I, and L. 2019, ch. 57, Part W, in each instance extending the time period for which such funding may be recovered. Pursuant to 14 NYCRR § 593.8[g], recovery of overpayments or excess reimbursements held by residential providers of mental health-related rehabilitation services is to be pursued by the New York State Department of Health upon notification by OMH. Thus, L.

client fees, SSI, Medicaid reimbursement, gifts and grants. TSLI asserts that because those amounts consistently exceeded its projected allowable annual operating expenses, so that there was no "anticipated shortfall between [TSLI's] estimated operating costs and estimated income" in any of those years, TSLI did not receive any "state aid" from OMH pursuant to MHL § 41.44[13] during the relevant years and, therefore, there is no "state aid" subject to recoupment from it by OMH. To the extent that TSLI is contending that there is a distinction between "Medicaid," on the one hand, and "state aid," on the other, that, by operation of MHL § 41.44[c], limits OMH's standing, jurisdiction or authority to pursue recoupment of Medicaid-related amounts, it is clear that the Legislature enacted L. 2010 ch. 111, Part D and like statutes in subsequent years for the express purpose of making plain that OMH does, so far as New York State is concerned, have such authority, and that it has such authority "notwithstanding any other inconsistent provision of law to the contrary" (*id.*). As the Third Department held in ***Assn. for Community Living, Inc. v New York State Off. of Mental Health***, *supra*, the enactment of Part D of L. 2010 § 1 "expressly confirms OMH's existing authority to recoup Medicaid exempt income" and renders moot any claim that "OMH's Medicaid exempt income recoupment policy lacks statutory or regulatory authority and OMH's reliance on guidelines, rather than a rule or regulation, violates SAPA" (92 AD3d at 1067). To the extent that TSLI is contending, more broadly, that Medicaid is a federal program in origin and that recoupment of paid benefits is, therefore, beyond the purview of the State or any State agency, the simple response is that although Medicaid exists in the first instance under the auspices of federal law (*see* Title XIX of the Social Security Act, 42 USC §§ 1396, et seq.), it is in fact a "cooperative federal-state program" (***Douglas v Ind. Living Ctr. of S. California, Inc.,*** 565 US 606, 610 [2012]), that is, in its application, largely administered at the state level (*see, e.g.*, Social Services Law § 363-a, 363-c; ***Douglas v Ind. Living Ctr. of S. California, Inc.,*** 565 US at 610; *see also* ***Managed***

2010 ch. 111, Part D and the subsequent like enactments extended recovery powers directly to OMH.

[13] MHL § 41.44[c], the pertinent subsection of the statute, provides as follows:

> (c) Within amounts available therefor and subject to regulations established by him and notwithstanding any other provisions of this article, the commissioner may provide state aid to local governments and to voluntary agencies in an amount not to exceed one hundred percent of net operating costs of community residences for the mentally ill. The commissioner shall establish guidelines for determining the amount of state aid provided pursuant to this section. The guidelines shall be designed to enable the effective and efficient operation of such residences and shall include, but need not be limited to standards for determining anticipated revenue, for retention and use of income exceeding the anticipated amount and for determining reasonable levels of uncollectible income. Such state aid to voluntary agencies shall not be granted unless there has been prior approval of the proposed community residence by the local governmental unit.

Pharm. Care v Sebelius, 716 F3d 1235, 1252 [9th Cir 2013] (rejecting a provider's federal Takings Clause claim on the grounds that "[b]ecause participation in Medicaid is voluntary, providers do not have a property interest in a particular reimbursement rate.").

In sum, it cannot be said that the application of OMH's Exempt Income Policy about which TSLI complains, for the period and in the circumstances here presented, was arbitrary or capricious, or inconsistent with the parties' respective rights and obligations under the contractual arrangements between them or under applicable law. Accordingly, and for all of the reasons discussed above, the petition must be denied and the proceeding dismissed.

The foregoing constitutes the decision and order of the court.

Dated: October 8, 2019
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

__XX__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**