

# **EXPLOITING NOT-FOR-PROFIT CARE IN AN ADULT HOME**

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***THE STORY BEHIND OCEAN HOUSE CENTER, INC.***

NEW YORK STATE COMMISSION ON QUALITY OF CARE  
FOR THE MENTALLY DISABLED  
DECEMBER 2001



# Preface

In the State of New York, adult homes are a valuable resource and play an important role in providing care to individuals who, because of their age or disability, require lodging, board and some assistance and supervision in daily living. The responsibility for enforcing acceptable standards of care at the homes—such as, admission criteria, conditions of physical plant, staffing, and resident services—rests principally with the Department of Health while variants, including actual placements, resident retention, health/mental health services, and social services, may be the responsibility of other federal, state and local agencies.

The task is enormous. As of 1999, there were some 453 adult homes with over 28,000 mostly elderly residents. Making the job more complex, but all the more necessary, is a subset of some 11,000 residents who at some time have received or are receiving services from a mental hygiene provider.<sup>1</sup> These residents generally have a greater need for on-site or community-based social, health/mental health and habilitative services which are not provided by the adult home. In an effort to ensure safe and comfortable housing, and appropriate services for these individuals, the Commission on Quality of Care for the Mentally Disabled was granted special oversight authority by the State Legislature in 1994 for those homes with 25 percent or more residents with mental disabilities. This responsibility includes the investigation of complaints about the quality of care, including the mental hygiene services provided to such residents, at some 176 facilities designated as “impacted” homes.

The investigation of Ocean House Center, Inc., the subject of this report, follows an earlier in-depth look at this adult home a decade ago when, following a legislative request to conduct a programmatic and fiscal review of the adult home industry,<sup>2</sup> the Commission completed a review of a preexisting adult home at this location, then known as HI-LI Manor.<sup>3</sup> The HI-LI and Ocean House reviews are similar in that they both stemmed from complaints about poor care and conditions at the home. While both studies conclude that large portions of public assistance funds intended to meet the needs of the facility’s residents have not been reaching their intended beneficiaries, mostly because of business decisions

related to the home’s real estate, the current review also finds that the quantity and type of services offered to Ocean House’s mentally-ill residents appear to have been more revenue-driven than meaningful or necessary. Significantly, even though an adult home in the New York City area, as of August 1, 2001, receives \$10,164 yearly for room, board and assistance for each resident from his/her Supplemental Security Income benefit checks, the Commission found another \$27,000 per Ocean House resident was being spent for often ill-defined or duplicative services by outside providers paid for by Medicaid.

This report represents the unanimous opinion of the members of the Commission. Responses to a draft of this report by the Department of Health and Office of Mental Health are attached respectively as Appendix A and Appendix B. The responses from the Ocean House board of directors and two of its outside service providers are not appended because of their length but are excerpted into the report in the endnotes.



Gary O’Brien  
Chair



Elizabeth W. Stack  
Commissioner



Angelo T. Muccigrosso  
Commissioner



# Executive Summary

**T**he operation of an adult care facility requires the written approval of the Department of Health (DOH). The approval may be granted only after the department is satisfied as to the need for the facility; that the proposed operator is of good moral character and financially responsible; and the premises and care meet regulatory standards. Once an operating certificate is obtained by the home it may not be transferred and is considered the property of the department. Thus, adult homes are regulated, licensed entities that are to be run by competent, engaged, concerned operators who can be relied on by the state to run high quality programs in a financially responsible manner.

This report details how Sherman Taub—who surrendered his license to practice law amidst allegations of impropriety—used an intermediary to gain control of Ocean House Center, Inc., a 125-bed adult home in Far Rockaway, New York. Thereafter, he used the home’s not-for-profit status as an instrumentality to conduct personal transactions and activities which illegally produced substantial financial profits for himself and his family. Similar to HI-LI Manor, Ocean House’s real estate has been used by Taub to leverage money for other health care real estate ventures. He has also used the home to take full advantage of suspect arrangements to improve its bottom line, such as using home health care agency staff to supplant personal care staffing and entering into questionable lease arrangements with outside providers.

Prior to Ocean House’s incorporation in January 1995, the facility, then known as HI-LI Manor Home for the Aged, had been administered by Beryl Zyskind, who owned the building. In 1985, he purchased the property for \$950,000 from the Hebrew Academy of the Five Towns and Rockaway (HAFTR), which held the operating certificate and employed Zyskind as administrator. Following a Commission investigation of that home, a referral to the United States Attorney, Eastern District of New York, and a jury trial, Zyskind was convicted of bank fraud in obtaining a mortgage on the home and for embezzling funds from its residents.

The principal findings of the Commission’s investigation of Ocean House are as follows:

## ○ Taub Masks His Control

In the course of Zyskind’s bankruptcy and related litigation involving the adult home property among Zyskind, the mortgage holders, and HAFTR, Sherman Taub (Zyskind’s brother-in-law) gained control of the adult home and its mortgages without disclosing these interests to the regulatory agency. He accomplished this by using an intermediary named Michael Kraus to acquire the mortgages and transfer them to him. Kraus also obtained the home’s operating license from the state on Taub’s behalf which gave Taub the authority to control the facility behind-the-scenes. The home was reincorporated as a not-for-profit corporation, whose board of directors and accountant consisted of individuals connected to Taub through family and business associations. The organizational structure, which initially included Kraus and later Taub’s sons as board presidents, has allowed Taub and his family to realize huge financial gains (Report pp. 3 - 4, 7 - 8).

## ○ Implementation of Profit-Making Scheme

Taub’s scheme to profit from the home started in 1994 when he began to acquire the outstanding debts on the facility property at steep discounts—because the home was in bankruptcy—and arranged with his son, Jay Taub, to divert to himself the prospective gains by enforcing the debts at substantially inflated amounts. Taub purchased the home’s mortgages which were in default, concealing his identity from the bank which would have had concerns about selling the mortgage to a Zyskind relative. Concurrently, Zyskind transferred the deed to the newly-formed Ocean House at no cost beyond the property liens. Once Taub acquired the mortgages, Jay Taub, representing himself as the corporate “president,” signed a restated mortgage inflating the amount owed to well beyond what it cost to acquire the property. As a result, the not-for-profit home was obligated to repay \$4.0 million for a debt that had been purchased by Taub for one-tenth of that amount or \$400,000 (Report pp. 3 - 5).

Taub profited further from a new mortgage with Ocean House, which was also arranged with his son. This mortgage in the amount of \$733,952 was agreed to on the understanding that Sherman Taub would pay off the delinquent real estate taxes on the property owed by its

previous owner. However, there were no documents obligating Taub to make payments in exchange for the mortgage. Indeed, his mortgage company's books indicated he did not assume the liability for the tax lien. As a result, while collecting on this mortgage for several years, Taub periodically paid off only a fraction of the overdue taxes, at times, obtaining waivers from the City of New York to reduce the balance. Eventually, Ocean House borrowed \$700,000 to pay off the remaining taxes. Taub profited by over \$90,000 from the tax credits granted by the city (Report p. 6).

### **○ Misuse of Not-For-Profit Privilege**

Although Ocean House obtained certain benefits from its not-for-profit status, such as property and business tax exemptions, the facility finances were handled more like a family-run business. In addition to the familial domination, as exemplified by Taub's son rotely signing off on the mortgages and the lack of a written agreement on the \$733,952 real estate tax obligation, Sherman Taub and his son wrote checks from the home accounts to cover personal expenses (later classified as mortgage payments) or for interest-free loans (Report pp. 5 – 7).

Minutes of board of director meetings appear to document approvals for financial transactions, but there are reasons to question their legitimacy. Not only did the board lack impartiality, the board minutes conflicted with other evidence gathered by the Commission. For example, statements made during interviews indicate that the purported board approval of the mortgages at a May 1995 meeting, as documented by putative board minutes, never actually took place. Many other key corporate documents and government filings contain discrepancies, even on such basic information as the roster of officers and directors. Given the relationships between the board and Taub and its lack of knowledge or debate on key issues related to Ocean House's indebtedness, it seems clear Ocean House has been deprived of the independent oversight needed to safeguard the best interests of the not-for-profit corporation (Report pp. 7 – 10).

### **○ Lease Arrangements with Outside Service Providers**

Questionable leasing of office space to outside providers of health care services has enhanced the home's revenues, but the home is still dangerously dependent on leveraging outside debt to keep the facility afloat because "surplus" funds have been withdrawn from the facility by Taub in the form of prepayments on the mortgage. At the same time, outside providers renting office space inside the

adult home benefitted via a steady stream of income from high-volume services to the home's residents. The Commission is concerned that the rental payments may be a pretext for giving money to the adult home for its referrals. Most suspect are rental payments for excess space and management services that were not provided (Report pp. 10 – 11).

### **○ Commingling of Residents' Personal Allowances and Possible Kickback**

Other questionable transactions included the commingling of resident personal funds with Ocean House funds in violation of Social Services Law and regulations. Also, the Commission noted an unusual payment of \$35,000 from an Ocean House contractor to Sherman Taub's mortgage company. This payment has the appearance of a kickback as its timing coincided with a large payment from Ocean House to the contractor (Report p. 11).

### **○ Violations of Professional Accounting Standards**

There is cause to believe that audit work performed by CPAs on Ocean House records failed to meet professional standards. Importantly, the auditors should not have conducted the engagements because they lacked independence—the most fundamental requirement for an outside auditor. The audit work performed was lacking in the areas of audit evidence, report disclosure and deficiency reporting particularly as applied to the mortgage transactions (Report pp. 11 – 12).

### **○ Cost of Care**

A comprehensive review of the costs of care and services provided to Ocean House residents was undertaken. At the time of the events in question, the average annual cost per resident totaled approximately \$37,000. Nearly all of the residents received about \$10,000 in Supplemental Security Income benefits which Ocean House applied to residential care. A major portion of the remaining \$27,000 consisted of mental health services and home health care from outside service providers (Report pp. 13 – 14).

### **○ Improper Billings for Medicaid Services - \$812,121**

Ocean House became a provider of Medicaid services in 1998 when it began a transportation program for its residents. The Commission reviewed its Medicaid claims for the 13-month period ending April 30, 1999 and found a lack of corroborating documents for 794 claims representing \$15,934 or 22 percent of the amount billed (Report p. 11).

The Commission examined a sample of mental health clinic and continuing day treatment services to the home's residents by an outside provider and concluded that \$307,888 of the clinic services billed to Medicaid were inappropriate. The prevailing impropriety of the clinic billings was that the services were not clinical in nature but rather were social or recreational. Although "activity therapy" may be eligible in the less-costly continuing day treatment program, such therapies are not eligible for Medicaid reimbursement in a clinic. Regarding recreational activities, regulations require they be provided by the adult home and not separately billed to Medicaid (Report pp. 15 – 18).

The Commission also found that two psychiatrists who were salaried employees of the psychiatric clinic at Ocean House billed Medicaid separately for services provided to the home's residents. However, the costs for the psychiatrists to administer the clinic program were included in the \$141.45 Medicaid rate for individual therapy sessions and, therefore, bills for their services should not have been submitted separately by the physicians to Medicaid. The Commission identified \$68,282 in double billings by the physicians from January 1999 to May 2001 (Report p. 16).

The Commission found that \$420,017 of home health care billings for Ocean House residents were improper, primarily because they supplanted housekeeping and personal care services which are a responsibility of the adult home. Mr. Taub's son benefitted from these billings as a subcontractor providing home health care aides for Ocean House residents (Report pp. 19 – 20).

## Recommendations

Based on the findings reported herein, the Commission makes the following recommendations and has or will refer its findings to the following enforcement agencies within the scope of their jurisdiction.

### Referrals

- *NYS Department of Health*: for revocation of the home's operating certificate and removal of the home's board for failure to demonstrate financial responsibility and requisite character and competence to operate Ocean House, failure to keep adult home funds and resident funds separate as required by law, and failure to comply with requirements of the Not-For-Profit Corporation Law; to ensure that there is a

properly reconstituted board of directors (including appointment of a Commissioner designee) which will provide independent oversight of this not-for-profit facility; to recoup improper Medicaid payments made to Ocean House, St. John's Episcopal Hospital, First to Care Home Care, Inc., and two psychiatrists; and, to monitor home health care agency services to adult home residents to assure that they do not duplicate or supplant services that adult homes are required by regulation to provide.

- *NYS Office of Mental Health*: to conduct an inspection and certification review of the clinic program operated by St. John's Hospital; and to explore with the Commission how to best serve persons with mental illness at Ocean House, using a habilitation model to promote growth and recovery. Additionally, because the residents of Ocean House represent a "captive" population for outside service providers to maximize Medicaid billings, a cost-effective approach needs to be explored with DOH to provide adult home residents a managed care model of service delivery, wherein a primary care physician takes responsibility for the provision and coordination of necessary medical services.
- *State Education Department*: for possible violations of regulations relating to the practice of public accountancy.
- *Department of Law*: for violations of the Not-For-Profit Corporation Law, including civil recoveries from board members and officers for misappropriation of the corporation's resources in the form of excess mortgage payments, interest-free loans, and distribution of cash assets to related party companies; and for possible violations of the Penal Law relating to the filing of written instruments containing false information.
- *District Attorney's Office, County of New York*: for possible crimes within the scope of its jurisdiction, including the misuse of Ocean House's tax-exempt status as a facade for operating a private corporation, effectively evading the payment of New York City real estate, corporate and sales taxes; the use of Ocean House as an instrumentality to siphon millions of dollars of public funds for the benefit of Sherman Taub and his family; and the diversion of bank loan proceeds for purposes other than stated in the bank loan agreements.

- *U.S. Attorney for the Eastern District of New York:* for investigation of a possible criminal conspiracy to misappropriate funds from a federal assistance program [18 U.S.C. §666(a)(1)(A)]; and possible improper remuneration to induce referrals [42 U.S.C. §1320a-7b(b)] under the medical assistance program.
- *U.S. Internal Revenue Service:* for possible violations related to the transfer of a tax-exempt facility’s financial resources to private individuals rather than preserving them for the corporation’s exempt purposes; and for assessment of penalties against Ocean House’s board and management for participating in “excess benefit transactions.”

## Statutory Change

- The Commission recommends the enactment of legislation in New York State similar to 18 U.S.C. §666(a)(1)(A) to make it a crime to knowingly convert or intentionally misapply public monies.

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# Introduction

The Commission's review of Ocean House Center, Inc., an adult home located at 12-14 Heyson Road, Far Rockaway, New York, began after it received a call in April 1999 about the management and conditions of the facility. The complainant, who had read about the Commission's prior investigation of the home, then known as HI-LI Manor Home for the Aged,<sup>4</sup> was concerned about the role of Ocean House's *de facto* operator, Sherman Taub, because of his connections to the former administrator who had been removed, and because Mr. Taub reportedly had embezzled hundreds of thousands of dollars from his former law firm.<sup>5</sup>

The caller reported that Sherman Taub was the brother-in-law of the home's former administrator, Beryl Zyskind, who was sentenced in early 1996 to 30 months in federal prison for bank fraud and stealing funds from the home's mentally-ill residents.<sup>6</sup> The caller also said the conditions at the home were very poor, suggesting that things might not have changed since the Commission's October 1990 adult home study<sup>7</sup> which found that of 47 homes studied, HI-LI Manor ranked as one of the worst, with serious deficiencies in virtually every area reviewed.

Ocean House Center, Inc., a 125-bed adult home serving individuals with a history of mental illness and licensed by the New York State Department of Health,<sup>8</sup> was incorporated as a *not-for-profit* corporation on January 6, 1995. Its public benefit purpose, as stated in the corporate charter, is "to provide assistance to elderly and mentally infirm individuals and to facilitate the provision of food and shelter for such individuals." Ocean House annually receives approximately \$1.4 million from Supplemental Security Income (SSI) payments and other public funding sources. These funds, less a small set-aside for resident personal spending allowances, are turned over to the home to apply toward the cost of room, board, and routine care. Rental payments from a mental health clinic, a home health care agency and physicians that provide services on-site contribute another \$185,000 annually.

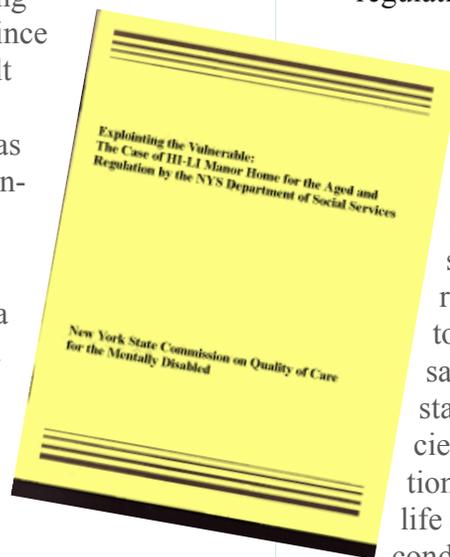
## Scope and Methodology of Review

Concerned about the care and conditions at Ocean House and the public monies used to support the services, the Commission, pursuant to its oversight authority,<sup>9</sup> conducted a comprehensive review and assessment of:

- the home's physical environment;
- the home's management and spending practices;
- performance of oversight responsibilities by the board;
- mental health, home health aide and nursing services furnished by outside providers to the home's residents; and
- Medicaid billings for these outside services and transportation services provided by Ocean House to determine whether they complied with Medicaid regulations and professionally recognized standards.

On May 6, 1999, a review of environmental conditions at Ocean House was undertaken when two Commission investigators along with an inspector from DOH visited the adult home. The DOH inspector reported health and safety hazards in the home, some of which were caused by ongoing renovation work, that were sufficiently serious to temporarily halt construction until certain safety requirements could be met. Commission staff found other serious and widespread deficiencies in many aspects of the home's operation which impacted negatively on the quality of life of the residents. Most prominently, the conditions of the physical environment (in the areas of the building not yet renovated) were deplorable, having been allowed to deteriorate so seriously that the stairs were unstable, the kitchen floor was rotting and bathroom plumbing was often inoperable. However, subsequent visits to Ocean House confirmed that the physical environment had been greatly improved by the extensive renovations.

On May 12, 1999, Commission fiscal staff began an on-site review of the management and finances of Ocean House, covering the period from the home's formation



through mid-1999. This review included an examination of the Medicaid billings for the mental health, nursing and home health care services provided on-site. To review the regulatory compliance of these services, the Commission examined a statistically valid sample of Medicaid-reimbursed claims. The Commission also reviewed all of the Medicaid claims submitted by Ocean House for transporting residents to day treatment programs, physicians and hospitals.

Concurrently, Commission program staff reviewed the mental health, nursing, and home health records of selected residents. Observations of actual service delivery and discussions with providers and residents were also part of the review.

Issuance of the Commission's draft report was delayed until April 3, 2001 because of problems in obtaining routine financial information needed to conclude the investigation and at the request of the District Attorney of the County of New York, which on March 15, 2001, served warrants to search the premises of Sherman Taub and his wife Chana, the Ocean House adult home, and the accounting firm of Brand Sonnenschine LLP. The Commission issued 12 subpoenas because of difficulties

in obtaining records relative to its review to Ocean House officials and third parties. The seizure of records by the District Attorney was authorized after a showing was made to the court that there was probable cause that a specific crimes were committed and that there was a likelihood that evidence could be found at the places searched.

On May 22, 2001, Samuel Fuhrer submitted a 66-page response to a draft of this report on behalf of the Ocean House board of directors. The submission, which also includes 122 pages of exhibits, was prepared by Mel P. Barkan, Ocean House's "special counsel," and approved by the board of directors with the advice of another counsel who was retained to represent the board in their "individual capacities."

Excerpts from the response are included as endnotes to the appropriate sections of this report, along with rebuttal comments by the Commission.<sup>10</sup>

# Commission Findings

This report traces how Sherman Taub and his family profited by using Ocean House as an instrumentality to conduct personal transactions and activities, disregarding the best interests of the not-for-profit corporation. The Commission found that Sherman Taub gained control of Ocean House by using an intermediary to keep secret his involvement when he obtained the home's mortgage and operating license, and then arranged to have persons connected to him through family and business association appointed as corporate officers and directors. So complete was Taub's control that he has been able, as the home's *de facto* operator and mortgage holder, to divert millions of dollars meant for the care of the home's residents to himself and his family.

Taub accomplished this by: charging the not-for-profit corporation \$4.0 million for a mortgage purchased at a cost of \$400,000; indebting the home to a \$733,952 second mortgage, even though the home did not receive the proceeds from this mortgage; loaning Ocean House funds interest-free to his son to develop a related business; using the home's assets to finance other health care facilities; and personally receiving \$35,000 from a contractor who was paid to renovate the home.

The misdeeds against the corporation were often difficult to investigate because they were hidden in a maze of real estate and money-shuffling transactions with related businesses. The victims were not only the corporation and the government whose funds were misapplied, but also, and more importantly, the home's mentally ill residents who were dependent on the home to use its resources to provide the best possible care.

## Ocean House Beginnings

Prior to becoming Ocean House, the adult home was operated as a not-for-profit entity by the Hebrew Academy of the Five Towns and Rockaway (HAFTR) and was known as HI-LI Manor Home for the Aged. The administrator of HI-LI Manor was Beryl Zyskind who, along with his wife, owned the home's property. However, because of frauds perpetrated against the home, Mr. Zyskind was removed as the home's administrator in November 1991, and a proceeding was brought by the New York State Department of Social Services (DSS) to revoke HAFTR's license. Zyskind eventually declared bankruptcy and

defaulted on the home's two mortgages: a \$1.2 million mortgage held by First Fidelity Bank and a \$450,000 mortgage held by HAFTR.

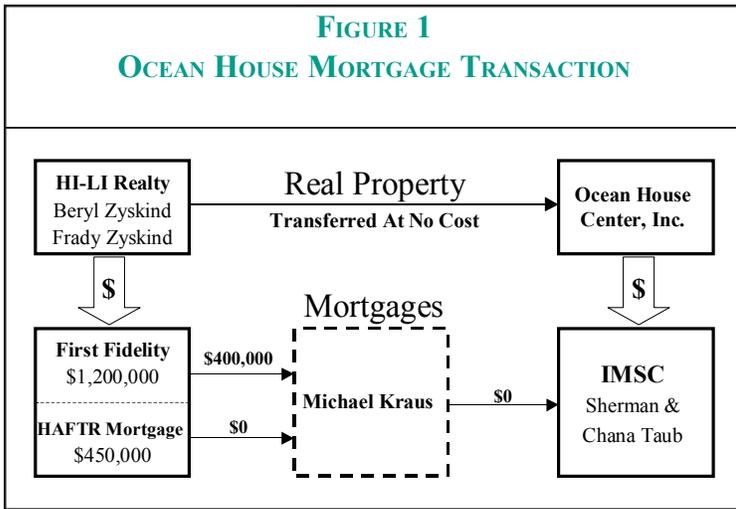
Although DSS revoked HAFTR's license in January 1993 – because of the bankruptcy, the defaulted mortgages and protracted litigation between HAFTR and the Zyskinds – HAFTR was allowed to run the home on a temporary basis for almost two years until a new operator could be found. On November 22, 1994, DSS approved Michael Kraus as the home's "interim operator." The approval was given with the understanding that Mr. Kraus would form a not-for-profit corporation (Ocean House) and would submit an application to DSS for an operating certificate to run the home. Ocean House's incorporators (Michael Kraus, David Friedman, and William Neuman) would serve as the home's initial directors. Concurrent with the DSS approval and as part of the Bankruptcy Court sale of HI-LI Manor, the two mortgages on the property were assigned to Kraus and the deed to the property was transferred directly from the Zyskinds to Ocean House.

### *Taub Masks His Control*

Although representations were made to the state that Michael Kraus and his associates would act to form a not-for-profit corporation to take over the operations of HI-LI Manor, the record shows that the real sponsors of the corporation were Sherman Taub and his family.<sup>11</sup>

On November 28, 1994, Kraus purchased the \$1.2 million First Fidelity mortgage for \$400,000. However, the Commission found that Kraus used Sherman Taub's money to purchase the mortgage with at least \$200,000 coming from a profit-sharing trust titled "Samuel Sonnenschine T/U/A of Sherman Taub Profit Sharing Trust."<sup>12</sup> Mr. Kraus said that the remaining monies came from Taub as well, adding that Sherman Taub "ran the show" and was always "the boss" since it was his money that was used to purchase the facility. This is further evidenced by mortgage documents dated February 8, 1995 which indicated that the mortgage debt on the property was transferred at no cost to International Mortgage Servicing Company (IMSC), a partnership owned by Sherman Taub and his wife, Chana.

**FIGURE 1**  
**OCEAN HOUSE MORTGAGE TRANSACTION**



It appears, therefore, that Sherman Taub used Mr. Kraus to hide his ownership of the mortgage from the bank because, according to a First Fidelity officer, the bank would have had concerns about selling the mortgage to relatives of the defaulting party. Michael Kraus confirmed that Mr. Taub wanted to hide his involvement from the bank because of his brother-in-law’s problems at HI-LI Manor.<sup>13</sup>

To further secure their standing in the not-for-profit corporation, Sherman and Chana Taub entered into a private agreement with Michael Kraus which was not disclosed to the state when the home applied for its operating certificate.<sup>14</sup> The November 29, 1994 agreement stated the Taubs would manage the facility with “sole responsibility for day to day decisions [and] sole authority to hire such personnel and incur such expenses as we deem necessary.” It also called for Kraus to receive an annual fee of \$35,000 “to devote only such time to the operations of the Facility as you in your absolute and sole discretion deem necessary” having the “right to hire such other administrators or operators for the Facility as may reasonably be required with our [Sherman and Chana Taub] prior consent.” Another reason Taub would want to mask his control over the facility was because his misconduct at the law firm presumably would have raised questions during the state’s licensing process about his “character and competence” to run the facility in a “financially responsible” manner (see *infra*, discussion at endnote 5).

***Inflated Mortgage Value***

After acquiring the two Ocean House mortgages through IMSC, Sherman Taub arranged with his son, Jay, Ocean House’s “president,”<sup>15</sup> to inflate the debt on the property to ten times its cost. Despite only paying \$400,000 for the First Fidelity mortgage and obtaining the HAFTR mortgage at no cost, Sherman Taub, as *alter ego* of the

corporation, asserted their worth to be \$4.3 million (\$2.5 million for the First Fidelity mortgage and \$1.8 million for the HAFTR mortgage).

While Mr. Taub asserted that the mortgages were worth this much because *no payments* had been made on them and interest and penalties had accumulated over the years, the Commission learned from third party sources that the Zyskinds had made payments against the mortgage debts and that Sherman Taub had inflated the outstanding balances of both mortgages well beyond what even creditors claimed were owed.<sup>16</sup> For instance, documents obtained from First Fidelity Bank reveal that, at the time of closing, the final “payoff” amount for the \$1.2 million loan was \$1.7 million, not the \$2.5 million assessed by Taub. The HAFTR mortgage, arguably had no value at all. According to HAFTR officials, due to protracted litigation between HAFTR and the Zyskinds, HAFTR concluded the loan was worthless and “wrote it off” its books before 1994.<sup>17</sup> Further, Zyskind’s bankruptcy filings and a letter he sent to First Fidelity indicate that the mortgage was paid off.<sup>18</sup>

**FIGURE 2**  
**VALUATION OF OCEAN HOUSE MORTGAGES**

Original Mortgage Holder	Prior to Assignment	Taub's Cost	After Assignment
First Fidelity	\$1,700,000	\$400,000	\$2,500,000
HAFTR	0	0	1,800,000
Total	\$1,700,000	\$400,000	\$4,300,000

Notwithstanding the vast differences in valuations by the Taubs and the prior mortgage holders, New York courts have uniformly held that when corporate directors participate in the purchase of property with the intention of reselling it to the not-for-profit corporation of which they are directors, the resale must be at *cost*. Additionally, when corporate officers or directors in control of a not-for-profit corporation personally contract with the corporation, they must do so in complete candor and be subjected to strict scrutiny. If the transaction results in profits to themselves, they are accountable to the corporation for the profits realized, irrespective of their motives or good faith.<sup>19,20</sup>

Thus, with his son's help, Sherman Taub was able to use Ocean House as an instrumentality to generate profits well in excess of what he would have been entitled to had he acted in the best interest of the not-for-profit corporation, as required by law.<sup>21</sup>

In May 1995, Taub modified the terms of the consolidated mortgages when the board allegedly approved a plan whereby the \$4.3 million mortgage (owned by IMSC) would be reduced to \$4.0 million, the interest rate fixed at five percent, and the term extended to 35 years if Ocean House agreed to make every effort to prepay the mortgage principal.

## Profits from Mortgage

### *80 Percent Return on Investment*

An analysis of Ocean House's payments (Figure 3) showed that, in less than five years, nearly \$2.0 million in cash flowed from Ocean House to IMSC, Taub's mortgage company. This represented 30 percent of Ocean House's income and gave IMSC an annual rate of return of 80 percent on its \$400,000 investment, without even considering that well over \$2.0 million was still due.

**FIGURE 3**  
**MORTGAGE PAYMENTS MADE TO IMSC**

Fiscal Period Ending	Mortgage Payments
August 31, 1995 (nine months)	\$193,025
August 31, 1996	\$331,023
August 31, 1997	\$467,167
August 31, 1998	\$468,344
August 31, 1999	\$503,478
<b>Total</b>	<b>\$1,963,037</b>

### *Substantial Mortgage Prepayments*

Included in the above figures are mortgage prepayments. According to its mortgage agreement with IMSC, Ocean House should have been making monthly payments of \$20,187.51 over a 35-year period. However, the Commission found that monthly payments have nearly doubled, averaging about \$40,000 in recent years. Notwithstanding that not-for-profit corporations are required under the Not-For-Profit Corporation Law (N-PCL) §508 to rein-

vest incidental profits back into their charitable mission, Ocean House made over \$800,000 in excess mortgage payments over the five-year period from November 1994 to August 1999.<sup>22</sup>

During this same period, Ocean House was being cited by DSS/DOH for numerous deficiencies in violation of the adult home regulations. Among the findings of non-compliance cited by DSS/DOH in its November 1996 and November 1997 inspection reports were: missing or cracked floor tiles, water-damaged ceiling tiles, broken bathroom fixtures, cracked mirrors, bathtubs worn down to metal and problems with the home's sprinkler system. Yet, during this period, the home was making substantial payments and prepayments on the inflated mortgage, rather than using the funds to improve the home's condition. In February 1998, the home borrowed \$1.4 million from M & T Bank of which \$700,000 was earmarked to renovate the home.<sup>23</sup>

### *Personal Expenses Charged to Mortgage*

Payments made to IMSC were not typical mortgage payments. Instead of making a monthly payment to IMSC, either Sherman or Jay Taub would often write checks from Ocean House's accounts to third parties to pay for personal credit card charges, cellular phone bills, car lease payments, and other personal expenses, and then record these payments as a reduction to the mortgage. An analysis of the two-year period ending August 31, 1998, found numerous personal payments totaling \$141,056.<sup>24</sup>

**FIGURE 4**  
**PAYMENTS FOR PERSONAL EXPENSES**

Category	Amount
American Express	\$20,350
Telephone	\$20,459
Automobile payments	\$17,803
Automobile insurance	\$9,646
Astoria Pines Holding Corp.*	\$52,500
Petty cash/other	\$20,298
<b>Total</b>	<b>\$141,056</b>

\*These funds relate to a nursing home project partially owned by Chana Taub and Rosemarie Weingarten (Ms. Weingarten is an Ocean House board member).

## ***Profiting from Tax-Exempt Status***

Finally, there is reasonable cause to believe that the home's payments on the inflated mortgage were facilitated, in part, by its not-for-profit status. In 1995, the home was granted a real estate tax exemption by the City of New York from future property taxes, effectively freeing up approximately \$54,000 annually. This should have resulted in more money becoming available to promote Ocean House's charitable purpose. However, it appears these funds flowed instead to IMSC through increased mortgage payments. The failure to reinvest incidental profits in accordance with the N-PCL §508 suggests that Ocean House had assumed the character of a private corporation, raising questions regarding the legitimacy of Ocean House's tax-exempt status.

## **Profits from Additional Mortgages**

### ***Real Estate Tax Mortgage***

#### **Taub's Obligate Home to Mortgage without Loaning Funds**

Further personal gains were generated through an arrangement whereby Jay Taub, as "president" of Ocean House, signed a mortgage loan with his parents' mortgage company (IMSC) obligating the home to a debt of \$733,952 in exchange for an *oral agreement* to pay off delinquent real estate taxes. However, IMSC never fully paid off the delinquent taxes. It was only after IMSC began to receive mortgage payments from Ocean House that it, in turn, began to make some payments to reduce the home's real estate taxes. Even so, most of the taxes remained unpaid for over three years until Ocean House paid them off with funds it subsequently borrowed in 1998 from M&T Bank (see below).

Sherman Taub claims he took on certain risks in this arrangement; yet, in the absence of a written contract obligating IMSC, the verbal assumption of the tax lien may not be legally enforceable. Indeed, IMSC's books raise similar doubt because, although the mortgage receivable from Ocean House was recorded, there is no corresponding entry for the \$733,952 real estate tax liability IMSC supposedly assumed.

#### **Taub's Profit from Tax Reductions**

Most of the payments which reduced the tax lien were not made directly to the City of New York, but rather to an "expediter" who purchased tax credits at a discount. It appears that the Taubs set up this real estate tax mortgage

arrangement to produce hidden profits on these tax reductions. The Commission analyzed the cash flows pertaining to Ocean House's payments on the \$733,952 mortgage, along with the real estate tax payments actually made by Taub's company, and concluded that as of February 2000 the Taubs received a net cash profit of \$92,300 from the mortgage/tax transactions and stand to receive an additional \$50,000 after a final settlement from the expediter.<sup>25</sup>

### ***M & T Bank Mortgage***

#### **Ocean House Covers IMSC's Assumed Tax Debt**

In February 1998, Ocean House obtained a \$1.4 million mortgage from M&T Bank to fund various renovations at the home. To secure the debt, the bank sought assurances that all delinquent real estate taxes would be paid and, indeed, the bank placed \$700,000 of the loan in escrow to cover the back taxes.<sup>26</sup> Thus, even though IMSC had agreed to pay off the delinquent taxes as of December 1994, it wasn't until Ocean House obtained this bank loan over three years later that the tax obligation was actually settled.<sup>27</sup>

#### **Diversion of Bank Funds**

Although \$700,000 of the M&T Bank loan was placed by the bank into a title insurance company escrow account for payment of back City of New York real estate taxes, the title company only paid \$270,546 to the city to liquidate the debt. Another \$130,000 was distributed by the title company directly to Astoria Pines Holding Company, \$282,500 to an escrow account administered by Ocean House's "attorney/assistant secretary" Benjamin Hager, and a \$32,321 residual amount (including interest on the escrow deposit) to Ocean House. From the second escrow account, \$60,000 was paid to Astoria Pines, \$36,500 was paid to Sherman Taub, and \$186,000 to an "expediter" who reduced the interest/penalties portion of Ocean House's tax liability by purchasing credits from other property owners who were entitled to property tax refunds from the city. Thus, even though the purpose of these M&T Bank proceeds was to pay off back taxes, through a series of money shuffling transactions, portions of the money totaling \$226,500 were transferred to Sherman Taub and his nursing home project.

## **Illegal Loans to Jay Taub**

N-PCL §716 prohibits loans to officers and directors. The Commission found, however, that Jay Taub obtained a series of interest-free loans from Ocean House for himself and/or his home health care business, Future Care

Health Services, Inc.<sup>28</sup> Further, Jay Taub obtained the loans without board approval by using his check-signing authority over the Ocean House bank accounts.

Based upon a review of Ocean House’s books and records and its accountant’s work papers, the following loans and repayments totaling \$24,500 were made:

**FIGURE 5**  
**INTEREST-FREE LOANS TO JAY TAUB/FUTURE CARE**

<b>Date</b>	<b>Loan</b>	<b>Repayment</b>	<b>Balance</b>
1/08/98	\$ 5,000		\$ 5,000
1/22/98	\$ 5,000		\$10,000
1/28/98	\$ 3,000		\$13,000
2/04/98	\$ 3,000		\$16,000
2/13/98	\$ 5,000		\$21,000
2/18/98		\$ 2,500	\$18,500
3/11/98		\$ 6,000	\$12,500
4/20/98		\$ 3,000	\$ 9,500
5/29/98		\$ 2,500	\$ 7,000
6/24/98	\$ 3,500		\$10,500
6/29/98		\$ 3,500	\$ 7,000
7/09/98		\$ 5,000	\$ 2,000
8/21/98		\$ 2,000	0
<b>Total</b>	<b>\$24,500</b>	<b>\$24,500</b>	

These loans due to Ocean House remained outstanding from January 8, 1998 through August 21, 1998, during which time the loan balance was as high as \$21,000. A portion of these funds was invested in Future Care, which has been providing home care services to Ocean House residents since December 1997.

It was not until after the Commission began its review that the board became aware of this activity and took steps to address the problem. According to board minutes dated January 12, 2000, the board became aware of the loan activity because of the Commission’s “inquiries about certain payments and repayments involving Jay Taub” for the year ended August 31, 1998. The board was advised by “special counsel” that this should be disclosed and dealt with officially at the next board meeting. However, the minutes reflect that only \$14,500 of the \$24,500 was actually disclosed. The board resolved that no future loans be made to any officer or director and that Jay Taub be instructed to pay Ocean House ten percent interest on the \$14,500.<sup>29</sup>

## Sham Not-For-Profit Corporation

### *Relationships Weaken Board Impartiality*

Not-for-profit corporations are unique in that directors are to be guided by the principle of shared accountability to the mission of the corporation. It is commonly understood that the primary responsibility of the board of directors of a not-for-profit corporation is to protect the interests of that corporation. Further, if directors or officers have neglected, failed to perform, or otherwise violated their duties in the management or disposition of corporate assets under their control, or wrongfully acquired or wasted corporate assets, they can be compelled to account for their conduct [N-PCL §720(a)]. Thus, they owe to the corporation a duty of loyalty, avoidance of conflicts of interest, fairness in any corporate dealings, giving priority to the corporation when corporate opportunities arise, and disclosing pertinent information. Ocean House, however, did not receive the requisite protection from its directors or officers. Instead, it was hard to distinguish this corporation from a private business.

Ocean House was first incorporated on January 6, 1995. The corporation initially had three directors. However, because DSS regulation [18 NYCRR 485.4 (e)] requires a minimum of seven directors, the board was increased to that level according to board minutes dated May 1995. The Commission’s review found that except for one former and one current member, all of the board directors are related through family or business association to Sherman Taub. This included Taub’s brother-in-law, his sons Jay and Michael and their respective fathers-in-law, as well as Sherman Taub’s business associates and/or their relatives.

Given these relationships, and thus their conflicting interests, the ability of board members to provide independent, unbiased oversight to act in the best interests of the corporation was compromised.<sup>30</sup>

### *Questionable Authenticity of Board Minutes and Actions*

The Commission found that corporate records contained many contradictions raising questions about the legitimacy of board approvals and actions. Most notably, the Commission questions the authenticity of board minutes that purportedly document important board approvals.

According to board minutes signed by David Friedman, a meeting was held on May 10, 1995 during which the three initial directors allegedly voted on several critical actions including: adding four new members to the

board, electing officers,<sup>31</sup> and approving the IMSC mortgages. Yet, the other two directors (Michael Kraus and William Neuman) both told Commission staff that they never attended any board meeting, did not know some of the other members, and never approved the mortgage payment terms. Indeed, William Neuman did not know “who gave the mortgage” to Ocean House. The statements by Kraus and Neuman that they never attended a board meeting not only call into question the validity of board minutes but also, and more fundamentally, whether there was a board in place to properly conduct corporate business. The Commission noted other inconsistencies in board records, further raising concerns about the legitimacy of the board and its actions:

- Annual reports filed by Ocean House with the IRS and DOH indicated that Jay Taub was the president and secretary of Ocean House. Yet, N-PCL §713(a) and Ocean House’s by-laws prohibit the same person from simultaneously occupying both offices.
- Certain board minutes and documents relating to the M&T Bank loan were signed by Jay Taub as secretary; however, all other minutes indicate that David Friedman was the secretary. Interestingly, when Commission fiscal staff first visited the home, the minutes signed by secretary Friedman were not there. Initially, Sherman Taub said that board minutes were “maintained” by Ocean House’s attorney, Jerome Levy. However, about three weeks later, the missing minutes were provided to Commission staff by another attorney, Benjamin Hager.
- At about the same time that the missing board minutes were provided to the Commission, Ocean House paid each board member \$1,000 with checks signed by Jay Taub. This was the first time board members were paid and no board minutes indicate that a meeting took place to approve such compensation.

**FIGURE 6**  
**BOARD OF DIRECTORS**

Board Member	Duration	Relationship
Michael Kraus	11/94 - 9/97	Son-in-law of Otto and Rosemarie Weingarten. The Weingartens and the Taubs are business partners in the Astoria Pines Nursing Home project.
David Friedman	11/94 - Present	Father-in-law of Michael Taub (son of Sherman and Chana Taub).
William Neuman	11/94 - 9/97	Not related.
Jay Taub	5/95 - 1/00	Son of Sherman and Chana Taub
Samuel Fuhrer	5/95 - Present	Father-in-law of Jay Taub.
Emanuel Pollak	5/95 - Present	Brother-in-law of Sherman Taub
Rosemarie Weingarten	5/95 - Present	Business partner in Astoria Pines Nursing Home project.
Samuel Sonnenschine	9/97 - Present	Business associate of Sherman Taub and Ocean’s House accountant.
Martin Schrieber	9/97 - Present	Partner with Sonnenschine in accounting firm that does accounting work for Ocean House.
Michael Taub	1/00 - Present	Son of Sherman and Chana Taub.

- Minutes for a special board meeting held on January 2, 1998 and signed by Jay Taub as secretary reportedly approved the M&T Bank loan. Yet, the minutes list only three members as “being all the Trustees of the Corporation” - David Friedman, Samuel Sonnenschine and Jay Taub - even though other minutes indicate that there were seven members at that time.
- Minutes for a special meeting dated May 3, 1999 and signed by Jay Taub as secretary indicate that all seven members were present to approve an additional \$500,000 loan from M&T Bank. However, on May 27, 1999, member Martin Schrieber told Commission staff that he never attended any board meeting.
- Federal IRS Form 990 for the years ending August 31, 1997 and 1998 list the Ocean House board as consisting of only three members: David Friedman, Samuel Sonnenschine and Jay Taub. Similarly, the DOH cost reports for those two years list these same individuals

as making up the board. These respective filings with federal and state governments are in contradiction to the board minutes which indicate there were seven members during those periods.

- Certain documents submitted to M&T Bank are signed by Benjamin Hager as assistant secretary of the corporation, but no minutes provided to the Commission indicate that he was ever appointed an officer of the corporation.
- Ocean House's application to DOH to become a Medicaid transportation provider listed Richard Graber as a member of the board of directors. There is no evidence in the minutes provided to the Commission that Mr. Graber was ever elected to the board. Mr. Graber was a member of the Brand Sonnenschine LLP accounting firm.<sup>32</sup>

### ***Discrepancies in Notarized Mortgage Documents***

A notary public is commonly used to certify that a known person signed a written instrument on a specified date. The Commission found evidence that several notarized documents relating to Ocean House's mortgages were not executed on the date specified.

- The \$4.0 million mortgage provided to the Commission was certified as being executed by Jay Taub as "president" of Ocean House on December 1, 1994. Yet, according to board minutes, Jay Taub was not elected to the board until May 1995 and was not made president until 1996. Indeed, Jay Taub told Commission staff that he was not involved with the home until mid-1995.
- Similarly, the Ocean House \$733,952 real estate tax mortgage was notarized as being signed by Jay Taub as president of Ocean House on December 1, 1994. However, the real estate tax liability did not reach the \$733,952 level until May 1995. Both of the above mortgages were notarized by Ocean House's attorney, Benjamin Hager.<sup>33</sup>
- The two mortgage assignment documents which transferred ownership of the First Fidelity and HAFTR mortgages from Michael Kraus to IMSC were both notarized by Sherman Taub. Although the notarizations indicated that these documents were signed on February 8, 1995, Mr. Kraus told the Commission that he signed the documents in November 1994, the day after he closed on the mortgages. Also, Sherman Taub

acted inappropriately in notarizing these documents (which were filed with the Queens County Clerk) because he was a party in interest.<sup>34</sup>

### ***Misrepresentations to State Licensing Agency***

Sherman Taub's misuse of Ocean House's not-for-profit status to generate personal profits stands in stark contrast to representations made to DSS in 1994 and 1995 when Mr. Kraus sought approval to take over the operations of HI-LI Manor. Based on documents filed with DSS, the state was misled into thinking Ocean House would not be a money-making business. In 1994, when Kraus was approved as the temporary operator of HI-LI Manor, it was with the understanding that within a few months a not-for-profit corporation (Ocean House) would be formed to operate the home. As previously mentioned, it was never disclosed that Sherman Taub was acting behind the scenes in establishing this corporation and acting as the home's *de facto* operator.

Moreover, in August 1995, when DSS requested clarification of the financial consideration associated with the transfer of the facility, it was provided with the following response by Ocean House's attorney, Jerome Levy:

As part of the Bankruptcy Court sale of Hi-Li Manor, the mortgage to the property was assigned to Michael Kraus, who subsequently assigned the mortgage to International Mortgage Servicing Company, while the deed was transferred to Ocean House Center, Inc. *without any additional consideration beyond the price paid by International Mortgage Servicing Company for the mortgage.* (Emphasis supplied)

The response to DSS claimed that the liability on the mortgage amounted to \$1,950,000, suggesting that IMSC paid this amount for the mortgage. This was misleading because IMSC's cost was only \$400,000.<sup>35</sup> A subsequent submission by Ocean House to DSS in December 1995 caused further concern because the debt was now asserted to be \$4.0 million plus an additional \$733,952 for real estate taxes. When DSS again asked for clarification, Mr. Levy's law firm responded that the prior descriptions were incomplete and in part inaccurate. In support of the higher figures, the new letter purported to "represent a complete description of the mortgages and liens." Yet, this second letter was also inaccurate because it asserted that the outstanding sums on the mortgage totaled \$4.3 million; incorrectly stated that the "liability for such real estate taxes [\$733,952] has not been converted into a second mortgage;"<sup>36</sup> and again did not disclose that Taub purchased the mortgage for \$400,000.

## ***Ocean House Documents Contradict Taubs' \$4.0 Million Mortgage Valuation***

As discussed *supra*, an Ocean House submission to DSS dated August 1995 indicated the mortgage totaled \$1.95 million. The Commission found other early documents indicating that Ocean House initially valued the mortgage below \$2.0 million, rather than the \$4.0 million it ultimately booked on its financial statements. Ocean House's initial filing with the IRS requesting exempt status dated February 8, 1995 listed the mortgages on the property at \$1.95 million. William Neuman told Commission staff that he rotely signed this document at the direction of Sherman Taub.

Other documents contradict Sherman Taub's \$4.0 million valuation, namely, the property transfer tax filings for the City of New York and the State of New York. Both sets of documents, which are dated January 5, 1995, list the total transferred mortgage balances at \$1.8 million. Interestingly, these documents are not only signed by Beryl Zyskind but also are signed on behalf of Ocean House by David Friedman and notarized by Sherman Taub.<sup>37</sup>

## **Ocean House Leases**

The leasing of office space at Ocean House is a lucrative arrangement for both the adult home and outside providers of health care services. Ocean House benefits by receiving rental income which comprises about 12 percent of its total revenue. Outside providers benefit by being able to provide services on-site, allowing them to earn a steady stream of income through high-volume services to the home's residents.

However, the rental of space in an adult home to provide health care services paid for by a federal program must, under federal statute [42 U.S.C. §1320a-7b(b)], not be an indirect way of inducing the adult home-landlord to make referrals. Accordingly, on-site service providers should not rent premises of a size that is not necessary or in excess of fair market value. Rentals inconsistent with these norms create the appearance that the payments may be a pretext for giving money to the adult home for its referrals. Examples of suspect arrangements include rental amounts for space not used or where prior rental arrangements were at no cost or nominal sums as an accommodation between the parties for the benefit of the residents.

Based on the current leases, Ocean House is expected to receive \$185,046 per year in lease payments from outside

providers. As presented below, the majority comes from two sources; Episcopal Health Services, Inc. on behalf of St. John's Episcopal Hospital, South Shore (St. John's) which runs a mental health clinic on-site, and Americare Certified Special Services, Inc., a certified home health care agency that provides nursing and personal care services.<sup>38</sup>

**FIGURE 7**  
**OCEAN HOUSE LEASES**

<b>Lessee</b>	<b>Annual Rent</b>
St. John's Hospital	\$120,276
Americare HHC	\$35,874
Future Care	\$6,300
Dr. Sevetar	\$8,400
Dr. Saini	\$14,196
<b>Total</b>	<b>\$185,046</b>

The Commission found several problems with Ocean House's lease arrangements which resulted in the receipt of excessive rental payments from on-site service providers.

### ***Lease for Space not Used - \$19,800***

Ocean House entered into two leases with St. John's Hospital, the largest outside provider. One lease was for the mental health clinic which is located on-site and one lease was for a medical habilitation clinic which was also supposed to be located on-site, but was never developed. Based on a review of both leases, the Commission found that the hospital was paying for space never used. Of eight rooms being leased by the hospital, six related to the medical habilitation clinic that was never developed. Additionally, with regard to the mental health clinic run by St. John's, the Commission determined that certain common areas within the home were not being utilized in accordance with the lease. For instance, St. John's pays for the "shared use" of an administrative office. The lease calls for St. John's to have use of this office for four hours per day. However, interviews of St. John's staff revealed that this office is used, at most, one hour a week.

The lease for office space with Americare is equally questionable. For example, Americare pays for a "waiting area" in the basement of the building, even though no such area exists. Instead, the area referred to in the lease is the basement hallway. Also, Americare's lease contains a provision for two parking spaces adjacent to the home for use by its employees. Americare pays \$200 per month for these parking spaces; however, there is no parking lot next to the home.

## ***Payment for “Management Services” not Provided - \$29,520***

St. John’s Hospital and Americare also pay Ocean House to provide “management services” to their programs, such as purchasing supplies, cleaning the office space, marketing, providing a clinical liaison for coordinating services and providing clerical support. The Commission, however, found that many of these services were either not rendered or were already being provided by Ocean House staff as part of their normal duties in operating the home.

According to Ocean House staff, the “management services” required under the two leases for coordinating services were performed either by Ocean House’s administrator or case manager. However, DSS regulation [18 NYCRR 487.7(g)] requires the home to provide case management services which includes “assisting the resident in making arrangements to obtain services needed to maintain...the resident’s health or mental health” and are thus already paid for through the SSI rate. Regarding the “management services” provided for the medical habilitation clinic, because no clinic was ever developed by St. John’s, no management services were ever provided. Yet, St. John’s continued to pay Ocean House for these services.<sup>39</sup>

## **Transportation Services**

In late 1997, Ocean House applied to DOH to become a Medicaid-approved transportation carrier for its residents. It stated in the application that the home which serves “approximately 125 senior citizens” sought to become a licensed transportation provider “in order to provide safe, convenient and efficient transportation for its residents, who have no other means of transportation, to physician and clinic appointments and adult day care programs.” The application further stated that “residents have had to rely on various ambulette and livery services which have frequently failed to provide reliable transportation for its residents.” The home’s application was approved by DOH in January 1998.

The Commission conducted a review of all 3,391 Medicaid transportation claims totaling \$72,416 made by Ocean House for the period April 1, 1998 through April 30, 1999. The Commission attempted to verify the propriety of the claims by cross-checking Ocean House’s claims to corroborating documents of other providers. Based on its review, the Commission is recommending that 794 claims, representing \$15,934 or 22 percent of the amount billed to Medicaid be disallowed because there was no corresponding documentation from the other providers

that the Ocean House residents attended programs or visited physicians on the dates claimed.<sup>40</sup>

## **Other Findings**

### ***Possible Kickback***

In the process of analyzing the activity in IMSC’s bank accounts, the Commission found a deposit from Accessible Development Corporation (Accessible), the contractor hired to perform extensive renovations at Ocean House.<sup>41</sup> On December 4, 1998, a \$35,000 check from Accessible was deposited into IMSC’s checking account and recorded as a capital contribution, suggesting that it was not an ordinary business transaction. On that same day, Accessible received a \$98,817.75 wire-transfer from Ocean House as a progress payment for on-going renovation work at the home. Interestingly, also on the same day the contractor wrote the \$35,000 check, IMSC issued a \$35,000 check to a Crown Heights charitable organization, Keren Ten Yad, which helps to pay the wedding costs of needy families. At the very least, these actions create the appearance of a kickback.<sup>42</sup>

### ***Commingling of Resident Funds***

During the Commission’s review of resident funds, it was noted that Ocean House was not making timely transfers of the personal needs allowance (PNA) portion of the residents’ SSI payments into a separate account. Social Services Law §131-o and 18 NYCRR 487.6(a)(3) prohibit PNA funds from being commingled with the operator’s funds and from becoming an asset of the operator. Also, PNA funds are to be kept separate and distinct from any other account and must be distributed to the resident within two banking days of receipt [18 NYCRR 487.6(b)(2)]. However, transfers of funds at Ocean House were routinely delayed about a month, causing resident funds to be commingled with agency funds in violation of Social Services Law. This practice often left resident fund accounts under-funded by approximately \$10,000. In addition, resident fund accounts were not reconciled each month as required by 18 NYCRR 487.6(c)(10).<sup>43</sup>

## **Possible Accountant Misconduct**

### ***Lack of Auditor Independence***

An accountant acting in the role of auditor is required by professional standards to diligently perform procedures sufficient to render an independent opinion on the fairness of the entity’s financial statements. In offering his/her opinion, the independent auditor is responsible not

only to the agency's board of directors, but also to third parties that rely on the auditor's report. In the case of Ocean House, the Commission questions whether the audits performed by Brand Sonnenschine LLP and A.J. Goldberger, CPA met professional standards.

The firm of Brand Sonnenschine LLP performed the first audit of Ocean House for the partial year ended August 31, 1995. The Commission believes that the firm could not legitimately sign off as an "independent auditor" due to relationships maintained with the Taubs and, thereby, should have been precluded from expressing an audit opinion.<sup>44</sup>

Not only did the CPA firm's partner, Samuel Sonnenschine, and Sherman Taub have a close relationship as business partners, but Mr. Sonnenschine also is the trustee of Mr. Taub's profit-sharing trust which funded the mortgage acquisition from First Fidelity Bank.<sup>45</sup> Yet, the firm rendered a "clean" audit opinion on the initial financial statements of Ocean House establishing the mortgage values which have been carried forward into subsequent year financial reports.

Although A. J. Goldberger issued audit reports for the three succeeding years, September 1, 1995 through August 31, 1998, Brand Sonnenschine LLP's staff continued to perform the audit fieldwork while Mr. Goldberger merely took over as the reviewing engagement partner. It is worth noting that Mr. Goldberger practiced accounting in the Manhattan office of Brand Sonnenschine LLP; was provided office space rent-free; and, Mr. Goldberger did not charge Ocean House for his work.<sup>46</sup>

### ***Lack of Audit Evidence and Report Disclosure***

The Commission reviewed Brand Sonnenschine LLP's work and found that the firm's audit program documents to assure an adequate examination of long-term debt were left blank. Thus, its working papers lacked documentation of audit work on the mortgages even though the mortgages constituted a material figure in the financial statements. The failure to document audit procedures leads the Commission to conclude that basic standards of auditing, such as gathering sufficient evidential matter, and adequately planning and supervising the engagement, have been violated.

The audits performed by both Brand Sonnenschine LLP and A.J. Goldberger also were deficient regarding the \$733,952 mortgage. The Commission's review of the auditors' files found neither supporting agreements evidencing the supposed assumption of real estate tax debt by IMSC in exchange for a \$733,952 note, nor a

copy of the executed note.<sup>47</sup> Furthermore, this transaction is reflected on the financial statements simply as a note payable, failing to disclose the underlying indebtedness for real estate taxes and the risk of foreclosure.

### ***Lack of Deficiency Reporting***

There is also a question why no "management letters" were issued by the auditors describing "reportable conditions" of deficiencies in internal controls as required by Generally Accepted Auditing Standards. The Commission found significant deficiencies that it believes should have been reported to the board of directors, including weaknesses in the controls over mortgage payments to IMSC and other weaknesses such as the interest-free loans and the commingling of personal funds held on behalf of the residents.

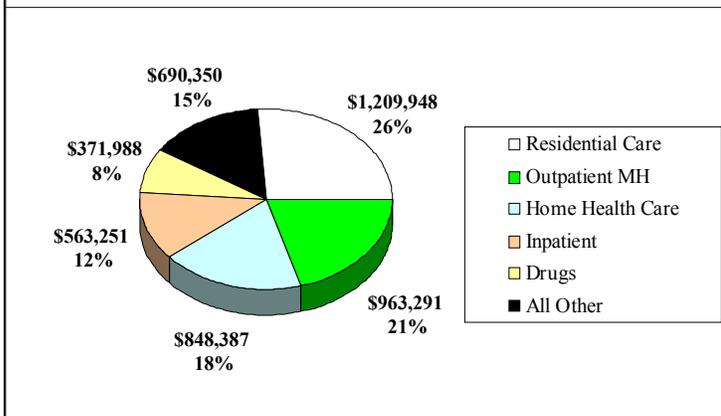
As previously discussed, the Taub family appeared to have complete control over the Ocean House payments, to the benefit of themselves and family-owned companies. Jay and Sherman Taub, using their authority to prepare and sign Ocean House checks, had wide discretion over loan payment amounts, the timing of the payments, the extent of prepayments, and even the degree to which such payments would cover their personal expenses. The Commission concludes that this was a significant weakness in internal controls that should have been communicated by the auditor to the board.

# Cost of Care

As part of its review, the Commission examined the total cost of care and services provided to Ocean House residents for calendar years 1997 and 1998. The overall amount of funds going into services for residents, while considerable, is not easily identifiable because outside agencies supply uncoordinated services to residents both on-site and in the community through multiple funding sources. These include: SSI-funded residential care and Medicaid-funded outpatient mental health care, home health care, hospital inpatient care, medication, other physician services (provided primarily on-site), nursing services, and transportation. Notably, the funds that go directly to Ocean House for the care of its residents were found to represent only about one-fourth of the overall expenditures for services to its residents.

For each of the two years reviewed, the total cost of care and services for Ocean House’s 125 residents averaged approximately \$4.6 million, or about \$37,000 per resident annually (Figure 8).

**FIGURE 8**  
**ANNUAL COST OF CARE**  
**\$4.6 MILLION**



The residential portion, mainly paid for by the SSI “Level II Residential Care” rate, constituted approximately 26 percent of the total. An adult home receives the Level II rate because, in addition to room and board, it is required

to provide other services, such as case management, medication management and personal care services. In 1998, the downstate rate for Level II Residential Care was \$818 per month or \$9,816 per year per resident.<sup>48</sup>

The next largest category of service for residents was for mental health outpatient clinic services, which accounted for 21 percent of the total resident costs. On average, for the two years reviewed, mental health clinic services cost approximately \$963,000 per year. One of the providers, St. John’s Hospital, began providing services to Ocean House residents in 1996 after Sherman Taub reportedly approached the hospital because the home was not satisfied with the services provided by the previous on-site provider. An official from the previous clinic said, however, that St. John’s approached the home and entered into a contract advantageous to the home and the hospital where both stood to see their revenues increased. St. John’s charges Medicaid \$141.45 for each individual or group session, a sum considerably higher than the fees allowed for individual and group sessions for the “Article 31” clinic which it replaced.<sup>49</sup> St. John’s, in turn, leased space from Ocean House at almost ten times the amount that the previous clinic provider was paying.

Home health care comprised the next largest cost, accounting for 18 percent of overall expenditures for the two years. Home health care (nursing and home health aides) was provided to about 80 percent of Ocean House residents and Medicaid was charged \$848,000 per year. Yet, to avoid “double billing,” home health care services at an adult care facility cannot duplicate or replace those services which the home is required by law or regulation to provide. However, as discussed later in this report, the Commission found that the majority of services provided to Ocean House residents and billed to Medicaid supplanted the services that Ocean House was required by regulation to provide.

Since not all residents receive all of the services enumerated below, the Commission calculated the average cost of the various discrete services by resident in 1997 and 1998:

**FIGURE 9**  
**ANNUAL COST OF CARE BY CATEGORY**

<b>Category</b>	<b>Total Cost</b>	<b>Recipients</b>	<b>Annual Cost per Recipient</b>
MH capitation	\$373,849	16	\$23,366
Hospital inpatient care	\$563,251	53	\$10,729
Residential care	\$1,209,948	124	\$9,757
Home health care/nursing	\$848,387	100	\$8,484
Outpatient MH services	\$963,291	128	\$7,526
Skilled nursing home	\$38,603	6	\$6,434
Case management	\$46,470	9	\$5,163
Drugs	\$371,988	134	\$2,776
Physician services	\$120,273	136	\$884
Transportation	\$107,114	123	\$874
Miscellaneous	\$4,041	60	\$67

# Mental Health Services for Residents of Ocean House

Nearly all residents of Ocean House receive outpatient mental health services either on-site or in the community. St. John's Hospital provides on-site individual and group clinic services to approximately 80 residents, six days a week. Another 16 residents are enrolled in the New York Office of Mental Health (OMH) Prepaid Mental Health Program. This program is staffed by a clinician from Creedmoor Psychiatric Center who is present at Ocean House three days a week and conducts individual therapy sessions for his clients along with a social hour once a week. A psychiatrist from Creedmoor visits the home weekly and reviews medications for the individuals in this program. Additionally, some residents attend the nearby continuing day treatment program and/or the alcoholism rehabilitation program, both run by St. John's Hospital.

As a general rule, the type, purpose, and frequency of outpatient services are agreed upon in a treatment plan devised by the provider and the recipient. In part to establish consistent minimal expectations, each type of outpatient mental health program (e.g., clinic services, continuing day treatment, partial hospitalization programs) is governed by regulation (14 NYCRR 587). The regulation asserts the right of recipients to "clinically appropriate" care and treatment in settings which are suited to their needs.

Clinic services are supposed to be designed to advance the purpose of outpatient clinic treatment, i.e., to reduce symptoms in an individual, enhance functioning, and, provide ongoing support. To this end, the regulations specifically identify those services which *must* be offered in each program type and those additional services which *may* be offered, such as, case management, crisis intervention and clinical support services. Any other services provided must receive prior written approval from OMH.

As is clear from the listing of services prescribed in regulation for clinic programs (Figure 10), clinic treatment modalities focus on verbal therapy, medication therapy and education, with the addition of assessment and referral. Activity therapies such as movement and arts and crafts groups and groups whose primary purpose is socialization or recreation are not included as appropriate clinic services and, thus, cannot be billed to Medicaid.

**FIGURE 10**  
**OMH REGULATIONS FOR CLINIC SERVICES**  
**14 NYCRR 587 & 588**

## **Billable Services**

- Health Screening and Referral
- Individual and Group Verbal Therapy
- Medication Therapy and Education
- Symptom Management
- Psychiatric Rehabilitation Readiness, Determination and Referral

## **Non-billable Services**

- Socialization Groups

In contrast, activity groups are appropriate in continuing day treatment programs for adults. Recreation is not a Medicaid-billable service for adults in either a clinic or a day treatment program (14 NYCRR 588). The Commission acknowledges that recreational and social activities add to the quality of life of residents. However, these services are required by 18 NYCRR 487.7(h) to be provided by the adult home and should not be billed to Medicaid through a mental health clinic.

Clinic programs receive reimbursement for regular, crisis and collateral visits, each consisting of, at minimum, a 30 minute face-to-face session between the therapist and the recipient and/or collateral parties. A brief visit is at least 15 minutes, but not more than 29 minutes in duration and, a group therapy visit must last at least 60 minutes and serve from two to 12 recipients [14 NYCRR 588.6 (a)]. All clinic services must be documented in the individual's treatment record. St. John's receives \$141.45 per session for each person receiving either individual or group therapy.

## ***Medicaid Claims Improperly Billed - \$307,888***

The Commission's review revealed that the majority of clinic services provided by St. John's were either recreational or social in nature and, therefore, should not have

been billed to Medicaid. The Commission reviewed a statistically valid sample of 364 Medicaid-reimbursed claims for the period January 1997 to April 1999. The sample included 218 clinic, 139 continuing day treatment and seven alcohol treatment claims. The review revealed 119 instances (55 percent of all clinic claims) where clinic services did not comply with OMH regulation, thereby rendering them ineligible for Medicaid reimbursement. The error rate found in the sample translates into a potential disallowance of \$307,888 when projected to St. John's total universe of claims.<sup>50</sup>

**(a) Billings for social and recreational activities.**

Of the 119 recommended disallowed billings, 105 relate to the billing of clinic group visits which were not clinical in nature. These clinic groups consisted of activities with little or no verbal component which were either primarily recreational or social in nature, as documented in the description provided by St. John's, and as verified through several Commission observations. This conclusion is perhaps best demonstrated by illustrations and descriptions noted on page 17.<sup>51</sup>

**(b) Billing for undocumented sessions**

OMH regulation (14 NYCRR 587.18) requires a visit to be fully documented in order to receive reimbursement. In ten instances, St. John's billed for a regular, group or brief clinic visit, but failed to include a progress note in the individual's medical record to support the claim.

**(c) Billing for services in the absence of a treatment plan**

OMH regulation (14 NYCRR 587.16) requires a treatment plan for each client which includes his/her diagnosis, treatment goals and objectives, plans for the provision of additional services to support the recipient outside of the program and the criteria for discharge. In two instances, the Commission found no treatment plan. In addition to the deficiencies described above, the Commission found that treatment planning was problematic in many of the plans reviewed (see p. 18).

**(d) Billing for unauthorized services**

OMH regulation [14 NYCRR 588.6 (c)] requires OMH authorization to continue to provide recipient services in excess of 40 clinic visits annually. In the Commission's sample, the necessary authorization was absent in two instances.

## ***Continuing Day Treatment - Rate Code and Service Duration Concerns***

In contrast to the Commission's findings related to the inappropriate clinic group services, the Commission's limited review at the off-site continuing day treatment program revealed activities and treatment planning in compliance with regulations. Continuing day treatment programs are designed to provide treatment to maintain and enhance a consumer's functioning and skills and keep him/her in the community. These programs have an additional goal that provides them a broader selection of treatment venues, i.e., to develop self-awareness and self-esteem through the exploration and development of strengths and interests. Regulations for this treatment modality specifically permit supportive skills training and activity therapy (14 NYCRR 587.10).

Generally, consumers attend a continuing day treatment program three to five times a week for several hours each day. St. John's is paid \$75.61 per participant for each day of continuing day treatment service regardless of the amount of time spent at the program. In contrast to this rate, the clinic rate is \$141.45 for as little as 15 minutes of individual therapy or one hour of group therapy. This reflects the different intent and intensity of the programs when properly implemented.

The St. John's continuing day treatment program operates seven days a week. Group activities begin at 10:00 AM, although participants may come earlier for coffee and socializing. At the time of the Commission's visit, the schedule of programming covered four hours daily, including lunch. The Commission questions why the continuing day treatment program is billing Medicaid using a rate code indicating that individuals are receiving five hours of service.<sup>52</sup>

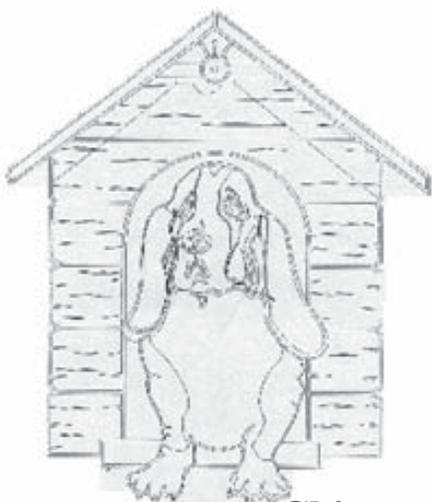
## ***Double Billings for Psychiatrist Services***

The Commission also found that two psychiatrists, who were salaried employees of St. John's hospital, were billing Medicaid separately for services provided to Ocean House residents. The claims were mainly for medication management and were duplicate billings because their costs were already reimbursed to the hospital through its \$141.45 clinic Medicaid rate. For the period January 1999 to May 2001, the two physicians improperly billed Medicaid \$68,282 for 2,523 claims.

## Examples of Socialization Activities

On each Thursday St. John's offered an art group. During two sessions in October 1999 and January 2000 when Commission staff made direct observations, residents signed an attendance sheet, listened to a 2-3 minute introduction by the facilitator, and chose markers and a coloring sheet – in October a Halloween picture and in January pictures of animals. Recipients colored the sheets, and, when finished, were given a glass of soda and potato chips. There was little conversation among the participants beyond “pass the red marker,” and most residents finished the activity within 15-20 minutes. The goals of these sessions, as described by St. John's included, but were not limited to: developing eye-hand coordination, promoting feelings of self-worth and pride, encouraging leisure time activities, and enhancing interaction and socialization.

**For the art group and all other groups,  
Medicaid was billed \$141 per participant**



**Chips and Soda Included**

Each Thursday afternoon in October and January, St. John's conducted a talent show for residents of Ocean House as part of a “social enhancement” activity. On the two occasions when Commission staff observed this activity, residents were encouraged to entertain the other residents by singing or dancing. All of the singing was done acappella, with the audience joining in on familiar tunes. The dancing consisted of single residents moving to music. The purpose of the social enhancement clinic group, as stated in the St. John's program description, was to encourage social interaction through the active participation of its members. This description noted that appropriate social enhancement activities also included pool tournaments, dominos, checkers, and chess.

On the four Wednesdays in October 1999 and on two Wednesdays in January 2000 a clinic group activity was a trip to the mall. Residents were transported to and from the mall and escorted as necessary. Notes indicated that several participants were totally independent and simply used the “clinic group session” as a means of transportation. The stated purpose of this activity was to provide an opportunity to enhance socialization and engage in recreational activities that could reduce stress and tension. Similarly, on two Fridays in October, the clinic group went to the movies.

In October, St. John's staff conducted “social” groups 17 times (four mornings each week at 10:00 AM) and on 18 occasions in January. According to the description of the group, any session could include group discussion, parties, games and group projects. The purpose of the group, as the name implies, was to promote socialization among the participants.

## **Examples of Inappropriate Treatment Plans**

### **Reliance on broad, generalized treatment objectives, often with little individualization.**

AC was to comply with medications and weekly therapy sessions, discuss her problems in therapy and reduce her isolation. Typically, while objectives related to medication compliance issues were common, medication education was rarely mentioned. The lack of individualized objectives left several serious issues unaddressed, such as one resident's unwillingness to use the bathroom or another resident's need to attend to his weight problem.

### **Failure to identify effective methods for reaching objectives.**

SF's treatment plan noted his need to decrease isolation by attending group activities three times each week. In a 21-month period, SF attended seven group sessions. While notes document his failure to attend, there is no discussion of methods to encourage/motivate SF's interaction with others beyond talking about the problem with his therapist.

### **Failure to revise treatment plans.**

Two case records in the sample continued the same treatment plan for well over a year. EL's treatment goals were not modified from August 1997 through February 1999. Similarly, BZ's original treatment plan written before 1997 was not in the record. The record listed his treatment objectives as "same" through August 1999.

### **Failure to include an Intensive Case Manager in treatment planning.**

There is no evidence in the treatment record that the "Intensive Case Manager" (whose name did not appear in the record reviewed by Commission staff) plays or has been requested to play any part in treatment planning or service coordination for SB. In addition, the treatment record for SB reviewed by the Commission contained no notes from the private psychiatrist who reportedly sees her weekly at Ocean House. No rationale was provided for a medication change in early 1998.

# Home Health Care Services

The effects of serious and persistent psychiatric disability, frequent or lengthy stays in hospitals or psychiatric centers and the isolation and stigma associated with mental illness combine to make many residents of Ocean House unable to manage the activities of daily living without assistance. Consequently, many residents require prompting and assistance with personal hygiene, grooming, bed-making and laundry.

State regulation (18 NYCRR 487.7) requires the operator of an adult home to provide residents with room, board, housekeeping, supervision, personal care, case management and activities. Also, the operator is required to assign “a minimum of 3.75 hours of personal services staff time per week per resident ...distributed throughout the day and evening shifts.”

Thus, for example, in an adult home of 125 residents, such as Ocean House, the operator needs to employ the equivalent of 12.5 employees to assist residents.

The Commission found, however, that Ocean House had employed only one personal care aide. Ocean House’s administrator asserted that most of the residents of the home were self-sufficient and only a few needed personal care services. However, contrary to this claim, nearly one-half of the residents at Ocean House (61/125— as of January 2000) received personal care assistance through home health aides employed by an outside provider which billed these services to Medicaid.

## *Duplicate or Supplanted Services*

It is a fundamental principle that providers participating in the medical assistance program not bill Medicaid for services where there is another payment source, since Medicaid is the payer of last resort. Conduct conflicting with this principle is considered an “unacceptable practice” [42 U.S.C. §1396a (a)(25); 18 NYCRR 515.2] because the services are “unnecessary.” To prevent any misunderstanding of this policy, DSS issued administrative directives on March 27, 1992 and April 30, 1992 clarifying that community-based programs must not duplicate or replace those services which the adult home facility is required by law or regulation to provide. The

**FIGURE 11**  
**DSS REQUIREMENTS FOR**  
**HOME CARE SERVICES AT ADULT HOMES**

<b>Responsibility</b>	<b>Adult Home</b>	<b>Home Health Care</b>
Making/changing bed	✓	
Light cleaning bed & bath	✓	
Resident’s laundry	✓	
Bathing - some assistance	✓	
Bathing - total assistance		✓
Grooming/dressing - some assistance	✓	
Grooming/dressing - total assistance		✓
Routine skin care	✓	
Simple tests to monitor medical conditions		✓

directives specify the respective responsibilities of the adult home and home health care provider and delineate the role of each to assure unduplicated service and reimbursement in meeting the care needs of adult home residents. The distinctions between those tasks that the adult home should perform and those that are the responsibility of home health aides, working under the supervision of a registered professional nurse, and thus are eligible for Medicaid reimbursement are presented in Figure 11.<sup>53</sup>

The Certified Home Health Agency (CHHA) under contract with Ocean House since June 1, 1999 is Americare Certified Special Services, Inc. (Americare). Previously, the CHHA providing home health aides to Ocean House was First to Care Home Care, Inc. (First to Care). In each case, the CHHA subcontracted with Future Care Health Services, Inc. (Future Care) to provide home health aide services for Ocean House residents. Future Care is co-owned by Jay Taub and Abraham Lichtschein (see endnote 28).

As stated above, home health aides work under the supervision of a registered professional nurse. Both First to Care’s and Americare’s registered nurses stated that they determine the duties, length of time needed to accomplish them (usually one or two hours) and the

frequency with which (number of times each week) the duties are to be performed. These recommendations for service are reviewed and authorized by a physician. The nurse also directly performs certain nursing procedures required by some residents, e.g., changing dressings, monitoring blood glucose levels and administering insulin and injections of long-acting anti-psychotic medications.

The duties of the home health aides working at Ocean House during the report period, as per their assignment sheets, are divided into four general categories:

- *Household care*, including making and changing beds, cleaning the bathroom after client's use, laundry, vacuuming and dusting;
- *Personal care*, including assistance with toileting, bathing, shampooing, shaving, oral hygiene, dressing and skin care (applying lotion);
- *Nutrition and diet*, including grocery shopping, meal preparation and assistance with feeding; and,
- *Special treatments/instructions*, which include reminding clients to take medication, assisting with range of motion exercises, assisting with ambulation and transfers, and assisting with wound and ostomy care.

### ***Medicaid Claims Improperly Billed - \$420,017***

The Commission reviewed a statistically valid sample of 379 Medicaid-reimbursed claims submitted by First to Care for the period from October 27, 1997 to April 30, 1999. During this period, First to Care billed Medicaid

for 26,593 home health care and nursing services and was reimbursed \$1,176,664. Most of the claimed services were for home health care services billed for one to two hours at \$17 per hour. Nursing care services were generally billed in the amount of \$81.94 for one, and occasionally twice that amount for two, visits per day.

The sample consisted of 293 home health care visits and 86 nursing visits. Of the 379 visits reviewed, the Commission found 285 instances where the home health care visits supplanted the adult home's personal care services. A review of a sample of weekly assignment sheets and interviews with several home health aides revealed that the vast majority of their work was related to housekeeping and personal care. All of the assignment sheets reviewed required the aide to assist the resident with hygiene and grooming, make the bed, do his/her laundry and tidy the bedroom and bath. Several aides told Commission staff that they were required to serve meals in the dining room to all residents, not just their clients.

The Commission additionally found 10 instances in its sample where there was no evidence the services were provided. Consequently, these 295 services are not eligible for Medicaid reimbursement. The remaining 84 claims were for nursing services and were found to be in compliance with Medicaid billing requirements. The error rate found in the sample translates into a potential disallowance of \$420,017 when projected to the total amount claimed by First to Care.

# Recommendations

Based on the findings of this report, the Commission has or will refer the findings of this investigation to the following agencies for follow-up actions within the scope of their respective jurisdictions.

## Referrals

- *NYS Department of Health*: for revocation of the home's operating certificate and removal of the home's board for failure to demonstrate financial responsibility and requisite character and competence to operate Ocean House, failure to keep adult home funds and resident funds separate as required by law, and failure to comply with requirements of the Not-For-Profit Corporation Law; to ensure that there is a properly reconstituted board of directors (including appointment of a Commissioner designee) which will provide independent oversight of this not-for-profit facility; to recoup improper Medicaid payments made to Ocean House, St. John's Episcopal Hospital, First to Care Home Care, Inc., and two psychiatrists; and, to monitor home health care agency services to adult home residents to assure that they do not duplicate or supplant services that adult homes are required by regulation to provide.
- *NYS Office of Mental Health*: to conduct an inspection and certification review of the clinic program operated by St. John's Hospital; and to explore with the Commission how to best serve persons with mental illness at Ocean House, using a habilitation model to promote growth and recovery. Additionally, because the residents of Ocean House represent a "captive" population for outside service providers to maximize Medicaid billings, a cost-effective approach needs to be explored with DOH to provide adult home residents a managed care model of service delivery wherein a primary care physician takes responsibility for the provision and coordination of necessary medical services.
- *State Education Department*: for possible violations of regulations relating to the practice of public accountancy.
- *Department of Law*: for violations of the Not-For-Profit Corporation Law, including civil recoveries from board members and officers for misappropriation of the corporation's resources in the form of excess mortgage payments, interest-free loans, and distribution of cash assets to related party companies; and for possible violations of the Penal Law relating to the filing of written instruments containing false information.
- *District Attorney's Office, County of New York*: for possible crimes within the scope of its jurisdiction, including the misuse of Ocean House's tax-exempt status as a facade for operating a private corporation, effectively evading the payment of New York City real estate, corporate and sales taxes; the use of Ocean House as an instrumentality to siphon millions of dollars of public funds for the benefit of Sherman Taub and his family; and the diversion of bank loan proceeds for purposes other than stated in the bank loan agreements.
- *U.S. Attorney for the Eastern District of New York*: for investigation of a possible criminal conspiracy to misappropriate funds from a federal assistance program [18 U.S.C. §666(a)(1)(A)]; and possible improper remuneration to induce referrals [42 U.S.C. §1320a-7b(b)] under the medical assistance program.
- *U.S. Internal Revenue Service*: for possible violations related to the transfer of a tax-exempt facility's financial resources to private individuals rather than preserving them for the corporation's exempt purposes; and for assessment of penalties against Ocean House's board and management for participating in "excess benefit transactions."

## Statutory Change

- The Commission recommends the enactment of legislation in New York State similar to 18 U.S.C. §666(a)(1)(A) to make it a crime to knowingly convert or intentionally misapply public monies.

# Endnotes

- <sup>1</sup> *Report to the Legislature, Delivery of Mental Health Services to Individuals in Adult Home Facilities*, Office of Mental Health, April 1999.
- <sup>2</sup> *Adult Homes Serving Residents with Mental Illness: A Study of Conditions, Services, and Regulation*, New York State Commission on Quality of Care for the Mentally Disabled, October 1990.
- <sup>3</sup> *Exploiting the Vulnerable: The Case of HI-LI Manor Home for the Aged and Regulation by the NYS Department of Social Services*, New York State Commission on Quality of Care for the Mentally Disabled, May 1992.
- <sup>4</sup> *Id.*
- <sup>5</sup> Mr. Taub resigned as tax partner from Tenzer, Greenblatt, Fallon & Kaplan amid allegations he improperly charged to clients and to the law firm hundreds of thousands of dollars of personal expenses, including some of the costs of his son's wedding (*New York Law Journal*, June 29, 1994). On August 8, 1996, following charges that he "committed serious professional misconduct arising out of his billing practices" Sherman Taub, during the pendency of a disciplinary proceeding before the Departmental Disciplinary Committee, First Judicial Department, Appellate Division of the Supreme Court, voluntarily resigned from the practice of law in the State of New York in lieu of disbarment. The court papers point out that Sherman Taub resigned on July 1, 1994 and had made substantial restitution. In surrendering his law license, Sherman Taub admitted "that he committed most of the acts underlying the charges and that he could not successfully defend himself against the merits of the pending charges."
- <sup>6</sup> *See*, U.S. v. Zyskind, 118 F.3d 113, 116 (2d Cir. 1997).
- <sup>7</sup> *Adult Homes Serving Residents with Mental Illness*.
- <sup>8</sup> In 1997-98, the Congregate Care Facilities Program which oversees adult homes was transferred from DSS to DOH.
- <sup>9</sup> Effective August 12, 1994, the Commission was given oversight authority under N.Y. Mental Hygiene Law §45.10 for adult homes in which 25 percent or more of the residents receive or have received services from a mental hygiene provider. The Commission is authorized to investigate complaints regarding the quality of care and services and to conduct programmatic or financial reviews of these homes and their mental hygiene service providers.
- <sup>10</sup> Mr. Fuhrer is the father-in-law of Jay Taub who is Sherman Taub's son. Mr. Barkan has represented Ocean House and Sherman Taub throughout the course of the Commission's investigation. Ocean House in its response attempts to dispute the Commission's findings that the not-for-profit corporation was misused as an instrumentality of Sherman Taub to commit wrongdoing by arguing that he was a smart businessman who took a troubled facility out of bankruptcy, improved its physical plant and programs, and is entitled to a "substantial profit" because he assumed all the risks. The Commission finds the board's response unpersuasive since, when Ocean House became indebted to the Taubs' mortgage company, Sherman Taub was controlling the bargaining on both sides of the table, in his not-for profit capacity as *de facto* operator and his for-profit role as creditor. Through his complete domination, he was able to abuse the home's not-for-profit status, personally enriching his family from public monies in the form of grossly inflated mortgage payments.
- <sup>11</sup> Ocean House's response claims that Sherman Taub did not mask his involvement from DSS, since a week after Ocean House applied for its operating license his role was disclosed in a lawsuit brought by a former Ocean House employee who was fired allegedly at the direction of DSS. Ocean House produced a May 1995 affidavit of the employee which states that she was fired by Sherman Taub, who along with Michael Kraus were the "new owners." This argument is refuted, however, by an October 11, 1995 affidavit in the same lawsuit by the respondent, DSS' director of its metropolitan office, who said Sherman Taub was simply a business associate of Michael Kraus and "is not an interim operator or an applicant for a permanent operating certificate...and that the permanent operator of Hi-Li is to be a not-for-profit corporation." Furthermore, an affidavit by Michael Kraus, dated October 12, 1995, fails to disclose Taub's control, simply stating "Sherman Taub was acting as a consultant to me in my operation of the facility." Ocean House also claims that Taub's involvement was disclosed in an October 10, 1995 application for an assisted living program license at the home. The

Commission has reviewed this document and finds that Taub was only disclosed as an interested party because he held the mortgage on the property.

Ocean House's production of secondary documents, not part of the certification process, as proof that Sherman Taub's role as operator was known to the state is misleading.

<sup>12</sup> The bank account for this trust was opened 13 days prior to Kraus' purchase of the mortgage.

<sup>13</sup> Ocean House admits in its response that "[b]ecause he was Ziskind's [sic] brother-in-law, Taub and all the professionals he engaged were concerned that Village Bank and perhaps HAFTR would not deal with him out of fear that he might simply be a front for the continuation of Ziskind's [sic] interest...it was decided that Michael Kraus...would act as Taub's nominee in purchasing the mortgages."

<sup>14</sup> Ocean House asserts that there was no legal requirement in applying for an operating certificate to make the state aware of the secret agreement. This statement appears to be at odds with the board's contention that Taub's "intimate involvement with Ocean House was clearly disclosed." The purpose of the state's certification requirement is to assure that adult homes are run by competent, engaged concerned operators of good moral character. For this reason, the responsibility for adult home operation may not be transferred to another person without the prior written approval of the state [18 NYCRR 485.5 (g)]. The Ocean House board has failed to comply with this requirement since, according to Messrs. Kraus and Friedman, Taub controlled Ocean House, including decisions about the repayment of the mortgage. The Commission found the agreement during a review of Kraus' files at a nursing home where he was employed but, despite repeated requests for it, Kraus failed to turn over a copy until a subpoena was issued.

<sup>15</sup> According to board minutes, Michael Kraus was Ocean House's president from its incorporation on January 6, 1995 until January 8, 1996 when Jay Taub was elected president. Although the restated mortgages were notarized as being signed by Jay Taub as president on December 1, 1994, these mortgage documents were backdated and thus the actual signing date is unknown. *See also, infra*, discussion at p. 9.

<sup>16</sup> After becoming aware from the Commission's draft report that payments had been made against the outstanding balances on the mortgages, Ocean House responded with a series of reasons why the Taubs' mortgage company is entitled to payments beyond what it paid for the outstanding mortgages. Rather than

exercise its fiduciary duty of due care to the not-for-profit home, the board appears to continue to subordinate the interests of the adult home to the interests of the mortgage company.

<sup>17</sup> During the Commission's prior investigation of HI-LI Manor, it obtained records from the earlier years of this mortgage showing numerous interest payments to HAFTR totaling \$275,000. Such payments when compounded would negate about one-half of Taub's \$1.8 million valuation.

In its response, Ocean House disputes that \$275,000 was paid on the HAFTR mortgage by mistakenly confusing it with payments from a hidden bank account totaling \$274,000 benefitting a HAFTR executive, his family and others, as discussed in the Commission's HI-LI report (*see supra*, endnote 3).

<sup>18</sup> Interestingly, Taub's law firm at the time represented Zyskind in his bankruptcy proceedings. Thus, on one hand, filings by his firm represent the value of the HAFTR mortgage as zero; yet, once IMSC acquired it, he valued it at \$1.8 million.

Ocean House states that the Commission's reliance on "statements of a convicted felon [Beryl Zyskind], is absurd" and is an "attempt to discredit Ocean House...to ignore the truth."

It is important to note that the litigation between HAFTR and Zyskind involved numerous intertwined claims and counter-claims. The settlement of litigation, as structured, left Zyskind's sister and brother-in-law with the HAFTR mortgage free-of-charge. The only party whose interests appeared lacking during the negotiations on this transaction was Ocean House.

<sup>19</sup> N.Y. Not-For-Profit Corporation Law (N-PCL) §715 and case law interpretations.

<sup>20</sup> Ocean House's response states that there was no obligation to transfer the adult home facility at Sherman Taub's cost to the "newly" formed not-for-profit corporation. While it correctly states that Sherman Taub was not listed as a director of Ocean House, clearly Michael Kraus was a director and acted on Taub's behalf to purchase the mortgages and gain control of the home's property and operations, ultimately charging the home ten times the original cost. The essence of N-PCL §715 and its interpretations is that those who sit on a board have a fiduciary duty to the not-for-profit corporation and any self-dealing to the detriment of the corporation is wrong. Moreover, it is a well-settled principle that whenever directors participate in a scheme to purchase property with the intention of

reselling it to the corporation of which they are directors, they must resell at cost.

Ocean House further states that at its beginnings as an “empty shell” corporation it had “no negotiating position” and “had nothing to lose and everything to gain” by acquiring the property at the inflated amount. It asserts that “the conveyance of the adult home facility as a going concern was not an opportunity that either was available to that shell corporation or to which it had any legal right or expectation.” The Commission believes that this reasoning ignores the value of the operating certificate granted by the state as a requirement to operate an adult home business. The State granted an interim certificate to Michael Kraus with the understanding that he would form the not-for-profit Ocean House to run the home. Thus, this not-for-profit corporation did have certain expectations and legal rights which are further strengthened by case law prohibiting personal profits, irrespective of motives or good faith even in situations when the corporation is financially unable to purchase property itself.

<sup>21</sup> N-PCL §715 and case law interpretations.

<sup>22</sup> Ocean House underscores in its response that for each mortgage prepayment there was a corresponding increase in Ocean House’s equity. These payments, it claims, were “reinvestments in Ocean House.” This reasoning is flawed because mortgage prepayments do not add to a corporation’s equity since there is a corresponding decrease in available cash. Moreover, the cash could have been used to improve the home and obviate the need for costly construction loans.

<sup>23</sup> See, *infra*, discussion at p. 6.

<sup>24</sup> Ocean House says that the Commission unfairly criticizes Taub’s personal expenses paid by the adult home and “de-emphasizes” that such repayments were used to pay down the mortgage. It states that the “unorthodox method” of making payments was done “only for the sake of convenience.” Yet, such circuitous financial arrangements involving Ocean House and other entities underscore that Taub used the adult home and its not-for-profit status as a facade for operating a private business corporation.

<sup>25</sup> The Ocean response suggests that Taub’s assumption of the real estate tax mortgage obligation was beneficial to Ocean House claiming he received a “modest 7.7% per annum profit [on his investment] over a five-year period prior to the final payment of all the taxes.” However, this calculation does not properly consider the timing of cash outlays by Taub. The Commission

calculated the annual rate of return at 50 percent. The difference in the calculations is because the board assumes Taub’s outlay of cash was up-front when, in fact, much of it did not occur until after he received payments on the real estate tax mortgage from Ocean House.

<sup>26</sup> To further secure the bank’s position and lien on the home’s property, IMSC subordinated its \$4.0 million mortgage and Sherman Taub personally guaranteed the M&T Bank mortgage.

<sup>27</sup> When the M&T Bank funds were used to pay off the back taxes, the payments were recorded on Ocean House’s books as payments against the IMSC \$733,952 mortgage. Ocean House did not pay the same taxes twice; however, it did pay interest to IMSC for funds that were never borrowed from it.

<sup>28</sup> Jay Taub and Abraham Lichtschein each have a 50 percent share in Future Care. Mr. Lichtschein is the son-in-law of Samuel Sonnenshine who has been an Ocean House board member since September 1997, a partner in the accounting firm for Ocean House, and is a business partner of Sherman Taub.

<sup>29</sup> Ocean House’s response states the “Jay Taub’s 1998 loans totaling \$24,500 were improper,” and notes that \$10,000 in loans, out of the total \$24,500, were not discovered or confirmed prior to Ocean House’s receipt of the Commission draft report. Subsequently, he was fined \$1,000 and ordered to repay interest at ten percent on the \$10,000. Ocean House is confident that such “transgressions” will not be repeated by any other officer or director.

<sup>30</sup> Ocean House contends that the Commission’s conclusion that members of the board are too close to Sherman Taub is unwarranted because such connections in and of themselves do not violate the law as long as the board acted for the benefit of the corporation, which, it claims, has had an “incredible turnaround.” Its response states that all of the major decisions were known, approved and ratified by the board after receiving full explanations of the transactions in question and Taub’s role in them. Simultaneously, it points out efforts underway to attract new members “not as aligned with Taub,” and that Mr. Schreiber, a partner of Brand Sonnenshine LLP which has done the accounting work for Ocean House, has been replaced and that Mr. Sonnenshine will be replaced in the near future. Also, the board will reportedly “more carefully monitor cash flow and mortgage prepayments [to the Taubs].”

Had the board been paying close attention to the debt being placed on the corporation and been conscious of its fiduciary obligations, it is difficult to believe it would have allowed Sherman Taub to put into place a scheme to divert millions of dollars of public funds intended for the care of its vulnerable residents to himself and his family. The fact that the board seems willing to affirm some earlier actions (e.g., approval of the inflated mortgage) does not cloak those actions within the standard of due care which must be exercised during the decision-making process, not after the fact. Based on the totality of this report, the Commission finds unpersuasive the board arguments that it exercised due care and that the positive results in improving the facility's property justify the magnitude of the return the board contends the Taubs are entitled to receive.

<sup>31</sup> According to the May 1995 minutes, board members Kraus, Friedman, and Neuman were appointed to the respective positions of president, vice-president/secretary, and vice-president/treasurer. Sherman Taub, who was not a board member, was appointed as a vice-president.

<sup>32</sup> The Ocean House response did not specifically address several of the discrepancies noted in this section of the report. It notes that they are the result of "sloppy paperwork." Most significantly, left unexplained is the finding that two of the initial board members (Kraus and Neuman) did not approve the mortgages. The present board of Ocean House reports that the mortgages have been approved and that it is now exceedingly careful about keeping formal minutes and other paperwork. Yet, the N-PCL places a heavy responsibility on a board to act in the public interest and does not shield members from scrutiny from irrational or even misguided decisions where board members are not disinterested parties.

<sup>33</sup> The Ocean House response reports that the restated mortgages signed by Jay Taub were wrongly backdated by Benjamin Hager, whose services it no longer employs.

<sup>34</sup> Under the N.Y. Penal Law §175.40, a notary may be guilty of a Class E Felony for issuing an official written instrument knowing that it contains false information.

<sup>35</sup> Ocean House asserts that it does not believe that the state was misinformed regarding the amount paid for the mortgage. It claims that there was no significance attached to the \$1.95 million mortgage liability other than that, as of late April or early May 1995, this sum was thought to be the amount the new entity could afford to pay (at seven percent interest) in order to be

perceived as "financially viable" by the licensing agency.

<sup>36</sup> The Ocean House response claims that Mr. Levy's letter contained a typographical error, i.e., the word "not" should read "now" and that the clause should read "liability for such real estate taxes has now been converted into a second mortgage."

<sup>37</sup> The Ocean House response alleges that the origin of the \$1.8 million figure is unknown as it was written on the transfer tax forms after the documents were signed and notarized.

<sup>38</sup> On May 31, July 12, and July 31, 2001, St. John's Hospital submitted responses to the draft of this report. These responses were in addition to two previous responses submitted in October and December 2000 which addressed issues raised by the Commission's review regarding the leases with Ocean House, the hospital's billing of mental health services to Medicaid, and questionable separate billings by two salaried hospital clinic psychiatrists for services to Ocean House residents.

<sup>39</sup> St. John's does not dispute that the space leased at Ocean House for the medical habilitation clinic was never used because the program was never developed. It contends, however, that the Commission did not cite any evidence of "improper or fraudulent intent" on the part of the hospital in entering into the leases, that the leases were at fair market value, and, at its first opportunity (delayed due to its impending bankruptcy) when the hospital realized the habilitation clinic was not feasible, the lease agreement was rejected.

With regard to the lease for space related to the mental health clinic, St. John's also does not dispute that certain space and services were not utilized. The hospital contends that prior to operating the clinic "educated guesses" were made about what space and services were needed. However, after the clinic commenced operations, "the Hospital realized that some of the space and services were not necessary, but the Hospital was locked into a lease and service agreement at that point."

The Commission's report does not claim St. John's fraudulently entered into the leases. Rather, it points out that leasing space at an adult home can be a very lucrative arrangement for both the adult home and outside providers of health care services and that every effort must be taken to comply with federal standards. Leasing unused space, however, is a common form of inducing referrals in the health care field and is

presumptive evidence of a suspect arrangement. Regarding the space and services not used by the mental health clinic, the Commission notes that the hospital had been providing services at Ocean House for nearly a year and one-half prior to signing the lease agreement. Therefore, the hospital's contention that this was a "new enterprise" and that educated guesses had to be made on its space needs is not entirely accurate.

<sup>40</sup> Ocean House states that "poor record-keeping" prevented it from submitting legitimate claims to Medicaid for transportation services. Although it claims that \$5,000 was voluntarily repaid prior to the issuance of the Commission's draft report, Ocean House can document only that \$3,818 was repaid because the "records, which Jay Taub used to make the adjustment are no longer in his possession. They are in the possession of the Manhattan District Attorney." Ocean House agrees to repay the remaining balance to Medicaid once it can determine the precise amount that is owed.

<sup>41</sup> Through September 7, 1999, Accessible Development Corporation was paid \$831,204 for work done at Ocean House.

<sup>42</sup> The Ocean House response states that "[b]ased on information provided by Taub" the alleged kickback was actually a loan from the contractor to Taub's mortgage company. Reportedly, Taub has not repaid the loan because Ocean House and the contractor are now suing each other.

<sup>43</sup> Ocean House admits that its procedure for handling resident funds "does not technically comply with applicable requirements" but asserts its "process was done for administrative convenience." To ensure that funds are remitted to residents in a timely manner, "Ocean House is changing its practice to record and segregate such funds immediately as each check arrives." Its response states that there were instances when the separate account was over-funded; however, this short-lived over-funding does not excuse the defects but rather highlights another manner of improper commingling. The Ocean House response does not address the finding about failure to perform monthly reconciliations, although it states a bookkeeper will be hired to handle resident funds accounting.

<sup>44</sup> According to professional standards, a certified public accountant performing an audit must be independent from the auditee in order to avoid impairing the integrity and objectivity of the process. Independence is a fundamental requirement of an auditor as evi-

denced by its prominence in Generally Accepted Auditing Standards (General Standard No. 2) as well as the Code of Professional Conduct (Rule 101-Independence).

<sup>45</sup> The AICPA Rules of the Code of Professional Conduct state that a member or a firm of which he is a partner shall not express an opinion on financial statements of an enterprise if during the period of the engagement he or his firm was a trustee of any trust which had acquired any direct or material indirect financial interest in the enterprise (Interpretation 101-1).

<sup>46</sup> Ocean House responded that it assumes that accountant Goldberger acted appropriately when he signed the certification of its financial statements and places a high degree of trust and confidence in the Brand Sonnenschine accounting firm. Nevertheless, Ocean House is now engaging a different independent accounting firm.

<sup>47</sup> The auditor's files included an unsigned mortgage note containing a five percent interest rate which was the rate reported in the first four financial statements. Mr. Sonnenschine informed the Commission that there was a large error in the reporting of this \$733,952 mortgage because the interest rate was actually seven percent. This resulted in a material misstatement in the first four audited financial statements requiring a prior period adjustment well in excess of \$100,000.

<sup>48</sup> As of August 1, 2001, an individual residing in an adult home in New York City, Nassau, Suffolk, Westchester and Rockland counties is entitled to a yearly Supplemental Security Income (SSI) benefit of \$11,592, or in the rest of the state, \$11,232. Of these respective amounts, the adult home operator receives \$10,164, or \$9,804 for residential care, and the resident receives a \$1,428 (\$119 per month) allowance for his/her personal needs. Homes may also receive payments above the SSI amount from "private-pay" residents who have income or resources that make them ineligible for SSI benefits.

<sup>49</sup> In 1996, an Article 31 regular clinic visit was billed at \$60 per patient for a session lasting at least 30 minutes; a group session, which should last at least 60 minutes, was billed at \$21 for each patient in attendance.

<sup>50</sup> At a September 21, 2000 meeting, Commission staff presented its findings on improper claims to St. John's officials and representatives from its law firm, Garfunkel, Wild & Travis, P.C. The firm's December 5, 2000 response indicated that some of the missing notes and documentation to support duration of visits had been found. The Commission examined these

records and has adjusted its recommended disallowance accordingly. With respect to billings for social and recreational activities, the response noted that St. John's "believes those services were necessary to reduce patient symptoms, improve functioning and provide ongoing support to patients."

<sup>51</sup> St. John's strongly disagrees with the Commission's characterization of services as social and recreational in nature. It maintains that all the clinic services were "necessary clinical services provided in accordance with the sound medical judgement of staff psychiatrists and other providers." It contends that its services are based on sound medical judgment because "groups in a social and recreational format with goal-directed activities (such as craft groups) are successful in encouraging patient participation and achieving treatment goals." The hospital additionally notes that "with regard to the treatment plans and all of the other clinical issues raised by the Commission, the Office of Mental Health recently completed a survey of the Clinic and issued a renewal of its operating certificate."

St. John's does not dispute that "social and recreational" groups were provided as part of its clinical services. The Commission acknowledges that these type of activities add to the quality of life of residents, *but they are not billable services to Medicaid*. With regard to St. John's operating certificate, it should be noted that after the Commission alerted OMH to its preliminary findings, a December 2000 inspection was conducted. OMH found that the clinic *did not meet minimum standards and the clinic was denied recertification* because, *inter alia*, the adult home program was not provided adequate psychiatric oversight to meet the needs of the residents for medication therapy and because treatment plans were not always individualized or written by professional staff. The hospital was asked to provide a plan of correction within 15 days. On March 1, 2001, the clinic was advised that the plan was accepted. On April 19, 2001, OMH conducted a follow-up inspection which found that St. John's has stopped holding "activity" groups and was now only conducting verbal therapy groups. The clinic was granted a tier 3 certification (lowest category in the OMH system) for a three-month period, May 1–July 31, 2001.

<sup>52</sup> St. John's responded and the Commission acknowledged that the hospital is paid \$75.61 per participant for each day of continuing day treatment services regardless of the amount of time spent at the program. Therefore, there was no adverse impact on the Medicaid program. It further stated that this concern has been addressed, because the hospital revised its billing procedures to use the four-hour billing rate code rather than the five-hour rate code.

<sup>53</sup> On June 1, 2001, First to Care Home Care submitted a response to the Commission's draft findings along with an enclosure documenting the procedures it uses to provide care to Ocean House residents (i.e., signed physician order specifying duration and frequency of services, comprehensive nursing assessment, and plan of care). First to Care contests the Commission's finding concerning duplicate billings stating, *inter alia*, that it did not engage in "prohibited behavior" because "during a period when the residents of the adult home were receiving home health aide services through our agency, the adult home was violating state regulations by not employing a full complement of personal service staff." It asserts that the state should seek to recover public funds from Ocean House for its inadequate or nonexistent services. First to Care claims the state's directives do not apply to CHHAs and that its actions were not an "unacceptable practice" because they did not violate any "official rule or regulation." The Commission rejects this contention since 18 NYCRR 540.6(e)(1) requires that "[a]s a condition of payment, all providers of medical assistance must take reasonable measures to ascertain the legal liability of third parties to pay for medical care and services." The directives are clear concerning the roles of each the adult home and home health care agency to avoid unduplicated services. First to Care's claim that it is unfairly being "swept up...in the raft of irregularities apparently committed by Ocean House" has no foundation in law which makes it clear that those who deal with government are expected to know the law and are themselves responsible for the consequences of failing to comply with measures in place to help insure against improper billings.



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# Appendix A

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# STATE OF NEW YORK DEPARTMENT OF HEALTH

Office of Continuing Care      161 Delaware Avenue      Delmar, NY 12054-1393

Antonia C. Novello, M.D., M.P.H. Dr. P.H.  
*Commissioner of Health*

Dennis P. Whalen  
*Executive Deputy Commissioner*

August 16, 2001

Mr. Gary O'Brien  
Chair  
State of New York  
Commission on Quality of Care  
for the Mentally Disabled  
401 State Street  
Schenectady, New York 12305-2397

Dear Mr. O'Brien:

This is in response to your correspondence regarding Ocean House Center, Inc. We have reviewed the preliminary findings and proposed recommendations. As indicated in the report's introduction, it would appear that our joint surveillance has resulted in some improvements in physical environment and program compliance. However, your report identifies several serious underlying issues and concerns which we agree need to be addressed.

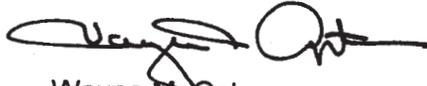
We are particularly concerned with the following issues outlined in the report, as they relate to the adult home the and home care services components of the report:

- The lack of disclosure of relationships between the governing authority and individuals not part of this ownership structure at the time of the initial application submission;
- The mortgage arrangements and whether this has been in the best interest of the not-for-profit entity authorized to operate this facility;
- The ability of the existing operator to properly govern because of business and family relationships between the not-for-profit board members and the defacto operator of this facility;
- Whether the board was properly constituted and operating in compliance with the New York State not-for-profit law;
- The appropriateness of the leasing arrangements;
- The allegations regarding kickbacks and possible Medicaid fraud;

- Insufficient staffing of the facility; and
- Inappropriate delivery of home care services by certified home care providers.

Finally, we will be meeting with Office of Mental Health to discuss the Medicaid issues related to the mental health clinic services and will advise you of any further actions which will be taken in regard to the Medicaid services rendered by St. John's Episcopal Hospital.

Sincerely,

A handwritten signature in black ink, appearing to read 'Wayne M. Osten', with a stylized flourish at the end.

Wayne M. Osten  
Director  
Office of Health Systems Management

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## **Appendix B**

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44 Holland Avenue  
Albany, New York 12229

May 21, 2001

Gary O'Brien  
Chairman  
State of New York  
Commission on Quality of Care for the Mentally Disabled  
401 State Street  
Schenectady, New York 12305-2397

Dear Mr. O'Brien:

The following responds to issues identified in the confidential draft "Ocean House Center, Inc." which details the results of the Commission's extensive investigation of Ocean House and some co-located programs. The report makes three recommendations for Office of Mental Health (OMH) follow up:

CQC Recommendation #1

OMH should conduct an inspection and certification review of the clinic program operated by St. John's Hospital.

OMH Response #1

On 12/01/00 certification staff of the Office of Mental Health's New York City Field Office conducted an announced site visit and comprehensive review of the program. The results of this visit identified many of the same issues pointed out in the CQC's confidential draft report and resulted in assignment of the program to Tier III status (the lowest of the three scoring categories in the OMH system). As a result of this disposition the program's license renewal was held in abeyance and COPS funding was halted pending submission and satisfactory implementation of a Plan of Corrective Action (POCA). A satisfactory POCA was received on 2/27/01 and approved on 3/1/01. A subsequent 4/19/01 focused visit by the New York City Field Office showed that the plan was being satisfactorily implemented. For example: concerns regarding treatment plan goals and objectives and the lack of revision of treatment plans have been addressed through in-service training of direct care/clinical staff and are to be regularly addressed in case conferences throughout the year; the provision of services not approved by OMH and the failure to provide required services have been resolved by a new menu of groups including medication management, independent living skills, relationships, etc. A minimum duration Operating Certificate with restored COPS funding is about to be issued.

In addition to the program specific response recommended by the CQC, the OMH has begun a series of systemic changes designed to improve our ability to identify and remediate these types of issues in outpatient programs located at adult homes. Responsibility for the inspection of outpatient programs affiliated with NYC adult homes has been assigned to dedicated staff. Additional staff assignments dedicated to monitoring programs in adult homes are underway. The OMH's inspection protocol for clinic programs has been modified to require visits to all adult home satellite locations. Routine visits to lower quality adult home based programs will occur at three to six month intervals. It is expected that Central Office Inspection and Certification staff will also be assigned to help coordinate and supplement field level monitoring of outpatient programs located in adult homes.

#### CQC Recommendation #2

To explore with CQC how best to serve persons with mental illness at Ocean House using a rehabilitation model to promote growth and recovery.

#### OMH Response #2

In September of 2000 OMH enthusiastically endorsed the formation of a time limited workgroup composed of Department of Health, OMH and CQC staff to identify strategies for collaboration among the three agencies in an attempt to improve adult home conditions. That group has met frequently and will be reporting its recommendations to agency executive staff at the end of this month. Among the strategies identified is the use of evidence based practices, in which the rehabilitation recovery model figures prominently, to tailor outpatient program services to the needs of adult home residents. Plans include the development of demonstration projects to model these approaches. Currently three respected OMH licensed provider agencies are taking over seven NYC adult homes outpatient program satellites on an emergency basis and will work with OMH to design new service models specifically designed for the adult home population.

#### CQC Recommendation #3

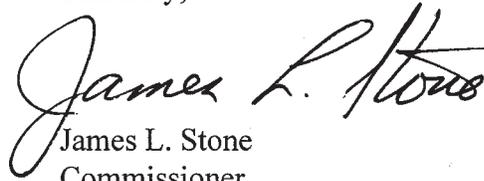
Explore cost effective approaches to service provision for this population. Enroll adult home residents in a managed care model of service delivery.

#### OMH Response #2

The OMH agrees that in some adult home environments "layering of services" has resulted in excessive cost for services and that attention must be paid to developing a cost effective model for the provision of adequate and appropriate services to this population. However, with the sunseting of the legislation enabling the development of SNPs there is no feasible managed care option available. OMH is currently working with both DOH and CQC to develop data sharing procedures that will help identify problem programs and to develop best practice approaches to service provision that will provide a cost efficient model for service delivery in a fee for service environment.

We believe that the initiation of the joint OMH, DOH, CQC workgroup is an important first step in cooperatively addressing the broader problems associated with some adult homes. I hope you find the above comments helpful.

Sincerely,

A handwritten signature in black ink that reads "James L. Stone". The signature is written in a cursive style with a large, looping initial "J".

James L. Stone  
Commissioner





Copies of this report are available in large print, braille, or voice tape. Please call the Commission for assistance in obtaining such copies at 518-381-7098.

The Commission on Quality of Care for the Mentally Disabled is an independent agency responsible for oversight in New York State's mental hygiene system. The Commission also investigates complaints and responds to requests concerning patient/resident care and treatment which cannot be resolved with mental hygiene facilities.

The Commission's statewide toll-free number is for calls from patients/residents of mental hygiene facilities and programs, their families, and other concerned advocates.

Toll-free Number:

**1-800-624-4143** (Voice/TDD)



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Schenectady, NY 12305-2397

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**<http://www.cqc.state.ny.us>**

**email: [marcusg@cqc.state.ny.us](mailto:marcusg@cqc.state.ny.us)**