



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office Of Inspector General
Office Of Audit Services

Region II
Jacob K. Javits Federal Building
26 Federal Plaza
New York, NY 10278

February 23, 2004

Report Number: A-02-02-01024

Antonia C. Novello, M.D.
Commissioner
New York State Department of Health
Empire State Plaza
14th Floor, Room 1408
Corning Tower
Albany, New York 12237

Dear Dr. Novello:

Enclosed are two copies of the Department of Health and Human Services (HHS), Office of Inspector General's (OIG) final report entitled "Review of Medicaid Claims for Beneficiaries Under the Age of 21 Who Reside in Institutions for Mental Diseases in New York State." A copy of this report will be forwarded to the HHS action official noted below for review and any action deemed necessary.

Final determination as to actions taken on all matters reported will be made by the HHS action official. We request that you respond to the HHS action official within 30 days from the date of this letter. Your response should present any comments or additional information that you believe may have a bearing on the final determination.

In accordance with the principles of the Freedom of Information Act, 5 U.S.C. § 552, as amended by Public Law 104-231, OIG reports are made available to members of the public to the extent information contained therein is not subject to exemptions in the Act which the Department chooses to exercise (see 45 CFR part 5).

To facilitate identification, please refer to report number A-02-02-01024 in all correspondence.

Sincerely,

Timothy J. Horgan
Regional Inspector General
for Audit Services

Enclosures – as stated

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Direct Reply to HHS Action Official:

Ms. Sue Kelly
Associate Regional Administrator
Division of Medicaid and Children's Health
Centers for Medicare & Medicaid Services, Region II
Department of Health and Human Services
26 Federal Plaza, Room 3811
New York, New York 10278

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**REVIEW OF MEDICAID CLAIMS FOR
BENEFICIARIES UNDER THE AGE OF 21 WHO
RESIDE IN INSTITUTIONS FOR MENTAL
DISEASES IN NEW YORK STATE**



**FEBRUARY 2004
A-02-02-01024**

Office of Inspector General

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EXECUTIVE SUMMARY

OBJECTIVE

The objective of our review was to determine if controls were in place to preclude New York State from claiming Federal financial participation (FFP) under the Medicaid program for all medical services, except inpatient psychiatric services, provided to residents of institutions for mental diseases (IMDs) under the age of 21. Examples of the types of medical claims included in this review were inpatient acute care, physician, clinic, pharmacy, laboratory, and dental services.

FINDINGS

Our review included a 100-percent review of 1,144 claims with an FFP amount equal to or greater than \$2,500 and a stratified random sample of 120 claims with an FFP amount less than \$2,500. The total FFP amount for all claims in our review was \$17,155,555. We found that New York improperly claimed FFP for 512 of the 1,144 claims and 81 of the 120 claims. In our opinion, New York improperly claimed FFP because:

- it did not have controls to prevent FFP from being claimed for medical services provided to IMD residents under the age of 21 in private psychiatric hospitals and inpatient psychiatric residential treatment facilities and
- its controls were either not effective or not applied for the IMD population under age 21 in State-operated psychiatric hospitals.

As a result, during our July 1, 1997 through June 30, 2001 audit period, we estimate that New York improperly claimed \$7,642,194 of FFP under the Medicaid program.

RECOMMENDATIONS

We recommend that New York:

- refund \$7,642,194 to the Federal Government,
- implement controls to prevent FFP from being claimed for medical services provided to IMD residents under the age of 21 in private psychiatric hospitals and residential treatment facilities,
- apply established controls to prevent FFP from being claimed for IMD residents under the age of 21 in State-operated psychiatric hospitals, and
- identify and refund to the Federal Government any improper FFP claimed for periods subsequent to our June 30, 2001 audit cutoff date.

In comments dated April 16, 2003, New York officials disagreed with our findings and recommendations. The State's response is included in its entirety as Appendix D.

OFFICE OF INSPECTOR GENERAL'S RESPONSE

We disagree with the State's comments and continue to recommend that New York refund \$7,642,194 to the Federal Government. We also continue to recommend that the State implement our three remaining recommendations.

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INTRODUCTION

BACKGROUND

Definition of an Institution for Mental Diseases

Section 1905(i) of the Social Security Act and 42 CFR § 435.1009 define an IMD as a hospital, nursing facility, or other institution of more than 16 beds that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases, including medical attention, nursing care, and related services. Psychiatric hospitals (including State-operated and private psychiatric hospitals) and inpatient psychiatric residential treatment facilities with more than 16 beds are IMDs.

Medicaid Exclusion

Regulations found at 42 CFR §§ 435.1008 and 441.13 preclude paying FFP for any services to residents under the age of 65 who are in an IMD, except for inpatient psychiatric services provided to individuals under the age of 21 and in some instances those under the age of 22.¹

New York's Medicaid Program

In New York State, the Department of Health is the single State agency responsible for operating the State's title XIX Medicaid program. Within the New York Department of Health, the Office of Medicaid Management is responsible for administering the Medicaid program. The Department of Health uses the Medicaid Management Information System, a computerized payment and information reporting system, to process and pay Medicaid claims. Additionally, the Office of Mental Health sets State mental health policy. State-operated psychiatric hospitals, private psychiatric hospitals, and residential treatment facilities are under the jurisdiction of both the Office of Mental Health and the Department of Health.

OBJECTIVE, SCOPE, AND METHODOLOGY

Objective

The objective of our review was to determine if controls were in place to preclude New York State from claiming FFP under the Medicaid program for all medical services, except inpatient psychiatric services, provided to IMD residents under the age of 21. Examples of the types of medical claims included in this review were inpatient acute care, physician, clinic, pharmacy, laboratory, and dental services.

¹ If the individual was receiving the services immediately before he or she reached age 21, services may continue to be provided until the earlier of (1) the date the individual no longer requires the services or (2) the date the individual reaches the age of 22.

Scope

Our audit period covered July 1, 1997 through June 30, 2001. During our audit, we did not review the overall internal control structure of the State or the Medicaid program; our internal control review was limited to obtaining an understanding of the State's controls to prevent FFP from being claimed under the Medicaid program for all medical services, except inpatient psychiatric services, provided to IMD residents under the age of 21. We also did not review the rates used by New York to claim Medicaid reimbursement for inpatient psychiatric services. Audit fieldwork was performed at the New York Department of Health, the New York Office of Mental Health, and the Medicaid Management Information System fiscal agent.

Methodology

Our review was conducted in accordance with generally accepted government auditing standards. To accomplish our audit objectives, we took the following steps:

- We held discussions with State agency officials to ascertain policies and procedures for claiming FFP under the Medicaid program for individuals under the age of 21 who were residents of State-operated psychiatric hospitals, private psychiatric hospitals, and residential treatment facilities in New York.
- We obtained an understanding of computer controls and edits established by New York regarding the claiming of FFP for medical services, other than inpatient psychiatric services, provided to IMD residents under the age of 21.
- We obtained a listing of State-operated psychiatric hospitals, private psychiatric hospitals, and residential treatment facilities within the State. See Appendix A for a listing of the IMDs included in our audit.
- We provided our Advanced Audit Techniques Staff with the rate codes used by State-operated psychiatric hospitals, private psychiatric hospitals, and residential treatment facilities to claim Medicaid reimbursement for inpatient psychiatric services. Using these parameters, the staff identified 14,149 beneficiaries who were claimed for Medicaid reimbursement and who resided in these IMDs during our review period.
- We matched the 14,149 beneficiaries' Medicaid identification numbers and IMD admission and discharge dates against the 8 paid claims files at Computer Sciences Corporation, the Medicaid Management Information System fiscal agent. The eight files were clinic, practitioner, laboratory, pharmacy, inpatient, dental, home health agency, and durable medical equipment. This match identified 179,787 claims totaling \$36,121,918 (\$18,088,906 of FFP).
- We made 4 decreasing adjustments to the match universe as follows: (1) claims made on behalf of residents in 6 residential treatment facilities that did not meet the definition of an IMD (they each had less than 16 beds), (2) claims for all 21-year-olds that were included in previous Office of Inspector General (OIG) IMD audits, (3) speech and transportation claims made by school health providers that were being reviewed in

separate OIG audits, and (4) all claims with an FFP amount of less than 1 cent. After these adjustments were made, our audit universe consisted of 167,899 claims totaling \$34,255,900 (\$17,155,555 of FFP).

- We performed a 100-percent review of 1,144 claims with an FFP value greater than or equal to \$2,500 and used stratified random sampling techniques to select a sample of 120 claims from the remaining universe of 166,755 claims with an FFP value of less than \$2,500. Appendix B contains the details of our sample methodology and design.
- We issued letters, as needed, to the medical providers and IMDs requesting documentation to support the claims under review.
- We reviewed documentation obtained from the medical and billing records of both the medical providers and the IMDs for the claims under review to determine if they were allowable.
- Finally, we used a variable appraisal program to estimate the dollar impact of the improper claims in the total population of 166,755 claims with an FFP value of less than \$2,500. This FFP dollar amount was added to the results of our 100-percent review of claims with an FFP amount greater than or equal to \$2,500 to determine our overall total of unallowable FFP claims.

FINDINGS AND RECOMMENDATIONS

Our review included a 100-percent review of 1,144 claims with an FFP amount equal to or greater than \$2,500 and a stratified random sample of 120 claims with an FFP amount less than \$2,500. We found that New York improperly claimed FFP for 512 of the 1,144 claims and 81 of the 120 claims. In our opinion, New York improperly claimed FFP because:

- it did not have controls to prevent FFP from being claimed for medical services provided to IMD residents under the age of 21 in private psychiatric hospitals and residential treatment facilities and
- its controls were either not effective or not applied for the under-21-year-old population in State-operated psychiatric hospitals.

As a result, during our July 1, 1997 through June 30, 2001 audit period, we estimate that New York improperly submitted claims for \$7,642,194 of FFP under the Medicaid program.

FEDERAL REGULATIONS AND GUIDANCE

Legislative and Regulatory Background

Section 1905(a) of the Social Security Act (the Act) defines the term “medical assistance.” Medical assistance includes inpatient hospital services and nursing facility services for IMD residents 65 years of age or over but excludes care or services for IMD residents who are under 65, except “inpatient psychiatric hospital services for individuals under the age of 21.”

Federal regulations prohibit payment of FFP for “any individual who is under age 65 and is in an institution for mental diseases, except an individual who is under age 22 and receiving inpatient psychiatric services under subpart D of this part.” (See 42 CFR § 441.13.)

Centers for Medicare & Medicaid Services Guidance

The Centers for Medicare & Medicaid Services (CMS) guidance to States specifies that FFP is only available for inpatient psychiatric services under the Medicaid program for individuals under the age of 21 and in certain instances those under the age of 22. Specifically, CMS issued Transmittal Number 65 of the State Medicaid Manual in March 1994 and Transmittal Number 69 of the State Medicaid Manual in May 1996. Section 4390 of the State Medicaid Manual, entitled “Institutions for Mental Diseases,” provides in subsection A.2. (“IMD Exclusion”):

The IMD exclusion is in 1905(a) of the Act in paragraph (B) following the list of Medicaid services. This paragraph states that FFP is not available for any medical assistance under title XIX for services provided to any individual who is under age 65 and who is a patient in an IMD unless the payment is for inpatient psychiatric services for individuals under age 21.

CMS guidance to States has also established that FFP is not permitted for IMD residents who are temporarily released to acute care hospitals for medical treatment. Specifically, section 4390.1 of the State Medicaid Manual, entitled “Periods of Absence From IMDs,” states in part that, “If a patient is temporarily transferred from an IMD for the purpose of obtaining medical treatment . . . the patient is still considered an IMD patient.”

In summary, based on the Act, the implementing Federal regulations, and CMS’s guidance, FFP may not be claimed for any medical services, except inpatient psychiatric services, for IMD residents under the age of 21.

CLAIMS REVIEW

We performed a 100-percent review of 1,144 claims with an FFP amount greater than or equal to \$2,500 and used stratified random sampling techniques to select a sample of 120 claims from the remaining universe of 166,755 claims with an FFP value of less than \$2,500. The 1,144 claims totaled \$18,250,697 (\$9,131,577 of FFP), and the 166,755 claims totaled \$16,005,203 (\$8,023,978 of FFP). The sample of 120 claims consisted of 3 strata, each with 40 claims. The first stratum totaled \$1,616 (\$808 of FFP), the second stratum totaled \$6,498 (\$3,371 of FFP), and the third stratum totaled \$68,211 (\$34,105 of FFP).

The determination as to whether an FFP claim was improper and unallowable was based on Federal laws and regulations. Specifically, if the following four criteria were met, the FFP claim under review was considered improper and unallowable:

- The beneficiary was a resident of an IMD on the service date of the FFP claim under review.

- The beneficiary was under the age of 21 on the service date under review.
- The service date of the FFP claim under review was during the period that the beneficiary was an IMD resident.
- The provider who rendered the services was paid and New York claimed FFP for the service rendered.

Review of Claims With an FFP Amount of \$2,500 or Greater

Our review of the 1,144 medical claims determined that 521 were allowable because the medical services either ended on the date the beneficiaries were admitted to an IMD (458 claims) or began on the date of discharge from the IMD with no immediate return to an IMD following discharge from the medical facility (63 claims). Therefore, for these 521 claims, the individuals were not residents of an IMD during their medical treatment.

Of the 623 remaining claims (1,144 minus 521), 594 were for inpatient services, 25 were for home health agencies, 2 were for durable medical equipment, 1 was for a clinic, and 1 was for a pharmacy. To evaluate the allowability of the 623 claims where it appeared that the beneficiaries were residents of IMDs, we issued letters requesting documentation from the medical providers who submitted the claims. We also requested documentation from the IMDs where these beneficiaries resided. Using the documentation received, we verified the beneficiaries' dates of admission to and discharge from the IMDs as well as the dates services were rendered by the medical providers. Additionally, we verified that the medical services were rendered.

Our review showed that 512 of the 623 medical claims occurred while the beneficiaries were residents of the IMDs and, as such, were improper. Of the 512 claims, 505 were inpatient claims made during periods when the IMD residents were temporarily released to acute care hospitals for medical treatment. Under CMS's written guidance, individuals residing in IMDs retain their IMD status when they are temporarily released to acute care hospitals for medical treatment and then return to the IMDs. The seven remaining improper FFP claims were composed of five home health agencies and two durable medical equipment claims.

An example of an unallowable FFP acute care claim is one made for a 14-year-old beneficiary who was admitted to Bronx Children's Psychiatric Center, an IMD, on June 1, 2000. The beneficiary was temporarily released to the Hospital for Special Surgery for spinal surgery on September 24, 2000, and was discharged back to Bronx Children's on October 2, 2000. The beneficiary remained at the IMD until November 27, 2000. For the 8-day stay at the hospital, Medicaid paid the hospital \$9,722 and the State improperly claimed \$4,861 of FFP.

The 512 improper claims totaled \$6,615,643 (\$3,307,821 of FFP).

Review of 120 Sample Claims

Our 120 sample claims were made up of 35 clinic, 24 inpatient, 23 pharmacy, 22 practitioner,

9 home health agency, 5 laboratory, and 2 dental services. To evaluate the 120 sample claims against the 4 criteria discussed above, we issued letters requesting supporting documentation from the medical providers who submitted the 120 claims. We also requested documentation from the IMDs where the beneficiaries resided. We reviewed the submitted documentation to determine if the sample medical claims occurred while the beneficiaries were residents of the IMDs.

Our review determined that 81 of the 120 claims for FFP were improper. The 81 claims consisted of 28 clinic, 20 practitioner, 17 pharmacy, 6 inpatient, 5 laboratory, 3 home health agency, and 2 dental claims. Of the 81 claims in error, 37 occurred while the beneficiary was a resident in a residential treatment facility, 32 occurred while the beneficiary was a resident in a private psychiatric hospital, and 12 occurred while the beneficiary was a resident in a State-operated psychiatric hospital.

We found that 36 of the 40 claims in stratum 1, 27 of the 40 claims in stratum 2, and 18 of the 40 claims in stratum 3 were improper. Extrapolating the results of the statistical sample, we estimated that New York improperly claimed between \$4,334,373 and \$5,763,423 of FFP during our July 1, 1997 through June 30, 2001 audit period. The midpoint of the confidence interval amounted to \$5,048,898 of FFP. The range shown has a 90-percent level of confidence with a sampling precision as a percentage of the midpoint of 14.15 percent. The details of our sample appraisal are shown in Appendix C.

An example of an unallowable FFP clinic claim was one made for a 10-year-old Medicaid beneficiary who was admitted on September 18, 2000 to a residential treatment facility--Jewish Board Ittleson Center, an IMD. On June 19, 2001, the beneficiary received an electroencephalogram at Blythedale Children's Hospital. Upon completion of the test, the beneficiary returned to Jewish Board Ittleson Center where he continued to reside until at least September 2001. For this clinic claim, Medicaid paid the hospital \$72.70 and the State improperly claimed \$36.35 of FFP.

REASONS THE IMPROPER CLAIMING OCCURRED

In our opinion, New York improperly claimed FFP because:

- it did not have controls to prevent FFP from being claimed for medical services provided to IMD residents under the age of 21 in private psychiatric hospitals and residential treatment facilities and
- its controls were either not effective or not applied for the under-21-year-old population in State-operated psychiatric hospitals.

No Controls to Prevent FFP From Being Claimed for Under-21-Year-Old Residents of Private Hospitals and Residential Treatment Facilities

Although New York officials stated that the inpatient psychiatric per diem rates for private psychiatric hospitals and residential treatment facilities were all inclusive and that medical and

ancillary services should not be separately claimed by outside medical providers, they had no controls or edits in place to prevent these claims from being paid and claimed for FFP.

Controls Not Effective To Prevent FFP From Being Claimed for Under-21-Year-Old Residents of State-Operated Hospitals

New York Office of Mental Health officials stated that for clients in State-operated psychiatric hospitals, the same general controls for medical and ancillary services existed for the under-21-year-old population as those for the population aged 21 to 64. Our prior audit report (A-02-01-01014) determined that, for the most part, New York had implemented controls that were generally adequate to prevent FFP from being claimed for medical and ancillary services provided to residents of State-operated psychiatric hospitals between the ages of 21 and 64. However, we found that these controls were not effective for the under-21-year-old population.

Specifically, our prior audit noted that Office of Mental Health officials had sent directives and instructions to their local resource offices (which process the billing for State-operated psychiatric hospitals) that indicated medical and ancillary services should be paid with State funds and not claimed for Medicaid payment. The medical providers were instructed to use New York vouchers for payment. Office of Mental Health officials stated that when a State-operated psychiatric hospital beneficiary (including a beneficiary under the age of 21) goes for services to an outside medical provider, they notify the provider to bill New York and not Medicaid. However, we found that 12 of the 81 sample errors occurred while the under-21-year-old beneficiaries were residents of State-operated psychiatric hospitals. The fact that 10 of the 12 errors involved medical and ancillary claims indicates that the established controls were not effective.

Additionally, our prior audit (A-02-99-01031) determined that effective September 1, 1998, New York had established controls to prevent FFP from being claimed for residents of State-operated psychiatric hospitals aged 21 to 64 who were temporarily released to acute care hospitals for medical treatment. However, we found that these controls were not applied to the under-21-year-old population. New York officials stated that they believe if a patient under the age of 21 was temporarily released from a State-operated psychiatric hospital to an acute care hospital for medical treatment, claims for FFP under the Medicaid program would be allowable. We disagree. As stated above, individuals residing in IMDs retain their IMD status when they are temporarily released to acute care hospitals for medical treatment, and the exclusion of FFP for the under-21-year-old population would apply.

ESTIMATION OF THE IMPROPER CLAIMS

We found that 512 of the 1,144 claims with an FFP amount greater than or equal to \$2,500 and 81 of the 120 sample claims with an FFP amount less than \$2,500 were improperly claimed for FFP. As a result, during our July 1, 1997 through June 30, 2001 audit period, we estimate that New York improperly claimed \$7,642,194 of FFP under the Medicaid program. This amount includes \$3,307,821 of improper FFP identified by our 100-percent review plus \$4,334,373 of improper FFP identified by our review of the 120 sample claims.

RECOMMENDATIONS

We recommend that New York:

- refund \$7,642,194 to the Federal Government,
- implement controls to prevent FFP from being claimed for medical services provided to IMD residents under the age of 21 in private psychiatric hospitals and residential treatment facilities,
- apply established controls to prevent FFP from being claimed for IMD residents under the age of 21 in State-operated psychiatric hospitals, and
- identify and refund to the Federal Government any improper FFP claimed for periods subsequent to our June 30, 2001 audit cutoff date.

AUDITEE'S COMMENTS

We received comments from two State agencies: the Department of Health, which is the State Medicaid agency, and the Office of Mental Health, which sets State mental health policy. New York disagreed with our findings and recommendations. The State's comments are included in their entirety as Appendix D.

New York Department of Health officials noted that sections 1905(a)(4)(B) and 1905(r) of the Social Security Act set forth a State's responsibility for the provision of Early and Periodic Screening, Diagnostic and Treatment services. Officials stated that Federal law does not appear to limit or restrict a State's ability to claim FFP for these services due to the child's residence in an IMD. Officials believed that the position taken by our audit contravenes the purpose of the Early and Periodic Screening, Diagnostic and Treatment provisions and that children residing in IMDs deserve no less than the full services available to all Medicaid-eligible children. State officials concluded that "OIG's position is wrong on health policy and it is wrong on the law."

Officials of the New York Office of Mental Health disagreed with the disallowance and stated that they believed it resulted from an erroneous interpretation of Federal Medicaid laws and regulations. They stated that the recommended disallowance was premised upon the contention that an individual transferred to a general hospital for medical care continued to be "in" an IMD for the purposes of Medicaid. Officials stated that they continued to believe that this is a mistaken interpretation, and they contended that even if this interpretation were adopted, the costs recommended for disallowance would still be properly reimbursable.

Office of Mental Health officials contended that we based our disallowance on guidance from CMS contained in Transmittal Numbers 65 and 69 of the State Medicaid Manual. Officials stated that these transmittals advised that FFP was only available for inpatient psychiatric services under the Medicaid program for individuals under the age of 21 (and in certain instances those under the age of 22). According to State officials, CMS's transmittals are contrary to Medicaid law and regulations.

Office of Mental Health officials stated that section 1905(a) of the Social Security Act defined the term "medical assistance" and set out the benefits for which FFP is available. These benefits include inpatient and outpatient hospital services, clinic services, and other ancillary services. That section also provides that medical assistance includes inpatient psychiatric hospital services for individuals under age 21 as well as inpatient hospital and nursing services for individuals age 65 and older in an IMD. State officials noted that the meaning of this statute was clear. They stated that a Medicaid-eligible individual was entitled to receive all services and, if he or she was under the age of 21, also entitled to receive inpatient psychiatric hospital services. Officials contended that there was nothing in the language of the statute to indicate that such individuals may only receive inpatient psychiatric hospital services.

The officials also stated that Medicaid regulations at 42 CFR §§ 435.1008 and 441.13 did not exclude an individual under the age of 22 from receiving medical or ancillary services outside of the IMD. Rather, they noted that the regulations stating the general rule prohibiting FFP for individuals in an IMD did not pertain to individuals under the age of 21. Officials noted that the law and regulations stated that FFP was available for psychiatric services for individuals under the age of 21 who were in IMDs and that neither stated that FFP was available only for such services.

Furthermore, these officials stated that the individuals in question were Medicaid-eligible and that they retained this eligibility upon their admission to the inpatient psychiatric hospital. Officials believed that it could not be the OIG's position that, upon the individual's referral to an outside medical provider, his or her eligibility ceased. According to State officials, that contention would be in direct contradiction of the position previously taken by OIG that individuals remain patients in a psychiatric hospital as long as they have not been discharged, conditionally released, or placed on convalescent leave. Further, they stated that if an individual were in the psychiatric hospital, he or she would be eligible for medical assistance because of the exception to the IMD exclusion for individuals under age 21. Officials stated that if patients were not in the psychiatric hospital, they were eligible for medical assistance because the IMD exclusion did not apply.

Finally, the officials contended that OIG's position constituted a change in the interpretation and enforcement of the Medicaid law without any formal rulemaking procedures. According to State officials, OIG's position violated the Administrative Procedures Act, 5 U.S.C. § 553(c).

OIG'S RESPONSE

We disagree with the State's comments and continue to believe that the FFP claims in question are unallowable. According to the statute and regulations, States may not claim FFP for any services provided to IMD residents under the age of 21 and in some instances those under the

age of 22, with the exception of inpatient psychiatric services.

Under the Social Security Act and implementing Federal regulations, the only exception to the IMD exclusion for individuals under the age of 21 is for inpatient psychiatric services. No other services may be claimed for FFP. As part of the definition of “medical assistance” in section 1905(a) of the Act, subsection (a)(4)(B) states that medical assistance includes Early and Periodic Screening, Diagnostic and Treatment services (as defined in subsection (r)) for individuals who are eligible under the plan and are under the age of 21. However, section 1905(a) also provides, in the material following subsection (a)(27):

except as otherwise provided in paragraph (16), such term does not include –

(A) any such payments with respect to care or services for an individual who is an inmate of a public institution (except as a patient in a medical institution); or

(B) any such payments with respect to care or services for an individual who has not attained 65 years of age and who is a patient in an institution for mental diseases.

Section 1905(a) thus provides, notwithstanding the general allowability of payments for Early and Periodic Screening, Diagnostic and Treatment and other services, that “such payments” are not eligible for FFP if made with respect to care or services for those under 65 who are patients in an IMD. The only exception to this exclusion from coverage for IMD patients is contained in paragraph 16, which authorizes payments for “inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h) [which further provides in part that certain 22-year-olds may qualify for payment].” Therefore, unless the Early and Periodic Screening, Diagnostic and Treatment services at issue are also within the scope of “inpatient psychiatric hospital services for individuals under age 21,” they are subject to the statute’s exclusion from coverage for IMD patients under 65.

This is contrary to the position of the State, which apparently argues that the general requirement for coverage of Early and Periodic Screening, Diagnostic and Treatment services in section 1905(a)(4) overrides the exclusion from coverage in the language following section 1905(a)(27). Such a reading of the statute, if applied consistently to all other enumerated mandatory services, would render meaningless the language following subsection (a)(27) that medical assistance does not include services for inmates of public institutions or services to patients in an IMD who are under 65. Consequently, such a reading would be contrary to the fundamental principle of statutory construction that all words of a statute are to be given effect. Also, the presence of one specific exception from the exclusion of services to IMD patients under age 65 indicates that the Congress knew how to make such an exception (for inpatient psychiatric hospital services for individuals under age 21), and under standard principles of statutory construction, it thus must be presumed that the Congress did not intend to make an exception for Early and Periodic Screening, Diagnostic and Treatment services. The statute cannot reasonably be read to imply that services other than those within the scope of “inpatient psychiatric services for individuals

under age 21” can be included as medical assistance under the program for IMD inpatients under age 65.

This reading is fully consistent with CMS regulations and the State Medicaid Manual. Specifically, 42 CFR § 441.13, entitled “Prohibitions on FFP: Institutionalized individuals,” states that “(a) FFP is not available in expenditures for . . . Any individual who is under age 65 and is in an institution for mental diseases, except an individual who is under age 22 and receiving inpatient psychiatric services under subpart D of this part.”

The regulations governing Early and Periodic Screening, Diagnostic and Treatment services do not in any way state that these services may be provided to patients under 21 or 22 in an IMD, regardless of whether such patients are receiving inpatient psychiatric hospital services. 42 CFR § 440.40(b) merely defines what types of services are available as part of the Early and Periodic Screening, Diagnostic and Treatment program.

Contrary to the State’s assertions, CMS consistently provided guidance to the State regarding the IMD exclusion. Specifically, CMS Transmittal Number 65 of the State Medicaid Manual (issued in March 1994) and Transmittal Number 69 of the State Medicaid Manual (issued in May 1996) both provided guidance to New York that FFP was not available for any medical assistance under title XIX for services provided to any individual under age 65 who is a patient in an IMD, unless the payment is for inpatient psychiatric services for individuals under the age of 21. This guidance goes on to state that FFP was not permitted for IMD residents who were temporarily released to acute care hospitals for medical treatment.

Section 4390 of the State Medicaid Manual, entitled “Institutions for Mental Diseases,” provides in subsection 4390 A.2. (“IMD Exclusion”) that:

The IMD exclusion is in 1905(a) of the Act in paragraph (B) following the list of Medicaid services. This paragraph states that FFP is not available for any medical assistance under title XIX for services provided to any individual who is under age 65 and who is a patient in an IMD unless the payment is for inpatient psychiatric services for individuals under age 21. This exclusion was designed to assure that States, rather than the Federal government, continue to have principal responsibility for funding inpatient psychiatric services. Under this broad exclusion, no Medicaid payment can be made for services provided either in or outside the facility for IMD patients in this age group.

We believe that contrary to the State’s assertions, CMS’s guidance is completely consistent with section 1905(a) of the Act. In their comments, State officials cited various sections of 1905(a) of the Act that they believe entitle the IMD under-21 population to receive certain benefits beyond inpatient psychiatric services. However, again, we believe that State officials have ignored the section following the enumerated paragraphs of section 1905(a) that states, except as otherwise provided in paragraph (16), the term “medical assistance” does not include any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an IMD.

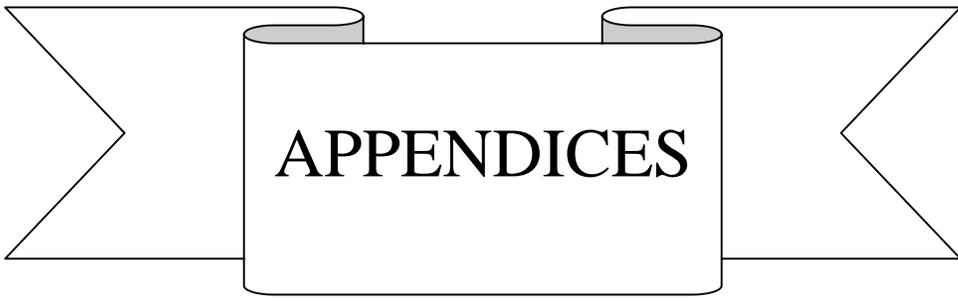
State officials also argued that the Federal Government had previously reimbursed the services that are proposed to be disallowed and, therefore, the position taken by the OIG constituted a

change in the interpretation and enforcement of Medicaid law in violation of the Administrative Procedure Act, 5. U.S.C. § 553(c).

New York raised a similar argument to the Departmental Appeals Board (the Board) in New York State Department of Social Services, DAB No. 1577 (1996). In this case, the Board upheld CMS's disallowance of FFP for claims for medical services provided to 22- to 64-year-old residents of IMDs who were temporarily transferred to acute care facilities to receive medical services. This disallowance was based on OIG audit findings. New York officials argued that prior to the period covered by the disallowance, "Medicaid continuously and consistently reimbursed" New York for services provided to these patients. The Board rejected New York's argument, finding that CMS's failure to take a disallowance at the earliest opportunity does not amount to a representation that "all the expenditures in the [quarterly expenditure reports] were acceptable as charged."

Finally, State officials argued that children residing in facilities classified as IMDs deserved no less than the full screening, diagnosis, and treatment services that are available to all other Medicaid-eligible children. However, patients under 21 or 22 may still be eligible for Early and Periodic Screening, Diagnostic and Treatment services as long as those services are within the scope of inpatient psychiatric hospital services. Moreover, the general IMD exclusion affects only Federal funding for medical services. It does not preclude an individual who is a patient in an IMD from receiving medical services outside the IMD.

Based on the above, we believe that our findings and recommendations are valid and we continue to recommend that New York refund \$7,642,194 to the Federal Government and implement our four remaining recommendations.



SAMPLING METHODOLOGY

Audit Objective

The objective of our review was to determine if controls were in place to preclude New York from claiming FFP under the Medicaid program for all medical services provided to IMD residents under the age of 21, except inpatient psychiatric services.

Population

The population was medical claims, except inpatient psychiatric claims, for FFP made on behalf of Medicaid beneficiaries under the age of 21 who were residents of State-operated psychiatric hospitals, private psychiatric hospitals, or residential treatment facilities (the three types of IMDs included in our audit) during our July 1, 1997, through June 30, 2001, audit period. The population does not include any claims related to six residential treatment facilities that do not meet the definition of an IMD, any speech or transportation services rendered by school health providers, and any claims with an FFP amount less than 1 cent.

Sampling Frame

The sampling frame was a computer file containing 167,899 detailed FFP claims for Medicaid beneficiaries under the age of 21 who were residents in an IMD during our review period. All claims with an FFP value greater than or equal to \$2,500 were reviewed and 1,144 claims with a total reimbursement of \$18,250,697 (\$9,131,577 of FFP) were removed from the frame. The total Medicaid reimbursement for the remaining 166,755 claims was \$16,005,203 (\$8,023,978 of FFP).

The claims were extracted from the eight paid claims files maintained at the Medicaid Management Information System fiscal agent and then merged together. The eight files were inpatient, clinic, practitioner, home health agency, durable medical equipment, dental, pharmacy, and laboratory.

Sampling Unit

The sampling unit was an individual Medicaid FFP claim.

Sample Design

We used a stratified random sample to evaluate the population of Medicaid FFP claims. To accomplish this, we separated the sampling frame into three strata as follows:

Stratum 1: \$0.00 to \$49.99--129,957 claims
Stratum 2: \$50.00 to \$299.99--33,918 claims
Stratum 3: \$300.00 to \$2,499.99--2,880 claims

Sample Size

A sample size of 120 claims was selected--40 claims from each stratum.

Source of the Random Numbers

The source of the random numbers was the Office of Audit Services Statistical Sampling software dated September 2001. We used the Random Number Generator for our stratified sample.

Method for Selecting Sample Items

The claims in our sampling frame were numbered sequentially. Three sets of 40 random numbers were selected for each of the 3 strata. The random numbers were correlated to the sequential numbers assigned to each claim in the sampling frame. A list of the 120 sample items was then created.

Characteristics To Be Measured

Applicable Federal laws and regulations were used to determine whether an FFP claim was improper and unallowable. Specifically, if the following four criteria were met, the FFP claim under review was considered improper and unallowable:

- The beneficiary was a resident of an IMD on the service date of the FFP claim under review.
- The beneficiary was under the age of 21.
- The service date of the FFP claim under review was during the period that the beneficiary was an IMD resident.
- The medical provider who rendered the service was paid and New York claimed FFP for the service rendered.

Estimation Methodology

We used the Department of Health and Human Services, OIG, Office of Audit Services variables appraisal program in RAT-STATS to appraise the sample results. We used the lower limit at the 90-percent confidence level to estimate the overpayment associated with the improper claiming of FFP under the Medicaid program for all medical services, except inpatient psychiatric services, for residents of IMDs who are under the age of 21.

SAMPLE RESULTS AND PROJECTION

Results of Sample

The results of our review of the 120 FFP Medicaid claims were as follows:

<u>Stratum Number</u>	<u>Claims in Universe</u>	<u>FFP Value of Universe</u>	<u>Sample Size</u>	<u>FFP Value of Sample</u>	<u>Improper FFP Claims</u>	<u>FFP Value of Improper Claims</u>
1. \$0.01 to \$49.99	129,957	\$2,069,053.93	40	\$808.02	36	\$649.12
2. \$50.00 to \$299.99	33,918	\$3,385,292.18	40	3,371.46	27	2,313.31
3. \$300.00 to \$2,499.99	2,880	\$2,569,632.67	40	34,105.27	18	13,588.67
TOTAL	166,755	\$8,023,978.78	120	\$38,284.75	81	\$16,551.10

PROJECTION OF SAMPLE RESULTS

Precision at the 90-Percent Confidence Level

Point Estimate: \$5,048,898
 Lower Limit: \$4,334,373
 Upper Limit: \$5,763,423
 Precision Percent: 14.15 %



STATE OF NEW YORK
DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Antonia C. Novello, M.D., M.P.H., Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

April 16, 2003

Timothy J. Horgan
Regional Inspector General for
Audit Services
DHHS OIG Office of Audit Services
26 Federal Plaza
Room 3900A
New York, New York 10278

Dear Mr. Horgan

Enclosed are the Department of Health's and the Office of Mental Health's comments on the DHHS - OIG's Draft Audit Report A-02-02-01024 entitled "Review of Medical Claims Made to Medicaid for Beneficiaries Under the Age of 21 Who Reside in Institutions for Mental Diseases Within New York State".

Thank you for the opportunity to comment

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Whalen', written over a horizontal line.

Dennis P. Whalen
Executive Deputy Commissioner

Enclosure

Department of Health and Office of Mental Health
Comments on the
Department of Health and Human Services
Office of the Inspector General
Draft Audit Report A-02-02-01024
“Review of Medical Claims Made to Medicaid for
Beneficiaries Under the Age of 21 Who Reside in Institutions for
Mental Diseases Within New York State”

The following are the Department of Health’s (DOH) and the Office of Mental Health’s (OMH) comments in response to the Department of Health and Human Services (DHHS), Office of Inspector General (OIG) Draft Audit Report A-02-02-01024 entitled “Review of Medical Claims Made to Medicaid for Beneficiaries Under the Age of 21 Who Reside in Institutions for Mental Diseases Within New York State”.

Recommendation #1:

Refund \$7,642,194 to the Federal Government.

Recommendation #2:

Implement controls to prevent FFP from being claimed for medical services provided to IMD residents under the age of 21 in private psychiatric hospitals and RTFs.

Recommendation #3:

Issue written guidance to medical providers and IMDs that **separate** medical claims should not be made for IMD residents under the age of 21.

Recommendation #4:

Apply established controls to prevent FFP from being claimed for IMD residents under the age of 21 in SOPHs.

Recommendation #5:

Identify and refund to the Federal Government any improper FFP claimed for periods subsequent to our June 30, 2001 audit cut off date.

The following are the Department of Health's and the Office of Mental Health's responses to recommendations 1- 5.

Department of Health's Comments:

The recommendations made by the Office of Inspector General (OIG) call for New York State refunding to the federal government \$7,642,192 in inappropriate federal claims. The inappropriate claims were found to be for medical services such as inpatient acute care, physician, clinic, pharmacy, laboratory and dental services.

Sections 1905(a)(4)(B) and 1905(r) of the Social Security Act (SSA) set forth a state's responsibility for the provision of Early and Periodic Screening, Diagnostic and Treatment Services (EPSDT). As specified in § 1905(r), screening services that are provided include those "indicated as medically necessary to determine existence of certain physical or mental illnesses or conditions." Federal law does not appear to limit or restrict a state's ability to claim federal participation for EPSDT due to the child's residence in an Institution for Mental Diseases (IMD).

While SSA §1905(a)(4)(A), mandating nursing facility services for persons 21 years of age or older, contains a specific exception for nursing facility services provided in an IMD, §1905(a)(4)(B) (the EPSDT provision) contains no such IMD exception. Clearly Congress knew how to create such an exception; the nursing facility provision immediately preceding the EPSDT provision contains the exception. We believe that the position being taken by OIG in this audit contravenes the purpose of the EPSDT provisions. Children residing in facilities that are classified as IMDs deserve no less than the full screening, diagnosis and treatment services that are available to all other Medicaid eligible children. OIG's position is wrong on health policy and it is wrong on the law.

Office of Mental Health Comments:

For the reasons set forth below, the State of New York disagrees with the recommended disallowance, and believes that it rests upon an erroneous interpretation of federal Medicaid laws and regulations.

The recommended disallowance is premised upon the OIG's contention that an individual who has been transferred to a general hospital for medical care continues to be "in" an institution for mental diseases for the purposes of Medicaid. While the State of New York continues to believe that this is a mistaken interpretation of Medicaid laws and regulations, even if one does adopt that interpretation, the costs recommended for disallowance by the OIG are properly reimbursable, for the following reasons:

1. OIG bases this disallowance upon Centers for Medicare and Medicaid Services (CMS) guidance to states, contained in Transmittal Number 65 of the State Medicaid Manual in March, 1994, and Transmittal Number 69 of the State

Office of Mental Health Comments

1. continued:

Medicaid Manual in May, 1996, which advised that FFP was only available for inpatient psychiatric services under the Medicaid program for individuals who are under the age of 21, (and in certain instances those under the age of 22). The relevant portions of the transmittals state that:

"...FFP is not available for any medical assistance under title XIX for services provided to any individual who is under age 65 and who is a patient in an IMD unless the payment is for inpatient psychiatric services for individuals under age 21."

These transmittals, however, are contrary to Medicaid laws and regulations. Section 1905 (a) of the SSA defines the term "medical assistance", i.e. it sets out the benefits for which Federal Financial Participation (FFP) is available. Included in those benefits are inpatient hospital services (other than services in an institution for mental diseases), outpatient hospital services, clinic services, and numerous other ancillary services. That section also provides that medical assistance includes inpatient psychiatric hospital services for individuals under age 21, as well as inpatient hospital services and nursing facility services for individuals 65 years of age or over in an institution for mental diseases.

The meaning of this statute is clear. An individual who is eligible for Medicaid is entitled to receive certain benefits. Among these are inpatient hospital services, outpatient hospital services, clinic services, etc. If they happen to be under the age of 21, they are also entitled to receive inpatient psychiatric hospital services. There is nothing in this language to indicate that such individuals may only receive these services.

Similarly, Medicaid regulations at 42 CFR 441.13 and 42 CFR 435.1008 state that FFP is not available in expenditures for any individual who is under the age 65 and is in an institution for mental diseases, "except an individual who is under age 22 and receiving inpatient psychiatric services." As with the statute, the regulation does not exclude an individual under the age of 22 from receiving medical or ancillary services outside of the IMD. Rather, the regulations indicate that the general rule prohibiting FFP for individuals in an IMD does not pertain to those individuals under the age of 21. The individuals in question were all under the age of 22, and were all receiving inpatient psychiatric services. They were duly admitted to a psychiatric hospital to receive inpatient mental health care. There is no indication that the provision of such mental health care ceased while they were in the general hospital. In fact, such individuals do continue to receive necessary mental health and psychiatric services while they are in the general hospital.

Office of Mental Health Comments

1. continued:

Further, it has been the position of the OIG, confirmed by the Department Health and Human Services (DHHS) Departmental Appeals Board (DAB), that the services of the IMD include “medical attention, nursing care, and related services.” See DAB Decision No. 1549.

Both the transmittal letters and the interpretation being proposed by the OIG misstate the language and intent of the Medicaid laws and regulations. The law and regulations state that FFP is available for psychiatric services for individuals under the age of 21 who are in IMDs; neither states that FFP is available only for such services.

The erroneous nature of the OIG’s interpretation is confirmed by the legislative history of the law, which as stated by the DHHS’ DAB, indicates that the IMD exclusion is “based upon a congressional belief that care in mental institutions was a traditional State responsibility, as well as on Congress’ general distrust of the effectiveness and efficiency of care in IMDs.” See DAB Decision No. 1549. Here, the OIG is turning that intent directly on its head, contending that for the subject population, the services in the IMD are covered, while those provided in the community are not.

The individuals in question are Medicaid-eligible. While it is true that DHHS has treated the IMD exclusion as both a limit on covered services and a limit on eligibility, it is clear that the individuals are covered by Medicaid. The OIG acknowledges that the individuals in question were under 21 years of age, and were admitted to inpatient psychiatric hospitals. The OIG further acknowledges that upon their admission to such hospitals, they continued to be eligible for Medicaid.

It cannot be the position of the OIG, however, that upon the individual’s referral to an outside medical provider, their eligibility ceased. That contention would be in direct contradiction of the position previously taken by OIG that an individual remains a patient “in” a psychiatric hospital so long as they have not been discharged, conditionally released, or released on convalescent leave. If the individual is “in” the psychiatric hospital for the purposes of the law, then they are eligible for medical assistance because of the exception to the IMD exclusion for individuals under the age of 21. If they are not “in” the psychiatric hospital, then they are eligible for medical assistance, because the IMD exclusion does not apply at all. Thus, in either case, the individuals here are eligible for Medicaid.

Office of Mental Health Comments continued

- 2 The position taken by the OIG constitutes a change in the interpretation and enforcement of the Medicaid law, which is being undertaken without any formal rulemaking procedures. Accordingly, it violates the Administrative Procedures Act (“APA”) 5 U.S.C. § 553-(c). When agencies promulgate rules, they are required to publish a notice of proposed rulemaking, and give interested parties an opportunity to participate through the submission of comments. The services that are proposed to be disallowed here had previously been consistently reimbursed by the federal government and had been claimed, not just by New York, but by a large number of states. These claims were not unusual, or hidden from the view of the federal government. Thus, their reimbursement could not have been a result of having been “undiscovered” violations of existing laws, rules or regulations. Rather, they were the result of the federal government effectuating its then current interpretation of the law. Therefore, the action being proposed here, is a clear change in the program rules, which has been undertaken by fiat. There has been no notice of proposed rulemaking, and no required opportunity for comment by interested parties.

ACKNOWLEDGMENTS

This report was prepared under the direction of Timothy J. Horgan, Regional Inspector General for Audit Services. Other principal Office of Audit Services staff who contributed include:

John Berbach, *Audit Manager*

Kevin Smith, *Senior Auditor*

Michael Fratangelo, *Auditor*

Tyeese Cavallaro, *Auditor*

Victoria Inzerillo, *Auditor*

Technical Assistance

David Phillips, *Advanced Audit Techniques*

Erin Fratangelo, *Advanced Audit Techniques*

Brenda Ryan, *Statistical Specialist*

For information or copies of this report, please contact the Office of Inspector General's Public Affairs office at (202) 619-1343.