



JUN 14 2005

Washington, D.C. 20201

TO: Mark B. McClellan, M.D., Ph.D.
Administrator
Centers for Medicare & Medicaid Services

FROM: Daniel R. Levinson *Daniel R. Levinson*
Acting Inspector General

SUBJECT: Review of Medicaid Speech Claims Made by the New York City Department of Education (A-02-02-01029)

Attached is an advance copy of our final report on Medicaid speech claims made by the New York City Department of Education (NYCDE). We will issue this report to New York State within 5 business days. This report is the third in a series on the State's Medicaid school health program.¹ We are conducting these audits in response to a request by officials of the Centers for Medicare & Medicaid Services (CMS).

Our objective was to determine whether Federal Medicaid payments for speech services claimed by NYCDE were in compliance with Federal and State requirements. Our audit period covered September 1, 1993, through June 30, 2001, when such payments totaled \$551.1 million.

Pursuant to Federal laws and regulations, Federal guidance, State regulations, or the Medicaid State plan, (1) documentation must be maintained to support speech services billed, (2) a minimum of two speech services must be provided during the month billed, (3) a referral for speech services must be made by an appropriate medical professional, (4) a child's individualized education plan or an individualized family service plan (child's plan/family plan) must be prepared, (5) speech services must be included in the child's plan/family plan, and (6) speech services must be provided by or under the direction of a speech-language pathologist certified by the American Speech-Language-Hearing Association (ASHA) or an individual with similar qualifications.

Eighty-six of the 100 speech claims in our statistically valid sample did not comply with Federal and State requirements, and 68 contained more than 1 deficiency. Specifically:

- For 42 claims, we were unable to verify that the services billed were rendered.
- For 47 claims, we were unable to verify that a minimum of 2 speech services were rendered during the month billed.
- Two claims lacked any documentation at all.
- Forty-three claims lacked a referral by an appropriate medical professional.

¹The other reports are "Review of Medicaid Speech Claims Made by School Health Providers in New York State" (A-02-02-01030, issued February 17, 2004) and "Review of Medicaid Transportation Claims Made by School Health Providers in New York State" (A-02-03-01008, issued August 31, 2004).

- For 24 claims, no child’s plan/family plan was provided or the plan was untimely.
- One claim did not include a recommendation for speech services in the child’s plan/family plan.
- For 76 claims, the services were not provided by or under the direction of an ASHA-certified individual or an individual with similar qualifications.

As a result, we estimate that the State improperly claimed \$435,903,456 in Federal Medicaid funding during our audit period.

We recommend that the State (1) refund \$435,903,456 to the Federal Government, (2) provide proper and timely guidance on Federal Medicaid criteria to NYCDE, (3) reinforce the need for NYCDE to comply with Federal and State requirements, (4) improve its monitoring of NYCDE’s speech claims to ensure compliance with Federal and State requirements, and (5) instruct NYCDE to maintain appropriate documentation to support its speech claims.

In written comments on our draft report, State officials disagreed with most aspects of the report, including the audit period, approach, criteria, and conclusions, and stated that the draft report should be withdrawn. The State also expressed concern that we had applied Federal regulations designed for a medical office setting to an educational setting and that we had not conducted our audit in accordance with generally accepted government auditing standards.

We disagree with most of the State’s comments. We planned this audit in conjunction with the Department of Justice and CMS and conducted the audit in accordance with generally accepted government auditing standards. Our criteria and conclusions are valid. Medicaid school health providers need to follow the documentation standards required of all Medicaid providers.

If you have any questions or comments about this report, please do not hesitate to call me, or your staff may contact George M. Reeb, Assistant Inspector General for the Centers for Medicare & Medicaid Audits, at (410) 786-7104 or Timothy J. Horgan, Regional Inspector General for Audit Services, Region II, at (212) 264-4620.

Attachment



DEPARTMENT OF HEALTH & HUMAN SERVICES

Report Number: A-02-02-01029

JUN 16 2005

Region II
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28 Federal Plaza
New York, NY 10278

Antonia C. Novello, M.D., M.P.H., Dr. P.H.
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 (OIG) final report entitled "Review of Medicaid Speech Claims Made by the New York City Department of Education." A copy of this report will be forwarded to the HHS action official noted below for review and any action deemed necessary.

The HHS action official will make final determination as to actions taken on all matters reported. 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.

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To facilitate identification, please refer to report number A-02-02-01029 in all correspondence.

Sincerely yours,

Timothy J. Horgan
Regional Inspector General
for Audit Services

Enclosures -- as stated

Direct Reply to HHS Action Official:

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Associate Regional Administrator
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Centers for Medicare & Medicaid Services, Region II
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Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**REVIEW OF MEDICAID SPEECH
CLAIMS MADE BY THE NEW YORK
CITY DEPARTMENT OF EDUCATION**



**JUNE 2005
A-02-02-01029**

Office of Inspector General

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OAS FINDINGS AND OPINIONS

The designation of financial or management practices as questionable or a recommendation for the disallowance of costs incurred or claimed, as well as other conclusions and recommendations in this report, represent the findings and opinions of the HHS/OIG/OAS. Authorized officials of the HHS divisions will make final determination on these matters.



EXECUTIVE SUMMARY

OBJECTIVE

Our objective was to determine whether Federal Medicaid payments for speech services claimed by the New York City Department of Education (NYCDE) were in compliance with Federal and State requirements. Our audit period covered September 1, 1993, through June 30, 2001, when such payments totaled \$551.1 million.

Officials of the Centers for Medicare & Medicaid Services (CMS) requested the audit.

SUMMARY OF FINDINGS

Eighty-six of the 100 speech claims in our statistical sample did not comply with Federal laws and regulations, Federal guidance, State regulations, or the Medicaid State plan. The Federal law and regulations governing allowability of speech services are contained in section 1902(a)(27) of the Social Security Act and 42 CFR §§ 431.17, 433.32, and 440.110(c). Relevant Federal guidance includes Office of Management and Budget Circular A-87, a 1997 CMS Medicaid school-based technical assistance guide, and Medicaid State operations letters issued by CMS. Further, State regulations issued to the provider community govern the allowability of school health services.

Pursuant to these requirements, (1) documentation must be maintained to support speech services billed, (2) a minimum of two speech services must be provided during the month billed, (3) a referral for speech services must be made by an appropriate medical professional, (4) a child's individualized education plan or an individualized family service plan (child's plan/family plan) must be prepared, (5) speech services must be included in the child's plan/family plan, and (6) speech services must be provided by or under the direction of a speech-language pathologist certified by the American Speech-Language-Hearing Association (ASHA) or an individual with similar qualifications.

Of the 86 noncompliant claims, 68 contained more than 1 deficiency:

- For 42 claims, we were unable to verify that the services billed were rendered.
- For 47 claims, we were unable to verify that a minimum of 2 speech services were rendered during the month billed.
- Two claims lacked any documentation at all.
- Forty-three claims lacked a referral by an appropriate medical professional.
- For 24 claims, no child's plan/family plan was provided or the plan was untimely.

- One claim did not include a recommendation for speech services in the child’s plan/family plan.
- For 76 claims, the services were not provided by or under the direction of an ASHA-certified individual or an individual with similar qualifications.

In our opinion, these deficiencies occurred because (1) the State did not provide proper or timely guidance about Federal provider and speech service referral requirements to its schools and preschools, including NYCDE; (2) NYCDE did not comply with other State guidance it had received; (3) the State did not adequately monitor speech claims from providers, including NYCDE, for compliance with Federal and State requirements; and (4) NYCDE failed to maintain appropriate documentation to support its speech claims.

As a result, during our audit period, we estimate that the State improperly claimed \$435,903,456 in Federal Medicaid funding.

RECOMMENDATIONS

We recommend that the State:

- refund \$435,903,456 to the Federal Government,
- provide proper and timely guidance on Federal Medicaid criteria to NYCDE,
- reinforce the need for NYCDE to comply with Federal and State requirements,
- improve its monitoring of NYCDE’s speech claims to ensure compliance with Federal and State requirements, and
- instruct NYCDE to maintain appropriate documentation to support its speech claims.

STATE’S COMMENTS

In written comments on our draft report, State officials disagreed with most aspects of the report, including the audit period, approach, criteria, and conclusions, and stated that the draft report should be withdrawn. The State also expressed concern that we had applied Federal regulations designed for a medical office setting to an educational setting and that we had not conducted our audit in accordance with generally accepted government auditing standards. With the exception of Attachment D, which contained documentation related to 57 claims questioned by our audit, the full text of the State’s comments is included as Appendix G.

OFFICE OF INSPECTOR GENERAL’S RESPONSE

We disagree with most of the State’s comments. We planned this audit in conjunction with the Department of Justice and CMS and conducted the audit in accordance with generally accepted

government auditing standards. Our criteria and conclusions are valid. Medicaid school health providers need to follow the documentation standards required of all Medicaid providers.

After reviewing the documentation included with the State's comments, we reduced the number of unallowable claims from 88 to 86 and made other changes as appropriate. If the State furnishes additional relevant documentation to CMS during the resolution process or if the State can prove that records were destroyed in accordance with established record retention policies, we will assist the parties in recalculating the sample projection.

Finally, in finding that 86 of 100 sampled claims did not comply with Federal and State requirements, we identified deficiencies that could have a direct impact on the quality of services rendered. We believe that the State needs to strengthen compliance with Federal and State requirements to ensure proper administration of this program.

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Glossary of Abbreviations and Acronyms

ASHA	American Speech-Language-Hearing Association
CCC	Certificate of Clinical Competence
CFR	Code of Federal Regulations
CMS	Centers for Medicare & Medicaid Services
CSE	Committee on Special Education
DOJ	Department of Justice
GAO	Government Accountability Office
HCFA	Health Care Financing Administration
IDEA	Individuals with Disabilities Education Act
IEP	Individualized Education Plan
NYCDE	New York City Department of Education
NYCRR	New York Compilation of Codes, Rules and Regulations
OIG	Office of Inspector General

INTRODUCTION

BACKGROUND

The Medicaid Program

Under Title XIX of the Social Security Act (the Act), the Medicaid program pays the health care costs of persons who qualify because of medical condition, economic condition, or other qualifying factors. Medicaid costs are shared between the Federal Government and participating States. Within the Federal Government, the Centers for Medicare & Medicaid Services (CMS) administers the Medicaid program.

To participate in Medicaid, a State must submit and receive CMS's approval of a State plan. The State plan is a comprehensive document describing the nature and scope of the State's Medicaid program and the State's obligations to the Federal Government. Medicaid pays for medically necessary services that are specified in Medicaid law when included in the State plan and when provided to individuals eligible under the State plan.

Medicaid Coverage of School Health Services

Section 411(k)(13) of the Medicare Catastrophic Coverage Act of 1988 (Public Law 100-360) amended section 1903(c) of the Act to permit Medicaid payments for medical services provided to children under the Individuals with Disabilities Education Act (IDEA) (originally enacted as Public Law 91-230 in 1970) through a child's plan/family plan.

In August 1997, CMS issued a school-based guide entitled "Medicaid and School Health: A Technical Assistance Guide." According to this guide, school health-related services included in a child's plan/family plan may be covered if all relevant statutory and regulatory requirements are met. In addition, the guide provides that a State may cover services included in a child's plan/family plan as long as (1) the services are listed in section 1905(a) of the Act and are medically necessary; (2) all Federal and State regulations are followed, including those specifying provider qualifications; and (3) the services are included in the State plan or are available under the Early and Periodic Screening, Diagnostic and Treatment Medicaid benefit. Covered services may include but are not limited to physical therapy, occupational therapy, speech pathology/therapy services, psychological counseling, nursing, and transportation services.

New York's Medicaid Program

In New York State, the Department of Health is the State agency responsible for operating the Medicaid program. Within the Department of Health, the Office of Medicaid Management administers 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, including school health claims. Speech claims paid by the State's

Medicaid Management Information System show a service date of the first of the month for services rendered during that month.

The Department of Health and the State Education Department developed the State's school supportive health services and preschool supportive health services programs. In general, under the school program, 5- to 21-year-old students receive school health services from their local school districts. Under the preschool program, 3- to 4-year-old children receive school health services through their county offices.

The Federal share of school health claims was 50 percent during our audit period. Under the State's Medicaid program, only the Federal share is actually paid to school health providers. The State share is taken from the school district's or county's annual State education aid appropriation. In addition, the State takes back 50 percent of the Federal share from the school districts, leaving them with 25 percent of each claim submitted, and 59.5 percent from the counties (preschools), leaving them with 20.25 percent of each claim submitted.

New York City Department of Education

The New York City Department of Education (NYCDE) (formerly known as the New York City Board of Education) is the largest provider of school health services in the State. More than 1 million students are enrolled in NYCDE, which encompasses 5 boroughs/counties and consists of 40 school districts.

During our September 1, 1993, through June 30, 2001, review period, NYCDE submitted more than 60 percent of the State's Medicaid claims for school health speech services provided to school and preschool students.

OBJECTIVE, SCOPE, AND METHODOLOGY

Objective

Our objective was to determine whether Federal Medicaid payments for speech services claimed by NYCDE were in compliance with Federal and State requirements.

Officials of CMS requested the audit.

Scope and Methodology

Our audit period covered September 1, 1993, through June 30, 2001. During our audit, we did not review the overall internal control structure of the State or the Medicaid program. Rather, we limited our internal control review to the objective of our audit.

To accomplish our objective, we:

- met with CMS regional and central office officials to plan the audit;

- reviewed applicable Federal and State regulations and guidelines;
- reviewed prior survey work that we had performed at 11 schools and preschools in the State, including those of NYCDE;
- held discussions with State Department of Health and Education Department officials to gain an understanding of the State's school and preschool programs;
- performed survey site visits to NYCDE from April through June 2000 to gain an understanding of its organization and Medicaid claim procedures and to review 79 claims (including speech claims) for 9 students;
- ran computer programming applications at the Medicaid Management Information System fiscal agent that identified 15,311,862 school and preschool claims totaling over \$5 billion (\$2.5 billion Federal share) for the period April 1, 1990, through June 30, 2001;
- extracted all NYCDE school and preschool claims from our programming applications;
- eliminated from our programming applications all duplicate school and preschool claims (including those made by NYCDE) that were identified in an Office of the State Comptroller audit report (Report 2000-S-1) for the period January 1, 1997, through December 31, 1999; and
- eliminated, for periods before and after the Office of the State Comptroller's audit period, all duplicate school and preschool claims made by NYCDE, which we discussed in a December 20, 2002, Office of Inspector General (OIG) report (A-02-02-01018).

We extracted from the programming applications the speech claims for our September 1, 1993, through June 30, 2001, audit period. These applications identified 2,517,503 speech claims totaling \$1,102,215,225 (\$551,121,609 Federal share) made by NYCDE. These claims were made on behalf of 109,140 beneficiaries (students). We then used simple random sampling techniques to select a sample of 100 claims from the universe of 2,517,503 speech claims. Appendix A contains the details of our sample design and methodology.

On May 17, 2002, we issued letters to the NYCDE school and preschool offices requesting documentation to support the 100 sampled claims. Of the 100 claims, 96 were for school students and 4 were for preschool students. Appendix B contains the instructions that were attached to our letters.

In conjunction with CMS officials, we developed worksheets that contained the criteria applied to each sampled claim. We reviewed the documentation submitted by NYCDE against the criteria on these worksheets to determine whether the claims were allowable.

For 96 sampled claims, we determined that the initial documentation submitted by NYCDE was inadequate, and we issued 5 additional letters to NYCDE requesting further documentation or

clarification. We reviewed the additional documentation that NYCDE submitted. We also performed site visits to NYCDE in March and April 2003 to interview five district supervisors of speech services.

In addition, if NYCDE did not supply American Speech-Language-Hearing Association (ASHA) certification information, we contacted ASHA officials to determine whether the service providers or the individuals providing direction to the service providers were ASHA certified. Similarly, if NYCDE did not supply information on State-licensed speech-language pathologists, we consulted the State Education Department, Office of the Professions Web site to determine whether they were licensed.

We used a variables appraisal program to estimate the dollar impact of the improper Federal funding claimed in the total population of 2,517,503 speech claims.

We performed fieldwork at the State Department of Health in Albany, NY; the State Medicaid Management Information System fiscal agent in Menands, NY; the CMS central office in Baltimore, MD; and NYCDE.

We conducted our review in accordance with generally accepted government auditing standards.

FINDINGS AND RECOMMENDATIONS

Eighty-six of the 100 speech claims in our statistically valid sample did not comply with Federal and State requirements. Of the 86 claims, 68 contained more than 1 deficiency. The schedule below summarizes the deficiencies noted and the number of claims that contained each type of deficiency. Appendix C shows our determination on the deficiencies in each sampled claim.

Summary of Deficiencies in Sampled Claims

Type of Deficiency	Number of Unallowable Claims¹
1. Unable to verify that the services billed were rendered	42
2. Unable to verify that a minimum of two speech services were rendered during the month billed	47
3. No documentation provided	2
4. Speech service referral requirements not met	43
5. No or untimely child's plan/family plan	24
6. Speech services not included in child's plan/family plan	1
7. Federal provider requirements not met	76

¹Total exceeds 86 because 68 claims contained more than 1 error.

The sample error rate remained consistently high throughout our audit period, as summarized below:

<u>Service Period</u>	<u>Number of Claims Sampled</u>	<u>Sample Error Rate</u>
1993–1995	34	100.0%
1996–1998	34	76.5%
1999–2001	<u>32</u>	81.3%
Total	100	

In our opinion, these deficiencies occurred because:

- The State did not provide proper or timely guidance about Federal provider and speech service referral requirements to its schools and preschools, including NYCDE.
- NYCDE did not comply with other State guidance it had received.
- The State did not adequately monitor speech claims from providers, including NYCDE, for compliance with Federal and State requirements.
- NYCDE failed to maintain appropriate documentation to support its speech claims.

As a result, during our September 1, 1993, through June 30, 2001, audit period, we estimate that the State improperly claimed \$435,903,456 in Federal Medicaid funding.

STATUTES, REGULATIONS, AND GUIDANCE

Below are the Federal and State law, regulations, and guidelines that applied to our review of speech services.²

Federal Requirements

Section 1903(c) of the Act permits Medicaid payments for medical services provided to children under IDEA that were included in a child’s plan/family plan. In general, school health-related services included in a child’s plan/family plan can be covered if all relevant requirements are met.

Section 1902(a)(27) of the Act requires providers to maintain records “as are necessary fully to disclose the extent of the services provided.” Federal regulations (42 CFR § 431.17) require that the Medicaid State agency “maintain or supervise the maintenance of records necessary for the proper and efficient operation of the [State] plan.” Regulations (42 CFR § 433.32) also require Medicaid agencies to “maintain an accounting system and supporting fiscal records to assure that claims for Federal funds are made in accordance with applicable Federal requirements.”

²See Appendix D for relevant State guidance.

Pursuant to 42 CFR § 440.110(c), reimbursable speech pathology services are those provided by or under the direction of a speech pathologist for which a patient was referred by a physician or another licensed practitioner. (Prior to April 1995, a physician was required to make the referral.) The regulation defines a speech pathologist as an individual who has a Certificate of Clinical Competence (CCC) from ASHA, has completed the equivalent educational requirements and work experience necessary for the CCC, or has completed the academic program and is acquiring supervised work experience to qualify for the CCC.

Office of Management and Budget Circular A-87 establishes principles and standards for determining allowable costs incurred by State and local governments under Federal awards. Section C.1.c. of Attachment A of those principles states that to be allowable, costs must be authorized or not prohibited by State or local laws or regulations.

In August 1997, CMS issued a school-based guide entitled “Medicaid and School Health: A Technical Assistance Guide.” The guide provides information and technical assistance to school health services programs seeking Medicaid funding.

Medicaid State Operations Letters

On September 3, 1993, CMS Region II issued Medicaid State Operations Letter 93-54 to State Medicaid directors on the subject of school health. The letter stated in part that:

. . . HCFA³ policy is that the more specific regulatory authority relating to “provider qualifications” must be adhered to when services coverable under more than one authority are covered under a broad coverage category. If the services of a physical therapist, occupational therapist, audiologist or speech pathologist are covered under the rehabilitation option (42 CFR 440.130), the specific provider qualification requirements at 42 CFR 440.110 must be met.

On February 9, 1995, CMS Region II issued Medicaid State Operations Letter 95-12 to State Medicaid directors. The letter furnished guidance on the term “under the direction of” for purposes of speech pathology services. In its letter, CMS recited the Federal requirements of 42 CFR § 440.110(c) and stated that:

The Health Care Financing Administration’s interpretation of the term “under the direction of a speech pathologist” is that the speech pathologist is individually involved with the patient under his or her direction and accepts ultimate responsibility for the actions of the personnel that he or she agrees to direct. We advise States that the speech pathologist must see each patient at least once, have some input into the type of care provided, and review the patient after treatment has begun. The speech pathologist would also need to assume the legal responsibility for the services provided. Therefore, it would be clearly in the pathologist’s own interest to maintain close oversight of any services for which he or she agrees to assume direction.

³CMS was formerly known as the Health Care Financing Administration (HCFA).

State Plan Requirements

On June 2, 1995, CMS approved New York's State plan amendment 92-42 for school and preschool supportive health services for adoption into the Medicaid State plan effective May 21, 1992. Pursuant to the State plan amendment, State officials agreed to (1) assume the responsibility for providing school districts and counties with training and information concerning participation in the Medicaid program, (2) establish a system to ensure that school health providers bill Medicaid for only those types of services that are Medicaid reimbursable, (3) monitor compliance with documentation requirements, and (4) monitor school health providers' compliance with the obligation to provide school health services by appropriately licensed or certified staff who meet Medicaid standards.

The State plan specifies that Medicaid will reimburse school and preschool providers through a fixed fee that covers speech services provided during a calendar month. The State plan requires that a minimum of two speech services be provided within the month to claim Medicaid reimbursement. The monthly fee established by the State for speech services provided by school districts, including NYCDE, was \$432 (\$216 Federal share). For preschool providers, including NYCDE, the monthly fee was either \$545 (\$272.50 Federal share) or \$410 (\$205 Federal share).

State Regulations

New York Compilation of Codes, Rules and Regulations (NYCRR), Title 18, section 505.11 provides that rehabilitation services, including speech pathology services, provided in a school setting are Medicaid-reimbursable services under the State's Medicaid program only if provided pursuant to a child's plan/family plan. Section 505.11 was amended in September 1993 to include sections on referral and provider requirements related to Medicaid school health speech services. In October 1993, the referral requirements of section 505.11 were further amended to allow registered nurses, nurse practitioners, and speech pathologists, as well as physicians, to recommend speech pathology services. Subsection (c)(1)(iv) of the regulation states that qualified professional personnel employed by or under contract to a school district, an approved preschool, or a county in the State or the city of New York may provide the services.

The regulation states in part that:

Speech pathology services may be provided under subparagraph (iv) of this paragraph by a teacher of the speech and hearing impaired under the direction of a speech pathologist. Under the direction of a speech pathologist means that a teacher of the speech and hearing impaired may provide services as long as a speech pathologist meets with such teacher on a regular basis and is available for consultation to assure that care is provided in accordance with the individualized education program or an interim or final individualized family services plan.

Centers for Medicare & Medicaid Services Guidance

In a February 8, 1995, letter, CMS provided the State with guidance on the term “under the direction of” contained in 42 CFR § 440.110(c). CMS stated that the ASHA-certified or equivalent speech pathologist providing direction must see each patient at least once, have some input into the type of care to be provided, review the patient after treatment has begun, assume the legal responsibility for the services provided, and maintain close oversight of the services for which he or she agrees to assume direction. In a November 20, 1996, letter, the State disagreed with CMS’s interpretation of “under the direction of.” The State believed that “direction” allowed for flexibility based on the qualifications of the individual receiving the direction.

In a June 4, 1997, response to the State, CMS continued to maintain that providers of speech pathology services must meet the specific qualifications of 42 CFR § 440.110(c) to maintain quality assurance. CMS also stated that:

. . . it would be reasonable for New York to look to its own State practice laws in order to determine when services are appropriately provided “under the direction of” a qualified speech pathologist. Therefore, the State could utilize its school employees to provide speech pathology services “under the direction of” a Medicaid qualified speech pathologist, if this was consistent with the State’s own laws and regulations.

DEFICIENCIES NOTED IN SAMPLED CLAIMS

The sections below discuss the seven types of deficiencies noted in the sampled claims and the criteria that we applied in determining whether claims were in compliance with Federal and State requirements.

1. Unable To Verify That the Services Billed Were Rendered

Section 1902(a)(27) of the Act, Federal regulations (42 CFR §§ 431.17 and 433.32), and CMS’s August 1997 technical assistance guide require that services claimed for Federal Medicaid funding be documented. The State acknowledged this requirement in November 1992 guidance and provided a form for school health providers’ use in documenting the number of services rendered per month. The State reemphasized this requirement in August 1995 guidance.

Of the 100 sampled claims, 42 did not comply with Federal law and regulations requiring documentation that would identify the services rendered. To document the speech services delivered monthly to students, NYCDE relied primarily on a service-recording document called a related-service attendance form. For 41 claims, neither related-service attendance forms nor other service delivery documents were provided. Also, for one claim, the related-service attendance form showed that no services had been rendered.

KPMG Peat Marwick found similar problems during a review of NYCDE’s Medicaid reimbursement for speech, occupational therapy, and physical therapy school health services in the early years of our audit period. A November 17, 1995, NYCDE memorandum stated that the

purpose of the review “is to assess possible school health system liability prior to a Federal audit.” According to the memorandum, KPMG Peat Marwick drew a statistical sample of students for whom Medicaid reimbursement was received during the school years 1992-93, 1993-94, and 1994-95. The memorandum went on to state that related-service attendance forms must be submitted for all students in the sample. However, a summary document prepared by KPMG Peat Marwick noted that 51 percent of the forms could not be located. This percentage is slightly higher than our error rate of 42 percent (42 of 100 sampled claims) for speech services provided during the full audit period.

2. Unable To Verify That a Minimum of Two Speech Services Were Rendered During the Month Billed

The State plan specifies that Medicaid will reimburse school and preschool providers through a fixed fee that covers speech services provided during a calendar month. To qualify for the fixed-fee reimbursement during a particular month, the State plan requires that a minimum of two speech services be provided within the month. For 47 of the 100 sampled claims, NYCDE either submitted documentation showing that the minimum of 2 speech services had not been rendered or provided no service delivery documentation.

For 5 of the 47 claims questioned by our audit, the related-service attendance forms showed that only 1 speech service had been rendered during the month for which a claim had been submitted. For 1 of the 47 claims, the form showed no speech services rendered. For the remaining 41 claims questioned, NYCDE did not submit related-service attendance forms or other service recording documents to show the number of speech services rendered during the month billed. Therefore, we were unable to verify that at least two speech services had been rendered during the month for which speech services were billed to the Medicaid program.

In a January 31, 2003, letter to us, an NYCDE official stated that NYCDE had performed a review to test the reliability of approximately 81,000 Medicaid claims submitted for May 2001. The letter stated that the review involved an examination of whether and to what extent the service attendance forms showed that at least the minimum number of related-service encounters had occurred to support the claims. The letter went on to state: “Some of the sampled service cards indicated that the student had not received the minimum of two service encounters. An examination of Medicaid claims made for these students in other months of school year 2000-01 revealed a similar pattern for other months.”

Thus, NYCDE has itself identified a number of claims in which the students did not receive at least two speech services.

3. No Documentation Provided

Federal regulations (42 CFR §§ 431.17 and 433.32) and State regulations (18 NYCRR § 540.7) require that services claimed for Federal Medicaid funding be documented. For 2 of the 100 sampled claims, NYCDE did not provide any documentation at all.

4. Speech Service Referral Requirements Not Met

Federal regulations require a referral for speech services by a physician or another licensed practitioner (42 CFR § 440.110(c)). (Before April 1995, only a physician could make the referral.) State regulations provide that a referral is needed from a physician, a registered nurse, a nurse practitioner, or a licensed speech-language pathologist (18 NYCRR § 505.11).

Of the 100 sampled claims, 43 did not meet Federal speech service referral requirements:

- For 22 claims, an appropriate professional did not make the referral.
- Sixteen claims lacked documentation of a referral.
- For three claims, the referral was made 2 to 11 months after the service date.
- The documentation for two claims indicated that speech services were not recommended for the service dates under review.

In addition, 42 of the 43 claims did not meet the State's own speech service referral requirements.

5. No or Untimely Child's Plan/Family Plan

Section 1903(c) of the Act permits Medicaid payments for school health services provided to children that are identified in a child's plan/family plan. Part B of IDEA, which established the concept of the child's plan/family plan, requires that school districts prepare, for each child with special needs, a child's plan/family plan that specifies all needed special education and related services. The "related services" provided for in the child's plan/family plan are often medical services that are potentially reimbursable by Medicaid. Medicaid will pay for medical services provided pursuant to an IDEA-required child's plan/family plan if the services are listed in the child's plan/family plan and meet all other Medicaid requirements.

In addition, State regulation (18 NYCRR § 505.11) requires that speech services provided in a school setting be listed in the child's plan/family plan to be reimbursable by Medicaid.

The U.S. Department of Education establishes the requirements for a child's plan/family plan. Federal regulations of that Department (34 CFR § 300.342) state that a child's plan/family plan must be in effect at the beginning of each school year, be in effect before special education and related services are provided, and be implemented as soon as possible following the meetings described under § 300.343. Also, 34 CFR § 300.343 states that the child's plan/family plan must be reviewed at least annually to determine whether the annual goals for the child are being achieved and to revise the plan as appropriate.

State regulations implementing the U.S. Department of Education requirements (Part 200.4(f) of the Regulations of the Commissioner of Education) provide that the child's plan/family plan "of

each student with a disability shall be reviewed and, if appropriate, revised, periodically but not less than annually.” Part 200.4(f)(2) states that before the annual review, a Committee on Special Education⁴ must notify the parent of its intent to review the student’s program and placement. Part 200.4(f)(3) states that upon completion of the annual review, the committee must notify the parent of the committee’s recommendations. Part 200.4(d)(2)(iii) states that the committee must develop a child’s plan/family plan that includes recommendations listing measurable annual goals. Pursuant to the Medicaid State plan, the State is responsible for monitoring the provision of services in accordance with these regulations (State Plan Amendment 92-42, Attachment 4.16-A).

Additionally, the CMS August 1997 technical assistance guide states that it is CMS’s policy that health-related services provided in a school may be covered under Medicaid only “if all relevant statutory and regulatory requirements are met.”

Of the 100 sampled claims, 24 did not meet Federal and State requirements for a child’s plan/family plan:

- Six claims lacked any child’s plan/family plan.
- For three claims, the child’s plan/family plan provided by NYCDE was prepared after the service date under review.
- For 15 claims, the child’s plan/family plan provided by NYCDE had not been reviewed in the 12 months prior to the service date under review.

6. Speech Services Not Included in Child’s Plan/Family Plan

State regulation (18 NYCRR § 505.11) requires that speech services provided in a school setting be listed in the child’s plan/family plan to be reimbursable by Medicaid. For 1 of the 100 sampled claims, although a child’s plan/family plan existed, the plan did not identify or recommend speech services. Therefore, these services were not Medicaid reimbursable.

7. Federal Provider Requirements Not Met

Federal regulations require that speech services be provided by or under the direction of an ASHA-certified speech-language pathologist, an individual with equivalent education and work experience necessary for the ASHA CCC, or an individual who has completed the academic program and is acquiring supervised work experience to qualify for the CCC (42 CFR § 440.110(c)).

⁴A Committee on Special Education, a multidisciplinary team established to ensure timely evaluation and placement of students, develops, reviews, and revises the child’s plan/family plan of students with disabilities.

Service Provider Qualifications

For 76 of the 100 sampled claims, the requirement for ASHA certification or the equivalent was not met or no documentation was provided to show compliance with the requirement.

For most cases in our sample where the service provider was known, a teacher of speech improvement or a teacher of the speech and hearing handicapped rendered the speech services in question, and no direction was provided or documented. Speech services rendered by these types of providers are not eligible for Medicaid reimbursement unless the providers are under the direction of an ASHA-certified or equivalent speech-language pathologist. In instances where NYCDE did not supply information on ASHA certifications (and if the identity of the individual was known), we contacted ASHA officials to determine whether either the service provider or the speech pathologist identified as providing direction was ASHA certified. As a result of our contacts, we accepted 12 claims that would have been unallowable based on documentation submitted by NYCDE.

An ASHA-certified or equivalent speech-language pathologist did not render the speech services or we had no assurance that Federal requirements were met for the 76 claims in question. Specifically:

- Forty-three sampled claims did not meet the requirement that an ASHA-certified or equivalent speech-language pathologist provide the speech services. For 22 of the 43 claims, NYCDE did not supply the credentials of the service providers. We contacted ASHA officials and determined that none of these 22 service providers were ASHA certified. For the remaining 21 claims, the service providers had various credentials but were not ASHA certified and did not meet the equivalency requirements of 42 CFR § 440.110(c). Specifically, 12 were teachers of speech improvement, 5 were teachers of the speech and hearing handicapped, 1 was a State-licensed speech pathologist, 1 was an occupational per diem substitute, 1 was a “teacher of common branches,” and 1 had a special education teacher certificate.
- Thirty-three sampled claims lacked any documentation (such as related-service attendance forms, speech evaluations, or progress notes) to identify who provided the speech services. Because the identities of the providers were unknown, we were unable to determine whether Federal requirements were met.

“Under the Direction of” Requirements

The 76 claims also did not meet the “under the direction of” requirements of 42 CFR § 440.110(c), Medicaid State Operations Letter 95-12, or the June 4, 1997, letter from CMS to the State. Specifically:

- For 13 sampled claims, neither the service provider nor the supervisor identified as providing direction was ASHA certified or equivalent. Because the services were not provided by or under the direction of a qualified speech pathologist, Federal direction requirements were not met.

- For five sampled claims, the service provider was not ASHA certified or equivalent, and no person was identified as providing direction. Therefore, we could not establish compliance with the “under the direction of” requirements.
- For 25 sampled claims, the service provider was not ASHA certified or equivalent, but the identified district or citywide supervisors were ASHA certified. However, for all 25 claims, NYCDE failed to provide evidence/documentation showing that the applicable Federal and State requirements for direction were met.
- For 33 sampled claims, NYCDE was not able to provide evidence/documentation of who rendered the speech services. For 23 of the 33 claims, NYCDE named the service provider but supplied no evidence/documentation that the provider had actually rendered the services. For 10 of the 33 claims, NYCDE neither named the service provider nor supplied evidence/documentation of the provider’s identity. As a result, we determined that the “under the direction of” requirements had not been met in these 33 cases.

New York City’s Position

In a series of letters provided in response to questions raised by our audit, NYCDE officials asserted that their supervisory structure “meets the federal requirement that speech services be provided by or under the direction of a licensed speech pathologist.” The officials stated:

. . . you have asked, among other things, for those teachers who are speech pathologists or ASHA certified, documentation that services were provided under the direction of a licensed pathologist. You have also asked for supervisory material that is specific to the child being reviewed. We are enclosing a Speech Services Procedural Manual that explains the various responsibilities of a speech supervisor. These responsibilities include observing and writing observation reports for teachers of speech improvement, ensuring that the appropriate services are provided, providing materials to teachers of speech improvement. Supervisors meet with teachers to review caseloads, in order to ensure that students are receiving the appropriate services. Supervisors conduct observations of teachers to evaluate techniques and approaches used to work with students. They provide ongoing, regularly scheduled opportunities for professional development. For annual IEP [individualized education plan] updates, speech supervisors meet with teachers, as well as review and monitor progress reports and IEP goals in order to determine the ongoing needs of students. Speech supervisors are available to teachers for consultation on a regular basis.

The officials went on to state:

There are some limited instances where the speech supervisor may not be a licensed pathologist or ASHA certified. In these cases, the speech supervisor is responsible for supervising the speech teachers in his/her district. However, an additional supervisor is

responsible for working with the speech supervisor. [Name 1 deleted⁵] has had this responsibility since 1994 for all districts other than District 75 where the speech supervisor is not a licensed pathologist. In District 75, [name 2 deleted⁵] provides the supervisory oversight. (This was explained to you by [name 1 deleted⁵] in an extensive interview session several years ago.) Ms. [name 1 deleted⁵] or Ms. [name 2 deleted⁵] will meet with supervisors, review IEPs, conduct professional development and be available for consultation on a regular basis.

The officials concluded by stating:

It is the Department's position that this supervisory structure meets the federal requirement that speech services be provided by or under the direction of a licensed pathologist. The "under the direction of" requirement does not state that services must be provided under the direct observation of a licensed speech pathologist. Rather, it is the Department's position, which has been approved by the State, that the involvement of speech supervisors, as described above, assures that speech therapy is provided under the direction of a licensed speech pathologist. As a result, the documents that are being provided in connection with this audit may not include an observation by a speech supervisor of the speech teacher working with a child named in the audit. In addition, there may not be extensive documentation of the specifics of the oversight provided by the speech supervisors. However, the supervisors are required to oversee the speech teachers as part of their job responsibilities.

Office of Inspector General's Position

We disagree with NYCDE's position that its supervisory structure meets the Federal ASHA requirements of 42 CFR § 440.110(c). For all 76 claims questioned by our audit, the speech service providers were not ASHA certified or equivalent. NYCDE had little or no documentation at or around the time that the services were delivered to support its position that the speech services in question had been provided by or under the direction of an ASHA-certified or equivalent speech-language pathologist. The correspondence prepared in response to our audit did not constitute documentation that the qualifications standards set forth in 42 CFR § 440.110(c), Medicaid State Operations Letter 95-12, and/or 18 NYCRR § 505.11 had been met.

As part of our audit, we interviewed the district speech supervisors of five NYCDE districts. Two of the five district supervisors had ASHA certifications, and three did not. During our interviews, the district supervisors stated that they did not meet with all speech students in their respective districts.

For 25 of the 76 claims, NYCDE submitted no documentation to show direction. For the remaining 51 claims, NYCDE submitted some documentation to substantiate its compliance with the direction requirements. We carefully reviewed all documentation that NYCDE provided.

For the most part, the documentation did not show that the individuals identified as providing

⁵OIG policy does not permit us to include individuals' names in our reports.

direction were “individually involved with the patient under his or her direction” as required by Medicaid State Operations Letter 95-12. The documentation also did not show evidence that the service provider and the individual identified as providing direction met regularly or that the individual identified as providing direction was “available for consultation to assure that care [was] provided in accordance with” the child’s plan/family plan as required by 18 NYCRR § 505.11.

For only 3 of the 76 claims did the same document contain the names of the student, the service provider, and the individual providing direction. However, in all three instances, the document provided was a speech authorization form created by NYCDE for referral purposes. These forms do not show any evidence of direction. For the remaining 73 claims, the names or signatures of the service provider and the person identified as providing direction were not indicated in the child’s plan/family plan, service delivery documentation showing the services rendered, progress notes, speech evaluations, or any other documents submitted by NYCDE. In summary, for these 73 claims, NYCDE provided no documentation linking the student, the service provider, and the person identified as providing direction.

For the 76 claims in question, the documentation submitted by NYCDE can be generally categorized as follows:

- For 25 claims, NYCDE submitted no documentation to show direction. Therefore, we could not determine whether direction had been provided.
- For six claims, NYCDE submitted only visitation logs from a citywide supervisor. The visitation logs for five of the six claims reflected meetings between the citywide supervisor (an ASHA-certified speech pathologist) and a non-ASHA-certified district supervisor, and those for one claim reflected meetings between the citywide supervisor (a non-ASHA-certified speech pathologist) and a non-ASHA-certified district supervisor. For five claims, the logs did not show the students’ or the service providers’ names. For one claim, the log contained the name of the service provider, but it was dated 3 years before the service date under review. The visitation logs did not provide any evidence of direction for these six claims.
- For three claims, NYCDE submitted only meeting agendas. The agendas were generally for districtwide meetings or training sponsored by the district supervisor. The agendas did not show the students’ or the service providers’ names and contained no evidence of direction. No sign-in sheets or lists of attendees for these meetings were provided.
- For three claims, NYCDE submitted only teacher observation reports showing the district supervisor’s performance evaluation of the speech teacher. Yearly teacher observations, which are required by State regulations, may occur anytime during the school year. The observation reports did not show the students’ names for the sampled claims. These observation reports did not provide assurance that regularly scheduled meetings were held

or that the district supervisors were available for consultation to ensure that care was provided in accordance with the child’s plan/family plan.

- For 13 claims, NYCDE submitted only speech authorization forms, which are used to refer students for speech services. These documents showed the name of the district supervisor referring the student for speech services, but some of the district supervisors’ signatures appeared to be rubber stamped. Generally, the documents did not show the service provider’s name. These documents did not provide evidence of direction.
- For 26 claims, NYCDE submitted a combination of observation reports, speech authorizations, and other types of documents. No single document showed the names of the student, the service provider, and the supervisor, nor did the combination of documents submitted provide other evidence of direction or of the provision of care in accordance with the child’s plan/family plan.

The documentation submitted by NYCDE to show direction did not provide evidence of the direction required by 42 CFR § 440.110(c), Medicaid State Operations Letter 95-12, or the June 4, 1997, letter from CMS to the State. Based on our review, we do not believe that the 76 claims in question meet these Federal requirements. Appendix E provides examples of the documentation submitted by NYCDE for three questioned claims and our explanations as to why the claims did not meet “under the direction of” requirements.

Although we believe that CMS regulations and guidance to the State make clear that either the individual providing speech services or the individual providing direction to the service provider must be ASHA certified or equivalent, we also reviewed the sampled claims to ascertain whether the State complied with its own regulation (18 NYCRR § 505.11) that permits a teacher of the speech and hearing impaired to provide speech pathology services under the direction of a State-licensed (but not necessarily ASHA-certified) speech-language pathologist. We found that 75 claims did not meet the State’s own requirements. As stated above, we determined, where the service provider was known, that for the most part, a teacher of speech improvement or a teacher of the speech and hearing handicapped rendered the speech services in question and that no direction from an ASHA-certified or a State-licensed speech-language pathologist was provided or documented.

CAUSES OF UNALLOWABLE CLAIMS

As discussed below, we found four main causes of the unallowable claims.

State Guidance Was Improper or Untimely

Some of the unallowable claims resulted from improper or untimely State guidance to the provider community, including NYCDE, about Federal regulations and guidelines.

Initial State guidance in 1992 stated that Medicaid-reimbursable speech services must comply with Federal regulations (42 CFR § 440.110(c)) requiring that speech services be provided by or under the direction of an ASHA-certified or equivalent speech-language pathologist. However,

in May and June 1994, the State modified its guidance to provide that for purposes of billing Medicaid, an ASHA-certified speech-language pathologist or a State-licensed speech-language pathologist could provide the speech services or the direction. Subsequent guidance to providers also contained this modification. This later State guidance was improper because State licensure is not equivalent to ASHA certification.

Additionally, during our audit period, 42 CFR § 440.110(c) required a referral for speech services by a physician or another licensed practitioner. However, the State did not issue guidance to the provider community on this referral requirement until May 1997.

The New York City Department of Education Did Not Comply With State Guidance

Unallowable claims were also submitted because NYCDE did not comply with the guidance it had received from the State. For example, for 42 of the 43 claims questioned for noncompliance with speech service referral requirements, NYCDE did not comply with the State's guidance that a referral for speech services was needed from a physician or another licensed practitioner before claiming Medicaid reimbursement.

The State Did Not Adequately Monitor Speech Claims

The State did not adequately monitor speech claims from its school health providers, including NYCDE, for compliance with Federal and State requirements. Although the State conducted documentation reviews, these reviews were infrequent.

During our September 1, 1993, through June 30, 2001, audit period, the State conducted only one documentation review at NYCDE around December 1993. Neither the State nor NYCDE could supply us with a copy of the report issued as a result of this review. Given that NYCDE submitted about two-thirds of all school health claims and more than 60 percent of all speech claims in the State, we believe that these reviews should have occurred more frequently.

The New York City Department of Education Failed To Maintain Adequate Documentation

As evidenced throughout this report, NYCDE failed to maintain adequate documentation to support its Medicaid speech claims. During our audit, we made six written requests for documentation. However, service delivery documentation, such as related-service attendance forms, was either not prepared or not provided for 42 of the 100 sampled claims. Additionally, for 6 sampled claims, NYCDE did not provide a child's plan/family plan, and for 15 claims, NYCDE did not provide documentation showing that the child's plan/family plan had been reviewed within 12 months prior to the service date.

ESTIMATION OF THE UNALLOWABLE CLAIMS

Of the 100 speech claims sampled, 86 were not in accordance with Federal and State requirements. Extrapolating the results of our sample, we estimate that the State improperly

claimed between \$435,903,456 and \$498,845,408 in Federal funds from September 1, 1993, through June 30, 2001. The midpoint of the confidence interval amounted to \$467,374,432. The range shown has a 90-percent level of confidence with a sampling precision as a percentage of the midpoint of 6.73 percent. The details of our sample results and projection are shown in Appendix F.

RECOMMENDATIONS

We recommend that the State:

- refund \$435,903,456 to the Federal Government,
- provide proper and timely guidance on Federal Medicaid criteria to NYCDE,
- reinforce the need for NYCDE to comply with Federal and State requirements,
- improve its monitoring of NYCDE's speech claims to ensure compliance with Federal and State requirements, and
- instruct NYCDE to maintain appropriate documentation to support its speech claims.

STATE'S COMMENTS AND OFFICE OF INSPECTOR GENERAL'S RESPONSE

In comments dated October 18, 2004, State officials disagreed with the findings and recommendations in our draft report and stated that the report should be withdrawn. Their response included an 18-page summary attached to a 2-page cover letter, plus 5 attachments labeled A to E. With the exception of Attachment D, which contained documentation related to 57 claims questioned by our audit, the State's comments are included in their entirety as Appendix G. In a December 31, 2004, letter, the State provided additional information on one claim questioned by our audit.

The majority of the documentation in the State's Attachments C and D was not new information. However, based on the information provided, we reduced the number of unallowable claims from 88 to 86 and made other changes as appropriate.

Below are summaries of the main issues raised by the State and OIG's response to those comments.

Reasons for the Audit

State's Comments

State officials said that a Department of Justice (DOJ) investigation of three school districts was the primary impetus for our audit of NYCDE's speech claims as well as the five additional school health audits of the State's Medicaid school health program.

Office of Inspector General's Response

The primary reasons for this audit and five additional audits were past OIG survey work that found numerous problems with the State's Medicaid school health claims, including survey work that found a 92-percent error rate in NYCDE's Medicaid school health claims; past CMS reviews dating back to 1993 that found problems with the State's claims; and a DOJ investigation of the State resulting from a Federal false claims action. Additionally, the State accounts for 44 percent of all Medicaid school health payments nationwide.

Audit Period and Approach

State's Comments

State officials said that our September 1, 1993, through June 30, 2001, audit period was inconsistent with the audit periods that we used in reviewing other States' school health programs. State officials noted that the audit periods used in other States were usually more recent years, such as 1999 or 2000. Additionally, officials stated that although Federal regulations (42 CFR § 433.32(b)) require a State to retain records for 3 years from the submission of a final expenditure report and although the State's regulations (18 NYCRR § 504.3(a)) require providers to keep records for 6 years, our audit covered claims for services as far back as 1993. The State asserted that because school districts were not required to maintain records for such distant periods, they were not able to thoroughly document many of the claims. Finally, State officials noted that relative to the audits in other States, the New York State audit used a miniscule sample size.

Office of Inspector General's Response

On the basis of fraud allegations we received from DOJ, and after consulting with CMS, we identified an audit period of September 1, 1993, through June 30, 2001. Record retention standards do not establish a bar on what periods we may audit. In a March 31, 2003, letter, NYCDE conceded that most school districts retain relevant files well beyond the retention period. However, notwithstanding this practice, NYCDE did not establish that pertinent documentation in support of the sampled claims ever existed, nor has NYCDE established that any pertinent records were discarded or destroyed. If the State can demonstrate that records were destroyed in accordance with established record retention policies or if documentation is furnished to CMS during the resolution process, we will assist the parties in recalculating the sample projection.

For simple random sampling, we use a minimum sample of 100. Use of larger sample sizes usually has the advantage of yielding estimates with better precision without affecting the estimate of the mean. Better precision would typically result in a larger lower bound for the confidence interval of the estimate. The lower bound is used as the amount recommended for monetary recovery. Our sampling and estimation methodology is statistically valid. Use of the minimum sample size does not adversely affect the auditee.

Educational Versus Medical Model

State's Comments

State officials said that Congress intended Medicaid to support medically necessary services required by a child's plan pursuant to IDEA and that this was notable for two reasons. First, local educational agencies would receive Medicaid funds for services mandated under Federal law since 1975. Second, to receive those benefits, local educational agencies would have to learn the complex Medicaid recordkeeping and billing requirements. The State said that school districts had provided those services for at least 15 years before they could bill Medicaid. Officials noted that pursuant to IDEA, documented services were provided under an educational model, which focused on how the child would meet long-term goals in the child's plan.

By contrast, State officials said that application of the medical model required schools to focus on technical, medically oriented documentation of individual service dates with less emphasis on long-term outcomes. According to the officials, compliance with the medical model presented significant challenges for schools, and those challenges caused many of our recommended audit disallowances.

Office of Inspector General's Response

Medicaid was established as a payer of medical services, and school health providers that enroll as Medicaid providers are not exempt from Medicaid requirements on the provision of State plan services. Medicaid school health providers need to follow the same documentation standards as all Medicaid providers.

Furthermore, the State's guidance on documentation to be maintained by school districts is consistent with the types of documentation maintained by traditional Medicaid providers. Additionally, in response to our audit of speech claims in areas of the State other than New York City (A-02-02-01030), State officials noted that between 1992 and January 2002, they issued 26 separate communiqués to school districts and counties "to aid the school districts in their application of the medical model of documentation of services" (emphasis added). In our opinion, these communiqués show that the State understood the program to be a medical model. Also, in guidance directed to the State and in its 1997 technical assistance guide, CMS clearly delineated that school health providers were considered medical providers and that they must meet the documentation standards that apply to all Medicaid providers.

The law and regulations allowing Medicaid to be the primary payer for IDEA services provided in schools do not call for or allow a suspension or loosening of general Medicaid requirements. Specifically, the U.S. Department of Education's 1999 final regulations on IDEA (34 CFR § 300.142(i)) state that "Nothing in this part should be construed to alter the requirements imposed on a State Medicaid Agency, or any other agency administering a public insurance program by Federal statute, regulations or policy under title XIX, or title XXI of the Social Security Act or any other public insurance program." This section clearly specifies that Medicaid requirements apply to school-based IDEA health services.

Applicable Federal Regulations

State's Comments

State officials said that 42 CFR § 440.110(c) (services for individuals with speech, hearing, and language disorders) did not apply to speech services provided under the Medicaid school health program. Rather, they stated that 42 CFR § 440.130(d) (diagnostic, screening, preventative and rehabilitative services) applied. State officials maintained that CMS had applied the wrong Federal regulation to speech services. Furthermore, they said that CMS had supported their contention that 42 CFR § 440.130(d) was the applicable regulation at the outset of their federally approved program. Officials also stated that the application of 42 CFR § 440.110(c) improperly imposed criteria on the delivery of speech services that did not exist under the rehabilitative option in New York's CMS-approved State plan.

State officials noted that 42 CFR § 440.130(d) did not require that rehabilitative services be provided "under the direction of" any particular individual, merely that they be recommended by a physician or another licensed practitioner of the healing arts, within the scope of his or her practice under State law. According to the State, as long as a child's plan/family plan recommended speech services, the recommendation requirement conformed to 42 CFR § 440.130(d) and a referral for speech services was not required.

Office of Inspector General's Response

The Federal regulation governing speech services, 42 CFR § 440.110(c), clearly applies to the services reviewed in this audit, not the standard that applies generally to "rehabilitation services" contained in 42 CFR § 440.130(d). CMS so informed State officials on at least six occasions:

1. A September 29, 1992, CMS letter to the Commissioner of the State Department of Social Services asked State officials to clarify that speech services for patients referred by a physician would be provided by or under the direction of a speech pathologist or audiologist in accordance with 42 CFR § 440.110(c).
2. Medicaid State Operations Letter 93-54, issued on September 3, 1993, informed the State that the specific provider qualification requirements of 42 CFR § 440.110(c) must be met even if the services were covered under the rehabilitation option of 42 CFR § 440.130(d).
3. A February 8, 1995, CMS letter to the State provided guidance on "under the direction of" and again referenced the use of 42 CFR § 440.110(c).
4. Medicaid State Operations Letter 95-12, issued to the State on February 9, 1995, recited the specific requirements of 42 CFR § 440.110(c) and provided guidance on "under the direction of" requirements.

5. A June 4, 1997, CMS letter to the State specified that the provider qualifications for speech pathology services at 42 CFR § 440.110(c) would apply even if the services were covered in the State plan pursuant to 42 CFR § 440.130(d).
6. CMS's August 1997 technical assistance guide stated that 42 CFR § 440.110 was the applicable Federal regulation for school-based speech services.

Furthermore, the State informed its school health providers on at least seven occasions that 42 CFR § 440.110(c), not 42 CFR § 440.130 or 42 CFR § 440.130(d), applied to Medicaid school health speech claims. The State's guidance to its school health providers did not reference either 42 CFR § 440.130 or 42 CFR § 440.130(d). Rather, the State's guidance on school-based speech services paralleled the requirements of 42 CFR § 440.110(c).

Although the State expressed its belief that speech services did not need to be provided by or under the direction of a speech pathologist and that 42 CFR § 440.130(d) (which does not have this requirement) applied, the State nonetheless required a preschool provider (a county) to return Medicaid funds for school health speech claims that were not provided by or under the direction of a licensed speech-language pathologist. Specifically, an October 2, 1998, letter from a State official to the preschool provider stated that:

We are concerned that Medicaid has reimbursed the county for speech services provided by teachers of the speech and hearing handicapped at the local BOCES [Board of Cooperative Educational Services] who are not "under the direction of" a licensed speech-language pathologist. Consequently, any claims for speech services delivered at the BOCES which have been reimbursed to the county by Medicaid under these circumstances should be voided. The Department will recover these funds through future claims submitted by the county.

Additionally, as a result of a review by the State Medicaid Fraud Control Unit, another preschool provider returned \$295,697 (\$147,849 Federal share) for Medicaid school health speech claims that were not provided by or under the direction of a licensed speech-language pathologist. The Medicaid Fraud Control Unit also required the preschool provider to pay \$39,000 in interest on those improper claims.

Federal Guidance

State's Comments

According to State officials, one of the most notable problems that hampered their effective administration of the school health program was inconsistent and contradictory Federal guidance. They maintained that a series of reports by the Government Accountability Office (GAO) had also criticized the lack of Federal guidance. State officials noted that one of these reports, issued in 1999, contained the following concern: "Inconsistent guidance from HCFA appears to have heightened school districts concerns that Medicaid reimbursements will have to be returned to the federal government later because of inappropriate documentation requirements."

Additionally, State officials said that the President’s budget proposal for fiscal year 2003 highlighted the problem in stating: “In past years, billing inconsistencies have plagued the program because the federal government has never articulated clear guidance.” Also, State officials said that CMS had acknowledged that its guidance on “under the direction of” was still evolving.

Office of Inspector General’s Response

We believe that the CMS guidance was clear and adequate. Although the GAO reports and testimony expressed concern about CMS’s oversight and guidance in general, CMS Region II guidance to the State was clear and noncontradictory. In our opinion, the State’s failure to follow this guidance resulted in the submission of unallowable Medicaid claims and unwarranted Federal Medicaid reimbursement.

American Speech-Language-Hearing Association-Certified Versus State-Licensed Speech-Language Pathologists

State’s Comments

According to State officials, we alleged that some NYCDE service providers were not ASHA certified and that others had various credentials but were not ASHA certified and did not meet the equivalency requirements. The officials said that our report failed to specify in what way the providers failed to meet the equivalency requirements and whether the various credentials included State licenses.

State officials continued to assert that their licensing requirements for a speech pathologist met or exceeded the requirements for a speech pathologist with a CCC from ASHA in the following areas: (1) the degree accepted, (2) the quantity of course work, (3) the distribution of course work, (4) the quantity of predegree practicum, (5) the specification of disorder types and age groups for the predegree practicum, (6) the amount of supervision during the clinical fellowship, and (7) the quality and quantity of supervision during clinical fellowship. According to State officials, the State’s licensing standards were identical to ASHA’s 1993 standards. The State noted that ASHA had not required that members certified during or before 1993 meet its newer standards, but rather had “grandfathered” them.

Office of Inspector General’s Response

For the 76 claims that we questioned in this area, a State-licensed speech-language pathologist either delivered the speech services or provided direction for only 1 claim. The remaining 75 claims did not meet the State’s own licensing requirements. For 33 of the 75 claims, NYCDE was not able to provide documentation to identify who provided the speech services. For 22 of the 75 claims, NYCDE did not supply the credentials of the speech service providers; however, we verified that the individuals were not ASHA certified or equivalent, nor were they State-licensed speech-language pathologists. For 20 of the 75 claims, individuals with credentials below an ASHA-certified or equivalent or a State-licensed speech-language pathologist delivered

the speech services. Specifically, 12 were teachers of speech improvement, 5 were teachers of the speech and hearing handicapped, 1 was an occupational per diem substitute, 1 was a “teacher of common branches,” and 1 had a special education teacher certificate.

Furthermore, in response to similar issues raised by the State concerning our report (A-02-02-01030) on speech claims made by non-New York City school health providers, ASHA’s Director of Government Relations and Public Policy stated in a September 4, 2002, letter to us that a State-licensed speech-language pathologist was not equivalent to an individual who holds a CCC from ASHA and that the differences were substantive. In summary, the letter stated that State licensing requirements in speech-language pathology were less stringent than ASHA’s CCC requirements in the following areas: (1) degree accepted, (2) quantity of course work (20 percent less), (3) distribution of course work, (4) quantity of the predegree practicum (20 percent less), (5) specification of disorder types and age groups for the predegree practicum, (6) amount of supervision for the predegree practicum, (7) quantity of supervision during the clinical fellowship, and (8) quality of supervision during clinical fellowship.

The September 4, 2002, letter went on to state:

The CCC is a nationally validated standard with documented studies that provide compelling evidence that the component requirements of the CCC provide a valid measure for competent practice. Even a minor deviation from these component requirements has potential for impact on this validity. The long list of differences between NY licensure and the ASHA CCC lead us to only one conclusion: NY licensure is not equivalent to the ASHA CCC.

We shared relevant portions of our A-02-02-01030 draft report and the State’s comments on that report with ASHA officials and asked that they respond to the State’s assertion that its licensing requirements meet or exceed the requirements of a speech pathologist with a CCC from ASHA. A June 16, 2003, response from ASHA’s Director of Government Relations and Public Policy stated that:

We continue to find in our analysis of this specific case that there are differences in the way standards are applied between New York state licensure and the Certificate of Clinical Competence (CCC). However, based on a legal review, it would appear that the interpretation of what constitutes completion of the “equivalent education and work experience necessary for the certificate” is based upon the regulatory definition established by the Centers for Medicare and Medicaid Services (CMS) and therefore, should ultimately be rendered by that agency.

CMS officials advised us that the State had not raised the equivalency issue with them before the State’s response to our A-02-02-01030 draft report. The State may wish to submit a formal request to CMS with adequate documentation for a determination on this issue.

“Under the Direction of” Requirements

State’s Comments

State officials contended that there was no Federal guidance specifying how to define “under the direction of” or how to document that services complied with that standard. They said that disallowing claims on that basis was inappropriate.

The State said that the current Federal regulation governing speech pathology services (42 CFR § 440.110(c)(1)) contained language that services be provided “by or under the direction of a speech pathologist.” The State noted that former regulations (42 CFR § 449.10(b)(11)) provided that services for individuals with speech, hearing, and language disorders be provided “by or under the supervision of a speech pathologist or audiologist.” State officials also noted that the “under the supervision” standard also applied to physical therapy, occupational therapy, and dental services.

According to the State, CMS redesignated 42 CFR § 449.10(b)(11) as 42 CFR § 440.110 in 1978, when the “under the supervision” standard for speech pathology, physical therapy, occupational therapy, and dental services was changed to “under the direction of.” The State said that on April 11, 1980, CMS published changes to Medicaid regulations that had been redesignated in 1978 and changed the word “direction” back to “supervision” for dental services, but did not make this change for speech, physical therapy, and occupational therapy. State officials asserted that the 1980 change to the dental regulation had caused “more ambiguity and confusion about an undefined regulatory standard.”

The State said that CMS had acknowledged the ambiguity created by the history of the term “under the direction of.” On April 2, 2003, CMS proposed to amend 42 CFR § 440.110(c) to revise the qualifications for audiologists, but not speech pathologists. On May 28, 2004, CMS finalized its proposed rulemaking concerning audiologists’ qualifications. CMS discussed its interpretation of “under the direction of” for audiology services in the preamble to the regulation, but not the regulation itself. According to the State, CMS also acknowledged in the preamble that its interpretation of “under the direction of” was “evolving” as it related to speech pathology services in schools. The State asserted that this CMS concession raised a question as to what standard we had applied for claims dating back to the early 1990s. The State contended that our definition of “under the direction of” had no basis in Federal or State laws or regulations. The State pointed to a recent OIG report on school-based transportation services (A-02-03-01008), in which we set aside, rather than questioned, claims when Federal Medicaid law and regulations did not define how to document services.

The State said that CMS’s August 1997 technical assistance guide did not define “under the direction of” and contained no instructions on how to document compliance with the standard. The State also said that CMS’s guide allowed States the flexibility to develop their own system for providing medical services to Medicaid-eligible children. Officials believed that this instruction in CMS’s guide was consistent with CMS’s June 4, 1997, letter instructing the State that it “could look to its own State practice laws in order to determine when services are

appropriately provided ‘under the direction of’ a Medicaid qualified speech pathologist, if this was consistent with the State’s own laws and regulations.”

The State said that pursuant to 18 NYCRR § 505.11, “under the direction of” a speech pathologist meant that a teacher of the speech and hearing impaired could provide services as long as the speech pathologist met with the teacher on a regular basis and was available for consultation to ensure that care was provided in accordance with the child’s plan/family plan.

Office of Inspector General’s Response

For 76 of the 100 sampled claims, the Federal requirement that speech services be provided by or under the direction of an ASHA-certified or equivalent speech-language pathologist was not met or we had no assurance that this requirement was met.

Contrary to the State’s assertions, CMS provided guidance to the State on the definition of “under the direction of.” Specifically, Medicaid State Operations Letter 95-12, issued to New York on February 9, 1995, stated:

The Health Care Financing Administration’s interpretation of the term “under the direction of a speech pathologist” is that the speech pathologist is individually involved with the patient under his or her direction and accepts ultimate responsibility for the actions of the personnel that he or she agrees to direct. We advise States that the speech pathologist must see each patient at least once, have some input into the type of care provided, and review the patient after treatment has begun. The speech pathologist would also need to assume the legal responsibility for the services provided. Therefore, it would be clearly in the pathologist’s own interest to maintain close oversight of any services for which he or she agrees to assume direction.

The 76 claims questioned by our audit did not meet the requirements of Medicaid State Operations Letter 95-12.

Additionally, in a June 4, 1997, letter, CMS informed the State that it could look to its own State laws to determine whether speech services met the “under the direction of” requirement. The State’s interpretation of “under the direction of” is in 18 NYCRR § 505.11. Pursuant to 18 NYCRR § 505.11(c)(1), “under the direction of a speech pathologist means that a teacher of the speech and hearing impaired may provide services as long as a speech pathologist meets with such teacher on a regular basis and is available for consultation to assure that care is provided in accordance with” the child’s plan/family plan. However, 75 claims questioned by our audit did not meet the “under the direction of” requirements of 18 NYCRR § 505.11. (Appendix D summarizes State guidance on “under the direction of” requirements.)

In summary, we applied the appropriate criteria to determine whether NYCDE met the Federal requirement that speech services be provided by or “under the direction of” a qualified speech pathologist. We believe that the State’s arguments regarding “under the direction of” are without merit.

Referrals

State's Comments

Although State officials disputed the applicability of 42 CFR § 440.110, which requires a referral by a physician or another medical practitioner, they maintained that they had nonetheless complied with this requirement since the inception of their school health program. The officials commented that when the school health program began, a child's plan was sufficient to meet the requirements of 42 CFR § 440.110 because a Committee on Special Education was to include a physician or another licensed professional at the request of the school district, county, or parent.⁶ The State asserted that a recommendation from a Committee on Special Education in the form of a child's plan/family plan was equivalent to a physician referral. According to the State, in 1997, based on Federal guidance, the State clarified its position to the school districts, instructing them to require a referral from either a speech pathologist or a physician. The State noted that this guidance was still in effect.

Office of Inspector General's Response

Of the 100 sampled claims, 43 did not meet Federal speech service referral requirements. Federal regulations require a referral for speech services by a physician or another licensed practitioner (42 CFR § 440.110(c)). Before April 1995, only a physician could make the referral. Therefore, if a physician was involved in developing a child's plan/family plan before April 1995, we allowed the claim for referral purposes. Similarly, if a physician or another qualified practitioner was involved in developing a child's plan/family plan during or after April 1995, we allowed the claim for referral purposes. We accepted recommendations from a Committee on Special Education that included a physician as referrals. Therefore, contrary to the State's understanding, our audit accepted a child's plan/family plan, as well as other types of documentation, as referral sources if all Federal and State requirements were met.

State's Analysis of Sample Findings

State's Comments

The State said that we exaggerated findings to maximize the number of errors assigned to each of the sampled claims and that this grossly inflated a reader's perception of the scope of the alleged problems. Specifically, the State referred to Appendix C of our draft report, where we showed findings for no date-specific service delivery documentation and no assurance that services were rendered, as well as Federal provider requirements not met and speech services not provided by or under the direction of a State-licensed speech-language pathologist. In these instances, they asserted that we turned one alleged deficiency into two errors.

The State provided a sample-by-sample analysis of our findings in its Attachment C and documentation related to 57 claims questioned by our audit in Attachment D. However, the

⁶A Committee on Special Education, a multidisciplinary team established to ensure timely evaluation and placement of students, develops, reviews, and revises the child's plan/family plan of students with disabilities.

State did not provide an analysis or documentation for 27 claims questioned by our audit because it asserted that these cases extended beyond the State's 6-year record retention rule. The State said that for many of these claims, it could not locate documentation establishing that the speech services had been provided because of the age of the claims. The State also said that despite our statement that the number of errors remained consistently high during the audit period, the State's analysis showed an improvement in the later years.

The State said that we disallowed six claims on the basis that there was no child's plan/family plan covering the service dates under review. According to the State, there were valid plans for these six claims dated more than a year from the service dates or shortly after the service dates. The State said that Federal and State education regulations did not specify that a child's plan/family plan "expires" after 1 year or that a child in need of related services is not entitled to a continuation of such services solely because a child's plan/family plan is not timely reviewed.

Office of Inspector General's Response

We did not exaggerate the findings in our report. We clearly said that each claim could have more than one error. In conjunction with CMS, we developed worksheets that contained the criteria applied to each sampled claim. If a claim met all of the criteria, we allowed the claim. If it failed one or more of the criteria, we recommended a disallowance of the claim. Appendix C shows the criteria applied to each sampled claim and the deficiencies noted.

In response to DOJ's investigation, the State Education Department issued a January 30, 2002, letter to all school health providers (including NYCDE), notifying them of our statewide audit. The letter stated that the Federal Government had requested all providers to preserve all documents related to school health claims from January 1, 1990, forward and provided an extensive list of the documentation that should be preserved. Therefore, we believe that NYCDE should have retained all documentation related to the 100 sampled claims, including the 27 cases that the State said exceeded the 6-year retention period. Furthermore, for 25 of the 27 claims, NYCDE was able to provide some type of documentation. For example, a child's plan/family plan was submitted for 23 of the 27 claims, and service delivery documentation was submitted for 9 of the 27 claims.

We reviewed the documentation supplied by the State for 57 claims that were questioned in our draft report. Based on our review, we reduced the number of questioned claims from 88 to 86 in our final report. If additional relevant documentation is furnished to CMS during the resolution process or if the State can prove that records were destroyed in accordance with established record retention policies, we will assist the parties in recalculating the sample projection.

Although the State asserted that the error rate per sampled claim decreased in the later years of our audit period, the error rates in this program remained substantial. Our audit found that 86 of 100 sampled claims were in error and that 68 claims contained more than 1 deficiency.

Federal regulations (34 CFR § 300.342) state that a child's plan must be in effect at the beginning of each school year, be in effect before special education and related services are provided, and be implemented as soon as possible following the meetings described under

§ 300.343. Also, 34 CFR § 300.343 states that the child’s plan must be reviewed at least annually to determine whether the annual goals for the child are being achieved and to revise the child’s plan as appropriate.

New York State Medicaid regulation (18 NYCRR § 505.11) requires that speech services provided in a school setting be listed in the child’s plan/family plan to be reimbursable by Medicaid. Further, State education regulations (part 200.4(f)) provide that the child’s plan “of each student with a disability shall be reviewed and, if appropriate, revised, periodically but not less than annually.” Under the Medicaid State plan, the State is responsible for monitoring the provision of services in accordance with these regulations (State Plan Amendment 92-42, Attachment 4.16-A). Further, an NYCDE child’s plan manual states that a review of the child’s plan should be conducted at least once a year to ensure the appropriateness of special education placement and services.

The CMS August 1997 technical assistance guide states that it is CMS’s policy that health-related services provided in a school may be covered under Medicaid only “if all relevant statutory and regulatory requirements are met.”

Six of the claims in our sample lacked any child’s plan/family plan. Without a child’s plan/family plan, speech services provided in a school setting are not reimbursable by Medicaid. Accordingly, we recommended a disallowance. For three claims in our sample, the child’s plan/family plan provided by NYCDE was prepared after the service date under review. Because no child’s plan/family plan was in effect when the speech services were provided, we believe that these claims did not meet all statutory and regulatory requirements and that, as a result, the services were not Medicaid reimbursable. Accordingly, we also recommended a disallowance for these claims. Finally, for 15 claims, the child’s plan/family plan provided by NYCDE had not been reviewed in the 12 months prior to the service date under review. Because Federal and State regulations require that the child’s plan/family plan be reviewed at least annually, we recommended a disallowance for these claims as well.

Generally Accepted Government Auditing Standards

State’s Comments

State officials said that various violations of generally accepted government auditing standards had occurred during our audit. They specifically stated that OIG had violated standards on independence, reporting standards, and fieldwork standards.

Office of Inspector General’s Response

We strongly disagree. We planned and conducted our audit in an objective and independent manner, and we gathered sufficient, competent, and relevant evidence to support our findings and recommendations. We obtained relevant criteria and measured the documentation provided against those criteria. We made multiple attempts to obtain information needed for the audit. We believe that soliciting the views of ASHA officials was a valid audit step.

The State was fully aware of the information we requested from NYCDE, and the State requested that it be furnished with all information provided to us. We also afforded the State an opportunity to comment on our findings in the draft report, and we considered those comments in finalizing this report.

In conclusion, there were no violations of generally accepted government auditing standards.

APPENDIXES

SAMPLE DESIGN AND METHODOLOGY

Overview: A contracted statistical consultant developed the sample design and methodology for our audit of speech claims.

Methodology: The methodology used in the audit was that of full probability sampling, enabling the auditors to compute (1) an unbiased estimate of the total amount of the overpayment for the universe and (2) an estimate of the standard error associated with the estimated overpayment.

Sampling Frame: The sampling frame was Federal Medicaid claims paid for school and preschool speech services claimed by the New York City Department of Education (NYCDE) with service dates from September 1, 1993, through June 30, 2001. This frame contained 2,517,503 claims totaling \$551,121,609 of Federal funds.

Sampling Procedures: Since the dollar values of the claims in our sampling frame were narrowly distributed and the variances of the paid amounts were small, a simple random sampling technique of selecting 100 sampled claims was applied.

Random Selection: The claims were sorted by beneficiary identification number and then by service date in ascending order. The claims were then numbered sequentially from 1 to 2,517,503. The random selection numbers were generated by RAT STATS (May 1993 version), an approved software used in sample auditing by the Office of Inspector General's (OIG's) Office of Audit Services. The random selection numbers were applied to select the claims to be examined in the audit.

Review Process: Documentation to support the claims that were randomly selected was requested from NYCDE. If documentation supporting a sampled claim was not found, the Federal payment for that claim was considered an error.

Analysis of Audit Results: A database was produced showing the amount of the overpayment for each sampled claim. Using RAT STATS, the data in the sample were used to derive statistical estimates of the total amount of the overpayment. The lower limit of a symmetric, two-sided 90-percent confidence interval was reported as the estimate of the total overpayment. Thus, it was possible to state as a statistically valid estimate that with 95 percent confidence, the true overpayment was at least as great as the lower limit.

DOCUMENTATION REQUESTED BY OUR AUDIT

Below are the actual instructions attached to the letters sent to NYCDE.

Please provide the following documents and information for the claim(s) for Medicaid reimbursement for speech pathology services for the student(s) identified by Enclosure A.

1. The student's Individualized Education Plans or Programs (IEPs) or Individualized Family Services Plans (IFSPs) recommending the speech pathology services for the relevant time period under review.
2. The evaluation performed of the student's need for the speech pathology services applicable to the time period under review.
3. Service encounter records, logs, or other documentation substantiating that the speech pathology services were rendered and documentation showing the specific number of speech pathology services rendered each month during the time period under review. If a student was provided speech pathology services by the New York City Board of Education, please also provide the Related Service Attendance Forms (RSAFs) for the relevant time period.
4. Student and service provider attendance records for the period under review.
5. Documentation sufficient to show whether the speech pathology services were provided on an individual (one-on-one) or group basis during the relevant time period. If this varied from session to session, please provide documents sufficient to show how this varied. In addition, if the speech pathology services were provided on a group basis, please provide documents sufficient to show the number of students in the group.
6. Documentation identifying by name the service provider(s) who rendered the speech pathology services (i.e., who provided the services) to the student during the time period under review. If the service provider varied during the relevant time period, please provide documents identifying each provider and the time period that provider rendered speech pathology services to the student. In addition, with respect to each service provider identified by this documentation, please provide the following applicable to the relevant time period under review:
 - (a) Documents sufficient to show the professional qualifications of the service provider for the period under review, including documents showing (i) whether the service provider was a teacher of the speech and hearing impaired/handicapped (hereinafter referred to as "speech teacher") or a speech pathologist, (ii) the professional licenses and certifications held by the service provider during the relevant time period (for example, a New York State speech pathologist license or a certification provided to a speech teacher), and (iii) if the service provider was a speech pathologist, provide his or her Certificate of Clinical Competence (CCC) from the American Speech-Language-Hearing

Association (ASHA). If a speech pathologist does not have a CCC, provide documents showing that he or she met the equivalency criteria, that is, had completed the equivalent educational requirements and work experience necessary for the CCC *or* had completed the academic program and was acquiring supervised work experience to qualify for the CCC.

- (b) The service provider's progress notes relating to the speech pathology services rendered to the student during the relevant time period.

7. With respect to each service provider identified in response to paragraph 6 above, who was not a speech pathologist with an ASHA CCC or did not meet the equivalency criteria, please provide documentation identifying by name the speech pathologist who “directed” the speech pathology services rendered to the student. In addition, with respect to each speech pathologist identified by this documentation, please provide the following:

- (a) Documents sufficient to show the professional qualifications of the speech pathologist who provided the direction, including (i) the professional licenses and certifications held by the speech pathologist during the relevant time period (for example, a New York State speech pathologist license), and (ii) his or her CCC from ASHA. If a speech pathologist does not have a CCC, provide documents showing that he or she met the equivalency criteria, that is, had completed the equivalent educational requirements and work experience necessary for the CCC *or* had completed the academic program and was acquiring supervised work experience to qualify for the CCC.
- (b) Documents reflecting the nature and extent of the direction that the speech pathologist provided to the speech teacher. In particular, please provide the following:
 - (i) any documents showing that the speech pathologist met with the speech teacher on a regular basis or had periodic contact with the speech teacher concerning the student;
 - (ii) any documents showing that the speech pathologist was available for consultation to assure that speech pathology services were provided in accordance with the student's IEP or IFSP;
 - (iii) any documents reflecting any assessments or evaluations performed by the speech pathologist of the student's speech impairment or disability;
 - (iv) any documents showing the speech pathologist's involvement in deciding the type and extent of the speech pathology services to be provided to the student;

- (v) any documents showing the speech pathologist's review of the student's IEP or IFSP;
- (vi) any documents showing the speech pathologist's involvement in preparing the treatment plan for the student;
- (vii) any documents showing the speech pathologist's involvement in monitoring or evaluating the progress of the speech pathology services being provided by the speech teacher to the Medicaid student;
- (viii) any documentation of performance appraisals and evaluations by the speech pathologist of the speech teacher's services to the student;
- (ix) any documentation of the speech pathologist's observation of the speech pathology services rendered by the speech teacher to the student;
- (x) any documentation of meetings between the speech pathologist and speech teacher (especially, those meetings in which the speech pathologist and speech teacher discussed the speech pathology services rendered or to be rendered to the student);
- (xi) any documentation of the speech pathologist's review of the speech teacher's progress notes (especially, those documents reflecting that quarterly reviews were performed);
- (xii) any Committee on Special Education (CSE) documents (including, but not limited to, CSE notes, minutes, or records of meetings) that reflect any direction by the speech pathologist to the speech teacher to assure that the appropriate speech pathology services were prescribed and provided based on the student's impairment or disability; and
- (xiii) any other documents of any kind reflecting direction by the speech pathologist to the speech teacher to assure that appropriate speech pathology services were prescribed and provided based on the student's impairment or disability.

8. Documentation showing that a physician or other licensed practitioner of the healing arts (within the scope of his or her practice under state law) referred the student for the speech pathology services.

9. Documentation showing that a physician, registered nurse, nurse practitioner or speech pathologist or other licensed practitioner of the healing arts (within the scope of his or her practice under state law) recommended the speech pathology services, including, any order prescribing the service and the IEP reflecting the recommendation.

10. Any external or internal written communications (*e.g.*, correspondence, memoranda) or notes relating to the Medicaid claims for speech pathology or other school health services provided to the student.

11. If outside contractors or service providers (such as an independent agency or the Board of Cooperative Educational Services) were used to provide the speech pathology services, please provide a copy of the signed Provider Agreement and Statement of Reassignment.

Claim No.	1	2	3	4	5	6	7	No. of Deficiencies
69		X					X	2
70					X		X	2
71	X	X	X	X	X		X	6
72	X	X		X			X	4
73					X		X	2
74	X	X			X		X	4
75				X			X	2
76							X	1
77								0
78				X			X	2
79							X	1
80	X	X		X			X	4
81								0
82							X	1
83							X	1
84	X	X					X	3
85							X	1
86	X	X					X	3
87	X	X		X	X		X	5
88					X		X	2
89				X			X	2
90	X	X		X			X	4
91	X	X		X			X	4
92	X	X		X			X	4
93	X	X				X	X	4
94	X	X					X	3
95							X	1
96								0
97	X	X					X	3
98		X					X	2
99	X	X		X			X	4
100	X	X						2
Total	42	47	2	43	24	1	76	

NEW YORK STATE GUIDANCE

STATE GUIDANCE TO SCHOOL HEALTH PROVIDERS

The State Department of Health and the State Education Department provided guidance to schools and preschools for claiming Medicaid reimbursement. For example, in a February 1992 Medicaid Management Information System Provider Manual, the State informed school health providers that Medicaid-reimbursable speech services include those performed by or under the direction of a speech pathologist who has met the requirements of 42 CFR § 440.110(c). A November 1992 State Education Department memorandum also sets forth 42 CFR § 440.110(c) provider qualification requirements for speech pathology services. October 1993 guidance, under the heading “Documentation,” states that school districts must maintain clinician notes (progress reports) about students for each service.

May and June 1994 memorandums, whose subject was “Clarification of the Guidelines for the Billing of Medicaid for Speech Services,” state that for the purpose of billing Medicaid, the individual ASHA-certified speech-language pathologist or State-licensed speech-language pathologist provides direction to the speech teacher by being available to the teacher for assistance and consultation, although not necessarily on the same premises, and by reviewing student progress reports at least quarterly, consulting with the teacher as appropriate, and offering recommendations. The two memorandums go on to state that the purpose of this direction is to ensure that (1) appropriate health-related support services are delivered per the child’s plan/family plan and (2) the services are medically appropriate.

School health provider documentation requirements are also contained in August 1995 guidance provided by the State Education Department. Under the heading “Documentation Requirements,” the guidance states: “School districts must maintain all documentation of services for six years from the date of Medicaid payment. This includes documentation of services provided by Boards of Cooperative Education Services (BOCES) or other contracted service providers.”

The August 1995 guidance goes on to state that school districts are responsible for audit disallowances due to unsubstantiated Medicaid claims. The guidance also provides a list of documentation to be maintained by the school districts that includes but is not limited to:

- date of service delivery documentation;
- signoff of the service delivery documentation by the service provider;
- minimally, quarterly progress notes;
- the child’s plan/family plan;
- credentials of the service provider; and
- credentials of the individual providing direction.

In April 1996, the State Education Department issued a Medicaid claiming/billing handbook to school health providers. This handbook was updated at least five times in May 1997, April 1998, May 1999, May 2000, and January 2001. The May 1999 through January 2001 handbooks

state that to claim Medicaid reimbursement, speech services may be provided only by or under the direction of a State-licensed or ASHA-certified speech-language pathologist. The handbooks state that “under the direction of” means that speech-language pathology services may be provided by a teacher of the speech and hearing handicapped under the direction of a State-licensed speech-language pathologist. They further state that the licensed speech-language pathologist providing direction must (1) ensure the delivery of speech-language pathology services per the child’s plan/family plan; (2) ensure that the services are medically appropriate; (3) be readily available for assistance and consultation, but need not be on the premises; and (4) review periodic progress notes prepared by the teacher, consult with the teacher, and make recommendations, as appropriate.

The Medicaid claiming/billing handbook, updated in May 1997, May 1999, and January 2001, contains the documentation requirements needed to claim Medicaid reimbursement. The handbooks state that the school district files should contain documentation identifying the staff receiving and requiring direction by a licensed or ASHA-certified speech pathologist with their license/ASHA certification numbers. Additionally, the handbooks state that the speech pathologist providing direction must sign a list of the staff to whom they provide direction. Also, the handbooks state that the “under the direction of” requirements contained in (1) through (4) above must be followed.

Additionally, the January 2001 Medicaid claiming/billing handbook, under the heading “Documentation Requirements for Under the Direction of,” states that a certification is required by the licensed speech pathologist that he/she is providing direction to a list of teachers of the speech and hearing handicapped and that this certification must be kept on file in the school district office. The January 2001 handbook also states that the licensed speech pathologist must have filed in the school district office documentation of the manner in which he/she will be accessible to the teacher of the speech and hearing handicapped. Examples given in the handbook to meet the accessibility requirement are weekly team meetings, access by telephone on a scheduled basis, individual meetings with teachers routinely or on request, or any other method that demonstrates accessibility. Finally, the January 2001 handbook provides a sample form entitled “Certification of Under the Direction and Accessibility” for the directing speech pathologists’ use in documenting direction.

A May 1997 memorandum from the State Department of Health and the State Education Department provides that to claim Medicaid reimbursement for speech therapy, a written referral from a physician, physician’s assistant, or nurse practitioner for the evaluation and the service is needed. The memorandum notes that the referral must be renewed annually. A June 1997 addendum to the May 1997 memorandum allows a State-licensed speech-language pathologist to make the referral.

Finally, in a January 30, 2002, letter, the State Education Department notified the school health provider community of our statewide review of school health services and indicated that documents supporting claims for Medicaid reimbursement should be preserved from January 1, 1990, forward.

DOCUMENTATION REVIEW GUIDE DEVELOPED BY THE STATE

The State developed a documentation review guide for use in reviewing school districts' and preschools' Medicaid school health claims. The purpose of the guide is to determine whether the providers have appropriate documentation to support their claims. The guide states that this purpose will be accomplished by reviewing the supporting documentation of a predetermined number of claims.

Under the speech category, the guide lists the following documents that the State will check at the school health providers visited:

- referral, recommendation, or order for services;
- child's plan/family plan for type/frequency/duration of services;
- service delivery documentation for the date of the service and the signature of the service provider;
- statement of reassignment and provider agreement;
- "under the direction of" documentation;
- quarterly progress notes; and
- certification/license of the service provider.

A note in the "under the direction of" documentation requirement states:

Documentation may take many different forms. Some districts may use a signed statement by the speech pathologist that they are providing direction. Other providers have had the speech pathologist sign off on progress notes. This is a sensitive issue with the American Speech and Hearing Association. Problems in this area should be referred to central office.

The guide states that to claim Medicaid reimbursement, speech services must be in the child's plan, a speech referral or recommendation must be made by an appropriate professional, providers must ensure that progress is noted and reviewed quarterly, speech services must be provided by a State-licensed speech pathologist or a certified teacher of the speech and hearing handicapped under the direction of a State-licensed speech pathologist, and the license/certification credentials of the professionals must be kept on file. Finally, the guide states that the speech pathologist providing direction must (1) ensure the delivery of speech-language pathology services per the child's plan/family plan; (2) ensure that the services are medically appropriate; (3) be readily available for assistance and consultation, but need not be on the premises; and (4) review periodic progress notes prepared by the teacher, consult with the teacher, and make recommendations, as appropriate.

**EXAMPLES OF SITUATIONS NOT MEETING THE FEDERAL
“UNDER THE DIRECTION OF” REQUIREMENTS¹**

For claim number 13, the documentation supplied by NYCDE showed that “AL” provided the speech services for the December 1, 1996, service date under review. NYCDE submitted no certification or license information for “AL.” Through our verification efforts, we determined that “AL” was not ASHA certified or equivalent or a State-licensed speech pathologist. NYCDE stated that “RW,” a district supervisor who was ASHA certified and a State-licensed speech pathologist, provided the necessary direction for this sample claim. NYCDE provided four documents to show the direction: two observation checklists, an administrative visit, and an observation report. These documents were prepared on four separate dates in 1998 through 2000, 2 to 4 years after the December 1, 1996, service date under review. The sample student’s name was not contained/mentioned on any of the four documents. The documents showed only “AL’s” and “RW’s” names. The documents also showed the district supervisor’s (“RW’s”) observations of the speech teacher (“AL”). The observations of a class taught by the speech teacher appeared to have been made yearly. Based on the above, we do not believe that the four documents submitted by NYCDE meet the “under the direction of” requirements of 42 CFR § 440.110(c), Medicaid State Operations Letter 95-12, or the June 4, 1997, letter from the Centers for Medicare & Medicaid Services (CMS) to the State.

For claim number 14, the documentation supplied by NYCDE showed that “RD” provided the speech services for the October 1, 1998, service date under review. “RD” was not ASHA certified or equivalent or a State-licensed speech pathologist. According to NYCDE officials, “RD’s” district supervisor was “DV,” who also was not ASHA certified or equivalent or a State-licensed speech pathologist. NYCDE did not provide any documentation showing “DV’s” supervision of “RD.” NYCDE officials stated that because “DV” was not a licensed pathologist, a citywide supervisor named “JC,” who was ASHA certified and a State-licensed speech pathologist, provided the necessary direction for this sample case. To show this direction, NYCDE provided three visitation logs of meetings between “JC” and “DV.” These logs were dated October 2000, April 2001, and June 2001, well after our service date, and did not include any mention or discussion of the service provider (“RD”) or the sample student. Rather, the three visitation logs discussed other service providers and students not related to the sample claim. Based on the above, we do not believe that the three visitation logs submitted by NYCDE meet the “under the direction of” requirements of 42 CFR § 440.110(c), Medicaid State Operations Letter 95-12, or the June 4, 1997, letter from CMS to the State.

For claim number 66, with a service date of November 1, 1997, NYCDE did not submit any documentation to establish who provided the speech services. In a February 27, 2003, letter responding to questions raised by our audit, NYCDE stated that “SK” was the student’s speech teacher but did not submit documentation showing that “SK” had provided the services to the sample student. NYCDE stated, and we verified, that “SK” was not ASHA certified or equivalent or a State-licensed speech pathologist. NYCDE stated that “RM,” a State-licensed speech pathologist who did not receive ASHA certification until 2000, was “SK’s” supervisor.

¹Because OIG policy does not permit the naming of individuals, this appendix refers to individuals by their initials.

To show direction, NYCDE submitted an administrative visit report and a supervisory observation report dated January 22, 1997, and various meeting agendas dated from February 1996 through October 1997. These documents did not mention the sample student. The administrative report and the supervisory observation report reflected meetings between “RM” and “SK” and related to the prior school year, not the school year with our service date. The meeting agendas generally appeared to concern meetings organized by the district supervisor (“RM”) for general discussion or training purposes that were open to all speech service providers in the district. NYCDE also submitted a Speech Therapy Authorization Form, dated March 10, 1998, which recommended that speech services be provided to the sample student. This form, which appeared to contain a rubber-stamped signature rather than a signed signature from “RM,” was dated approximately 4 months after the services in the sampled claim. Based on the above, we do not believe that the documents submitted by NYCDE meet the “under the direction of” requirements of 42 CFR § 440.110(c), Medicaid State Operations Letter 95-12, or the June 4, 1997, letter from CMS to the State.

SAMPLE RESULTS AND PROJECTION

The results of our review of the 100 Federal Medicaid speech claims were as follows:

Sample Results

Claims in Universe	Value of Universe (Federal Share)	Sample Size	Value of Sample (Federal Share)	Improper Claims	Value of Improper Claims (Federal Share)
2,517,503	\$551,121,609	100	\$21,759	86	\$18,565

Projection of Sample Results

Precision at the 90-Percent Confidence Level

Midpoint:	\$467,374,432
Lower Limit:	\$435,903,456
Upper Limit:	\$498,845,408
Precision Percent:	6.73%



STATE OF NEW YORK
DEPARTMENT OF HEALTH

APPENDIX G
Page 1 of 46

Coming 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

October 18, 2004

Timothy J. Horgan
Regional Inspector General for Audit Services
Region II
Jacob K. Javits Federal Building
26 Federal Plaza
New York, NY 10278

Re: Draft Report Number A-02-02-01029 Entitled: "Review of Medicaid Speech
Claims Made by the New York City Department of Education"

Dear Mr. Horgan:

Enclosed is the New York State Department of Health's ("DOH") response to the above-referenced draft report, produced by Health and Human Services' ("HHS") Office of the Inspector General ("OIG"). As described in the enclosed response, the draft report is flawed in both concept and design, and should be withdrawn.

For more than a decade, local school districts in New York State have relied on Congress's promise that it would provide federal Medicaid funds to help fund health services to poor children with disabilities in New York State schools. Those funds have proven invaluable in helping local school districts provide the medical services necessary for these children to live healthy lives, in the context of their receiving a free and appropriate public school education.

As President Bush has acknowledged, however, prior administrations never articulated clear guidance for this program -- guidance that school districts needed to help them apply Medicaid rules originally designed for the medical office and hospital to the entirely different educational settings of the classroom and local school district office.

Now, more than a decade after Congress made its promise, and with federal guidance still absent, OIG seeks to undercut the promise by seeking the return of nearly \$450 million in federal payments for these services. Relying on a sample of only 100 claims (out of a universe of 2,517,503 claims!) across eight years, OIG proposes to disallow more than 80% of the claims for speech services submitted by the New York City Department of Education!

OIG's proposed disallowance is premised on its overly technical application of the Medicaid rules, rules designed for hospitals and medical offices, but not for the entirely different culture of the special education classroom. In light of prior administrations' persistent failure to provide adequate guidance to school districts and the recent acknowledgement by the Centers for Medicare and Medicaid Services ("CMS") that its standards for the provision of speech

pathology services in schools are still evolving, it is wholly inappropriate for OIG to recommend wholesale disallowances of claims for speech services.

In this audit there is no question that the New York City Department of Education billed for services it felt were provided to poor children with disabilities. Any deficiencies in documentation found by OIG relate primarily to the inappropriate audit period chosen by OIG, inconsistent federal direction on program requirements and disagreements about technical documentation requirements, not to the failure to provide services.

In our response, we have repeated many of the same points made to OIG in our responses to earlier draft audit reports in this series of audits of New York's School Supportive Health Services Program. Unfortunately, OIG has seen fit to dismiss New York's arguments, both with regard to the overall audit design and to the speech services at issue in this audit.

To the extent that policy issues exist between the State and HHS, these disputes should be resolved amicably between them. This report should be used as a guide for improvement to ensure the continued delivery of services to children with disabilities in the educational setting, not as a means to recover funds that will be necessary for that very purpose.

Sincerely,



Kathryn Kuhmerker
Deputy Commissioner
Office of Medicaid Management

RESPONSE TO OFFICE OF INSPECTOR GENERAL AUDIT REPORT
A-02-02-01029 – Review of Medicaid Speech Claims Made by the New York City
Department of Education

I. OVERVIEW

A. General History

In 1988, Congress enacted legislation to encourage state and local education agencies across the nation to access federal Medicaid reimbursement for health-related services for disabled children. These health-related services represent an essential element of the educational program required for each disabled child pursuant to the federal Individuals with Disabilities Education Act (IDEA). Pursuant to this legislation, New York received formal federal approval of its efforts to implement what became known as the School Supportive Health Services (SSHS) program in 1995. The federal approval was made retroactive to May 1992, and school districts were permitted to bill for services back to April 1990.

Prior to the federal approval of SSHS in 1995, school districts and counties that offered school age and pre-school programs had begun to enroll as Medicaid providers and bill under the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) program. In 1993, they began billing for various services, including speech pathology, physical therapy, occupational therapy, skilled nursing, psychological counseling, transportation and medical evaluations. The billing for services under this program was eventually merged into the SSHS program.

It is clear that Congress intended federal Medicaid funds to be used to assist states in the provision of medically necessary services to disabled children in an educational setting consistent with IDEA. Congressional intent is evident in the amendments included in the Medicare Catastrophic Coverage Act of 1988. In the Act, Congress amended Title XIX of the Social Security Act by adding a new section 1903(c) (42 U.S.C. 1396b(c)), which provides that:

Nothing in this subchapter shall be construed as prohibiting or restricting, or authorizing the Secretary to prohibit or restrict, payment under subsection (a) of this section for medical assistance for covered services furnished to a child with a disability because such services are included in the child's individualized education program established pursuant to part B of the Individuals with Disabilities Education Act or furnished to an infant or toddler with a disability because such services are included in the child's individualized family service plan adopted pursuant to part H of such Act.

B. Audit History

In the fall of 2001, the federal Department of Justice (DOJ) and the Office of Inspector General (OIG) initiated an investigation of three New York school districts – Ogdensburg, Ithaca and Elmira – as a result of a federal False Claims Act “whistleblower” action initiated by a service provider. This investigation appears to have provided the impetus for this audit as well as five additional audits of SSHS by OIG. The six audits (including this one) are in various stages of completion and cover the following SSHS services:

- Speech pathology services for New York City only. (The audit is the subject of this response and covers claims for September 1, 1993 through June 30, 2001.)
- Speech pathology services for all schools/counties other than New York City, Jefferson County, Ogdensburg, Ithaca and Elmira. (The audit covers claims for September 1, 1993 through June 30, 2001.)
- Transportation services for all schools/counties other than New York City, Jefferson County, Ogdensburg, Ithaca and Elmira. (The audit covers claims for September 1, 1993 through June 30, 2001.)
- Transportation services for New York City only. (The audit will cover claims for September 1, 1993 through June 30, 2001.)
- Retroactive claims for all schools/counties other than New York City, Jefferson County, Ogdensburg, Ithaca and Elmira. (This audit will cover claims for April 1, 1990 through August 31, 1993.)
- Retroactive claims for New York City only. (This audit will cover claims for April 1, 1990 through August 31, 1993.)

The current audit was conducted by OIG using a sample of 100 claims for services provided from September 1993 through June 2001. The draft audit report from OIG contends that 88 of the sample claims are unallowable, thereby resulting in a projected disallowance of over \$448 million, or roughly 81 percent of the \$551 million in claims submitted.

C. Billing for Services under “Educational” vs. “Medical” Model

In accordance with Congressional intent that Medicaid be used to support medically necessary services required by a child’s Individualized Education Program (IEP) under IDEA, school districts and counties began billing for SSHS services. This is notable for two important reasons. First, it meant that local educational agencies would finally begin to receive Medicaid payment for costly services that they had been mandated to provide under federal law since 1975. Second, in order to receive these benefits, school districts would have to learn the technical record-keeping and billing requirements of Medicaid – one of the most complex programs in the nation. Guided by federal IDEA requirements, school districts had provided the services for at least fifteen years before they could bill Medicaid. Using the IDEA guidelines, schools had developed methods for

documenting children's progress in each service area. This IDEA-based method of documentation can be described as an "educational" model. The educational model focuses on how the services assist the child in meeting long term goals, as described in the student's IEP. When services are not adequate and the child does not meet IEP goals, federal law grants parents recourse to a number of legal remedies designed to guarantee that services are provided as required.

In contrast to the "educational" model, application of the "medical" model would require schools to focus on technical, medically oriented documentation of individual service dates, with less emphasis on longer-term outcomes. In addition, many of the modalities for providing health services in schools, such as using federally-prescribed committees on special education to refer children for speech services, or the methods for using school personnel to oversee the provision of services, raised questions about how best to comply with technical Medicaid requirements. In light of these factors, compliance with the "medical" model clearly presents a significant challenge for schools. These challenges are at the root of many of the disallowances taken in this audit.

D. Inconsistent/Contradictory – And Lack of – Federal Guidance

The initial years of implementation for any program can be difficult, and the SSHS program is no exception. Compliance with documentation and billing requirements was even more difficult for schools and counties, since they were more accustomed to the IDEA-based educational model of documentation than the medical model. Under the educational model, they had provided health-related services under a federal mandate for at least 15 years before Medicaid was made available to pay for the services.

While the State Departments of Social Services (now Health) and Education provided extensive training in billing and documentation retention, one of the most notable problems that has hampered effective SSHS administration in New York is the inconsistent/contradictory and general lack of guidance that has been provided by federal agencies. This problem is by no means unique to New York. The lack of federal guidance was also criticized in a series of reports produced by the federal General Accounting Office (GAO). In one of these reports, issued in 1999, GAO reported the frequently voiced concerns of school districts: "Inconsistent guidance from HCFA appears to have heightened school district concerns that Medicaid reimbursements will have to be returned to the federal government later because of inappropriate documentation requirements."

Indeed, President Bush highlighted the problem in his budget proposal for the 2003 fiscal year. The President said, "In past years, billing inconsistencies have plagued the program because the federal government has never articulated clear guidance. In 2002, the Administration will release guides that will address all aspects of school-based Medicaid billing." As discussed below, the Centers for Medicare and Medicaid Services

(CMS) did not issue a Medicaid and School Health Technical Assistance Guide until August 1997 but that Guide is also insufficient. For example, the Guide does not define the "under the direction of" standard in 42 C.F.R. § 440.11(c) or specify how to document compliance with such standard. As discussed below, the Centers for Medicare and Medicaid Services (CMS) has acknowledged that its guidance on "under the direction of." is "still evolving."

E. Period of Time Covered by Audit

Although federal Medicaid regulations require a State to retain records for a period of three years from the date of submission of a final expenditure report [42 C.F.R. § 433.32(b)], and despite the fact that New York's regulations [18 NYCRR 504.3(a)] require providers to keep records for six years, OIG's audit covers claims for services rendered as long ago as 1993. Because school districts were not required to maintain records for such distant periods, they were not able to thoroughly document many of the claims made during this period. Despite its knowledge of this requirement, OIG recommends disallowing these claims. In addition, OIG recommends disallowing an artificially high percentage of current claims because school districts could not document those old claims. OIG makes a pass at acknowledging the issue by stating that a disallowance will not be taken if a provider can establish that records that existed at one time were destroyed in accordance with documented record destruction policies. If it wants to acknowledge this issue, it should do so in the most straightforward way: it should limit its review to the period that New York State was otherwise required to maintain documentation. Instead OIG has disingenuously placed another documentation retrieval requirement on top of its inappropriate request for old documents. For any entity including, we suspect, the federal agencies involved in this matter, the ability to identify accurately and specifically the precise documents destroyed eight to ten years ago would be highly problematic.

F. Inconsistency with Audit Approach in Other States

Recently, OIG has conducted a number of audits of SSHS programs in other states, including Massachusetts, Connecticut, Oregon and Rhode Island. However, the audit approach taken by OIG in New York is inconsistent with that used in the other states, and results in a recommended disallowance that is excessively and disproportionately large. Relative to the audits in the other states, the New York State audit used miniscule sample sizes taken from claims for services that were provided as early as 1993, and OIG applied much higher standards of documentation in New York.

The audits in other states also focused on more recent periods (e.g., the most recent fiscal year completed – 1999 or 2000), rather than going back to 1993 as in New York. This audit methodology substantially disadvantages New York State. The longer period covered, and the examination of claims that are far older than the six year period that New York requires providers to maintain service documentation, made it much more difficult for

the New York City Department of Education to demonstrate its full compliance. In Rhode Island, OIG specifically cited the federal three-year record retention regulation and audited two years of claims (OIG Report A-01-02-00014). The contrast in approaches is fundamentally unfair to New York and has not been explained.

II. RESPONSES TO DRAFT AUDIT FINDINGS

A. 42 C.F.R. § 440.110 Does Not Apply to the Speech Services Provided Under New York's School Supportive Health Services Program

New York has consistently maintained that CMS has applied the wrong federal regulation to its analysis of speech service delivery. The applicable regulation is 42 C.F.R. § 440.130 ("Diagnostic, screening, preventive, and rehabilitative services"). The application by CMS of 42 C.F.R. § 440.110 ("Physical therapy, occupational therapy, and services for individuals with speech, hearing and language disorders") improperly imposes criteria on the delivery of speech services that do not exist under the rehabilitative services option in New York's CMS-approved State Plan.

In its recitation of State Plan optional services, Congress has clearly delineated between "therapy" services and "rehabilitative" services. Section 1905(a)(11) of the Social Security Act ("SSA") sets out "physical therapy and related services" as an optional service under a State's program. Speech is a "related" service under this option. The criteria for delivery of services under this option is set forth in regulations at 42 C.F.R. § 440.110 and includes the concept of "services provided by or under the direction of a speech pathologist or audiologist." 42 C.F.R. § 440.110(c).

SSA § 1905(a)(13) permits a State to include in its State Plan "other diagnostic, screening, preventive, and rehabilitative services...for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level." 42 C.F.R. § 440.130 further defines and describes this option. Notably, § 440.130 does not require that rehabilitative services be provided "under the direction of" any particular individual, merely that they be "recommended by a physician or other licensed practitioner of the healing arts, within the scope of his practice under State law." 42 C.F.R. § 440.130(d). Because the concept of diagnosis, screening, prevention and rehabilitation is consistent with the provision of Early and Periodic Screening, Diagnostic, and Treatment Services (EPSDT) to persons under age 21 mandated under federal law [SSA § 1905(a)(4)(B)], New York decided to provide School and Preschool Supportive Health Services under the "rehabilitative services" option. CMS (then the Health Care Financing Administration – HCFA) agreed with the State's position: the June 2, 1995 letter approving State Plan Amendment #92-42 states: "This is to notify you that New York's State Plan Amendment (SPA) #92-42, reflecting the State's program for Rehabilitative Services for School and Preschool Supportive Health Services, has been approved for adoption into the State Medicaid Plan...." Thus the State's contention that § 440.130 is the applicable regulation, and not § 440.110, was

supported by HCFA at the very outset of the federally approved program.

In a November 20, 1996 letter to HCFA (Attachment A hereto), the State reiterated its position that speech pathology services provided by public schools and municipalities to children with developmental disabilities fall under the provision pertaining to "rehabilitative" services at 42 C.F.R. § 440.130(d). The letter further noted that under § 440.130(d), there are no professional qualifications listed for the provider of services. All that is required in order to provide services to a handicapped child is a recommendation by a physician or other licensed practitioner of the healing arts, within the scope of such person's practice under State law. The letter maintained that the qualifications of these practitioners, absent specific federal regulations issued pursuant to the Administrative Procedure Act, are under the jurisdiction of the State and not the federal government.

Notwithstanding New York's arguments, HCFA, in a June 4, 1997 letter to the State (Attachment B hereto), concluded that even though no specific federal standards are included in § 440.130, the provider qualifications for speech pathology at § 440.110 would apply even when the speech services are covered in the SPA under the "rehabilitative" option governed by § 440.130. HCFA maintained that it is their policy that services coverable under more than one regulatory authority must meet the requirements of the more specific authority even when covered under a broad coverage category such as the rehabilitation benefit. HCFA offered no statutory or regulatory support for this "policy," which is not surprising, as there is none. The June 4, 1997 letter did, however, express agreement with the State's position that, if forced by HCFA to adhere to the more specific requirements of § 440.110, it could "...look to its own State practice laws in order to determine when services are appropriately provided 'under the direction of' a Medicaid qualified speech pathologist, if this was consistent with the State's own laws and regulations." This concession by HCFA further complicated the issue by seeming to apply the "under the direction of" requirement of one optional services regulation (§ 440.110) while simultaneously applying the "within the scope of practice under State law" requirement of a different optional services regulation (§ 440.130).

The State continues to disagree with the federal interpretation as to the appropriate regulatory standard to be applied to the services at issue. We contend that the applicable governing regulation for provision of these services is solely 42 C.F.R. § 440.130.

B. The State Complied with the Requirements of 42 C.F.R. § 440.110

Assuming, for the sake of argument only, that § 440.110 is applicable to these speech services, the State has adhered to the intent of the requirements of this regulation. There are three basic requirements contained therein:

- (1) the services must be provided by or under the direction of a speech pathologist or audiologist;

- (2) the speech pathologist or audiologist must be certified by the American Speech and Hearing Association ("ASHA") or have completed the equivalent educational requirements and work experience necessary for the certificate; and
- (3) there must be a referral by a physician or other licensed practitioner of the healing arts within the scope of his or her practice under State law.

1. "Under the Direction Of"

The current Federal Medicaid regulation governing speech pathology services, 42 C.F.R. § 440.110(c)(1), provides:

"Services for individuals with speech, hearing, and language disorders means diagnostic, screening, preventive, or corrective services provided by or under the direction of a speech pathologist or audiologist, for which a patient is referred by a physician or other licensed practitioner of the healing arts within the scope of his or her practice under State law. It includes any necessary supplies and equipment." (Emphasis added.)

Before its redesignation as 42 C.F.R. § 440.110(c) in 1978, former regulation 42 C.F.R. § 449.10(b)(11) provided that services for individuals with speech, hearing, and language disorders be provided "by or under the supervision of a speech pathologist or audiologist" (emphasis added). The same "under the supervision of" standard also applied to physical therapy, occupational therapy and dental services under the former § 449.10(b). Other services, however, such as inpatient and outpatient hospital services, laboratory and x-ray services, and clinic services, had to be provided "under the direction of" a physician or dentist. "Physicians' services" had to be provided "by or under the personal supervision" of an individual licensed to practice medicine or osteopathy. § 449.10(b)(5) (emphasis added). The regulations did not define any of these terms; nor are definitions of these terms found in the regulatory preambles or in the current regulations (see, e.g., § 440.10 (inpatient hospital services); § 440.20 (outpatient hospital services); § 440.30 (laboratory and radiology services); and § 440.90 (clinic services).

In 1978, CMS (then HCFA), redesignated § 449.10(b)(11) as § 440.110. The preamble to the final rule states that no substantive changes were intended. 43 FR 45175, 45176 (9/29/78). Among the changes was that the "under the supervision of" standard for speech pathology, PT, OT, and dental services was changed to "under the direction of." HCFA offered no explanation for the change.

Two years later, on April 11, 1980, HCFA published "technical and wording" changes to the Medicaid regulations that had been redesignated in 1978. 45 FR 24878. HCFA stated in the preamble that the new rules "contain correction either of technical errors (citations, spelling, cross-references, etc.) or of inadvertent omissions, improper wording, changes in organizational structure of the regulations, and the like, which may have appeared to make substantive changes."

As for the change from “supervision” to “direction” in the 1978 regulation covering dental services (§ 440.100(a)), HCFA stated:

“The wording of the previous regulation on dental services is being restored to clarify that there has been no substantive change in this definition. The word[] ‘direction’ . . . [is] being replaced by ‘supervision’”. 45 FR at 24880.

No such restoration of the “supervision” standard was made for speech, PT, and OT services, which remained subject to the “under the direction of” standard introduced in 1978.

This 1980 change to the dental regulation simply added more ambiguity and confusion to an already undefined regulatory standard. Did HCFA mean to suggest that “direction” and “supervision” were synonymous? While the use of different regulatory terms – “direction,” “supervision,” “personal supervision” – might suggest that the words had different meanings, HCFA never articulated what those different meanings might be and even maintained that the switch from one term to the other was a non-substantive change. Why was it necessary to change “direction” back to “supervision” in the dental regulation if the terms were synonymous? And having made that change in the dental regulation, why did it not also change “direction” back to “supervision” in the regulation applicable to speech (and PT and OT) services? Was it an oversight? How could it be an oversight given that CMS at the same time made another restorative change to the speech regulation (restoring the requirement that speech services must be referred by a physician) and easily could have restored the supervision standard had it wished to do so?

CMS has, at long last, acknowledged the terrible ambiguity created by the history of its use of the term “under the direction of.” On April 2, 2003, CMS proposed to amend 42 C.F.R. § 440.110(c) to revise the qualification requirements for audiologists. 68 FR 15973. The proposal does not change the “under the direction of” requirement, but CMS took the opportunity to informally describe an interpretation of the phrase in the regulatory preamble – but only as it applied to audiology services.

On May 28, 2004, CMS finalized the proposed rule concerning audiologist qualifications. CMS again discussed its interpretation of “under the direction of” for audiology services in the preamble (but not in the regulation itself). 69 FR 30580. Most significantly, CMS acknowledged in the preamble that its interpretation of “under the direction of,” particularly as it relates to speech pathology services in schools – the issue here – was “evolving” – i.e., has not been firmly established:

“We also would like to say that our guidance in this area is evolving, particularly as it relates to speech-language and hearing services provided to Medicaid-eligible children in schools. We anticipate that we will continue to update and provide guidance as necessary to States and providers through various means such as State Medicaid Manual guidelines, letters to State Medicaid

Directors, and educational documents, as well as direct technical assistance to State Medicaid agencies.” Id. at 30584.

This concession – that CMS still has not decided what “under the direction of” means in the context of the speech services at issue in this audit – raises a fundamental question: What standard is the OIG applying to these services, going back to the early 1990s? Clearly, the OIG may not recommend for disallowance hundreds of millions of dollars of Medicaid payments based on perceived non-compliance with a non-existent Federal standard.

Notwithstanding the absence of an applicable federal Medicaid definition or guidance on how to document “under the direction of,” the OIG work papers set out an elaborate definition of “under the direction of” that has absolutely no basis in applicable federal or state law or regulation. For example, the OIG definition states that the professional providing direction “must assure, both before and during treatment, (i) that the appropriate services are prescribed based on the patient’s disability . . . and (iii) that the services are medically necessary.” What is the statutory or regulatory source of this requirement, which appears to put a supervising therapist in a position of having to second-guess a prescribing physician or practitioner concerning the medical necessity of ordered services?

There is, in fact, no federal guidance specifying how to define “under the direction of” or how to document that services were furnished in compliance with that standard, and it therefore is inappropriate to disallow claims on that basis. Indeed, the recent OIG audit report involving transportation services in New York State “set aside” rather than disallowed claims “because Federal Medicaid law and regulations require that services be documented but do not specify how services should be documented.” Review of Medicaid Transportation Claims Made By School Health Providers in New York State (# A-02-03-01088), Executive Summary p. i. Here, too, federal Medicaid law and regulations fail to specify how to document that services were provided under the direction of a speech pathologist.

In August 1997, CMS published Medicaid and School Health: A Technical Assistance Guide, the purpose of which was “to provide information and technical assistance regarding the specific Federal Medicaid requirements associated with implementing a school health services program and seeking Medicaid funding for school health services.” Guide, p. 4. Significantly, while the Guide contains a section describing the speech pathology service category (p. 20) and a section on documenting services (p. 41), it does not define “under the direction of,” and contains no direction on how to document compliance with the standard.

Moreover, the Guide suggests that state, rather than Federal, definitions and requirements generally control. The Guide states (p. 73) that “each state program has its own unique characteristics,” that “each state not only develops its own requirements but

also designs and develops its own system for providing medical services to Medicaid-eligible children,” and that “the state is the primary source for specific information on its Medicaid requirements for school-based services.” This is, of course, entirely consistent with the direction New York received from HCFA in its June 4, 1997 letter, that New York could “...look to its own State practice laws in order to determine when services are appropriately provided ‘under the direction of’ a Medicaid qualified speech pathologist, if this was consistent with the State’s own laws and regulations.” Thus, the New York definition of “under the direction of” found in State Regulation 18 NYCRR § 505.11, rather than CMS’s informal musings on the subject in recent regulatory preambles, should control.

18 NYCRR § 505.11(c) states that rehabilitative services may be provided by a qualified professional employed by or under contract to a school district. The regulation also states that “[s]peech pathology services may be provided under subparagraph (iv) of this paragraph by a teacher of the speech and hearing impaired under the direction of a speech pathologist. *Under the direction of a speech pathologist* means that a teacher of the speech and hearing impaired may provide services as long as a speech pathologist meets with such teacher on a regular basis and is available for consultation to assure that care is provided in accordance with the individualized education program or an interim or final individualized family services plan. Teachers of the speech or hearing impaired or speech pathologists who provide services or in the case of a speech pathologist under whose direction services are provided must be currently registered and certified in accordance with the New York State Education Law and the rules of the Commissioner of Education.”

For the foregoing reasons, the OIG should not recommend for disallowance claims for speech pathology services on the ground that such services were not provided “under the direction of” a speech pathologist. Neither the CMS regulations nor CMS’s Technical Assistance Guide defines the “under the direction of” standard, and neither specifies how to document that the standard was met.

2. ASHA Certification

42 C.F.R. §440.110(c)(2) defines a speech pathologist or audiologist as an individual who: “(i) has a certificate of clinical competence from the American Speech and Hearing Association; (ii) has completed the equivalent education requirements and work experience necessary for the certificate; or (iii) has completed the academic program and is acquiring supervised work experience to qualify for the certificate.”

In its earlier report on speech services provided in non-New York City school districts, OIG had erroneously concluded that New York State’s speech pathologist licensure requirements were not equivalent to ASHA’s requirements for a Certificate of Clinical Competence (“CCC”). While OIG has not specifically made that same claim in this draft audit report, New York is unaware that OIG has explicitly agreed that services

provided by or under the direction of a New York licensed speech pathologist meet the requirements of the regulation. The draft report (page 6) states that, for some services, ASHA requirements were not met because "an ASHA certified or equivalent speech-language pathologist did not provide the speech services." OIG alleges that, in some cases, "none of [the] service providers were ASHA certified." In other cases, "the service providers had various credentials but were not ASHA certified and they did not meet the equivalency requirements of [the regulation]." The report fails to specify in what way the providers failed to meet the equivalency requirements and fails to specify whether the "various credentials" included New York speech pathology licensure. We are forced by the vagueness of these findings and the failure of OIG to renounce its earlier dismissal of New York licensure to repeat in this response our analysis of the "ASHA equivalence" issue.

New York State asserts that its licensing requirements meet or exceed the requirements of a speech pathologist with an ASHA CCC. This can be seen in the following areas:

- the degree accepted for licensure,
- the quantity of course work required for licensure,
- the distribution of course work,
- the quantity of pre-degree practicum,
- the specification of disorder types and age groups for the pre-degree practicum,
- the amount of supervision during the clinical fellowship, and
- the quality and quantity of supervision during clinical fellowship.

(a) Degree accepted for licensure

The ASHA CCC requires a Master's degree or a doctoral degree. NYS also requires a Masters degree or higher. The State accepts a degree equivalent to a Masters degree in speech-language pathology. In such a case, an individual with a graduate degree in a field other than speech pathology must obtain the necessary graduate course work and practica in speech-language pathology prior to licensure.

(b) Quantity of course work

The NYS course work requirement for licensure complies with the 1993 ASHA standard of 60 semester credit hours. However, at least 98 percent of our new (1994 onward) licensees are graduates of ASHA-accredited programs that have a 75-semester credit hour standard. The other two percent are individuals who either (a) graduated from ASHA-accredited programs prior to 1994 when the ASHA standard was the same 60 semester hours as NYS (the majority of whom hold an ASHA CCC), (b) were licensed and worked in another state and are moving to NYS, or (c) graduated from foreign speech-language pathology programs and have the education necessary to meet New York's standards.

(c) Distribution of course work

Only two percent of new licensees do not meet the 75 credit-hour standard, and as stated above the majority of that two percent hold their ASHA CCC.

(d) Quantity of pre-degree practicum,

(e) Specification of disorder types and age groups for the pre-degree practicum, and

(f) Amount of supervision for the pre-degree practicum

All but one of New York licensure-qualifying speech- language pathologist masters degree educational programs are accredited by ASHA. Practically speaking, this means that 95 percent of NYS graduates since 1994 have had clinical practicum under the ASHA model.

(g) Quantity and quality of supervision during the clinical fellowship

New York requirements for the clinical fellowship exceed ASHA requirements. While both the CCC requirements and NYS licensure requirements mandate completion of a full-time clinical fellowship, NYS requires nine months (39 weeks) of full-time experience, while ASHA requires only 36 weeks. Ninety-eight percent of new licensees earn their ASHA CCC concurrently with their NYS license, using the same experience for both credentials. Thus, ASHA accepts NYS standards for the quality of supervision as well as the quantity of the period of supervision. Individuals who already hold their CCC when applying for NYS licensure are frequently required to do additional weeks of supervised experience in order to meet New York's requirements.

(h) Additional NYS requirements

Effective January 1, 2001, NYS requires speech-language pathologists to obtain 30 continuing competency hours every three years in order to re-register in NYS. Current registration is required to practice in NYS. The continuing competency requirement has three parts: planning, participating in continuing competency learning activities, and recording what was learned. NYS is the only state that has such a comprehensive continuing competency program. New York's program is different from traditional continuing education programs in that it requires licensees to:

- Prospectively identify those areas of the profession that they wish to pursue for development in the 3-year cycle and identify how that learning will enhance their practice;
- Undertake learning activities during the 3-year cycle (e.g. sponsored continuing education workshops, study groups, mentoring, independent study); and

- Record what they learned. The majority of the learning that takes place for the professional will occur once that individual embarks in practice. Professional competence develops with practice.

Only New York, and neither ASHA nor any other state that we are aware of, has such a plan in place to address the professional competency of the licensee over the span of his/her professional lifetime.

(i) Equivalency

NYS's licensure standards (entry level into the profession) are identical to ASHA's 1993 standards. Significantly, ASHA has not made its members who were certified during or before 1993 meet its newer standards, but rather has "grandfathered" them in. As a result, a large percentage of individuals who hold the CCC nationwide (and in NYS) are permitted by ASHA to meet less than the current ASHA standards.

It is also important to note that the NYS speech pathology licensure program is accredited by the NYS Board of Regents. The NYS Board of Regents, like ASHA, is a federally recognized education accrediting body without, however, ASHA's inherent conflict of interest i.e., simultaneously representing and promoting the profession. The NYS Board of Regents' function in the domain of professional licensing is solely public protection. In addition, any proposed changes in federal, state and local laws, regulations or policy require hearings and opportunity for public comment. In contrast, ASHA consistently implements standard changes without providing opportunity for hearings or public comment periods. The federal government has condoned this practice by requiring practitioners to meet the ASHA standard, regardless of the extent or frequency with which standards have changed. Additionally, because ASHA charges its members a fee to join the private organization, some pathologists may simply choose not to become members. Licensure and registration are all that are required by the State; ASHA certification is not a requirement to practice the profession of speech pathologist in New York.

NYS licensure requirements for speech pathologists meet the requirements for speech pathologists with a CCC from ASHA; in some instances, as noted above, the State exceeds ASHA requirements.

Also note that the Medicare program, also administered by CMS, accepts a state's speech pathology licensure as the appropriate credential for the delivery of speech services.

3. Referrals

The audit report applies 42 C.F.R. § 440.110(c) to the provision of speech services. Under § 440.110(c), a referral for speech services by a physician or other

licensed practitioner is required. To support its position that § 440.110 is the applicable regulation, the audit report points out that "State Regulations at [NYCRR], Title 18, section 505.11 provide that a referral is needed from a physician, a physician's assistant, a registered nurse, a nurse practitioner, or licensed speech-language pathologist," suggesting that the State also believes that § 440.110 applies. The State maintained at that time, and continues to maintain, that these services fall under the rehabilitative services of 42 C.F.R § 440.130. However, in order to receive approval of the State Plan Amendment, the State acquiesced and promulgated section 505.11 and the supporting guidance.

Even if, as the audit contends, 42 C.F.R. § 440.110 applies, the State has, since the inception of its SSHS program, been in compliance with that regulation's requirement for a "referral by a physician or other practitioner of the healing arts." When the program began, the State believed that the IEP was sufficient to meet the requirements of § 440.110 because in New York the CSE was to include a physician or other licensed professional (which could include a speech pathologist) as a member at the request of the school district, county or parent. The State asserts that a recommendation from a CSE in the form of an IEP/ISFP was equivalent to a physician referral. In 1997, based upon Federal guidance, the State clarified its position to the school districts, instructing them to require a referral from either a speech pathologist or a physician. That guidance remains in effect today; a physician or a speech pathologist makes the referrals for speech services provided by the SSHS program in New York State.

III. ANALYSIS OF INDIVIDUAL SAMPLE FINDINGS

At the outset, it must be noted that, as in its earlier SSHS audit reports, OIG has exaggerated its findings to maximize the number of "errors" that can be assigned to each of the sampled cases. While the number of "errors" per sample does not increase the number of samples recommended for disallowance in this audit (a sample would be equally recommended for disallowance by OIG if it had two perceived errors or four perceived errors), this practice by OIG acts to greatly exaggerate any documentation or other errors that might actually exist in a sampled case and grossly inflates a reader's perception of the scope of the problems alleged to exist in the audited program. Unfortunately, this practice appears to be consistent with OIG's biased approach throughout this audit project.

In Appendix C of the Draft Report, Error Type C – No Assurance That Services Were Rendered – goes hand in hand with Error Type B – No Service Date Delivery Documentation. Wherever OIG alleges the one deficiency of lack of service date documentation, it makes a "finding" of two errors. Similarly, wherever OIG alleges that a speech service was not provided by or under the direction of a speech pathologist (Error Type E), it also adds Error Type D – Federal Provider Requirements Not Met. Again, one alleged deficiency is turned into two errors. This is a misleading practice and should be stopped.

The Department's sample-by-sample analysis of OIG's findings is found in the grid

appended hereto as Attachment C. Also appended hereto as Attachment D is documentation in sample number order that illustrates the points made in the grid and establishes that the speech services were necessary, were appropriately ordered for the child and were actually provided.

Many of the sampled cases are for service periods that extend well beyond New York's six-year record retention requirement. The following 27 sample numbers are not reflected in the grid for that reason: 1, 3, 5, 15, 17, 19, 26, 27, 30, 33, 41, 42, 47, 48, 50, 51, 59, 60, 63, 71, 73, 74, 79, 80, 90, 91 and 92. For many of these samples, documentation establishing that the speech service was provided was not able to be located by the district due to the age of the cases. It is simply inequitable for OIG to recommend disallowances of these cases, disallowances that, when extrapolated, result in tens of millions of dollars of alleged overpayments. The disallowances attached to these cases should be withdrawn in their entirety.

Although OIG contends that the "errors" remained consistently high throughout the audit period, a more careful analysis shows dramatic improvement in documentation by the provider over the life of the audit period. The average number of alleged deficiencies per claims decreases over time as follows: 1993-95 service years – 4.86; 1996-98 service years – 3.21; and 1999-2001 service years – 2.53. If we exclude categories D and E from the analysis (as indicated above, the State strongly disagrees with OIG's analysis of the "under the direction of" and ASHA certification issues), the documentation improvement is even more dramatic. Average deficiencies decrease as follows: 1993-95 service years – 3.03; 1996-98 service years – 1.91; and 1999-2001 service years – 1.09.

The OIG recommended for disallowance certain claims on the basis that there were not IEPs that covered the month of service at issue. In many of these instances, however, there are in fact IEPs – one dated more than a year before the month of service and another dated shortly after such month. See, e.g., sample numbers 8, 14, 37, 40, 49, and 88. The OIG apparently disregarded any IEP dated more than a year prior to the month of service in question.

It is not appropriate to disallow payment on these claims. First, in most such cases, the IEP dated after the month of service indicates that speech services are to "continue", thus clearly establishing that speech services during the relevant month were furnished pursuant to a valid IEP. See, e.g., sample numbers 8, 14, 37, 40, and 49.

Second, the mere fact that an IEP is more than a year old does not in itself mean that the IEP is not valid and enforceable. Indeed, Federal and State education regulations do not specify that an IEP "expires" after one year or that a child in need of related services is not entitled to a continuation of such services solely because an IEP is not timely renewed. Moreover, 42 C.F.R. § 300.514(a) provides that "during the pendency of any administrative or judicial proceeding regarding a complaint [concerning the identification, evaluation or educational placement of a student], unless the State or local agency and the parents of the

child agree otherwise, the child involved in the complaint must remain in his or her current educational placement." (Emphasis added.) See also 8 NYCRR § 200.5(l)(1). In such case, the IEP remains unchanged and in effect until the complaint is resolved, which could very well not occur until more than one year since the last IEP.

IV. AUDIT STANDARDS

The Inspector General Act of 1978 requires federal inspectors general to comply with the Comptroller General's standards for audits of federal organizations, programs, activities and functions. Generally Accepted Government Auditing Standards (GAGAS) issued by the Comptroller General of the United States delineate the standards that must be followed.

The State believes that during the course of the OIG audit of our SSHS program, the following violations of GAGAS occurred:

Standard 3.04 places responsibility on each auditor and the audit organization to maintain independence so that opinions, conclusions, judgments, and recommendations will be impartial and will be viewed as impartial by knowledgeable third parties.

Auditor independence was compromised when, based on a limited survey, the OIG auditor alleged to CMS that problems with the New York program were so bad that CMS took the unusual step of withholding two quarters of SSHS claims for federal reimbursement. This placed the auditor and OIG, having presented the allegations to both the DOJ and CMS, in the position of then having to produce sufficient evidence to prove the allegations. This suggests that the audit did not even begin objectively but rather with a purpose and goal that had to be met. Any independence was already lost.

Standard 3.07 e addresses situations where an auditor's preconceived ideas toward individuals, groups, organizations, or objectives of a particular program could bias the audit.

There is no question that this audit was undertaken with preconceived ideas that could bias the audit. New York State is the only state of which we are aware whose SSHS program is being audited back to the inception of the program. The audit appears to be driven by maximizing the potential recovery of funds while eviscerating the SSHS program. This bias is reinforced by the secretive manner in which the audit was conducted. None of the assumptions, testimonial evidence or auditor conclusions were shared with the State prior to the issuance of the draft audit report.

This practice is in direct conflict with **Standard 8.04**, which encourages discussion of "... findings, judgments, conclusions, and recommendations with persons who have responsibilities involving the area being audited." There was no attempt to obtain information from the State on testimonial evidence obtained by the OIG from ASHA. This evidence was taken at face value without any indication in the audit report that ASHA's determination could be biased. It is reasonable to conclude that an organization that could

stand to gain both in stature and financially through increased enrollment as a result of audit findings would have, at a minimum, a potential to be biased.

The fact that there was no attempt to obtain additional evidence on this issue ignores **Standard 7.53 e**, which recognizes that testimonial evidence received from an individual that is biased is less reliable than testimonial evidence where no bias exists. Reliance on the ASHA testimony is further brought into question by the manner in which the OIG auditor requested the evidence. The OIG letter to ASHA requesting the evidence said:

"It is our understanding that NYS officials believe that their licensed speech pathologists are equivalent to and meet the requirements of a speech pathologist with a CCC from ASHA. Although we do not agree, OAS [Office of Audit Services] felt it is necessary to consult with ASHA officials on this question. Please provide us with a written response.

On a final note, DOJ has "stepped aside" with respect to its investigation of NYS's school health claims to Medicaid. However, CMS officials have requested that OAS continue with its audits of this area." (See letter of July 30, 2002 from John Berbach to James Potter, Attachment E hereto)

The OIG auditor tarnished his ability to obtain impartial testimony by stating the OIG position on the issue in his request. Additionally, the auditor attempted to substantiate OIG's position by mentioning DOJ involvement in the audit. These actions, aimed at influencing ASHA's response to the OIG inquiry, call into question the impartiality of the auditor and strongly suggest a bias on his part.

Standard 7.48 requires that sufficient competent and relevant evidence be obtained to afford a reasonable basis for the auditor's findings and conclusions. Additionally, **Standard 8.13** requires, in part, that reported findings be provided in a fair presentation and in proper perspective.

Through OIG's omissions, these standards have not been met in the OIG audit report. The audit references a 1995 letter from HCFA that describes the term "under the direction of" and uses this description to support audit disallowances. The audit failed to consider a June 1997 letter from HCFA that states that NYS should use its own regulation to determine "under the direction of." By ignoring the 1997 letter, OIG was able to choose the definition of "under the direction of" most likely to support audit disallowances.

Finally, by excluding the State from participation in the fieldwork process, **Standard 8.04** was again violated. The OIG contacted only the school district to obtain documentation. State Medicaid program staff has invested significant resources in educating providers concerning Medicaid; however, as a group, they are new to the program. Medicaid and Education use different jargon. A Medicaid "referral" is significantly different than a "referral" in the Special Education environment. The OIG is not familiar with the Education

environment; as a result, many opportunities to provide sufficient documentation were missed because neither party understood the other's language. The State Medicaid program staff is well aware of this and is fluent in both languages because the Medicaid and Education Agencies have been working together for over 10 years and have first-hand experience with the difficulties that arise when attempting to mesh the educational and medical models. Nevertheless, OIG discussions with State Medicaid program staff were virtually nonexistent throughout this audit.

Failure to follow the above-cited standards has resulted in a draft audit report that contains unsupported findings of errors, inflates errors that were found, reaches conclusions based on biased testimonial, and draws conclusions without supporting facts. This failure to follow GAGAS has jeopardized the continuance of a valuable program in New York State and casts a shadow on the validity of the audit findings.

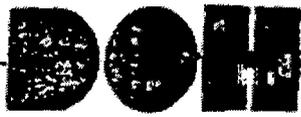
V. CONCLUSION

The OIG draft audit report entitled "Review of Medicaid Speech Claims Made by the New York City Department of Education" should be withdrawn. As New York has described in this detailed audit response, the vast majority of the audit findings were the result of inappropriate regulatory interpretations and OIG's misunderstanding of the State's requirements for professional practitioners. In addition, the design of the audit is inconsistent with the methods OIG has used to audit similar providers in other states.

The audit fails to recognize the essential foundation upon which the School Supportive Health Services program is based: Congress intended to assist school districts with the provision of services required under IDEA and expected that the services would be provided as determined by each local educational agency's Committee on Special Education, in accordance with the provisions of IDEA.

Finally, the draft audit raises no question that essential SSHS services to disabled children were provided, and that disabled children received those services. Instead, a massive disallowance is proposed that would have a paralyzing impact on New York and its schools based upon an alleged failure to meet highly technical documentation requirements.

ATTACHMENT A



STATE OF NEW YORK
DEPARTMENT OF HEALTH

APPENDIX G

Page NOV 25 1996

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

Barbara A DeBuono, M.D., M.P.H.
Commissioner

November 20, 1996

Arthur J. O'Leary
Associate Regional Administrator
United States Department of Health
and Human Services
Health Care Financing Administration
Division of Medicaid
Region II
Federal Building
26 Federal Plaza
New York, New York 10278

RE: Services under SPA 92-42

Dear Mr. O'Leary:

The purpose of this letter is to provide a formal response to a letter from the Health Care Financing Administration (HCFA) to the New York State Department of Social Services (DSS) setting forth an interpretation of HCFA regulations at 42 C.F.R. 440.110 and 42 C.F.R. 440.130.

The Department of Health (the State, the Department or DOH), as successor to DES as single state agency for Medicaid, disagrees with the interpretation of these regulations set forth in the HCFA letter of February 8, 1995, to DSS. In addition, the Department takes issue with the HCFA interpretation of the same regulations contained in Medicaid State Operations Letter (MSOL) 93-54, dated September 3, 1993.

The State's Medicaid program includes speech pathology services provided by public schools and municipalities to children with disabilities under the rehabilitative option of federal regulations set forth at 42 C.F.R. 440.130. Federal financial participation (FFP) for these services is claimed for eligible children in accordance with approved State Plan Amendment (SPA) 92-42. The regulation at 42 C.F.R. 440.130 is silent about the professional qualifications of the provider of service. The Department maintains that professional qualifications of providers under the rehabilitation option are under the jurisdiction of the State and not under federal jurisdiction, in the absence of specific federal regulations issued pursuant to the Administrative Procedure Act.

APPENDIX G
Page 23 of 46

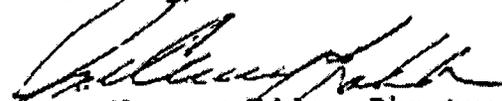
The letter indicated that the provider qualifications 440.110(c)(1) apply even though rehabilitative speech services are provided pursuant to 42 CFR 440.110(d). We interpret the omission of rehabilitative services from the definition of services for individuals with speech, hearing, and language disorders in 42 CFR 110(c)(1) as intentional, and not providing the type of exception which would bring the professional qualifications of such providers under federal jurisdiction.

We also disagree with how you interpret "under the direction of" as it applies to providers of speech pathology services in 42 CFR 440.110(c). We believe that "direction" allows for flexibility in degree based on the qualifications of the individual receiving the direction, and have adopted State conforming regulations at 18 N.Y.C.R.R. 505.11(c). The HCFA letter provides that the speech pathologist must observe the certified teacher of speech and hearing handicapped providing care to the child, have some input into the type of care provided, and take ultimate legal responsibility for the care provided. However, HCFA interprets the regulation in such a way that "direction" in fact means "direct supervision" of the teacher by the speech pathologist. We view this an overly narrow interpretation of the regulation and statute. If the regulation were intended to impose the requirement of direct supervision, then the regulation would have included the word "supervision," as do other HCFA regulations. See section 405.2452 of Title 42 CFR.

The Department believes that Congress has made it clear that it is a sound exercise of public policy to shift payments for medically necessary services included in Individual Education Programs under the Individuals with Disabilities Education Act (IDEA) for Medicaid recipients from education funding sources to Medicaid ones. The HCFA's interpretation of the regulations is inconsistent with that view. The Department intends to pursue all appropriate rights and remedies to challenge the interpretation and any associated loss of FFP.

You may contact Julie Elson of my staff if you have any questions about the content of this letter. She may be reached at 518-474-2262.

Sincerely,


Ann Clemency Kohler, Director
Office of Medicaid Management

ACR/GM/CH/MAP/SVL/

cc: Jans Salchli
Robert Scalise

ATTACHMENT B



DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to MOB JMS

Region II
Federal Building
26 Federal Plaza
New York NY 10278

JUN 30 1997

Ann C. Kohler, Director
Office of Medicaid Management
New York State Department of Health
Corning Tower, Room 1441
Empire State Plaza
Albany, NY 12237

Post-it® Fax Note	7671	Date	6/19/97	# of pages	1
MIKE ALBINO		From SARAH JANULEZ			
CO. DESK	DSJ-QAA	Co.			
Phone #	39059	Phone #	37978		
Fax #	63524	Fax #	32892		

Dear Ms. Kohler:

This is in response to New York State's request that we review the policies previously stated concerning HCFA's interpretation of regulations at 42 CFR 440.110 and 440.130. The State's Medicaid program includes speech pathology services provided by public schools and municipalities to children with disabilities under the rehabilitation benefit option at 42 CFR 440.130(d). New York questions the provider qualifications for these services provided under the Medicaid rehabilitation benefit. The State maintains that professional qualifications of providers under the rehabilitation option are under the jurisdiction of the State in the absence of specific Federal rehabilitation regulations specifying qualifications of providers.

Federal regulations at 42 CFR 440.110(c) provide that services for individuals with speech, hearing, and language disorders be provided by or under the direction of a speech pathologist or audiologist, for which a patient is referred by a physician. A speech pathologist or audiologist is defined as an individual who has a certificate of clinical competence from the American Speech and Hearing Association, has completed the equivalent educational requirements and work experience necessary for the certificate, or has completed the academic program and is acquiring supervised work experience to qualify for the certificate.

Regulations at 42 CFR 440.130(d) provide that rehabilitation services include any medical or remedial services recommended by a physician or other licensed practitioner of the healing arts for maximum reduction of physical or mental disability and restoration of a recipient to his best possible functional level. There are no Federal provider qualification standards included in the regulatory language at 440.130(d). However, HCFA previously set forth the policy that services coverable under more than one regulatory authority must meet the requirements of the more specific authority, even when covered under a broad coverage category such as the rehabilitation benefit. As such, the provider qualifications for speech pathology services at 42 CFR 440.110(c) would apply even when the services are covered in the State's Medicaid plan under 42 CFR 440.130(d) (rehabilitation). By adhering to this policy, HCFA is assured that quality is not compromised by allowing less stringent provider qualifications to apply with respect to services for which very specific qualifications were developed.

In addition, New York disagrees with our policy interpretation of "under the direction of" as it pertains to providers of speech pathology services in 42 CFR 440.110(c). We advised New York that

the term "under the direction of" a speech pathologist means that the speech pathologist must see each patient at least once, have some input as to the type of care provided, and review the patient after treatment has begun, as well as assume legal responsibility for the services provided.

While we continue to maintain that the specific qualifications at 42 CFR 440.110(c) must be met by providers of speech pathology services in order to maintain quality assurance, regardless of which benefit authority is used for coverage under Medicaid, we believe that it would be reasonable for New York to look to its own State practice laws in order to determine when services are appropriately provided "under the direction of" a qualified speech pathologist. Therefore, the State could utilize its school employees to provide speech pathology services "under the direction of" a Medicaid qualified speech pathologist, if this was consistent with the State's own laws and regulations.

We hope this information will be useful in responding to New York State. If you have any questions or need additional information, please contact Jane Salchli of my staff at (212) 264-2775.

Sincerely,



Arthur J. O'Leary
Associate Regional Administrator
Division of Medicaid

cc: Julie Elson

<OIG NOTE>:
**OIG deleted all names contained within the
State's Attachment C .**

ATTACHMENT C

ANALYSIS OF NYCDOE SPEECH CLAIMS
RECOMMENDED FOR DISALLOWANCE IN OIG
DRAFT AUDIT REPORT

#	NAME	MOS ¹	DESCRIPTION
2		3/97	<p>Disallowed for no services, no IEP & no referral</p> <ul style="list-style-type: none"> Services: Supporting documentation includes: (1) school attendance records indicate student was absent only two days in 3/97; (2) teacher's attendance records indicate teacher was absent only one day in 3/97; and (3) [new document (not previously submitted to OIG)] speech/language progress report dated 6/17/93 by teacher indicates the student "attends regularly". IEP: Supporting documentation includes: (1) IEP dated 4/9/97 decertifying speech services; and (2) IEPs dated 10/11/91, 11/24/92 and 11/16/93.
4		1/00	<p>Disallowed for no "under the direction of" ("UDO")</p> <ul style="list-style-type: none"> UDO: The provider () is a teacher, and the supervisor () is an SLP CCC. Supporting documentation includes: (1) supervisor's agenda of meetings with speech teachers (1/21/00); (2) observation report of the teacher by supervisor (2/14/00) (this was apparently not considered by OIG although previously provided to OIG); and (3) a speech therapy authorization form ("STAF") of the student by supervisor (11/20/98) (not considered by OIG).
6		9/00	<p>Disallowed for no services, no UDO & no referral</p> <ul style="list-style-type: none"> UDO: Supporting documentation includes a STAF by an SLP dated 11/14/00.
7		11/96	<p>Disallowed for no services, no UDO, no referral & no IEP</p> <ul style="list-style-type: none"> Services: Supporting documentation includes: (1) student's school attendance records, which indicate that he was absent only one day in 11/96; (2) teacher's attendance records, which indicate that she was absent only one day in 11/96; (3) teacher's schedule which

¹ Service months in bold are beyond New York State's six-year record retention policy. In addition, service months for the following 27 students, not otherwise included in this analysis, are beyond the State's six year record retention period: OIG audit numbers 1, 3, 5, 15, 17, 19, 26, 27, 30, 33, 41, 42, 47, 48, 50, 51, 59, 60, 63, 71, 73, 74, 79, 80, 90, 91 and 92.

			<p>indicates the student was scheduled for speech therapy on Thursdays & Fridays at 2:10 – 2:45 p.m. (not considered by OIG); and (4) a speech/language progress report dated 1/9/98 by the teacher which indicates that the student “attends [speech classes] regularly”.</p> <ul style="list-style-type: none"> • UDO: Supporting documentation includes memoranda from supervisor (an SLP) to “all speech improvement teachers” re: meetings of the speech services unit, time and places, for the 1996 – 97 school year. • IEP: Supporting documentation includes: (1) an IEP dated 15 months before the MOS; and (2) (new document) minutes of E.P.C. meetings on 1/12/98 and 2/10/98, indicating that an IEP was “developed and discussed”, and that recommends speech/language therapy twice a week.
8		10/96	<p>Disallowed for no UDO & no IEP</p> <ul style="list-style-type: none"> • UDO: The provider is a teacher and the supervisor is includes an SLP. Supporting documentation includes a formal observation report of the teacher by the supervisor (11/14/95). • IEP: Supporting documentation includes: (1) (new document) an IEP dated 12/3/96 (only two months past MOS), which indicates a “continuation” of speech language therapy; and (2) an IEP dated 12/5/94 (also contains teacher/provider updates for 1/3/95 & 4/8/95).
9		4/94	<p>Disallowed for no documentation of services, no UDO & no referral</p> <ul style="list-style-type: none"> • Services: Supporting documentation includes: (1) student’s school attendance shows that the student was absent only 1 day that month; and (2) minutes of a 10/13/93 CSE meeting include a request for a fuller evaluation of speech because it is the student’s area of weakness (not considered by the OIG). • UDO: The provider is a teacher and the supervisor is is not an SLP. Supporting documentation includes: (1) an observation report of the teacher by an SLP (2/2/94) (not considered by the OIG). • Referral: Supporting documentation includes a speech evaluation by an SLP (10/22/93).

10		10/96	<p>Disallowed for no UDO</p> <ul style="list-style-type: none"> The provider _____ is a teacher, and the supervisor _____ is an SLP (and CCC, as noted by the OIG). Supporting documentation includes: (1) a report of an administrative visit on 10/23/96 by supervisor with teacher to discuss improvement regarding administrative teaching functions; and (2) a supervisory observation report on 2/6/97 of the teacher by the supervisor. (The OIG did not consider these documents.)
11		3/94	<p>Disallowed for no UDO & no referral</p> <ul style="list-style-type: none"> UDO: The provider _____ is a speech clinician, and the supervisor _____ is an SLP. Supporting documentation includes an annual review of the teacher (9/93 – 6/94) – not acknowledged by the OIG. Referral: Supporting documentation includes a speech evaluation (6/12/92) by an SLP recommending speech language therapy 2 times per week, for 30-minute session on a 1 to 1 basis.
12		9/00	<p>Disallowed for no UDO</p> <ul style="list-style-type: none"> The provider _____ is a teacher, and the supervisor _____ is an SLP. Supporting documentation includes: (1) supervisor's meeting agendas for 4/18/00 & 6/12/00 for speech services department conferences; (2) a memo from supervisor to District 20 speech providers re: annual review issues; and (3) a STAF of the student by the supervisor (4/10/00).
13		12/96	<p>Disallowed for no UDO & no referral</p> <ul style="list-style-type: none"> UDO: Supporting documentation includes: (all new documents) (1) an observation report of the teacher by supervisor (an SLP) dated 4/7/00; (2) a letter of recommendation for the teacher by supervisor, (3) a speech therapy administrative visit on 9/15/99 of the teacher by the supervisor; (4) speech therapy observation checklist on 12/2/98 of the teacher by supervisor; (5) an observation report on 3/24/99 of the teacher by supervisor; and (6) a supervisory observation report on 1/13/98 of the teacher by supervisor.

14		10/98	<p>Disallowed for no UDO & no IEP</p> <ul style="list-style-type: none"> • UDO: Supporting documentation includes: (1) Related Service Student Assistance records (RSSAs) and teacher's attendance record (showing the provider is a teacher, who was substituting for the regular teacher [redacted], who was on maternity leave from 10/9/98 – 12/2/98); and (2) (new document) [redacted] C.V. [redacted] is not an SLP, but has credentials equivalent to a CCC, and has in fact been an ASHA presenter). • IEP: Supporting documentation includes: (1) an IEP from 6/7/99, which recommends speech language therapy and states "no change" from the last IEP, indicating that speech was recommended on the IEP covering this MOS; and (2) the first 3 pages of an IEP dated 5/96.
20		12/96	<p>Disallowed for no services & no UDO</p> <ul style="list-style-type: none"> • Services: Supporting documentation includes: (1) student's school attendance, which indicates that the student was only absent four days in 12/96; and (2) the student's IEP recommends speech language therapy three times a week; and (3) the teacher's attendance records show no absences for 12/96. • UDO: The provider [redacted] is an SLP and ASHA certified; therefore no UDO documentation is necessary.
21		4/94	<p>Disallowed for no UDO & no referral</p> <ul style="list-style-type: none"> • UDO: The provider [redacted] is a teacher, and the supervisor [redacted] is an SLP (and CCC, as noted by the OIG). Supporting documentation includes: (1) meeting agendas of the supervisor with teachers (including a 4/94 meeting); and (2) a supervisory observation report of the teacher by the supervisor (1/26/94). • Referral: Supporting documentation includes: (1) a pediatric neurodevelopmental evaluation by a physician recommending speech therapy (2/14/91); (2) a speech evaluation on 3/9/93 by an SLP recommending speech language therapy. [OIG notes that the neurodevelopmental evaluation does not recommend speech, but fails to note references to student's disfluency and physician's conclusions and recommendations (at end of evaluation) acknowledging speech impediments.]

22		5/96	<p>Disallowed for no UDO & no referral</p> <ul style="list-style-type: none"> • UDO: The provider () is a teacher, and the supervisor is not an SLP, but was supervised by an SLP, CCC . Supporting documentation includes: — visitation log w4 • Referral: Supporting documentation includes (new document) a speech evaluation by an SLP on 1/25/94 recommending speech language therapy.
24		6/99	<p>Disallowed for no services</p> <ul style="list-style-type: none"> • Supporting documentation includes: (1) student's school attendance which indicates that he was present at least 13 days; and (2) the student's IEP, which recommends speech language therapy twice a week.
25		4/98	<p>Disallowed for no services & no UDO</p> <ul style="list-style-type: none"> • Services: Supporting documentation includes: (1) the student's school attendance records; and (2) the student's 11/21/97 IEP, which recommends speech services twice a week. • UDO: Supporting documentation includes: (1) visitation log with the teacher's supervisor for Jan. 1998 through June 1999; and (2) (new document) (not an SLP, but has credentials equivalent to a CCC, and has in fact been an ASHA presenter).
28		3/01	<p>Disallowed for no UDO</p> <ul style="list-style-type: none"> • The provider () is a teacher, and the supervisor is not SLP, but has credentials equivalent to a CCC, and has in fact been an ASHA presenter. Supporting documentation includes (1) (new document) (C.V.); and (2) visitation log with (visits on 10/6/00, 6/25/01 & 4/25/01, reviewed teacher's records and made substantive comments.
29		1/99	<p>Disallowed for no UDO, no referral & no IEP</p> <ul style="list-style-type: none"> • Referral: Supporting documentation includes a physician's referral dated 3/9/99 recommending speech language services. • IEP: Supporting documentation includes: (1) an IEP dated 11/5/99, which recommends speech therapy; and (2) an IEP dated 12/17/96 recommending

			speech/language therapy (not considered by OIG).
31		8/00	<p>Disallowed for no UDO</p> <ul style="list-style-type: none"> The provider is a teacher, and the supervisor is an SLP, CCC. The MOS is August and the provider is not the student's regular speech teacher. Supporting documentation (for the regular speech teacher) includes: (1) a supervisory observation report by supervisor (11/10/99 & 4/8/00); (2) a report of administrative visit by supervisor (9/14/99); (3) a STAF of the student by the supervisor (9/15/99); and (4) the supervisor's P77K meeting agenda for 1/26/00 & agenda for 10/26/99 with attendance sheet with regular teacher's name on it.
32		12/96	<p>Disallowed for no services, no UDO & no referral</p> <ul style="list-style-type: none"> Services: Supporting documentation includes (1) student's school attendance records, which indicate that he had no absences in 12/96; (2) the teacher's attendance, which indicates only two absences in 12/96; and (3) schedule for speech teacher, which indicates the student is scheduled for speech therapy Wednesdays at 11:25 a.m. and Fridays at 12:25 p.m. (not considered by OIG). UDO: Supporting documentation includes: (1) memoranda from supervisor to "all speech improvement teachers" re: meetings of speech services unit for the 1996 - 97 school year; (2) a memo re: agenda of an Annual Conference of Manhattan Teachers of Speech Improvement; and (3) a memo re: Speech Progress Reports: Training of Teachers of Speech Improvement.
34		1/99	<p>Disallowed for no services</p> <ul style="list-style-type: none"> Supporting documentation includes: (1) the student's school attendance, which indicates that he was absent only five days in 1/99; (2) the student's 4/30/98 IEP, which indicates that he was to receive speech language services twice a week; (3) a speech/language progress report dated 10/22/97 indicating that student "attends regularly;" (4) teacher's attendance indicating that she was only absent four days in 1/99; and (5) teacher's speech schedule indicating that the student was scheduled for speech therapy Mondays & Thursdays at 8:45-9:15 a.m. (These documents were not considered by OIG.)

35		3/00	<p>Disallowed for no UDO</p> <ul style="list-style-type: none"> Supporting documentation includes STAFs of the student by the supervisor (10/4/99 & 9/19/00). (The OIG did not consider this documentation.)
36		10/96	<p>Disallowed for no services, no UDO, no referral and no IEP</p> <ul style="list-style-type: none"> Services: Supporting documentation includes: (1) the student's school attendance, which indicates that he was absent only four days in 10/96 (not considered by OIG); and (2) (new document) 11/99 speech/language progress report by the teacher indicating that the student "attends regularly." UDO: Supporting documentation includes: (1) visitation log with the supervisor to review various teachers' students' IEPs; and (2) speech/language progress report dated 6/10/96 by the teacher with the supervisor's name printed on it (discusses past therapy and objectives and future therapy). Referral: Supporting documentation includes: (1) (new document) a physician's recommendation for speech therapy; and (2) (new document) a bilingual speech language evaluation by an MA, CCC on 9/15/97. IEP: Supporting documentation includes (new document) an IEP dated 9/24/97, which recommends a "continuation" of speech language therapy.
37		5/99	<p>Disallowed for no UDO & no IEP</p> <ul style="list-style-type: none"> UDO: Supporting documentation includes: (1) a speech/language progress report 1/30/96 by an SLP, CCC; and (2) a STAF by an SLP dated 10/29/98. (These documents were not considered by OIG.) IEP: Supporting documentation includes: (1) IEP dated 4/10/97 recommending a continuation of speech/language therapy; and (2) IEP dated 7/8/99 recommending a "continuation" of speech/language therapy.
39		4/95	<p>Disallowed for no referral & no IEP</p> <ul style="list-style-type: none"> Referral: Supporting documentation includes (new document) a speech language evaluation by an SLP (1/95). IEP: Supporting documentation includes an IEP dated

			3/8/95 that recommends a "continuation" of speech language therapy. (The OIG noted that the conference date on the IEP is 3/8/95, but claimed "the overwhelming majority of the evidence in the IEP ... represents information related to the 10/25/96 Update." But that IEP specifies that the related services are to "continue", thus indicating that the services were on a prior IEP).
40		5/99	<p>Disallowed for no IEP</p> <ul style="list-style-type: none"> Supporting documentation includes: (1) an IEP dated 12/22/97 recommending a "continuation" of speech language therapy; and (2) an IEP dated 6/1/99 recommending "continuation" of speech language therapy.
43		6/97	<p>Disallowed for no UDO & no IEP</p> <ul style="list-style-type: none"> UDO: Supporting documentation includes: (1) a speech/language progress report dated 11/8/94 by an SLP, CCC; (2) a STAF dated 9/20/00 by an SLP; and (3) a speech/language evaluation dated 3/21/95 by an MA, CCC. (These documents were not considered by OIG.) IEP: Supporting documentation includes: (1) an IEP dated 6/21/95 recommending speech language services; and (2) a speech language progress report by an SLP dated 3/20/98 which indicates that the services provided reflect the current IEP recommendation of speech language therapy (not considered by OIG).
44		4/97	<p>Disallowed for no UDO & no referral</p> <ul style="list-style-type: none"> UDO: The provider _____ is a teacher, and the supervisor _____ is an SLP. Supporting documentation includes: (1) a supervisory observation report for 11/13/95 of teacher by supervisor (not considered by the OIG); (2) meeting agendas by _____ to Heads of All Schools 2/6/97 - 6/2/97 re: organizational and training meetings; (3) a STAF by supervisor of student 12/9/97 (not considered by the OIG). Referral: Supporting documentation includes a 6/14/96 speech evaluation recommending speech language therapy (not considered by the OIG).
49		1/01	<p>Disallowed for no IEP</p> <ul style="list-style-type: none"> Supporting documentation includes: (1) an IEP for

			11/4/99, recommending speech language therapy 2x30x3; and (2) an IEP dated 3/9/01 modifying speech language therapy from 2x30x3 to 3x30x3.
53		1/98	<p>Disallowed for no IEP</p> <ul style="list-style-type: none"> Supporting documentation includes an IEP dated 10/2/96, which recommends speech language therapy 2x30x3 with a teacher/provider update in 11/97. (The OIG applied an erroneous IEP standard by not accepting the 11/97 teacher/provider update as a valid review of the IEP and claiming that it did not constitute an annual <u>renewal</u> of the IEP by the CSE. The IEP need be <u>reviewed</u> annually, not renewed.)
54		11/00	<p>Disallowed for no UDO</p> <ul style="list-style-type: none"> Supporting documentation includes: (1) a STAF dated 9/13/00 by the teacher, and cosigned by the supervisor, an SLP; and (2) a speech/language evaluation and progress report dated 11/22/99 by an SLP, CCC (not considered by OIG).
56		4/01	<p>Disallowed for no UDO</p> <ul style="list-style-type: none"> The provider _____ is a teacher, and the supervisor _____ is an SLP (and CCC, as noted by the OIG). Supporting documentation includes: (1) monthly memos from supervisor to speech teachers re: speech services unit meetings for 2000 – 01 with place and time of meetings; and (2) STAF of student by supervisor and teacher 10/16/00. (None of these documents were considered by the OIG.).
57		10/96	<p>Disallowed for no services, no UDO & no referral</p> <ul style="list-style-type: none"> Services: Supporting documentation includes student's school attendance, which indicates no school absences in 10/96. UDO: Supporting documentation includes: (1) (new document) an evaluation by SLP CCC on 4/19/94, 4/26/94 and 5/3/94; and (2) (new document) a STAF dated 1/24/98 by an SLP. Referral: Supporting documentation includes (new document) a speech language evaluation by an MS, CCC dated 5/3/94 recommending speech language therapy twice a week.

61		3/99	<p>Disallowed for no services, no UDO & no referral</p> <ul style="list-style-type: none"> • Services: Supporting documentation includes: (1) speech teacher's schedule which indicates that the student was scheduled for Mondays & Thursdays at 1:25 – 2:10; (2) student's school attendance which indicates that he had no absences in 3/99; and (3) teacher's attendance which indicates that she was absent only two days in 3/99. (These documents were not considered by OIG.) • UDO: Supporting documentation includes: (1) a lesson observation of the teacher dated 3/10/99; (2) an agenda of meetings from supervisor to teachers for 10/98 – 5/99, indicating place & time (about 1 meeting/mo.); and (3) (new documents) STAFs of student by the supervisor on 9/27/99 and by the supervisor and the teacher on 9/26/00.
62		2/99	<p>Disallowed for no services & no UDO</p> <ul style="list-style-type: none"> • Services: Supporting documentation includes: (1) student's school attendance indicates that the student had no absences in 2/99; and (2) (new document) the student's 1999/00 RSSA shows nearly perfect attendance for speech language therapy services. • UDO: The provider is a teacher, and supervisor is an SLP. Supporting documentation includes a STAF of the student by the supervisor (10/6/98).
64		5/98	<p>Disallowed for no IEP</p> <ul style="list-style-type: none"> • Supporting documentation includes an IEP dated 3/6/97 that contains notes of conference held on 11/17/97 (annual review), and recommends no change in service.
65		6/99	<p>Disallowed for no services & no UDO</p> <ul style="list-style-type: none"> • Services: Supporting documentation includes student's school attendance, which indicates that the student had no absences from school in 6/99 (not considered by the OIG). • UDO: The provider is a teacher, and the supervisor is an SLP CCC. Supporting documentation includes: (1) a formal observation report of teacher by supervisor (4/23/99); (2) a classroom observation report of teacher by assistant principal (1/13/99); (3) meeting agendas for 1998 – 99

			re: speech/special education; and (4) a STAF of student by supervisor (1/25/99). (Except for the STAF, none of these documents were considered by the OIG.)
66		11/97	<p>Disallowed for no services & no UDO</p> <ul style="list-style-type: none"> Services: Supporting documentation includes: (1) student's school attendance, which indicates that the student was only absent 4 days (not considered by the OIG); and (2) (new document) teacher had no absences that month. UDO: The provider _____ is a teacher, and the supervisor _____ is an SLP. Supporting documentation includes: (1) a program administrative visit by the supervisor (1/22/97); (2) a supervisory observation report of the teacher by the supervisor (1/22/97); (3) a STAF of the student by the supervisor; and (4) supervisor's meeting agendas for 2/6/96, 5/7/96, 9/24/97 and 10/17/97 re: speech staff development. (None of these documents were considered by the OIG.)
67		6/99	<p>Disallowed for no UDO</p> <ul style="list-style-type: none"> The provider (_____) is a teacher, and the supervisor (_____) is an SLP, CCC. Supporting documentation includes: (1) (new document) supervisor's meeting agendas to District 1 speech teachers; and (2) a STAF by supervisor of student (9/15/98) (not considered by the OIG).
69		2/99	<p>Disallowed for less than two services and no UDO</p> <ul style="list-style-type: none"> UDO: Supporting documentation includes: (1) a speech/language assessment dated 3/3/93 by an SLP CCC; (2) a letter from two SLPs to the teacher re: her presentation at a training session; and (3) a STAF by an SLP dated 10/1/98. (These documents were not considered by OIG.)
70		3/01	<p>Disallowed for no UDO & no IEP</p> <ul style="list-style-type: none"> IEP: Supporting documentation includes an IEP dated 10/24/01 that recommends "continued" speech language therapy.
72		11/97	<p>Disallowed for no services, no UDO & no referral</p> <ul style="list-style-type: none"> Services: Supporting documentation includes: (1) student's school attendance records, which indicate that student had one absence in 11/97; (2) teacher's

			<p>attendance records, which indicate teacher was not absent in 11/97; and (3) provider's schedule for 9/97, which indicates student scheduled for speech Mon. at 9:40 – 10:10 & Wed. at 12:55 – 1:25. (Neither the provider's attendance nor the provider's schedule was considered by the OIG.)</p> <ul style="list-style-type: none"> • UDO: The provider _____ is a teacher, and the supervisor _____ is an SLP (and CCC, as noted by the OIG). Supporting documentation includes: (1) an observation report of teacher by supervisor (3/16/98); and (2) 11/19/97 agenda of meetings with special education speech teachers. (None of these documents were considered by the OIG.) • Referral: Supporting documentation includes a medical documentation form completed by _____ w/medical diagnosis of "speech dysfluency due to mispronunciation of certain letters" (not considered by the OIG).
75		5/96	<p>Disallowed for no UDO & no referral</p> <ul style="list-style-type: none"> • UDO: Supporting documentation includes: (1) (new document) a speech/language progress report by an SLP, CCC dated 12/9/97; and (2) (new document) a STAF by an SLP dated 10/23/98.
76		1/99	<p>Disallowed for no UDO</p> <ul style="list-style-type: none"> • The provider _____ is a teacher, and the supervisor _____ is an SLP (and CCC, as noted by the OIG). Supporting documentation includes a STAF of the student by the supervisor (1/12/99) (not considered by the OIG).
78		1/98	<p>Disallowed for no UDO & no referral</p> <ul style="list-style-type: none"> • UDO: The provider _____ is a teacher, and the supervisor _____ is an SLP (and CCC, as noted by the OIG). Supporting documentation includes: (1) meeting agendas with speech teachers for 2/11/97 (?) & 11/19/97; (2) a STAF of the student by the supervisor dated 12/14/97 (?); and (3) (new document) an observation report of the teacher by the supervisor (3/24/98). • Referral: Supporting documentation includes (new document) a speech language evaluation by an SLP, CCC on 7/18/94, which recommends speech language therapy.

82		1/01	<p>Disallowed for no UDO</p> <ul style="list-style-type: none"> The provider _____ is a teacher, and the supervisor _____ is an SLP. Supporting documentation includes: (1) meeting agendas for teachers 10/00, 4/01 & 6/01 (not considered by the OIG); and (2) a STAF of the student by the supervisor (12/28/00).
83		2/01	<p>Disallowed for no UDO</p> <ul style="list-style-type: none"> The provider _____ is a teacher, and the supervisor _____ is an SLP, CCC. Supporting documentation includes STAFs of the student by the supervisor (12/8/00 & 11/7/01) (not considered by the OIG).
84		5/98	<p>Disallowed for no services & no UDO</p> <ul style="list-style-type: none"> Services: Supporting documentation includes (new document) student's attendance records, which indicate no absence in 5/98. UDO: Supporting documentation includes (new document) a bilingual speech and language evaluation by an SLP, CCC dated 8/20/95.
85		5/98	<p>Disallowed for no UDO</p> <ul style="list-style-type: none"> The provider _____ is a teacher, and the supervisor _____ is an SLP, CCC. Supporting documentation includes a STAF of the student by the supervisor (12/8/97) (not considered by the OIG).
86		10/95	<p>Disallowed for no services, no UDO & no referral</p> <ul style="list-style-type: none"> Services: Supporting documentation includes student's school attendance, which indicates that the student had no absences in 10/95. UDO: Supporting documentation includes a speech evaluation by _____ SLP, of the student (4/1/93). _____ is an SLP _____ but the OIG claimed that she was not. In addition, the State informed the OIG that the provider was _____, who is an SLP; therefore no UDO documentation need be provided. Referral: Supporting documentation includes a speech language evaluation (4/1/93) by an SLP recommending speech language therapy; (2) a SLP _____ signed an IEP (9/28/95) recommending

			speech language therapy 2x30x8 (not considered by the OIG).
88		3/99	<p>Disallowed for no UDO, no referral & no IEP</p> <ul style="list-style-type: none"> • UDO: The provider [redacted] is a teacher, and the supervisor [redacted] is an SLP. Supporting documentation includes: (1) a supervisory report of the teacher by the supervisor (1/28/99) (not considered by the OIG); and (2) (new document) an "Overview of CSS Staff Development Activities" with a list of supervisor's workshops. • Referral: Supporting documentation (new document) includes a clinical speech evaluation by an SLP, CCC (10/26/98). • IEP: Supporting documentation includes an IEP from 11/26/97 with attached pages from a 6/7/99 CSE conference attended by the student's speech teacher (not considered by the OIG).
89		10/94	<p>Disallowed for no UDO & no referral</p> <ul style="list-style-type: none"> • UDO: The provider [redacted] is a teacher, and the supervisor [redacted] is an SLP, CCC. Supporting documentation includes: (1) supervisor's meeting agendas for 9/94 attaching professional development materials; and (2) a supervisory observation report of the teacher by the supervisor (5/13/95). • Referral: Supporting documentation includes a speech language evaluation by an SLP recommending speech language therapy (1/25/91) (not considered by the OIG).
94		8/95	<p>Disallowed for no services & no UDO</p> <ul style="list-style-type: none"> • Services: Supporting documentation includes: (1) student's school attendance indicates the student had no absences in 8/95; and (2) the student's IEP recommended that he have speech language therapy three times per week (not considered by the OIG). • UDO: The provider, [redacted] is an SLP, therefore no UDO documentation is required.
95		5/99	<p>Disallowed for no UDO</p> <ul style="list-style-type: none"> • The provider [redacted] is a teacher, and the

			<p>supervisor _____ is an SLP. Supporting documentation includes: (1) supervisory staff meeting agendas from the supervisor to speech language providers (1/99 – 4/99); (2) supervisory observation reports of teacher by supervisor on 4/16/99 and 2/24/99; and (3) a STAF of the student by the supervisor (10/98). (None of these documents were considered by the OIG.)</p>
97		12/97	<p>Disallowed for no services & no UDO</p> <ul style="list-style-type: none"> • Services: Supporting documentation includes: (1) student's school attendance, which indicates that the student was absent seven days in 12/97; (2) related service provider reports (2/15/96 & 3/10/97) that note student's "very good attendance to speech class;" and (3) student's IEP (4/2/97) indicates that the student received speech language therapy twice a week. (The OIG did not consider either the related services reports or the IEP.) • UDO: The provider, _____ is an SLP, CCC, so no UDO documentation is required.
99		2/97	<p>Disallowed for no services, no UDO & no referral</p> <ul style="list-style-type: none"> • Services: Supporting documentation includes: (1) student's school attendance, which indicates that the student had no absences in 2/97; and (2) student's IEP (11/6/96) indicates that speech language therapy was to be provided three times a week (not considered by the OIG). • UDO: The provider _____ is a teacher, and the supervisor _____ is not an SLP, but the supervisor's supervisor _____ is an SLP. Supporting documentation includes: (1) a report of administrative visit of teacher by supervisor (12/18/96 & 10/7/96); (2) memos to Bronx speech teachers from supervisor (9/96 – 2/97) re: place and time of meetings, including attendance sheets; teacher attended on 2/12/97, 11/8/96 & 10/10/96; and (3) a STAF of student by _____ (None of these documents were considered by the OIG.) • Referral: Supporting documentation includes a STAF by _____ not considered by the OIG).
100		3/97	<p>Disallowed for no services</p> <ul style="list-style-type: none"> • Supporting documentation includes: (1) student's

			school attendance, which indicates that the student was only absent two days in 3/97; and (2) the student's 11/13/96 IEP, which recommends speech language therapy 3 times a week (not considered by the OIG).
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<OIG NOTE>:

Attachment D consists of detailed case information corresponding to the 57 claims listed in Attachment C.

ATTACHMENT D

ATTACHMENT E

Berbach, John (OIG/OAS)

APPENDIX G

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From: Berbach, John (OIG/OAS)
 Sent: Tuesday, July 30, 2002 10:42 AM
 To: 'jpotter@asha.org'
 Cc: Feltz, Linda; Tavener, Linda; Lasowski, William S; Rhodes, Rhonda; Zeinger, Jerry; Strauss, Richard; Reisman, Peter; Kelly, Sue; Bonnie, Edmond A; Provost, William G; Horgan, Timothy (OIG/OAS); Jackson, Ben (OIG/OAS); Hagg, John (OIG/OAS); Wellins, Gregory (OIG/OAS); Smith, Kevin (OIG/OAS); Inzenilo, Victoria (OIG/OAS); Halko, Nicholas (OIG/OAS); Sharkey, Terence (OIG/OAS); Fratangelo, Michael (OIG/OAS); Cavaliaro, Tyese (OIG/OAS)
 Subject: Question For ASHA Related To NYS's Licensed Speech-Language Pathologists

Mr. James Potter
 Director of Government Relations and Public Policy
 American Speech-Language Hearing Association (ASHA)

We have a follow-up question to our April 8, 2002 meeting/phone conference related to our audit of New York State's (NYS) school health claims to Medicaid for speech services. Our question is this: For compliance with 42 CFR Part 440.110 (c) would NYS's licensed speech-language pathologists be equivalent to and meet the requirements of a speech-language pathologist who possesses a Certificate of Clinical Competence (CCC) from ASHA? If they are not equivalent or meet the requirements, please provide a detailed explanation as to why.

As background to our question, during our April 8, 2002 meeting/conference call with DOJ Attorney Carol Wallack, AUSA Rob Sadowski, and the Office of Audit Services (OAS), we indicated that the Federal Government was performing an audit of NYS's speech school health claims to Medicaid. During the meeting, we explained that within NYS, speech services to school and preschool students are delivered by three types of individuals as follows: (1) a Teacher of the Speech and Hearing Handicapped (TSHH) who possesses a Teaching Certificate from NYS, (2) a NYS licensed speech-language pathologist, or (3) an ASHA certified speech pathologist. Some individuals possess all three, some just the first two, and others are just a TSHH.

Federal regulations governing Medicaid reimbursement, found at 42 CFR Part 440.110 (c), state that speech services must be provided by or under the direction of a speech pathologist or audiologist. The regulations define a speech pathologist or audiologist as an individual who: "(i) Has a certificate of clinical competence from the American Speech and Hearing Association; (ii) Has completed the equivalent requirements and work experience necessary for the certificate; or (iii) Has completed the academic program and is acquiring supervised work experience to qualify for the certificate."

NYS has provided written guidance to its school health providers. The guidance states that in order to claim Medicaid reimbursement, speech services must be provided by or under the direction of an ASHA certified speech pathologist "or" a NYS licensed speech pathologist.

It is our understanding that NYS officials believe that their licensed speech pathologists are equivalent to and meet the requirements of a speech pathologist with a CCC from ASHA. Although we do not agree, OAS felt it necessary to consult with ASHA officials on this question. Please provide us with a written response.

On a final note, DOJ has "stepped aside" with respect to its investigation of NYS's school health claims to Medicaid; however, CMS officials have requested that OAS continue with its audits of this area.

If you have any questions or would like to meet, please let me know. Thank you in advance for your consideration.

John W. Berbach
 Audit Manager
 HHS OIG Office of Audit Services
 (518) 437-9399 Ext. 228

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:

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