



November 3, 2009

TO: Carmen Nazario
Assistant Secretary for Children and Families

FROM: /Daniel R. Levinson/
Inspector General

SUBJECT: Pennsylvania's Title IV-E Claims on Behalf of Children Who Exceeded the Maximum Eligible Age From October 1997 Through September 2002 (A-03-08-00553)

Attached is an advance copy of our final report on Pennsylvania's Title IV-E claims on behalf of children who exceeded the maximum eligible age from October 1997 through September 2002. We will issue this report to the Pennsylvania Department of Public Welfare (the State agency) within 5 business days. The Administration for Children and Families (ACF) requested this review.

In Pennsylvania, the State agency administers the Title IV-E foster care program through the 67 counties. The counties submit quarterly summary invoices for maintenance and training costs to the State agency and claim administrative costs separately. The State agency consolidates the claims from all 67 counties and submits Quarterly Reports of Expenditures and Estimates (Forms ACF-IV-E-1) to ACF to claim Federal funding. This report, one in a series of reports on Pennsylvania's Title IV-E foster care claims, covers 65 of the 67 counties.

Our objective was to determine, for the period October 1997 through September 2002, whether the State agency claimed Title IV-E maintenance and associated administrative costs only for children under the age of 19.

The State agency did not always claim Title IV-E maintenance and associated administrative costs only for children under the age of 19. As required, the State agency did not file any Title IV-E claims for services provided to 63 of 100 sampled children after they reached the age of 19. However, the State agency filed unallowable Title IV-E claims on behalf of the 37 remaining sampled children for services provided after they turned 19. Based on our sample results, we estimated that the State agency improperly claimed at least \$1,641,903 (Federal share) in Title IV-E maintenance and associated administrative costs on behalf of children aged 19 or older in the 65 counties reviewed.

We recommend that the State agency:

- refund to the Federal Government \$1,641,903 (Federal share), including \$1,002,540 in unallowable maintenance costs and \$639,363 in unallowable administrative costs, for the period October 1997 through September 2002;
- work with ACF to identify and resolve any unallowable claims for maintenance costs for children aged 19 or older made after September 2002 and refund the appropriate amount; and
- work with the counties to establish controls to identify and prevent claims for Title IV-E reimbursement for children aged 19 or older.

In its comments on our draft report, the State agency disagreed with our finding and recommendations. The State agency questioned our authority to conduct the audit and stated that our recommendations were without merit and contrary to law. We maintain the validity of our recommendations, as well as our conclusion that the State agency did not always comply with Federal Title IV-E age requirements.

If you have any questions or comments about this report, please do not hesitate to call me, or your staff may contact Lori S. Pilcher, Assistant Inspector General for Grants, Internal Activities, and Information Technology Audits, at (202) 619-1175 or through email at Lori.Pilcher@oig.hhs.gov or Stephen Virbitsky, Regional Inspector General for Audit Services, Region III, at (215) 861-4470 or through email at Stephen.Virbitsky@oig.hhs.gov. Please refer to report number A-03-08-00553.

Attachment



November 9, 2009

Report Number: A-03-08-00553

Ms. Estelle B. Richman
Secretary of Public Welfare
Pennsylvania Department of Public Welfare
P.O. Box 2675
Harrisburg, Pennsylvania 17105

Dear Ms. Richman:

Enclosed is the U.S. Department of Health and Human Services (HHS), Office of Inspector General (OIG), final report entitled "Pennsylvania's Title IV-E Claims on Behalf of Children Who Exceeded the Maximum Eligible Age From October 1997 Through September 2002." We will forward a copy of this report to the HHS action official noted on the following page 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 this 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.

Section 8L of the Inspector General Act, 5 U.S.C. App., requires that OIG post its publicly available reports on the OIG Web site. Accordingly, this report will be posted at <http://oig.hhs.gov>.

If you have any questions or comments about this report, please do not hesitate to call me, or contact Michael Walsh, Audit Manager, at (215) 861-4480 or through email at Michael.Walsh@oig.hhs.gov. Please refer to report number A-03-08-00553 in all correspondence.

Sincerely,

/Stephen Virbitsky/
Regional Inspector General
for Audit Services

Enclosure

Direct Reply to HHS Action Official:

Mr. Ron Gardner
Grants Officer
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150 South Independence Mall West
Philadelphia, Pennsylvania 19106-3499

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**PENNSYLVANIA'S TITLE IV-E
CLAIMS ON BEHALF OF
CHILDREN WHO EXCEEDED THE
MAXIMUM ELIGIBLE AGE FROM
OCTOBER 1997 THROUGH
SEPTEMBER 2002**



Daniel R. Levinson
Inspector General

November 2009
A-03-08-00553

Office of Inspector General

<http://oig.hhs.gov>

The mission of the Office of Inspector General (OIG), as mandated by Public Law 95-452, as amended, is to protect the integrity of the Department of Health and Human Services (HHS) programs, as well as the health and welfare of beneficiaries served by those programs. This statutory mission is carried out through a nationwide network of audits, investigations, and inspections conducted by the following operating components:

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The Office of Audit Services (OAS) provides auditing services for HHS, either by conducting audits with its own audit resources or by overseeing audit work done by others. Audits examine the performance of HHS programs and/or its grantees and contractors in carrying out their respective responsibilities and are intended to provide independent assessments of HHS programs and operations. These assessments help reduce waste, abuse, and mismanagement and promote economy and efficiency throughout HHS.

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The Office of Evaluation and Inspections (OEI) conducts national evaluations to provide HHS, Congress, and the public with timely, useful, and reliable information on significant issues. These evaluations focus on preventing fraud, waste, or abuse and promoting economy, efficiency, and effectiveness of departmental programs. To promote impact, OEI reports also present practical recommendations for improving program operations.

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Notices

THIS REPORT IS AVAILABLE TO THE PUBLIC
at <http://oig.hhs.gov>

Section 8L of the Inspector General Act, 5 U.S.C. App., requires that OIG post its publicly available reports on the OIG Web site.

OFFICE OF AUDIT SERVICES FINDINGS AND OPINIONS

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

EXECUTIVE SUMMARY

BACKGROUND

Title IV-E of the Social Security Act, as amended, authorizes Federal funds for State foster care programs. For children who meet Title IV-E requirements, the Administration for Children and Families (ACF) provides the Federal share of States' costs, including maintenance (room and board) costs and administrative and training costs.

In Pennsylvania, the Department of Public Welfare (the State agency) supervises the Title IV-E foster care program through its Office of Children, Youth, and Families. The State agency administers the program through the 67 counties. The counties submit quarterly summary invoices for maintenance and training costs to the State agency and claim administrative costs separately. The State agency consolidates the claims from all 67 counties and submits Quarterly Reports of Expenditures and Estimates (Forms ACF-IV-E-1) to ACF to claim Federal funding.

This report, one in a series of reports on Pennsylvania's Title IV-E foster care claims, covers 65 of the 67 counties.

OBJECTIVE

Our objective was to determine, for the period October 1997 through September 2002, whether the State agency claimed Title IV-E maintenance and associated administrative costs only for children under the age of 19.

SUMMARY OF FINDING

For the period October 1997 through September 2002, the State agency did not always claim Title IV-E maintenance and associated administrative costs only for children under the age of 19. As required, the State agency did not file any Title IV-E claims for services provided to 63 of 100 sampled children after they reached the age of 19. However, the State agency filed unallowable Title IV-E claims on behalf of the 37 remaining sampled children for services provided after they turned 19.

Based on our sample results, we estimated that the State agency improperly claimed at least \$1,641,903 (Federal share) in Title IV-E maintenance and associated administrative costs on behalf of children aged 19 or older in the 65 counties reviewed.

RECOMMENDATIONS

We recommend that the State agency:

- refund to the Federal Government \$1,641,903 (Federal share), including \$1,002,540 in unallowable maintenance costs and \$639,363 in unallowable administrative costs, for the period October 1997 through September 2002;

- work with ACF to identify and resolve any unallowable claims for maintenance costs for children aged 19 or older made after September 2002 and refund the appropriate amount; and
- work with the counties to establish controls to identify and prevent claims for Title IV-E reimbursement for children aged 19 or older.

STATE AGENCY COMMENTS

In its comments on our draft report (Appendix E), the State agency disagreed with our finding and recommendations. The State agency questioned our authority to conduct the audit and stated that our recommendations were without merit and contrary to law.

OFFICE OF INSPECTOR GENERAL RESPONSE

After reviewing the State agency's comments, we maintain the validity of our recommendations, as well as our conclusion that the State agency did not always comply with Federal Title IV-E age requirements.

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INTRODUCTION

BACKGROUND

Title IV-E Foster Care Program

Title IV-E of the Social Security Act (the Act), as amended, authorizes Federal funds for States to provide foster care for children under an approved State plan. At the Federal level, the Administration for Children and Families (ACF) administers the program.

For children who meet Title IV-E foster care requirements, including age requirements, Federal funds are available to States for maintenance, administrative, and training costs:

- Maintenance costs cover room and board payments to licensed foster parents, group homes, and institutional care facilities. The Federal share of maintenance costs is based on each State's Federal rate for Title XIX (Medicaid) expenditures. During our audit period, the Federal share of Pennsylvania's maintenance costs ranged from 52.85 percent to 54.21 percent.
- Administrative costs cover staff activities such as case management and supervision of children placed in foster care and children considered to be Title IV-E candidates, preparation for and participation in court hearings, placement of children, recruitment and licensing for foster homes and institutions, and rate setting. Also reimbursable under this category is a proportionate share of overhead costs. The Federal share of administrative costs allocable to the Title IV-E program is 50 percent.
- Training costs cover the training of State or local staff to perform administrative activities and the training of current or prospective foster care parents, as well as personnel of childcare institutions. Certain State training costs qualify for an enhanced 75-percent Federal funding rate.

Pennsylvania's Title IV-E Program

In Pennsylvania, the Department of Public Welfare (the State agency) supervises the Title IV-E foster care program through its Office of Children, Youth, and Families. The State agency administers the program through the 67 counties. The counties determine Title IV-E eligibility and contract with foster parents, group homes, and institutional care facilities to provide foster care services.

Contractors submit invoices to the counties for the care provided. The counties pay the invoices and then submit quarterly summary invoices for maintenance and training costs to the State agency. The counties claim administrative costs separately. The State agency consolidates the claims from all 67 counties and submits Quarterly Reports of Expenditures and Estimates (Forms ACF-IV-E-1) to ACF to claim Federal funding.

Adoption and Foster Care Analysis and Reporting System

Federal regulations (45 CFR § 1355.40(a)) require each State agency to establish an Adoption and Foster Care Analysis and Reporting System (AFCARS). Appendix A of these regulations describes the foster care data elements collected in the AFCARS. State agencies use the AFCARS to collect case-level information about children in foster care and children who are adopted under the auspices of the State agency. State agencies are required to submit AFCARS data to ACF semiannually for the periods October 1 through March 31 and April 1 through September 30.

Audits of the State Agency's Title IV-E Claims

We are performing a series of audits of the State agency's Title IV-E foster care claims. Appendix A lists the four previously issued reports, which focused on Philadelphia County. This report, the fifth in the series, focuses on foster care claims made on behalf of children aged 19 or older in 65 of the State's 67 counties. A sixth report will focus on foster care claims submitted for Allegheny County.

OBJECTIVE, SCOPE, AND METHODOLOGY

Objective

Our objective was to determine, for the period October 1997 through September 2002, whether the State agency claimed Title IV-E maintenance and associated administrative costs only for children under the age of 19.

Scope

Our review covered 646 children in 65 counties who reached the age of 19 before or during our audit period but continued to appear on the State agency's AFCARS submissions. During our audit period, the State agency submitted 10 semiannual AFCARS reports.

Some of the services that we identified as unallowable for reimbursement under Title IV-E may have been allowable for reimbursement through other Federal programs. However, determining the allowability of costs for other Federal programs was not within the scope of this audit.

We reviewed only those internal controls considered necessary to achieve our objective.

We performed our fieldwork at the State agency in Harrisburg, Pennsylvania, from August to December 2008.

Methodology

To accomplish our objective, we:

- reviewed Federal criteria related to Title IV-E foster care claims;

- interviewed State agency personnel regarding the State agency's Title IV-E foster care claims;
- reviewed the State agency's accounting system and reconciled vouchers to the Quarterly Reports of Expenditures and Estimates to identify all maintenance costs claimed for Federal reimbursement during the audit period;
- reviewed the State agency's 10 semiannual AFCARS submissions to determine each child's date of birth, whether the child participated in the Title IV-E foster care program, and the county claiming the child;
- identified, for the 65 counties reviewed, a sampling frame of 646 children aged 19 or older listed in the 10 AFCARS submissions;
- selected a random sample of 100 children from the sampling frame (Appendix B);
- reviewed Client Information System data,¹ vital records, and county billing invoices provided by the State agency documenting the age and the Title IV-E maintenance costs claimed for each of the 100 sampled children; and
- estimated the total dollar value of all Title IV-E maintenance claims for services provided to children aged 19 or older (Appendix C) and the associated administrative costs.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our finding and conclusions based on our audit objective.

FINDING AND RECOMMENDATIONS

For the period October 1997 through September 2002, the State agency did not always claim Title IV-E maintenance and associated administrative costs only for children under the age of 19. As required, the State agency did not file any Title IV-E claims for services provided to 63 of the 100 sampled children after they reached the age of 19. However, the State agency filed unallowable Title IV-E claims on behalf of the 37 remaining sampled children for services provided after they turned 19.

Based on our sample results, we estimated that the State agency improperly claimed at least \$1,641,903 (Federal share) in Title IV-E maintenance and associated administrative costs on behalf of children aged 19 or older in the 65 counties reviewed.

¹The Client Information System is a statewide database of individuals who participate in social service programs.

AGE REQUIREMENTS

Section 472(a) of the Act states that children for whom States claim Title IV-E funding must meet the eligibility requirements for Aid to Families with Dependent Children (AFDC) as established in section 406 or section 407 (as in effect on July 16, 1996).² Section 406(a)(2), as in effect on July 16, 1996, stated that the children must be “(A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student in a secondary school (or in the equivalent level of vocational or technical training), if, before he attains age nineteen, he may reasonably be expected to complete the program of such secondary school (or such training).”³

UNALLOWABLE COSTS FOR CHILDREN WHO EXCEEDED THE MAXIMUM AGE

The documentation that we reviewed showed that the State agency claimed Title IV-E maintenance costs totaling \$227,525 (Federal share) for 37 sampled children who were at least 19 years of age when the services were provided. (See Appendix D for details on the 37 children.) These claims did not comply with Federal age requirements. For example, one child reached the age of 19 on September 20, 1999. The State agency improperly claimed Title IV-E costs on behalf of this child until June 28, 2001, for a total Federal share of \$20,739 in unallowable costs.⁴

Based on our sample results, we estimated that the State agency improperly claimed \$1,002,540 (Federal share) in Title IV-E maintenance costs for the 65 counties. Including associated administrative costs of \$639,363 (Federal share), we estimated that the State agency improperly claimed at least \$1,641,903 (Federal share) in Title IV-E maintenance and associated administrative costs.⁵ The administrative costs also were unallowable. The State agency claimed costs for children aged 19 or older because it did not have adequate controls to identify claims submitted by the counties for children who did not meet Title IV-E age requirements.

²The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 repealed AFDC and established in its place the Temporary Assistance for Needy Families block grant. However, Title IV-E foster care requirements look back to the 1996 AFDC criteria for eligibility.

³ACF’s “Child Welfare Policy Manual,” section 8.3A.2, Question and Answer No. 1, also addresses the issue of foster care eligibility for children over the age of 18.

⁴The State agency ceased claiming Title IV-E reimbursement for all of the children in our sample no later than the reporting quarter of their 21st birthdays.

⁵We calculated unallowable administrative costs by dividing the State agency’s total Title IV-E claims for administrative costs (\$593,233,356 (Federal share)) by its total Title IV-E claims for maintenance costs (\$857,954,391 (Federal share)) plus training costs (\$72,252,983 (Federal share)). We then applied the resultant percentage to the estimated \$1,002,540 (Federal share) in unallowable maintenance costs.

RECOMMENDATIONS

We recommend that the State agency:

- refund to the Federal Government \$1,641,903 (Federal share), including \$1,002,540 in unallowable maintenance costs and \$639,363 in unallowable administrative costs, for the period October 1997 through September 2002;
- work with ACF to identify and resolve any unallowable claims for maintenance costs for children aged 19 or older made after September 2002 and refund the appropriate amount; and
- work with the counties to establish controls to identify and prevent claims for Title IV-E reimbursement for children aged 19 or older.

STATE AGENCY COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE

In its July 15, 2009, comments on our draft report, the State agency disagreed with our finding and recommendations. The State agency questioned our authority to conduct the audit and stated that our recommendations were without merit and contrary to law. The State agency also said that we had singled out Pennsylvania for an audit of unprecedented size and scope, unlawfully assumed ACF's program operating responsibilities, focused on practices from many years ago rather than on current practices, and lacked a foundation for our questioned costs.

We have summarized the State agency's comments, along with our response, below, and we have included those comments as Appendix E. We have excluded the exhibits accompanying the State agency's comments because of their volume and because they relate to prior reports.

Scope of Audit

State Agency Comments

The State agency said that Pennsylvania was being singled out for an unprecedented audit. According to the State agency, "Pennsylvania stands alone among the fifty States in being subjected to such a far-reaching, overly-detailed, and multi-year review of its Title IV-E claims."

Office of Inspector General Response

We did not single out Pennsylvania for this audit. We often conduct extensive audits of programs. For example, recent multiyear audits of comparable scope included audits of Medicaid school-based services and Medicaid costs under a waiver agreement in California. We also conduct audits of relatively comparable scope in States with smaller total claim amounts.

Program Operating Responsibilities

State Agency Comments

The State agency said that ACF had unlawfully transferred, and the Office of Inspector General (OIG) had wrongfully assumed, program operating responsibilities in violation of the Inspector General (IG) Act of 1978, as amended (5 U.S.C. App. § 9(a)(2)). The State agency also said that we lacked the requisite independence and objectiveness in deciding to initiate and conduct this audit.

Office of Inspector General Response

There is no basis for the State agency's argument that we unlawfully assumed program operating responsibilities. The IG Act, as interpreted by the applicable case law, may in some cases restrict OIG from conducting "regulatory" audits that are the responsibility of the program agency. However, our audit was not regulatory in nature. Rather, we conducted a compliance audit designed to identify the improper expenditure of Federal dollars for the Pennsylvania foster care program. None of the court cases on which the State agency based its objection questioned OIG's authority and responsibility to conduct such audits. In the more recent decision of University of Medicine and Dentistry of New Jersey v. Corrigan, 347 F.3d 57, 67 (3rd Cir. 2003), involving the expenditure of Medicare funds, the U.S. Court of Appeals for the Third Circuit held that "routine compliance audits" that are designed to "enforc[e] the rules" are a proper OIG function even if the ability to conduct such audits is shared with that of the program agency. Moreover, the U.S. Court of Appeals for the Fifth Circuit stated in its opinion that, under section 9(a)(2) of the IG Act, "for a transfer of function to occur, the agency would have to relinquish its own performance of that function" (Winters Ranch Partnership v. Viadero, 123 F.3d 327, 334 (5th Cir. 1997); see also United States v. Chevron, 186 F.3d 644, 648 (5th Cir. 1999)). ACF has continued to perform its own periodic reviews of eligibility in State programs, as required by ACF regulations, and thus at no time did it relinquish its program operating function.

We also do not agree that we lacked the requisite independence and objectivity for this audit. ACF did request this audit; however, OIG regularly responds to requests from Members of Congress, States, ACF, and other program agencies, as well as the general public. There is no basis to conclude that the source of a request undermines the independence with which an audit or other project is performed. The State agency cited U.S. v. Montgomery County Crisis Center, 676 F. Supp. 98, 99 (D. Md. 1987) to support its position. In that case, however, the U.S. District Court refused to enforce a subpoena issued by the Department of Defense OIG because it was issued at the behest of another agency and because it related to a security matter that "was outside the Inspector General's area of regular responsibility." The expenditure of Federal funds for foster care is neither a security issue nor outside the IG's area of regular responsibility.

Audit Focus Period

State Agency Comments

The State agency said that the audit improperly focused on practices from many years ago rather than on current practices affecting the quality of childcare services and that Congress was concerned about this type of review when it enacted section 1123A of the Act (42 U.S.C. § 1320a-2a). The State agency also said that we improperly conducted an audit of claims submitted outside the Federal record retention period. Citing 45 CFR § 74.53,⁶ the State agency said that a State generally is not required to retain financial records or supporting documents for more than 3 years and therefore should not be subject to an audit of claims beyond the 3-year record retention period.

Office of Inspector General Response

This audit focused on whether the State agency claimed Federal reimbursement only for children who had not exceeded the maximum allowable age established by Federal law. If the State agency claimed an erroneous payment for a child who was ineligible for Title IV-E maintenance payments, the overpaid Federal funds must be refunded.

With respect to congressional concern, section 1123A of the Act provides authority to withhold funds if a State's Foster Care and Adoption Program substantially fails to conform to the State plan. This provision requires the Secretary to implement a system of program reviews through regulations that specify, among other things, when the reviews will take place. However, the Departmental Appeals Board (DAB) has ruled that the provision "does not apply to reviews of past maintenance payments for which a state had claimed FFP [Federal financial participation] . . ." (New Jersey Department of Human Services, DAB No. 1797, page 3 (2001)).

The record retention period cited by the State agency does not preclude our review of records that the State agency provides, or has in its possession, during the audit. Federal regulations (45 CFR § 74.53(e)) provide that "[t]he rights of access . . . are not limited to the required retention period, but shall last as long as records are retained." The requirement for a grantee to keep records for a specified period protects the grantee in situations in which records are destroyed after the expiration of the retention period pursuant to a statewide records management plan. However, if the grantee has maintained records beyond the retention period, 45 CFR § 74.53(e) is clear that the Department of Health and Human Services, including OIG, has access to those records. Further, the DAB has ruled that agencies may disallow costs based on grantee records retained beyond the 3-year retention period (Community Health and Counseling Services, DAB No. 557, page 4 (1984)). Our audit identified unallowable costs based on our review of documentation and case files provided by the State agency.

⁶Effective September 2003, the applicable regulation is 45 CFR § 92.42, which provides a substantially similar 3-year retention period. However, our audit period fell entirely before September 2003.

Maintenance Costs

State Agency Comments

The State agency questioned our calculations of the unallowable Federal maintenance costs claimed for two sampled children (sample numbers 11 and 65).

Office of Inspector General Response

After reviewing the State agency's comments, we maintain that our calculations were accurate. For sample number 11, the State agency indicated that the invoices totaled only \$7,076, not the \$10,277 that we calculated. The State agency apparently was unaware of an invoice for \$6,773, of which \$6,472 was claimed for the period after the child turned 19. For sample number 65, the State agency indicated that the invoices submitted after the child turned 19 totaled \$2,997, or \$419 more than we questioned. The difference was attributable to the fact that we questioned only the \$2,578 claimed for the period beginning on the child's 19th birthday.

Associated Administrative Costs

State Agency Comments

The State agency said that we had improperly recommended the disallowance of associated administrative costs. The State agency said that because Pennsylvania identified and allocated administrative costs through a random-moment timestudy, it was incorrect to assume that a disallowance of a maintenance claim would necessarily result in a proportionate decrease in associated administrative costs. The State agency also said that our calculation of associated administrative costs was unsound because it used a statewide ratio based on all 67 counties, whereas the audit excluded Philadelphia and Allegheny counties, the two counties with the largest populations of Title IV-E-eligible children. The State agency added that including costs from these two counties in the calculation might skew the ratio applied to the 65 smaller counties.

Office of Inspector General Response

When maintenance costs are not eligible for Title IV-E funding, the administrative costs associated with the ineligible maintenance costs are likewise ineligible.

OMB Circular A-87 allows States to identify administrative costs related to a specific cost objective or to allocate the costs according to an approved allocation methodology, such as a random-moment timestudy or another quantifiable measure. The State agency allocated those costs based on an approved allocation methodology. Similarly, we determined the unallowable administrative costs associated with the ineligible maintenance claims by applying a proportionate share of the administrative costs to the total costs, including both maintenance and training costs. We maintain that our approach was reasonable. The State agency did not offer an alternative method of calculating administrative costs on either a statewide or county-specific basis.

APPENDIXES

PREVIOUSLY ISSUED REPORTS RELATED TO THIS AUDIT

“Costs Claimed Under Title IV-E Foster Care Program for Children in Castille Contracted Detention Facilities From October 1, 1997, to September 30, 2002” (A-03-04-00586, issued October 3, 2005).

“Claims Paid Under the Title IV-E Foster Care Program for Children in Castille Contracted Detention Facilities From October 1, 1997, to September 30, 2002” (A-03-05-00550, issued September 20, 2007).

“Philadelphia County’s Title IV-E Claims for Children for Whom the Contractual Per Diem Rate for Foster Care Services Exceeded \$300 From October 1997 Through September 2002” (A-03-06-00564, issued December 13, 2007).

“Philadelphia County’s Title IV-E Claims Based on Contractual Per Diem Rates of \$300 or Less for Foster Care Services From October 1997 Through September 2002” (A-03-07-00560, issued May 22, 2008).

SAMPLING METHODOLOGY

SAMPLING FRAME

Our sampling frame consisted of 646 children aged 19 or older who were listed in 10 Adoption and Foster Care Analysis and Reporting System (AFCARS) submissions made by the Pennsylvania Department of Public Welfare (the State agency). The AFCARS submissions covered the period October 1997 through September 2002.

SAMPLE UNIT

The sample unit was a child aged 19 or older who appeared on any of the State agency's AFCARS submissions during the audit period.

SAMPLE DESIGN

We used a simple random sample.

SAMPLE SIZE

We selected for review a sample of 100 children.

SOURCE OF RANDOM NUMBERS

We used an approved Office of Inspector General, Office of Audit Services, statistical software package to generate the random numbers for selecting the sampled children.

METHOD OF SELECTING SAMPLE ITEMS

We identified from the 10 AFCARS submissions the children aged 19 or older. We excluded children from Philadelphia and Allegheny Counties. We reviewed the record of each child in each of the 10 AFCARS submissions to identify children who appeared on more than one submission and developed a "unique child list." We then sequentially numbered each record from the unique child list. After generating 100 random numbers between 1 and 646, we selected the corresponding records from our sampling frame.

ESTIMATION METHODOLOGY

We used an approved Office of Inspector General, Office of Audit Services, statistical software package to estimate the total Federal dollar value of Title IV-E maintenance claims for services provided to children aged 19 or older.

**SAMPLE RESULTS AND ESTIMATES
FOR MAINTENANCE COSTS**

Sample Results

Number of Children in Sampling Frame	Value of Services Claimed for Sampled Children (Federal Share)	Sample Size	Number of Children With Unallowable Services	Value of Unallowable Services (Federal Share)
646	\$361,926	100	37	\$227,525

Estimated Unallowable Costs

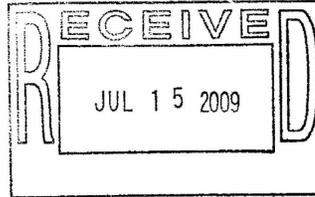
(Limits Calculated for a 90-Percent Confidence Interval)

Point estimate	\$1,469,814
Lower limit	1,002,540
Upper limit	1,937,089

TITLE IV-E COSTS CLAIMED FOR 37 SAMPLED CHILDREN AGED 19 OR OLDER

Sample Number	Date of Birth	Date of 19 th Birthday	Date of Discharge From Foster Care	Federal Share of Maintenance Costs at the Age of 19 or Older
1	6/23/1980	6/23/1999	6/15/2001	\$12,189
7	2/12/1979	2/12/1998	6/5/1998	4,193
10	10/17/1981	10/17/2000	1/29/2002	3,655
11	4/4/1980	4/4/1999	NA	10,277
16	8/18/1977	8/18/1996	8/18/1998	25,297
17	6/29/1981	6/29/2000	11/8/2001	4,519
19	4/20/1980	4/20/1999	6/18/1999	71
20	2/17/1983	2/17/2002	NA	4,074
25	9/20/1980	9/20/1999	6/28/2001	20,739
26	3/19/1983	3/19/2002	6/7/2002	2,740
30	8/22/1978	8/22/1997	8/22/1999	11,525
31	8/5/1977	8/5/1996	3/6/1998	1,440
34	2/5/1983	2/5/2002	7/9/2002	4,244
35	4/23/1983	4/23/2002	6/12/2002	1,958
38	6/8/1981	6/8/2000	NA	11,923
39	6/3/1982	6/3/2001	1/29/2002	1,826
40	2/20/1981	2/20/2000	2/23/2001	4,379
41	9/8/1979	9/8/1998	7/23/1999	9,829
48	9/18/1978	9/18/1997	1/1/1999	19,353
50	6/16/1981	6/16/2000	NA	998
54	4/9/1978	4/9/1997	12/22/1997	2,357
55	5/5/1983	5/5/2002	6/21/2002	1,996
56	6/16/1979	6/16/1998	9/1/1998	986
59	7/6/1983	7/6/2002	NA	2,426
60	5/5/1983	5/5/2002	NA	3,077
65	7/17/1979	7/17/1998	10/15/1998	2,578
68	7/25/1983	7/25/2002	NA	1,516
73	8/9/1978	8/9/1997	8/5/1998	14,690
74	1/23/1979	1/23/1998	2/9/1999	2,936
76	11/24/1981	11/24/2000	6/8/2001	1,643
77	10/12/1978	10/12/1997	4/6/1998	6,714
78	8/21/1981	8/21/2000	11/2/2000	5,287
79	8/24/1978	8/24/1997	6/10/1998	8,085
80	5/30/1978	5/30/1997	5/28/1998	11,258
87	11/10/1981	11/10/2000	11/28/2000	1,194
92	11/4/1980	11/4/1999	11/4/2001	1,456
97	11/27/1981	11/27/2000	3/13/2002	4,097
Total				\$227,525

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July 15, 2009

HAND DELIVERY

Stephen Virbitsky, Regional Inspector General for Audit Services
United States Department of Health and Human Services
Office of Inspector General
Office of Audit Services
150 South Independence Mall West, Suite 316
Philadelphia, PA 19106-3499

Re: Report Number: A-03-08-00553

Dear Mr. Virbitsky:

I am writing on behalf of the Commonwealth of Pennsylvania, Department of Public Welfare, in response to the May 15, 2009 draft report of the Office of Inspector General ("OIG") of the Department of Health and Human Services ("HHS"), entitled "Pennsylvania's Title IV-E Claims on Behalf of Children Who Exceeded the Maximum Eligible Age From October 1997 to September 2002" (the "Draft Report").

In the Draft Report, OIG recommends that Pennsylvania "refund" to the federal government \$1,002,540 in allegedly improper foster care maintenance placement costs for children aged 19 or older, plus an additional \$639,363 in what OIG characterizes as "associated administrative costs," for a total "refund" of \$1,641,903. (Draft Report at 5.) OIG further recommends that Pennsylvania "work with" the Administration for Children and Families ("ACF") "to identify and resolve any unallowable claims for maintenance costs for children age 19 or older made after September 2002" and "work with the counties to establish controls to identify and prevent claims for Title IV-E reimbursement for children age 19 or older." (*Id.*)

All of OIG's recommendations are without merit and contrary to law. As explained in my letters of April 16, 2007, January 31, 2008, and October 20, 2008, responding to previous OIG draft and final reports concerning other phases of this multi-

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phase audit of all of Pennsylvania's Title IV-E claims (the "Audit"),¹ and as further explained below, Pennsylvania opposes the entire OIG Audit, including any recommendations stemming from it, because:

- OIG has singled out Pennsylvania by conducting this Audit of unprecedented size and scope without an adequate basis and in contravention of federal law;
- By conducting the Audit, OIG is wrongfully assuming ACF's program operating responsibilities in violation of the Inspector General Act of 1978, 5 U.S.C. App. 3;
- The Audit improperly focuses on past practices rather than Pennsylvania's current child welfare system; and
- OIG has not provided an appropriate factual, mathematical or legal basis for its recommendations that Pennsylvania return millions of dollars in maintenance costs and thousands of dollars in "associated administrative costs" to the federal government.

Based on all of these critical problems with the Audit, Pennsylvania requests that OIG withdraw the Draft Report, including the recommendations in it, and terminate all aspects of the Audit.

A. OIG Has Unlawfully And Without Any Proper Basis Singled Out Pennsylvania In This Unprecedented Audit

By letter dated November 19, 2003, OIG first announced its intention to conduct an audit "of the Commonwealth of Pennsylvania's claims for payments made under the Title IV-E Foster Care Program for Federal Fiscal Years 1998 through 2002." (See 11/19/03 Letter from Stephen Virbitsky to Michael L. Stauffer, attached as Exhibit D.) In accordance with that notice, OIG is currently auditing the entirety of Pennsylvania's Title IV-E claims for a full five-year period, putting at issue more than \$1.5 billion in public funds that was spent years ago to provide critical services to Pennsylvania's needy children.

The Audit is both draconian and unprecedented. Pennsylvania stands alone among the fifty states in being subjected to such a far-reaching, overly-detailed, multi-year review of its Title IV-E claims. OIG's published work plans and the documents it provided in

¹ Because Pennsylvania opposes OIG's recommendations in the Draft Report for many of the same reasons it has opposed OIG's recommendations in its previous draft and final reports, this letter repeats many of the points I made in my letters of April 16, 2007, January 31, 2008 and October 20, 2008. Those letters are enclosed with and incorporated into this letter as Exhibits A, B and C, respectively.

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response to Pennsylvania's prior FOIA requests do not identify any national audit encompassing the type of broad review it is performing in Pennsylvania. In its responses to Pennsylvania's comments on this point in previous phases of this Audit, OIG also has not been able to identify any other state being subjected to this type of extensive multi-phase audit concerning regularly-filed foster care maintenance claims. (See OIG's September 20, 2007 Report No. A-03-05-00550, entitled "Claims Paid Under the Title IV-E Foster Care Program for Children in *Castille* Contracted Detention Facilities from October 1, 1997 to September 30, 2002" ("September 20, 2007 Final Report"), at 12; OIG's May 22, 2008 Report No. A-03-07-00560, entitled "Philadelphia County's Title IV-E Claims Based on Contractual *Per Diem* Rates of \$300 or Less for Foster Care Services from October 1997 Through September 2002" ("May 22, 2008 Final Report"), at 12.) At the same time, neither OIG nor ACF has provided any evidence suggesting that Pennsylvania's Title IV-E program had a significantly greater error rate than that of any other state program.

Although OIG has previously denied that it has singled out Pennsylvania, claiming that Pennsylvania is simply the first state selected as part of "a multistate review of juvenile justice placement costs claimed under Title IV-E" (see September 20, 2007 Final Report at 12.), this Audit is indisputably *not* limited to the "juvenile justice placement costs" referred to by OIG. Indeed, OIG has expressly acknowledged that even though it originally intended to audit only juvenile justice placement costs, ACF requested that it expand the scope of the audit to cover the entirety of Pennsylvania's Title IV-E claims over a multi-year period. (See 4/5/2000 Letter from David M. Long to John H. Bungo, attached as Exhibit E.) Because OIG granted that request, the purported existence of a "multistate review of juvenile justice placement costs" in no way explains why Pennsylvania alone is being subjected an all-encompassing audit of the entirety of its Title IV-E claims over a five-year period. In addition, OIG has failed to identify even one other state that is facing even the more limited "review of juvenile justice placement costs" – let alone the type of all-encompassing audit of all Title IV-E claims over a multi-year period that Pennsylvania faces here.

OIG also has stated that it initiated the Audit because of a general concern over Pennsylvania's increased amount of claims and because of "an ACF probe sample of 50 Title IV-E statewide foster care cases conducted in 1998, of which 44 cases had multiple errors." (See 3/9/04 Letter from Stephen Virbitsky to Michael L. Stauffer, attached as Exhibit F.) However, OIG's purported reliance upon a small and statistically unreliable sample of unique claims submitted in 1998 as the basis for launching a comprehensive audit of *all* Title IV-E claims Pennsylvania submitted from 1998 until 2002 lacks foundation and makes no sense.

The 1998 probe sample referred to by OIG as the basis for the Audit did not involve Pennsylvania's general Title IV-E population but, as expressly acknowledged by ACF Regional Administrator David J. Lett, focused only on a retroactive claim for a narrow group of "children who were determined ineligible for [Title] IV-A Emergency Assistance" by virtue

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of the juvenile justice restrictions belatedly imposed on that program and who were "redetermined eligible by the Department of Public Welfare under the Foster Care and Adoption Assistance Program . . . [under] Title IV-E. . . ." (See 2/10/99 Letter from David J. Lett to Feather O. Houston, attached as Exhibit G.) That these highly unique claims – involving a limited group of children who were reclassified after a change in federal law – were found to have certain errors is neither surprising nor a reason to question the operation of Pennsylvania's overall Title IV-E program. And it provides no legitimate justification for this highly burdensome and unprecedented Audit that is well outside the parameters of the normal Title IV-E review process.

In light of the above circumstances, it is plain that, notwithstanding OIG's protestations to the contrary, OIG has singled out Pennsylvania for selective, arbitrary and unlawful treatment. See, e.g., *Burlington Northern and Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) ("Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld."); *Petroleum Communications, Inc. v. F.C.C.*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) ("We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently."). The circumstances also suggest that ACF may have asked OIG to perform the Audit for retaliatory or other equally improper reasons wholly unrelated to the administration of Pennsylvania's Title IV-E program. In any event, it is clear that no basis exists for OIG to arbitrarily subject Pennsylvania to this all-encompassing multi-phase Audit. For this reason alone, the Draft Report should be withdrawn.

B. ACF Has Unlawfully Transferred, And OIG Has Unlawfully Assumed, ACF's Program Operating Responsibilities

The Inspector General Act (the "Act") established the Office of Inspector General in order to facilitate "objective inquiries into bureaucratic waste . . . and mismanagement." *NASA v. Fed. Labor Relations Auth.*, 527 U.S. 229, 240 (1999) (emphasis added). By creating OIG, Congress also intended "to consolidate existing auditing and investigative resources to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of [various executive] departments and agencies." S. Rep. No. 1071, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S.C.C.A.N. 2676, 2676. However, while Congress gave OIG broad audit and investigative authority to carry out its oversight function, see 5 U.S.C.App. 3 § 6(a), the Act explicitly required OIG to remain "independent and objective" from the federal agencies it oversees. See *id.* at 3 § 3(a).

To ensure that OIG retains its critical independence, the Act expressly prohibits OIG from assuming "program operating responsibilities." 5 U.S.C. App. 3 § 9(a)(2). Program operating responsibilities are "those activities which are central to an agency's statutory mission [as distinguished from] those which are purely internal or administrative." *United States v. Hunton & Williams*, 952 F. Supp. 843, 850 (D.D.C. 1997).

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Federal courts have regularly recognized the importance of that distinction. They have consistently held that OIG is not authorized to conduct “regulatory compliance audits” that do not further the oversight purposes set forth in the Act but, instead, are of the type within the responsibilities of the federal agency itself. See, e.g., *Truckers United for Safety v. Mead*, 251 F.3d 183 (D.C. Cir. 2001); *Burlington Northern R.R. Co. v. Office of Inspector General, Railroad Retirement Bd.*, 983 F.2d 631 (5th Cir. 1993). For instance, in *Truckers United for Safety*, the United States Court of Appeals for the D.C. Circuit held that OIG had acted outside the scope of its authority in conducting investigations of motor carriers’ compliance with federal safety regulations. 251 F.3d at 189. In so ruling, the Court concluded that “Congress did not intend to grant [OIG] authority to conduct investigations constituting an integral part of DOT programs” and that [OIG] “is not authorized to conduct investigations as part of enforcing motor carrier safety regulations – a role which is central to the basic operations of the agency.” *Id.*

Similarly, in *Burlington Northern*, the United States Court of Appeals for the Fifth Circuit concluded that OIG lacked statutory authority to conduct “regulatory compliance investigations or audits,” which it defined as “those investigations or audits which are most appropriately viewed as being within the authority of the agency itself.” 983 F.2d at 642.

[A]s a general rule, when a regulatory statute makes a federal agency responsible for ensuring compliance with its provisions, the Inspector General of that agency will lack the authority to make investigations or conduct audits which are designed to carry out that function directly.

Id. The Court reasoned that if an Inspector General were to assume an agency’s regulatory compliance function, “his independence and objectiveness – qualities that Congress has expressly recognized are essential to the function of combating fraud, abuse, waste, and mismanagement – would . . . be compromised.” *Id.*

OIG’s Audit of all of Pennsylvania’s Title IV-E claims over a five-year period falls squarely within the bounds of a prohibited regulatory compliance audit. OIG is not auditing Pennsylvania’s claims “for the purpose of evaluating [ACF’s] programs in terms of their management, efficiency, rate of error, and vulnerability to fraud, abuses, and other problems,” *Winters Ranch Partnership v. Viadero*, 123 F.3d 327, 333 (5th Cir. 1997); indeed, OIG is not focused at all on ACF’s performance or the ongoing operation of the federal Title IV-E program. Instead, OIG’s Draft Report focuses solely on whether Pennsylvania strictly complied with all of the statutory, regulatory, and ACF-imposed requirements in its submission and documentation of claims under Title IV-E of the Social Security Act.

The issue of Pennsylvania’s compliance with the plethora of federal statutory and regulatory claiming requirements is not a proper focus of OIG’s oversight

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responsibilities; the Social Security Act and federal regulations place that program responsibility squarely on the shoulders of HHS. *See, e.g.,* 42 U.S.C. § 674(b). Pursuant to those authorities, ACF is responsible for reviewing all Title IV-E claim submissions and deferring or disallowing any claims of questionable allowability. *See id.*; 45 C.F.R. § 201.15(c). ACF also is responsible for conducting, when necessary, additional reviews of a state's Title IV-E programs and submissions, including an examination of the "case records of individual recipients" to ensure that "State agencies are adhering to Federal requirements. . . ." *Id.* § 201.10(a); *see also id.* §§ 1355.32, 1355.33. Thus, this Audit falls within the statutory and regulatory responsibilities of ACF, and cannot be conducted by OIG, just as the courts determined with respect to the OIG audits in the *Truckers United for Safety* and *Burlington Northern* decisions.

Separately, OIG also lacked the requisite "independence and objectiveness" in deciding to initiate and conduct this oppressive audit of Pennsylvania's Title IV-E claims. By its own admission, OIG did not independently decide to initiate the audit of Pennsylvania's Title IV-E claims; it acceded to a request from ACF's Regional Office staff that it do so. OIG has stated that it decided to audit Pennsylvania because ACF – *not* OIG – was purportedly concerned that errors ACF identified in the 1998 probe sample of unique reclassified children might also have somehow occurred in later periods in the general population of Title IV-E children. (*See* 3/9/04 Letter, Ex. F.) Initiating an audit in response to an agency request hardly qualifies as "independent and objective" oversight. *See, e.g., U.S. v. Montgomery County Crisis Center*, 676 F. Supp. 98, 99 (D. Md. 1987) (finding OIG's issuance of subpoena to be improper because, among other reasons, it "did not initiate the investigation on its own but . . . at the behest of the [Naval Investigation Service] on a matter well outside [OIG's] areas of regular responsibility").

In its May 22, 2008 Final Report, OIG acknowledged that it may be legally prohibited from conducting "regulatory" audits that fall within the responsibilities of the program agency, but claimed that this Audit is not such an audit. (May 22, 2008 Final Report at 12.) Rather, OIG characterized this Audit as simply a "'compliance' audit designed to identify the improper expenditure of Federal dollars for the Pennsylvania foster care program." (*Id.*) OIG additionally contended that it has not unlawfully assumed ACF's program operating responsibilities because ACF has purportedly not relinquished its own responsibilities for that function. (*Id.* at 13.) OIG is wrong on both counts.

First, OIG's use of semantics to justify this Audit as a "compliance" audit, as opposed to a "regulatory compliance audit," should not be permitted. As already explained, this Audit involves an examination of whether Pennsylvania (*not* ACF) strictly complied with all of the statutory, regulatory, and ACF-imposed requirements on the submission and documentation of its claims during the Audit period. Such an audit also is one of the statutory and regulatory "program operating responsibilities" of ACF – *not* OIG. *See* 45 C.F.R. §§ 201.10, 201.15, 1355.32, 1355.33. OIG's Audit therefore is an unlawful

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"regulatory compliance audit" of Pennsylvania – not simply a routine "compliance" audit as
OIG has attempted to characterize it. See *Burlington Northern*, 983 F.2d at 642.

ACF also has plainly relinquished to OIG its operating responsibilities in
conducting this Audit of Pennsylvania. Between the 1998 submission of the probe sample
and OIG's 2003 initiation of the Audit, Pennsylvania regularly submitted quarterly claim
reports to ACF for all Title IV-E placement maintenance and administrative claims. ACF paid
such claims. If ACF had concern about any aspect of Pennsylvania's Title IV-E claims at that
time – either based on the probe sample results, the amount of the claims, or any other
legitimate grounds – it could have requested additional information, conducted a financial
review, or disallowed such claims. See, e.g., 42 U.S.C. § 674(b)(4); 45 C.F.R. § 201.10.
Instead, after presumably reviewing all claims as they were submitted during this period,
ACF paid Pennsylvania's claims in full. ACF, however, later decided that these claims
should be reviewed yet again and directed OIG to take on that task even though it was
something it was required to do. See 45 C.F.R. §§ 201.10, 201.15, 1355.32, 1355.33.
Therefore, OIG is undeniably performing program responsibilities of ACF in conducting this
Audit of claims that ACF has already reviewed and that the agency is responsible for re-
reviewing as well when necessary; it makes no difference that ACF may have retained its
responsibilities to review other unrelated claims.

OIG has acted as an arm of ACF throughout this process. OIG initiated the
broad audit not of its own accord but at ACF's request; it has undertaken ACF's statutory
responsibility for ensuring Pennsylvania's compliance with regulatory requirements by
conducting a massive review to determine whether Pennsylvania complied with all of the
statutory and regulatory requirements for claiming federal participation under the Social
Security Act; and it engaged in a "regulatory compliance audit" that is not an appropriate
component of OIG's oversight responsibility but, instead, is a central responsibility of ACF
itself. Under such circumstances, it is clear that ACF has improperly transferred, and OIG
has wrongfully assumed, program operating responsibilities in violation of Section 9(a)(2)
of the Inspector General Act. For that reason alone, OIG lacks statutory authority to conduct
this Audit and the Draft Report should be withdrawn.

C. **The Audit Improperly Focuses On Practices From Many Years Ago Rather
Than On Current Practices**

The Audit is also improper in that it relates to claims submitted and paid
anywhere between six and eleven years ago. Indeed, both Congress and OIG itself have
recognized that such an outdated audit is unhelpful and should not be conducted.

The Title IV-E review process has been a concern of the federal government for
many years. In 1998, Congress imposed a moratorium on DHS activities, prohibiting it from
collecting any penalties from states based on its reviews because of critical procedural and
pragmatic problems with the reviews, largely related to their timing. See Committee on

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Ways and Means, U.S. House of Representatives, 2000 Green Book: Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means (2000). Specifically, Congress, child welfare advocates, and state and federal officials were concerned at the fact that “[r]eviews were conducted retrospectively, sometimes for fiscal years that had long passed, so that current practices were not examined.” *Id.* This problem was exacerbated by “the late release of final reports by [DHS], so their findings and recommendations were sometimes irrelevant by the time they were issued.” *Id.* Furthermore, the reviews were “seen as adversarial and punitive, rather than collaborative and potentially helpful.” *Id.* Indeed, the reviews seemed to focus on generating refunds for the federal government, rather than improving the quality of care for children in need. *Id.*; see also Office of Inspector General, Dep’t of Health and Human Serv., Oversight of State Child Welfare Programs, i (1994) (Congress, state officials and child welfare advocates were concerned that “the reviews elevate process issues over quality of services”).

At about the same time that these concerns were being voiced, OIG conducted an audit of HHS’s Title IV-E review system, and concluded that the review procedures were, for the most part, inadequate because they were untimely. OIG reported: “[A]s our examination of 69 review reports shows, reviews have taken place and reports have been released long after the fiscal year under review was over. On average, Title IV-E reviews were released over two and a half years after the end of the fiscal year under review . . .” OIG, Oversight of State Child Welfare Programs, 14. OIG also echoed Congress’s concern with DHS’s reports being irrelevant by the time they were issued and “windows of opportunity for change [being] closed by the time the reports are released.” *Id.* at 15. Given these problems, OIG recommended that HHS make several changes, including improving “the timeliness of reporting to States the results of Federal reviews.” *Id.* at 27.

In 1994, as a result of all these concerns, Congress enacted amendments to the Social Security Act that required HHS to enact regulations for reviewing states’ Title IV-E programs. See 42 U.S.C. § 1320a-2a. Among other things, the amendments direct that the new regulations include a timetable of the review process to ensure that states are subject to “timely review[s].” *Id.* § 1320a-2a(b)(1)(B). The amendments also prohibit HHS from assessing liability on a state for past-submitted claims without first allowing the state the opportunity to correct any errors through a program improvement plan. *Id.* § 1320a-2a(b)(3)(B).

This Audit is precisely the type of Title IV-E review that Congress was concerned about and trying to avoid in promulgating the 1994 amendments to the Social Security Act; it concerns claims related to long past fiscal years and makes recommendations that are no longer relevant. Perhaps most importantly, its focus is on obtaining billions of dollars in refunds that will place at risk the Commonwealth’s current child welfare programs – programs that ACF determined were in substantial compliance with ACF’s regulations and rules following the 2004 and 2007 reviews it conducted – rather than on improving the quality of care needed today for the vulnerable children in those

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programs. Although the statutory amendments and HHS's regulations based on those amendments do not explicitly apply to audits conducted by OIG, those amendments and regulations are rendered meaningless if HHS can evade them by simply asking OIG to conduct retrospective audits of claims made numerous years ago which focus on process issues instead of the quality of child care services.

OIG's own guidelines also strongly suggest that it should not conduct audits of aged claims. Those guidelines restrict OIG from issuing disallowances of claims made outside the federal records retention period, *i.e.*, three years from the date the claim was made. See HHS Grants Administrative Manual § 74.53; 45 C.F.R. § 74.53. With the Audit having been initiated on November 19, 2003, these guidelines would therefore dictate that no claims made before November 19, 2000 should have been audited or disallowed.

Although OIG has claimed in previous correspondence that the retention period should be extended in this case because it announced a different audit in 2000 that should have put Pennsylvania on notice to retain its records from 1997 onward (*see* 3/9/04 Letter, attached as Exhibit F), this claim is unfounded. Federal regulations only require a state to retain records beyond the three year retention period if a review or audit is "started before the expiration of the 3-year period." See 45 C.F.R. § 74.53(b)(1). OIG never started the "audit" it "announced" in 2000; it never had an entrance conference regarding that "audit," Pennsylvania never opened its books and records for OIG to review, and OIG never conducted any auditing analysis. OIG therefore cannot justify its review of these claims submitted from anywhere between six and eleven years ago based on its announcement of an "audit" in 2000 that it never even began.

Accordingly, to be consistent with its previously expressed positions and those of Congress concerning the problems with aged audits, and in order to abide by its own guidelines concerning the time frame of audits, OIG should terminate the Audit and withdraw the recommendations made in the Draft Report as well as its previous draft and final reports.

D. OIG's Findings In The Draft Report Lack Foundation

Separate and apart from the selective and arbitrary nature of the Audit, OIG's lack of legal authority for conducting it, and its outdated nature, OIG's findings in the Draft Report lack mathematical, factual and legal support. For these additional reasons, detailed below, the Draft Report should be withdrawn.

1. OIG Has Not Provided A Proper Basis For Its Claim For Maintenance Costs

In the Draft Report, OIG contends that Pennsylvania improperly claimed a total of \$227,525 in Title IV-E maintenance costs for 37 children out of the sample unit of 100 children who allegedly turned 19 before or during the Audit period. (See Draft Report at

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4, Appendix D.) OIG also states that it reached that number by applying a rate of somewhere between 52.85 percent and 54.21 percent for each case in which reimbursement was claimed for a child over the age of 19. OIG, however, does not specify what percentage within the range it used with respect to each case or how it determined such a rate was applicable. The absence of this information makes it impossible for Pennsylvania to determine the validity of any of the amounts that OIG determined to be ineligible. Without such information, Pennsylvania opposes OIG's conclusions regarding the assertedly improper maintenance costs.

Additionally, in determining that Pennsylvania improperly claimed \$1,002,540 in federal maintenance costs related to the entire sampling frame of 646 children, OIG also states that it used an unidentified "statistical software package" approved by its own Department. (See Draft Report at Appendix B.) Again, without further information regarding this statistical software or how exactly the statistical analysis was done, Pennsylvania cannot determine the validity of OIG's analysis and therefore opposes OIG's findings.²

Pennsylvania also cannot find any mathematical or legal basis for OIG's findings with regard to two specific sample cases. First, for sample number 11, OIG states that Pennsylvania improperly claimed \$10,277 in federal maintenance expenses after the child turned 19. The invoices submitted with respect to this child, however, total only \$7,076. OIG's calculation of \$10,277 in federal maintenance costs related to this child is therefore plainly wrong.

Second, for sample number 65, OIG states that Pennsylvania improperly claimed \$2,578 in federal maintenance costs after the child turned 19. However, the invoices submitted after this child turned 19 total \$2,997.15. Again, OIG's calculation of \$2,578 in federal maintenance costs is clearly wrong.

2. OIG Improperly Recommends the Disallowance of Non Identifiable "Associated Administrative Costs"

In its Draft Report, OIG recommends that Pennsylvania refund to the federal government \$639,363 in "associated administrative costs." (Draft Report at 4-5.) OIG's manufacture/calculation of these unidentified "administrative costs" is fundamentally unsound and falls woefully short of being an appropriate basis for the disallowance of federal funds.

First, OIG's assumption – an assumption critical to its argument – that the disallowances of a certain number of maintenance claims incurred by Pennsylvania should

² Pennsylvania also opposes OIG's statistical analysis to the extent it applied a 90% confidence level rather than the standard 95% confidence level.

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necessarily result in a proportionate decrease in “associated” administrative costs is incorrect in light of Pennsylvania’s federally-approved administrative cost claiming methodology. Like most states, Pennsylvania identifies, measures and allocates administrative costs for Title IV-E eligible programs through a random moment time study (“RMTS”), which monitors and analyzes the activities of county case workers throughout the Commonwealth. Each quarter, approximately 3,000 “moment in time” requests are randomly sent to county case workers throughout Pennsylvania. Each recipient of an RMTS request identifies what type of activity he or she is conducting at that precise moment and documents the activity on the observation form. The Commonwealth then aggregates the information from all forms, calculates the percentage of time an average Pennsylvania case worker spends on certain activities, and applies the applicable percentage to each county’s actual administrative cost pool. Pennsylvania has used this administrative cost claiming methodology, with the knowledge and approval of HHS, since 1989.

Because Pennsylvania’s federally-approved administrative cost claiming methodology is purely activity-driven (meaning that its result is dependent upon county caseworkers’ average activities rather than calculated on a child-by-child basis), it is incorrect to assume that a disallowance of a Title IV-E placement maintenance claim would necessarily result in *any* significant reduction – let alone a proportionate reduction – of Title IV-E administrative costs for which Pennsylvania seeks federal financial participation. Indeed, it is entirely possible that even significant disallowances of a subset of placement maintenance claims would have little appreciable effect on the overall administrative claims submitted during the same period. Thus, there is no factual or legal basis for OIG’s unstated (and wholly unsupported) assumption that disallowances of certain placement maintenance claims, if imposed by ACF, should necessarily result in additional disallowances of administrative claims.

In addition, and separately, the formula used by OIG to calculate the alleged amount of associated administrative costs that should be refunded to the federal government is unsound. According to footnote 5 in the Draft Report, OIG calculated these purported administrative costs by “dividing *the State agency’s total IV-E claims for administrative costs* (\$593,233,356 (Federal share)) by *its total Title IV-E claims for maintenance costs* (\$857,954,391 (Federal share)) plus training costs (\$72,252,983 (Federal share)) [and then applying] the resultant percentage to the estimated \$1,002,540 (Federal share) in unallowable maintenance costs.” (*Id.* at 4 n.5) (emphasis added). However, a state-wide ratio (*i.e.*, 67 counties), such as that explained in the footnote, cannot be used to fairly determine administrative costs purportedly tied to the maintenance claims at issue in this phase of the Audit because this phase excludes Title IV-E claims submitted with respect to children in Philadelphia and Allegheny counties, the two largest counties in the Commonwealth and the counties with the largest population of Title IV-E eligible children. Including these two large counties in the calculation therefore might unfairly skew the ratio that is then applied to the 65 smaller counties.

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In an earlier phase of the Audit, OIG maintained (without explanation or support) that its approach to identifying and calculating these “associated administrative costs” was “reasonable.” (See September 20, 2007 Final Report at 14.) It also noted that Pennsylvania “did not offer an alternative method of calculating administrative costs on either a statewide or county-specific basis.” (*Id.*) But Pennsylvania is not required to identify alternative methodologies that OIG could employ to manufacture phantom costs; rather, because Pennsylvania *never claimed the specific costs that OIG recommends be disallowed*, it is OIG that bears the burden of establishing that the manner in which it identified and calculated these so-called “associated” costs was reasonable and appropriate. Cf. HHS DAB Appellate Division Practice Manual FAQ, available at <http://www.hhs.gov/dab/appellate/manual.html> (“[W]hen the disallowance amount results from extrapolation from a sample measurement, the respondent must detail the statistical methodology used and be prepared to substantiate the validity of the methodology upon inquiry.”) For the reasons explained above, OIG cannot meet its burden in this case.

Accordingly, OIG’s recommendation that Pennsylvania refund \$639,363 in purported “associated administrative costs” is without legal or factual support and should be withdrawn.

E. Pennsylvania Rejects All Recommendations Of The Draft Report

Pennsylvania does not concur with any of the recommendations OIG makes in the Draft Report. Pennsylvania has been unlawfully singled out in this Audit of enormous size and scope – putting more than \$1.5 billion under review – based upon the results of a small and statistically unreliable sample of unique reclassified claims from more than a decade ago at the apparent request of ACF regional staff with whom Pennsylvania has had a long-standing contentious relationship. By acceding to ACF’s request, OIG acted outside of its statutory authority, failed to maintain the independence and objectivity required by the Inspector General Act, and improperly assumed ACF’s own program operating responsibilities for ensuring states’ compliance with all requirements for federal financial participation under the Social Security Act and implementing regulations. The Audit also improperly focuses on claims submitted numerous years ago, during a different administration, and under far different circumstances, rather than on the current status of Pennsylvania’s child welfare system.

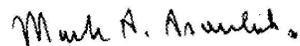
In addition to the above problems with the Audit as a whole, OIG’s findings in this phase of the Audit lack an adequate factual or legal basis. OIG has left critical gaps in its explanation of how it determined the amount of unallowable claims based on the result of its sample findings. And, OIG’s conclusion that Pennsylvania must refund a proportionate amount of administrative costs allegedly “associated” with its maintenance costs also has no basis.

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In sum, the Draft Report is rife with errors and wholly unsupported conclusions. There is no factual or legal basis for the recommended disallowances and there is no reason for Pennsylvania to "work with ACF" on anything that has to do with this arbitrary and seemingly punitive course of events. The Draft Report should be withdrawn in its entirety and any and all aspects of this audit should be immediately terminated.

Thank you for providing Pennsylvania with the opportunity to comment on the Draft Report.

Very truly yours,



Mark A. Aronchick

MAA/saw
Enclosures

cc: Estelle B. Richman, Secretary of Public Welfare
(with enclosures – *via electronic mail and first class mail*)