

Department of Health and Human Services

**OFFICE OF  
INSPECTOR GENERAL**

**MISSOURI IMPROPERLY CLAIMED  
FEDERAL REIMBURSEMENT FOR  
MOST REVIEWED MEDICAID INPATIENT  
PSYCHIATRIC HOSPITAL SERVICE AND  
DISPROPORTIONATE SHARE HOSPITAL  
PAYMENTS TO HAWTHORN  
CHILDREN'S PSYCHIATRIC HOSPITAL**

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Gloria L. Jarmon  
Deputy Inspector General

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A-05-12-00050

# *Office of Inspector General*

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## **EXECUTIVE SUMMARY**

### **BACKGROUND**

#### **Medicaid Program**

Pursuant to Title XIX of the Social Security Act, the Medicaid program provides medical assistance to low-income individuals and individuals with disabilities. The Federal and State Governments jointly fund and administer the Medicaid program. At the Federal level, the Centers for Medicare & Medicaid Services (CMS) administers the program. Each State administers its Medicaid program in accordance with a CMS-approved State plan. Although the State has considerable flexibility in designing and operating its Medicaid program, it must comply with applicable Federal requirements.

#### **Missouri Medicaid Program**

The Missouri Department of Social Services (State agency) administers the Missouri Medicaid program according to the CMS-approved State plan. The State agency makes Medicaid payments to eligible hospitals and claims Federal reimbursement for a portion of such payments. During the audit period, the Missouri Department of Mental Health operated nine State-owned psychiatric hospitals that provided inpatient treatment for mental health conditions. Hawthorn Children's Psychiatric Hospital (Hawthorn), an institution for mental diseases and one of the nine State-owned psychiatric hospitals, provided inpatient psychiatric services primarily to children and youth. During the audit period, July 1, 2005, through June 30, 2010, Hawthorn participated in the Medicaid, but not the Medicare, program.

#### **Federal Requirements for Inpatient Psychiatric Hospital Services**

For States to claim Federal reimbursement for their Medicaid inpatient psychiatric service and disproportionate share hospital (DSH) payments to a psychiatric hospital, the hospital's inpatient services must meet the Federal definition of such services. This definition requires the provider to demonstrate compliance with the basic Medicare Conditions of Participation (CoP) generally applicable to all hospitals and two special Medicare CoP applicable to psychiatric hospitals. The basic Medicare CoP address issues such as licensing, quality of care, safety, patient rights, self-assessment and performance improvement, and service availability. The special Medicare CoP specify staffing and medical record requirements.

A psychiatric hospital must undergo review by qualified health care professionals to demonstrate compliance with the basic and special Medicare CoP. Such review provides CMS with reasonable assurance that participating facilities are improving the health and protecting the safety of Medicaid beneficiaries. For periods in which a psychiatric hospital does not demonstrate compliance with the basic and special Medicare CoP, all Medicaid inpatient psychiatric service and DSH payments received from the State agency are ineligible for Federal reimbursement.

CMS made a technical error when it issued Medicare transplant center CoP regulations in 2007. Effective June 28, 2007, it inadvertently omitted certain Medicare psychiatric hospital CoP regulations that were relevant to this audit. CMS formally reinstated the omitted regulations effective October 26, 2007. Despite the omission, CMS's implementing guidance remained in effect from June 28 through October 25, 2007 (the regulatory gap period).

## **OBJECTIVE**

Our objective was to determine whether the State agency claimed Federal reimbursement for Medicaid inpatient psychiatric service and DSH payments made to Hawthorn in accordance with certain Federal requirements for inpatient psychiatric hospital services.

## **SUMMARY OF FINDING**

Most State agency claims for Federal reimbursement for Medicaid inpatient psychiatric service and DSH payments made to Hawthorn were not in accordance with Federal requirements for inpatient psychiatric hospital services because Hawthorn did not demonstrate compliance with the special Medicare CoP during the audit period. Of the \$22,722,265 claimed for that period, the amount of \$21,375,765 that was for claims with dates of service outside the regulatory gap period was not allowable. We have not provided an opinion on the allowability of State agency claims for the remaining \$1,346,500, which was for claims with dates of service during the regulatory gap period. The State agency claimed the \$22,722,265 because it believed that Hawthorn had met all requirements to be eligible for Medicaid inpatient psychiatric service and DSH payments.

## **RECOMMENDATIONS**

We recommend that the State agency:

- refund \$21,375,765 to the Federal Government for its share of Medicaid inpatient psychiatric service and DSH payments made to Hawthorn for claims with dates of service outside the regulatory gap period,
- work with CMS to determine whether the State agency should refund an additional \$1,346,500 to the Federal Government for its share of payments made to Hawthorn for claims with dates of service during the regulatory gap period,
- identify and refund the Federal share of any additional payments made to Hawthorn for claims with dates of service after the audit period if neither the State agency nor Hawthorn can demonstrate the hospital's compliance with Federal requirements for inpatient psychiatric hospital services, and
- ensure that Federal reimbursement for Medicaid inpatient psychiatric service and DSH payments to psychiatric hospitals is claimed only if those hospitals can demonstrate compliance with the special Medicare CoP.

## **STATE AGENCY COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE**

In written comments on our draft report, the State agency did not concur with our first and second recommendations and did not comment on our third and fourth recommendations. The State agency did not concur with our first and second recommendations because it believes that Hawthorn did not have to meet the special Medicare CoP to make the State agency's claims for Federal reimbursement allowable.

After reviewing the State agency's comments, we maintain that our findings and recommendations are valid. Federal Medicaid requirements mandate that inpatient service and DSH payments to psychiatric hospitals are eligible for Federal reimbursement only if they demonstrate compliance with the special Medicare CoP. Hawthorn did not demonstrate such compliance during the audit period.

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# INTRODUCTION

## BACKGROUND

### Medicaid Program

Pursuant to Title XIX of the Social Security Act (the Act), the Medicaid program provides medical assistance to low-income individuals and individuals with disabilities. The Federal and State Governments jointly fund and administer the Medicaid program. At the Federal level, the Centers for Medicare & Medicaid Services (CMS) administers the program. Each State administers its Medicaid program in accordance with a CMS-approved State plan. Although the State has considerable flexibility in designing and operating its Medicaid program, it must comply with applicable Federal requirements.

### Missouri Medicaid Program

The Missouri Department of Social Services (State agency) administers the Missouri Medicaid program according to the CMS-approved State plan. The State agency makes Medicaid payments to eligible hospitals and claims Federal reimbursement for a portion of such payments. During the audit period, the Missouri Department of Mental Health operated nine State-owned psychiatric hospitals that provided inpatient treatment for mental health conditions. Hawthorn Children's Psychiatric Hospital (Hawthorn), an institution for mental diseases (IMD) and one of the nine State-owned psychiatric hospitals, provided inpatient psychiatric services primarily to children and youth. During the audit period, July 1, 2005, through June 30, 2010, Hawthorn participated in the Medicaid, but not the Medicare, program.

### Federal Requirements for Inpatient Psychiatric Hospital Services

For States to claim Federal reimbursement for their Medicaid inpatient psychiatric service and disproportionate share hospital (DSH)<sup>1</sup> payments to a psychiatric hospital, the hospital's inpatient services must meet the Federal definition of such services. This definition requires the provider to demonstrate compliance with the basic Medicare Conditions of Participation (CoP) generally applicable to all hospitals and two special Medicare CoP applicable to psychiatric hospitals.

#### *Medicaid Payments*

Pursuant to § 1903(a)(1) of the Act, States may claim Federal reimbursement for a portion of their Medicaid medical assistance and DSH payments. For patients in IMDs, a category that generally includes psychiatric hospitals, medical assistance includes inpatient hospital services for individuals aged 65 or older but excludes care or services for younger individuals except for

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<sup>1</sup> Pursuant to § 1923 of the Act, certain hospitals are eligible for special payments, known as DSH payments. To receive DSH payments, hospitals must serve a disproportionately large share of low-income and/or uninsured patients and meet other Federal and State requirements. The payments compensate the hospitals for their uncompensated costs of providing hospital services to such patients.

inpatient psychiatric hospital services for individuals under age 21 (§ 1905(a) of the Act).<sup>2</sup> In addition, if a certain percentage of a psychiatric hospital's inpatient days are attributable to Medicaid-eligible patients, the hospital may be entitled to DSH payments pursuant to § 1923 of the Act.

### *Definition of Medicaid Inpatient Psychiatric Hospital Services*

The Federal definition of Medicaid inpatient psychiatric hospital services requires the hospitals providing such services to comply with Medicare CoP, including two special Medicare CoP. The basic Medicare CoP address issues such as licensing, quality of care, safety, patient rights, self-assessment and performance improvement, and service availability (42 CFR §§ 482.1–482.23 and 42 CFR §§ 482.25–482.57). The special Medicare CoP specify staffing and medical record requirements (42 CFR §§ 482.61 and 482.62).

In 72 Fed. Reg. 60787 (Oct. 26, 2007), CMS corrected a technical error that it had made when it issued Medicare transplant center CoP regulations that became effective June 28, 2007. When it amended 42 CFR part 482, subpart E, in 72 Fed. Reg. 15198 (Mar. 30, 2007), CMS inadvertently omitted 42 CFR §§ 482.60–482.62, which are Medicare psychiatric hospital CoP regulations relevant to this audit. The correction reinstated the omitted regulations effective October 26, 2007. Despite the omission, CMS's implementing guidance (e.g., manuals) remained in effect from June 28 through October 25, 2007 (the regulatory gap period).

### *Demonstrating Compliance With Medicare Conditions of Participation*

To demonstrate compliance with the basic and special Medicare CoP, a psychiatric hospital must undergo review by qualified health care professionals. Medicare-participating psychiatric hospitals are generally deemed to meet both the basic and special Medicare CoP for Medicaid purposes (42 CFR § 488.5(b)). During our audit period, psychiatric hospitals that did not participate in Medicare could generally demonstrate compliance with the *basic* Medicare CoP<sup>3</sup> by being accredited as a hospital by CMS-approved organizations, such as the Joint Commission.<sup>4</sup> However, during that time, such accreditation did not demonstrate compliance with the *special* Medicare CoP (42 CFR § 488.5(a)).<sup>5</sup> According to the *CMS State Operations Manual*, § 2718A, psychiatric hospitals had to be specially surveyed by qualified psychiatric health care professionals to demonstrate compliance with the *special* Medicare CoP. Accreditation or survey by qualified health care professionals provides CMS with reasonable

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<sup>2</sup> Pursuant to 42 CFR § 441.151(a)(3), medical assistance also includes necessary inpatient psychiatric hospital services for individuals aged 21 if they were receiving such services immediately before reaching age 21.

<sup>3</sup> One exception is the utilization review requirement in 42 CFR § 482.30; however, compliance with the utilization review requirement was outside the scope of our audit.

<sup>4</sup> The Joint Commission was previously known as the Joint Commission on Accreditation of Healthcare Organizations and is so referenced in 42 CFR § 488.5(a).

<sup>5</sup> After the audit period (July 1, 2005, through June 30, 2010), CMS granted the Joint Commission deeming authority with respect to the two special Medicare CoP (76 Fed. Reg. 10598 (Feb. 25, 2011)).

assurance that participating facilities are improving the health and protecting the safety of Medicaid beneficiaries.

For periods in which a psychiatric hospital does not demonstrate compliance with the basic and special Medicare CoP, all Medicaid inpatient psychiatric service and DSH payments received from the State agency are ineligible for Federal reimbursement.

## **OBJECTIVE, SCOPE, AND METHODOLOGY**

### **Objective**

Our objective was to determine whether the State agency claimed Federal reimbursement for Medicaid inpatient psychiatric service and DSH payments made to Hawthorn in accordance with certain Federal requirements for inpatient psychiatric hospital services.

### **Scope**

We reviewed Hawthorn's compliance for the period of July 1, 2005, through June 30, 2010, with certain Federal requirements for inpatient psychiatric hospital services. We identified \$22,722,265 in Federal reimbursement for Medicaid inpatient psychiatric service and DSH payments made to Hawthorn for claims with dates of service during the audit period. We limited our review of the State agency's internal controls to those significant to the objective of our audit.

We performed our fieldwork from March through June 2012.

### **Methodology**

To accomplish our objective, we:

- examined Federal and State Medicaid requirements for inpatient psychiatric hospital services,
- identified periods for which neither the State agency nor Hawthorn could demonstrate Hawthorn's compliance with certain Federal requirements for inpatient psychiatric hospital services,
- held discussions with officials of the State agency and reviewed its Medicaid payment information, and
- determined the amount of Federal reimbursement for Medicaid inpatient psychiatric service and DSH payments made to Hawthorn for claims with dates of service during periods when it did not demonstrate compliance.

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 findings and conclusions based on our audit objectives.

## **FINDING AND RECOMMENDATIONS**

Most State agency claims for Federal reimbursement for Medicaid inpatient psychiatric service and DSH payments made to Hawthorn were not in accordance with Federal requirements for inpatient psychiatric hospital services because Hawthorn did not demonstrate compliance with the special Medicare CoP during the audit period. Of the \$22,722,265 claimed for that period, the amount of \$21,375,765 that was for claims with dates of service outside the regulatory gap period was not allowable. We have not provided an opinion on the allowability of State agency claims for the remaining \$1,346,500, which was for claims with dates of service during the regulatory gap period. The State agency claimed the \$22,722,265 because it believed that Hawthorn had met all requirements to be eligible for Medicaid inpatient psychiatric service and DSH payments.

### **FEDERAL REQUIREMENTS**

Pursuant to §§ 1905(h)(1) and 1861(f) of the Act, if inpatient psychiatric services furnished to individuals under age 21 are provided in a psychiatric hospital, the psychiatric hospital must meet the basic and special Medicare CoP. Regulations in 42 CFR § 482.60 implement the requirements in 1861(f)<sup>6</sup> and mandate that such psychiatric hospitals meet the basic Medicare CoP (42 CFR §§ 482.1–482.23 and 42 CFR §§ 482.25–482.57) applicable to all hospitals and two special Medicare CoP applicable to psychiatric hospitals (42 CFR §§ 482.61 and 482.62). Psychiatric hospitals that provide Medicaid inpatient psychiatric services must meet the same Medicare CoP for their DSH payments to be eligible for Federal reimbursement.

The Medicare CoP for psychiatric hospitals are minimum standards that provide a basis for improving quality of care and protecting the health and safety of Medicaid beneficiaries. The basic Medicare CoP address issues such as licensing, quality of care, safety, patient rights, self-assessment and performance improvement, and service availability (42 CFR §§ 482.1–482.23 and 42 CFR §§ 482.25–482.57). The special staffing Medicare CoP require that psychiatric hospitals “have adequate numbers of qualified professional and supportive staff to evaluate patients, formulate written, individualized comprehensive treatment plans, provide active treatment measures, and engage in discharge planning” (42 CFR § 482.62). The special medical record Medicare CoP require that “medical records maintained by a psychiatric hospital ... permit determination of the degree and intensity of the treatment provided to individuals who are furnished services in the institution” (42 CFR § 482.61).

### **HAWTHORN DID NOT DEMONSTRATE COMPLIANCE WITH SPECIAL MEDICARE CONDITIONS OF PARTICIPATION DURING THE AUDIT PERIOD**

Hawthorn did not demonstrate compliance with the special Medicare CoP during the audit period. Hawthorn did not participate in Medicare but was accredited by the Joint Commission as

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<sup>6</sup> Regulations in 42 CFR § 482.1(a)(2) cite § 1861(f) of the Act as a statutory basis for 42 CFR pt. 482.

a hospital during the audit period. That accreditation generally demonstrated Hawthorn’s compliance with the basic Medicare CoP. However, Hawthorn was never specially surveyed to demonstrate compliance with the special Medicare CoP.

Of the \$22,722,265 in Federal reimbursement claimed for Medicaid inpatient psychiatric service and DSH payments made to Hawthorn for claims with dates of service during the audit period, the State agency improperly claimed \$21,375,765 for claims with dates of service outside the regulatory gap period. The \$21,375,765 included Federal reimbursement of \$11,812,084 for improperly claimed service payments and \$9,563,681 for improperly claimed DSH payments. We have set aside for further review by CMS and the State agency \$1,346,500 in Federal reimbursement for payments made to Hawthorn for claims with dates of service during the regulatory gap period.<sup>7</sup> The table below shows Federal reimbursement by payment type.

### Federal Reimbursement by Payment Type

<b>Payment Type</b>	<b>Improperly Claimed</b>	<b>Set Aside</b>	<b>Total</b>
<b>Service</b>	\$11,812,084	\$766,098	<b>\$12,578,182</b>
<b>DSH</b>	9,563,681	580,402	<b>10,144,083</b>
<b>Total</b>	<b>\$21,375,765</b>	<b>\$1,346,500</b>	<b>\$22,722,265</b>

The State agency claimed the \$22,722,265 in Federal reimbursement for claims with dates of service during the audit period because it believed that Hawthorn had met all requirements to be eligible for Medicaid inpatient psychiatric service and DSH payments.

### RECOMMENDATIONS

We recommend that the State agency:

- refund \$21,375,765 to the Federal Government for its share of Medicaid inpatient psychiatric service and DSH payments made to Hawthorn for claims with dates of service outside the regulatory gap period,
- work with CMS to determine whether the State agency should refund an additional \$1,346,500 to the Federal Government for its share of payments made to Hawthorn for claims with dates of service during the regulatory gap period,

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<sup>7</sup> Despite CMS’s inadvertent omission of 42 CFR §§ 482.60–482.62 in 72 Fed. Reg. 15198 (Mar. 30, 2007), CMS’s implementing guidance remained in effect during this period.

- identify and refund the Federal share of any additional payments made to Hawthorn for claims with dates of service after the audit period if neither the State agency nor Hawthorn can demonstrate the hospital's compliance with Federal requirements for inpatient psychiatric hospital services, and
- ensure that Federal reimbursement for Medicaid inpatient psychiatric service and DSH payments to psychiatric hospitals is claimed only if those hospitals can demonstrate compliance with the special Medicare CoP.

## **STATE AGENCY COMMENTS**

In written comments on our draft report, the State agency did not concur with our first and second recommendations and did not comment on our third and fourth recommendations. The State agency did not concur with our first and second recommendations because it believes that Hawthorn did not have to meet the special Medicare CoP to make the State agency's claims for Federal reimbursement allowable.

The State agency gave three reasons for believing that Hawthorn did not have to meet the special Medicare CoP to make the DSH payments it received eligible for Federal reimbursement. First, the State agency indicated that no CMS regulation or guidance makes DSH payments contingent on meeting the special Medicare CoP. Second, the State agency indicated that § 1923(h) of the Act permits DSH payments to a wider range of mental health facilities than just IMDs. Finally, the State agency indicated that CMS did not provide adequate notice that Hawthorn was required to meet the special Medicare CoP.

The State agency next gave two reasons for believing that Hawthorn did not have to meet the special Medicare CoP to make the inpatient psychiatric service payments it received eligible for Federal reimbursement. First, the State agency indicated that the regulations for inpatient psychiatric services to individuals under age 21 do not require psychiatric hospitals to meet the special Medicare CoP; such hospitals need only accreditation by the Joint Commission. Second, it cited *New Jersey Department of Human Services, Departmental Appeals Board (DAB) No. 513 (1984)*, in which the DAB concluded that a facility's Joint Commission accreditation was generally adequate to make its inpatient psychiatric services to individuals under age 21 eligible for Federal reimbursement.

The State agency's comments are included in their entirety as the Appendix.

## **OFFICE OF INSPECTOR GENERAL RESPONSE**

After reviewing the State agency's comments, we maintain that our findings and recommendations are valid. In our response to the State agency's comments, we first address its comments regarding inpatient psychiatric service payments and then address its comments regarding DSH payments. Federal Medicaid requirements mandate that inpatient service and DSH payments to psychiatric hospitals are eligible for Federal reimbursement only if they demonstrate compliance with the special Medicare CoP. Hawthorn did not demonstrate such compliance during the audit period.

## Inpatient Psychiatric Service Payments

Regarding inpatient psychiatric service payments, the State agency believes that psychiatric hospitals that provide inpatient services to individuals under age 21 do not have to meet the special Medicare CoP; we disagree. Section 1905(h)(1) of the Act states, “[T]he term ‘inpatient psychiatric hospital services for individuals under age 21’ includes only ... inpatient services which are provided in an institution ... which is a psychiatric hospital as defined in section 1861(f).”<sup>8</sup> Section 1861(f) of the Act defines a psychiatric hospital and requires such facilities to meet both the basic and special Medicare CoP. These requirements are implemented in 42 CFR § 482.60.<sup>9</sup> Therefore, psychiatric hospitals like Hawthorn are required to meet the basic *and* special Medicare CoP to make the inpatient service payments they receive for individuals under age 21 eligible for Federal reimbursement.

The State agency quoted the primary implementing regulations for inpatient psychiatric services to individuals under age 21 that were in effect during our audit period (42 CFR §§ 440.160 and 441.151). Those regulations permitted such services to be provided in psychiatric hospitals, which were required to meet the basic and special Medicare CoP (§ 1861(f) of the Act; 42 CFR § 482.60), and added a Joint Commission accreditation requirement.<sup>10, 11</sup>

The State agency also cited *New Jersey Department of Human Services*, DAB No. 513 (1984), in support of its belief that facilities that provide inpatient psychiatric services to individuals under age 21 do not have to meet the special Medicare CoP; however, that DAB decision was based on statutes that were subsequently amended. In a decision dated April 18, 1984, the DAB concluded that a facility’s Joint Commission accreditation was generally adequate to make its inpatient psychiatric services to individuals under age 21 eligible for Federal reimbursement. The DAB’s conclusion was based, in part, on § 1905(h)(1) of the Act, which, on April 18, 1984, stated, “[T]he term ‘inpatient psychiatric hospital services for individuals under age 21’ includes only ... inpatient services which are provided in an institution which is accredited as a psychiatric hospital by the Joint Commission.” Effective July 18, 1984, § 2340(b) of the Deficit Reduction Act of 1984, P.L. No. 98-369, changed § 1905(h)(1) to state that “the term ‘inpatient psychiatric hospital services for individuals under age 21’ includes only ... inpatient services which are provided in an institution ... which is a psychiatric hospital as defined in section 1861(f).” Therefore, the DAB’s conclusion no longer applies because of statutory changes that

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<sup>8</sup> Section 1905(h)(1) of the Act also permits such services to be provided “in another inpatient setting that the Secretary has specified in regulations,” such as psychiatric residential treatment facilities. However, such settings are irrelevant to this audit because Hawthorn was a psychiatric hospital throughout the audit period.

<sup>9</sup> Regulations in 42 CFR § 482.1(a)(2) cite § 1861(f) of the Act as a statutory basis for 42 CFR pt. 482.

<sup>10</sup> Effective October 1, 2010, CMS changed 42 CFR §§ 440.160 and 441.151 to remove the Joint Commission accreditation requirement, to reiterate the statutory requirement that psychiatric hospitals comply with the basic and special Medicare CoP, and to add information about how to demonstrate such compliance (75 Fed. Reg. 50041 (Aug. 16, 2010)).

<sup>11</sup> Hawthorn met the Joint Commission accreditation requirement throughout the audit period, but its hospital accreditation generally demonstrated compliance with only the basic Medicare CoP. Such accreditation could not demonstrate compliance with the special Medicare CoP during the audit period (42 CFR § 488.5(a)).

require psychiatric hospitals providing such services to comply with the special Medicare CoP in §§ 1861(f)(3) and (4) of the Act.

### **Disproportionate Share Hospital Payments**

Regarding DSH payments, the State agency first indicated that no CMS regulation or guidance makes DSH payments contingent on meeting the special Medicare CoP; we disagree. The State agency also indicated that the DSH statute (§ 1923 of the Act) and certain regulations (42 CFR §§ 440.10(a)(3)(iii) and 440.20(a)(3)(ii)) require that a facility meet only the basic Medicare CoP. Although that may be true for a hospital, as discussed above, § 1861(f) of the Act requires psychiatric hospitals to meet the basic *and* special Medicare CoP. Hawthorn did not demonstrate compliance with the special Medicare CoP during the audit period.

The State agency then indicated that § 1923(h) of the Act permits DSH payments to a wider range of mental health facilities than just IMDs; we agree but consider the comment irrelevant. Although we agree that DSH payments are permitted to be made to a wider range of mental health facilities than just IMDs, the comment is irrelevant because Hawthorn was both a psychiatric hospital and an IMD that provided “inpatient psychiatric hospital services for individuals under age 21” during our audit period. Therefore, it was required to demonstrate compliance with the special Medicare CoP (§§ 1861(f)(3) and (4) of the Act; 42 CFR §§ 482.60(c) and (d)).

Finally, the State agency indicated that CMS did not provide adequate notice that Hawthorn was required to meet the special Medicare CoP; we disagree. The statutes that required Hawthorn to meet the special Medicare CoP were in effect prior to the beginning of our audit period. Moreover, CMS’s *State Operations Manual*, § 2718A, stated, “To participate in Medicare and Medicaid, a psychiatric hospital must meet the special medical records and special staffing requirements.” Hawthorn was a psychiatric hospital but did not demonstrate compliance with the special Medicare CoP, which specified the medical record and staffing requirements.

# **APPENDIX**

APPENDIX: STATE AGENCY COMMENTS



JEREMIAH W. (JAY) NIXON, GOVERNOR • ALAN O. FREEMAN, DIRECTOR

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February 13, 2013

Sheri L. Fulcher  
Regional Inspector General for Audit Services  
Office of Audit Services, Region V  
233 North Michigan, Suite 1360  
Chicago, IL 60601

Re: OIG Report Number: A-05-12-00050

Dear Ms. Fulcher:

The Missouri Department of Social Services ("DSS") appreciates the opportunity to comment on the Office of Inspector General's ("OIG") draft report entitled *Missouri Improperly Claimed Federal Reimbursement for Most Reviewed Medicaid Inpatient Psychiatric Hospital Services and Disproportionate Share Hospital Payments to Hawthorn Children's Psychiatric Hospital* ("audit report").

DSS strongly disagrees with the OIG's recommendation that it refund \$21,374,765 to the federal government for Medicaid inpatient and disproportionate share hospital ("DSH") payments made to Hawthorn Children's Psychiatric Hospital ("Hawthorn"). Similarly, DSS believes that the \$1,346,500 it claimed for payments made to Hawthorn with dates of service during the "regulatory gap period," between June 28 and October 25, 2007, are likewise allowable, and therefore there is no reason to work with CMS to determine whether DSS must refund these payments.

I. Satisfying Medicare's Special Conditions of Participation is Not Required to Receive DSH Payments

The OIG recommends that DSS refund \$9,563,681 in federal reimbursement for DSH payments made to Hawthorn. This recommendation is based on the OIG's assumption that "[p]sychiatric hospitals that provide Medicaid inpatient psychiatric services must meet the same Medicare CoP [conditions of participation] for their DSH payments to be eligible for Federal reimbursement." Audit Report, at 4.

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The OIG is incorrect. To date, neither CMS regulations nor its guidance make meeting Medicare's special conditions of participation a condition of receiving DSH payments. There is no statute, regulation, or CMS guidance document advising that a psychiatric facility must be **Medicare** certified in order to be eligible to receive federal **Medicaid** DSH payments. Thus, absent contrary instruction from CMS, there is no reason to assume that institutions for mental diseases must satisfy Medicare special conditions of participation for psychiatric hospitals, particularly for a hospital like Hawthorn that exclusively serves children and therefore has no reason to satisfy these supplemental conditions required for Medicare participation.

In fact, the DSH statute and regulations lead to just the opposite conclusion --that Medicare's special conditions of participation are *not* required for facilities to receive DSH payments. Section 1923 of the Social Security Act ("SSA") sets forth the federal requirements for States in making DSH payments. Under this section, States may designate hospitals as DSH hospitals as long as they have a Medicaid inpatient utilization rate (MIUR) of at least one percent. SSA, § 1923(a)(4) and (d) (3). These payments offset uncompensated costs of providing "hospital services" to Medicaid-eligible or uninsured patients. *See* SSA, § 1923(g)(1)(A). Federal regulations define "inpatient hospital services" and "outpatient hospital services" as services that are "furnished in an institution that . . . [meets] the requirements for participation in Medicare as a hospital." 42 C.F.R. §§ 440.10(a)(3)(iii); 440.20(a)(3)(ii). Hospitals are deemed to meet the requirements for participation in Medicare if they have been accredited by a national accreditation organization, such as JCAHO. *See* SSA §1865; 42 C.F.R. § 488.5. Thus, under CMS regulations, a hospital that has been accredited by JCAHO is providing "hospital services" and should be eligible for a DSH payment. At all times during the OIG's audit period, Hawthorn was accredited by JCAHO.

Section 1923(h) specifically authorizes DSH payments for "institutions for mental disease or other mental health facilities." *Id.* § 1923(h)(1). It is important to note that the statute does not refer to "psychiatric hospitals," a term that is used in CMS regulations to refer to the facilities that must satisfy the special conditions of participation to participate in Medicare. *See* 42 C.F.R. § 482.60-62. Rather, the statute authorizes DSH payments for "institutions for mental disease or *other mental health facilities*," indicating that Congress intended DSH payments to be payable to a broader range of facilities than merely those that qualify as an institution for mental disease (IMD).

Indeed, there is only one reference in Medicaid rules to the Medicare special conditions of participation for psychiatric hospitals. This reference appears in Section 440.140 of the Code of Federal Regulations, and this section, by title, is applicable only to "inpatient hospital services . . . for individuals age 65 or older in institutions for mental diseases." Hawthorn is a facility that serves only children under the age of 21. It does not serve individuals over age 65. Accordingly, this regulation, the only Medicaid regulation that incorporates the Medicare special conditions of participation, does not affect Hawthorn's eligibility to receive DSH payments.

The OIG Report cites no authority for its assumption that Hawthorn must meet the same special conditions of participation as psychiatric hospitals that participate in Medicare. Thus, for this assumption to be the basis of a recommendation that DSS refund federal funds, CMS must, at the

least, have provided States adequate notice of these requirements. To date, CMS has not done so. In fact, even the most recent CMS guidance on this issue does not articulate the position advanced by OIG. CMS recently issued guidance instructing States how to audit DSH payments for costs made to institutions for mental diseases, including reports made for individuals between the ages of 22 and 64. *See* 73 Fed. Reg. 77,094, 77,929 (Dec. 19, 2008). Nowhere in this recent guidance did CMS address this issue.

Because statute and regulations do not require institutions for mental diseases that do not participate in Medicare to meet Medicare's special requirements for psychiatric hospitals for those under age 65 to receive Medicaid DSH payments, there is no basis for DSS to refund the \$9,563,681 it claimed in DSH payments for Hawthorn Children's Psychiatric Hospital.

## II. Medicare's Special Conditions of Participation for Psychiatric Hospitals Does Not Apply to Children's Hospitals

The OIG also recommends that DSS refund \$11.8 million to the federal government for its share of Medicaid inpatient psychiatric services made to Hawthorn during the audit period on the basis that "if inpatient psychiatric services furnished to individuals under age 21 are provided in a psychiatric hospital, the psychiatric hospital must meet the basic and special Medicare CoP requirements." Audit Report, at 4.

This statement is incorrect. The Medicare special conditions of participation for psychiatric hospitals are inapplicable to institutions, like Hawthorn, that serve only children under the age of 21. As described above, the regulations governing inpatient psychiatric services for individuals age 65 or older expressly require a hospital to meet the special conditions of participation at 42 C.F.R. § 482.60. *See* 42 C.F.R. § 440.140(a)(1). By contrast, the regulations for inpatient psychiatric services for individuals under age 21 require that the services must be provided by "a psychiatric hospital or an inpatient psychiatric program in a hospital, accredited by the Joint Commission on Accreditation of Healthcare Organizations [JCAHO]." 42 C.F.R. § 440.160; *see also* 42 C.F.R. § 441.151(a)(2)(i) ("[i]npatient psychiatric services for individuals under age 21 must be: . . . [p]rovided by . . . [a] psychiatric hospital or an inpatient psychiatric program in a hospital, accredited by [JCAHO]"). As described above, at all times during the relevant audit period, Hawthorn had accreditation from JCAHO.

In *New Jersey Department of Human Services*, DAB No. 513 (1984), the Departmental Appeals Board confirmed that there are "distinct statutory requirements" for the two groups and that, unlike the over-65 category, "for Medicaid individuals under age 21, JCAH[O] accreditation renders a facility or program eligible to receive FFP so long as the services are in compliance with 42 C.F.R. Part 441, Subpart D and the services are provided under the direction of a physician." DAB No. 513 at 6, 3.

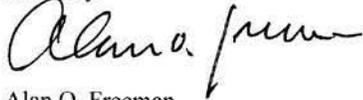
Therefore, because the regulations at 42 C.F.R. Sections 440.160(b) and 441.151(a)(2) provide that a facility need only be accredited by JCAHO or an equivalent organization in order to qualify as a Medicaid provider of inpatient psychiatric services for children under age 21, the OIG's recommendation that DSS refund the \$11.8 million it claimed in federal funding for direct services provided at Hawthorn during the audit period should be rejected.

III. There is no reason to resolve the allowability of federal funds claimed during the regulatory gap period.

The same reasoning applies during the “regulatory gap” period during which the Medicare psychiatric hospital conditions of participation regulations were omitted from the federal register. Because these regulations were inapplicable to Hawthorn during the time they were in effect, there is no reason why they would apply during the four-month period when they did not appear in federal register. Accordingly, there is no reason for DSS to work with CMS to determine whether DSS should refund the \$1,346,500 claimed for its share of payments to Hawthorn during this time.

Thank you for the opportunity to review the draft audit report and provide this response. We appreciate your consideration of the information provided in this letter. If you have any questions about our response, please contact Jennifer Tidball at (573)751-7533.

Sincerely,

A handwritten signature in black ink that reads "Alan O. Freeman". The signature is written in a cursive style with a long, sweeping underline.

Alan O. Freeman  
Director

AOF:JC:bsb