Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Florida Agency for Health Care Administration
Docket No. A-17-29
Decision No. 2808
July 27, 2017

DECISION

The Florida Agency for Health Care Administration (AHCA/Florida), which operates Florida's Medicaid program, has appealed a determination by the Centers for Medicare & Medicaid Services (CMS) to disallow $1,774,798 in federal financial participation (FFP) claimed for Florida's Medicaid program for state fiscal years (SFYs) 2007 through 2009. AHCA claimed the disallowed FFP for "administration" costs incurred by the Florida Agency for Persons with Disabilities (APD), which supervises elements of Florida's Medicaid program that benefit its developmentally disabled clients. APD has a cost allocation plan (CAP), approved by the United States Department of Health and Human Services (HHS), for distributing its administration costs among the federal and state programs (including Medicaid) that it supervises.

To determine a program's allocable share of administration costs, APD uses random moment sampling (RMS), the methodology and procedures for which are spelled out in APD's CAP. Under RMS, a sample of APD employees are surveyed at randomly selected workday moments. Employees selected for the sample report what they are doing in those random moments by completing an "observation" form. Information gathered on the observation form is used to estimate the percentage of total employee time devoted to Medicaid activities, and that percentage in turn is used to calculate the amount of FFP claimed by AHCA for APD's administration costs.

In 2012, HHS's Office of Inspector General (OIG) audited AHCA's fiscal year 2007-2009 FFP claims for APD administration costs. As part of the audit, the OIG sampled 300 completed RMS observation forms from the universe of forms used to determine Medicaid's allocable share of APD administration costs (as reported on AHCA's FFP claims) during the three fiscal years reviewed. The OIG found that 45 of 300 sampled forms were not, for one reason or another, compliant with the requirements of APD's CAP and that approximately $2.2 million in FFP that AHCA had claimed on the basis of those forms were therefore subject to disallowance under 45 C.F.R. § 95.519. CMS

concurred with all of the OIG's noncompliance findings but ultimately issued the challenged disallowance based on 37 of the 45 forms identified by the OIG as deficient. Florida then filed this appeal, contending that those 37 forms were compliant with the CAP or otherwise adequate bases for claiming FFP.

We conclude that 35 of the disputed 37 RMS forms were, as CMS and the OIG found, noncompliant with APD's CAP, and that 45 C.F.R. §§ 95.517(a) and 95.519 authorized CMS to disallow FFP claimed on the basis of those forms. We further conclude that two of the 37 disputed RMS forms do not reveal noncompliance with the CAP and thus do not justify a disallowance. Because our decision is partially favorable to Florida, we remand the case to CMS to recalculate the disallowance to reflect that outcome.

I. Legal Background

Under the Medicaid program, the federal government provides financial assistance to states that provide medical care to low-income, blind, and disabled persons. *See* Social Security Act (Act)[1] §§ 1901-1903; 42 C.F.R. § 430.0. A state with an approved "State plan for medical assistance" is eligible to receive federal matching funds – that is, FFP – for its costs in carrying out the state plan. Act §§ 1902, 1903; 42 C.F.R. §§ 430.30(a), 433.10(a), 433.15(a).

FFP-eligible costs include (in addition to payments for covered medical care) expenditures for Medicaid program "administration." The federal Medicaid statute authorizes FFP at a rate of 50 percent for "activities the Secretary [of Health & Human Services] finds necessary for the proper and efficient administration of the [Medicaid] State plan." Act § 1903(a)(7). (Costs of certain administrative activities, not relevant here, are eligible for FFP at rates higher than 50 percent.)

HHS regulations in 45 C.F.R. Part 95, subpart E require a state agency that supervises Medicaid or other federal public assistance programs to have an HHS-approved CAP. A CAP is a "narrative description of the procedures that the State agency will use in identifying, measuring, and allocating all State agency costs incurred in support of all programs administered or supervised by the State agency." 45 C.F.R. § 95.505. (The term "State agency costs" includes "all costs incurred by or allocable to the State agency except expenditures for financial assistance, medical vendor payments, and payments for services and goods provided directly to program recipients . . . ." *Id.*) "The purpose of

[1] The current version of the Act can be found at https://www.ssa.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table.

the CAP is to assure that where a state agency incurs administrative costs that benefit multiple Federal and/or state programs, a claim for FFP under a particular Federal program includes only the share of those costs appropriately allocated to that program."[2] *Co. Dept. of Health Care Policy and Financing*, DAB No. 2640, at 23 (2015); *see also* 45 C.F.R. § 95.501(b) (indicating that the Part 95 regulations establish requirements for "[a]dherence to approved cost allocation plans in computing claims for Federal financial participation").

The Part 95 regulations provide, in section 95.517(a), that a "[a] State must claim FFP for [State agency] costs associated with a program only in accordance with its approved cost allocation plan." 45 C.F.R. § 95.517(a). Section 95.519 states, in relevant part, that state agency costs "not claimed in accordance with the approved cost allocation plan . . . will be disallowed." *Id.* § 95.519.

Consistent with these and related requirements, the Board has held that costs of administration are allowable (that is, eligible for FFP) "only if properly allocated, charged in accordance with an approved [cost allocation plan], and reasonable and necessary for proper administration of the [Medicaid] program." *Pa. Dept. of Public Welfare*, DAB No. 2653, at 4 (2015). The Board has also said that a state must demonstrate that any cost allocation methodology was "implemented in a manner which ensured that expenditures charged to the Medicaid program met all requirements for federal reimbursement." *Pa. Dept. of Human Servs.*, DAB No. 2710, at 2 (2016). In contesting a disallowance, a state has the burden of demonstrating that disallowed expenditures have been claimed in accordance with a CAP and are otherwise allowable under applicable federal requirements. *Id.* at 2, 12; *see also Mo. Dept. of Social Servs.*, DAB No. 2547, at 12 (2013) (stating that the entity challenging the disallowance "has the burden of demonstrating that its costs or expenditures meet the federal requirements governing the availability of FFP"). When a disallowance is supported by audit findings, the grantee has the burden of showing that the findings are legally or factually unjustified. *Me. Dept.of Human Resources*, DAB No. 2292, at 9 (2009).

[2] A CAP must conform to applicable federal cost principles and other regulations and instructions for determining a state's allowable costs under federal public assistance programs. *See* 45 C.F.R. § 95.507(a)(2). Under federal cost principles (currently codified in 45 C.F.R. Part 75), a state expenditure is an allowable (FFP-eligible) cost of a federal program only to the extent that it is "allocable to" that program. *See Pa. Dept. of Human Servs.*, DAB No. 2710, at 3 (2016) (citing legal authorities). "Allocability means that when expenditures (or the goods or services purchased with the expenditures) serve multiple cost objectives (a cost objective can be a program, organization, function, or activity), then the expenditures must be charged to those objectives in a manner that fairly reflects the relative degree to which each [cost objective] benefits from the expenditures." *Id.* at 3-4.

II. Case Background

A. *APD's Cost Allocation Plan and Random Moment Sampling System*

APD, whose costs are implicated by the challenged disallowance, administers various federal and state-funded social service programs. FL Ex. 2 (CAP at 6, 57-68). Those programs include Medicaid "waiver" programs that pay for healthcare items and services provided to persons with developmental disabilities who reside in home and community-based settings. *Id.* (CAP at 6-7).

APD's CAP[3] documents the "procedures by which the administrative costs of [APD] are allocated to" the various programs it administers. *Id.* (CAP at 3, 39, 48). Those costs consist largely of salaries, benefits, and other personnel and related non-personnel expenses. *Id.* (CAP at 39-40).

As noted, APD uses RMS, a statistical sampling technique, to determine Medicaid's allocable share of its administration costs. Under RMS, a sample of all employees engaged (in whole or part) in program administration are asked at randomly selected "moments" during a calendar quarter to specify on a standard "Random Moment Observation Sampling Form" the type of function they are performing during the selected workday moment. *See* FL Ex. 2 (CAP at 49, 77-83, 86-89). The results of that quarterly survey yield an estimate of the "percentage of employee effort" devoted by APD administrative staff to Medicaid-reimbursable activities during the relevant quarter. *Id.* (CAP at 49, 82-83). That percentage, in turn, is used to quantify the portion of an administrative cost pool that is allocable to Medicaid and reported as expenditures of Medicaid administration on Florida's quarterly Medicaid FFP claim. *Id.* (CAP at 83); FL Ex. 1 (OIG Report at 2).

The RMS process, spelled out in Attachments C and F of APD's CAP, can be briefly summarized as follows: prior to the beginning of each quarter, APD uses a computer program to select a random sample of 2,500 employee moments for that quarter – each moment being the combination of a date, time (that is, any minute during APD's "core work hours," excluding the lunch hour), and "eligible APD worker" (that is, an employee from the "universe" of "direct workers who are involved in the day-to-day administration within each local office"). *Id.* (CAP at 74-78, 81, 86, 88). For each sample moment,

[3] Unless otherwise indicated, we cite to the version of the CAP in effect as of July 1, 2008, contained in Florida Exhibit 2, and cite to the page numbers of the CAP document itself. Excerpts from earlier versions of the CAP are contained in Florida Exhibit 7.

APD's Central Office prepares an RMS form specifying (among other information) the name of the selected employee who must complete the form, the position held by the employee, and the date and time when the form must be completed by the employee. *Id.* (CAP at 86, 88). The Central Office distributes the RMS forms containing the pre-printed random moment information to "district/region sample coordinators." *Id.* Those coordinators in turn give the forms (and instructions for completing them) to the selected employees on the dates specified on the forms, "no earlier."[4] *Id.*

The selected employee "must complete, sign and enter time and date on the observation form in accordance with the moment stated on the sample form." *Id.* (CAP at 88, 92, 100). In one section of the form, the employee must identify the type of "activity" that he or she is performing in the selected moment by marking one of the alphabetically designated activity codes, each of which corresponds to a different Medicaid-reimbursable or non-Medicaid-reimbursable program function. *Id.* (CAP at 92, 100). In addition, the employee must write a brief narrative of what he or she was doing in the sample moment in the section labeled "Comments." *Id.* The employee must sign the form and record the "Date & Time" of the signature, which should "correspond to the time and date on the observation form." *Id.* (CAP at 88, 92). Standard instructions provided to employees, and reproduced in Attachment D to the CAP, state that an employee "should make any changes to information that has been incorrectly entered on the [RMS] form" by "put[ting] a single line through an incorrectly entered [activity] code or comment and initial[ing] and dat[ing] those changes to verify that you made those changes." *Id.* (CAP at 92).

The CAP specifies the responsibilities of district/region sample coordinators (and other RMS staff) in carrying out the quarterly sampling. *Id.* (CAP at 89). Those responsibilities include timely distribution and collection of RMS forms and "[r]eview[ing] all . . . forms to ensure accuracy in the following areas":

- Correct activity code checked;
- Dated signature and sample time of Samplees;
- Check to make sure whiteout has not been used on the form;
- Samplee has put a single line through any accidental mistakes within the comment section and/or any wrongly selected code;
- Samplee ha[s] initialed and dated and any changes as detailed above.

[4] APD's Central Office also provides regional and district offices with "control number reference lists" that list the quarter's randomly selected moments in chronological order by the name of the employee to be sampled in each listed moment. FL Ex. 2 (CAP at 86).

Id. (CAP at 89-90). In addition, district/region sample coordinators must, for 10 percent of sample observations, "provide a validation review by observing the samplee complete the observation form and interviewing the designated employee at the prescribed time to validate accuracy of choosing the correct code and completion on the sample date at the sample time." *Id.* (CAP at 90). When a validation review is completed, the sample coordinator who performs the validation review signs the RMS form and records the date and time of her signature in the designated spaces. *Id.* (CAP at 90, 91, 102).

Once reviewed by the district/region sample coordinators, the collected forms are sent to APD's Central Office for "management data entry." *Id.* (CAP at 88). If the forms "are not fully completed," they are returned to the district or regional offices "for correction." *Id.* According to the CAP, "[a]ll forms for the quarter must be received [at the Central Office] no later than seven days after the end of the sample date." *Id.* (CAP at 89).

Based on the information gathered from the quarter's random moments, APD calculates a "Medicaid observation percentage" – that is, the percentage of employee time allocable to Medicaid administration – for the sample.[5] FL Ex. 1 (OIG Report at 2). APD then multiplies the RMS-derived Medicaid observation percentage by total pooled administrative costs (costs associated with the universe of all APD administrative staff) for the quarter. *Id.* The product is then reported by Florida as costs of Medicaid administration on its FFP claim for the relevant quarter. *Id.*

B. *The OIG audit*

For SFYs 2007 through 2009, Florida reported on its FFP claims that APD had expended $129,045,626 for Medicaid administration, a figure that includes $44,449,066 in expenditures allocated to Medicaid based on APD's RMS methodology. FL Ex. 1 (OIG Report at 2).

In 2012, the OIG audited Florida's FFP claims for SFYs 2007-2009 to determine if the RMS-allocated costs were allowable under federal requirements, including the requirement in 45 C.F.R. § 95.517(a) that costs be charged to Medicaid "in accordance with [the relevant state agency's] approved cost allocation plan." FL Ex. 1 (OIG Report at 2-3).[6]

[5] According to the OIG, "APD calculate[s] its quarterly Medicaid-reimbursable observation percentage by dividing Medicaid-reimbursable observations by total valid observations." FL Ex. 1 (OIG Report at 2 n.2).

[6] The OIG's audit findings are contained in a March 2013 report titled, "Florida Claimed Some Medicaid Administrative Costs That Did Not Comply With Program Requirements" (No. A-04-10-00076), which Florida filed as Exhibit 1.

For each of the three fiscal years examined, the OIG compiled a "sampling frame" of "Medicaid-reimbursable observations" – that is, instances in which an employee reported on an RMS observation form to have been engaged in a Medicaid administration activity at the selected moment. *Id.* (OIG Report at 3). From each of the sampling frames for the three years at issue, the OIG randomly selected 100 Medicaid-reimbursable observations (or a total of 300 sample observations). *Id.* For each sample observation, the OIG reviewed the completed RMS form to verify that the observation had been obtained and documented in accordance with CAP requirements and properly "classified as Medicaid reimbursable." *Id.*

The OIG found that 45 of the 300 sampled RMS forms reflected failures to comply with the CAP and thus should have been excluded from the calculation of the Medicaid observation percentage. *Id.* (OIG Report at 3-8). The OIG found the following areas of CAP "noncompliance":

- Corrections on the RMS form were initialed but not dated by the employee;
- Corrections on the RMS form were neither initialed nor dated by the employee;
- Employee signature on the RMS form did not include a date or time;
- Signature time and date did not match the sampled moment;
- Entry of a Medicaid activity code was not supported by adequate documentation;
- The name of the employee in the sampled position was changed after the sample was selected;
- Sample moments did not fall within APD's core work hours.

Id. (OIG Report at 6-7).

Based on its identification of 45 noncompliant RMS forms (from the sample of 300), the OIG concluded that the Medicaid observation percentages used by Florida to quantify its FFP claims for SFYs 2007-2009 were "overstated." *Id.* (OIG Report at 3, 7). The OIG calculated that overstated observation percentages caused Florida to claim FFP for $4,386,952 in unallowable costs for SFYs 2007-2009. *Id.* (OIG Report at 3, 8).

In April 2013, CMS informed Florida that it agreed with all of the OIG's audit findings and asked Florida to deduct $4,386,952 from its next quarterly FFP claim. Florida objected to that request, and, after further review, CMS decided that no disallowance would result from "error" findings concerning eight of the RMS forms on which the employee either failed to date an activity coding change, or failed to initial or date a change to handwritten "comments" describing the activity performed by the employee in the selected moment.[7] Accordingly, CMS determined the amount of unallowable costs claimed by Florida for SFYs 2007-2009 was $3,489,596 (reduced from $4,386,952). On July 1, 2016, CMS notified Florida that it was disallowing $1,744,798 in FFP (for 50 percent of $3,489,596) for its Medicaid program based on the 2013 audit findings and 45 C.F.R. § 95.519.

Florida filed a request for reconsideration in which it asked CMS to clarify its reason(s) for revising its calculation of unallowable costs. CMS denied the reconsideration request. Concerning the reduction in the disallowance amount, CMS stated that, "[a]lthough it agreed with the identified errors [on eight RMS forms]," it had decided not to recover federal funds claimed on the basis of those forms "if the identified error was due to an activity change that would not result in Medicaid being charged more or if the correction was for the addition or update of a comment where the activity code did not change[.]" Oct. 26, 2016 Recon. Denial Letter at 1.

Florida then filed this appeal. At Florida's request, the Board asked CMS to provide a "clearer explanation of its reasons for excluding eight RMS observations from the disallowance calculation[.]" Jan. 10, 2017 Ack. of Notice of Appeal and Scheduling Order at 2. CMS responded that the noncompliance on those forms (that is, the failure to initial or date a change to an activity code or to a narrative description of the employee's activity) "did not cause an improper claim for costs to the Medicaid program" because "the 'changes' in responses were from one Medicaid activity to another Medicaid activity, from one non-Medicaid activity to another non-Medicaid activity or did not involve a change in 'activity' at all." CMS's Feb. 6, 2017 Response to DAB's Scheduling Order at 2-3.

[7] Those eight RMS forms were, as numbered by the OIG, forms 88 (2007), 16 (2008), 47 (2008), 56 (2008), 63 (2008), 64 (2008), 44 (2009), and 98 (2009). Only one of the eight – form 88 (2007) – involved a change to the activity code initially made by the employee; the employee made that change by crossing out the code initially selected, marking a different code, then initialing – but not dating – the correction. The other seven forms contained changes or additions to the employee's handwritten "comments" that were not initialed or dated.

III. Discussion

Given CMS's decision not to disallow FFP based on eight RMS forms, Florida's appeal is focused on 37 (of the original 45) RMS forms identified by the OIG as noncompliant with APD's CAP.[8] Florida submits that all 37 are, for various reasons, sufficient bases upon which to claim FFP.[9]

Before reviewing Florida's challenges to specific audit findings, we address a recurring theme in its arguments. According to Florida, the OIG's form-by-form review uncovered nothing more than "minor" or "technical" mistakes in APD's implementation of the RMS process. Brief of Appellant (FL Br.) at 4, 9, 17-18. Florida concedes that CMS is responsible for ensuring that FFP is provided only for costs that are allowable under applicable federal requirements, *id.* at 1, and that the RMS forms on which its FFP claims are based must be "accurate," Reply Br. at 1. However, Florida submits that whatever "errors" (that is, CAP noncompliance) occurred in completing those forms, they do not justify a disallowance because they do not show that the activities documented on the forms were ineligible for federal Medicaid reimbursement. *Id.* at 17-18. "[A] federal refund is only warranted," says Florida, "when the auditor finds evidence of serious, material noncompliance with federal rules suggesting the activities performed were invalid and not eligible for federal reimbursement." *Id.* at 18.

To begin with, Florida misunderstands the question before us. We must determine whether Florida has shown sufficient reliable documentation to support the claims it made for federal funds, not whether a "federal refund" is "warranted." *See, e.g., Pa. Dept. of Human Servs.*, DAB No. 2710, at 12 (2016) (State has burden to demonstrate FFP was allowable and allocable under CAP, citing 42 C.F.R. § 430.42(b)(2)(ii) (stating that "[i]n all cases, the State has the burden of documenting the allowability of its claims for FFP")).

[8] Florida's brief presents an argument regarding one observation form – RMS Form 87 (2008) – that CMS states "was not an error form and did not form part of the disallowance." CMS Br. at 13. Florida does not dispute that statement (*see* Reply Br.), and the OIG's annotation on the form does not identify any errors of the kind mentioned in its audit report (*see* FL Ex. 6-A ("OIG #87")). Accordingly, we make no finding concerning RMS Form 87 (2008).

[9] Florida does not take issue with the OIG's audit methods or with how the OIG derived the disallowance amount from the results of its review of 300 randomly selected RMS forms.

Furthermore, we disagree with Florida's characterization of the "errors" identified by the OIG. The CAP provides that APD's administration costs are allocated to Medicaid based on the RMS process, which produces an estimate of the percentage of employee effort devoted by APD employees to Medicaid-reimbursable activities. The elements of that process include not only the methods and procedures for choosing a representative sample of workday moments, but standard protocols for distributing, completing, collecting, and reviewing RMS forms on which relevant data about the random moments are reported.

The CAP's data collection protocols, such as the requirements to initial and date corrections on an RMS form, are not trivial requirements. They exist to ensure that activities documented on the RMS observation form are accurately reported, related to the selected random moments (and not to other moments that might improperly skew the sample results), and correctly coded as Medicaid-reimbursable or not Medicaid-reimbursable.[10] *See* Reply Brief of Appellant (Reply) at 3 (stating that the protocols are designed to "avoid errors that would result in improper allocation of costs"). In other words, the protocols are instrumental in ensuring that the RMS process yields a valid estimate of employee effort devoted to Medicaid (that estimate being the "Medicaid observation percentage") and, by extension, a reliable measurement of APD administration costs allocable to Medicaid and eligible for FFP claiming.

The regulation at 45 C.F.R. § 95.517(a) required Florida to claim FFP for APD's administration costs "in accordance with" that agency's CAP. In turn, the CAP called for Florida to develop any FFP claim for those costs based on an RMS study result – the Medicaid observation percentage. Because the validity of that result, and hence the reliability of any derivative FFP claim, depends (in part) on compliance with the CAP's RMS data collection protocols, CMS properly determined that Florida failed to claim FFP in accordance with the CAP during SFYs 2007 through 2009 to the extent that its claims were based on RMS forms reflecting noncompliance with those protocols.[11] Section 95.519 authorized CMS to disallow FFP whenever costs that are not in compliance with the CAP are claimed. Consequently, CMS had authority to require

[10] For example, initialing a correction on the RMS form ensures that the corrected information was entered by the employee selected for the sample and not by someone lacking direct, personal knowledge of the information's truth or accuracy. Likewise, dating a correction would provide some evidence that the employee made the entry at a point where he or she could accurately recall what occurred in the selected moment. In addition, the requirement that an employee enter the date and time of the observation verifies that it occurred at the predesignated randomly selected moment, as the CAP requires.

[11] Here, we agree with the OIG's observation that "the accuracy of observation forms supporting APD's Medicaid observation percentages was a key factor in determining the propriety of APD administrative costs assigned to Medicaid." FL Ex. 1 (OIG Report at 2).

removal of noncompliant RMS forms from the calculation of APD's Medicaid observation percentages for SFYs 2007 through 2009, and then use the recalculated Medicaid observation percentages to determine the amount of claimed FFP subject to disallowance.

Citing 42 C.F.R. § 430.35(a)(2) and principles of contract law, Florida suggests that CMS may disallow funds only if Florida was not "substantially" compliant with the CAP. FL Br. at 17. However, the regulations under which CMS issued the challenged disallowance (42 C.F.R. §§ 95.517 and 95.519) impose no such substantial compliance standard. Furthermore, section 430.35(a)(2) does not govern the disallowance of FFP (for improperly claimed expenditures) or establish criteria for evaluating whether a state agency's administration costs have been allocated in accordance with an approved CAP or other federal requirements. Instead, that provision authorizes the prospective withholding of Medicaid funding (in advance of any claim for FFP) if CMS determines that the state's Medicaid plan, or its administration of that plan, does not substantially comply with the State plan requirements in section 1902 of the Act.[12] *Pa. Dept. of Public Welfare*, DAB No. 2653, at 17-18 (2015) (distinguishing a disallowance arising from an alleged failure to allocate costs in accordance with a CAP from a "State plan conformity" dispute under 45 C.F.R. § 430.35).

Florida suggests that CMS, by deciding not to recover FFP associated with eight noncompliant RMS forms, "acknowledge[d] that strict and absolute compliance" with the CAP requirements at issue here is unnecessary in order to claim FFP. Reply Br. at 3. However, CMS's decision concerning those eight forms conveyed no acceptance of that theory. As noted in the background, CMS disregarded eight noncompliant RMS forms not because it found information on the form to be accurate, and not because it found the changes entered to be trustworthy, but because it judged that the CAP violations could not have materially affected the calculation of Medicaid's allocable share of APD's administration costs. That discretionary decision by CMS does not compel CMS, or the Board on appeal, to accept other noncompliant (and hence inherently unreliable) RMS forms whose defects could have resulted in a misallocation of APD administration costs to the Medicaid program. Because even slight variations in the Medicaid observation percentage – the end product of the RMS process – may cause shifting of hundreds of thousands of dollars among federal and state programs, CMS may insist, as it does in this appeal (CMS Br. at 10), on strict compliance with the requirements of that process to ensure that the federal government bears only its allocable share of state agency administration costs.

[12] Title 42 C.F.R. § 430.35(a)(2) states, in relevant part, that CMS may "withhold[ ] payments to the State, in whole or in part, only if, after giving the agency reasonable notice and opportunity for hearing . . ., the Administrator finds . . . [t]hat in the administration of the [Medicaid] plan there is a failure to comply substantially with" the provisions in section 1902 of the Act.

Relying on *Missouri Department of Social Services*, DAB No. 2547 (2013), Florida suggests that we overlook any failure by the employee to follow CAP requirements when changing the activity code initially selected and simply decide whether information in the employee's narrative is sufficient proof that the employee was performing a Medicaid administration function at the predesignated random moment. *See* FL Br. at 9. Like this case, *Missouri* involved a disallowance of Medicaid FFP claimed on the basis of random moment sampling. However, *Missouri* did not, unlike this case, involve noncompliance with CAP protocols or altered activity coding. The pertinent question presented by the disallowance in *Missouri* was whether the employee who completed an observation form had been engaged in activity that qualified for an enhanced FFP rate. DAB No. 2547, at 21-26. The Board focused on the content of the form's narrative because it determined that the employee's coding choice was, even under Missouri's own administrative claiming requirements, insufficient to demonstrate its eligibility for the enhanced rate. *Id.* at 25-26. We do not see how those circumstances required CMS in this case to accept an RMS form's narrative as ratifying a coding change that failed to comply with procedures intended to ensure its accuracy and trustworthiness.

Having concluded that CMS may disallow FFP based on RMS forms that are noncompliant with data collection protocols specified in APD's CAP, the issue remaining before us is whether the 37 disputed RMS forms are in fact noncompliant with the CAP. We find, in the following sections, that 35 of those 37 forms are noncompliant and therefore support the disallowance.

A. *RMS forms with undated activity coding changes (20 forms)*

Twenty (20) disputed RMS forms were cited by the OIG as noncompliant with the CAP because in each instance, the employee who completed the form changed his or her initial choice of activity code without dating the change. RMS Form 52 (2007) is one example. That form shows that the employee initially marked activity code G ("Referral, Coordination, and Monitoring of Medicaid Services"), crossed out that selection and marked activity code I ("Medicaid Provider Relations"), then initialed but failed to date the change. *See* FL Ex. 6-B ("OIG #52"). The disputed RMS forms with this type of defect are: 15 (2007); 44 (2007); 52 (2007); 54 (2007); 71 (2007); 92 (2007); 19 (2008); 37 (2008); 50 (2008); 77 (2008); 78 (2008); 81 (2008); 94 (2008); 7 (2009); 23 (2009); 66 (2009); 67 (2009); 79 (2009); 82 (2009); and 83 (2009).

Florida argues that the CAP does not clearly require changes on the form to be dated. *See* FL Br. at 16. We disagree. The CAP plainly states that requirement in two places. First, the standard "instructions" to employees, on page 92, direct an employee to "put a single line through an incorrectly entered code or comment and initial *and date* those changes to verify you made those changes." FL Ex. 2 (CAP at 92 (italics added)). That directive is

also reflected on page 90, in the section describing the responsibilities of district/region sample coordinators. Those coordinators, say the CAP, must "ensure" that "[s]amplee[s] [have] put a single line thru any accidental mistakes within the comment section and/or any wrongly selected code" and have "initialed *and dated* any changes made . . . ." *Id.* (CAP at 90) (italics added)).

Florida points to page 91 of the CAP, which contains the following instructions that omit a dating requirement:

> Do not use correction fluid. If a mistake is made, the Samplee should cross out the error, initial it and then mark the correct choice.

Id. (CAP at 91). Suggesting that this provision creates "ambiguity," Florida asserts that it has "interpreted its CAP as encouraging employees to both initial and date any changes to the RMS form, but does not consider a failure to date changes to be 'non-compliant' with the CAP." FL Br. at 7.

That assertion is undercut by the CAP's revision history. As indicated above (at footnote 3), our discussion is based (unless otherwise noted) on the version of the CAP that took effect on July 1, 2008. An earlier version of the CAP, effective from August through November 2006, did *not* instruct employees to date their corrections on the RMS form; it directed employees to change incorrectly entered information by "put[ting] a single line through the incorrect information and initial[ing] next to the changes made." FL Ex. 7 (Aug. 2006 CAP at 4.9). The August 2006 CAP also included the just-quoted language that immediately follows the admonition not to use correction fluid. *Id.* (Aug. 2006 CAP at 4.6). Effective December 2006, Florida revised the CAP to include: (1) the instruction, found on page 92 of the July 1, 2008 CAP, to date any change made to information entered on the RMS form; and (2) the directive to sample coordinators, on page 90, to verify that employees have initialed and dated their changes on the form. *Id.* (*compare* pages 4.6 and 4.9 of the Aug. 2006 CAP with pages 4.6 and 4.9 of the Dec. 2006 CAP); *see also* FL Ex. 2 (CAP at 90, 92). This revision history shows that the dating requirement on page 92 of the CAP supersedes any inconsistent language on page 91. Furthermore, Florida's suggestion that the CAP merely "encourages" employees to date their corrections does not jibe with its directive (on page 90) to sample coordinators to "ensure" that changes on the form are "initialed and dated." We therefore hold that except for one pre-December 2006 RMS form (discussed in the next section), the CAP required an employee to date a change to information entered on the RMS observation form.

Florida contends that several of the RMS forms on which an employee failed to date an activity coding change fit the profile of RMS Form 88 (2007), which CMS excluded from this disallowance calculation. As noted earlier, CMS's determination that no misallocation of costs could have resulted from that form's noncompliance does not require CMS to accept equally noncompliant RMS forms, nor does it require CMS to determine the specific risk of misallocation posed by each instance of noncompliance.[13] CMS may insist on strict compliance with CAP provisions, such as the instruction to initial and date an activity coding change, that are instrumental in determining Medicaid's allocable share of a state agency's administration costs.

B. *Change of employee name on RMS form – RMS Forms 6 (2007), 7 (2007), and 72 (2007)*

The OIG cited three 2007 RMS forms (numbers 6, 7, and 72) as noncompliant with the CAP because an employee other than the one selected to be part of the sample completed the form. On each form, the pre-printed employee name was crossed out, and the name of another employee (who actually completed the form) was handwritten on the form above or below the crossed-out name. *See* FL Ex. 1 (OIG Report at 7); FL Ex. 6-B ("OIG #6," "OIG #7," and "OIG #72").

Florida responded to these findings in part as follows:

> In each instance . . ., the employee whose name [was] pre-printed on the form no longer worked at APD in the stated position, and the name had been crossed out and *replaced with the name of the current employee in that position*. Because the "random sample of eligible APD workers is

[13] Furthermore, none of the 20 RMS forms discussed in this section fit the pattern of RMS Form 88 (2007). On that form, the employee initially marked activity code E ("Facilitating Access to Medicaid Eligibility"), then crossed out that selection and marked activity code G ("Referral, Coordination, and Monitoring of Medicaid Services"). Activity code E, the code initially marked by the employee, relates to activities that are "direct charged" to Medicaid (meaning that 100 percent of time classified under that code is allocated to Medicaid), whereas activity G, the code ultimately selected by the employee, allocates time to Medicaid based on the Medicaid Eligibility Rate (MER), which is a fraction. In short, the undated coding change on RMS Form 88 moved the selected random moment from a code that allocates 100 percent of time to Medicaid to a code that allocates a lower percentage of time to Medicaid. Unlike the coding change on RMS Form 88 (2007), the coding changes on the 20 disputed RMS forms discussed in this section moved the observed random moment from a non-Medicaid code to a Medicaid code, or from a lower-allocation Medicaid code to a higher-allocation Medicaid code. Those circumstances support the CMS's implicit finding that the noncompliance on those 20 forms could have resulted in a misallocation of FFP to the Medicaid program.

> drawn during the month proceeding the sampling quarter" and all forms are created and printed prior to the beginning of each sampling quarter, the printed portion of the form could not capture turnover in staff, and any changes to the samplee name had to be made by hand.

FL Br. at 10 (italics added). In support of those assertions, Florida proffered personnel records that, it says, verify that the employee whose name was pre-printed on the RMS form no longer worked in the noted "position" on the designated observation date, and that the employee who completed the form was appointed to the position prior to that date. *See id.* at 11-12 (*citing* FL Exs. 3-4). Florida submits that allowing the "employee [who] occupied the pre-generated position listed on the RMS Form" to complete the form did not violate any provision of the CAP or "compromise the integrity of the sample itself" because "RMS forms are generated based on the *employee position* rather than by individual employee names[.]" FL Br. at 10-11 (italics in original). Florida further asserts that "under [its] interpretation of the CAP, the employee is *required*" to change the employee name on the form in these circumstances. *Id.* at 11 (italics in original).

CMS responds, and we agree, that changing the employee named on the RMS form violated a sample selection requirement on page 86 of the CAP, which states that "[o]nce the sample has been selected, no changes are made to the *sample data* during the quarter." FL Ex. 2 (CAP at 86) (italics added); CMS Br. at 8. The CAP states that "[w]ithin APD RMS, *employees* are sampled." In addition, the CAP explains that information about a selected RMS sample (consisting of 2,500 randomly selected moments) is compiled in a "reference" or "control" list that includes the "date," "minute," "***name***," "position number," "location code," and "position classification" associated with each sample moment. *See* FL Ex. 2 (CAP at 75, 78, 86). It is clear from these provisions that employee names are "sample data" that may not be changed after the sample is selected.

We see nothing in the CAP that permits, much less requires (as Florida contends), an employee to change the preprinted information on the RMS form. The CAP does instruct employees to change information "incorrectly entered on the form." FL Ex. 2 (CAP at 92). But the context of that instruction makes it clear that it relates to information that the *employee* has incorrectly entered, not to preprinted information identifying predesignated random moment. Moreover, sample coordinators are directed to ensure that samplees "put a single line thru any *accidental mistakes* within the comment section and/or any wrongly selected code." FL Ex. 2 (CAP at 90) (italics added). Hence, the corrections are clearly meant to be made to the employee's own errors, not to preprinted sample data.

The CAP calls for an RMS form to be distributed to a selected employee in a specified position. FL Ex. 2 (CAP at 88). Thus, if the selected employee has vacated the position, or the position no longer exists, then no observation can be made consistent with the sample data selected at the beginning of the quarter.

Even if it were accurate to say that "positions" rather than "persons" are sampled under APD's RMS system, the record before us would not substantiate the appropriateness of the employee-name changes on RMS Forms 6, 7, and 72. With respect to RMS Forms 6 and 7, although the APD personnel records submitted by Florida confirm that the employees who completed the forms were, within six to seven weeks prior to the designated observation dates, appointed to the "positions" (which are identified by five-digit position numbers) noted on the forms, the records do not confirm that those employees were still in the noted positions on the observation dates. *See* FL Exs. 3-4; FL Ex. 6-B ("OIG #6" and "OIG #7"). In addition, with respect to RMS Form 72, Florida's personnel records indicate that the employee who completed the form was (approximately one month prior to the observation date) appointed to a position (number 15963) different than the position (number 16074) held by the employee whose name was crossed off the form. *See* FL Ex. 5; FL Ex. 6-B ("OIG #72").

APD could have written a sampling plan that identified each unit in the sampling universe by position number regardless of occupant, but chose to use employee names as well as positions. Consequently, it was not unreasonable for CMS to apply the prohibition on changes to sample data in light of that plan. In addition, the prohibition itself is reasonable given that its apparent purpose is to prevent unauthorized changes to the sample that might compromise its representativeness or distort the RMS results.

C. *Failure to enter time of signature – RMS Forms 28 (2007) and 46 (2007)*

RMS Form 28 (2007) documents an observation that was supposed to occur at 1:21 p.m. on March 27, 2007. *See* FL Ex. 6-B ("OIG #28"). The employee who signed the form recorded the date ("3/27/07"), but not the time, of her signature. *Id.* RMS Form 46 (2007) – which documents an observation that was supposed to occur at 2:29 p.m. on January 12, 2007 – has the same type of omission: the employee who signed that form recorded the date ("1/12/07"), but not the time, of her signature. *Id*. ("OIG #46"). Florida suggests that the missing date entries are immaterial because the activities

described on the forms are clearly Medicaid-reimbursable.[14] FL Br. at 30, 31. That suggestion ignores the purpose of those entries, which is to verify that an observation occurs at the randomly selected moment printed on the form, as required by the CAP. FL Ex. 2 (CAP at 88 (requiring the employee to complete the form "[a]t the specific time designated")). An observation that occurs on the randomly selected "date," but not at the randomly selected time, is incompatible with the sample design described by the CAP. *Id.* (CAP at 77 (stating that a "random moment" consists of, among other things, a particular "minute" during core working hours)). We therefore affirm the noncompliance findings regarding RMS Forms 28 (2007) and 46 (2007).

D. *Failure to enter date of signature – RMS Forms 5 (2007) and 63 (2007)*

RMS Form 5 (2007) documents an observation that was supposed to occur at 1:26 p.m. on March 26, 2007. *See* FL Ex. 6-B ("OIG #5"). The selected employee signed the form and recorded the time (1:26 p.m.), but not the date, of her signature, in violation of the CAP's requirement that she "sign and *reflect the date and time* in which the sample is completed."[15] *Id.*; FL Ex. 2 (CAP at 92, 100 (sample RMS form with signature line with space for the signature's "Date & Time")). An "observation taker" also signed the form and recorded the date and time of her signature, which matched the moment printed on the form. FL Ex. 6-B ("OIG #5"). In addition, the observation taker wrote "3/26/07" just below the employee's signature and initialed that entry. *Id.*

RMS Form 63 (2007) is similar to RMS Form 5 (2007). It documents an observation that was supposed to occur at 10:23 a.m. on September 20, 2006. *See* FL Ex. 6-B ("OIG # 63"). The employee signed the form and recorded the time (10:24 a.m.), but not the date, of her signature.[16] *Id.* The form was also signed by an "observation taker," who entered a date and time matching the moment printed on the form. *Id.*

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[14] The employee who completed RMS Form 28 (2007) marked activity code I ("Medicaid Provider Relations") on the form and wrote in the "comments": "Para transit – Transportation service subcommittee meeting at PalmTran Connections – a major Transportation Service Provider for our Medicaid waiver clients." FL Ex. 6-B ("OIG #28"). The employee who completed RMS Form 46 (2007) marked activity code G ("Referral, Coordination, and Monitoring of Medicaid Services") and wrote in the "comments" that she was "assisting a Medicaid Waiver consumer with locating Medicaid providers." *Id.*

[15] The employee who completed RMS Form 5 (2007) marked activity code G ("Referral, Coordination, and Monitoring of Medicaid Services") on the form and wrote in the "comments" section that, at the designated random moment, she was "putting eligible clients in program database ABC, checking Medicaid # through FMMIS." FL Ex. 6-B ("OIG #5").

[16] The employee who completed RMS Form 63 (2007) marked activity code G ("Referral, Coordination, and Monitoring of Medicaid Services") on the form and wrote in the "comments" section that, at the designated random moment, she was "meeting with support coordinator . . . ." FL Ex. 6-B ("OIG #63").

Although it concedes that the employee in each instance did not comply with the instruction to enter the date of the observation, Florida submits that the omission is immaterial because "there are other indicia that the employee completed the form at the prescribed date and time (i.e., the pre-printed date and time on the form)." FL Br. at 28. For example, Florida points out that "the sample time was not omitted and matches the pre-printed sample time, evidencing an error of omission rather than non-compliance with the sample." *Id.* "Because the time and date are listed together on the form," says Florida, "it is unlikely that an employee would have completed the form at the correctly stated time, but on the wrong date, particularly because forms are physically distributed to the samplee 'on the designated day of the sample, no earlier.'" *Id.* at 29, 31 (quoting FL Ex. 2 (CAP at 88)). However, given the absence of documentary evidence verifying when the forms were distributed to and collected from the employees, we have little more than supposition on which to gauge the likelihood that the employees either completed, or failed to complete, the forms at the prescribed moments.

Florida also contends that the signatures of the observation takers "corroborates the date, time, and accuracy of the sample," claiming that both forms were "part of the 10 percent validation sample, where an observation taker interviews the employee at the *exact* sample moment, and documents the activity being performed by the employee at that time." FL Br. at 28-29, 31-32 (italics in original). However, it is not clear that RMS Forms 5 (2007) and 63 (2007) were, as Florida alleges, part of the 10 percent validation review. The standard observation form has the following preprinted one-word question: "Validate?" The answer "No" was entered on both forms. Even if the "observation takers" who signed RMS Forms 5 and 63 were validation reviewers, the missing date entries on the form create legitimate doubt about whether the reviewers observed and interviewed the employees as they completed the forms. The chief purpose of a validation review is to verify the accuracy of the information actually entered on the form. FL Ex. 2 (CAP at 90 (stating that the review is supposed to "validate accuracy of choosing the correct code and completion [of the form] on the sample date at the sample time"). When both the employee and the validation reviewer sign the form, they attest to, among other things, the "accuracy of the information" entered. *Id.* In these two instances, both the samplee and the reviewer failed to catch the omission of the samplee to record an accurate time.

E. *Random moment outside of "core hours" – RMS Forms 81 (2007) and 92 (2007).*

On two disputed RMS Forms – 81 (2007) and 92 (2007) – the selected random moment fell outside APD's "core hours" of 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m. The preprinted moment on RMS Form 81 (2007) was at *5:11 p.m.* on April 12, 2007; on RMS Form 92 (2007), the preprinted moment was at 5*:17 p.m.* on May 2, 2007. *See* FL Ex. 6-B ("OIG # 81" and "OIG # 92").

Florida submits that this error was the result of a "glitch in the RMS computer program," perhaps relating to the program's inadvertent failure to recognize the March 17, 2007 change to daylight savings time. FL Br. at 12. Florida provided no evidence of any computer programming flaws, however. Regardless of how or why it occurred, the "glitch" caused a deviation from the sample selection methodology specified in the CAP, which states clearly that a quarterly sample consists of moments occurring within APD's core hours. FL Ex. 2 (CAP at 77).[17] For that reason, we affirm the noncompliance findings regarding RMS Forms 81 (2007) and 92 (2007).[18]

F. *Date or time entry did not match sample moment – RMS Forms 10 (2007), 22 (2007), 33 (2007) and 95 (2007)*

The CAP states that "[a]t the specific time designated on the observation form, the samplee must complete, sign and *enter time and date on the observation form in accordance with the moment stated on the sample form*." FL Ex. 2 (CAP at 88 (italics added)). The CAP elsewhere indicates that employees selected for the sample should take steps to ensure their availability to complete the RMS form at the moment indicated on the form:

> The Samplee should take the Random Moment Sample forms for the day when they are away from the office (for example when in the field or training), and complete the observation form at the prescribed sample time or *as close to the sample time as possible*.

Id. (CAP at 91 (italics added)).

[17] That the sample was drawn in part from moments outside core work hours raises a question, not addressed by Florida, about the sample's representativeness. Florida points to a recommendation by the OIG that APD expand the definition of core hours to account for some employees' "flextime" schedules, whose hours the OIG said were 7:00 a.m. to 5:00 p.m., as somehow demonstrating that the OIG was "disingenuous" in finding fault with forms using times outside the hours set in the CAP. FL Br. at 13. We do not see that recommendation's relevance given that the selected moments printed on RMS Forms 81 and 92 fall outside the flextime schedule described by the OIG. The point made by the OIG was that the validity of the RMS process as a whole is potentially undermined if the process does not ensure that all working moments have an equal chance of being selected, which is not the case where the sample is limited to a different set of hours than those actually worked. FL Ex. 1 (OIG Report at 8). This issue was one of several unquantifiable "vulnerabilities" that prevented the OIG from confirming the allowability of the Medicaid claims based on the RMS, but that CMS did not rely on in the disallowance.

[18] CMS found two errors on RMS Form 92 (2007): the employee's failure to date an activity coding change; and the fact that the form reflected an observation that occurred outside of APD's core hours. We sustained the former error finding in section III.A and the latter finding in this section.

The OIG found four RMS forms from SFY 2007 – 10, 22, 33, and 95 – to be noncompliant with the CAP because the employee entered a time or date that did not match the preprinted random moment. Florida contends that these forms reflect no noncompliance – or, at worst, immaterial noncompliance – with the CAP. FL Br. at 14-15, 29-31. For the reasons stated below, we reject that contention and sustain CMS's noncompliance findings regarding all four forms.

1. RMS Form 10 (2007)

The random moment printed on RMS Form 10 (2007) was July 13, 2007 at 10:02 a.m. FL Ex. 6-B ("OIG #10"). The selected employee signed the form and entered "**8**/13/07" at 10:02 a.m. next to her signature. *Id.* (emphasis added). Florida submits that the date entry is "clearly a typographical error on the part of the employee, particularly because the forms are physically provided to the employee on the sample date, no earlier, and must be submitted back to the central office within 1 week of the sample date." FL Br. at 29. Florida further contends that "[u]nder [its] validation process, there is simply no way that a form completed one month after the sample date could have been included as a part of the RMS statistical sampling group." *Id.* at 30. However, the existence of written procedures governing the distribution and collection of observation forms does not necessarily negate the possibility that the employee failed to complete the form on the prescribed date. Furthermore, there are no date-stamps or other information on the form verifying that it was distributed to the employee, then collected and returned to APD's Central Office, within the appropriate timeframes. In short, we see nothing on the form verifying that the error was, as Florida maintains, an inadvertent "scrivener's error."

2. RMS Form 22 (2007)

The random moment printed on RMS Form 22 (2007) was 2:00 p.m. on January 25, 2007. FL Ex. 6-B ("OIG #22"). The selected employee signed the form and entered **4:05 p.m.** on January 25, 2007 next to her signature. *Id.* Florida does not suggest a reason why the employee completed the form two hours after the designated random moment or otherwise demonstrate that it was completed "as close to the sample time as possible." In addition, Florida (understandably) fails to mention that an observation taker signed the form two hours *earlier* than the employee, a fact that creates only more uncertainty about when the reported activity occurred.

3. RMS Form 33 (2007)

The random moment printed on RMS Form 33 (2007) was November 1, 2006 at 3:16 p.m. FL Ex. 6-B ("OIG #33"). The selected employee signed the form and entered November **2**, 2006 and "2:05" next to her signature. *Id.* The form was signed by an "observation taker," who entered a date – that is, November **1**, 2006 – and time matching the preprinted random moment. *Id.*

While conceding that the employee's date and time entries fail to match the sample moment, Florida contends that RMS Form 33 (2007) is compliant with the CAP because it was part of the 10 percent validation review, and because observations "that go through the validation process have independent corroboration, not only of the time and date that the form was completed, but also of the accuracy of the contents of the form." FL Br. at 29-30. It is not clear, however, that the observation documented on RMS Form 33 (2007) was part of a validation review. The form contains the following preprinted one-word question: "Validate?" The preprinted answer on the form was "No." Even assuming that the "observation taker" who signed the form was a validation reviewer, the discrepant date-and-time entries on the form create uncertainty about whether the review actually occurred, or occurred when it was supposed to (that is, when the employee completed the form). *See* FL Ex. 2 (CAP at 90-91 (indicating that the reviewer must "observe" and "interview" the employee as she completes the RMS form, and then sign and date the form following the observation). According to the CAP, both signatures on a validated RMS form attest to, among other things, the "accuracy of the information" entered on the form. *Id.* (CAP at 90). Assuming that RMS Form 33 (2007) was validated, the employee and observation taker, as signatories, attested to conflicting information about the observation's date, a circumstance that renders the form inherently unreliable.

4. RMS Form 95 (2007)

The random moment printed on RMS Form 95 (2007) was 11:41 a.m. on September 14, 2006. FL Ex. 6-B ("OIG #95"). The selected employee signed the form and entered **5:25 p.m.** on September 14, 2006 next to her signature. *Id.* Florida does not explain why the employee completed the form almost six hours after the designated random moment, and there is nothing about the reported activity ("calls . . . being made to people interested in opening up group homes") which persuades us that the form was completed "as close to the sample time as possible."

G. *Remaining disputed RMS forms*

1. RMS Form 3 (2007)

RMS Form 3 (2007) documents an observation on October 10, 2006. FL Ex. 6-B ("OIG #3). The employee who completed that form initially marked activity code A ("Direct Medical and Dental Services"), then crossed out that selection and marked activity code G ("Referral, Coordination, and Monitoring of Medicaid Services"). *Id.* The employee initialed but did not date the correction. *Id.* In its annotation on the form, the OIG correctly noted that the version of APD's CAP in effect during October 2006 did not

instruct an employee to date his initials when making corrections on the RMS form. *Id.*; *see also* FL Ex. 7 (compare Aug. 2006 CAP (pg. 4.9) with Dec. 2006 CAP (pg. 4.9)). Hence, the activity coding correction on RMS Form 3 (2007) did not violate the CAP. We therefore reverse the disallowance to the extent that it is based on this form.

2. RMS Form 9 (2007)

The employee who completed RMS Form 9 (2007) marked activity code N ("Supervisory Conference and General Administrative") and indicated in the comments that he was "working with supervisor of election office obtaining voter registration application." FL Ex. 6-B ("OIG #9"). The form shows no correction to the selected activity code or to the employee's handwritten narrative. *Id.* In addition, the form was signed by the employee who entered a date and time that matches the moment printed on the form. *Id.*

In an annotation on the form, the OIG suggested that the observation was problematic because the "*[s]ample item listed Activity Code E* ["Facilitating Access to Medicaid Eligibility"], and [the] RMS Form[ ] showed Activity Code N." *Id.* Like Florida (*see* FL Br. at 23), we are unsure what the OIG meant when it said that the "sample item listed Activity Code E." CMS offers no explanation and otherwise fails to specify how RMS Form 9 (2007) fails to conform with CAP requirements.[19] *See* CMS Br. at 13. Because CMS has not provided sufficient information about the basis for the adverse finding regarding RMS Form 9 (2007), we reverse the disallowance to the extent it is based on that form.

3. RMS Form 79 (2008)

RMS Form 79 (2008) documents an observation that was supposed to occur at 4:28 p.m. on January 11, 2008. *See* FL Ex. 6-A ("OIG #79"). The selected employee signed the form and recorded the time (4:28 p.m.), but not the date, of her signature. Florida contends that "[b]ecause the time and date are listed [that is, preprinted] together on the form, it is unlikely that an employee would have completed the form at the correctly stated time, but on the wrong date, particularly because forms are physically distributed to employees 'on the designated day of the sample, no earlier.'" FL Br. at 32 (quoting FL Ex. 2 (CAP at 88)). However, that proposition assumes that the form was physically distributed to the employee on the pre-designated date, as required by the CAP, and

[19] CMS says only that the "error" on (or revealed by) RMS Form 9 (2007) "obviously impacted Medicaid FFP because the activity code was changed from one that partially allocated costs to Medicaid (N) to one that "fully" allocated costs to Medicaid (E)." CMS Br. at 13.

collected the same day. Nothing on the form verifies that that happened. Absent information on the form concerning the timing of its distribution and collection, the employee's failure to date the signature is a material omission that calls into question whether the observation occurred at the randomly selected moment. We therefore affirm the noncompliance finding regarding RMS Form 79 (2008).

4. RMS Form 15 (2009)

The employee who completed RMS Form 15 (2009) selected activity code L, "Medicaid Administrative Training," and wrote in the "comments" that he was attending a "Suppor[t] Coordinator's monthly meeting." *See* FL Ex. 6-C ("OIG #15). In its annotation on the form, the OIG stated that the employee's comments "indicate that the [appropriate] code was N [Supervisory Conference and General Administration] not L." *Id.*

In our view, the form's comments do not contain enough detail to know which code was appropriate, or more appropriate. Nonetheless, because the OIG validly questioned the coding choice, it was incumbent on Florida to show that it was correct. Florida did not do so. Quoting the CAP's definition of Medicaid Administrative Training, Florida contends that the activity described by the employee "was properly coded as L, as it involved 'participating in or presenting training which improves the quality of identification, referral and coordination of individuals to Medicaid covered services[.]'" FL Br. at 16 (quoting FL Ex. 2 (CAP at 97)). But there is no indication in the comments, or elsewhere in the record, that "training" was the topic or purpose of the "meeting" attended by the employee.

Florida also asserts that "[t]here is nothing in the State CAP that suggests that a disallowance is permitted for failing to choose the Medicaid Reimbursable code that best describes the Medicaid reimbursable activity[.]" FL Br. at 15. We disagree. The CAP indicates that the result of the RMS process (namely, the Medicaid observation percentage) ensures that the allocation of APD's administration costs complies with federal cost principles and program-specific requirements. FL Ex. 2 (CAP at 74). That result necessarily reflects the coding choices made by employees on RMS observation forms – choices that specify whether, or the extent to which, a particular activity (and its associated costs) can be said to benefit a particular program.[20] *Id.* (CAP at 82, 83, 101-

[20] As explained in a prior note (at footnote 13), Medicaid-reimbursable codes allocate varying percentages of employee time to the Medicaid program. For example, activity code C ("Medicaid Outreach") is a "direct charge" code, meaning that 100 percent of time reported under that code is allocated to Medicaid, whereas time reported under activity code G ("Referral, Coordination, and Monitoring of Medicaid Services") is discounted by the Medicaid Eligibility Rate.

03). It follows that APD's administration costs could be misallocated to Medicaid, resulting in excessive FFP claims, to the extent that employees in the sample have incorrectly coded their activities. For that reason, the CAP's standard instructions, distributed with the form, advise the employee to "[r]eport the activity you are performing by checking the one box [that is to say, the one activity code] that *best describes what you are doing* at the selected moment." *Id.* (CAP at 92 (italics added)). The CAP also requires RMS staff to perform validation and other reviews to ensure that employees have checked the "proper" or "correct" code. *Id.* (CAP at 90, 92).

Because the CAP plainly requires accurate coding of activities performed in the sample moments, and because Florida has not demonstrated that the employee who completed RMS Form 15 (2009) properly coded the reported activity, we affirm CMS's noncompliance finding regarding that form.

5. RMS Form 30 (2009)

The employee who completed RMS Form 30 (2009) marked activity code K ("Transportation and Translation Assistance to Access Services") and wrote on the form that she was "traveling to visit a consumer to verify if case to be closed from [APD]." FL Ex. 6-C ("OIG #30"). In its annotation on the form, the OIG correctly stated that activity code K "is for arranging client transportation not employee travel."[21] *Id.* The OIG further stated that "*[p]ossibly* this [employee activity] should have been coded G," as "Referral, Coordination, and Monitoring of Medicaid Services." *Id.* (italics added).

Florida concedes that the employee made a coding error but contends that "[b]ecause both Code K and Code G . . . are Medicaid reimbursable activities," the error did not result in an "improper claim for costs to the Medicaid program and should be excluded from the disallowance." FL Br. at 22-23 (internal quotation marks omitted). The problem with this contention is that it is impossible to tell from the comments on the form that G – or any other Medicaid-reimbursable code – is proper. Nothing on the face of RMS Form 30 (2009) indicates that the employee was visiting a *Medicaid* client, coordinating Medicaid-covered services, or performing other Medicaid-related functions. And the OIG did not find that G was the proper code, only that it "possibly" was a proper one. We therefore have no basis to accept Florida's contention that the coding error did not result in an improper claim for FFP. Accordingly, we affirm CMS's noncompliance finding regarding RMS Form 30 (2009).

[21] The CAP defines activity code K to include: "Activities that include arranging for specific support provisions, such as transportation and translation assistance, which are necessary for an individual or family to access Medicaid covered services." FL Ex. 2 (CAP at 101).

Conclusion

We sustain CMS's determination to disallow Medicaid FFP claimed on the basis of 35 disputed RMS forms discussed in sections III.A through III.F, and IV.G.3 through IV.G.5 of this decision. We hold that two disputed RMS forms, discussed in sections III.G.1 and III.G.2 were completed in compliance with APD's CAP and were therefore proper bases for claiming Medicaid FFP. We remand the case to CMS to adjust the disallowance amount to reflect our findings regarding those two forms.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member