

## Department of Health and Human Services

### DEPARTMENTAL APPEALS BOARD

#### Appellate Division

SUBJECT: Maryland Department of Health and Mental Hygiene      DATE: June 11, 2007  
          and Mental Hygiene  
          Docket No. A-05-96  
          Decision No. 2090

#### DECISION

The Maryland Department of Health and Mental Hygiene (DHMH) appealed a determination by the Centers for Medicare & Medicaid Services (CMS) disallowing \$19,954,944 in federal financial participation (FFP) claimed by five local education agencies (LEAs) in Maryland as medical assistance under title XIX of the Social Security Act (Act) for school-based services. The Board permitted Baltimore County Public Schools (Baltimore County or BCPS) and Baltimore City Public School System (Baltimore City or BCPSS) to participate in the appeal proceedings as intervenors. DHMH represented the remaining three LEAs (Anne Arundel, Prince George's and Wicomico Counties). (We refer to all of the LEAs collectively below as "Maryland" or "the State" where appropriate.) CMS based the disallowance on an Office of the Inspector General (OIG) audit that reviewed a 100-unit sample of claims in Maryland's eight highest paid LEAs. Each sample unit consists of claims for all school-based services for a student in a one-month period between July 1, 1999 through June 30, 2000. Of the 408 claims in the sample, the auditors found 290 claims, totalling \$9,886.50 FFP, in error and identified one or more types of error for each claim. Based on the sample results, the auditors estimated that the eight LEAs were overpaid \$19,954,944 FFP. During the proceedings before the Board, CMS withdrew the error findings for five of the claims (Sample 72, claims 289-293) but did not recalculate the disallowance.

Maryland appealed the disallowance in full, arguing that none of the claims were in error (although Baltimore County later conceded that two of the claims were in error) and that the methodology used to estimate the amount of the overpayment was not valid.

For the reasons discussed below, we conclude that 230 claims were paid in error and 55 claims were properly paid. We also conclude that the statistical methodology was valid. Accordingly, we uphold the disallowance to the extent that it is based on the

claims which we conclude were paid in error and we reverse the remaining disallowance.

Although we discuss the claims individually below in the context of their particular facts, we note here some cross-cutting considerations that guided our evaluation of the supporting documentation for the claims.

- o Documentation other than progress notes prepared by the direct service provider may be sufficient evidence of services provided under an IEP. As discussed in detail with respect to Sample 16, claim 97, CMS's State Medicaid Manual does not interpret the statutory and regulatory requirement for documentation of the "extent" of services for which FFP is claimed as requiring progress notes (or the equivalent), nor do generally applicable recordkeeping requirements necessarily require progress notes.

- o Non-contemporaneous documentation may be not be used to establish that covered services were provided unless there is a basis to believe that such documentation is reliable, for example, in Sample 13, claim 43, where a social worker's declaration simply clarifies contemporaneous documentation with which it is consistent and explains how she could recall the events she described.

- o The federal regulatory definition of "services for individuals with speech, hearing, and language disorders" as services provided "under the direction of" a speech pathologist (where a speech pathologist is not the direct service provider) is not satisfied by a showing that the speech therapist worked under the general supervision of a speech pathologist. As discussed in detail with respect to Sample 5, claims 5-8, such services are not provided "under the direction of" a speech pathologist when the speech therapist was not in any way directed by the speech pathologist in the provision of services to the particular student.

- o The definition of a unit of case management service in the State plan unambiguously requires that at least one case management contact per month be in person or by telephone, as discussed in detail with respect to Sample 4, claim 4. Moreover, written case management contacts do not qualify as a covered service in the absence of the required in-person or telephone contact.

The record for this decision consists of briefs and exhibits filed by CMS, DHMH, BCPS and BCPSS. DHMH's exhibits include a CD-ROM prepared by the OIG, which contains files in pdf format of

the OIG's audit plan documents, federal and state regulations relied upon by the OIG, audit data summaries and other audit-related documents.

### Background

Medicaid, a program jointly funded by the federal and state governments, provides health care to low-income persons and families. Social Security Act (Act), sections 1901 and 1902.<sup>1</sup> Each state operates its own Medicaid program in accordance with broad federal requirements and the terms of its Medicaid state plan. *Id.* Act, sections 1902(a)(10), 1905(a); 42 C.F.R. Part 435. A state receives federal reimbursement, or FFP, for a share of its Medicaid program expenditures, primarily "medical assistance," that a state is authorized to provide (and in some cases must provide) under its Medicaid state plan. Act, sections 1903(a), 1905(a).

The services at issue here were for children with disabilities who had individualized education programs (IEPs) established under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. The IDEA requires states to ensure that "all children with disabilities" (regardless of Medicaid eligibility) "have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs[.]" 20 U.S.C. § 1400(d)(1)(A) (emphasis added); see also 34 C.F.R. § 300.34(a) (definition of "Related services"). Section 1903(c) of the Act prohibits denying or restricting Medicaid payment for covered services furnished to a child with a disability because the services are included in the child's IEP. Based on this provision, CMS has stated that its policy is that health-related services included in a child's IEP may be reimbursed by Medicaid if they meet all applicable Medicaid requirements. See Medicaid and School Health: A Technical Assistance Guide, dated August 1997 (*Guide*), at 15 (CMS Ex. 3, at 11).

Each of the local education agencies at issue here entered into a provider agreement with DHMH, the Medicaid State agency, to provide school-based health services to disabled or special needs

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<sup>1</sup> The current version of the Social Security Act can be found at [www.ssa.gov/OP\\_Home/ssact/comp-ssa.htm](http://www.ssa.gov/OP_Home/ssact/comp-ssa.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.

children for whom such services are specified in an IEP. The provider agreement, which takes the form of a Memorandum of Understanding, requires that services be provided in accordance with all applicable State regulations. As relevant here, the services specified in the provider agreements included occupational therapy, physical therapy, psychology, social work, speech-language pathology, service coordination (i.e., case management), and transportation. CMS Ex. 7b.

The OIG identified one or more of the following types of errors for each of the 209 claims for these services that it found were erroneously billed to Medicaid: 1) the services were not provided by a qualified health care provider; 2) case management services were limited to written case management, contrary to the State plan; 3) the services were not provided to the appropriate individual (i.e., case management contacts were with the teacher or related staff or the student was not present for other services); 4) the services were not authorized in the IEP; 5) transportation was provided on a date when there were no other covered services; and 6) there was insufficient documentation for the services.

Although insufficient documentation was treated as a separate category, many error findings in the other categories involve documentation questions. Based on uniform administrative requirements for grants, the Board has "consistently held that it is a fundamental principle of grants management that a grantee is required to document its costs, and that the burden of documenting the allowability . . . of costs for which funding was received rests with the grantee." Maryland Dept. of Human Resources, DAB No. 1875 (2003). Thus, in upholding many of the error findings, we do not necessarily find that the services for which Medicaid funding was claimed were not provided but simply that Maryland did not meet its obligation to document that the services were provided in accordance with the applicable requirements.

### Analysis

Since our determination regarding whether the claims are in error largely depends on the documentation for each claim, we discuss the claims individually below. Where the same analysis applies to more than one claim, we set it out fully in our discussion of the first claim and cross-reference it later.<sup>2</sup>

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<sup>2</sup> The briefs submitted by the parties and intervenors are  
(continued...)

Following our discussion of the individual claims, we address the statistical sampling issue.

### I. Individual Claims

#### Sample 3, claim 3 - case management: error finding upheld<sup>3</sup>

The OIG found this claim in error on the grounds that there was insufficient documentation of case management and that the documentation was falsified. The LEA, Anne Arundel County, admitted that the documentation originally provided to the auditors - the case manager's service log - was backdated. See CMS Ex. 17, Sample 3, at 4. DHMH relies instead on a written statement from the student's guardian dated 6/18/02 (DHMH Ex. 7) "certify[ing]" that the case management services provided included a phone call to the parents on 2/14/00 following up on an IEP report card. (The statement identifies the author as "parent/guardian;" however, DHMH states that she was the guardian. DHMH Br. at 8.) CMS does not dispute that such a contact would be billable as case management for the month in question (February 2000). However, to establish that such a contact occurred would at the very least require some basis to believe that the guardian's after-the-fact statement is reliable. The statement does not explain how the guardian could recall the contact over two years later (even assuming that she was referring to a phone call made to her) and there are no other indicia of reliability. Accordingly, we uphold the error finding.

#### Sample 4, claim 4 - case management: error finding upheld

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<sup>2</sup>(...continued)

organized primarily by issue and then sample number although many sample numbers involve more than one claim and some claims were found in error on more than one ground. Not all of the claims are specifically addressed in the briefs. In addition, the claims for Baltimore County, Baltimore City, and the remaining counties are discussed in separate briefs. To the extent that we have not addressed any material argument with respect to a particular claim, we presume that the parties will be able to determine whether the claim is in error based on the guidance we have provided regarding similar claims.

<sup>3</sup> The OIG identified the type of services for which each claim was made and the grounds for the error finding on a Schedule of Errors and, for most claims, on a spreadsheet for the sample number.

The OIG found this claim in error on the ground that there was only written case management. According to CMS and the OIG, the State plan requires at least one case management contact per month in person or by telephone. The Monthly Medicaid Billing Form (CMS Ex. 17, Sample 4, at 2) shows that the only contact during the month for which case management was billed was through a quarterly report sent home. DHMH does not point to any documentation of other case management contacts during the month. DHMH argues, however, that it had reasonably interpreted its State plan to permit written contacts to be claimed as a unit of case management service where an oral contact was not feasible.<sup>4</sup> DHMH further argues that this interpretation was consistent with longstanding State practice. DHMH Br. at 16, citing COMAR 10.09.52.04 (at DHMH Ex. 13).

The applicable State plan provision stated in relevant part:

b. A unit of service for ongoing service coordination includes:

- (1) At least one contact by the service coordinator in person or by telephone with the participant or the participant's parent or other responsible individual, on the participant's behalf, relating to the child's ongoing service coordination, and
- (2) The provision of any other necessary covered services under ongoing service coordination.

c. These services shall include:

\* \* \* \* \*

- (2) Maintaining contact with direct service providers and with a participant and a participant's parent or other responsible individual through home visits, office visits, school visits, telephone calls and follow-up services as necessary[.]

CMS Ex. 6c, at 4 (emphasis added).

DHMH acknowledges that it revised its regulations in 1998 to define a unit of case management service as including "[a]t least one contact by the service coordinator or IEP team in person, by telephone, or by written progress notes or log with the participant or the participant's parent, on the participant's

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<sup>4</sup> Unlike other types of health-related services, only one unit of case management, which may consist of contacts on multiple dates, is billed per month. See CMS Ex. 6d, at 1 (State plan Attachment 4.19).

behalf." DHMH Ex. 13, at 2. However, DHMH argues that it viewed this as a minor clarification that did not require it to revise its State plan since nothing in that plan "preclude[s] written communication where necessary[.]" DHMH Br. at 17.

There is no dispute that the State plan permitted written contacts as part of ongoing service coordination, i.e., case management. The issue, however, is whether the definition of a unit of case management service in the plan is met where none of the contacts between the service coordinator, i.e., case manager, and the child and/or the child's parent are in person or by telephone. On that point, the language of the plan is clear, since it requires "[a]t least one contact by the service coordinator in person or by telephone." Accordingly, while the Board has stated that it "will generally defer to a state's interpretation of ambiguous language in its own plan, provided the interpretation is reasonable and does not conflict with federal requirements" (Virginia Dept. of Medical Assistance Services, DAB No. 1838 at 13-14 (2002), quoting Louisiana Dept. of Health and Hospitals, DAB No. 1542, at 2 (1995)), the lack of ambiguity means that there is no basis for such deference here.

DHMH argues further that it should be permitted to modify a non-essential aspect of its plan in order to effectuate the underlying purpose of the plan to provide recipients adequate access to case management. DHMH Reply Br. at 10. This argument has no merit. The fact that Maryland was not required to include this provision in its State plan does not necessarily mean that it was not an essential part of the State plan. Even if we had a basis to differentiate between essential and non-essential parts of the State plan (and we do not), section 1903(a)(1) of the Act, which provides funding only for amounts expended "as medical assistance under the State plan," requires conformity with all plan provisions. DHMH correctly points out that, unlike some other cases in which the Board upheld disallowances of costs that were not claimed in accordance with a State plan, this case does not involve a rate increase or coverage for new services. Id. at 11, citing Missouri Dept. of Social Services, DAB No. 1229 (1991), and Arkansas Dept. of Human Services, DAB No. 998 (1998). However, nothing in the cited decisions indicates that those were the only situations in which a state must conform to the requirements of its plan.

DHMH attempts to explain the fact that, prior to the period covered by the disallowance, Maryland amended its regulations but not its State plan by stating that persons performing services and filing claims rely on the regulations, not the plan, for guidance. However, DHMH does not allege that there were any

obstacles to amending the State plan prior to the time period in question here. DHMH ultimately submitted a State plan amendment which, pursuant to 42 C.F.R. § 447.256(c), was effective on April 1, 2002. CMS Br. at 21. Since Maryland could have amended its plan earlier but did not, we see no reason to permit it to claim costs that were not incurred in accordance with the plan.

Accordingly, we uphold the error finding.

Sample 5, claim 5 - case management: error finding upheld

The OIG found this claim in error on the ground that the individual who provided the case management was not qualified as a case manager. The State plan requires that "[o]ngoing service coordination (i.e., case management)" be provided by a service coordinator. CMS Ex. 6c, at 4. The State regulations at COMAR 10.09.52.03.C.(2) state that a service coordinator may be a--

- (a) Professional who has a current license or certification, in accordance with §C(3) of this regulation, in the profession most immediately relevant to a participant's needs . . . .

Section C.3 states in relevant part:

A professional who is chosen as a participant's service coordinator shall meet the following licensing or certification requirements, as appropriate, and be:

\* \* \* \* \*

- (i) A speech therapist or speech pathologist:
    - (i) With at least a master's degree in speech pathology, and
    - (ii) Certified pursuant to COMAR 13A.12.03.11 or licensed pursuant to health Occupations Article, Title 20, Annotated Code of Maryland
- . . . .

The individual who provided the case management here was a speech therapist and thus needed to have a master's degree in order to be qualified as a service coordinator under the regulations quoted above. The Advanced Professional Certificate issued by the Maryland State Department of Education (MSDE) (CMS Ex. 17, Sample 5, at 3) shows that her highest degree was a bachelor's degree. DHMH does not point to any contrary evidence. Accordingly, we uphold the error finding.



Sample 5, claims 6-8 - speech therapy: error findings upheld

The OIG found these claims in error on the ground that the individual who provided the speech therapy neither qualified as a "speech pathologist or audiologist" nor provided the services "under the direction of a speech pathologist or audiologist" within the meaning of the applicable regulations. Under 42 C.F.R. §§ 440.1 and 440.110, "services for individuals with speech, hearing, and language disorders" are considered "medical assistance" for which FFP is available under title XIX of the Act. Section 440.110(c)(1) defines these services as--

diagnostic, screening, preventive, or corrective services provided by or under the direction of a speech pathologist or audiologist, for which a patient is referred by a physician or other licensed practitioner of the healing arts

. . . .

(2) A "speech pathologist or audiologist" is an individual who--

- (i) Has a certificate of clinical competence from the American Speech and Hearing Association;
- (ii) Has completed the equivalent educational requirements and work experience necessary for the certificate; or
- (iii) Has completed the academic program and is acquiring supervised work experience to qualify for the certificate.

(Emphasis added.)

To establish that the services were provided under the direction of a speech pathologist, DHMH relies on a letter dated 5/16/02 (CMS Ex. 17, Sample 5, at 2) from two individuals claiming to have the certificate of clinical competence required by section 440.110(c)(2)(i). The letter states that the signatories "provide support, assistance and clinical supervision for Speech Language Pathologists" employed by the school system in question (Anne Arundel), and that during fiscal year 2000, the direct service provider in question here as well as the direct service provider in Sample 10 "were providing Speech Language Pathologist diagnosis and treatment services for Medical Assistance eligible students under our direction[.]" CMS takes the position that this letter is insufficient to establish that services were provided "under the direction of" a speech pathologist because it fails to identify "which one directed the services of which therapist on which dates," and is "unsupported by any evidence showing what direction or supervision had been provided." CMS Br. at 11.

We conclude that DHMH failed to establish that the services were provided "under the direction of" a speech pathologist. The letter contains no indication of what is meant by "under our direction" and, as CMS points out, does not state that the speech therapist who was the direct service provider worked under the direction of a particular speech pathologist. Thus, it is unclear whether the speech therapist was in any way directed by a speech pathologist in the provision of the services to the particular student. DHMH nevertheless argues that the letter establishes at a minimum that the speech therapist was under the general supervision of a speech pathologist and that evidence of general supervision is sufficient, asserting that in Maryland, "under the direction of" was considered synonymous with "supervision." Since section 440.110(c)(1) requires that the services be provided under the direction of a speech pathologist, however, it is not sufficient to show that the person who provided the services was under the general supervision of a speech pathologist. Moreover, since elsewhere in the regulations CMS uses the phrase "under the supervision of" (see, e.g., 42 C.F.R. § 409.31(a) (skilled nursing and skilled rehabilitation services must be furnished directly by, or under the supervision of, specified personnel)), CMS's use of the phrase "under the direction of" here indicates that CMS intended to distinguish between "supervision" and "direction."

DHMH also notes that CMS's predecessor organization, the Health Care Financing Administration (HCFA), stated on 12/4/98 as follows:

While we have traditionally interpreted the term "under the direction of" a speech pathologist or audiologist to mean that the speech pathologist/audiologist must see a patient at least once, have some input as to the type of care provided and review the patient after treatment has begun, and assume legal responsibility for the services provided, we believe that in cases where services are being provided under the direction of a licensed practitioner, it is reasonable for States to look to their own State practice laws to determine when services are appropriately provided 'under the direction of' . . . ."

DHMH Br. at 11, quoting DHMH Ex. 12 (letter from Director, Center for Medicaid and State Operations, HCFA, to President, American Speech-Language-Hearing Association) (emphasis added). This argument is unavailing. That CMS viewed it as a state issue whether a service could appropriately be provided "under the direction of" a qualified individual (rather than "by" that individual) does not mean that CMS would defer to a state's

definition of what constitutes "under the direction of," since that is ultimately a matter of federal law. In any event, DHMH does not point to any State law in effect during the period in question that explains what was meant by "under the direction of." (The only State law identified in the record that addresses this matter is a regulation adopted after the period in question, which the parties agree does not govern here.)

Accordingly, we uphold the error findings.

Sample 7, claims 11, 14, 16, 18, 20, 22 - transportation: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of transportation.<sup>5</sup> The auditors found that any claim for transportation that was not supported by a "trip log" lacked sufficient documentation. CMS takes the position that a state must be able to document "that a particular trip for a particular student occurred on a particular date," although the documentation need not be in the form of a trip log. CMS Br. at 43, citing CMS Ex. 4b at 3 (State Medicaid Director Letter dated 5/21/99 stating that documentation of transportation "usually takes the form of a trip log maintained by the provider of the specialized transportation service"). DHMH relies on an attendance card (DHMH Ex. 8), which it claims shows that the student was in school on the dates for which transportation was claimed. Even if an attendance card were sufficient documentation of transportation, the attendance card cited is for a different student. Accordingly, we uphold the error findings.

Sample 7, claim 12 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. A service log (CMS Ex. 17, Sample 7, at 4) shows that the only case management encounter during the month was through a communication notebook sent to the mother. DHMH does not point to any documentation of other case management contacts during the month. Accordingly, we uphold the error finding.

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<sup>5</sup> CMS also found that claim 11 was in error because there was no covered medical assistance service on that date (12/1/99). However, there was a claim for speech services for that date which was not found in error. See OIG CD-ROM, AS3\_d, at p. 27.

Sample 8, claim 24 - transportation: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of transportation. DHMH relies on an attendance card (at DHMH Ex. 8) which it claims shows that the student was in school on the dates of service. Even if an attendance card were sufficient documentation of transportation, however, the attendance card cited is for a different student. Accordingly, we uphold the error finding.

Sample 9, claim 25 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. DHMH does not point to any documentation to show that there was such a contact. Accordingly, we uphold the error finding.

Sample 10, claims 27, 29, 31, 34 - speech therapy: error findings upheld

The OIG found these claims in error on the ground that the individual who provided the speech therapy neither qualified as a "speech pathologist or audiologist" nor provided the services "under the direction of a speech pathologist or audiologist" within the meaning of the applicable regulations. DHMH relies on the 5/16/02 letter described with respect to Sample 5, claims 6-8 to establish that the services were provided under the direction of a speech pathologist. That letter is inapposite since it addresses services provided in FY 2000 while the services in question here were provided in March 1999. In any event, for the reasons explained in the discussion of Sample 5, claims 6-8, the letter would not be sufficient to establish that the services were provided "under the direction of" a speech pathologist. Accordingly, we uphold the error findings.

Sample 10, claims 28, 30, 32, 33, 35 - transportation: error findings upheld

The OIG found all of these claims except claim 33 in error on the ground that there was no covered medical assistance service provided on the dates for which transportation was billed. The State plan covers transportation to and from a school where a Medicaid-covered service is provided if both the medical service and the transportation service are included on the child's IEP. CMS Ex. 6g (State Plan Attachment 3.1-D); see also CMS Ex. 9b, at

3 (COMAR 10.09.25.04). Providers may only bill "for transportation services on dates when other Medicaid-covered services are provided." CMS Ex. 9b, at 4 (COMAR 10.09.25.05). The speech therapy in claims 27, 29, 31, and 34 was provided on the same dates for which the transportation was billed (3/1/99, 3/8/99, 3/15/99, and 3/29/99) but did not constitute a covered medical assistance service for the reasons discussed above. DHMH does not point to any other services provided on those dates.

CMS also found all of these claims in error on the ground that there was insufficient documentation of the transportation services themselves. DHMH relies on documentation (DHMH Exs. 10 and 11) showing that the child attended school on the dates in question; however, DHMH does not point to any documentation to show that arrangements had been made for the child to ride the bus to school, much less that bus transportation was actually provided on the dates in question.

Accordingly, we uphold the error findings on the grounds identified above.

Sample 11, claim 36 - case management: error finding upheld

The OIG found this claim in error on the ground that the individual who provided the case management was not qualified as a case manager. As indicated in the discussion of Sample 5, claim 5, the State plan requires that case management be provided by a service coordinator, who may be a speech therapist with at least a master's degree in speech therapy. The individual in question here was the same speech therapist described in the discussion of Sample 5, claim 5, who had only a bachelor's degree.

The OIG also found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. The OIG spreadsheet (CMS Ex. 17, Sample 11) notes that there was a written case management encounter with the parent that was documented by an encounter form and that the coordination record noted "sent home folder." DHMH does not point to any documentation of other case management contacts during the month.

Accordingly, we uphold the error finding on both grounds.

Sample 11, claims 37-39 - speech therapy: error findings upheld

The OIG found these claims in error on the ground that the individual who provided the speech therapy neither qualified as a "speech pathologist or audiologist" nor provided the services "under the direction of a speech pathologist or audiologist" within the meaning of the applicable regulations. DHMH relies on the 5/16/02 letter described with respect to Sample 5, claims 6-8 to establish that the services were provided under the direction of a speech pathologist. For the reasons explained in that discussion, the letter is not sufficient to establish that the services were provided "under the direction of" a speech pathologist. Accordingly, we uphold the error findings on this ground.

Sample 13, claims 41, 45, 47, 48, 51, 53, 55, 56, 59, 62 - transportation: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of transportation. Baltimore County relies on a bus itinerary updated in June 2000 (BCPS Ex. 27, at 4-5) which shows stops at the student's address. Even if it were reasonable to infer from this that the student rode the bus to and from school in June 2000 or thereafter, however, the itinerary has no bearing on whether the child rode the bus in October 1999, the month for which the transportation was billed.<sup>6</sup>

The OIG also found claims 55 and 62 in error on the ground that transportation to and from school was unnecessary because the covered medical assistance services (social work services) were provided in the student's home. Baltimore County does not dispute the evidence in the record that the services were provided in the student's home (BCPS Ex. 25, at BCPS-13-0022-0023), making transportation unnecessary.<sup>7</sup>

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<sup>6</sup> The OIG spreadsheet (CMS Ex. 17, Sample 13, at 1-2) also notes for each of these claims that there was insufficient documentation of "driver qualifications." However, the BCPS Office of Transportation driving record (BCPS Ex. 40), together with the explanation of that record in BCPS Exhibit 45, establish that the bus driver was licensed on the dates for which transportation was billed.

<sup>7</sup> The OIG also found claims 45 and 51 in error on the ground that there was no covered medical assistance service on the dates for which transportation was billed (10/5/99 and

(continued...)

Accordingly, we uphold the error findings on the grounds identified above.

Sample 13, claim 43 - social work: error finding reversed

The OIG found this claim in error on the ground that the social worker did not meet with the student. State regulations provided: "Providers may not bill the Program for (1) Services . . . in which the participant is not present[.]" COMAR 10.09.50.06.B(1) (OIG CD-ROM B\_3\_3). In addition, the child's IEP (CMS Ex. 17, Sample 13, at 5) covered only social work services provided directly to the student. Baltimore County disputes CMS's view that the School Social Worker's Report for 10/4/99, the date for which services were billed (BCPS Ex. 25, at BCPS-13-0021), shows that the student was not present. The report is captioned "Psychosocial Consultation," states that the social worker "provided consultation to" the child's teacher, describes the child's behaviors that day, and states "Behavioral concerns were discussed, and suggestions were given." According to Baltimore County, this report indicates that the social worker met with both the student and the teacher. Baltimore County also relies on a declaration by the social worker dated 3/3/06 (BCPS Ex. 34) stating that she "provided both social work services to [the child] and consultation services to [the teacher] on" the date in question (*id.* at 2). CMS takes the position that the social worker's declaration is inconsistent with her earlier report and is entitled to no weight.

We find that the social worker's declaration is not clearly inconsistent with her earlier report since, contrary to what CMS suggests, there is nothing in the language of the report that indicates that the description of the student's behavior in the report was provided by the teacher to the social worker rather than based on the social worker's own observation of the student. Thus, the social worker's characterization, in her declaration, of the services provided as both social work services to the student and consultation services to the teacher is not unreasonable. Moreover, while the declaration was prepared after-the-fact, the social worker's recollection seems reliable since she noted that she had "a particular recollection of the events of this day because it was the first day to meet [the teacher]." BCPS Ex. 34, at 2.

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<sup>7</sup>(...continued)  
10/8/99). As indicated in our discussion of claims 44 and 50 below, however, we conclude that there was a covered medical assistance service on each of those dates.

Accordingly, we reverse the error finding.

Sample 13, claims 44, 50 - social work: error findings reversed

The OIG found these claims, for social work services on 10/5/99 and 10/8/99, in error on the ground that the services provided to the child exceeded the amount authorized by the IEP. A third claim, for social work services on 10/6/99, was not found in error. State regulations require that school health-related services be "[d]elivered in accordance with an IEP[.]" CMS Ex. 9c (COMAR 10.09.50.04(5)). The IEP (CMS Ex. 17, Sample 13, at 5) provided for .5 hours of social work services per week. According to CMS, all of the services authorized by the IEP were provided on 10/6/99 since the social worker's notes for that date (CMS Ex. 17, Sample 13, at 4) state that she worked with the student "all morning."

We conclude that the services on 10/5/99 and 10/8/99 were provided in accordance with the IEP. Federal regulations require that an IEP include the "anticipated frequency . . . and duration" of services. 34 C.F.R. § 300.347(a)(6) (1999) (emphasis added).<sup>8</sup> Thus, the frequency and duration of a particular service specified in an IEP is just an estimate of the services that will be needed. CMS does not cite any basis for a contrary reading other than to argue that ignoring the amount of services specified in the IEP renders the regulation meaningless. That argument might be persuasive in a situation where the IEP team had an opportunity to amend the IEP to reflect its changed view with respect to the frequency of the services. Here, however, there is no indication that the IEP team had any reason to expect that the child would need the services, described in the social worker's notes for 10/5/99 (CMS Ex. 17, Sample 13, at 3) as "crisis intervention services," prior to the week in question.<sup>9</sup>

Accordingly, we reverse the error findings.

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<sup>8</sup> This requirement currently appears in section 300.320(a)(7).

<sup>9</sup> CMS appeared to argue at one point that the IEP did not authorize the "crisis intervention services" provided here. However, Baltimore County responded, and CMS did not dispute, that crisis intervention is just a type of social work services.



Sample 13, claim 63 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. Baltimore County does not point to any documentation to show that such a contact occurred. Accordingly, we uphold the error finding.

Sample 14, claims 64 and 66-86 - transportation: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of transportation. Baltimore County relies on two 1999/2000 bus itineraries which specify revision dates of "11/15" (BCPS Ex. 25, at BCPS-14-0018 - 2025) which include stops at the student's address. Baltimore County also relies on "look-back checks" performed by its Office of Transportation on 2/17/00 and 5/30/00 (*id.* at BCPS-14-0026 - 0029) verifying that students listed on bus itineraries rode the bus on those dates. We need not reach the question whether it is reasonable to infer from the itineraries and look-back checks that the student rode the bus to and from school on the dates in March 2000 for which transportation was billed since there is another basis for finding the transportation claims in error. As indicated in the discussion of Sample 10, claim 28, the State plan covers transportation to and from school if the student receives a covered medical assistance service at school on the same date. As discussed below, the case management in claim 65, which was billed for the same month as the transportation at issue here, is not a covered medical assistance service because there was only written case management and the State plan requires at least one case management contact per month in person or by telephone in order to bill for a unit of case management service. Although the State plan defines case management to include written contacts, written contacts on the dates the transportation was provided cannot reasonably be considered covered medical assistance services in the absence of any in-person or telephone contact. There were no other medical assistance services billed for the dates in question. Accordingly, we uphold the error findings.

Sample 14, claim 65 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the

State plan requires at least one case management contact per month in person or by telephone. Baltimore County does not point to any documentation to show that such a contact occurred. Accordingly, we uphold the error finding.

Sample 16, claim 94 - case management: error finding upheld

The OIG found this claim in error on the ground that the individual who provided the case management was not qualified as a case manager. As indicated in the discussion of Sample 5, claim 5, the State plan requires that case management be provided by a service coordinator. The State regulations at COMAR 10.09.52.03.C.(2), quoted in part in that discussion, also state in relevant part that a service coordinator may be-

- (j) An education professional who is:
  - (i) Certified as a teacher pursuant to COMAR 13A.12.02, or
  - (ii) Certified as an administrator or supervisor pursuant to COMAR 13A.12.04.

The direct service provider here taught special education but, according to CMS, had no teacher's certificate as of the billing date (4/1/99). CMS points to a note on the OIG spreadsheet (CMS Ex. 17, Sample 16, at 2) that "Provider did not submit transcripts to MSDE for MSDE Cert due to illness per B. Feldman BCPSS Interim Dtr." Baltimore County does not point to any documentation to show that the direct service provider was certified during the month for which the unit of case management service was billed.

CMS also found this claim in error on the ground that there was insufficient documentation of case management. According to the OIG spreadsheet (CMS Ex. 17, Sample 16, at 1), the only documentation provided was an "encounter form" that indicates that there was an in-person meeting with the parent but does not describe the service. Baltimore City takes the position that this form provides all the information required to document a claim but does not provide a copy of the form.

Accordingly, we uphold the error finding on both grounds.

Sample 16, claim 95 - social work: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of social work. According to the OIG spreadsheet (CMS Ex. 17, Sample 16, at 1), due to a computer system error, a claim for psychological services for the same

date (claim 97) was originally billed as social work services, which were never provided. Baltimore City does not dispute this finding. Accordingly, we uphold the error finding.

Sample 16, claim 97 - psychological services: error finding reversed

The OIG found this claim in error on the ground that there was insufficient documentation for the services. The auditors made a finding of insufficient documentation for all claims for health-related services for which no "progress notes" were produced by the direct service provider describing the services rendered. CMS takes the position that such records of treatment are required by the applicable federal authorities, including section 1902(a)(27) of the Act (requiring that Medicaid providers keep, and furnish upon request, "such records as are necessary fully to disclose the extent of the services provided" to recipients) and 42 C.F.R. § 431.107(b) (requiring that a provider keep, and furnish upon request, "any records necessary to disclose the extent of services the provider furnishes to recipients"). Baltimore City argues that the cited authorities do not require a provider to produce progress notes or other records of treatment to support a claim for Medicaid funding. Baltimore City relies instead on the Monthly Encounter Form (CMS Ex. 17, Sample 16, at 5a) completed by the direct service provider for services billed for this student. This form contains a "Presenting Problem Code" corresponding to "Problems with Learning" and a "Procedure Code" corresponding to "Psychological Evaluation." See id. and CMS Ex. 18 (list of codes and explanations).

We conclude that this form is adequate to support the claim. On its face, the statutory and regulatory requirement to disclose "the extent of the services" does not require a narrative description of the interaction with the student such as might appear in progress notes. Although CMS's interpretation of the statute and regulation as requiring that documentation of health-related services include progress notes or the equivalent might be a reasonable one, CMS does not claim that it gave states any written notice of such an interpretation. The only interpretation of which Maryland had notice, as far as we are aware, appears in section 2500.2.A of CMS's State Medicaid Manual (Rev. 74, dated 11-91), which contains general information for claiming FFP for medical assistance expenditures under title XIX. This section directs states to "[r]eport only expenditures for which all supporting documentation, in readily reviewable form, has been compiled and which is immediately available when the claim is filed." OIG CD-ROM I\_1\_21, at 1. It goes on to state:

Your supporting documentation includes as a minimum the following: date of service, name of recipient, Medicaid identification number, name of provider agency and person providing the service, nature, extent, or units of service, and the place of service.<sup>10</sup>

A provider would comply with the documentation requirement as stated in the State Medicaid Manual by documenting (as relevant here) the nature or the extent or the units of service provided.<sup>11</sup> The procedure code in the encounter form constitutes a description of the nature of the services provided, the need for which is explained by the diagnosis code. Nothing in this language suggests that a more detailed description is required.<sup>12</sup>

CMS also argues that progress notes are required by State regulations, which require LEAs to maintain documentation of the "[n]ature, unit or units, and procedure or codes of covered services provided." See CMS Ex. 9c, at 8 (COMAR 10.09.50.06.A(2)).<sup>13</sup> However, the progress notes CMS accepted for other claims do not separately identify the nature, unit or units, and procedure or codes of the services in question. See,

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<sup>10</sup> The section of the State Medicaid Manual on outpatient psychiatric services refers to documentation including "updates describing the patient's progress." SMM Section 4221.D. However, there is no comparable requirement that applies generally to all health-related services provided as part of school-based services.

<sup>11</sup> CMS does not argue that the Monthly Encounter Form (or similar documentation Maryland relied on for other claims) did not include the other information required by the State Medicaid Manual.

<sup>12</sup> We see no reason why the generally applicable recordkeeping requirements cited by CMS are not satisfied here. See CMS Br. at 28, citing 45 C.F.R. § 74.21(b)(2) and (b)(7); see also id., n.18, citing OMB Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments, ¶ C.1.j. (made applicable by 45 C.F.R. §§ 74.27(a) and 92.20(a)(5) and currently published in 2 C.F.R. Chapter II); 42 C.F.R. § 431.17(a)(2); 42 C.F.R. § 433.32(a); and 42 C.F.R. § 447.202.

<sup>13</sup> The regulation cited applies to school health-related services. Similar provisions apply to transportation and case management. See CMS Ex. 9b, at 4 (COMAR 10.09.25.06.A(2)); CMS Ex. 9d, at 12 (COMAR 10.09.52.06.A(2)).

e.g., CMS Ex. 17, Sample 37, at 7a (cited in CMS Reply Br. at 18). Thus, CMS's position that the Monthly Encounter Form is unacceptable for that reason is unreasonable.<sup>14</sup>

CMS argues in addition that the information on a Monthly Encounter Form is inadequate because it does not assure that the services were in fact provided. As CMS's argument suggests, the purpose of the documentation requirement is "to assure that the expenditure was made on behalf of an eligible recipient for covered services rendered by a certified provider." SMM section 2497.4 (CMS Ex. 5b at 1). However, CMS does not explain why a detailed description of the services is necessary to provide this assurance where there is contemporaneous documentation of the services and CMS has identified no reason for questioning whether services were provided.<sup>15</sup> We note, moreover, that the IEP process that is set out in federal regulations provides oversight of a child's developmental progress and provides some assurance that the services provided are necessary and reasonable. See, e.g., 34 C.F.R. § 300.324 (Development, review, and revision of IEP).

Finally, CMS points out that the Monthly Encounter Form is a billing form and that "[t]he form is not comparable to the information that would be maintained by a health provider concerning the nature and extent of services provided." CMS Br. at 33. According to CMS, professional standards require that a health professional maintain progress notes (or the equivalent). CMS Br. at 31, citing CMS Ex. 10b, at 2, 5 (Paul-Brown, Diane, "Clinical record keeping in audiology and speech-language pathology," ASHA, 36, pp. 40-43 (May 1994)). (The OIG also relied on COMAR 10.41.02.04.H (Code of Ethics for speech language pathologists, requiring that "[t]he licensee shall maintain

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<sup>14</sup> Moreover, we see no reason why the documentation for health-related services needs to indicate the unit of service billed since, as discussed with respect to Sample 13, claims 44 and 50, the frequency and duration of a particular service specified in an IEP is just an estimate of the services that will be needed. In addition, it appears from the record that the billing rate for each type of service was the same regardless of the duration of the service.

<sup>15</sup> As CMS notes, there are a few instances in which the State admits that it billed for services that were not provided or in which it is clear from the record that the State billed for services that were not provided; however, CMS points to no indication of a systemic problem.

adequate records of professional services rendered . . . ." See OIG CD-ROM at L\_SI\_11.) However, CMS does not identify any requirement that a school system maintain such records in order to support a state's Medicaid claims for school-based services when other documents adequately evidence the extent of the services provided.

Accordingly, we reverse the error finding.

Sample 17, claim 98 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. Baltimore County does not point to any documentation to show that such a contact occurred. Accordingly, we uphold the error finding.

Sample 17, claims 99-110 - transportation: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of transportation. Baltimore County relies on a bus itinerary which specifies a revision date of 12/99 and includes a stop at the student's address (BCPS Ex. 43). Even if it were reasonable to infer from this that the student rode the bus to and from school in December 1999 or thereafter, however, the itinerary has no bearing on whether the child rode the bus on any of the dates in October 1999 for which the transportation was billed. Baltimore County also relies on look-back checks performed by its Office of Transportation on 9/20/00 and 11/15/00 (BCPS Ex. 25 at BCPS-17-0014 - 0015 and BCPS Ex. 28) verifying that students listed on bus itineraries rode the bus on those dates. There is no basis for concluding that these look-back checks reflect the student's normal routine in October 1999, however. Moreover, Baltimore County does not take the position that the look-back checks alone are probative evidence that transportation was provided on the dates billed. See, e.g., BCPS Reply Br. at 17-18.

The transportation claims are also in error on another basis. As indicated in the discussion of Sample 10, claim 28, the State plan covers transportation to and from school if the student receives a covered medical assistance service at school on the same date. As discussed above, the case management in claim 98, which was billed for the same month as the transportation at issue here, is not a covered medical assistance service because there was only written case management and the State plan

requires at least one case management contact per month in person or by telephone in order to bill for a unit of case management service. Although the State plan defines case management to include written contacts, written contacts on the dates the transportation was provided cannot reasonably be considered covered medical assistance services in the absence of any in-person or telephone contact. There were no other medical assistance services billed for the dates in question.

Accordingly, we uphold the error findings on both grounds.<sup>16</sup>

Sample 18, claim 111 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. Baltimore County does not point to any documentation to show that such a contact occurred. Accordingly, we uphold the error finding.

Sample 18, claims 112-128 - transportation: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of transportation. Baltimore County relies on two bus itineraries specifying revision dates of 10/99 and 2/00, which include stops at the student's address (BCPS Ex. 25, at BCPS-18-0019-0035). Baltimore County also relies on look-back checks performed by its Office of Transportation on 9/16/99 and 2/7/00 (BCPS Ex. 25 at BCPS-18-0036 - 0039) verifying that students listed on bus itineraries rode the bus on those dates. We need not decide whether it can be reasonably inferred from the itineraries and look-back checks that the student rode the bus to and from school on the dates in December 1999 for which transportation was billed since the claims are in error on another basis. As indicated in the discussion of Sample 10, claim 28, the State plan covers transportation to and from school if the student receives a covered medical assistance service at school on the same date. As discussed above, the case management in claim 111, which was billed for the same month as the

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<sup>16</sup> CMS also raised a question about whether the bus driver was licensed on the dates for which transportation was billed. However, the BCPS Office of Transportation driving record (BCPS Ex. 39), together with the explanation of that record in BCPS Exhibit 45, establish that the driver was licensed on those dates.

transportation at issue here, is not a covered medical assistance service because there was only written case management and the State plan requires at least one case management contact per month in person or by telephone in order to bill for a unit of case management service. Although the State plan defines case management to include written contacts, written contacts on the dates the transportation was provided cannot reasonably be considered covered medical assistance services in the absence of any in-person or telephone contact. There were no other medical assistance services billed for the dates in question. Accordingly, we uphold the error findings.

Sample 22, claim 132 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. Baltimore County does not point to any documentation to show that such a contact occurred. Accordingly, we uphold the error finding.

Sample 24, claim 134 - social work: error finding upheld

The OIG found this claim in error on the ground that the social worker did not meet with the student. State regulations provided: "Providers may not bill the Program for (1) Services . . . in which the participant is not present[.]" COMAR 10.09.50.06.B(1) (at OIG CD-ROM B\_3\_3). Baltimore City does not dispute that the student was not present or that this violated State regulations. Accordingly, we uphold the error finding.

Sample 28, claim 140 - case management: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of case management. DHMH does not point to any documentation of case management. Accordingly, we uphold the error finding.

Sample 29, claim 141 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. DHMH does not point to any documentation to show that such a contact occurred.



The OIG also found this case in error on the ground that the documentation was falsified. The record includes a letter from DHMH to the OIG (CMS Ex. 17, Sample 29, at 5-6) admitting that the case manager's signature on the billing form was forged, but stating that the services were in fact provided by someone else. DHMH does not point to any documentation of the services other than the billing form.

Accordingly, we uphold the error finding on both grounds.

Sample 30, claim 142 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. DHMH does not point to any documentation to show that such a contact occurred. Accordingly, we uphold the error finding.

Sample 32, claims 144, 145, 147, 148 - speech therapy: error findings upheld

The OIG found these claims in error on the ground that the individual who provided the speech therapy neither qualified as a "speech pathologist or audiologist" nor provided the services "under the direction of a speech pathologist or audiologist" within the meaning of the applicable regulations. DHMH argues that the direct service provider qualified as a speech pathologist under 42 C.F.R. § 440.110(c)(2)(ii) or (iii), which provide for such qualification if an individual has "completed the equivalent educational requirements . . . necessary for" a certificate of clinical competence from ASHA or "completed the academic program . . . to qualify for" such a certificate. The individual had a bachelor's degree and an Advanced Professional Certificate as a Speech Therapist issued by the Maryland State Department of Education (MSDE) (CMS Ex. 17, Sample 32, at 5). However, in order to qualify for an ASHA certificate, an individual must have at least a master's degree. CMS Ex. 10a (ASHA Membership and Certification Handbook), at 12-14. Thus, the individual did not complete the "educational requirements" or "academic program" necessary for an ASHA certificate. Even if the regulations can be read as requiring only completion of the coursework necessary to qualify for an ASHA certificate, that requirement was not met here. The necessary coursework consists of 75 semester hours of specified course work, including 30 semester hours in courses for which graduate credit was received. Id. at 14, 18. The bachelor's degree does not show that the

individual completed the "educational requirements" or "academic program" necessary for an ASHA certificate because it does not establish that she earned any graduate credit. In addition, the fact that the individual held a MSDE Advanced Professional Certificate is not sufficient to establish that she completed the "educational requirements" or "academic program" necessary for an ASHA certificate. COMAR 13a.12.03.11 (CMS Ex. 9f, at 8) permits an individual without a master's degree to be certified by MSDE as a speech pathologist if the individual has "a bachelor's degree and study at the graduate level with 60 semester hours" in specified areas. There is no basis in the record for determining whether the undergraduate and graduate level courses that the individual took in order to obtain the MSDE certificate included the 75 semester hours of specified coursework required for the ASHA certificate.

Accordingly, we uphold the error findings.<sup>17</sup>

Sample 32, claim 146 - case management: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of case management. The Weekly MA Services Record (DHMH Ex. 5, at 4) indicates that the claim was for an "IEP meeting" on 4/13/00, but the OIG spreadsheet (CMS Ex. 17, Sample 32, at 1) notes that the meeting minutes show that the meeting occurred the following month (on 5/30/00). DHMH does not point to any documentation of case management during April 2000, the month for which case management was billed. Accordingly, we uphold the error finding.

Sample 34, claims 150-152 - transportation: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of transportation. DHMH does not point to any documentation of transportation.

The OIG also found claim 150 in error on the ground that no covered medical assistance service was provided on the date for

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<sup>17</sup> The OIG also found the claims in error on the ground that there was insufficient documentation of speech therapy. DHMH relies on the County Board of Education "Weekly MA Services Record" (DHMH Ex. 5, at 2-3), which specifies a "service key" of "SP" (speech pathology) and a "service description" of "treatment" for each of the dates for which speech therapy was claimed. We need not decide whether the claims were in error on this additional ground, however.

which transportation was billed (2/22/97, a Saturday). As indicated in the discussion of Sample 10, claim 28, the State plan covers transportation to and from school if the student receives a covered medical assistance service at school on the same date. DHMH argues that additional documentation provided by the Wicomico County School System (DHMH Ex. 6) shows that speech therapy was provided by a speech pathologist on 2/22/97. However, the documentation pertains to speech therapy provided on 2/24/97 (the date of service for claim 151).

Accordingly, we uphold the error findings on the grounds identified above.

Sample 35, claim 153 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. DHMH does not point to any documentation to show that such a contact occurred. Accordingly, we uphold the error finding.

Sample 36, claim 158 - transportation: error finding upheld

The OIG found this claim in error on the ground that the student was absent on the date of service. The Baltimore City Pupil Transportation Weekly Pupil Attendance Roster (CMS Ex. 17, Sample 36, at 2) lists the student's name but has no entries (i.e., "A" for absent or "P" for present with pick up and drop off times) for the date for which the transportation was billed. DHMH does not point to any evidence showing that the student was present on that date. Accordingly, we uphold the error finding.

Sample 37, claims 159, 164, 165, 168, 171 - physical therapy: error findings reversed

The OIG found these claims in error on the ground that there was insufficient documentation of physical therapy. Baltimore City relies on the Monthly Encounter Form (BCPSS Ex. 18-Sample 37, Page 4), which contains a "Presenting Problem" code corresponding to "Multi-Handicapped/Mixed Developmental Disorder" and, for the dates of service of each of these claims, a "Procedure Code" corresponding to "Physical Therapy Treatment." For the reasons explained in the discussion of Sample 16, claim 97 above, this is an adequate description of the extent of the services when considered with the IEP. According, we reverse the error findings.

Sample 37, claim 160 - case management: error finding upheld

The OIG found this claim in error on the ground that the contact was with the teacher. To bill for a unit of case management service, the State plan requires "[a]t least one contact by the service coordinator in person or by telephone with the participant or the participant's parent or other responsible individual, on the participant's behalf[.]" CMS Ex. 6c, at 4 (emphasis added). Baltimore City does not argue that the teacher could be considered an "other responsible individual" under the State plan or point to any documentation to show that there was a contact with someone other than the teacher. Accordingly, we uphold the error finding.

Sample 37, claim 161 - physical therapy services: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of physical therapy. Baltimore City relies on the Monthly Encounter Form (BCPSS Ex. 18-Sample 37, Page 4), which contains a "Presenting Problem" code corresponding to "Multi-Handicapped/Mixed Developmental Disorder" and, for the date of service of this claim, a "Procedure Code" corresponding to "Lifting, Handling, Positioning." See *id.* and CMS Ex. 18 (list of codes and explanations). However, Baltimore City does not explain how the services described by this procedure code, which is separate from the three procedure codes in CMS Exhibit 18 that specifically refer to physical therapy (Physical Therapy Eval, Physical Therapy Trtmt, and Physical Therapy Consult), are related to physical therapy. Accordingly, we uphold the error finding.

Sample 37, claims 162, 167, 170 - speech therapy: error findings reversed

The OIG found these claims in error on the ground that there was insufficient documentation of speech therapy. Baltimore City relies on the Student Service Record (BCPSS Ex. 18-Sample 37, Page 9), which shows that "Speech Lang Therapy" was provided on each date for which services were billed. For the reasons stated in the discussion of Sample 16, claim 97, this is an adequate description of the extent of the services when considered with the IEP. Although there is no diagnosis code, we see no reason why this level of detail is required. Accordingly, we reverse the error findings.

Sample 37, claim 169 - occupational therapy: error finding reversed

The OIG found this claim in error on the ground that there was insufficient documentation of occupational therapy. Baltimore City relies on the Monthly Encounter Form (BCPSS Ex. 18-Sample 37, Page 1), which contains a "Presenting Problem" code corresponding to "Infantile Cerebral Palsy" and, for the date for which the service was billed, a "Procedure Code" corresponding to "Occupational Therapy Treatment." See *id.* and CMS Ex. 18 (list of codes and explanations). For the reasons stated in the discussion of Sample 16, claim 97, this is an adequate description of the extent of the services when considered with the IEP. Accordingly, we reverse this error finding.

Sample 37, claim 173 - physical therapy: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of physical therapy. Baltimore City relies on a Monthly Progress Note Log (BCPSS Ex. 18-Sample 37, Page 12) signed by a physical therapy assistant which contains an entry for the date for which physical therapy was billed noting that the case had been "handed over by" another physical therapy assistant and stating "Oriented to classroom staff & procedures." Baltimore City does not explain how this activity qualifies as physical therapy services.<sup>18</sup> Accordingly, we uphold this error finding.

Sample 37, claim 174 - physical therapy: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of physical therapy. Baltimore City states that the claim was in error "because of a keying error." BCPSS Reply Br. at 17, n.13. Accordingly, we uphold the error finding.

Sample 38, claims 178, 180, 182, 184, 187, 189, 191, 194 - transportation: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of transportation. According to the OIG spreadsheet (CMS Ex. 17, Sample 38, at 1-2), Baltimore City provided only one-way transportation but billed for a round trip.

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<sup>18</sup> Baltimore City argues that the auditors had approved payment of the claim. Even if that were the case, however, CMS would not be precluded from finding the claim in error.

The Weekly Pupil Attendance Roster (CMS Ex. 17, Sample 38, at 14-15) shows that the student rode the bus only in the afternoon on the dates for which transportation was billed. Baltimore City does not point to any other documentation of the transportation. Accordingly, we uphold the error findings.

Sample 39, claim 195 - case management: error finding upheld

The OIG found this claim in error on the ground that there was no IEP for the student. Baltimore City relies on printouts of a screen from its Special Education Tracking System (SETS) (BCPSS Ex. 18-Sample 39, Pages 1-4). According to Baltimore City, information from the IEP is keyed directly from the hard copy IEP into SETS, a computer database which tracks IEPs and the services provided pursuant to them. Even assuming that SETS printouts can reliably document the services authorized by an IEP, the SETS printouts here do not show that case management was authorized but simply that case management was provided. Baltimore City asserts that it was discouraged by the auditors from providing additional printouts from the SETS, but does not explain its failure to provide the relevant information on appeal.

CMS also found the claim in error on the ground that there was insufficient documentation of case management. Baltimore City relies on the Monthly Encounter Form (BCPSS Ex. 18-Sample 39, Page 5), which shows a billing date of 3/31/00, and indicates that there were several types of transactions, including "Meeting/Conference," "Reports, Letters," and "Calls," and that the interactions were with "Related Service Staff," "Parent/Guardian," Teachers," "Administration Staff," "Student," and "Outside Social Service." However, it cannot be determined from this form whether any of the transactions that were in person or by telephone were with the student or the student's parent or guardian. As indicated in the discussion of Sample 4, claim 4, and Sample 37, claim 160, to bill for a unit of case management, the State plan requires at least one case management contact per month, in person or by telephone, with the student, their parent, or other responsible individual acting on their behalf.

Accordingly, we uphold this error finding on both grounds.

Sample 40, claims 197-199 - speech therapy: error findings upheld

The OIG found all three claims in error on the ground that there was insufficient documentation of speech therapy. Baltimore City does not point to any documentation of speech therapy.

The OIG also found claims 198 and 199 in error on the ground that the individual who allegedly provided the speech therapy neither qualified as a "speech pathologist or audiologist" nor provided the services "under the direction of a speech pathologist or audiologist" within the meaning of the applicable regulations. Baltimore City relies on a 6/3/02 letter (OIG CD-ROM at I\_2\_3) stating that all individuals employed by Baltimore City as speech/language pathologists "worked under the direction of" the "Educational Specialist for Speech/Language Services" (who was a speech pathologist) "and the direct support and supervision" of nine Area Facilitators (who were also speech pathologists). Baltimore City also relies on an evaluation form dated 5/28/99 (BCPSS Ex. 11) showing that a speech pathologist made "ongoing" observations of the direct service provider's performance. For the reasons explained in the discussion of Sample 5, claims 6-8, neither the letter nor the evaluation form is sufficient to establish that the services were provided "under the direction of" a speech pathologist.

Accordingly, we uphold the error findings on the grounds identified above.

Sample 41, claims 200-202 - speech therapy: error findings reversed

The OIG found these claims in error on the ground that there was insufficient documentation of speech therapy. Baltimore City relies on the speech pathologist's service log (BCPSS Ex. 18 - Sample 41, Page 1), which, next to the student's name, shows a "Diagnosis Code" corresponding to "Developmental Speech or Lang Disorder" and specifies the duration of services on each date billed. See id. and CMS Ex. 18 (list of codes and explanations). (The entry under each date is the numeral "1," representing a one-hour unit of service, not the letter "I," which CMS claims describes an unexplained service.) For the reasons stated in the discussion of Sample 16, claim 97, this is an adequate description of the extent of the services when considered with the IEP. Accordingly, we reverse the error findings.

Sample 42, claim 203 - case management: error finding upheld

The OIG found this claim in error on the ground that the individual who provided the case management was not qualified as a case manager. As indicated in the discussion of Sample 16, claim 94, State regulations provide that an "education professional" who is certified as a teacher may qualify as a service coordinator, or case manager. The direct service provider here taught special education but, according to CMS, had

no teacher's certificate as of the billing date (10/01/99). CMS points to the individual's MSDE Provisional Degree certificate (CMS Ex. 17, Sample 42, at 2), which indicates that it is valid for the period 7/1/98 to 7/1/99. Baltimore County does not point to any documentation to show that the individual was certified as a teacher for a later period including the month for which case management was billed.

The OIG also found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. The Monthly Encounter Form (CMS Ex. 17, Sample 42, at 3) shows the only case management encounter during the month was through "Reports, Letters." Baltimore City does not point to documentation of any other case management contacts during the month.

In addition, the OIG found this claim in error on the ground that there was no IEP. Baltimore City does not point to any documentation to show that there was an IEP.

Accordingly, we uphold the error finding on all of the grounds.

Sample 44, claims 205-207 - speech therapy: error findings reversed

The OIG found these claims in error on the ground that there was insufficient documentation of speech therapy. Baltimore City relies on the speech pathologist's service log (BCPSS Ex. 18-Sample 44, Page 3), which, next to the student's name, shows a "Diagnosis Code" corresponding to "Developmental Speech or Lang Disorder" and a "Procedure Code" corresponding to "Speech/Lang Therapy" and specifies the duration of services on each date billed. See id. and CMS Ex. 18 (list of codes and explanations). (The entry under each date is the numeral "1," representing a one-hour unit of service, not the letter "I," which CMS claims describes an unexplained service.) For the reasons stated in the discussion of Sample 16, claim 97, this is an adequate description of the extent of the services when considered with the IEP. Accordingly, we reverse these error findings.

Sample 45, claims 209-212 - transportation: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of transportation. Baltimore City relies on a form captioned "Attendance/Third Party Billing for S/L Caseload" (BCPSS Ex. 18-Sample 45, Pages 2-3), which shows



services to the student on all the dates for which transportation was billed, as well as on a Class Attendance Roster (*id.* at Page 4) showing the student present in school on those dates. These documents do not establish that the student rode the bus to or from school on the dates in question, however.

Baltimore City also alleges in support of these claims that transportation was authorized by the student's IEP. Even if the IEP excerpt (BCPSS Ex. 18-Sample 45, Page 1) showed that to be the case (which it does not), it does not necessarily follow that the student rode the bus.

Accordingly, we uphold these error findings.

Sample 46, claim 213 - speech therapy: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of speech therapy. The OIG spreadsheet (CMS Ex. 17, Sample 46, at 1) notes "speech svc never actually occurred on DOS [date of service]." Baltimore City does not point to any documentation to show that services were provided. Accordingly, we uphold the error finding.

Sample 46, claim 214 - case management: error finding upheld

The OIG found this claim in error on the ground that the contact was with the teacher. As indicated in the discussion of Sample 37, claim 160, to bill for a unit of case management, the State plan requires at least one case management contact per month with the student, their parent, or other responsible individual acting on their behalf. The Attendance/Third Party Billing form (CMS Ex. 17, Sample 46, at 2-3) lists one case management contact regarding this student in August 1999, the month for which case management was billed, and indicates that the contact involved only an interaction with teachers. Baltimore City does not argue that a teacher could be considered an "other responsible individual" under the State plan or point to documentation of any other case management contacts during that month. Accordingly, we uphold the error finding.

Sample 47, claim 215 - case management: error finding upheld

The OIG found this claim in error on the ground that there was no IEP. Baltimore City asserts that there is a paper IEP for this student, but the IEP excerpt it identified as pertaining to this student (BCPSS Ex. 7, cited in BCPSS Br. at 13, n.13) is for a different student. Although CMS identified this error in its brief (CMS Br. at 39), Baltimore City did not provide any other

documentation to show that there was an IEP for this student. Accordingly, we uphold the error finding.

Sample 47, claims 216, 217 - psychological services: error findings upheld

The OIG found these claims in error on the ground that there was no IEP. The claims involve the same student as Sample 47, claim 215. Accordingly, we uphold the error findings.

Sample 48, claims 219, 221, 223 - social work: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of social work. Baltimore City does not point to any documentation of social work. Accordingly, we uphold the error findings.

Sample 48, claims 220, 222, 224 - transportation: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of transportation. Baltimore City does not point to any documentation of transportation. Accordingly, we uphold the error findings.<sup>19</sup>

Sample 49, claims 225, 231, 232 - speech therapy: error findings upheld

The OIG found these claims in error on the ground that the individual who provided the speech therapy neither qualified as a "speech pathologist or audiologist" nor provided the services "under the direction of a speech pathologist or audiologist" within the meaning of the applicable regulations. Baltimore City relies on a 6/3/02 letter (OIG CD-ROM at I\_2\_3) stating that all individuals employed by Baltimore City as speech/language pathologists "worked under the direction of" the "Educational Specialist for Speech/Language Services" (who was a speech

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<sup>19</sup> The OIG also found these claims in error on the ground that there was no IEP covering the dates of service. The IEP in the record (CMS Ex. 17, Sample 48, at 3) has an effective date following the dates for which transportation was billed. A SETS printout (id. at 4) shows that there was an IEP that was undergoing revision during the month for which transportation was billed. However, we need not reach the question whether this reliably documents that an IEP was in effect during that month.

pathologist) "and the direct support and supervision" of nine Area Facilitators (who were also speech pathologists). Baltimore City also relies on an evaluation form signed by a speech pathologist on 6/5/00 (BCPSS Ex. 18-Sample 49, Page 5). For the reasons explained in the discussion of Sample 5, claims 6-8, neither the letter nor the evaluation form is sufficient to establish that the services were provided "under the direction of" a speech pathologist.<sup>20</sup>

Baltimore City relies in addition on the report of a site visit by a speech pathologist on 10/27/99 (BCPSS Ex. 18-Sample 49, Page 2) which shows that the speech pathologist reviewed student folders and determined that the therapy plans "reflect objectives, materials and follow up." We need not decide whether it is reasonable to infer that the speech therapy billed for the day following the site visit (on 10/28/99 for claim 232) was provided under the direction of the speech pathologist since, as discussed below, there is another ground for finding that claim in error. Since the remaining two claims were for services provided prior to the 10/27/99 site visit (on 10/6/99 for claim 225 and on 10/14/99 for claim 231), however, the site visit report cannot logically show that the speech therapist was directed by the speech pathologist in the provision of these services. Thus, with respect to these claims, the site visit report does no more than show that the direct service provider worked under the general supervision of the speech pathologist. The same is true of a 3/17/00 memorandum from the speech pathologist regarding her classroom observation the prior week (BCPSS Ex. 18-Sample 49, Page 4). For the reasons explained in the discussion of Sample 5, claims 6-8, this is not sufficient to establish that the services were provided "under the direction of" a speech pathologist.

The OIG found claim 232 in error on the additional ground that there was insufficient documentation of speech therapy. Baltimore City relies on a form captioned "Attendance/Third Party Billing for S/L Caseload" (CMS Ex. 17, Sample 49, at 13), which notes the duration of services to the student on the date of service billed. This is not an adequate description of the services, however. There are two procedure codes for speech

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<sup>20</sup> It is unclear from the record whether Baltimore City is arguing in the alternative that the direct service provider was herself a speech pathologist because she held a MSDE Advanced Professional Certificate. As discussed with respect to Sample 32, claim 144, however, this certification is not sufficient to establish that an individual qualifies as a speech pathologist.

services, for "Speech/Lang Diag Eval" and "Speech/Lang Therapy" (see CMS Ex. 18), and the form identifies the services only as "S/L," which does not indicate which of these services was provided.

Accordingly, we uphold the error findings on the grounds identified above.

Sample 49, claims 226-228, 230 - social work: error findings reversed

The OIG found these claims in error on the ground that there was insufficient documentation of the social work. The Monthly Encounter Form (CMS Ex. 17, Sample 49, at 20) contains a "Presenting Problem" code corresponding to "Mental & Behavioral Problems" and, for each date for which services were billed, a "Procedure Code" corresponding to "Social Work Serv." See id. and CMS Ex. 18 (list of codes and explanations). For the reasons stated in the discussion of Sample 16, claim 97, this is an adequate description of the extent of the services when considered with the IEP. Accordingly, we reverse the error findings.

Sample 49, claim 229 - case management: error finding upheld

The OIG found this claim in error on the ground that the case manager did not meet with the parent or student. As indicated in the discussion of Sample 39, claim 160, to bill for a unit of case management, the State plan requires at least one case management contact per month with the student, their parent, or other responsible individual acting on their behalf. The IEP Team Meeting Minutes/Evaluation Report (CMS Ex. 17, Sample 49, at 2, 6) shows that there was an IEP team meeting on 10/20/99 (also the billing date for the claim) and that documents were "mailed/hand delivered to the parent" on 10/25/99. This indicates that neither the parent nor other responsible individual was at the IEP team meeting. Baltimore City does not point to any documentation of other case management contacts during the month. Accordingly, we uphold the error finding.

Sample 50, claims 234-236 - speech therapy: error findings reversed

The OIG found these claims in error on the ground that there was insufficient documentation of speech therapy. Baltimore City relies on the speech pathologist's service log (BCPSS Ex. 18-Sample 50, Page 1), which, next to the student's name, shows a "Diagnosis Code" corresponding to "Developmental Speech or Lang

Disorder" and a "Procedure Code" corresponding to "Speech/Lang Therapy" and specifies the duration of the services on each date billed. See id. and CMS Ex. 18 (list of codes and explanations). For the reasons stated in the discussion of Sample 16, claim 97, this is an adequate description of the extent of the services when considered with the IEP. Accordingly, we reverse the error findings.

Sample 51, claim 237 - case management: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of case management. The OIG spreadsheet (OIG CD-ROM, AS3\_D at page 87) indicates that the "case management encounter" was with "svc provider" and notes that "parent did not attend mtg - recvd comm log." As indicated in the discussions of Sample 4, claim 4 and Sample 37, claim 160, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone with the student, their parent, or other responsible individual acting on their behalf. Baltimore City does not point to any documentation of case management contacts to show that the required contact occurred. Accordingly, we uphold the error finding.

Sample 52, claim 240 - case management: error finding upheld

The OIG found this claim in error on the ground that the individual who provided case management was not qualified as a case manager. As indicated in the discussion of Sample 16, claim 94, State regulations provide that an "education professional" who is certified as a teacher may qualify as a service coordinator, or case manager. The direct service provider here taught special education but, according to CMS, had no teacher's certificate as of the billing date (12/1/99). CMS relies on the individual's MSDE Provisional Degree certificate (CMS Ex. 17, Sample 52, at 2), which indicates that it is valid for the period 7/1/98 to 7/1/99. Baltimore City does not point to any evidence that the individual was certified as a teacher for a later period including the month for which case management was billed.

The OIG also found this claim in error on the ground that there was insufficient documentation of case management. Baltimore City does not point to any documentation of case management contacts.

Accordingly, we uphold the error finding on both grounds.

Sample 55, claim 243 - case management: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of case management. The Communication Log (BCPSS Ex. 18-Sample 55, at 4), which includes entries dating from 5/8/99 to 4/14/00, does not refer to any case management contacts in the month for which case management was billed (September 1999). Baltimore City does not point to any other documentation of case management contacts. Accordingly, we uphold the error finding.

Sample 55, claims 244-246 - speech therapy: error findings reversed

The OIG found these claims in error on the ground that there was insufficient documentation of speech therapy. The speech pathologist's service log (BCPSS Ex. 18-Sample 55, Page 1) shows, next to the student's name, a "Diagnosis Code" corresponding to "Developmental Articulation Disorder" and a "Procedure Code" corresponding to "Speech/Lang Therapy" and specifies the duration of services on each date billed. See id. and CMS Ex. 18 (list of codes and explanations). For the reasons stated in the discussion of Sample 16, claim 97, this is an adequate description of the extent of the services when considered with the IEP. Accordingly, we reverse the error findings.

Sample 55, claim 247 - speech therapy: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of speech therapy. None of the documentation submitted by Baltimore City for this sample number (at BCPSS Ex. 18) refers specifically to speech therapy provided on the billing date for this claim, nor does the documentation submitted by CMS (at CMS Ex. 17). Accordingly, we uphold the error finding.

Sample 56, claims 249, 250 - psychological services: error findings reversed

The OIG found these claims in error on the ground that there was insufficient documentation of psychological services. The Monthly Encounter Form (CMS Ex. 17, Sample 56, at 2) contains a "Presenting Problem" code corresponding to "Disturbance of Emotions" and, for the date of service of each of these claims, a "Procedure Code" corresponding to "Psychological Serv." See id. and CMS Ex. 18 (list of codes and explanations). For the reasons stated in the discussion of Sample 16, claim 97, this is an adequate description of the extent of the services when

considered with the IEP. Accordingly, we reverse the error findings.

Sample 57, claim 251 - case management: error finding upheld

The OIG found this claim in error on the ground that the individual who provided the case management was not qualified as a case manager. As indicated in the discussion of Sample 16, claim 94, State regulations provide that an "education professional" who is certified as a teacher may qualify as a service coordinator, or case manager. The direct service provider here taught special education but, according to CMS, had no teacher's certificate as of the billing date (3/1/00). CMS points to the individual's MSDE "Provisional Degree" certificate (CMS Ex. 17, Sample 57, at 2), which indicates that it is valid for the period 7/1/98 to 7/1/99. Baltimore City does not point to any documentation to show that the individual was certified as a teacher for a later period including the month for which case management was billed.

The OIG also found this claim in error on the grounds that the contact was with the teacher and that there was insufficient documentation of case management. The Monthly Encounter Form (CMS Ex. 17, Sample 57, at 4) shows only one date of service during the month for which case management was billed, during which there was an interaction with teachers during a classroom visit. As indicated in the discussion of Sample 37, claim 160, to bill for a unit of case management, the State plan requires at least one case management contact per month with the student, their parent, or other responsible individual acting on their behalf. Baltimore City does not argue that a teacher could be considered an "other responsible individual" under the State plan or point to any documentation of other case management contacts. Since the Monthly Encounter Form did not evidence the required contact, we need not address whether it otherwise constituted sufficient documentation of case management.

Accordingly, we uphold the error finding on both grounds.

Sample 57, claims 252-255 - speech therapy: error findings reversed

The OIG found these claims in error on the ground that there was insufficient documentation of speech therapy. The speech pathologist's service log (BCPSS Ex. 18-Sample 57, Page 2) shows, next to the student's name, a "Diagnosis Code" corresponding to "Developmental Speech or Lang Disorder" and a "Procedure Code" corresponding to "Speech/Lang Therapy" and specifies the duration

of services on each date billed. See id. and CMS Ex. 18 (list of codes and explanations). For the reasons stated in the discussion of Sample 16, claim 97, this is an adequate description of the extent of the services when considered with the IEP. Accordingly, we reverse the error findings.

Sample 59, claim 262 - transportation: error finding upheld

The OIG found this claim in error on the ground that transportation is not authorized in the student's IEP. As indicated in the discussion of Sample 10, claim 28, the State plan and state regulations require such authorization. An excerpt from the IEP (CMS Ex. 17, Sample 59, at 2) has check-boxes for supplementary services including "MTA Transportation" and "Special Transportation;" however, neither of these is checked.

The OIG also found this claim in error on the ground that there was insufficient documentation of transportation. Baltimore City does not point to any documentation of transportation.

Accordingly, we uphold the error finding on both grounds.

Sample 60, claim 263 - case management: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of case management. The OIG spreadsheet (OIG CD-ROM AS3\_d, at 96) indicates that there was no documentation of a case management encounter in person or by telephone with the parent or child. As indicated in the discussion of Sample 37, claim 160, to bill for a unit of case management, the State plan requires at least one contact per month in person or by telephone with the student, their parent, or other responsible individual acting on their behalf. Baltimore City does not point to documentation to show that a contact with one of these persons occurred. Accordingly, we uphold the error finding.

Sample 60, claims 264, 265, 267, 268 - social work: error findings reversed

The OIG found these claims in error on the ground that there was insufficient documentation of social work. The Monthly Encounter Form (BCPSS Ex. 18-Sample 60, Page 3) shows a "Presenting Problem" code corresponding to "Disturbance of Conduct" and a "Procedure Code" corresponding to "Social Work Serv." See id. and CMS Ex. 18 (list of codes and explanations). For the reasons stated in the discussion of Sample 16, claim 97, this is an



adequate description of the extent of the services when considered with the IEP. Accordingly, we reverse the error findings.

Sample 60, claim 266 - speech therapy: error finding reversed

The OIG found this claim in error on the ground that there was insufficient documentation of speech therapy. The speech pathologist's service log (BCPSS Ex. 18- Sample 60, Page 2), shows, next to the student's name, a "Diagnosis Code" corresponding to "Developmental Speech or Lang Disorder" and a "Procedure Code" corresponding to "Speech/Lang Therapy" and specifies the duration of services on the date billed. See id. and CMS Ex. 18 (list of codes and explanations). For the reasons stated in the discussion of Sample 16, claim 97, this is an adequate description of the extent of the services when considered with the IEP. Accordingly, we reverse the error finding.

Sample 61, claim 269 - case management: error finding upheld

The OIG found this claim in error on the ground that the contact was with the teacher or related staff. As indicated in the discussion of Sample 37, claim 160, to bill for a unit of case management, the State plan requires at least one case management contact per month with the student, their parent, or other responsible individual acting on their behalf. The Monthly Encounter Form (CMS Ex. 17, Sample 61, at 4) shows that case management during the month for which this claim was billed (January 2000) consisted of an interaction with "Related Service Staff" on 1/8/00. Baltimore City relies instead on a 5/9/02 letter from the case manager (id. at 3) stating in part: "I testify that I had direct contact with [the student] and her grandfather during January 2000. During these contacts, I had interactions that were intended to coordinate [the student's] plan of care." There is nothing in the contemporaneous documentation (the Monthly Encounter Form) that suggests that the case manager may have had direct contact with the student or her grandfather, however. Moreover, to establish that such a contact occurred based on the case manager's after-the-fact statement would at the very least require some basis to believe that it is reliable. The statement does not explain how the case manager could recall the contact over two years later and there are no

other indicia of reliability. Accordingly, we uphold the error finding.<sup>21</sup>

Sample 64, claim 272 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. The billing form for the services (CMS Ex. 17, Sample 64, at 2) shows the following "outcome" for 8/31/99, which was during the month for which case management was billed: "Written Note Sent Home to Parent/Guardian Regarding Child's Progress." Baltimore City does not point to documentation of any other case management contacts during the month. Accordingly, we uphold this error finding.

Sample 65, claims 273, 274 - social work: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of social work. The OIG spreadsheet (OIG CD-ROM, AS3\_d, at page 101) indicates that the basis for the finding of insufficient documentation was that there was no IEP.

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<sup>21</sup> The OIG also found this claim in error on the ground on the ground that the individual who provided the case management was not qualified as a case manager. As indicated in the discussion of Sample 16, claim 94, State regulations provide that an "education professional" who is certified as a teacher may qualify as a service coordinator, or case manager. The direct service provider taught special education but, according to CMS, had no teacher's certificate as of the billing date (1/1/00). Baltimore City relies on a form dated 12/01/01 requesting renewal of the individual's MSDE "Provisional Degree" certificate for the period 7/1/98 to 7/1/99 (BCPSS Ex. 12). A checkbox is checked next to the word "Provisional" followed by the handwritten notation "7/01/99 - 7/01/00 7/01/00 - 7/01/01." Baltimore City also relies on a 11/19/02 letter from a BCPSS certification specialist saying that the MSDE database shows that the individual had a "Maryland provisional teaching certificate in January 2000." BCPSS Ex. 14. It appears from this documentation that the individual was retroactively certified as a special education teacher for a period including the month for which case management was billed. CMS does not explain why retroactive certification would not satisfy the requirements of the State regulations. Thus, the claim was not in error on this basis.

Baltimore City does not point to any documentation to show that there was an IEP. Accordingly, we uphold the error findings.<sup>22</sup>

Sample 65, claim 275 - case management: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation for the services. The OIG spreadsheet (OIG CD-ROM, AS3\_d, at page 101) indicates that the basis for this finding was that the participant (i.e., the student) was not present for the case management services. As indicated in the discussion of Sample 37, claim 160, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone with the student, their parent, or other responsible individual acting on their behalf. Even if there was no in-person case management contact with the student, as the auditors' notes suggest, a telephone contact with the student or an in-person or telephone contact with their parent or other responsible individual acting on their behalf would have met the requirements of the State plan. However, Baltimore City does not point to documentation of any case management contacts. Accordingly, we uphold the error finding.

The OIG also found this claim in error on the ground that there was insufficient documentation of case management. The OIG spreadsheet (OIG CD-ROM, AS3\_d, at page 101) indicates that there was no IEP. Baltimore City does not point to any documentation to show that there was an IEP.

Accordingly, we uphold the error finding.

Sample 66, claim 276 - case management: error finding upheld

The OIG found this claim in error on the ground that the case management encounter was with the teacher or related staff. As indicated in the discussion of Sample 37, claim 160, to bill for a unit of case management, the State plan requires at least one case management contact per month with the student, their parent, or other responsible individual acting on their behalf. The Monthly Encounter Form (CMS Ex. 17, Sample 66, at 2) lists only one case management encounter, which was with "Related Service

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<sup>22</sup> The OIG's Schedule of Errors (OIG CD-ROM, AS3\_d, at page 100) does not include claim 274. However, this claim appears on the OIG spreadsheet for Sample 65 (id. at 101) as well as on the Schedule of Errors by Claim (id. at 12-18) and was included in the calculation of the disallowance.

Staff." Baltimore City does not argue that a teacher could be considered an "other responsible individual" under the State plan or point to documentation of any other case management contacts. Accordingly, we uphold the error finding.

Sample 66, claim 277 - social work: error finding reversed

The OIG found this claim in error on the ground that there was insufficient documentation of social work. The Monthly Encounter Form (BCPSS Ex. 18-Sample 66, Page 3) shows a "Presenting Problem" code corresponding to "Disturbance of Conduct" and, for the date of service, a "Procedure Code" corresponding to "Individual Psychotherapy." See *id.* and CMS Ex. 18 (list of codes and explanations). (CMS does not argue that psychotherapy could not be billed as social work services or that the direct service provider was not qualified to provide the services.) For the reasons stated in the discussion of Sample 16, claim 97, this is an adequate description of the extent of the services when considered with the IEP. Accordingly, we reverse the error finding.

Sample 69, claim 282 - case management: error finding upheld

The OIG found this claim in error on the ground that the individual who provided case management was not qualified as a case manager. As indicated in the discussion of Sample 16, claim 94, State regulations provide that an "education professional" who is certified as a teacher may qualify as a service coordinator, or case manager. The direct service provider here taught special education but, according to CMS, had no teacher's certificate as of the billing date (2/8/00). This is the same individual discussed with respect to Sample 57, claim 251, who had a MSDE "Provisional Degree" certificate valid only for the period 7/1/98 to 7/1/99. Accordingly, we uphold the error finding.

Sample 71, claims 284-287 - psychological services: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of psychological services. The OIG spreadsheet (OIG CD-ROM at AS3\_d, page 107) indicates that the basis for the finding of insufficient documentation was that there was no IEP. Baltimore City relies on a SETS printout (BCPSS Ex. 18-Sample 71, page 1) which shows that there was an IEP covering the dates for which the services were billed. Even if SETS printouts can reliably document that an IEP existed, however, the printout does not show whether or not psychological

services were authorized. Accordingly, we uphold the error finding.<sup>23</sup>

Sample 72, claims 289-293 - speech therapy: error findings withdrawn

Based on additional documentation provided by Baltimore County, CMS withdrew the finding that these claims were in error on the ground that the direct service provider was not qualified. CMS Br. at 14.

Sample 72, claim 294 - speech therapy: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of speech therapy, specifically, that the child was not in attendance and the services were not provided.<sup>24</sup> Baltimore County concedes that it cannot document that the student received the services on the billing date, which was marked as a snow day on the therapist's report. BCPS Reply Br. at 8, n.18. Accordingly, we uphold the error finding.

Sample 73, claim 295 - case management: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of case management. The OIG spreadsheet (CMS Ex. 17, Sample 73, at 1) notes that the Monthly Encounter Form did not state with whom the case manager met or the type of interaction. As indicated in the discussion of Sample 37, claim 160, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone with the student, their parent, or other responsible individual acting on their behalf. The

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<sup>23</sup> The OIG also found that the claims were insufficiently documented because there were no progress notes or attendance records. OIG CD-ROM, AS3\_d, at page 107. However, the "Presenting Problem" code and the "Procedure Code" on the Monthly Encounter Form (BCPSS Ex. 18-Sample 71, at 2) adequately describe the extent of the services. In addition, since CMS does not point to any basis for believing that the student was not present on the dates for which the psychological services were billed, we see no reason to require independent verification of attendance. Thus, the claims were not in error on these grounds.

<sup>24</sup> CMS withdrew the finding that this claim was in error on the ground that the direct service provider was not qualified. See CMS Br. at 14.

Monthly Encounter Form (BCPSS Ex. 18-Sample 73, Page 1) lists only one case management encounter, on 10/13/99, but does not specify the type of contact or whom it was with. Baltimore City relies on a letter from the student's case manager (*id.* at Page 2), undated but presumably written in 2002 during the audit, stating "I attest that I had direct contact with [the student] and his mother during October 1999. During this contact(s), I had continuous interactions that were intended to coincide with [the student's] specific education goals." However, to establish that the case manager had direct contact with the student or his mother based on this after-the-fact statement would at the very least require some basis to believe that it was reliable. The statement does not explain how the case manager could recall the contact over two years later and there are no other indicia of reliability. Accordingly, we uphold the error finding.

Sample 75, claims 297-299 - speech therapy: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of speech therapy. The OIG spreadsheet (OIG CD-ROM at AS3\_d, page 75) notes that there was a Monthly Encounter Form for these claims; however, neither party supplied this form for the record. Although we have accepted such forms as providing adequate documentation for other claims, we do not know what information appears on the form for these particular claims. Accordingly, we uphold the error findings.

Sample 77, claim 301 - case management: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of case management. Baltimore City relies on a Monthly Encounter Form (BCPSS Ex. 18-Sample 77, Page 2) indicating that there was a "Classroom Visit" with the "Parent/Guardian" during the month for which case management was billed (September 1999) and that the "Activity/Outcome" was "Other." Baltimore City also relies on a 1/22/02 memorandum from the case manager (*id.* at Page 1) stating that she "remember[ed] interactions with the guardian/parent of [the student] during September 1999 school year." The memorandum continues: "Although I do not have any clinical notes to substantiate that the guardian/parent did visit the classroom on the date in question, I do recall that [the student's] grandmother often visited the classroom during morning entry." The memorandum appears to say that the purpose of the visits was at least in part "to monitor student progress." CMS takes the position that "Other" is an insufficient description of the services and that the case manager "could not substantiate the visit or what services were provided." CMS Reply Br. at 20.

As indicated earlier, the State plan requires that, to bill for a unit of case management, there must be a contact "relating to the child's Ongoing Service Coordination[.]" The word "Other" on the Monthly Encounter Form is not sufficient to establish that the case management contact was for this purpose. Moreover, even if the case manager's memorandum could be read as indicating that the visits related to ongoing service coordination, it is not clear that the memorandum describes any contacts made in the month for which the case management covered by this claim was billed since the memorandum refers to the "September 1999 school year" (emphasis added).

Accordingly, we uphold the error finding.

Sample 77, claims 302-305 - speech therapy: error findings upheld

The OIG found these claims in error on the ground that the individual who provided the speech therapy neither qualified as a "speech pathologist or audiologist" nor provided the services "under the direction of a speech pathologist or audiologist" within the meaning of the applicable regulations. Baltimore City relies on a 6/3/02 letter (OIG CD-ROM at I\_2\_3) stating that all individuals employed by Baltimore City as speech/language pathologists "worked under the direction of" the "Educational Specialist for Speech/Language Services" (who was a speech pathologist) "and the direct support and supervision" of nine Area Facilitators (who were also speech pathologists). Baltimore City also relies on an evaluation form (BCPSS Ex. 18-Sample 77, Page 16) signed by a speech pathologist evaluating the speech therapist's performance during the school year. Although the evaluation form shows that the speech pathologist observed the speech therapist on 6/10/99, the date of service of claim 303, there is no basis for concluding that the observation necessarily occurred at the time on that date when the speech therapist was providing services to the particular student in question here. Thus, both documents show only that the direct service provider worked under the general supervision of a speech pathologist. For the reasons explained in the discussion of Sample 5, claims 6-8, this is not sufficient to establish that the services were provided "under the direction of" a speech pathologist.

The OIG also found claims 302 and 305 in error on the ground that there was insufficient documentation of speech therapy.<sup>25</sup>

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<sup>25</sup> Although the OIG found claims 303 and 304 in error on this ground as well as on the ground that the child was not in  
(continued...)

Baltimore City relies on a form captioned "Attendance/Third Party Billing for S/L Caseload" (BCPSS Ex. 18-Sample 77, Page 5), which notes the duration of services to the student on the date of service for claim 302 (9/3/99). This is not an adequate description of the services, however. There are two procedure codes for speech services, for "Speech/Lang Diag Eval" and "Speech/Lang Therapy" (see CMS Ex. 18), and the form identifies the services only as "S/L," which does not indicate which of these services was provided. Baltimore City does not point to any documentation of services on the date for which the speech therapy in claim 305 was billed (9/30/99).

Accordingly, we uphold these error findings on the grounds identified above.

Sample 78, claim 306 - case management: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of case management. The OIG spreadsheet (OIG CD-ROM, AS3\_d, page 114) notes that two case management services were billed in one month. As indicated in note 4 above, the State plan permits only one unit of case management to be billed per month. The spreadsheet shows that the other claim (claim 307) was not in error. Baltimore City does not dispute that it billed twice during the month for case management or explain why it should be permitted to do so. Accordingly, we uphold the error finding.

Sample 79, claim 308 - social work: error finding upheld

The OIG found this claim in error on the ground that social work was not authorized on the IEP. As indicated in the discussion of Sample 13, claim 44, State regulations require that services be delivered in accordance with the IEP. The IEP (BCPSS Ex. 8) specifies that services to address one of the IEP goals, "To improve behavioral functioning in the classroom," were to be provided by a school psychologist, school social worker, or mental health provider. Id. at 6 (unnumbered). While on its face this could be viewed as authorizing either psychological services or social work services, the summary of services on the student's IEP is a form listing Social Work Services separately from Psychological Services and does not show that either service

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<sup>25</sup>(...continued)

attendance, CMS withdrew both of these grounds based on additional documentation provided by Baltimore City with respect to these two claims. CMS Reply Br. at 19.



is authorized. Id. at 9 (unnumbered). The OIG spreadsheet (CMS Ex. 17, Sample 79, at 1) indicates that the auditors concluded that the IEP goal quoted above was not an authorization for social work services. Baltimore City does not explain why the auditors' conclusion was not correct in light of the summary of services. Accordingly, we uphold the error finding.

Sample 79, claim 309 - psychological services: error finding reversed

The OIG found this claim in error on the ground that there was "no support" for the services.<sup>26</sup> The Monthly Encounter Form (BCPSS Ex. 18-Sample 79, Page 2) shows a "Presenting Problem" code corresponding to "Disturbance of Emotions" and, for the date of service, a "Procedure Code" corresponding to "Psychological Serv." See id. and CMS Ex. 18 (list of codes and explanations). For the reasons stated in the discussion of Sample 16, claim 97, this is an adequate description of the extent of the services when considered with the IEP. Accordingly, we reverse the error finding.

Sample 80, claims 310, 311 - transportation: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of transportation. Baltimore City relies on a 5/14/02 letter from its Director of Pupil Transportation (BCPSS Ex. 18-Sample 80, Page 7) stating that "bus attendance documentation is not available" for the student but that "[s]tudents who attend the [student's] school are transported daily to school on special needs buses due to their unique disabilities and IEP accommodations." Even if we could reasonably infer that a particular student rode the bus to and from school on certain dates based on the fact that bus transportation was available for all students on those dates, however, the letter does not support such an inference with respect to the student in question here since it does not clearly refer to a period including the dates for which the transportation was billed (in May 1999). Accordingly, we uphold the error findings.

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<sup>26</sup> The OIG spreadsheet (CMS Ex. 17, Sample 79, at 1) lists this as a secondary basis for the error finding. The primary basis for the error finding was that psychological services were not authorized by the IEP until after the date of service. However, CMS withdrew the latter basis for the error finding. CMS Br. at 43.

Sample 81, claims 314, 316, 318 - transportation: error findings upheld

The OIG found these claims in error on the ground that the transportation was not authorized on the student's IEP. As indicated in the discussion of Sample 10, claim 28, the State plan and state regulations require such authorization. An excerpt from the IEP (CMS Ex. 17, Sample 82, at 3)<sup>27</sup> has check-boxes for supplementary services including "MTA Transportation" and "Special Transportation;" however, neither of these is checked.

The OIG also found these claims in error on the ground that there was insufficient documentation of transportation. Baltimore City does not point to any documentation of transportation.

Accordingly, we uphold the error findings on both grounds.

Sample 82, claim 319 - case management: error finding upheld

The OIG found this case in error on the ground that there was insufficient documentation of case management. The OIG spreadsheet (OIG CD-ROM at AS3\_d, page 119) notes that the Monthly Encounter Form does not state whom the encounter was with. That form (BCPSS Ex. 18-Sample 82, Page 1) lists only one case management encounter, on 5/3/00, during the month for which case management was billed (May 2000) and indicates only that the type of transaction was "Calls" and that the outcome was "Agree to Plan of Action." Baltimore City relies on a 5/7/02 letter from the case manager (BCPSS Ex. 18-Sample 82, Page 4) stating that she "had direct contact with [the student] and his mother during May 2000" and that "[d]uring these contacts," she "had interactions that were intended to coordinate [the student's] plan of care concerning his aggressive behavior towards the younger students in the class." CMS argues that this statement "is too general to describe the service provided . . ." and also objects to the use of after-the-fact documentation. CMS Reply Br. at 20. As indicated earlier, the State plan requires that, to bill for a unit of case management, there must be a contact "relating to the child's Ongoing Service Coordination[.]" The 5/7/02 letter indicates that such a contact occurred since it describes "interactions" for the purpose of coordinating the "plan of care" (presumably in the student's IEP) for addressing the student's behavioral issues. However, to establish that the

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<sup>27</sup> CMS submitted the IEP for Sample 81 under the tab for Sample 82.

required contact occurred based on the case manager's after-the-fact letter would at the very least require some basis to believe that it was reliable. The letter does not explain how the case manager could recall the contacts two years later and there are no other indicia of reliability. Accordingly, we uphold the error finding.

Sample 82, claims 320-323 - speech therapy: error findings reversed

The OIG found these claims in error on the ground that there was insufficient documentation of speech therapy. Baltimore City relies on a service log (BCPSS Ex. 18-Sample 82, Page 2), which, next to the student's name, has an entry under the heading "DC" (diagnosis code) corresponding to "Developmental Speech or Lang Disorder" and an entry under the heading "PC" (Procedure Code) corresponding to "Speech/Lang Therapy" and specifies the duration of services on each date billed. See id. and CMS Ex. 18 (list of codes and explanations). (Unlike the service logs submitted for other sample numbers, this log is missing the signature of the direct service provider. However, a letter dated 5/2/02 (BCPSS Ex. 18-Sample 82, Page 3) signed by the speech pathologist states that she provided language therapy to the student on the dates in question.) Thus, for the reasons stated in the discussion of Sample 16, claim 97, the service log together with the letter adequately describe the extent of the services. Accordingly, we reverse the error findings.

Sample 83, claim 324 - case management: error finding upheld

The OIG found this claim in error on the ground that the case manager did not meet with the parent or student. As indicated in the discussion of Sample 37, claim 160, to bill for a unit of case management, the State plan requires at least one case management contact per month with the student, their parent, or other responsible individual acting on their behalf. The Monthly Encounter Form (CMS Ex. 17, Sample 82, at 2) lists only one case management encounter during the month for which case management was billed (September 1999) and indicates that the interaction on that date was with "Teachers." Baltimore City does not argue that a teacher could be considered an "other responsible individual" under the State plan or point to any documentation of other case management contacts during the month. Accordingly, we uphold the error finding.

Sample 86, claims 328-331 - transportation: error findings upheld

The OIG found these claims in error on the ground that there were no covered medical assistance services on the dates for which transportation was billed. As indicated in the discussion of Sample 10, claim 28, the State plan covers transportation to and from school if the student receives a covered medical assistance service at school on the same date. According to CMS, since the student attended a non-public school, any health-related services provided to her did not qualify as covered medical assistance services. (There is no dispute that no health-related services were billed to Medicaid.) We need not address this argument since Baltimore City did not provide documentation that shows that health-related services were provided. The "transportation rosters" and "attendance forms" on which Baltimore City relies to document that services were provided on the dates of the transportation at issue in claims 329, 330 and 331 contain no description of health-related services. See BCPSS Reply Br. at 29; BCPSS Ex. 18-Sample 86, Pages 1,2,5,6. For the transportation at issue in claim 328 (billed for 3/3/99), Baltimore City relies on a 5/21/02 letter signed by the school social worker (BCPSS Ex. 18-Sample 86, Page 3) stating that she provided "ongoing direct counseling services" to the student and, on March 3, 1999, "met with [the student] to discuss issues relative to her IEP goals." However, to establish that such social work services were provided based on this after-the-fact statement would at the very least require some basis to believe that it is reliable. The statement does not explain how the social worker could recall the meeting over three years later and there are no other indicia of reliability.

The OIG also found claim 331 in error on the ground that there was insufficient documentation of the transportation. Baltimore City does not point to any documentation of transportation.

Accordingly, we uphold the error findings on the grounds identified above.

Sample 87, claims 333-335 - speech therapy: error findings upheld

The OIG found these claims in error on the ground that the individual who provided the speech therapy neither qualified as a "speech pathologist or audiologist" nor provided the services "under the direction of a speech pathologist or audiologist" within the meaning of the applicable regulations. Baltimore City relies on an evaluation form (BCPSS Ex. 18-Sample 87, Page 2) signed by a speech pathologist evaluating the speech therapist's performance during the school year. For the reasons explained in

the discussion of Sample 5, claims 6-8, evidence of general supervision by a speech pathologist is not sufficient to establish that services were provided "under the direction of" a speech pathologist. Accordingly, we uphold the error findings.

Sample 88, claim 336 - case management: error finding upheld

The OIG found this claim in error on the ground that the case manager did not meet with the parent or student. As indicated earlier, to bill for a unit of case management, the State plan requires at least one case management contact per month with the student, their parent, or other responsible individual acting on their behalf. The Monthly Encounter Form (CMS Ex. 17, Sample 88, at 2) lists only one case management encounter during the month for which case management was billed (February 2000) and indicates that the interaction on that date was with "Teachers." Baltimore City does not argue that a teacher could be considered an "other responsible individual" under the State plan or point to any documentation of other case management contacts during the month. Accordingly, we uphold the error finding.<sup>28</sup>

Sample 89, claim 337 - transportation: error finding upheld

The OIG found this claim in error on the ground that there was no covered medical assistance service on the date for which transportation was billed. As indicated in the discussion of Sample 10, claim 28, the State plan covers transportation to and from school if the student receives a covered medical assistance service at school on the same date. Baltimore City does not point to any documentation to show that a covered medical assistance service was provided on the date for which transportation was billed.<sup>29</sup>

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<sup>28</sup> Since the Monthly Encounter Form shows that the only interaction was by "Reports, Letters," the claim could also have been found in error on the ground that there was no in-person or telephone case management contact during the month for which case management was billed, as required by the State plan.

<sup>29</sup> This sample number raises the same question as Sample 86, i.e., whether a covered medical assistance service can be provided by a non-public school, since the OIG spreadsheet (CMS Ex. 17, Sample 89, at 1) notes that "stdt goes to non-public school." However, we need not address that question.

The OIG also found this claim in error on the ground that there was insufficient documentation of the transportation. Baltimore City does not point to any documentation of transportation.

Accordingly, we uphold the error finding on both grounds.

Sample 90, claim 338 - speech therapy: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of speech therapy. The OIG spreadsheet (CMS Ex. 17, Sample 90, at 2) notes that there was an "incomplete IEP" that does not show the parent's signature or whether the services were authorized. CMS asserts, and Baltimore County does not dispute, that the State regulations at COMAR 13A.05.01.13.B.(1) require the parent or guardian to sign the IEP.<sup>30</sup> Baltimore County admits that it is unable to provide the complete IEP but relies on "special education student data verification" it sent to MSDE in 1999 which indicates that the IEP authorized speech services. See BCPS Ex. 36, Declaration of Patrick Colohan, ¶7, and Attachment A. Baltimore County does not assert, however, that the verification is evidence that the parent signed the IEP.<sup>31</sup> Moreover, the IEP excerpt submitted by Baltimore County raises a question as to whether the parent ever signed the IEP since it states (at BCPS-90-0002 and BCPS-90-0004) that the parent was not present at the IEP meeting. Accordingly, we uphold the error finding.

Sample 90, claims 339, 341-348 - transportation: error findings upheld

The OIG found these claims in error on the ground that there was no covered medical assistance service on the date for which

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<sup>30</sup> Section 13A.05.01.13B.(1) states that "[a] public agency shall obtain written parental consent before the initial provision of special education and related services to a student with a disability." Section 13A.05.01.13B.(2) states that "[i]f a parent refuses to provide . . . consent for the initiation of special education and related services the public agency shall initiate mediation or due process as described in 20 U.S.C. §1415(e) and (f) and Regulation .15 of this chapter." CMS Ex. 9e at 37.

<sup>31</sup> The IEP excerpt provided by Baltimore County indicates (at BCPS Ex. 25, BCPS-90-0005) that speech therapy was an authorized service, so it was unnecessary for Baltimore County to rely on the verification data to establish that fact.

transportation was billed. As indicated in the discussion of Sample 10, claim 28, the State plan covers transportation to and from school if the student receives a covered medical assistance service at school on the same date. Baltimore County concedes that claim 347 was in error because school was closed for a Professional Development day on the date for which the transportation was billed. BCPS Reply Br. at 26, n.76. Baltimore County argues that case management was provided on the dates for which the transportation in claims 345 and 348 was billed (10/19/99 and 10/29/99). However, we concluded above that the claim for case management services provided in October 1999 (claim 340) was in error, i.e., not a covered medical assistance service. Baltimore County also argues that speech therapy was provided on the dates for which the transportation in claims 339, 341, 342, 343, 344, and 346 was billed (10/28/99, 10/7/99, 10/8/99, 10/14/99, 10/15/99, and 10/21/99). However, we concluded above that the claim for speech therapy on 10/28/99, claim 338, was in error. Since the basis for finding claim 338 in error was no parent signature on the student's IEP, the speech therapy provided to the same student on the remaining dates (but not billed) was also not a covered medical assistance service.<sup>32</sup> Accordingly, we uphold the error findings.

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<sup>32</sup> The OIG also found that the transportation claims were in error because there was insufficient documentation for the services. Baltimore County relies on two bus itineraries which specify revision dates of 8/25/99 and 2/27/00 (BCPS Ex. 25 at BCPS-90-0023 to 0049). Baltimore County also relies on look-back checks performed by its Office of Transportation on 9/27/99 and 2/10/00 (*id.* at BCPS-90-0050 - 0053) verifying that students listed on itineraries rode the bus on those dates. We need not decide whether it can reasonably be inferred from the itineraries and look-back checks that the student rode the bus to and from school on the dates in October 1999 for which transportation was billed since the claims are in error on another basis. CMS also argues that the claims were in error because they were not authorized in the IEP. Although the verification data in BCPS Exhibit 36 shows that transportation was authorized as a supplemental service, we need not decide whether that data is reliable. Finally, although CMS raised a question about whether the bus driver was licensed on the dates for which transportation was billed, the BCPS Office of Transportation driving record (BCPS Ex. 42), together with the explanation of that record in BCPS Exhibit 45, establish that she was.

Sample 90, claim 340 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. Baltimore County does not point to any documentation to show that such a contact occurred.

The OIG spreadsheet (CMS Ex. 17, Sample 90, at 1) also notes that this claim was in error because there was an "incomplete IEP" that does not show the parent's signature. As indicated in the discussion of claim 338, Baltimore County failed to establish that the parent signed the IEP for this student.

Accordingly, we uphold the error finding on both grounds.

Sample 91, claim 349 - case management: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of case management. According to CMS, "the case manager reported no contact with the student or parent on at least one occasion for the month." CMS Reply Br. at 13. As indicated earlier, to bill for a unit of case management, the State plan requires at least one case management contact with the student, their parent, or other responsible individual acting on their behalf. The Monthly Encounter Form (BCPSS Ex. 18-Sample 91, Page 1) lists only one case management encounter during the month for which case management was billed (September 1999) and indicates that the type of transaction was "File Review" and that the interaction was with "Other," resulting in a "Change of Placement." Baltimore City does not point to any documentation to show that this case management contact was with the student, their parent, or other responsible individual acting on their behalf, or to show that there were other case management contacts of that nature during the month. Accordingly, we uphold the error finding.

Sample 92, claim 351 - speech therapy: error finding upheld

The OIG found this case in error on the ground that there was insufficient documentation of speech therapy. Baltimore City relies on a form captioned "Attendance/Third Party Billing for S/L Caseload" (BCPSS Ex. 18-Sample 92, Page 1), which notes the duration of services to the student on the date for which speech therapy was billed. Baltimore City also relies on a Communication Log for the student (BCPSS Ex. 18-Sample 92, Page 2), which contains a note that "S/L services" for the year were



initiated on that date. We conclude that neither document adequately describes the extent of the services. There are two procedure codes for speech services, for "Speech/Lang Diag Eval" and "Speech/Lang Therapy" (see CMS Ex. 18 (list of codes and explanations)), and the documents identify the services only as "S/L," which does not indicate which of these services was provided. Accordingly, we uphold the error finding.

Sample 94, claim 354 - speech therapy: error finding upheld

The OIG found this claim in error on the ground that there was insufficient documentation of the services. The record does not contain an OIG spreadsheet identifying the nature of the services. Baltimore City relies on the speech pathologist's service log (BCPSS Ex. 18-Sample 94, Pages 1-2) to document all of the claims for this sample number (including the six claims discussed below). However, the service log does not contain an entry for the student for the dates for which the services in claim 354 were billed (12/1/99). (It appears that the services may have been case management rather than speech therapy since they were billed at the same rate as case management was billed for other sample numbers. However, we could not find that the claim was properly paid on that basis since there is no documentation that shows that the State plan requirements for case management were met.) Accordingly, we uphold the error finding.

Sample 94, claims 355-360 - speech therapy: error findings reversed

The OIG found these claims in error on the ground that there was insufficient documentation of speech therapy. Baltimore City relies on the speech pathologist's service log (BCPSS Ex. 18-Sample 94, Pages 1-2), which, next to the student's name, contains an entry under the heading "Diag. Code" corresponding to "Developmental Speech or Lang Disorder" and an entry under the heading "Proc. Code" corresponding to "Speech/Lang Therapy" and specifies the duration of services on each date billed. See *id.* and CMS Ex. 18 (list of codes and explanations). For the reasons stated in the discussion of Sample 16, claim 97, this document is an adequate description of the extent of the services when considered with the IEP. Accordingly, we reverse the error findings.

Sample 95, claim 361 - transportation: error finding upheld

The OIG found this claim in error on the ground that the participant was not present. The OIG spreadsheet (CMS Ex. 17,

Sample 95, at 1) contains the note "looks like a Saturday (per speech EF [encounter form])." The encounter form is not in the record, but the Student Attendance Roster for the bus (*id.* at 3) shows that 5/3/99 was a Monday, so that the date for which the transportation was billed - 5/1/99 - would have been a Saturday. Baltimore City does not point to any documentation to show that the billing date was a weekday or that services were provided on the billing date. Accordingly, we uphold the error finding.

Sample 96, claim 368 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. Baltimore City does not point to any documentation to show that such a contact occurred. Accordingly, we uphold the error finding.

Sample 96, claims 369, 371 - speech therapy: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of speech therapy. Baltimore City relies on a form captioned "Attendance/Third Party Billing for S/L Caseload" (BCPSS Ex. 18-Sample 96, Pages 1-2), which specifies the duration of services to the student on the dates for which speech therapy was billed. This is not an adequate description of the extent of the services, however. There are two procedure codes for speech services, for "Speech/Lang Diag Eval" and "Speech/Lang Therapy" (*see* CMS Ex. 18 (list of codes and explanations)), and the form identifies the services only as "S/L," which does not indicate which of these services was provided. Accordingly, we uphold the error findings.

Sample 96, claims 370, 372 - transportation: error findings reversed

The OIG found these claims in error on the ground that there was no covered medical assistance service on the dates for which the transportation was billed. As indicated in the discussion of Sample 10, claim 28, the State plan covers transportation to and from school if the student receives a covered medical assistance service at school on the same date. We concluded above that the speech therapy services in claims 369 and 371, which was provided on the dates for which the transportation was billed (4/5/00 and 4/12/00), were covered medical assistance services. Accordingly, we reverse the error findings.

Sample 98, claim 374 - case management: error finding reversed

The OIG found this claim in error on the ground that there was insufficient documentation of case management. Baltimore City relies on a form (BCPSS Ex. 18-Sample 98, Page 2) which shows that "CMD," identified in the code key as "Case Mgmt. Direct," was provided on "3/23," the month and the day for which case management was billed. It also shows that the interaction was "Meeting/Conference" with "Parent/Guardian," and that the "Activity/Outcome" was "Other." The student is not identified on the page cited, but Baltimore City asserts that it is the same student whose name appears on the corresponding line on the previous page. See BCPSS Reply Br. at 21. CMS states that this form "fails to describe in any way what case management services were provided." CMS Reply Br. at 13. We disagree. As indicated earlier, the State plan requires that, to bill for a unit of case management, there must be a contact "relating to the child's Ongoing Service Coordination[.]" The reference on the form to direct case management shows that the contact related "to the child's Ongoing Service Coordination." Accordingly, we reverse the error finding.

Sample 99, claims 379, 384, 385, 387, 391, 392, 395, 396, 400, 401 - transportation: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of transportation. Baltimore County relies on a bus itinerary for "1999/2000" (BCPS Ex. 25, BCPS-99-0033-0038) which shows one stop at the student's address, at 3:35, next to the notation "PM ONLY." Baltimore County also relies on four "look-back checks" performed by its Office of Transportation which show that the student was on the bus going to school on 2/9/00 and 5/4/00 and was on the bus coming home from school on 2/11/00 and 5/5/00. See id. at BCPS-99-0040-0042, 0044-0048. It is unclear that the itinerary was in effect during March 2000 since the itinerary shows only that the student was scheduled to ride the bus home from school, while two-way transportation was billed. Thus, it is not reasonable to infer from the itinerary that the student rode the bus to and from school on the dates in March 2000 for which transportation was billed. Moreover, while the look-back checks verify that the student rode the bus to and from school on dates before and after March 2000, there is no basis for finding that they reflect the student's normal routine in March 2000. In any event, Baltimore County does not take the position that the look-back checks alone are probative evidence that transportation was provided on the dates billed. See, e.g., BCPS Reply Br. at 17-18. Accordingly, we uphold the error findings.

Sample 99, claim 381 - case management: error finding upheld

The OIG found this claim in error on the ground that there was only written case management. As indicated in the discussion of Sample 4, claim 4, to bill for a unit of case management, the State plan requires at least one case management contact per month in person or by telephone. The billing form for this claim (BCPS Ex. 25 at BCPS-99-0019) shows several case management contacts during the month for which case management was billed, beginning on 3/2/00, and includes the handwritten notations: "copy of note sent home for 3/2" and "contact logs for remaining 'add'l case mgt'." Baltimore County does not point to any documentation to show that any of the "remaining" case management contacts were in person or by telephone. Accordingly, we uphold this error finding.<sup>33</sup>

Sample 99, claims 382, 389, 398, 403-405 - transportation: error findings upheld

The OIG found these claims in error on the ground that there was insufficient documentation of transportation. For the reasons discussed above with respect to the other transportation claims for this sample number, we agree with that finding.

The OIG also found these claims in error on the ground that there were no covered medical assistance services on the dates for which transportation was claimed. As indicated in the discussion of Sample 10, claim 28, the State plan covers transportation to and from school if the student receives a covered medical assistance service at school on the same date. As discussed above, the case management in claim 381, which was billed for the same month as the transportation at issue here, is not a covered medical assistance service because there was only written case management and the State plan requires at least one case management contact per month in person or by telephone in order to bill for a unit of case management service. Although the State plan defines case management to include written contacts, written contacts on the dates the transportation was provided (3/2/00, 3/9/00, 3/16/00, 3/23/00, 3/24/00, and 3/30/00) cannot

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<sup>33</sup> The OIG spreadsheet (CMS Ex. 17, Sample 99, at 1-4) also notes "no support that CM svce met w/ child" as a basis for finding the related transportation claims (claims 382, 387, 389, and 398) in error. This is not a proper basis for an error finding, however, since the State plan covers case management contacts with the student's parent or other responsible individual acting on the student's behalf, as well as contacts with the student.

reasonably be considered covered medical assistance services in the absence of any in-person or telephone contact. There were no other medical assistance services billed for the dates in question.

Accordingly, we uphold the error findings on both grounds.<sup>34</sup>

Sample 100, claims 406-408 - speech therapy: error findings upheld

The OIG found these claims in error on the ground that the individual who provided the speech therapy neither qualified as a "speech pathologist or audiologist" nor provided the services "under the direction of a speech pathologist or audiologist" within the meaning of the applicable regulations. Baltimore City relies on a 6/3/02 letter (OIG CD-ROM at I\_2\_3) stating that all individuals employed by Baltimore City as speech/language pathologists "worked under the direction of" the "Educational Specialist for Speech/Language Services" (who was a speech pathologist) "and the direct support and supervision" of nine Area Facilitators (who were also speech pathologists). For the reasons explained in the discussion of Sample 5, claims 6-8, this letter is not sufficient to establish that the services were provided "under the direction of" a speech pathologist. Accordingly, we uphold the error findings.

II. Statistical Sampling

We now turn to the statistical sampling issue raised in Baltimore City's brief.<sup>35</sup> Baltimore City does not dispute that ACF may use statistical sampling in computing the disallowance here. Baltimore City argues, however, that CMS did not provide sufficient information to show that the sample used by the OIG

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<sup>34</sup> The OIG spreadsheet (CMS Ex. 17, Sample 99, at 1-4) notes that the student was absent as an additional basis for the error findings for claims 404 and 405. However, the student's attendance card (BCPS Ex. 25, BCPS-99-0017) shows that she was present on 3/30/00, the date for which the transportation in claim 405 was billed. Baltimore City asserts that the attendance card shows that the student was absent only half of the day on 3/24/00, the date for which the transportation in claim 404 was billed. We need not resolve this matter since we have concluded that claim 404 is in error on other grounds.

<sup>35</sup> Neither DHMH and Baltimore County made separate arguments regarding this matter, but rather indicated that they were relying on Baltimore City's arguments.

was randomly selected or that the sample units were representative of the universe of students and months for which claims were made. See BCPSS Br. at 26-27, and BCPSS Ex. 16 (Declaration of Charles R. Mann, Ph.D. (Mann Decl.)). Baltimore City argues that CMS has therefore failed to show that the methodology used by the OIG is statistically valid. As discussed below, we conclude that Baltimore City's arguments have no merit.

In New York State Dept. of Social Services, DAB No. 1531 (1995) (reconsideration denied 11/1/05), New York challenged the use of the same statistical software used by the OIG to select to sample in question here. The Board found that that software, known as RAT-STATS, performed reliably as a random-number generator and that the lists of numbers it generated were suitable to select a random sample of claims for FFP (in that instance, claims relating to foster care maintenance payments made in two counties in two fiscal years) for review. While ACF does not cite DAB No. 1531 in its response to Baltimore City's arguments, it supplied the declaration of one of the same statistical experts it produced in that case. See Br. at 52-57, and CMS Ex. 16 (Declaration of Alan H. Kvanli, Ph.D. (Kvanli Decl.)). The declaration states that the random number generator within RAT-STATS which was used to select the 100-unit sample in question here is a "certified" random number generator, meaning that it has passed a series of randomness tests that verify that the generator is an acceptable random number generator. Id., ¶ 10. Baltimore City does not address the statistical sampling issue in any of the submissions it filed after receipt of CMS's response. Thus, we conclude that CMS has adequately established that the sample in this case was randomly selected.

Dr. Charles Mann, Baltimore City's expert, opines, however, that even if the sample was randomly selected, "it would be prudent to perform consistency checks in an attempt to assure that the random sample was also representative." Mann. Decl., ¶ 21. Dr. Mann states specifically that "[i]t would be prudent to confirm that the sample is representative with regard to the distribution by recipient" and "that the distribution of sample months is representative of the distribution of calendar months in the claims population." Id., ¶¶ 22 and 23. According to Dr. Mann, "[b]ecause the data is from school systems, . . . some calendar months could correspond to larger claims and corresponding larger 'errors.'" Id., ¶ 23. Dr. Kvanli's declaration addresses these assertions as follows:

Random samples are assumed to be representative of the sampled population. [citation omitted] Since a random sample was selected, the sample most certainly provides an

excellent representation of the population. Dr. Mann's statement that this sample might not be representative is only speculation in the absence of evidence that a segment of the population was ignored or given special treatment, which is not present in this case. To argue that a random sample is not representative ignores the basic premise underlying the use of statistical samples.

Kvanli Decl., ¶ 11. Dr. Kvanli further states that even if some calendar months could correspond to larger claims--

all calendar months were included in the sample frame and so had an equal chance of being selected. Consequently, there is no statistical reason warranting a verification that the months contained in the sample items are representative of the calendar months in the claims population.

Id., ¶ 13. Based on Dr. Kvanli's explanation, we conclude that use of the random number generator in RAT-STATS was sufficient to ensure that the sample drawn was representative, absent evidence that it was not in fact representative.

Baltimore City argues further that the confidence level selected by the OIG (95%) was not justified. Using the 95% confidence level allowed the OIG to estimate with a 95% probability that the true amount of unallowable payments is at least \$19,954,944 (the amount originally disallowed by CMS). Kvanli Decl., ¶¶ 8, 9. Dr. Mann states that, in his experience, courts commonly use a confidence level of 99.725%. Specifically, Dr. Mann states that statisticians have "commonly interpreted" Hazelwood School District v. United States, 433 U.S. 299 (1977), which found that a statistical disparity between the racial composition of the school district's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market could constitute prima facie proof of a pattern and practice of discrimination, to mean that a 99.725% confidence level is appropriate. Mann Decl., ¶¶ 14, 15, 17, 19, 20. Both parties agree, however, that determination of the confidence level is not a statistical judgment. Id., ¶ 14; Kvanli Decl., ¶ 8. Thus, even if Hazelwood in effect found that a 99.725% confidence level was appropriate in a discrimination case, that does not mean that use of another confidence level in other contexts is unreasonable. Indeed, in a prior decision, the Board held that "the 90% confidence interval gave Oklahoma a very high degree of protection from having to pay more than the true value of erroneous payments." Oklahoma Dept. of Human Services, DAB No. 1436, at 7 (1993). We conclude that Baltimore City has

advanced no cogent reason for requiring the use of the 99.725% confidence level here.

Dr. Mann's declaration also observes that "the quality of the estimate could have been improved by post-stratification" after the sample was taken." Mann Decl., ¶ 25. Dr. Kvanli states without contradiction, however, that "[s]tratification is an attempt to improve the precision of the estimate and has nothing whatsoever to do with the validity of the result" and that in any event stratification "in all likelihood would have resulted in . . . a larger estimated overpayment." Kvanli Decl., ¶ 15.

We therefore conclude that the methodology used by the auditors to estimate the amount of the overpayment was valid.

### Conclusion

For the foregoing reasons, we uphold the disallowance to the extent that it is based on the 230 claims which we conclude were paid in error and we reverse the disallowance with respect to the 55 claims which we conclude were properly paid.

\_\_\_\_\_/s/  
Judith A. Ballard

\_\_\_\_\_/s/  
Leslie A. Sussan

\_\_\_\_\_/s/  
Donald F. Garrett  
Presiding Board Member