Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Oklahoma Health Care Authority DATE: December 27, 2007
Docket No. A-05-117
Decision No. 2140

DECISION

The Oklahoma Health Care Authority (OHCA, State) appealed a determination by the Centers for Medicare & Medicaid Services (CMS) disallowing $2,035,381 in federal financial participation (FFP) claimed as medical assistance under title XIX of the Social Security Act (Act) for school-based services. CMS based the disallowance on an Office of the Inspector General (OIG) audit that reviewed a 330-unit sample of claims made for services provided in 11 Oklahoma school districts from July 1, 1999 through June 30, 2000 (State fiscal year 2000). Each sample unit consisted of all claims for school-based services provided to one student in a one-month period during that fiscal year. Based on the sample results, the OIG estimated that OHCA was overpaid $2,035,381 FFP. Of that amount, $1,131,859 was disallowed based on the finding that occupational therapy services and speech language therapy services were provided without a prescription or a referral "by a physician or other licensed practitioner of the healing arts . . . ," as required by 42 C.F.R. § 440.110(b) or (c). The remaining $903,522, which includes claims for several types of services, was disallowed on other grounds.

OHCA appealed the full amount of the disallowance pertaining to claims for occupational therapy and speech language therapy services disallowed based on the alleged lack of the requisite prescription or referral. OHCA also disputed some of the claims included in the remaining disallowance. In addition, OHCA asserted that the entire disallowance should be set aside because the alleged errors in disallowing these disputed claims established that the audit was not reliable.[1]

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[1] Although OHCA initially took the position that the statistical sampling methodology used by the OIG was flawed, it did not pursue this argument. Instead, in response to CMS's

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In Section I below, we conclude that CMS correctly determined that either the requirement in section 440.110(b) for a prescription for occupational therapy or the requirement in section 440.110(c) for a referral for speech language therapy was not met, and we uphold the part of the disallowance taken on that basis. In Section II below, we uphold the disallowance of some of the other disputed claims and reverse or remand the disallowance of the remaining such claims. In Section III below, we conclude that the fact that some of the claims were disallowed in error does not establish that the audit was unreliable or require that the entire disallowance be set aside.

Legal 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.[2] Each state operates its own Medicaid program in accordance with broad federal requirements and the terms of its Medicaid state plan. 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.

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[1](...continued)
detailed explanation of the audit methodology, OHCA merely complained that this explanation should have been provided in the final audit report. See OHCA Reply Br. at 3-4.

[2] The current version of the Social Security Act can be found at 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.

§ 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 14-15 (in the OIG Workpapers, Folder 5, at F-1). Among other things, the services must be a type of service covered by Medicaid and furnished by a qualified provider. Id. The health-related services at issue here include physical therapy, occupational therapy, occupational therapy evaluation, speech language therapy, nursing services, and Child Health Encounter services.

The primary regulation at issue here, 42 C.F.R. § 440.110, provides in pertinent part:

> **Physical therapy, occupational therapy, and services for individuals with speech, hearing, and language disorders.**
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> * * * * *
>
> (b) *Occupational therapy*. (1) *Occupational therapy* means services prescribed by a physician or other licensed practitioner of the healing arts within the scope of his or her practice under State law and provided to a recipient by or under the direction of a qualified occupational therapist. . . .
>
> (c) *Services for individuals with speech, hearing, and language disorders.* (1) *Services for individuals with speech, hearing, and language disorders* means diagnostic, screening, preventive, or corrective services provided by or under the direction of a speech pathologist or audiologist, for which a patient is referred by a physician or other licensed practitioner of the healing arts within the scope of his or her practice under State law. . . .

We identify other applicable authorities later in this decision.

Analysis

I. Claims for occupational therapy and speech language therapy services that lacked the requisite prescription or referral

The OIG found that six school districts did not obtain prescriptions for occupational therapy services and ten school districts did not obtain referrals for speech language therapy services. OHCA Ex. 3, at 7. In determining to disallow these questioned costs, CMS's Regional Administrator stated:

> The CMS central office has indicated that the IEP may serve as a prescription or referral for services, if permitted under the state practice act or other state law. The CMS Dallas Regional Office initially informed the State that a financial adjustment . . . was not required because the IEP served as the prescription or referral. The OIG also agreed that the IEP can be considered as the prescription for occupational therapy services and the referral for speech therapy services if an individual on the team of medical professionals signing the IEP has the authority to prescribe or refer under state law. However, the IEP team in Oklahoma typically consists of a psychologist, teacher, special education teacher, and a school administrator. The OIG determined that the individuals on the IEP team did not have the authority to prescribe or refer for occupational therapy and speech language therapy services under Oklahoma state law.

OHCA Ex. 1, at 3.

On appeal, OHCA argues that the requirement in section 440.110(b) and (c) was met because psychologists in Oklahoma have authority under State law to refer students for other services, including occupational therapy and speech language therapy services.[3] OHCA asserts that "[a] psychologist is a licensed practitioner of the healing arts under Oklahoma law[.]" OHCA Br. at 20, citing Okla. Stat. Ann. tit. 59, § 1352. OHCA further asserts that although "Oklahoma law does not expressly provide that psychologists have the authority to refer individuals for other professional services. . . . , referral authority is inherent in the scope of practice of psychologists." Id. at 21. To support this assertion, OHCA notes that ethical standards adopted by Oklahoma to regulate the practice of psychology "make reference to consultations and referrals." Id. at 21-22. OHCA also notes

[3] OHCA's argument appears to be predicated on the assumption that a psychologist was on the IEP team for each student in question, but OHCA makes no specific allegation to this effect. We need not determine whether this was the case in light of our conclusions below.

that State law does not expressly authorize physicians to refer individuals for other professional services, yet physicians are regarded as having this authority. OHCA reasons that express referral authority is only necessary "where referral authority could reasonably be in doubt," pointing out that State law expressly permits certain health professionals with lower levels of education and experience than physicians and psychologists to make referrals. OHCA Br. at 21, n.10.

This argument is not persuasive. The regulation requires that the prescription for occupational therapy services and the referral for speech language therapy services be made by a licensed practitioner of the healing arts "within the scope of his or her practice under State law[.]" Even assuming that an Oklahoma psychologist has some inherent authority under State law to make referrals, OCHA points to nothing showing that such authority included making referrals for speech language therapy services.[4]

Moreover, section 440.110(b) requires a prescription for occupational therapy, not simply a referral as in the case of speech language therapy. OCHA does not assert that a psychologist has express or inherent authority to write prescriptions. Moreover, OHCA does not address the auditors' assertion that an official of the State Board of Examiners of Psychologists stated that "Oklahoma law does not recognize that psychologists can prescribe services." See OHCA Ex. 3, at 13.

OHCA also argues in the alternative that CMS erred in finding that the IEP team is limited to a psychologist, teacher, special education teacher, and school administrator. OHCA states that the "initial IEP assessment teams in Oklahoma" consist of those individuals. OHCA Br. at 18. OHCA further states, however, that--

> if the assessment team decides that the child may require health-related services such as occupational therapy or speech therapy, the child is referred to a licensed specialist for evaluation and, if necessary, the development of a treatment plan. The occupational therapist or speech therapist develops the plan of care

[4] We express no opinion as to what would be required to show that a psychologist or other licensed practitioner of the healing arts had the authority to make referrals for speech language therapy or another health-related service.

> for ongoing services and thereby functions as a member of the IEP team.

Id. at 19. In support of its argument, OHCA points out that the IDEA regulations provide that the IEP team includes "related services personnel as appropriate." Id., citing 34 C.F.R. § 300.344.[5] In addition, OHCA relies on a statement in a Department of Education (DOE) publication that "[b]ecause an important part of developing an IEP is considering a child's need for related services . . . related services professionals are often involved as IEP team members." Id. (quoting from A Guide to the Individualized Education Program, Office of Special Education and Rehabilitative Services, DOE, dated July 2000, at 10).

In essence, OHCA takes the position that an occupational therapist or speech language pathologist is automatically a member of the IEP team where a child receives occupational therapy or speech language therapy. Even assuming that an occupational therapist or speech language pathologist is a "licensed practitioner of the healing arts" within the meaning of section 440.110(a) or section 440.110(c) (which OHCA did not show), OHCA's position appears to be contrary to the IDEA regulations. Those regulations indicate that affirmative action must be taken by the parent or the local education agency to include related services personnel on the IEP team. See 34 C.F.R. § 300.344 (quoted in footnote 5). Moreover, although an occupational therapist or speech language therapist who is providing (or overseeing the provision of) those types of services to a student might logically be considered a member of the student's IEP team once services commence, these providers would not necessarily have been on the IEP team at the time the child was identified as needing a referral or prescription for such services.

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[5] This provision was published in March 1999 (prior to the State fiscal year at issue here). 64 Fed. Reg. 12,418 (March 12, 1999). It was later redesignated as section 300.321 with no changes in the relevant language. 71 Fed. Reg. 46,753 (Aug. 14, 2006). The section, captioned "IEP Team," provides that "[t]he public agency must ensure that the IEP Team for each child with a disability includes-- . . .(6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate[.]"

We also note that, prior to 1995, section 440.110 did not include the language "or other practitioner of the healing arts, within the scope of his or her practice under State law." Hence, only physicians could make referrals. The preamble to the regulation adding this language indicates that the purpose of the revision was to enable "nurse practitioners to refer recipients to physical therapy, occupational therapy, speech services and language services when allowed under State law." 60 Fed. Reg. 19,856, 19861, 19,859 (Apr. 21, 1995). The fact that a nurse practitioner is the only other practitioner of the healing arts identified in the preamble indicates that the drafters did not expect that all types of licensed health professionals would necessarily have authority under state law to make referrals for speech language therapy or write prescriptions for occupational therapy.

Accordingly, we uphold the disallowance of the claims for occupational therapy and speech language therapy which the auditors found lacked a prescription or a referral, respectively.

II. Claims disallowed on other grounds

OHCA also identified specific groups of disallowed claims for services provided to a particular child on a particular date which OHCA contends are allowable in whole or in part. The bases for the disallowances fall into three categories discussed in turn below: overlapping times for services, wrong code, and duration less than a unit of service. Within each category, we discuss the individual claims by school district since the OIG workpapers on which the disallowances are based are arranged by school district and the parties present their arguments in charts--at OHCA Exhibit 10, Attachment A, and at CMS Exhibit F--that list the disputed claims by school district.[6]

We note that in many of the cases, CMS identified alternative grounds for the disallowance in addition to the primary ground on which the auditors relied. We discuss these alternative grounds only where we conclude that the primary ground does not support the disallowance.

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[6] Attachment A of OHCA Exhibit 10 cites to pages in numbered CMS exhibits, in anticipation of CMS submitting such exhibits with its response brief. See OHCA Br. at 13, n. 6. CMS did not submit numbered, paginated exhibits corresponding to the citations in OHCA Exhibit 10. However, the documents cited in OHCA's Exhibit 10 appear to be included in the OIG workpapers submitted by CMS on November 28, 2006.

A. Overlapping times for services

The claims discussed in this section were disallowed on the ground that the documentation purports to show that two different services billed for the same student on the same date were performed at the same time. We agree with CMS that both services were properly disallowed where the documentation clearly identifies overlapping times. For example, in some cases, the same 30-minute time range is specified for two 15-minute units of each of two different services. Where an overlap is documented, the overlap calls into question the reliability of the documentation for both services. OHCA failed to provide any basis for determining which of the two services, if any, was performed in any such cases at issue.[7] However, we conclude that the services need not be viewed as overlapping where the documentation for one of the services specifies a time range that exceeds the length of the unit of service, e.g., 15 minutes, and there is a 15-minute period within that time range that does not overlap with the 15-minute period specified in the documentation for the other service. It is reasonable to presume that the extended time ranges reflected activities not directly involving the child as well as direct services in all such cases and that the direct services were therefore provided during a time period that did not overlap with the other service that was claimed.[8]

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[7] OHCA clearly contemplated that, in order to be billable, services needed to be provided for the full number of minutes specified as a service unit since OHCA's July 1999 provider manual identifies the service unit for services including speech language therapy, occupational therapy, physical therapy, and nursing services as "Completed 15-minute increments." See OIG Workpapers, Folder 5, F-5a ("EPSDT School-Based Services: An Overview for Providers") at page 8. (The copy of the 1999 provider manual in the OIG workpapers is marked "DRAFT." However, the auditors did not indicate that they were relying on a draft policy and neither party contends that it was not the policy in effect during the relevant period (State fiscal year 2000).)

[8] At least one school district used a form that required the provider to specify the "Time Spent in Writing Documentation." See, e.g., OIG Workpapers, Folder 9, L-4-2 at page 72. If the time range indicated may include time spent by the provider in preparing the documentation as well as the time spent in providing direct services to the student, this could explain why some providers recorded 30 minutes attributable to a

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Oklahoma City[9]

One unit of nursing services and one unit of occupational therapy provided to A.D. on 12/1/99.
One unit of nursing services and one unit of occupational therapy provided to A.D. on 12/14/99.

The documentation reviewed by the auditors for each date shows that the nursing services were provided from 11:30 to 11:45 and that the occupational therapy was provided from 11:30 to 12:00. OHCA asserts that one 15-minute unit of each service should have been allowed for each date.

It is reasonable to presume that the occupational therapy was provided from 11:45 to 12:00 since the documentation does not specify the precise time period within the 30-minute time range that the 15-minute unit of service was provided. Accordingly, there was no overlap. We therefore reverse the disallowance of the nursing services claim and the occupational therapy claim for each date.

Two units of physical therapy and two units of speech language therapy provided to T.F. on 1/18/00.

The documentation reviewed by the auditors shows that physical therapy was provided from 9:30 to 10:00 and also that speech language therapy was provided from 9:30 to 10:00. OHCA argues that its claims for the service billable at the lower rate - speech language therapy – should be allowed since it appears that

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[8](...continued)
student but only one 15-minute unit of service provided to the student was claimed.

[9] These claims are addressed in the OIG Workpapers in Folder 2, G.1.4 at page 5 (A.D. and T.F.) and Folder 8, I-4-2 at 26-27 (A.D.). (We identify the students by their initials to protect their privacy.)

Where the same alpha-numeric appears more than once in a particular folder, we cite to the one that appears under the tab for the school district in question.

We were unable to locate in the OIG workpapers all of the documentation that was apparently reviewed by the auditors for this case and some other cases. However, the auditors' descriptions of the documentation are undisputed.

two 15-minute units of some service were provided during the 30-minute time period. OHCA does not explain, however, why we should find that either service was provided when the documentation purports to show that they were provided at precisely the same time. Accordingly, we uphold the disallowance of both of the physical therapy claims and both of the speech language therapy claims.

Moore[10]

One unit of physical therapy provided to T.N. on 4/4/00.
One unit of physical therapy provided to T.N. on 4/11/00.
One unit of physical therapy provided to T.N. on 4/18/00.
One unit of physical therapy provided to T.N. on 4/25/00.

The documentation reviewed by the auditors for each date shows that physical therapy was provided from 9:00 to 9:30 and that group speech language therapy was provided from 9:25 to 9:45. Claims for one 15-minute unit of physical therapy and one 15-minute unit of group speech language therapy were allowed. OHCA asserts that an additional 15-minute unit of physical therapy should have been allowed.

It appears that the auditors allowed the one unit of physical therapy based on the presumption that it was provided in the non-overlapping period of 9:00 to 9:15. It is also reasonable to presume that the 15-minute unit of group speech language therapy was provided from 9:30 to 9:45 since the documentation does not specify the precise time within the 20-minute time range that this unit of service was provided. There was thus no overlap between the second unit of physical therapy claimed by OHCA and the unit of group speech language therapy. CMS comments that speech language therapy was "already disallowed" because it "wasn't in the IEP." CMS Ex. F, 1st page (unnumbered). However, whether the claim for speech language therapy was unallowable on another ground has no bearing on whether this service overlapped with physical therapy in a way that calls into question whether physical therapy was provided. Accordingly, we reverse the disallowance of the physical therapy claim for each date.

[10] These claims are addressed in the OIG workpapers in Folder 4, G.1.2 at pages 5-6 and Folder 12, O-4-2 at pages 39-42.

Wanette[11]

One unit of occupational therapy and one unit of physical therapy provided to C.C. on 10/26/99.

The documentation reviewed by the auditors shows that physical therapy was provided from 9:15 to 9:45 and that occupational therapy was provided from 9:40 to 9:55. OHCA claimed two 15-minute units of physical therapy, of which one unit was allowed. OHCA argues that its claim for a second 15-minute unit of physical therapy should have been allowed. OHCA does not dispute the disallowance of its claim for one 15-minute unit of occupational therapy (which was disallowed on the grounds that it lacked the requisite prescription as well as that it was for an overlapping time).

It appears that the auditors allowed one unit of physical therapy based on the presumption that it was provided in the non-overlapping period of 9:15 to 9:30. OHCA does not explain, however, why we should find that a second unit of physical therapy was provided from 9:30 to 9:45 when the documentation purports to show that occupational therapy was provided in part at precisely the same time (9:40 to 9:45). Accordingly, we uphold the disallowance of both the occupational therapy claim and the physical therapy claim.

Muskogee[12]

Two units of occupational therapy and two units of physical therapy provided to C.M. on 9/14/99.

The documentation reviewed by the auditors shows that occupational therapy was provided from 9:30 to 10:00 and that physical therapy was provided from 9:00 to 10:00. OHCA asserts that its claims for two 15-minute units of each of the services should have been allowed.

It is reasonable to presume that the two 15-minute units of physical therapy were provided from 9:00 to 9:30 since the documentation does not specify the precise time within the 60-

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[11] These claims are addressed in the OIG workpapers in Folder 4, G.1.7 at pages 5-7.

[12] The claims are addressed in the OIG workpapers in Folder 3, G.1.2 at page 6 (C.M. and C.R.), and in Folder 9, L.4.2 at pages 19-20 and 72 (C.M.) and at pages 68-69, 72 (C.R.).

minute time range that the service was provided. There was thus no overlap with the two 15-minute units of occupational therapy provided from 9:30 to 10:00.

CMS asserts, however, that the occupational therapy claims are unallowable in any event because there was no prescription for these services. CMS Ex. F, 1st page (unnumbered). Based on our analysis in Section I, we agree that there was no prescription. Accordingly, we reverse the disallowance of the physical therapy claims but uphold the disallowance of the occupational therapy claims.

Two units of physical therapy provided to C.R. on 11/10/99.
Two units of occupational therapy provided to C.R. on 11/10/99.

The documentation reviewed by the auditors shows that physical therapy was provided from 8:30 to 9:00 and also that occupational therapy was provided from 8:30 to 9:00. OHCA asserts that its claims for two 15-minute units of physical therapy should be allowed but appears to concede that its claims for two 15-minute units of occupational therapy were properly disallowed based on the lack of authorization for this service in the student's IEP.[13] OHCA does not explain, however, why we should conclude that physical therapy was provided when the documentation purports to show that it was provided at precisely the same time as occupational therapy. Accordingly, we uphold the disallowance of both of the physical therapy claims and both of the occupational therapy claims.

Elk City[14]

One unit of speech language therapy provided to J.E. on 2/28/00.
One unit of personal care provided to J.E. on 2/28/00.

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[13] OHCA states that "[t]he OT should have been disallowed if it was not included on the IEP[.]" OHCA Ex. 10, Att. A, at 5. Our review of the student's IEP does not disclose any reference to occupational therapy (although an occupational therapist was on the IEP team). OIG workpapers, Folder 9, L-4-2 at pages 68-69. As indicated previously, all school-based services claimed under Medicaid must be authorized in an IEP.

[14] The claim is addressed in the OIG workpapers at Folder 4, G.1.5 at pages 2 and 4, and Folder 11, M-4-2 at pages 2 - 9.

The documentation reviewed by the auditors shows that speech therapy was provided from 9:45 to 10:00 and that personal care was provided from 9:55 to 10:05. OHCA argues that one 15-minute unit of speech language therapy is allowable. OHCA does not appear to dispute the disallowance of the personal care claim based on the lack of authorization for this service in the student's IEP.[15]

OHCA does not explain, however, why we should conclude that the speech language therapy claim was allowable when the documentation purports to show that it was provided in part at precisely the same time as personal care (9:55 to 10:00). Accordingly, we uphold the disallowance of the speech language therapy claim and the personal care claim.

Special Services Coop[16]

One unit of speech language therapy and one unit of occupational therapy provided to A.C. on 12/1/99.

The documentation reviewed by the auditors shows that speech language therapy was provided from 1:50 to 2:15 and that occupational therapy was provided from 1:30 to 2:00. OHCA claimed two 15-minute units of occupational therapy, of which one unit was allowed. OHCA asserts that its claim for a second 15-minute unit of occupational therapy as well as its claim for one 15-minute unit of speech language therapy should have been allowed.

It appears that the auditors allowed the one unit of occupational therapy based on the presumption that it was provided in the non-overlapping period of 1:30 to 1:45. It is also reasonable to presume that the speech language therapy was provided from 2:00 to 2:15 since the documentation does not specify the precise time within the 25-minute time range that the 15-minute unit of service was provided. Accordingly, the second unit of

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[15] OHCA states that "[t]he personal care should have been disallowed if it was not included on the IEP[.]" OHCA Ex. 10, Att. A, at 6. Our review of the student's IEP does not disclose any reference to personal care. OIG workpapers, Folder 11, M-4-2 at pages 2-8.

[16] The claims are addressed in the OIG workpapers in Folder 3, G.1.4 at page 5 and Folder 8, J.4.2 at page 18 (A.C.) and in Folder 3, G.1.4 at pages 2 and 5, and Folder 8, J-4-2 at page 34 (A.N.).

occupational therapy did not overlap with the unit of speech language therapy.

CMS argues that the speech language therapy claim is unallowable in any event because there was no referral for this service. Based on our analysis in Section I, we conclude that there was no referral. Accordingly, we uphold the disallowance of the speech language therapy claim and reverse the disallowance of the occupational therapy claim.

One unit of occupational therapy service and one unit of occupational therapy evaluation provided to A.N. on 8/20/99.

The documentation reviewed by the auditors consists of an "OT Services Documentation" form which shows that services were provided from 1:00 to 1:30 and checks off two different codes: the code for "IEP Child Guidance Treatment Encounter/occupational therapy" and the code for "Occupational Therapy Evaluation." The form also contains the notation "eval, teacher consult" under "Comments." See OIG workpapers, Folder 8, J-4-2 at page 34. OHCA does not dispute the disallowance of the occupational therapy service claim but asserts that the documentation establishes that an occupational therapy evaluation was provided.

We need not determine whether an occupational therapy evaluation was provided since we agree with CMS that no claims were allowable because the student lacked an IEP. OHCA does not dispute the statement in the audit report that the school district was unable to provide an IEP for this student (see OIG workpapers, Folder 3, G.1.4 at page 2) or assert that the IEP is now available. Accordingly, we uphold the disallowance of both the occupational therapy service claim and the occupational therapy evaluation claim.

B. Wrong Code Billed

The auditors determined that the code under which the services were billed did not apply to the activity that was documented. In most cases, the auditors suggested that another code could have been used. In some of these cases, we conclude that the service could properly have been billed under another code, and we reverse the disallowance up to the amount that could have been billed under that code. We also remand the disallowance with respect to some services improperly billed at an individual rate in order to give OHCA an opportunity to provide such additional information as CMS may require to support billing at a group rate. We sustain the disallowance of the remaining claims

including claims that we find are unallowable on alternative grounds.

Salisaw[17]

Three units of physical therapy provided to C.N. on 8/17/99.

According to the progress note on the claim form, the physical therapist observed the student during his regular physical education class. The progress notes also include a recommendation to continue physical therapy. See OIG workpapers, Folder 14, HC-R-G.1.4 at page 54. The auditors stated that the service provided was not physical therapy but that the "activity would fall under Targeted Case Management" (TCM) under OHCA's policy stating that TCM activities include monitoring. OHCA asserts that most of the claimed amount is allowable as TCM (which is billable at a lower rate than physical therapy). OHCA's July 1999 provider manual lists "Service coordination, monitoring and advocacy" as a TCM activity but does not provide any additional information regarding this activity. OIG workpapers, Folder 5, F-5a at page 14. However, as of June 11, 1999, Oklahoma's approved State plan described "Service Coordination and Monitoring" as follows:

> Facilitating the individual's access to the care, services and resources identified in the service plan through linkage, coordination, referral, consultation, and monitoring. This is accomplished through in-person and telephone contacts with the individual, his or her parent(s) or legal guardian, and with services providers and other collaterals on behalf of the individual. . . . It also includes advocating for the individual in matters regarding access, appropriateness and proper utilization of services.

OIG workpapers, Folder 5, F-2 at page 10.[18] Since the observation of the child provided a basis for the physical therapist to advocate for the child's continued access to physical therapy services, this activity appears to constitute

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[17] This claim is addressed in the OIG workpapers in Folder 4, G.1.4 at 3rd page (unnumbered) and in Folder 14, HC-R-G.1.4 at pages 53-54.

[18] The same language appears in OHCA's August 2000 provider manual, "EPSDT School Based Services: An Overview for Providers." See OIG workpapers, Folder 5, F-5, at page .

"Service Coordination and Monitoring" within the meaning of the State plan, and thus TCM under OHCA's policy. CMS takes the position that the activity did not constitute TCM but does not explain why it disagrees with the auditors' opinion. Accordingly, we reverse the disallowance of the physical therapy claims in the amount that could have been billed for TCM.

Muskogee[19]

Two units of individual occupational therapy provided to C.M. on 9/21/99.

According to the auditors, the documentation supporting the claims shows that the student received group occupational therapy although the service was coded as individual occupational therapy. OHCA asserts that the claims should be allowed up to the amount for group occupational therapy (which is billable at a lower rate than individual occupational therapy). We need not reach this question, however. CMS states as an alternative ground for the disallowance that there was no prescription for occupational therapy. CMS Ex. F, 1st page (unnumbered). Based on our analysis in Section I, we find that there was no such prescription. Accordingly, we uphold the disallowance of the individual occupational therapy claims.

Ardmore[20]

One unit of Child Health Encounter services provided to R.C. on 8/23/99.

The documentation reviewed by the auditors included progress notes that stated that the provider performed an "analysis of current applied IEP objectives" and determined that the speech language pathologist is "to proceed with individualized plan of care for rehabilitation." See OIG workpapers, Folder 1, G.1.2 at page 6. According to the auditors, this description of the service does not support a claim for a Child Health Encounter (CHE) but rather constitutes a service plan review billable as TCM under OHCA's policy. OHCA asserts that the amount of a claim

[19] This claim is addressed in the OIG workpapers in Folder 3, G.1.2 at page 6, and Folder 9, L-4-2 at pages 19-20, 72.

[20] This claim is addressed in the OIG workpapers in Folder 1, G.1.2 at page 6.

for TCM (which is billable at a lower rate than CHE) should have been allowed for this service.

OHCA's July 1999 provider manual lists "Services plan review" as a TCM activity but does not define it. OIG workpapers, Folder 5, F-5a, at page 14. However, as of June 11, 1999, Oklahoma's approved State plan described "Service Plan Review" as follows:

> Assessing the progress the individual has made on the service plan goals and objectives and the appropriateness and effectiveness of the services being provided on a periodic basis, but at least annually. This review may result in revision of the individualized service plan, continuation of the plan, or termination of case management services if they are no longer appropriate. Periodic reviews may be done through personal and telephone contacts with the individual and other involved parties. The annual review must include a team meeting.

OIG workpapers, Folder 5, F-2 at page 11.[21] We conclude that the service provided constituted a service plan review within the meaning of the State plan, and thus TCM under OHCA's policy, since it included an assessment and one of the listed results (continuation of the service plan). It is unclear whether the provider performed the assessment "through personal and telephone contacts with the individual and other involved parties" since the progress notes do not appear to be in the record; however, such contacts do not appear to be required as part of every service plan review. CMS takes the position that the activity did not constitute TCM but does not explain why it disagrees with the auditors' opinion. Accordingly, we reverse the disallowance of the CHE claim in the amount that could have been billed for TCM.

Cushing[22]

One unit of Child Health Encounter services provided to C.C. on 8/30/99.
One unit of Child Health Encounter services provided to W.C. on 10/27/99.

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[21] The same language is included in OHCA's August 2000 provider manual. See OIG workpapers, Folder 5, F-5 at page 29.

[22] These claims are addressed in the OIG workpapers in Folder 3, G.1.9 at page 3.

One unit of Child Health Encounter services provided to A.J. on 9/13/99.

The auditors stated that the services billed were "described as parent interviews and signatures related to the student's IEP." OIG Workpapers, Folder 3, G.1.9 at page 3. According to the auditors, the services did not qualify as a CHE under OHCA's policy but were instead TCM. OHCA asserts that the claims should be allowed up to the amount for TCM (which is less than the amount billable for CHE).

We conclude that the description of the services provided to the auditors is insufficient to establish that the services constituted TCM. We were unable to locate the documentation for the claims in the OIG workpapers. Further, OHCA failed to identify any additional information to support the assertion that TCM was provided to the three children on the specified dates even after CMS took the position in response to the appeal that the services were not allowable as TCM. See CMS Ex. F, 1st page (unnumbered). Accordingly, we uphold the disallowance of the CHE services claim for each date.

Special Services Coop[23]

One unit of Child Health Encounter services provided to P.G. on 10/6/99.

The auditors found that the service billed consisted of a nurse applying ointment to an abrasion that the child sustained. According to the auditors, this service did not qualify as a CHE as defined in OHCA's policy. OHCA asserted that the activity was a CHE since the nurse assessed and treated the student after an accident sustained at school. We need not reach this question, however. In order to be allowable, a health-related service must be authorized in the student's IEP. The student's IEP in effect on the date in question indicates that no related services are authorized. OIG workpapers, Folder 8, HC-J-4-3 at page 5. Accordingly, we uphold the disallowance of the CHE services claim.

[23] This claim is addressed in the OIG workpapers in Folder 3, G.1.1 at page 3, and Folder 8, HC-J-4-3 at pages 4-5.

Dennison[24]

Two units of individual physical therapy provided to S.B. on 12/16/99.
Two units of individual occupational therapy provided to S.B. on 4/6/00.
One unit of individual occupational therapy provided to S.B. on 4/13/00.
One unit of individual occupational therapy provided to S.B. on 4/20/00.
One unit of individual occupational therapy provided to S.B. on 4/27/00.
Two units of individual occupational therapy provided to S.B. on 5/4/00.
One unit of individual occupational therapy provided to S.B. on 5/11/00.

The documentation reviewed by the auditors purported to show that during all or part of the same time on the same date, a provider provided individual physical therapy or individual occupational therapy both to S.B. and to another student. The auditors stated that the services to S.B. and the other student should have been billed as group physical or occupational therapy. CMS notes that the auditors had commented that billing the services as group therapy might be appropriate; however, CMS states that "as CMS/RO stated in its comments there was not enough information to make a definitive determination that the group rate was appropriate[.]" CMS Br. at 12. It is not clear what additional information would be needed to make such a determination since we are unable to locate the CMS Regional Office comments in the record.[25] Accordingly, with one exception described below, we remand this part of the appeal to CMS to specify what further information is needed and to give OHCA an opportunity to provide that information, based on which CMS should issue a new determination regarding the allowability of these claims.

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[24] These claims are addressed in the OIG workpapers in Folder 3, G.1.4 at 1st - 5th pages (unnumbered), and Folder 12, HC-N-4-3 at 2nd page (unnumbered).

[25] We note that OHCA's 1999 provider manual limited the number of students for whom group therapy could be billed to five. See OIG workpapers, Folder 5, F-5a at page 8. There is no indication in the OIG workpapers pertaining to the individual claims that this number was exceeded.

The exception to the remand pertains to one of two units of individual occupational therapy billed for 5/4/00. The documentation reviewed by the auditors also showed that the time period for this unit of occupational therapy (from 9:00 to 9:15) overlapped with speech language therapy provided to S.B. Since the documentation calls into question whether either of the two services was provided to S.B., we uphold the disallowance of the claim for one unit of occupational therapy services for 5/4/00.

One unit of individual occupational therapy provided to T.W. on 9/9/99.
One unit of individual occupational therapy provided to T.W. on 9/21/99.
One unit of individual occupational therapy provided to T.W. on 9/30/99.
One unit of individual physical therapy provided to T.W. on 11/11/99.
Three units of individual occupational therapy provided to T.W. on 11/18/99.
Two units of individual speech language therapy provided to T.W. on 1/13/00.
Two units of individual occupational therapy provided to T.W. on 5/4/00.
One unit of individual occupational therapy provided to T.W. on 5/9/00.
Two units of individual physical therapy provided to T.W. on 5/4/00.[26]
Three units of individual physical therapy provided to T.W. on 6/21/00.[27]
Two units of individual physical therapy provided to T.W. on 6/28/00.

The documentation reviewed by the auditors purported to show that during all or part of the same time on the same date, a provider provided individual occupational therapy, individual physical

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[26] OHCA Exhibit 10, Att. A, page 13, last item, indicates that the date of service was 5/9/00. However, the OIG workpapers describe the services in question as provided on 5/4/00. See OIG workpapers, Folder 3, G.1.4 at 4th page (unnumbered).

[27] OHCA indicates that two units of individual physical therapy totalling $37.32 were disallowed. OHCA Ex.10, Att. A, page 14. However, as the OIG workpapers state, the $37.32 represents three units (45 minutes). OIG workpapers, Folder 3, G.1.4 at 5th page (unnumbered).

therapy, or individual speech language therapy both to T.W. and to another student. The auditors stated that the services to T.W. and the other student should have been billed as group occupational, therapy or speech language therapy. CMS notes that the auditors had commented that billing the services as group therapy might be appropriate; however, CMS states that "as CMS/RO stated in its comments there was not enough information to make a definitive determination that the group rate was appropriate[.]" CMS Br. at 12. It is not clear what additional information would be needed to make such a determination since we are unable to locate the CMS Regional Office comments in the record. Accordingly, with the exceptions described below, we remand this part of the appeal to CMS to specify what further information is needed and to give OHCA an opportunity to provide that information, based on which CMS should issue a new determination regarding the allowability of these claims.

One exception to the remand pertains to the claim for one unit of individual physical therapy provided to T.W. on 11/11/99.[28] The documentation reviewed by the auditors also showed that the time period for this unit of individual physical therapy (from 1:30 to 1:45) overlapped with individual occupational therapy provided to T.W. Since the documentation calls into question whether either of the two services was provided to T.W., we uphold the disallowance of the individual physical therapy claim for this date.

The claims for 5/4/00, consisting of two units of individual occupational therapy and two units of individual physical therapy provided to T.W., are also not appropriately remanded. The documentation reviewed by the auditors showed that both units of occupational therapy and physical therapy were provided to T.W. during the same time period (8:30 to 9:00). Since the documentation calls into question whether either of the two services was provided to T.W., we uphold the disallowance of the claims for two units of individual occupational therapy and two units of individual physical therapy.

[28] The auditors did not state that a claim for group therapy would have been appropriate in this case.

C. Duration of Services

Ardmore[29]

8 units of Child Health Encounter services provided to various students on dates ranging from 9/1/99 to 1/20/00.

The auditors found that the duration of each of five of the services billed as CHE was 10 minutes and that the duration of each of the remaining three services billed as CHE was 15 minutes. The auditors stated that "it does not seem appropriate for Ardmore to bill Medicaid $35.00 when the service provided has a duration of less than 30 minutes," noting that most services school districts provide are billed to Medicaid in 15-minute units, which are reimbursed by Medicaid at the rate of $17.50 per unit. OIG workpapers, Folder 1, G.1.2 at page 4. OHCA asserts that all eight claims should be allowed because its policy then in effect did not include a duration time for a CHE visit.

OHCA's July 1999 provider manual defines the unit of service for CHE as "An encounter (no minimum time requirement)." OIG workpapers, Folder 5, F-5a at page 7. Moreover, OHCA's approved State plan clearly indicates that the rate for a unit of CHE was $35. See OIG workpapers, Folder 5, F-2, at 17. CMS does not explain why this would not permit OHCA to bill for the services at the rate it did. Accordingly, we reverse the disallowance of the CHE claims.

One unit of Child Health Encounter services provided to A.W. on 2/17/00.

The auditors found that the services provided to the student for cut fingers did not meet the definition of CHE services in OHCA's policy. The auditors further stated that the services could not be billed as nursing services because their duration - 10 minutes - was shorter than 15-minute unit of service for nursing services. OHCA asserts that the services constituted CHE, which it argues may consist of unscheduled events such as the one in question regardless of duration (since the unit of service was "an encounter"). We need not reach the question whether the activity constituted CHE. In order to be allowable, a health-related service must be included in the child's IEP. The related

[29] These claims are addressed in the OIG workpapers in Folder 1, G.1.2 at pages 3-4 (multiple students), Folder 1, G.1.4 at 4th- 5th pages (unnumbered) (A.W.), and Folder 7, H-4-3 at pages 227-232.

services listed in the student's IEP in effect on the date in question do not include CHE, nor do they include nursing services, which the auditors said appeared to be the appropriate service (although they noted their opinion that it was not billable as such because the duration was less than the 15-minute unit of service for nursing services).[30] OIG workpapers, Folder 7, H-4-3 at page 231 and Folder 1, G-1-4, pages 4-5 (unnumbered). Accordingly, we uphold the disallowance of the CHE services claim.

III. OHCA has not established that the entire disallowance should be set aside on the ground that the audit was unreliable.

According to OHCA, the errors it identified in OHCA Exhibit 10, Attachment A inflated the overpayment amounts at the sample level by at least $666.40, which, OHCA asserts, becomes very significant when projected to the universe of claims. OHCA takes the position that "the prevalence of error at the sample level casts substantial doubt on the reliability of the audit, and, thus, on the proprie[ty] of the disallowance." OHCA Br. at 14, citing New York State Dept. of Social Services, DAB No. 1358, at 2 (1992) (stating that agency "is reasonable in using any audit technique, consistent with its own policies, which produces reliable evidence of the overpayment amount, including valid statistical sampling").

OHCA's argument has no merit. Since we uphold the disallowance with respect to the majority of the claims that OHCA contends were erroneously disallowed in whole or in part, the magnitude of the errors is not as great as OHCA asserts. Moreover, while the disallowance must be recalculated so that it no longer includes amounts projected from the sample claims that were disallowed in error, OHCA points to no basis for setting aside the entire disallowance. The quoted statement in the Board's New York decision simply indicates that a disallowance based on a flawed audit methodology might be subject to question. As indicated

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[30] The "Nursing Services Documentation" for this service includes progress notes that state in part:

> Student has health problem that needs nursing observation to maintain school Attendance. Student was observed and taught intervention to maintain optimal health.

OIG workpapers, Folder 7, H-4-3 at page 227. However, the need for this service is not reflected in the student's IEP.

earlier, however, OHCA did not pursue its initial arguments that the audit methodology here was flawed.

Conclusion

Based on the foregoing analysis, we uphold the disallowance with respect to the claims addressed in Section I and uphold, reverse or remand the disallowance with respect to the disputed claims addressed in Section II as specified therein. In addition, we uphold the disallowance of the remaining claims not disputed by OHCA. On remand of the Dennison school district claims described in Section II.B., CMS should determine whether services which were disallowed as improperly billed at the individual therapy rate are payable at the group rate and should issue a new determination with respect to these claims. If OHCA is dissatisfied with that determination, it may file an appeal pursuant to 45 C.F.R. Part 16.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member