



December 30, 2010

**TO:** David Hansell  
Acting Assistant Secretary  
Administration for Children and Families

**FROM:** /Daniel R. Levinson/  
Inspector General

**SUBJECT:** Audit of Allegheny County Title IV-E Foster Care Claims From October 1997  
Through September 2002 (A-03-08-00554)

Attached, for your information, is an advance copy of our final report on Allegheny County Title IV-E foster care claims from October 1997 through September 2002. We will issue this report to the Pennsylvania Department of Public Welfare within 5 business days.

If you have any questions or comments about this report, please do not hesitate to call me, or your staff may contact Lori S. Pilcher, Assistant Inspector General for Grants, Internal Activities, and Information Technology Audits, at (202) 619-1175 or through email at [Lori.Pilcher@oig.hhs.gov](mailto:Lori.Pilcher@oig.hhs.gov) or Stephen Virbitsky, Regional Inspector General for Audit Services, Region III, at (215) 861-4470 or through email at [Stephen.Virbitsky@oig.hhs.gov](mailto:Stephen.Virbitsky@oig.hhs.gov). Please refer to report number A-03-08-00554.

Attachment



January 4, 2011

Report Number: A-03-08-00554

Mr. Michael Nardone  
Acting Secretary of Public Welfare  
Pennsylvania Department of Public Welfare  
P.O. Box 2675  
Harrisburg, PA 17105

Dear Mr. Nardone:

Enclosed is the U.S. Department of Health & Human Services (HHS), Office of Inspector General (OIG), final report entitled *Audit of Allegheny County Title IV-E Foster Care Claims From October 1997 Through September 2002*. We will forward a copy of this report to the HHS action official noted on the following page for review and any action deemed necessary.

The HHS action official will make final determination as to actions taken on all matters reported. We request that you respond to this official within 30 days from the date of this letter. Your response should present any comments or additional information that you believe may have a bearing on the final determination.

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

If you have any questions or comments about this report, please do not hesitate to call me, or contact Michael Walsh, Audit Manager, at (215) 861-4480 or through email at [Michael.Walsh@oig.hhs.gov](mailto:Michael.Walsh@oig.hhs.gov). Please refer to report number A-03-08-00554 in all correspondence.

Sincerely,

/Stephen Virbitsky/  
Regional Inspector General  
for Audit Services

Enclosure

**Direct Reply to HHS Action Official:**

Mr. Ron Gardner  
Grants Officer  
Administration for Children and Families, Region III  
U.S. Department of Health & Human Services  
Suite 864, Public Ledger Building  
150 South Independence Mall West  
Philadelphia, PA 19106-3499

Department of Health & Human Services

**OFFICE OF  
INSPECTOR GENERAL**

**AUDIT OF ALLEGHENY COUNTY  
TITLE IV-E FOSTER CARE  
CLAIMS FROM OCTOBER 1997  
THROUGH SEPTEMBER 2002**



Daniel R. Levinson  
Inspector General

January 2011  
A-03-08-00554

# *Office of Inspector General*

<http://oig.hhs.gov>

---

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

## *Office of Audit Services*

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

## *Office of Evaluation and Inspections*

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

## *Office of Investigations*

The Office of Investigations (OI) conducts criminal, civil, and administrative investigations of fraud and misconduct related to HHS programs, operations, and beneficiaries. With investigators working in all 50 States and the District of Columbia, OI utilizes its resources by actively coordinating with the Department of Justice and other Federal, State, and local law enforcement authorities. The investigative efforts of OI often lead to criminal convictions, administrative sanctions, and/or civil monetary penalties.

## *Office of Counsel to the Inspector General*

The Office of Counsel to the Inspector General (OCIG) provides general legal services to OIG, rendering advice and opinions on HHS programs and operations and providing all legal support for OIG's internal operations. OCIG represents OIG in all civil and administrative fraud and abuse cases involving HHS programs, including False Claims Act, program exclusion, and civil monetary penalty cases. In connection with these cases, OCIG also negotiates and monitors corporate integrity agreements. OCIG renders advisory opinions, issues compliance program guidance, publishes fraud alerts, and provides other guidance to the health care industry concerning the anti-kickback statute and other OIG enforcement authorities.

# *Notices*

---

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

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

## **OFFICE OF AUDIT SERVICES FINDINGS AND OPINIONS**

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

## **EXECUTIVE SUMMARY**

### **BACKGROUND**

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

Allegheny County's Department of Human Services (DHS), Office of Children, Youth and Families, administers the Title IV-E program, which includes services for children supervised by Juvenile Justice Services. DHS determines Title IV-E eligibility and contracts with institutional care facilities to provide foster care services and with firms that place children in foster family and group homes. The contracts specify per diem rates negotiated with the respective contractors. Per diem rates vary by location and the type and extent of services provided. From October 1997 through September 2002, the State agency claimed \$146,115,235 (Federal share) in Title IV-E maintenance and associated administrative costs on behalf of Allegheny County children.

### **OBJECTIVE**

Our objective was to determine whether the State agency claimed Title IV-E maintenance and associated administrative costs for Allegheny County in accordance with Federal requirements from October 1997 through September 2002.

### **SUMMARY OF FINDINGS**

The State agency did not always claim Title IV-E maintenance and associated administrative costs for Allegheny County in accordance with Federal requirements. Of the 100 maintenance claims sampled, 62 were allowable. However, 23 claims were unallowable because they included costs for services provided to ineligible children. Some of the 23 claims contained multiple errors.

Based on these sample results, we estimated that the State agency improperly claimed \$17,284,239 for Title IV-E maintenance costs. Including associated administrative costs of \$11,022,902, we estimated that the State agency improperly claimed at least \$28,307,141 of the total \$146,115,235 (Federal share) claimed for Title IV-E reimbursement on behalf of Allegheny County children.

We were unable to determine the allowability of the 15 remaining sampled claims because the contractors' per diem rates did not distinguish between services that were eligible or ineligible for Title IV-E reimbursement and because the State agency did not provide a description of the sundry costs claimed. However, court records, case workers' progress notes, and other documentation indicated that the facilities provided some services, such as medical, educational,

and rehabilitative services, that were not eligible for Title IV-E foster care maintenance payments. Based on these sample results, we set aside \$27,913,816 for resolution by ACF.

## **RECOMMENDATIONS**

We recommend that the State agency:

- refund to the Federal Government \$28,307,141, including \$17,284,239 in unallowable maintenance costs and \$11,022,902 in unallowable administrative costs, for the period October 1997 through September 2002;
- work with ACF to determine the allowability of \$27,913,816 related to claims that included both allowable and unallowable services;
- work with ACF to identify and resolve any unallowable claims for maintenance payments made after September 2002 and refund the appropriate amount;
- discontinue claiming Title IV-E reimbursement for ineligible children and ineligible services;
- direct Allegheny County to develop rate-setting procedures that separately identify maintenance and other costs, including related administrative costs, so that claims are readily allocable to the appropriate Federal, State, and local funding sources; and
- direct Allegheny County to describe the services provided when claiming sundry costs.

## **STATE AGENCY COMMENTS**

In its written comments on our draft report, the State agency disagreed with our findings and recommendations. The State agency questioned our authority to conduct the audit and stated that our recommendations were without merit and contrary to law. We have included the State agency's comments as Appendix E. We excluded the exhibits accompanying the State agency's comments because of their volume and because some contained personally identifiable information.

## **OFFICE OF INSPECTOR GENERAL RESPONSE**

After reviewing the State agency's comments, we maintain the validity of our recommendations, as well as our conclusion that the State agency did not always comply with Federal requirements when claiming Title IV-E costs for Allegheny County children.

# TABLE OF CONTENTS

	<u>Page</u>
<b>INTRODUCTION</b> .....	1
<b>BACKGROUND</b> .....	1
Title IV-E Foster Care Program.....	1
Federal and State Licensing Requirements.....	1
Allegheny County’s Title IV-E Program.....	2
Audits of the State Agency’s Title IV-E Claims .....	2
<b>OBJECTIVE, SCOPE, AND METHODOLOGY</b> .....	2
Objective.....	2
Scope.....	2
Methodology.....	3
<b>FINDINGS AND RECOMMENDATIONS</b> .....	4
<b>COSTS CLAIMED FOR SERVICES PROVIDED TO INELIGIBLE CHILDREN</b> ...5	
Remaining in the Home Contrary to the Welfare of the Child.....	5
Income Requirements .....	6
Reasonable Efforts To Prevent Removal From the Home.....	6
Age Requirements.....	7
<b>COSTS CLAIMED FOR INELIGIBLE SERVICES</b> .....	7
<b>SUMMARY OF UNALLOWABLE AND POTENTIALLY UNALLOWABLE TITLE IV-E COSTS</b> .....	8
<b>RECOMMENDATIONS</b> .....	9
<b>STATE AGENCY COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE</b> .....	9
Scope of Audit .....	10
Program Operating Responsibilities .....	10
Audit Period.....	11
Associated Administrative Costs .....	12
Sampling Estimation and Set-Aside Calculation.....	13
Documentation for Sampled Claims.....	13

## **APPENDIXES**

A: PREVIOUSLY ISSUED REPORTS ON PENNSYLVANIA'S TITLE IV-E CLAIMS

B: SAMPLING METHODOLOGY

C: SAMPLE RESULTS AND ESTIMATES

D: DEFICIENCIES OF EACH SAMPLED CLAIM

E: STATE AGENCY COMMENTS

## INTRODUCTION

### BACKGROUND

#### **Title IV-E Foster Care Program**

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

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

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

In Pennsylvania, the Department of Public Welfare (the State agency) supervises the Title IV-E foster care program through its Office of Children, Youth, and Families. The State agency administers the program through the counties.

#### **Federal and State Licensing Requirements**

Section 472(c) of the Act requires that foster homes and childcare institutions be licensed or approved as meeting the standards established for such licensing by the State to receive Title IV-E reimbursement. The Pennsylvania State plan incorporates by reference Pennsylvania Code requirements for licensing and approving Title IV-E reimbursable institutions (55 PA. CODE chapters 3680, 3700, and 3800). The State agency grants licenses in accordance with Federal and State requirements, including standards related to admission policies, safety, sanitation, and the protection of civil rights.

## **Allegheny County's Title IV-E Program**

In Allegheny County, the Department of Human Services (DHS), Office of Children, Youth and Families, administers the Title IV-E program, which includes services for children supervised by Juvenile Justice Services. DHS determines Title IV-E eligibility and contracts with institutional care facilities to provide foster care and with firms that place children in foster family and group homes. The contracts specify per diem rates negotiated with the respective contractors. Per diem rates vary by location and the type and extent of services provided.

Contractors submit invoices to DHS based on the negotiated per diem rates. DHS pays the invoices and then submits quarterly summary invoices to the State agency. DHS claims administrative costs separately. The State agency consolidates the claims from all 67 counties, including Allegheny County, and submits Quarterly Reports of Expenditures and Estimates (Forms ACF-IV-E-1) to ACF to claim Federal funding.

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

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

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

### **Objective**

Our objective was to determine whether the State agency claimed Title IV-E maintenance and associated administrative costs for Allegheny County in accordance with Federal requirements from October 1997 through September 2002.

### **Scope**

Our review covered 126,283 claims for Title IV-E maintenance and associated administrative costs totaling \$146,115,235 (Federal share). During the audit period, DHS submitted 33 quarterly summary invoices to the State agency for Title IV-E maintenance and associated administrative costs. DHS provided the State agency with detailed lists in support of the summary invoices. Each line on the detailed lists showed a child's name; the claim period; and the clothing costs, sundry costs, and maintenance costs claimed for the child. (In this report, we refer to these lines as "claims.")

From the sampling frame of 126,283 claims, we selected a random sample of 100 claims totaling \$64,363 (Federal share) for Title IV-E maintenance costs. Fifty-one contractors provided the services for the 100 sampled claims at 83 facilities, primarily foster family homes, as well as some group homes and institutional care facilities. Appendix B explains our sampling methodology, and Appendix C details the sample results and estimates.

We requested, but the State agency did not provide, DHS's contracts with the foster care providers associated with our sampled claims. In addition, the State agency was unable to identify the specific costs and services included in the per diem rates paid to institutions. We also requested but did not receive a description of the types of sundry services included on four sampled claims.

Some services that we identified as unallowable for reimbursement as Title IV-E foster care costs, or for which we were unable to express an opinion, may have been allowable for reimbursement through other Federal programs. However, determining the allowability of costs for other Federal programs was not within the scope of this audit.

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

We performed our fieldwork at the State agency in Harrisburg and Pittsburgh, Pennsylvania.

## **Methodology**

To accomplish our objective, we:

- reviewed Federal and State criteria related to Title IV-E foster care claims,
- interviewed State agency personnel regarding the State agency's claims,
- reviewed the State agency's accounting system and reconciled vouchers to the Forms ACF-IV-E-1 to identify all maintenance costs claimed for Federal reimbursement during the audit period,
- obtained from the State agency DHS's quarterly summary invoices and detailed lists supporting the invoices,
- identified all Title IV-E maintenance claims,
- reviewed documentation provided by the State agency in support of the 100 sampled claims and reconciled maintenance costs to the amounts posted in the State agency's accounting records,
- reviewed licensing or approval information provided by the State agency for the contractors included in our sample, and
- requested all 51 contracts between DHS and the contractors included in our sample.

State agency officials directed us to address all requests for information to the State agency instead of going directly to the social workers, the courts, or Allegheny County. Initially, we requested Allegheny County's social worker case files, court orders, facility licenses, contracts, billing information, and any other documentation to support the State agency's claims. The State

agency supplied court orders, Client Information System data, social worker notes, and other data.<sup>1</sup>

After reviewing the information supplied by the State agency, we provided the State agency with a list of the documentation that we had requested but did not receive. As of June 15, 2009, the State agency informed us that after diligently searching its records, it was unable to locate many of the requested documents.

We questioned each unallowable claim only once regardless of how many errors it contained. Based on the errors in the sample, we estimated the dollar value of the errors in our sampling frame.

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

## **FINDINGS AND RECOMMENDATIONS**

The State agency did not always claim Title IV-E maintenance and associated administrative costs for Allegheny County in accordance with Federal requirements. Of the 100 maintenance claims sampled, 62 were allowable. However, 23 claims were unallowable because they included costs for services provided to ineligible children. Some of the 23 claims contained multiple errors, as shown in Appendix D.

Based on these sample results, we estimated that the State agency improperly claimed \$17,284,239 for Title IV-E maintenance costs. Including associated administrative costs of \$11,022,902, we estimated that the State agency improperly claimed at least \$28,307,141 of the total \$146,115,235 (Federal share) claimed for Title IV-E reimbursement on behalf of Allegheny County children.

We were unable to determine the allowability of the 15 remaining sampled claims because the contractors' per diem rates did not distinguish between services that were eligible or ineligible for Title IV-E reimbursement and because the State agency did not provide a description of the sundry costs claimed. However, court records, case workers' progress notes, and other documentation indicated that the facilities provided some services, such as medical, educational, and rehabilitative services, that were not eligible for Title IV-E foster care maintenance payments. Based on these sample results, we set aside \$27,913,816 for resolution by ACF.

---

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

## **COSTS CLAIMED FOR SERVICES PROVIDED TO INELIGIBLE CHILDREN**

The State agency submitted 23 claims totaling \$22,804 for services provided to children who did not meet Title IV-E foster care eligibility requirements. We questioned many of these claims for multiple reasons.

- For 16 claims, the State agency did not document that remaining in the home was contrary to the children’s welfare or that placement would be in the best interest of the children.
- For 11 claims, the State agency did not document computation of the children’s family incomes.
- For nine claims, the State agency did not document that it had made reasonable efforts to prevent the children’s removal from the home or that such efforts were not required.
- For four claims, the children did not meet Title IV-E age requirements.

### **Remaining in the Home Contrary to the Welfare of the Child**

Section 472(a)(1) of the Act required that “the removal from the home occurred pursuant to a voluntary placement agreement entered into by the child’s parent or legal guardian, or was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child ....”<sup>2</sup> Pursuant to 45 CFR § 1356.21(d), judicial determinations that remaining in the home would be contrary to the welfare of the child or that placement would be in the best interest of the child must be documented by a court order or a transcript of the court proceedings.<sup>3</sup>

For 16 claims, the State agency did not provide the necessary documentation to meet these requirements. Specifically, the State agency did not provide any documentation to indicate that it had entered into voluntary placement agreements with the children’s parents or legal guardians, nor did it provide court orders or transcripts to document that remaining in the home would be contrary to the children’s welfare.

- Documentation for nine claims did not include any voluntary placement agreements, court orders, or transcripts.
- Documentation for seven claims included court orders for the commitment of the children, but the court orders did not show that continuation in the home would be contrary to the children’s welfare or that placement would be in the best interest of the children.

---

<sup>2</sup> Section 472(a) of the Act was amended effective October 1, 2005. The applicable section is now 472(a)(2), which provides substantially similar requirements for removal of the child from the home.

<sup>3</sup> This regulatory requirement became effective on March 27, 2000 (65 Fed. Reg. 4020 (Jan. 25, 2000)).

## **Income Requirements**

Section 472(a)(4)(A) of the Act defined the needy child, in part, as one who “would have received aid [Aid to Families with Dependent Children (AFDC)] under the State plan approved under section 402 of this title (as in effect on July 16, 1996) in or for the month in which such [voluntary placement] agreement was entered into or court proceedings leading to the removal of such child from the home were initiated ....”<sup>4</sup>

Section 2 of Pennsylvania’s State plan incorporates, by reference to Office of Children, Youth and Families Bulletin 3140-01-01, the “standard of need” for each county based on countable family income and the number of family members. Countable income considers various expenses and payments, as well as earned wages and other household income. For Allegheny County, the standard of need was based on a maximum countable income ranging from \$298 per month for a family of one to \$976 per month for a family of six, with an additional allowance of \$121 per family member over six.

For 11 claims, the State agency did not document that it had computed countable family income or determined that the children would have received aid under Pennsylvania’s AFDC plan, as in effect on July 16, 1996.

- For 10 claims, the documentation that the State agency provided did not identify wages or other household incomes and resources.
- For one claim, the State’s Client Information System showed that the child’s legal guardian worked full time and that the family income exceeded the standard of need.

## **Reasonable Efforts To Prevent Removal From the Home**

Section 471(a)(15)(B) of the Act states: “[E]xcept as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families—(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home ....” Regulations (45 CFR § 1355.20) require a permanency hearing “no later than 12 months after the date the child is considered to have entered foster care ... or within 30 days of a judicial determination that reasonable efforts to reunify the child and family are not required.”<sup>5</sup> Pursuant to 45 CFR § 1356.21(d), judicial determinations that reasonable efforts have been made or are not required must be “explicitly documented” and stated in the court order or a transcript of the court proceedings.

---

<sup>4</sup> Section 472(a) of the Act was amended effective October 1, 2005. The applicable section is now 472(a)(3), which provides a substantially similar definition of the needy child. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 repealed AFDC and established in its place the Temporary Assistance for Needy Families block grant. However, Title IV-E foster care requirements look back to the 1996 AFDC criteria for eligibility.

<sup>5</sup> This definition of a “permanency hearing” became effective on March 27, 2000 (65 Fed. Reg. 4020 (Jan. 25, 2000)).

For nine claims, the State agency did not provide the necessary documentation to meet these requirements. Specifically, the State agency did not provide any court orders or transcripts to document judicial determinations that reasonable efforts had been made to prevent the children's removal from the home or that reasonable efforts were not required.

### **Age Requirements**

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

The State agency submitted four claims for children who were at least 18 years of age and for whom it did not provide sufficient evidence that the children were full-time students in secondary school or the equivalent or could reasonably have been expected to complete a secondary education program before the age of 19.

### **COSTS CLAIMED FOR INELIGIBLE SERVICES**

Section 475(4)(A) of the Act defines "foster care maintenance payments" as:

... payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.<sup>6</sup>

ACF policy (ACYF-PA-87-05, Oct. 22, 1987, in the section titled "Unallowable Cost") provides examples of services that are not reimbursable under Title IV-E, including "physical or mental examinations, counseling, homemaker or housing services and services to assist in preventing placement and reuniting families." ACF policy (ACYF-CB-PIQ-97-01, Mar. 4, 1997) states that "education is not in the definition found at section 475(4)(A)."

The maintenance costs included on the 100 sampled claims were based on per diem rates that ranged from \$15 to \$205.90. For 25 of the 100 claims, we were unable to determine whether the maintenance costs were limited to costs for allowable Title IV-E services.

For 21 of the 25 claims, the State agency did not provide information about which services were used to develop the per diem rates on which the claims were based and did not require the

---

<sup>6</sup> Section 475(4)(A) of the Act was amended effective October 7, 2008, to add reasonable travel for the child to remain in the school in which the child was enrolled at the time of placement but did not otherwise change this definition.

contractors to itemize charges for services claimed. However, court records, case workers' progress notes, and other documentation indicated that the facilities provided some services that are not specified in section 475(4)(A) of the Act and that are therefore not eligible for Title IV-E maintenance funding. These services included medical, educational, and rehabilitative services, such as counseling and physical, occupational, or speech therapy.<sup>7</sup> For example:

- The State agency claimed maintenance costs for a child based on a per diem rate of \$205.90. The delinquency court order stated that the child should remain at the facility and receive counseling. The court order also authorized routine medical and psychological examinations and procedures.
- The State agency claimed maintenance costs for another child based on a per diem rate of \$143.80. The preliminary court documents for this child's hearing stated that the provider would assess the family for family therapy and that the child would receive mental health treatment and therapeutic services.

Four of the twenty-five claims were for sundry services for which the State agency did not provide a description. For example, in addition to submitting a claim for room and board, the State agency submitted a \$378 claim for "sundry services" on behalf of a child. DHS's detailed list gave no explanation of the services provided. However, the claim identified the provider as Primary Care Health Services, which provides health and behavioral services through a network of clinics.

We were unable to determine allowable maintenance costs for the 25 claims because they lacked sufficient information about the services provided. Ten of these claims were unallowable because they included costs for services provided to ineligible children. We were unable to determine the costs for ineligible services included on the 15 remaining claims.

## **SUMMARY OF UNALLOWABLE AND POTENTIALLY UNALLOWABLE TITLE IV-E COSTS**

Of the 100 sampled claims, 23 claims totaling \$22,804 were unallowable because they included maintenance costs for services that were provided to ineligible children. Based on these sample results, we estimated that the State agency improperly claimed at least \$17,284,239 (Federal share) in maintenance costs. In addition, we estimated that the State agency claimed at least \$11,022,902 (Federal share) in administrative costs associated with the unallowable maintenance costs.<sup>8</sup> These administrative costs also were unallowable.

We were unable to determine the allowability of 15 sampled claims totaling \$13,497 because the State agency did not provide information about the services included in the contractors' per diem

---

<sup>7</sup> Some of these services may be allowable under other Federal programs or under State and local programs. However, determining the allowability of services under other programs was beyond the scope of this audit.

<sup>8</sup> We calculated unallowable administrative costs by dividing the State agency's total Title IV-E claims for administrative costs (\$593,233,356) by its total Title IV-E claims for maintenance costs (\$857,954,391) plus training costs (\$72,252,983). We then applied the resultant percentage to the estimated \$17,284,239 in unallowable maintenance costs.

rates and their relative costs or a description of the sundry costs claimed.<sup>9</sup> Based on these sample results, we set aside \$27,913,816 (Federal share consisting of \$17,044,076 in maintenance costs and \$10,869,740 in associated administrative costs) for resolution by ACF.<sup>10</sup>

## **RECOMMENDATIONS**

We recommend that the State agency:

- refund to the Federal Government \$28,307,141, including \$17,284,239 in unallowable maintenance costs and \$11,022,902 in unallowable administrative costs, for October 1997 through September 2002;
- work with ACF to determine the allowability of \$27,913,816 related to claims that included both allowable and unallowable services;
- work with ACF to identify and resolve any unallowable claims for maintenance payments made after September 2002 and refund the appropriate amount;
- discontinue claiming Title IV-E reimbursement for ineligible children and ineligible services;
- direct Allegheny County to develop rate-setting procedures that separately identify maintenance and other costs, including related administrative costs, so that claims are readily allocable to the appropriate Federal, State, and local funding sources; and
- direct Allegheny County to describe the services provided when claiming sundry costs.

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

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

We have summarized the State agency's comments, along with our responses, below, and we have included those comments as Appendix E. We excluded the exhibits accompanying the State agency's comments because of their volume and because some contained personally identifiable information.

---

<sup>9</sup> A total of 25 claims appeared to include costs for ineligible services, including 10 claims that were unallowable because they included costs for services provided to ineligible children.

<sup>10</sup> We calculated the percentage of set-aside administrative costs as described in footnote 8 and applied the resultant percentage to the estimated \$17,044,076 in maintenance costs for which we could not determine the allowability.

## **Scope of Audit**

### *State Agency Comments*

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

### *Office of Inspector General Response*

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

## **Program Operating Responsibilities**

### *State Agency Comments*

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

### *Office of Inspector General Response*

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

We also do not agree that we lacked the requisite independence and objectivity for this audit. ACF did request this audit; however, OIG regularly responds to requests from Members of Congress, States, ACF, and other U.S. Department of Health & Human Services (HHS) program agencies, as well as the general public. There is no basis to conclude that the source of a request undermines the independence with which an audit or other project is performed. The State agency cited U.S. v. Montgomery County Crisis Center, 676 F. Supp. 98, 99 (D. Md. 1987), to support its position. In that case, however, the U.S. District Court refused to enforce a subpoena issued by the Department of Defense (DoD) OIG to a crisis hotline that received a call from a distressed military employee who allegedly had disclosed classified information. The Naval Investigative Service had requested that DoD OIG subpoena information from the crisis center to uncover the identity of the caller. The court gave a number of reasons for refusing to enforce the subpoena, including because it was issued at the behest of another agency on a security matter that “was outside the Inspector General’s area of regular responsibility.” The expenditure of Federal funds for foster care is neither a security issue involving the disclosure of classified information nor outside HHS OIG’s area of regular responsibility.

## **Audit Period**

### *State Agency Comments*

The State agency said that the audit improperly focused on practices from many years ago rather than on current practices affecting the quality of childcare services and that Congress was concerned about this type of review when it enacted section 1123A of the Act (42 U.S.C. § 1320a-2a). The State agency also said that we improperly conducted an audit of claims submitted outside the Federal record retention period. Citing 45 CFR § 74.53,<sup>11</sup> the State agency said that a State generally is not required to retain financial records or supporting documents for more than 3 years and therefore should not be subject to disallowance for an audit of claims beyond the 3-year record-retention period.

### *Office of Inspector General Response*

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

The Federal record-retention period does not preclude our review of records that the State agency provides, or has in its possession, during the audit. Federal regulations (45 CFR § 74.53(e)) provide that “[t]he rights of access ... are not limited to the required retention period, but shall last as long as records are retained.” The requirement for a grantee to keep records for a specified period protects the grantee in situations in which records are destroyed after the

---

<sup>11</sup> Effective September 8, 2003, entitlement grant programs administered by HHS fell under the governing regulations at 45 CFR § 92. The record-retention and access requirement remained substantially the same.

expiration of the retention period pursuant to a statewide records management plan. If the grantee has maintained records beyond the retention period, 45 CFR § 74.53(e) is clear that HHS, including OIG, has access to those records. Further, the DAB has ruled that agencies may disallow costs based on grantee records retained beyond the 3-year retention period (Community Health and Counseling Services, DAB No. 557, page 4 (1984)).

Additionally, when an audit commences within the retention period, the regulations require the State to retain records until all audit findings are resolved and final action is taken (45 CFR § 74.53(b)(1)). We issued an audit commencement letter in 2000 outlining our planned review of Pennsylvania's Title IV-E foster care claims for fiscal years 1998 and 1999. Pennsylvania subsequently entered into negotiations with ACF to settle a Title IV-A audit as well as to resolve Title IV-E claims at issue. We did not terminate our audit during that period; rather, we suspended action pending resolution of the Title IV-E issues. The Title IV-E issues were not resolved through settlement efforts, and in 2003, we announced our intention to move forward with the audit announced in 2000, expanding the scope to cover fiscal years 1998 through 2002.

We note that section 5.7 of the Supreme Court of Pennsylvania's "Record Retention and Disposition Schedule With Guidelines" requires that the court permanently retain court orders relating to both dependent and delinquent juvenile cases. The guidelines also require that the court retain other court records until the child is 25 years old or 10 years after the last action, if later.

## **Associated Administrative Costs**

### *State Agency Comments*

The State agency said that we had improperly recommended the disallowance of "non-identifiable" associated administrative costs. According to the State agency, our calculation of administrative costs associated with the maintenance claims reviewed was unsound because it applied a statewide ratio to the maintenance claims, which included costs incurred only by Allegheny County, and because the county's administrative costs on a per-child basis differ significantly from those of other counties with much smaller or larger numbers of eligible children. The State agency also said that because Pennsylvania identified and allocated administrative costs through a random-moment timestudy, it is incorrect to assume that a disallowance of a maintenance claim would necessarily result in a proportionate decrease in associated administrative costs.

### *Office of Inspector General Response*

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

Office of Management and Budget Circular A-87 allows States to identify administrative costs related to a specific cost objective or to allocate the costs according to an approved allocation methodology, such as a random-moment timestudy or another quantifiable measure. The State

agency allocated administrative costs based on an approved allocation methodology. Similarly, we determined unallowable administrative costs associated with ineligible maintenance claims by applying a proportionate share of the administrative costs to the total costs, including both maintenance and training costs. We maintain that our approach was reasonable. The State agency did not offer an alternative method of calculating administrative costs on either a statewide or county-specific basis.

## **Sampling Estimation and Set-Aside Calculation**

### *State Agency Comments*

The State agency said that we had made significant sampling and extrapolation errors: (1) the standard deviation of the point estimate was so wide that it made the estimate of ineligible payments virtually useless and (2) our calculation of the set-aside amount erroneously relied on the point estimate of questioned claims rather than the lower limit. The State agency calculated a set-aside amount of \$13,127,923 at the lower limit.

### *Office of Inspector General Response*

Our sampling and estimation methodology is statistically valid. There is no fixed “acceptable level of precision” that makes a sample valid. The sampling variation is included in the calculations of the confidence interval. If there were better precision, the lower limit of the confidence interval would increase. Any lack of precision means that the amount of the lower limit is less than it would be if the estimate were more precise. This lower limit works in favor of the State agency.

The State agency is incorrect in stating that the use of the point estimate miscalculates the estimate of the set-aside amount. The point estimate is a valid estimate of the total value of claims that included ineligible costs and for which the State agency did not provide information about the services included in the contractors’ per diem rates and their relative costs. In Appendix C, we reported the lower limit, the point estimate, and the upper limit. There is no requirement to report only the lower limit. Using the 90-percent confidence interval, we are 95-percent confident that the actual value of claims with ineligible costs is greater than the lower limit. By providing the point estimate and the confidence interval, the values used in our report are balanced and reliable.

## **Documentation for Sampled Claims**

### *State Agency Comments*

The State agency said that it is wholly improper to recommend disallowances based solely on a lack of documentation. The State agency also said that it provided documentation during our audit to support the sampled claims. The State agency included copies of the previously submitted documentation for eight questioned claims with its comments.

*Office of Inspector General Response*

We did not question the eight claims based solely on a lack of documentation. Rather, we determined that the documentation did not support claims for Federal reimbursement. For seven of the eight claims, the State agency provided court orders for the commitment of delinquent children as documentation that remaining in the home was contrary to the welfare of the children. The court orders recommended treatment and rehabilitation but did not state that remaining in the home was contrary to the welfare of the children. Three of the claims were also questioned for other reasons. If we had not questioned the claims, we would have set them aside for ACF to determine the amount attributable to the unallowable treatment and rehabilitation services.

For the eighth claim, the State agency provided a family information form indicating that the mother was unemployed as evidence that the child met Title IV-E income requirements. However, the form showed that the nonresident father paid the rent and that the family did not receive Temporary Assistance for Needy Families or food stamps. The form also showed that no interview of the family was conducted and included no evidence of income, no record of assets, and no indication of the value of the father's contribution to the household. This child also did not meet Title IV-E age requirements.

# **APPENDIXES**

**APPENDIX A: PREVIOUSLY ISSUED REPORTS ON  
PENNSYLVANIA'S TITLE IV-E CLAIMS<sup>1</sup>**

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

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

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

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

*Pennsylvania's Title IV-E Claims on Behalf of Children Who Exceeded the Maximum Eligible Age From October 1997 Through September 2002 (A-03-08-00553, issued November 9, 2009).*

---

<sup>1</sup> These reports are available at <http://oig.hhs.gov>.

## **APPENDIX B: SAMPLING METHODOLOGY**

### **SAMPLING FRAME**

Our sampling frame consisted of 126,283 claim lines paid from October 1997 through September 2002 on behalf of foster care children in Allegheny County. The county's Department of Human Services provided detailed lists in support of 33 summary invoices for this period. Each claim line on the detailed lists showed a child's name, the claim period, and the costs claimed for the child.

### **SAMPLE UNIT**

The sample unit was an individual claim line listed for one of the 33 summary invoices.

### **SAMPLE DESIGN**

We used a simple random sample.

### **SAMPLE SIZE**

We selected for review a sample of 100 claim lines.

### **SOURCE OF RANDOM NUMBERS**

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

### **METHOD OF SELECTING SAMPLE ITEMS**

We sequentially numbered the claim lines provided for the 33 summary invoices. After generating 100 random numbers between 1 and 126,283, we selected the corresponding claim lines.

### **ESTIMATION METHODOLOGY**

We used the Office of Inspector General, Office of Audit Services, statistical software to estimate the unallowable and potentially unallowable costs in the sampling frame.

**APPENDIX C: SAMPLE RESULTS AND ESTIMATES**

**UNALLOWABLE COSTS**

**Sample Results**

<b>Number of Claim Lines in Sampling Frame</b>	<b>Value of Sampling Frame (Federal Share)</b>	<b>Sample Size</b>	<b>Value of Sample (Federal Share)</b>	<b>Number of Claim Lines With Errors</b>	<b>Value of Unallowable Costs (Federal Share)</b>
126,283	\$89,219,781	100	\$64,363	23 <sup>1</sup>	\$22,804

**Estimates of Unallowable Costs (Federal Share)**  
*(Limits Calculated for a 90-Percent Confidence Interval)*

Point estimate	\$28,796,994
Upper limit	40,309,750
Lower limit	17,284,239

**POTENTIALLY UNALLOWABLE COSTS**

**Sample Results**

<b>Number of Claim Lines in Sampling Frame</b>	<b>Value of Sampling Frame (Federal Share)</b>	<b>Sample Size</b>	<b>Value of Sample (Federal Share)</b>	<b>Number of Claim Lines With Errors</b>	<b>Value of Potentially Unallowable Costs (Federal Share)</b>
126,283	\$89,219,781	100	\$64,363	15	\$13,497

**Estimates of Potentially Unallowable Costs (Federal Share)**  
*(Limits Calculated for a 90-Percent Confidence Interval)*

Point estimate	\$17,044,076
Upper limit	26,072,288
Lower limit	8,015,863

---

<sup>1</sup> Although 38 claims had errors, we were unable to quantify the errors for 15 claims because of data limitations.

**APPENDIX D: DEFICIENCIES OF EACH SAMPLED CLAIM****Costs Claimed for Services Provided to Ineligible Children**

1. *Remaining in the Home Not Contrary to the Welfare of the Child*
2. *Income Requirements Not Met*
3. *Reasonable Efforts Not Made To Keep Child in the Home*
4. *Age Requirements Not Met*

**Costs Claimed for Ineligible Services**

5. *Services Included in Per Diem Rates*
6. *Sundry Services*

**Office of Inspector General Review Determinations on the 100 Sampled Claims**

<b>Sample</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>Number of Deficiencies</b>
1							0
2							0
3							0
4							0
5	X		X				2
6	X	X	X				3
7							0
8							0
9							0
10							0
11	X	X			X		3
12	X				X		2
13	X	X	X				3
14							0
15							0
16							0
17							0
18							0
19					X		1
20		X					1
21							0
22							0
23	X		X				2
24							0
25							0
26		X					1
27					X		1
28							0

<b>Sample</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>Number of Deficiencies</b>
29							0
30							0
31							0
32							0
33	X		X				2
34							0
35							0
36							0
37							0
38							0
39		X			X		2
40					X		1
41	X		X				2
42							0
43		X		X			2
44							0
45							0
46							0
47						X	1
48							0
49							0
50							0
51							0
52							0
53							0
54					X		1
55							0
56		X					1
57		X					1
58	X			X	X		3
59	X				X		2
60	X				X		2
61	X				X		2
62							0
63							0
64							0
65							0
66					X		1
67					X		1
68	X	X	X		X		4
69							0
70					X		1
71							0

<b>Sample</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>Number of Deficiencies</b>
72							0
73	X		X				2
74					X		1
75						X	1
76		X		X	X		3
77	X		X				2
78							0
79						X	1
80							0
81							0
82							0
83							0
84	X			X	X		3
85					X		1
86					X		1
87							0
88						X	1
89							0
90							0
91							0
92							0
93							0
94							0
95							0
96					X		1
97							0
98							0
99							0
100							0
<b>Total</b>	<b>16</b>	<b>11</b>	<b>9</b>	<b>4</b>	<b>21</b>	<b>4</b>	

## APPENDIX E: STATE AGENCY COMMENTS



One Logan Square  
27th Floor  
Philadelphia, PA 19103-6933  
215.568.0300/facsimile

www.hangley.com

Mark A. Aronchick  
Direct Dial: 215.496.7002  
E-mail: [maronchick@hangley.com](mailto:maronchick@hangley.com)

PHILADELPHIA, PA

CHERRY HILL, NJ

HARRISBURG, PA

NORRISTOWN, PA

September 10, 2010

HAND DELIVERY

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

Re: Draft Report Number A-03-08-00554/Audit of Allegheny  
County Title IV-E Foster Care Claims from October 1997  
through September 2002

Dear Mr. Virbitsky:

I am writing on behalf of the Commonwealth of Pennsylvania, Department of Public Welfare, in response to the July 12, 2010 draft report of the Office of Inspector General (“OIG”) of the Department of Health and Human Services (“HHS”), titled “Audit of Allegheny County Title IV-E Foster Care Claims From October 1997 through September 2002” (the “Draft Report”) (Exhibit A, attached).<sup>1</sup>

In the Draft Report, OIG recommends that Pennsylvania “refund” to the federal government \$17,284,239 in allegedly improper foster care maintenance placement costs, plus an additional \$11,022,902 in what OIG characterizes as “associated

<sup>1</sup> Exhibits A-Q to this response are provided in the attached Appendix.

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 2

administrative costs,” for a total “refund” of \$28,307,141. This covers a period stretching back more than twelve years, from October 1997 through September 2002. (Draft Report at ii.) OIG further recommends that Pennsylvania “work with” the Administration for Children and Families (“ACF”) “to determine the allowability of \$27,913,816 related to claims that included both allowable and unallowable services,” and “work with ACF to identify and resolve any unallowable claims for maintenance payments made after September 2002 and refund the appropriate amount.” (*Id.*)

All of OIG’s recommendations are without merit and contrary to law. As explained in my letters responding to previous OIG draft and final reports concerning other phases of this multi-phase audit of Pennsylvania’s Title IV-E claims (the “Audit”),<sup>2</sup> and as further explained below, Pennsylvania opposes the entire OIG Audit, including any recommendations stemming from it, for the following reasons:

- OIG has singled out Pennsylvania by conducting this Audit of unprecedented size and scope without an adequate basis and in contravention of federal law;
- By conducting the Audit, OIG is wrongfully assuming ACF’s program operating responsibilities in violation of the Inspector General Act of 1978, 5 U.S.C. App. 3;

---

<sup>2</sup> Because Pennsylvania opposes OIG’s recommendations in the Draft Report for many of the same reasons it has opposed OIG’s recommendations in its previous draft and final reports, this letter repeats many of the points I made in my letters of April 16, 2007, January 31, 2008, April 21, 2008, October 20, 2008, July 15, 2009, and December 9, 2009. Those letters (without exhibits) are attached to and incorporated into this letter as Exhibits B, C, D, E, F, and G respectively.

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 3

- The Audit improperly focuses on past practices rather than Pennsylvania's current child welfare system; and
- OIG has not provided an appropriate factual, mathematical or legal basis for its recommendations that Pennsylvania return millions of dollars in maintenance and "associated administrative costs" to the federal government.

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

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

By letter dated November 19, 2003, OIG first announced its intention to conduct an audit "of the Commonwealth of Pennsylvania's claims for payments made under the Title IV-E Foster Care Program for Federal Fiscal Years 1998 through 2002." (See 11/19/03 Letter from Stephen Virbitsky to Michael L. Stauffer, attached as Exhibit H.) In accordance with that notice, in September 2004, OIG began auditing the entirety of Pennsylvania's Title IV-E claims paid between 1997 and 2002. OIG has to date issued final audit reports for five phases of the audit; they have resulted in recommendations that Pennsylvania repay tens of millions of dollars of current public funds necessary to provide critical services required today by the needy children of Pennsylvania.<sup>3</sup>

---

<sup>3</sup> By letters dated August 20, 2010, ACF accepted OIG's recommendations as to four of the phases.

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 4

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

OIG has previously denied that it has singled out Pennsylvania by claiming that Pennsylvania is simply the first state selected as part of "a multistate review of juvenile justice placement costs claimed under Title IV-E." (See September 20, 2007 Final Report at 12.). However, the instant Audit is indisputably *not* limited to the "juvenile justice placement costs" referred to by OIG. Indeed, OIG has expressly acknowledged that even

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 5

though it originally intended to audit only juvenile justice related costs, ACF requested an audit covering the entirety of Pennsylvania's Title IV-E claims. (See 4/5/2000 Letter from David M. Long to John H. Bungo, attached as Exhibit I.) Because OIG ultimately granted ACF's request by conducting the instant Audit, the purported existence of a "multistate review of juvenile justice placement costs" in no way explains why Pennsylvania alone is being subjected to an all-encompassing audit of the entirety of its Title IV-E claims over a five-year period beginning so long ago. In addition, OIG has failed to identify one other state that is facing even the more limited "review of juvenile justice placement costs" – let alone the type of all-encompassing audit of all Title IV-E claims over a multi-year period that Pennsylvania faces here.

Although OIG also has suggested that it is not unfairly singling out Pennsylvania because it conducted "multiyear audits of comparable scope . . . of Medicaid school-based services and Medicaid costs . . . in California," the argument misses the point (See November 9, 2009 Final Report at 5, attached as Exhibit J.) This summary allegation of a broad *Medicaid* audit – having nothing to do with Title IV-E and with no indication of what triggered it – is hardly a rebuttal to Pennsylvania's claim that it has been arbitrarily singled out for an all encompassing multiyear Title IV-E audit. The fact remains that OIG cannot point to any Title IV-E audit comparable to the one being conducted in Pennsylvania.

OIG has further stated that it initiated the Audit because of a general concern over Pennsylvania's increased number of claims and because of "an ACF probe sample of 50 Title IV-E statewide foster care cases conducted in 1998, of which 44 cases had multiple

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 6

errors.” (See 3/9/04 Letter from Stephen Virbitsky to Michael L. Stauffer, attached as Exhibit K.) However, OIG’s purported reliance upon a small and statistically unreliable sample of unique claims submitted in 1998 as the basis for launching a comprehensive audit of *all* Title IV-E claims submitted by Pennsylvania from 1997 until 2002 lacks foundation and makes no sense.

The 1998 probe sample referred to by OIG as the basis for the Audit does not remotely justify the scope of the present audit. Unlike this audit, the probe sample did not involve Pennsylvania’s general Title IV-E population. As expressly acknowledged by ACF Regional Administrator David J. Lett, the sample focused only on a retroactive claim for a narrow group of “children who were ineligible under [Title] IV-A Emergency Assistance” by virtue of the juvenile justice restrictions belatedly imposed on that program and who were “redetermined eligible by the Department of Public Welfare under the Foster Care and Adoption Assistance Program . . . [under] Title IV-E. . . .” (See 2/10/99 Letter from David J. Lett to Feather O. Houstoun, attached as Exhibit L.) That these highly unique claims – involving a limited group of children who were reclassified after a change in federal law – were found to have certain errors is neither surprising nor a reason to question the operation of Pennsylvania’s overall Title IV-E program. It provides no legitimate justification for this highly burdensome and unprecedented Audit, an audit far outside the parameters of the normal Title IV-E review process.

Underscoring the singling out of Pennsylvania is the fact that between the 1998 submission of the probe sample that was the purported trigger of the Audit and OIG’s

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 7

2003 initiation of the Audit, Pennsylvania regularly submitted quarterly claim reports to ACF and ACF paid each such claim. If ACF had a concern about any aspect of Pennsylvania's Title IV-E claims at that time – either because of the probe sample results, the amount of the claims, or for any other legitimate reason – it could have requested additional information, conducted a financial review, or disallowed such claims. See, e.g., 42 U.S.C. § 674(b)(4). Instead, after presumably reviewing all claims as they were submitted during this period, ACF paid Pennsylvania's claims in full. For OIG now – as long as twelve years later – to single out Pennsylvania by subjecting these very same Title IV-E claims to an extensive federal audit based exclusively on factors of which ACF was well aware at the time it approved such claims is arbitrary and capricious and represents unlawful government action.

OIG's audit of these dated claims also runs afoul of the concerns that led Congress to enact the 1994 amendments to the Social Security Act concerning review of State-submitted claims. Before the enactment of the amendments (codified at 42 U.S.C. § 1320a-2a), states were subjected to a fragmented and inconsistent system of financial reviews and audits of their Title IV-E programs that improperly focused on documentation for previously submitted claims rather than on the quality of child care. See, e.g., Committee on Ways and Means, U.S. House of Representatives, 2000 Green Book, Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means (2000) (noting that "child welfare advocates, State and Federal officials, and Members of Congress" were dissatisfied with the previous review process because HHS

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 8

was performing the reviews in an untimely manner, because HHS was relying too heavily on documentation that was outside the control of the States, and because the review process did little to address the quality of care for children); see also 63 FR 50058-01.<sup>4</sup> In response to these concerns, Congress enacted Section 1320a-2a, which provides that review processes should focus on improving the quality of State Title IV-E programs rather than generating refunds to the federal government.

Inconsistently with that general Congressional intent, OIG recommends in this multiphase Audit that Pennsylvania be required to repay tens of millions of dollars for claims submitted up to twelve years earlier under a different state administration, even though ACF has determined that Pennsylvania's Title IV-E program has currently been operating in "substantial compliance" with federal requirements. In September 2004 – nearly a year after OIG initiated the current audit – ACF conducted its own review of Pennsylvania's compliance with Title IV-E eligibility requirements. Pennsylvania passed the review with flying colors. By letter dated October 19, 2004, ACF informed Pennsylvania that it had achieved substantial compliance (100% eligibility compliance) with Title IV-E program requirements and would not be subject to another eligibility review until 2007. (See 10/19/04 Letter from David J. Lett to Estelle B. Richman, attached as Exhibit M.) And in that

---

<sup>4</sup> Indeed, before the enactment of 42 U.S.C. § 1320a-2a, OIG authored its own report in which it criticized the HHS review process and recommended that certain changes (ultimately incorporated into the statutory amendments) be made. See Office of Inspector General, Department of Health and Human Serv., Oversight of State Child Welfare Programs (1994).

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 9

2007 eligibility review, ACF determined yet again that Pennsylvania was in substantial compliance with Title IV-E requirements. (See 4/23/09 Letter from Joseph J. Bock to Estelle B. Richman, attached as Exhibit N.) Thus, there was no legitimate basis for OIG or ACF to have believed that Pennsylvania's Title IV-E program was failing to comply with federal law.

In light of the above circumstances, it is plain that, notwithstanding OIG's protestations to the contrary, OIG has singled out Pennsylvania for selective, arbitrary and unlawful treatment. See, e.g., *Burlington N. and Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) ("Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld."); *Petroleum Communications, Inc. v. F.C.C.*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) ("We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently."). Neither OIG nor ACF has provided any evidence suggesting that Pennsylvania's Title IV-E program had a significantly greater error rate than was present in any other State program; yet OIG is subjecting only Pennsylvania – without justification – to an intensive multi-phase audit of its regularly-filed Title IV-E maintenance claims over a five-year period.

In sum, no basis exists for OIG arbitrarily to subject Pennsylvania to this all-encompassing multiphase Audit. For this reason alone, the Draft Report should be withdrawn.

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 10

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

The Inspector General Act, 5 U.S.C. App. 3 (the "Act") established the Office of Inspector General in order to facilitate "*objective* inquiries into bureaucratic waste . . . and mismanagement." *NASA v. Fed. Labor Relations Auth.*, 527 U.S. 229, 240 (1999) (emphasis added). By creating OIG, Congress also intended "to consolidate existing auditing and investigative resources to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of [various executive] departments and agencies." S. Rep. No. 1071, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2676.

However, while Congress gave OIG broad audit and investigative authority to carry out its oversight function, *see* 5 U.S.C.App. 3 § 6(a), the Act explicitly requires OIG to remain "independent and objective" from the federal agencies it oversees, providing that Inspector Generals "shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." *See id.* at 3 § 3(a).

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

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 11

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

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

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

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 12

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

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

The issue of Pennsylvania's compliance with the plethora of federal statutory and regulatory claiming requirements is not a proper focus of OIG's oversight responsibilities; the Social Security Act and federal regulations place that program responsibility squarely on the shoulders of HHS. *See, e.g., 42 U.S.C. § 674(b)*. Pursuant to those authorities, ACF is responsible for reviewing all Title IV-E claim submissions and deferring or disallowing any claims of questionable allowability. *See id.*; 45 C.F.R.

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 13

§ 201.15(c). ACF is also responsible for conducting, when necessary, additional reviews of a state's Title IV-E programs and submissions, including an examination of the "case records of individual recipients" to ensure that "State agencies are adhering to Federal requirements. . . ." *Id.* § 201.10(a); *see also id.* §§ 1355.32, 1355.33. Thus, just as the courts determined with respect to the OIG audits in the *Truckers United for Safety* and *Burlington Northern* decisions, this Audit falls within the statutory and regulatory responsibilities of ACF, and cannot be conducted by OIG.

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

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 14

investigation on its own but . . . at the behest of the [Naval Investigation Service] on a matter well outside [OIG's] areas of regular responsibility").<sup>5</sup>

In its May 22, 2008 and November 9, 2009 Final Reports on earlier phases of this Audit, OIG acknowledged that it may be legally prohibited from conducting "regulatory" audits that fall within the responsibilities of the program agency, but claimed that this Audit is not such an audit. (May 22, 2008 Final Report at 12; Nov. 9, 2009 Final Report at 6.) Rather, OIG characterized this Audit as simply a "compliance audit designed to identify the improper expenditure of federal dollars for the Pennsylvania foster care program." (May 22, 2008 Final Report at 12; Nov. 9, 2009 Final Report at 6.) OIG additionally contended that it has not unlawfully assumed ACF's program operating responsibilities because ACF has purportedly not relinquished its own responsibilities for that function. (May 22, 2008 Final Report at 13; Nov. 9, 2009 Final Report at 6.) OIG is wrong on both counts.

First, OIG's use of semantics to justify this Audit as a "compliance" audit, as opposed to a "regulatory compliance audit," should not be permitted. As already explained, the Audit involves an examination of whether Pennsylvania (*not* ACF) strictly complied with all of the statutory, regulatory, and ACF-imposed requirements on the

---

<sup>5</sup> OIG's previous attempts to distinguish *Montgomery County Crisis Center* because it dealt with a "security issue" "outside the IG's area of regular responsibility," are unavailing. Final Report at 6. First, quite apart from the security aspect of the case, the *Montgomery County Crisis Center* court was plainly concerned that "the Inspector General did not initiate the investigation on his own but acted at the behest of NIS." 676 F. Supp. at 99. And, second, as discussed above, a comprehensive evaluation of Pennsylvania's (rather than ACF's) compliance with the requirements of Title IV-E and its associated regulations is, as with the conduct in *Montgomery County Crisis Center*, "well outside the IG's area of regular responsibility."

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 15

submission and documentation of its claims during the audit period. Additionally, conducting such an audit is one of the statutory and regulatory “program operating responsibilities” of ACF – not OIG. See 45 C.F.R. §§ 201.10, 201.15, 1355.32, 1355.33. OIG’s Audit therefore is an unlawful “regulatory compliance audit” of Pennsylvania – not simply a routine “compliance” audit as OIG has attempted to characterize it. See *Burlington Northern*, 983 F.2d at 642.

Second and relatedly, ACF also has plainly relinquished to OIG its operating responsibilities in conducting this Audit. As noted above, between the 1998 submission of the probe sample and OIG’s 2003 initiation of the Audit, Pennsylvania regularly submitted quarterly claim reports to ACF. ACF could have, but did not, request additional information, conduct a financial review, or disallow such claims. See, e.g., 42 U.S.C. § 674(b)(4); 45 C.F.R. § 201.10. Instead, after presumably reviewing all the claims, ACF paid them in full. It was only later that ACF decided that these claims should be reviewed yet again and directed OIG to take on that task even though it was ACF’s responsibility to do so. See 45 C.F.R. §§ 201.10, 201.15, 1355.32, 1355.33. Therefore, OIG is undeniably performing program responsibilities of ACF in conducting this audit of claims that ACF has already reviewed and that it is responsible for re-reviewing as well when necessary; it makes no difference that ACF may have retained its responsibilities to review other unrelated claims.<sup>6</sup>

---

<sup>6</sup> OIG’s previous reliance on *Winters Ranch P’ship v. Vidaso*, 123 F.3d 327, 334 (5th Cir. 1987), also is unjustified. In *Winters*, the Court held, unremarkably, that the Inspector General’s use of the same

(continued...)

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 16

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

---

(continued...)

investigatory techniques as those used by the agency in question did not constitute a transfer of "program operating responsibilities"; the issue here of course has nothing to do with "investigatory techniques." And while, in dictum, *Winters* noted that "in order for a transfer of function to occur, the agency would have to relinquish its own performance of that function," 123 F.3d at 334, here, ACF, in paying the claims without further detailed inquiry, "relinquish[ed] performance of that function [of auditing]" in requesting OIG to conduct this Audit.

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 17

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

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

The Title IV-E review process has been a concern of the federal government for many years. In 1998, Congress imposed a moratorium on HHS activities, prohibiting it from collecting any penalties from states based on its reviews because of critical procedural and pragmatic problems with the reviews, largely related to their timing. See Committee on Ways and Means, U.S. House of Representatives, 2000 Green Book: Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means (2000). Specifically, Congress, child welfare advocates, and state and federal officials were concerned that “[r]eviews were conducted retrospectively, sometimes for fiscal years that had long passed, so that current practices were not examined.” *Id.* This problem was exacerbated by “the late release of final reports by [HHS], so their findings and recommendations were sometimes irrelevant by the time they were issued.” *Id.* Furthermore, the reviews were “seen as adversarial and punitive, rather than collaborative and potentially helpful.” *Id.* They seemed to focus on generating refunds for the federal government, rather than improving the quality of care for children in need. *Id.*; see also Office of Inspector General, Dep’t of Health and Human Serv., Oversight of State Child

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 18

Welfare Programs, i (1994) (Congress, state officials and child welfare advocates were concerned that “the reviews elevate process issues over quality of services”).

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

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

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 19

opportunity to correct any errors through a program improvement plan. *Id.* § 1320a-2a(b)(3)(B).

This Audit is precisely the type of Title IV-E review that Congress was concerned about and trying to avoid; it concerns claims related to long past fiscal years and makes recommendations that are no longer relevant. Perhaps most importantly, its focus is on obtaining millions of dollars in refunds that will place at risk the Commonwealth's current child welfare programs – programs that ACF determined were in substantial compliance with ACF's regulations and rules following the 2004 and 2007 reviews it conducted – rather than on improving the quality of care needed today for the vulnerable children in those programs. (See 10/19/04 Letter from Mr. Lett to Ms. Richman; 4/23/09 Letter from Mr. Bock to Ms. Richman.) Although the statutory amendments and HHS's regulations based on those amendments do not explicitly apply to audits conducted by OIG, those amendments and regulations are rendered meaningless if HHS can evade them by simply asking OIG to conduct retrospective audits of claims made many years ago which focus on process issues instead of the quality of child care services.<sup>7</sup>

---

<sup>7</sup> OIG has previously responded to DPW's concerns on this point by referencing the statement by the Department of Appeals Board (DAB) that § 1320a-2A "does not apply to reviews of past maintenance payments for which a state had claimed [federal financial participation]." *New Jersey Department of Human Services*, DAB No. 1787, page 4 (2001). The statement, however, does not question the validity or importance of Congress' concern with audits related to long past years. And it is noteworthy that the statute nowhere makes a distinction between past and future payments.

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 20

Separately, OIG's own guidelines also strongly suggest that it should not conduct audits of aged claims. Those guidelines clearly set forth a limited retention period of three years from the date the claim was made. See HHS Grants Administrative Manual § 74.53; 45 C.F.R. § 74.53. And, in the March 9, 2004 letter from Mr. Virbitsky to Mr. Stauffer (Exhibit K, attached), OIG itself acknowledged that it generally limits its work to the federal retention period. With the Audit having been initiated on November 19, 2003, these guidelines would therefore dictate that no claims made before November 19, 2000 should have been audited or disallowed.<sup>8</sup>

Although OIG has claimed in previous correspondence that the retention period should be extended in this case because it announced a different audit in 2000 that should have put Pennsylvania on notice to retain its records from 1997 onward (see 3/9/04 Letter from Mr. Virbitsky to Mr. Stauffer), this claim is unfounded for several reasons. First, OIG's suggestion that the current Audit is a mere continuation or re-initiation of the audit that it announced (but never began) in 2000 is belied by OIG's own written communications. OIG's letter of November 19, 2003 announcing the current audit

---

<sup>8</sup> Pennsylvania has also been unfairly prejudiced by the fact that the audit goes back beyond the retention period to a time when records were stored in hard copy rather than electronic searchable form. Simply by way of example, the counties had a procedure for issuing credits to Pennsylvania through "supplemental invoices" in situations in which they belatedly discovered that they had made and were paid for inappropriate claims, e.g., a maintenance claim for a child over 19 years of age. Pennsylvania in turn issued aggregate credits to ACF for the federal share of inappropriately made claims. Yet, there is no feasible way so many years later to identify those credits on a child-by-child basis. And, of course, many of the relevant records reflecting such credits for any given child may well have been destroyed.

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 21

(Exhibit H, attached) is devoid of any reference to the separate audit OIG had announced in 2000. Further, and most strikingly, OIG expressly acknowledged in its letter of March 9, 2004 (Exhibit K, attached) that OIG had announced a “similar audit” in 2000 – not the same audit that it was now undertaking. OIG never asserted that the current Audit was a mere continuation of the prior announced audit in any of these early communications; indeed, it did not take that position until many months later, in response to Pennsylvania’s continuing argument that the Audit should be limited to the three-year retention period.

Second, even if the current Audit had merely been a continuation of the separate audit announced in 2000, that fact, standing alone, would be an insufficient basis upon which to extend the scope of the current Audit beyond claims filed after November 19, 2000. Federal law does not require a State to retain records beyond the three-year period simply upon a threat of litigation, review, or audit; that obligation is triggered only if litigation, review, or audit has “started” during the retention period. See 45 C.F.R. § 74.53(b)(1) (“If any litigation, claim, financial management review, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.”).

OIG never took any steps to “start” the audit it announced in March 2000. OIG never held an entrance conference; Pennsylvania never opened its books and records for OIG to review; and OIG never conducted any type of auditing analysis. Thus, OIG’s mere announcement of an audit that it never began cannot allow it to review claims submitted

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 22

and paid for in an otherwise unreachable audit period.<sup>9</sup> To conclude otherwise would allow OIG unilaterally to vitiate the three-year record retention period by simply “announcing” audits that it never conducts.

Accordingly, to be consistent with its previously expressed positions and those of Congress concerning the problems with aged audits, and in order to abide by its own general guidelines and practices concerning the time frame of audits, the Draft Report should be withdrawn.

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

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

1. OIG Improperly Recommends the Disallowance of Non-Identifiable “Associated Administrative Costs”

In its Draft Report, OIG recommends that Pennsylvania refund to the federal government \$11,022,902 in “associated administrative costs.” (Draft Report at ii, 9.) OIG’s

---

<sup>9</sup> The audit announced in 2000 also included only Federal Fiscal Years 1998 and 1999 – not Federal Fiscal Year 2000. (See 3/22/00 Letter from David M. Long to Feather O. Houston, attached as Exhibit O.) Therefore, any audit of FFY 2000 cannot, under any circumstances, be considered a “continuation” of the prior announced audit and all disallowances based in whole or part on claims submitted during FFY 2000 must be removed.

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 23

manufactured calculation of these unidentified “administrative costs” is fundamentally unsound and is an inappropriate basis for the disallowance of federal funds.

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

Because Pennsylvania’s federally-approved administrative cost claiming methodology is purely activity-driven (meaning that its result is dependent upon county caseworkers’ average activities rather than calculated on a child-by-child basis), it is

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 24

incorrect to assume that a disallowance of a particular child's Title IV-E placement maintenance claim would necessarily result in any significant reduction – let alone a proportionate reduction – of Title IV-E administrative costs for which Pennsylvania seeks federal financial participation. Indeed, it is entirely possible that even significant disallowances of a subset of placement maintenance claims would have little appreciable effect on the overall administrative claims submitted during the same period. Thus, there is no factual or legal basis for OIG's unstated (and wholly unsupported) assumption that disallowances of certain placement maintenance claims, if imposed by ACF, should necessarily result in additional disallowances of administrative claims.

In addition, and separately, the formula used by OIG to calculate the alleged amount of associated administrative costs that should be refunded to the federal government is unsound. According to footnote 8 in the Draft Report, OIG calculated these purported administrative costs by “dividing the State agency's total Title IV-E claims for administrative costs (\$593,233,356 (Federal share)) by its total Title IV-E claims for maintenance costs (\$857,954,391 (Federal share)) plus training costs (\$72,252,983 (Federal share)) [and then applying] the resultant percentage to the estimated \$17,284,239 (Federal share) in unallowable maintenance costs.” (Draft Report at 8 n.8.) However, a state-wide ratio (*i.e.*, 67 counties), such as that explained in the footnote, cannot be used to fairly determine administrative costs purportedly tied to the maintenance claims at issue in this phase of the Audit because this phase only includes one of the 67 counties in Pennsylvania.

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 25

Allegheny County's eligible administrative costs on a per-child basis differ significantly from those in other counties with a much smaller or larger number of eligible children.

In an earlier phase of this Audit, OIG maintained, without explanation or support, that its approach to identifying and calculating these "associated administrative costs" is "reasonable." (See Final Phase II Report, at 14.) But, Summarily claiming that a method is reasonable does not make it so.

OIG also has noted in prior phases of this audit that its methodology is proper because Pennsylvania "did not offer an alternative method of calculating administrative costs on either a statewide or county-specific basis." (*Id.*) Pennsylvania, however, is not required to identify alternative methodologies that OIG could employ to manufacture phantom costs; it is OIG that bears the burden of establishing that the manner in which it identified and calculated these so-called "associated" costs was reasonable and appropriate. Cf. HHS DAB Appellate Division Practice Manual FAQ, available at <http://www.hhs.gov/dab/appellate/manual.html> ("[W]hen the disallowance amount results from extrapolation from a sample measurement, the respondent [here, OIG/ACF] must detail the statistical methodology used and be prepared to substantiate the validity of the methodology upon inquiry.") For the reasons explained above, OIG has not met its burden here.

Accordingly, OIG's recommendation that Pennsylvania refund \$11,022,902 in purported "associated administrative costs" lacks support and should be withdrawn.

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 26

2. OIG Made Significant Extrapolation and Calculation Errors

Although the universe of placement maintenance claims under review in this audit phase contain 126,283 claim lines totaling more than \$82 million, OIG selected and reviewed only 100 claims with an aggregate value of \$64,363 (Federal share) for Title IV-E maintenance costs. (Draft Report at 2.) OIG then applied the results of the 100 claim sample to the overall universe of claims through statistical extrapolation. (*Id.* at 2-4.) The Commonwealth objects to the use of such an extrapolation process as a means to recommend and ultimately request refunds relating to millions of dollars of claims that were never specifically reviewed. Furthermore, even assuming that such a process could be used, OIG made significant errors in performing its extrapolation and as a result the conclusions in its Draft Report are highly unreliable in several respects.

First, OIG's own internal Variable Unrestricted Appraisal calculations (attached as Exhibit P.) amply demonstrate that the standard deviation of the point estimate used to determine the amount of unallowable claims is so wide as to make the calculations virtually useless as a measure of anything. OIG's calculations show that standard deviation of the "difference" data (*i.e.*, the difference between the 100 sample claims extrapolated to the universe of claims and those sample claims that OIG would accept extrapolated to the universe of claims) is more than three times the mean of that same data: the mean is \$134.97 but the standard deviation is \$430.74. This extremely wide

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 27

distribution of numbers makes OIG's calculations volatile and unstable under any level of statistical rigor.<sup>10</sup>

Second, OIG fundamentally miscalculated the amount that purportedly should be "set aside" for further review by ACF. As shown by Appendix C to the Draft Report, OIG calculated the "set aside" figure of \$27,913,816 by erroneously relying on the "Point Estimate" of questioned claims (which it calculated as \$16,890,914) and then adding "associated administrative costs" of \$11,022,902. However, in calculating the amount of maintenance amounts that should be "set aside" due to the per diem rate issues identified by OIG in only 15 of the 100 sample claims, OIG should have used the *Lower Limit* figure of the questioned claims to extrapolate the sample findings to the universe of claims – *i.e.*, the much lower figure of \$8,015,863 (assuming a 90-percent confidence level) – just as it relied on the "Lower Limit" figure when extrapolating from the 23 claims that it rejected outright. (Draft Report at Appendix C.) Had OIG properly used the lower limit figure of \$8,015,863, the amount to be "set aside" for resolution by ACF on account of rate issues – even assuming the merit of OIG's concern and the applicability of its flawed methodology for calculating purported "associated administrative costs" – would be \$13,127,923 (\$8,015,863 in maintenance costs and \$5,112,060 in "associated administrative costs"),

---

<sup>10</sup> In addition to these flaws, OIG reported its financial estimates using the lower 90% confidence level rather than the standard 95% confidence level. Had OIG properly reported its conclusions using the standard 95% confidence level, the lower limit of its calculations using OIG's own flawed analysis would have been \$6,255,092 rather than the \$8,015,863.

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 28

not \$27,913,816. Therefore, regardless of the merit of OIG's concern over rates or the methodology it employed in calculating the purported "associated administrative costs," ACF must reduce the amount of any funds to be "set aside" for further discussion to no more than \$13,127,923.

Therefore, it is clear that OIG's sampling design and extrapolation methodology were fundamentally flawed, resulting in inaccurate and biased financial estimates that are statistically unsound, highly unreliable, and legally insupportable. For these additional reasons, the Draft Report should be withdrawn.

3. OIG Improperly Rejected Numerous Sample Claims

As already explained, it is wholly improper for OIG to recommend disallowances of previously submitted claims based solely on lack of documentation. OIG's review should have been substantive rather than formulaic. OIG should have determined whether the sample file contained evidence showing that the State took all necessary actions prior to placement and that the child was eligible for Title IV-E benefits – not simply whether the State could, for example, locate a specific court order containing special language from as long as a decade ago. The use of any reasonable review standard would result in a dramatic reduction of rejected claims. In any event, as explained below, OIG misapplied its own unduly restrictive standards with respect to a number of sample claims; those errors must be rectified.

On June 15, 2009, Pennsylvania sent OIG numerous documents relating to the sample claim files. While OIG accepted some of those documents as establishing

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 29

eligibility, it rejected a majority of them. Pennsylvania continues to believe that all of the documents submitted with its June 15, 2009 letter show that the claims were eligible for Title IV-E services. Pennsylvania therefore encloses and incorporates that letter and the exhibits enclosed with it in this letter. (See Ex. Q, June 15, 2004 Letter with exhibits.)

E. Pennsylvania Rejects All Recommendations Of The Draft Report

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

In addition to the above problems with the Audit as a whole, OIG's findings in this phase of the Audit lack an adequate factual or legal basis. OIG has left critical gaps in its explanation of how it determined the amount of unallowable claims based on the result of its sample findings. And OIG's conclusion that Pennsylvania must refund a proportionate

Stephen Virbitsky  
Regional Inspector General for Audit Services  
September 10, 2010  
Page 30

amount of administrative costs allegedly “associated” with its maintenance costs has no basis.

In sum, the Draft Report is rife with errors and wholly unsupportable conclusions. There is no basis for the recommended disallowances and no reason for Pennsylvania to “work with ACF” on anything that has to do with this arbitrary and seemingly punitive course of events.<sup>11</sup> The Draft Report should be withdrawn in its entirety and any further actions related to this Audit should be immediately terminated.

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

Very truly yours,

/s/ Mark A. Aronchick  
Mark A. Aronchick

MAA/saw  
Enclosures

cc: Harriet Dichter, Secretary of Public Welfare  
*(w/encl; via e-mail & first class mail)*

---

<sup>11</sup> Pennsylvania, of course, stands ready and continues to “work with ACF” cooperatively in a host of other contexts.