

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Texas Health & Human Services Commission
Docket No. A-08-87
Decision No. 2235

DATE: March 19, 2009

DECISION

The Texas Health & Human Services Commission (Texas) appealed the decision of the Centers for Medicare & Medicaid Services (CMS) to disallow federal financial participation (FFP) in the amount of \$7,846,951 claimed under the Medicaid program as costs incurred for school-based health services. CMS based the disallowance on an HHS Office of the Inspector General (OIG) audit that reviewed a 330-unit sample of claims made for services provided in eleven Texas school districts from September 1, 1999 through August 31, 2000 (state fiscal year 2000). Each sample unit consisted of all claims for services provided to one student in a one-month period during that fiscal year. Based on the sample results, the OIG estimated that Texas was overpaid \$8,749,158 FFP, of which Texas subsequently refunded \$902,197.

Texas appealed the full amount disallowed but later withdrew its appeal with respect to some of the claims. Texas also indicated in its reply brief that it was not pursuing its initial argument that the statistical methodology used by the OIG was invalid. In addition, while this appeal was pending, CMS withdrew the disallowance with respect to some of the claims. Most of the claims still at issue are for counseling, assessments, and nursing services the OIG found were provided by unlicensed providers. The OIG also found that the assessments were nonmedical assessments not covered by Medicaid. Also remaining in dispute are claims for speech therapy services the OIG found lacked the requisite referral.

As explained below, we conclude that Texas has documented that one of the providers found unlicensed by the OIG was in fact licensed, and we reverse the disallowance with respect to the claims for the direct services she provided as well as the related claims for the student's transportation. However, we conclude that Texas has not met its burden of documenting the

allowability of the remaining disputed claims for direct services, and we uphold the disallowance with respect to those claims as well as the related claims for the students' transportation on the dates on which no other direct services were provided.¹

Legal Background

The federal Medicaid statute, title XIX of the Social Security Act (Act), authorizes a program that furnishes medical assistance to low-income individuals and families as well as to blind and disabled persons. Act § 1901. Each state operates its own Medicaid program in accordance with broad federal requirements and the terms of its approved Medicaid state plan. Act §§ 1902(a)(10), 1905(a). A state receives federal reimbursement for a share of its Medicaid program expenditures. Act §§ 1903(a), 1905(a).

In order for Medicaid to reimburse states for the cost of health services provided in schools, the services must be among those listed in section 1905(a) of the Act. Further, the services must either be included in the state's Medicaid plan or be available as an Early and Periodic Screening, Diagnostic and Treatment (EPSDT) benefit. The Act requires states to provide EPSDT benefits – which include comprehensive diagnostic, prevention, and treatment services – to Medicaid-eligible children under age 21. Act §§ 1905(a)(4)(B), 1905(r). The objective is to ensure that an eligible child's health needs are identified, assessed, and treated early, before they become more complex and costly to treat. Illinois Dept. of Public Aid, DAB No. 2022 (2006), aff'd, State of Illinois Dep't of Healthcare & Family Servs. v. Leavitt,

¹ A chart identifying the disallowed claims originally appealed by Texas appears at Texas Exhibit 2. Texas withdrew its appeal with respect to claims for speech therapy services and the related transportation claims in the following sample cases: #16 (Center ISD), #24 (La Marque ISD), #6 (Texarkana ISD), #25 (Texarkana ISD), #11 (Texarkana ISD), #21 (Texarkana ISD), #7 (Texarkana ISD), and #29 (Texarkana ISD). See TX Reply Br. at 8, 10. We do not disturb the disallowance with respect to either these claims or the claims not originally appealed. CMS withdrew the disallowance with respect to claims for direct services and the related transportation claims in the following sample cases: #12 (Houston ISD)-speech therapy, #18 (Dallas ISD)-nursing, #21 (Houston ISD)-nursing, #30 (Houston ISD)-nursing, #12 (Houston ISD)-speech therapy, #9 (La Marque ISD)-occupational therapy, #1 (Texarkana ISD)-physical therapy, and #27 (Texarkana ISD)-physical therapy and occupational therapy. See CMS Br. at 11, 14-15.

No.06-C-6412, 2008 WL 877976 (N.D. Ill. Mar. 28, 2008).

In addition to meeting the medical needs of Medicaid-eligible students, school-based health services may fulfill requirements of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400. The IDEA requires states to ensure that all children with disabilities (regardless of Medicaid eligibility) "have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs[.]" 20 U.S.C. § 1400(d)(1)(A). For each child three years and older identified as disabled, a school must develop an "individualized education program" (IEP), which identifies the "special education and related services and supplementary aids and services to be provided to the child." 20 U.S.C. § 1414(d). CMS's guidance states that "[h]ealth-related services included in a child's IEP may be covered under Medicaid "as long as: 1) the services are medically necessary and coverable under a Medicaid coverage category (speech therapy, physical therapy, etc.), 2) all other Federal and state regulations are followed, including those for provider qualifications . . . ; and 3) the services are included in the state's plan or available under EPSDT." August 1997 Medicaid and School Health: A Technical Assistance Guide at 15 (CMS Ex. 1).

The regulations at 42 C.F.R. Part 440 contain the general provisions relating to services reimbursable by Medicaid. We cite to those regulations as appropriate below.

Texas' State Medicaid plan approved for the period in question here included school health and related services (SHRS) covered by EPSDT. TX Exs. 4, 6. As relevant here, the plan included speech therapy, school health services (provided by a school nurse or other similarly qualified person), assessment, and counseling, as well as transportation to health related services. TX Ex. 6, section 4.b.A. of Appendix 1 to Attachment 3.I-A. Section 4.b.B. of the plan, titled "Provider Definition and Conditions for Participation," states in part:

A qualified provider of SHRS is a person who meets state education agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the SHRS he/she is providing. Such requirements must be consistent with state/federal laws and regulations and are subject to approval by the single state agency.

TX Ex. 4, section 4.b.B.1.a. Section 4.b.B.1.b. of the plan states:

Providers must meet applicable Federal Medicaid requirements

and in accordance with Federal regulations at 42 CFR 431.107(b), the providers must maintain records and must submit any documentation required by the single state agency.

Section 4.b.B.3. of the plan also states in relevant part that "[a] provider must . . . comply with all applicable federal, state and local laws and regulations regarding the services provided[.]"

The uniform administrative requirements for grants to states place on a state the burden of documenting the allowability and allocability of costs for which reimbursement is claimed. See 45 C.F.R. §§ 74.50-74.53 (1999) (reporting and record retention requirements); see also Oklahoma Health Care Authority, Ruling No. 2008-4, at 4 (2008), citing California Dept. of Health Services, DAB No. 1606 (1996) ("It is a fundamental principle that a state has the initial burden to document its costs and to show that its claim for reimbursement is proper.").

Analysis

Below, we discuss each of the categories of disputed claims in turn.

1. Claims for counseling services the OIG found were provided by unlicensed providers

The OIG questioned claims for counseling services rendered by school counselors on the ground that the counselors did not have a license from the applicable State licensing agency. The OIG found that the services rendered by the school counselors were therefore not provided within the scope of their practice under State law, as required by 42 C.F.R. § 440.60(a). TX Ex. 1, at 20. CMS asserts, and Texas does not dispute, that counseling services may be covered by Medicaid only as "medical or other remedial care provided by licensed practitioners," which is defined in section 440.60(a) as—

Any medical or remedial care or services, other than physicians' services, provided by licensed practitioners within the scope of practice as defined under State law.

The Texas Occupations Code (TOC) provides for licensing of professional counselors by the Texas State Board of Examiners of Professional Counselors (TSBEP) and states that "[a] person may not engage in the practice of professional counseling unless the person is: (1) licensed under this chapter; or (2) exempt from this chapter under Subchapter B." TOC § 503.301 (accessible at <http://tlo2.tlc.state.tx.us/statutes/docs/OC/content/htm/oc.003.00.000503.00.htm>); see also TOC § 503.002(4) (definition of "licensed professional counselor").

On appeal, Texas does not dispute that the school counselors were not licensed by the TSBEPC pursuant to chapter 503 of the Texas Occupations Code. Texas takes the position, however, that the school counselors were licensed as required by State law because they were certified as counselors by the Texas Education Agency (TEA) or by the State Board for Educator Certification (SBEC), which took over this function in 1996. Texas points out that chapter 503 of the Texas Occupations Code specifically exempts from its licensing requirements "a person employed as a counselor by a . . . public or private educational institution if the person is performing counseling or counseling-related activities within the scope of the person's employment." Section 503.051. Texas argues that "[t]he individuals who provided the counseling services were thus not subject to the licensing provisions of the TSBEPC because they were practicing within the scope of their employment in a public educational institution and, therefore, were subject to the regulations and qualification requirements of another state entity, the TEA" or the SBEC. TX Br. at 10. Texas also argues that the school counselors were qualified as Medicaid providers under the State Medicaid plan because they "met the requirement, state education certification, for the SHARS they provided."² TX Reply Br. at 4.

Texas' arguments do not address the salient question: whether the school counselors who were certified by the State education agency may be considered "licensed practitioners" for purposes of providing medical or remedial services under Medicaid. We agree that the approved State Medicaid plan at section 4.B.b. can reasonably be read as treating certification as equivalent to licensing within the meaning of 42 C.F.R. § 440.60(a) where the certification permits an individual to provide remedial care and services covered by Medicaid. As we discuss below, however, the requirements for certification of school counselors in the Texas Administrative Code are much narrower in scope than the requirements for licensing of professional counselors in the Texas Occupations Code. In addition, the requirements for certification of school counselors do not appear to qualify these counselors to perform the comprehensive therapeutic counseling described in the definition of "practice of professional counseling" in the Texas Occupations Code. Moreover, the fact that a counselor who is certified only by the State education agency is not permitted to provide counseling services outside of a school setting is further evidence that the scope of practice of such school counselors was limited to educational counseling. Accordingly, while the school counselors certified by the State education agency were licensed to provide counseling services

² We assume that, by "SHARS," Texas is referring to "school health and related services," abbreviated in the State Medicaid plan as "SHRS."

within the scope of their employment, Texas has not established that it was within the scope of their practice to provide medical or remedial services reimbursable by Medicaid.

For State education agency certification as a counselor, an individual must meet the following requirements in addition to specified undergraduate criteria relating to certification of classroom teachers and other more generally applicable requirements:

(1) The guidance program (at least three semester hours). This area provides an understanding of the principles, philosophy, organization, and services of the guidance program.

(2) The pupil served (at least six semester hours). This area is devoted to intensive study that develops an understanding of the physical, intellectual, social, and emotional development of children and youth, and the influences of the school program on development.

(3) Resource areas (at least 21 semester hours).

(A) The preparation program shall help the prospective counselor achieve a balanced program of teacher education by giving attention to related resource areas. . . .

(B) These advanced level studies are not necessarily represented by a sequence of semester hour courses. They are planned programs to meet the needs of the individual student. They are intended to ensure professional competence.

(C) Upon completion of the program, the prospective counselor shall have developed skills in guidance techniques that assure an ability to use the instruments of measurement and evaluation necessary for understanding, appraising, and counseling individuals and groups. The student shall be skilled in the use of occupational and educational information and materials appropriate for the guidance of youths. Also, the student shall have developed, through study and supervised practice, an ability to work with groups of youths and adults and to counsel with individuals.

TX Ex. 3, at 11-12 (unnumbered) (TOC § 137.307). In addition, a valid provisional teaching certificate and three years of classroom teaching experience are required for the "professional counselor certificate." Id.

These certification requirements are focused on teacher education generally and in any event do not require either a specific program of study or supervised experience specifically in counseling. On their face, they appear merely to prepare an individual to provide the educational counseling normally provided by a school guidance counselor.

In contrast, the requirements for a licensed professional counselor at section 503.202 of the Texas Occupations Code include a master's or doctoral degree in counseling or a related field; completion of a graduate degree at a regionally accredited institution of higher education with not less than 48 graduate semester hours and 300 "clock hours of supervised practicum" that are primarily counseling in nature; completion of not less than 3,000 hours of supervised experience hours in a counseling setting after the completion of the graduate program; and passing a license examination and a jurisprudence examination. An individual meeting these requirements may engage in the "practice of professional counseling" as defined in section 503.003 of the Texas Occupations Code. Section 503.003(a) defines this term as—

The application of mental health, psychotherapeutic, and human development principles to:

- (1) Facilitate human development and adjustment throughout life;
- (2) Prevent, assess, evaluate, and treat mental, emotional, or behavioral disorders and associated distresses that interfere with mental health;
- (3) Conduct assessments and evaluations to establish treatment goals and objectives; and
- (4) Plan, implement, and evaluate treatment plans using counseling treatment interventions that include:
 - (A) counseling
 - (B) assessment;
 - (C) consulting; and
 - (D) referral.

The term "counseling treatment interventions" is defined to include, among other things, "the assessment, evaluation, and treatment of a person with a mental, emotional, or behavioral disorder," and "the use of functional assessment and counseling for a person requesting assistance in adjustment to a disability or handicapping condition[.]" TOC § 503.003(b)(4)(C), (E).

Texas does not explain how the relatively minimal requirements for certification in the Texas Administrative Code qualified school counselors to perform the professional counseling services described in the Texas Occupations Code.

Thus, we conclude that individuals who did not hold a professional counselors license from the TSBEPC did not meet the requirements of 42 C.F.R. § 440.60(a) and that the claims for services provided by these individuals were therefore unallowable.

2. Claims for assessments the OIG found were provided by unlicensed providers and were nonmedical assessments

The OIG questioned claims for assessments provided by educational diagnosticians. According to the OIG, the services consisted of "educational testing" and "assist[ing] in summarizing other medical providers' assessments/evaluations for IEP services." TX Ex. 1, at 20. The OIG found Medicaid reimbursement was not available for these services because they were nonmedical in nature. As an additional basis for questioning the claims, the OIG found that the educational diagnosticians could not qualify as providers under the approved State Medicaid plan since, according to the OIG, there is no provision in State law for licensing educational diagnosticians. Id.

Texas takes the position that educational diagnosticians conducted assessments of the type covered by the approved State Medicaid plan, which defines "assessment" as "[a]ctivities related to the evaluation of the functioning of a student for the purpose of determining the needs for specific school health or related services, the effect of delivered services on IEP goals and the revision of IEP plans and goals." TX Ex. 6, at 5. In addition, Texas argues that the educational diagnosticians were qualified providers under the State Medicaid plan because they were certified by the State education agency pursuant to section 137.425 of the Texas Administrative Code and met all other applicable requirements in the plan (such as the requirement that a SHRS provider be enrolled and approved for participation in Medicaid and sign a written provider agreement with the single state agency). According to Texas, moreover, the State education agency certification satisfied the requirement in 42 C.F.R. § 440.60(a) that medical or remedial care or services other than physicians' services be provided by licensed practitioners within the scope of practice as defined under State law.

For certification as an "Educational Diagnostician (Special Education)," section 137.425 of the Texas Administrative Code requires "an earned master's degree," and specifies the number of semester hours for each of five major areas of professional competence. TX Ex. 3, at 16-17 (unnumbered). According to Texas, the area of competence that is relevant here is "[k]nowledge of the exceptional child," which the Code states "should provide the prospective educational diagnostician with knowledge of the learning characteristics of those children deficient in basic integrities which can be categorized into peripheral nervous system dysfunction, central nervous system dysfunctions, and behavioral disorders." Id. The Code further states that learning characteristics "may include disorders in sensory functioning, perception, conceptualization, memory, language, attention, neuromuscular coordination, emotional social behavior, reading, writing, arithmetic, spelling, and any developmental disparity in the physiological and psychological processes related to education." Id. Texas argues that "[t]hese skills would certainly allow the educational diagnostician to

perform the assessment services described in the State Plan." TX Br. at 15.

The requirements for certification on which Texas relies appear to be designed to provide an educational diagnostician with the knowledge and skills to assess how a child's disabilities may affect or have affected the child's ability to meet various educational goals. We are not persuaded, however, that these requirements qualify an educational diagnostician to conduct the type of assessments described in the approved State Medicaid plan. The first part of the definition of "assessment" refers to "[a]ctivities related to the evaluation of the functioning of a student for the purpose of determining the needs for specific school health or related services[" (Emphasis added.) There is nothing in the certification requirements that would inform an educational diagnostician about a child's needs for specific school health or related services. Moreover, while the State Medicaid plan description of "assessment" refers generally to "the effect of delivered services on IEP goals and the revision of IEP plans and goals," this language must be read as referring to the effect of delivered health services on IEP goals and to the revision of IEP plans and goals related to health. Any other reading would conflict with federal law, which provides for Medicaid coverage of health services, not educational services, authorized by an IEP.³

Even if the educational diagnosticians were qualified to conduct the type of assessment described in the approved State Medicaid plan, there is no basis in the record for finding that the assessments they actually conducted were of this type. As noted above, the OIG described the assessments conducted by the educational diagnosticians as 1) "educational testing" and 2) "assist[ing] in summarizing other medical providers'

³ Texas asserts that "its interpretation of the qualifications of its educational diagnosticians is reasonable" and suggests that this interpretation is entitled to deference. TX Br. at 15, citing Colorado Dept. of Health Care and Policy Financing, DAB No. 2057, at 2 (2006) (stating that "[g]enerally, the Board gives deference to a state's interpretation of its own State plan, so long as that interpretation is an official interpretation and is reasonable in light of the language of the plan as a whole and the applicable federal requirements."). To the extent that Texas is arguing that the description of assessments in the State Medicaid plan should be read in such a way that educational diagnosticians certified by the State education agency were qualified to conduct the assessments, that argument has no merit since such a reading conflicts with federal law.

assessments/evaluations for IEP services." "Educational testing" is not necessarily directed at evaluating "the functioning of a student for the purpose of determining the needs for specific school health or related services" as provided in the State Medicaid plan. Moreover, since some IEP services are educational services rather than health-related services, the "assessments/evaluations for IEP services" with which the educational diagnosticians assisted did not necessarily qualify as assessments within the meaning of the State Medicaid plan. Thus, it is impossible to conclude that any of the assessments fell within the description in the State Medicaid plan without specific information about the nature of each of the assessments. Texas, however, provided no documentation of the assessments themselves.

Instead, Texas further asserts in support of its position that both educational diagnosticians and licensed specialists in school psychology (who were presumably qualified as Medicaid providers) use the same procedure code for assessments and may use the same testing instruments in conducting these assessments. According to Texas, this "refutes CMS's argument that the evaluations or assessments were for educational purposes only." TX Br. at 16. This argument ignores, however, the possibilities that the educational diagnosticians used the wrong procedure code or used the same testing instruments as the licensed specialists in school psychology but for different purposes.

Texas also suggests that an assessment conducted by an educational diagnostician qualified as a "developmental assessment," which CMS's State Medicaid Manual (SMM) indicates is covered by Medicaid as an EPSDT benefit.⁴ TX Br. at 16-17, citing SMM § 5123.2. Section 5123.2 states that a developmental assessment "includes a range of activities to determine whether an individual's developmental processes fall within a normal range of achievement according to age group and cultural background." TX Ex. 8, at 9. It continues: "Screening for developmental assessment is a part of every routine initial and periodic examination." *Id.* Texas also asserts that the State Medicaid Manual does not "limit the testing to a certain type of provider," presumably to make the point that educational diagnosticians are not precluded from conducting such assessments. TX Br. at 17.

While the State Medicaid Manual does state that "[t]he use of all types of providers is encouraged," this statement read in context does not authorize the use of educational diagnosticians to

⁴ As indicated above, if services required to be provided as part of EPSDT benefits are listed under section 1905(a) of the Act, they are reimbursable by Medicaid even if they are not included in an approved state plan.

conduct developmental assessments. The preceding paragraph states in pertinent part that "[e]xaminations are performed by, or under the supervision of, a certified Medicaid physician, dentist, or other provider qualified under State law to furnish primary medical and health services." TX Ex. 8, at 9 (emphasis added). The requirements for certification as an educational diagnostician do not purport to qualify individuals to furnish primary medical and health services, nor does Texas provide any evidence that the educational diagnosticians performed their "examinations" under the supervision of such a provider.

Thus, we conclude that educational diagnosticians were not qualified to provide the type of assessment described in the State Medicaid plan or in the State Medicaid Manual provisions on EPSDT benefits and that there is no basis in the record for concluding that the assessments actually conducted were other than educational assessments. Accordingly, we conclude that the claims for these assessments were unallowable.

3. Claims for speech therapy services the OIG found were rendered by unlicensed providers

The claims at issue here are for speech therapy services provided in sample cases #20, #1, #27, #25, #21, and #7 (all in Texarkana Independent School District (ISD)) by one individual we identify here as Ms. S. Section 440.110(c)(1) of 42 C.F.R. provides in relevant part that "*[s]ervices for individuals with speech, hearing, and language disorders means diagnostic, screening, preventive, or corrective services provided by or under the direction of a speech pathologist or audiologist*" (Italics in original.) There is no dispute that Ms. S provided the services under the direction of a speech pathologist. See CMS Br. at 11. Nevertheless, the OIG questioned the claims on the ground that Ms. S (and other providers no longer at issue) did not meet State licensing requirements. TX Ex. 1, at 8. As indicated above, the approved State Medicaid plan required that a qualified provider meet the State education agency licensing requirements applicable to the SHRS provided. CMS takes the position that Ms. S was required by State law to have an "intern license" since she "was acquiring supervised work experience (internship) during the period in question." CMS Br. at 11, citing section 401.301 of the Texas Occupations Code, section 741.62 of the Texas Administrative Code, and 1999 Texas Medicaid Provider Procedures Manual, Chapter 38-7 (TX Ex. 7, at 7 (unnumbered)).

Section 401.301 of the Texas Occupations Code states that "[a] person may not practice speech-language pathology or audiology or represent that the person is a speech-language pathologist or

audiologist in this state unless the person holds a license under this chapter." Texas argues that Ms. S was exempt from this requirement since section 401.054 of the Code contains an exception for persons certified in speech-language pathology by the Texas Education Agency "if the person only performs speech-language pathology or audiology services as part of the person's duties within an agency, institution, or organization under the jurisdiction of the Texas Education Agency." Texas also asserts that Ms. S had a "teaching certificate issued by the SBEC, a division of the TEA." Texas Reply Br. at 8. In support of its argument, Texas provided a copy of a "Texas Educator Certificate" which was valid for the period in question and which states that Ms. S "has fulfilled requirements of state law and regulations of the State Board for Educator Certification and is hereby authorized to perform . . . Speech and Language Therapy (Grades PK-12)." TX Ex. 11.

Texas' argument ignores other provisions of State law, however. Specifically, section 741.62 of the Texas Administrative Code, as in effect during the period in question, required that an applicant for a speech-language pathology license must have completed 36 weeks of full-time, or its part-time equivalent, of supervised professional experience, and that an applicant "must be licensed as an intern in order to commence the supervised professional experience." Sections 741.62(q), 741.62(a) (repealed 12/24/00) (accessible at [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.TacPage?sl=R&app=3&p_dir=&p_rloc=2028&p_tloc=&p_ploc=&pg=1&p_tac=2028&ti=22&pt=32&ch=741&rl=61&dt=01/02/1999](http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=3&p_dir=&p_rloc=2028&p_tloc=&p_ploc=&pg=1&p_tac=2028&ti=22&pt=32&ch=741&rl=61&dt=01/02/1999)). Consistent with these requirements, the 1999 Texas Medicaid Provider Procedures Manual stated in relevant part:

Individuals acquiring supervised work experience may also deliver speech-language therapy services. These individuals must have an intern license and may deliver speech-language therapy services under the supervision of an individual who is ASHA-certified or ASHA-equivalent qualified.

TX Ex. 7, at 7 (unnumbered).

Texas does not challenge CMS's assertion, which is supported by Texas' own documentation, that Ms. S was acquiring supervised professional experience at the time she provided the services in question here. See TX Ex. 2, at Tex-1a and Tex-1k (Report of Completed Internship Form and Clinical Fellowship Report, both showing beginning date of 8/16/99 and ending date of 5/26/00). Thus, she was clearly required by State law to have an intern license. The "Texas Educator Certificate" does not on its face

appear to be an intern license, however, nor does Texas contend that it constitutes such a license. Since Texas failed to document that Ms. S was licensed as required by State law, the claims for services she provided are unallowable.

4. Claims for nursing services the OIG found were rendered by unlicensed providers

The OIG questioned claims for nursing services on the ground that they were rendered by unlicensed providers. TX Ex. 1, at 20, citing section 301.251 of the Texas Occupations Code (providing that a person may not practice professional or vocational nursing in the State unless the person is licensed pursuant to chapter 301). The claims at issue here are for services provided in sample case #19 (Dallas ISD) by one individual, who was apparently identified by Texas on the claims documentation as "Kathy Duncan." The only dispute here is whether Texas has documented that this individual was licensed pursuant to chapter 301.

Texas submitted with its appeal a printout from the Texas Board of Nurse Examiners records showing that "Kathlyn Duncan" of Gulf Breeze, Florida was initially licensed on 12/15/93 and that her licensure was current as of 1/31/08. TX Ex. 2, at DAL-1. CMS found that the documentation "is insufficient to demonstrate that that 'Kathy Duncan' and 'Kathlyn Duncan' (a resident of Florida) are the same person." CMS Br. at 14. According to CMS, "the State Board of Nurse Examiners also has information on a 'Kathy Duncan' [who] was not licensed until . . . after the date of the services in question," as well as "several listings for persons with the same or variations of the name 'Kathy Duncan.'" Id. Texas subsequently submitted a printout from the Texas Board of Nurse Examiners records showing Kathlyn Duncan's social security number and a printout from its Department of Human Resources records showing the same social security number for the "Kathy Duncan" who provided the services.⁵ TX Ex. 13, at 1-5. Based on this documentation, we conclude that the claims were allowable.

5. Claims for speech therapy services for which the OIG found there was no referral

The OIG questioned claims for speech therapy services on the ground that they lacked the referral required by 42 C.F.R.

⁵ This information will be redacted on any copy of the record that is released in response to a Freedom of Information Act request.

§ 440.110(c)(1). TX Ex. 1, at 18. Section 440.110(c)(1) requires a referral "by a physician or other licensed practitioner of the healing arts within the scope of his or her practice under State law."

The claims at issue here are for services provided to two students, sample case #12 and sample case #18 (both La Marque ISD). For each student, Texas provided a form captioned "Physician's Prescription for Speech/Language Therapy." TX Ex. 2, at LAM-2 and LAM-5. One section of the form, captioned "Physician's Opinion," contains the following pre-printed language:

The student identified herein has been referred to me regarding the need for Speech/Language Therapy.

_____ I recommend that this student receive therapy, from a certified Speech Therapist or Speech Pathologist, as prescribed in the treatment schedule of the Individualized Education Plan (IEP). . . .

_____ I do not recommend this student for Speech/Language Therapy for the following reason(s):

Neither box is checked on the form for either sample case, although the physician signed and dated both forms.

CMS takes the position that the claims should be disallowed on the ground that "[t]he physician did not recommend that these students receive speech therapy services." CMS Br. at 12. Texas points out that in another section of the form, under the caption "Documents Reviewed," there are checkmarks showing that the physician reviewed the student's IEP. Texas provided a copy of the each student's IEP, which Texas asserts shows that the student "required" speech therapy services. TX Reply Br. at 9, citing TX Ex. 2, at LAM-2A and LAM-5A. Texas argues that since the physician signed the form after noting that he had reviewed these documents, "[t]he physician's intent to recommend the speech services is apparent when the form is considered in its entirety." TX Reply Br. at 9. Texas presented no evidence from the physician confirming that this was his or her intent.

Texas' argument appears to be predicated on the assumption that the physician would always refer the student for speech therapy services if the IEP team had determined that such services were required. Such an assumption makes the requirement for a

referral meaningless, however.⁶ Moreover, on its face, the form gives the physician the option of not referring the student for speech therapy services, without regard to what documents the physician has reviewed (or their content). Thus, while one could infer from the fact that the physician reviewed the IEP that the physician was considering whether to make a referral, we decline to infer on this basis alone that the physician intended to make the referral when the physician did not take the minimal step of indicating by a checkmark which option he or she was selecting.⁷

Conclusion

Based on the foregoing analysis, we reverse the disallowance with respect to the direct services and related transportation claims for sample case #19 (Dallas ISD). We uphold the disallowance of the remaining disputed claims for direct services and the related transportation claims.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member

⁶ A different situation might have been presented if the physician had been a member of the IEP team, in which case the signed IEP might have sufficed as the referral. Cf. Oklahoma Health Care Authority, DAB No. 2140 (2007); Ruling on Request for Partial Reconsideration, Ruling No. 2008-4 (2008).

⁷ In view of this conclusion, we need not consider CMS's argument that the date on the referral form for sample case #12, at Texas Exhibit 2, LAM-5, "appears to be altered" to show a date prior to the date the services were provided. CMS Br. at 12.