Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Texas Health and Human Services Commission
Docket No. A-22-83
Request for Reconsideration of DAB No. 3066 (2022)
Ruling No. 2024-1
October 27, 2023

RULING DECLINING TO RECONSIDER BOARD DECISION

The Texas Health and Human Services Commission (Texas) has asked the Board to reconsider *Texas Health and Human Services Commission*, DAB No. 3066 (2022) (Docket No. A-22-29). In DAB No. 3066, the Board upheld a disallowance, by the Centers for Medicare & Medicaid Services (CMS), of $16,287,695 in federal financial participation (FFP) for Texas's claims of direct medical services provided to Medicaid-eligible children pursuant to Texas's School Health and Related Services (SHARS) program for federal fiscal year 2011 (FFY 2011).

The Board declines to reconsider DAB No. 3066 because Texas has not shown clear error of fact or law in that decision.

Case Background and Board Decision[1]

Texas administers the Medicaid program, which provides medical assistance to low-income individuals and families as well as to blind and disabled persons, in the state of Texas. Texas receives federal funding in accordance with the Medicaid statute, codified in title XIX of the Social Security Act (Act), implementing regulations, and the terms of its federally approved state plan, which sets out the health care items and services the state Medicaid program covers. *See* DAB No. 3066, at 1.

In accordance with its state plan, as amended and in effect in FFY 2011, Texas provided Medicaid-covered services, including "early and periodic screening, diagnostic, and treatment" (EPSDT) services, to eligible Texas Medicaid beneficiaries under age 21 through its school-based health care program, known as SHARS. *Id.* at 1-2, 3. EPSDT services, a mandatory Medicaid benefit, include comprehensive health screenings, and

[1] This section briefly summarizes the case background and the Board's decision. It is only intended to provide context for the discussion to follow. It does not alter or replace any part of DAB No. 3066, which is available at: https://www.hhs.gov/about/agencies/dab/decisions/board-decisions/2022/board-dab-3066/index.html.

vision, dental, and hearing services. *Id*. at 2. Also, in accordance with its state plan in effect in FFY 2011, Texas covered medically necessary "personal care services" for Medicaid-eligible individuals under age 21, under the EPSDT benefit category. *Id*. at 2, 3-4. Texas's SHARS program delivered these services (as direct medical services) to Medicaid-eligible individuals in a school setting. *Id*. at 3.

The SHARS program uses a statistical sampling method called "Random Moment Time Study" (RMTS). *Id*. at 4-5. Under RMTS, individual school staff members in various school districts are pre-selected to participate in RMTS and are instructed, in advance, to record their activity during a pre-determined one-minute moment on a future day. *Id*. at 5. The information and documentation concerning the random moment samples are collected, and the results assessed, to determine the portion of time for services that are eligible for Medicaid coverage and reimbursement and, thus, a basis for claiming the federal share of Medicaid funding. *Id*. The random moment samples are coded, in accordance with guidelines, based on the collected information and documentation. *Id*. Participating school districts submit claims for direct medical services provided under SHARS to Texas on an ongoing basis, and Texas reimburses the school districts for those services on an interim basis and submits claims for FFP on a quarterly basis. *Id*. at 4.

In 2017, the United States Department of Health and Human Services, Office of the Inspector General (OIG) determined, following an audit of Texas's FFY 2011 claims, that Texas had claimed and received FFP for direct medical services provided through the SHARS program that were not reasonable, adequately supported, or otherwise allowable. *Id*. at 5. The OIG determined that 274 of 3,161 random moment samples Texas had used to claim FFP for the services in question were incorrectly coded as reimbursable services and thus did not qualify for FFP. *Id*. The OIG also found that Texas had not required supporting documentation for the RMTS participant responses and that approximately 94 percent of the 3,161 random moment samples were not supported by documentation, but did not question the claimed costs solely based on inadequate documentation. *Id*. at 6, 13-14. The OIG determined that, based on the 274 incorrectly coded random moment samples, Texas had received $18,925,853 in unallowable FFP for SHARS in FFY 2011. *Id*. at 6.

CMS reviewed OIG's audit findings, and ultimately determined that 238 of the 274 random moment samples were ineligible for FFP. *Id*. at 6. On June 23, 2021, CMS issued a decision disallowing FFP in the amount of $16,287,695, which represented unallowable FFY 2011 Medicaid claims for SHARS that did not comply with applicable requirements. *Id*. Texas requested reconsideration, which CMS denied on October 21, 2021. *Id*. at 6-7. Texas then timely appealed the disallowance to the Board. *Id*. at 7. Texas filed an opening brief and exhibits. CMS filed a response brief and exhibits. *Id.*

Reviewing CMS's disallowance decision de novo, the Board determined that CMS met its initial burden to articulate the basis for the disallowance, but Texas did not then meet

its burden to show that the disallowed costs are eligible for Medicaid reimbursement. *Id*. at 7, 8-11, 14. On June 24, 2022, the Board upheld the disallowance in full. *Id*. at 1, 24.

Standard for Reconsideration

In a case arising from a Medicaid disallowance, such as this one, a party has 60 days from the date of the Board's decision to request reconsideration of that decision. Act § 1116(e)(2)(B). The Board will grant a request to reconsider its decision "where a party promptly alleges a clear error of fact or law." 45 C.F.R. § 16.13; *see also Appellate Division Practice Manual* (*Practice Manual*), "What can I do if I think a decision issued by the Board is wrong and should be reconsidered?"[2]

Texas's Motion for Reconsideration and Reversal

Texas timely filed its Motion for Reconsideration and Reversal (Tex. Motion).[3] Generally, Texas advances two arguments as to why it believes the Board's decision is erroneous.[4] First, and chiefly, Texas maintains that the Board erred in concluding that Texas failed to substantiate its claims based on the 238 random moment samples with sufficient documentation. Tex. Motion at 1. According to Texas, it adequately documented its claims based on the 238 random moment samples because it used a documentation method "recommended" in CMS guidance and, accordingly, the Board erred to the extent it held Texas to producing certain documentation CMS did not require in its guidance. *Id*. at 2-3. Second, Texas maintains that RMTS itself does not require, and is not designed to generate, certain information and documentation and, moreover, certain information about students is protected by law from disclosure and is inaccessible by Texas due to lack of parental consent to release it. *Id*. at 3. The second argument appears to be related to the first argument, and advanced for the proposition that Texas

[2] The *Practice Manual* is available at https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/practice-manual/index.html#40.

[3] The Board issued its decision on June 24, 2022, and sent it to the parties through DAB E-File that day. Texas's motion for reconsideration was due Tuesday, August 23, 2022, 60 days after June 24, 2022. Act § 1116(e)(2)(B). On August 23, 2022, Texas emailed an attorney at the Departmental Appeals Board, Appellate Division, asking for assistance to electronically file its motion, which was attached to its email. On August 25, 2022, an Appellate Division attorney gave Texas instructions on how to file its motion as a "new appeal" in DAB E-File. *See* A-22-83, DAB E-File entries 2, 2a-2e. Texas then promptly filed its motion through DAB E-File. *See id.*, entry 1. We accepted Texas's August 25, 2022 DAB E-File submission, docketed under Appellate Division case number A-22-83, as timely filed.

[4] In the lead paragraph of its motion, Texas urges the Board to reconsider and reverse its decision "based on clear errors of fact contained therein." Tex. Motion at 1. However, Texas does not identify any factual finding in DAB No. 3066 that is contrary to or inconsistent with anything in the record on which the Board issued its decision. In any event, we review Texas's motion for clear factual or legal error in the Board's decision, in accordance with 45 C.F.R. § 16.13.

may not or should not be required to produce certain documentation that it could not have produced. Texas asks the Board to "remedy [its] error by reconsidering and reversing its [d]ecision." *Id*. at 1.

CMS's Response Brief

CMS asks the Board to deny Texas's motion for reconsideration because Texas does not show "that the Board made a clear error of law or material fact." CMS's Response to Appellant's Motion for Reconsideration and Reversal (CMS Response Br.) at 3. According to CMS, Texas is late in arguing that it "should be excused from providing adequate narrative and documentary support for the 238 random [moment] samples" and "does not attempt to explain its failure to present" the argument earlier. *Id*. at 2. Even were the Board to now consider Texas's "new," "general" argument, CMS says, the argument does not address "the core issue [of] whether [Texas] demonstrated any of 238 samples were actually allowable." *Id*. at 1, 2-3. CMS further maintains that Texas fails to show that the laws Texas cited as prohibiting disclosure of certain information or documentation concerning students "actually applied" to the 238 random moment samples. *Id*. at 2-3.

Discussion

We address Texas's arguments for reconsideration and reversal of the Board's decision in more detail below. Finding no error in the Board's decision, we decline to reconsider it.

I. Texas's late argument in reliance on CMS guidance not previously addressed or presented to the Board raises no allegation of clear error of fact or law in the Board's decision.

Texas maintains that, during FFY 2011, it used a documentation method recommended in CMS's "Medicaid School-Based Administrative Claiming Guide" (CMS Guidance)[5] and, accordingly, it adequately documented its claims in accordance with agency guidance. Texas thus asserts the Board erred to the extent it upheld the disallowance for failure to

[5] The record in the case docketed under A-22-29 included two guidance documents, both submitted by CMS. The first, developed by the Health Care Financing Administration (HCFA), CMS's predecessor, was "Medicaid and School Health: A Technical Assistance Guide," issued in August 1997, and of record as CMS exhibit 1. The second, apparently developed by Texas, was "Texas Timestudy Implementation Guide for Direct Services and Medicaid Administrative Claiming," of record as CMS exhibit 2. The "Medicaid School-Based Administrative Claiming Guide" was not in the record in A-22-29.

produce certain documentation not required by CMS in its guidance. *See* Tex. Motion at 2-3.[6]

Neither party addressed the CMS Guidance in the briefs or submitted the CMS Guidance or any part of it in the case docketed under number A-22-29. Texas does not now offer any part of the CMS Guidance for Board examination. Texas instead quotes language from that document (*see* Tex. Motion at 2-3), which we will address later.

Texas appears to misapprehend the Board's review process under 45 C.F.R. Part 16. In general, the parties are expected to present all arguments in their briefs and all documentation which they consider important to a resolution of the issues in the case *before* the Board issues its decision. *See* 45 C.F.R. § 16.8(a)-(c).[7] "Reconsideration of a [Board] decision is not a routine step" under Part 16, "but a means for the parties and the Board to point out and correct any error that makes the decision clearly wrong." *N.H. Dep't of Health & Human Servs.*, Ruling on Request for Reconsideration of DAB No. 2399 (2011), DAB Ruling No. 2012-2, at 8 (Oct. 14, 2011). "Historically, reconsideration," which is "an exceptional process, not merely . . . another regular step," "has rarely resulted in substantive modification of a decision." *Practice Manual*, "What can I do if I think a decision issued by the Board is wrong and should be reconsidered?"

Accordingly, the Board has consistently disfavored attempts to use the Part 16 reconsideration process to raise new arguments that could or should have been raised earlier, making clear that "arguments" and "representations" made too late "are not considered allegations of errors of fact or law justifying reconsideration of a decision."

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[6] Texas also states, "The Board's [d]ecision may be revised based on new evidence, and the Board may issue a revised decision on the basis of the entire record." Tex. Motion at 2 & 2 n.2 (citing 45 C.F.R. § 16.13; 42 C.F.R. § 498.102; *Practice Manual*). It is not clear exactly what Texas intended to convey by this sentence. Possibly, Texas is asserting that the Board may consider the CMS Guidance as "new evidence," together with the record in A-22-29, to issue a new decision reversing the disallowance. For purposes of this ruling, we need not delve into the issue of whether an agency guidance document may be considered "evidence," but note that Texas did not actually submit the CMS Guidance or any part of it to the Board. And, 42 C.F.R. Part 498, which includes section 498.102 (which, among other things, authorizes the Board to reopen and revise its decision) that Texas cites, did not govern the Board's review that resulted in the issuance of DAB No. 3066, and it does not govern the present review of Texas's motion for reconsideration. The regulation in 45 C.F.R. § 16.13 and the *Practice Manual*, which apply here, provide that the Board may reconsider its decision if a party alleges clear factual or legal error in the Board's decision. However, neither 45 C.F.R. Part 16 nor the *Practice Manual* expressly provides that, on reconsideration, the Board may revise its decision in a Part 16 case based on *new evidence*.

[7] In the Board's January 10, 2022 letter acknowledging Texas's appeal (A-22-29), the Board cited 45 C.F.R. § 16.8(a)-(c) and stated, "Upon expiration of the time for submitting a reply [by Texas], the Board may close the record and proceed to decision without further notice to the parties." Board Letter at 2. The Board also stated that it "may decide the case based solely on the [parties'] submissions," which "should therefore include all documents which would assist the Board in making findings of fact on disputed issues, as well as documents which provide necessary background information." *Id.* at 3. The Board's letter thus directed the parties to present all of their arguments and documents before the Board issues its decision.

Econ. Opp. Comm'n of Nassau Cnty., Inc., Ruling on Request for Reconsideration of DAB No. 2731 (2016), DAB Ruling No. 2017-1, at 1 (Jan. 26, 2017). The Board therefore will not reconsider its decision to address an issue that could have been but was not raised earlier. *See Ill. Dep't of Healthcare & Family Servs.*, Ruling on Request for Reconsideration of DAB No. 2863 (2018), DAB Ruling No. 2019-1, at 2 (Jan. 17, 2019).

Likewise, the Board has disfavored late attempts to drive additional or different findings based on submissions that could or should have been presented to the Board earlier, but were not. *See, e.g.*, *New Hampshire*, DAB Ruling 2012-2, at 8 (concluding that two declarations, dated after the Board's decision, offered to the Board without any showing that they could not have been presented to the Board earlier, were "not newly-discovered evidence of the type warranting reconsideration"); *Illinois*, DAB Ruling No. 2019-1, at 1, 13 (rejecting evidentiary submissions at reconsideration stage as "not the type of newly-discovered or previously unavailable documentation that might justify reconsideration"); *Nassau County*, DAB Ruling No. 2017-1, at 1 (stating that "evidence that an appellant could have submitted with its appeal (but did not)" did not justify reconsideration); *Alaska Dep't of Health and Soc. Servs.*, Ruling on Request for Partial Reconsideration of DAB No. 2103 (2007), DAB Ruling No. 2008-1, at 4 (Oct. 15, 2007) (refusing to reconsider a decision "to receive additional evidence that could have been presented to the Board before it issued its decision, but was not"); *Puerto Rico Dept. of Health*, Ruling on Request for Reconsideration of DAB No. 2385 (2011), DAB Ruling No. 2011-5, at 2-3 (Sept. 30, 2011) (and cited rulings).

CMS informed Texas that it was disallowing $16,287,695 in FFP based on OIG's audit findings that the claims based on the 238 disputed random moment samples were not reasonable, adequately supported, or otherwise allowable. *See* DAB No. 3066, at 6. And, in its response brief, CMS specifically argued that Texas had multiple opportunities during the audit process and CMS's reconsideration review to show that the disputed random moment samples were properly coded as reimbursable services; that Texas did not meet its burden of proof and made no pretense of substantiating the disputed claims; and that the Board may properly affirm the disallowance based solely on Texas's failure to meet its burden of proof. *See id.* at 8, 11, 12. Accordingly, at the latest, Texas could and should have filed a reply brief arguing that it had adequately substantiated its claims based on the random moment samples for claiming purposes by following CMS's guidance. But Texas did not use its opportunity to file a reply in which it could have disputed, and rebutted, CMS's position, at bottom, that Texas failed to show it was entitled to any portion of the disallowed FFP. *See id*. at 7, 11, 12, 14. Instead, Texas raised various arguments to the effect that it had appropriately claimed costs for personal care services (such as assistance with activities of daily living and instrumental activities of daily living) as costs for direct medical services in accordance with applicable authorities and state plan amendment provisions – all of which the Board addressed in detail and rejected. *See id*. at 11, 14-18. In A-22-29, Texas did not argue that it had adequately documented its claims by following CMS guidance. Texas makes no attempt

to explain why only now it raises an argument based on a CMS guidance document that it purportedly relied on in FFY 2011.

Texas's late argument in reliance on the CMS Guidance that it never put before the Board does not amount to an allegation of factual or legal error, much less clear factual or legal error, and, accordingly, is not a basis to reconsider the Board's decision. Under these circumstances, the Board would be under no obligation to further consider the argument. Nevertheless, for completeness, we next address the question of whether the CMS Guidance language on which Texas relies demonstrates any clear error of fact or law in the Board's decision.

II. The CMS Guidance language on which Texas relies does not raise an allegation of clear error of fact or law in the Board's decision.

Texas relies on the following language in the CMS Guidance:

> The burden of proof and validation of time study sample results remains the responsibility of the states. To meet this requirement, some states currently include space on time study forms for a brief narrative description of the Medicaid activity, function, or task being performed. . . . States should consider this approach to documentation, or some comparable procedure that adequately documents Medicaid sampled activities.

CMS Guidance, page 37.[8] This language is found in section V ("Claiming Issues"), subsection A ("Documentation"), of the CMS Guidance. *See id*. In its response brief, CMS asserts that Texas improperly raises new arguments based on the CMS Guidance (CMS Response Br. at 1-2) but does not address the contents of the document.

According to Texas, CMS "recommended" "the use of a narrative description in [the] RMTS response required by the sampled participant, and the recipients must certify the response as true at the time it is prepared and returned to [Texas]." Tex. Motion at 3. According to Texas, the CMS Guidance "implie[d]" that using a "narrative description" of the sampled moments alone would be "adequate" to "meet the documentation requirement." *Id*. Texas says that since it used narrative descriptions in accordance with the guidance, it "is unclear how certified narrative responses do not meet the

[8] The CMS Guidance, issued in May 2003, is available at: https://www.cms.gov/research-statistics-data-and-systems/computer-data-and-systems/medicaidbudgetexpendsystem/downloads/schoolhealthsvcs.pdf. The language on which Texas relies is in page 37, not page 39, of the CMS Guidance, as Texas states in page 3 of its motion.

documentation requirements as described in" the CMS Guidance. *Id*.[9] Texas thus asserts that the Board erred to the extent it upheld the disallowance based on Texas's failure to produce certain documents. Specifically, Texas takes exception to the following language:

> These descriptions fail to identify any specific physical, cognitive, or behavioral limitations for the students [the RMTS] participants were serving and . . . that any limitations were the result of those students' disabilities or chronic health conditions. Nor is there any evidence that the supervision and monitoring in each moment was a service authorized by a physician in accordance with a plan of treatment or a state-approved service plan . . . .

See id. at 2 (quoting DAB No. 3066, at 19).[10]

The CMS Guidance language quoted earlier provides that a state could use, but is not required to use, time study forms that include narrative descriptions of Medicaid activities. However, it is *not* reasonable to construe language suggesting the optional use of time study forms that include narrative descriptions of Medicaid activities as

[9] Texas argues that it appropriately followed CMS's guidance on documentation but stops short of expressly arguing that an agency's interpretive guidance provision could override any applicable statute or regulation that carries the force of law. *See BGI Retirement, LLC, d/b/a Crossbreeze Care Ctr.*, DAB No. 2620, at 10 (2015) ("The Board has held consistently that CMS manuals, instructions, or policy 'guidance' do not have the force of law.") (citations omitted); *see also N.Y. State Dep't of Social Servs.*, DAB No. 1134, at 7 (1990) (stating that CMS's "interpretive" rule, unlike a regulation, "does not have the force and effect of law" and would be "binding only if there was timely notice and the interpretation is reasonable") (citations omitted). And, to the extent any such guidance or interpretive rule contradicts or is inconsistent with applicable law or regulation, such guidance or interpretive rule would have to yield to the law or regulation. *See Conn. Dep't of Soc. Servs.*, DAB No. 1982, at 20 (2005) (Because CMS manual guidance "does not have the legal authority of the statute and regulations, [its] instructions must give way to the statute and regulations to the extent of any conflict."). Indeed, the CMS Guidance on which Texas relies expressly states that the document "does not supersede any statutory or regulatory requirements" but "clarifies and consolidates CMS' guidance on how to meet these statutory and regulatory requirements and explains the application of such requirements in the context of current practices." CMS Guidance, page 2; *see also* CMS Ex. 1 (HCFA's August 1997 guidance, "Medicaid and School Health: A Technical Assistance Guide"), at 5 (stating that the guidance in the document is intended to serve as "general reference summarizing" applicable authorities and is "not intended to supplant" the authorities). Accordingly, we could not overturn a disallowance decision lawfully issued in accordance with applicable authorities, as was the case here, based on guidance language alone.

[10] The language with which Texas takes issue is part of the Board's discussion of claims based on random moment samples that CMS determined were not reimbursable because they involved the provision of "educational" services, not services that addressed student health care needs. *See* DAB No. 3066, at 18-21. The Board's discussion in this regard was specific to the narrative descriptions in CMS exhibit 4, which is a spreadsheet summarizing the 238 random moment samples that CMS determined were miscoded. *See* DAB No. 3066, at 18-21. As further discussed below, Texas never submitted evidence of the narrative descriptions it allegedly prepared (or any other supporting documentation). Nor has Texas shown that the narrative descriptions that the Board considered in CMS exhibit 4 were any different from the narrative descriptions included on Texas's time study forms.

conveying that if a state uses such forms, then those forms, *by themselves*, would be sufficient to meet *all* applicable requirements for purposes of establishing legal entitlement to FFP. Nor is it reasonable to conclude or suggest that the submission of such time study forms would be sufficient to establish a state's entitlement to FFP without regard to the substance of the narrative descriptions. The very CMS Guidance language on which Texas relies and quoted above plainly provides that the state (non-federal party) must bear the burden of proof to adequately document and substantiate Medicaid-sampled activities on which claims for FFP would be made, as did the Board. *See* DAB No. 3066, at 2-3 (discussing authorities, including cost principles codified in regulations), and 9-11 and 13 (discussing the non-federal party's ultimate burden to document costs and substantiate claims in accordance with applicable authorities).

We need not now engage in an extended discussion of the contents of the CMS Guidance since Texas relies only on one paragraph from that document and CMS does not address the document's contents in its response brief. We do note, however, that other language on page 37 of the document reinforces the point that the state is responsible for maintaining documents that substantiate claims for FFP. *See* CMS Guidance, page 37 (stating, among other things, that "the state is required to maintain/retain adequate source documentation to support the Medicaid payments for administrative claiming" in accordance with the law and regulations, and that "it is critically important for additional documentation to be maintained, in order to verify the appropriateness of the claims in terms of allowability and allocability and to limit the risk of the federal government").

Furthermore, Texas's argument in reliance on the CMS Guidance language disregards that this case did not present a question of whether CMS had prescribed any specific form and manner of gathering information about and documenting Medicaid activities in a time-study context. The Board did not uphold the disallowance based on Texas's failure to maintain and produce specific types or forms of documentation. Ultimately, the Board upheld the disallowance because Texas did not carry its burden to show (and still has not shown) that its claims for FFP based on the 238 random moment samples were allowable or eligible for Medicaid reimbursement in accordance with applicable authorities and the state plan, because Texas produced nothing at all concerning any of the 238 random moment samples to show that CMS was wrong to deny the claims as ineligible for Medicaid reimbursement. *See* DAB No. 3066, at 3-4 and 17-18 (discussing relevant state plan amendment language), 9 ("[W]e uphold the disallowance in full because Texas has not carried its burden to prove that the 238 random moment samples in question were properly coded as direct medical services eligible for reimbursement."), 11 ("Texas has not shown that the disallowed costs are eligible for Medicaid reimbursement."), 14 ("Texas has not produced any documentation concerning the 238 random moment

samples . . . .").[11] As the Board explained, it must uphold the agency's decision if it was authorized by law, as CMS's disallowance here was, and the non-federal party has not disproved the factual basis for the decision, which Texas did not do. *See id*. at 10.

Texas's reliance on certain language in page 19 of the Board's decision also fails to consider the context in which the Board discussed the evidentiary deficit in Texas's case. The *only* evidence in the record in A-22-29 that addresses specific information concerning the 238 random moment samples is a spreadsheet identifying those samples, and it was submitted by CMS as its exhibit 4. *See* DAB No. 3066, at 11. The spreadsheet includes the date and time of each random moment sample, the school district from which the sample was derived, a description of the RMTS participant's activity during the sampled moment (presumably taken from the time study forms Texas now says it used in accordance with the CMS Guidance), and CMS's reason for disqualifying the described activity (e.g., the activity involved student education, not a health care-related service, or did not involve the delivery of any service). *See id*. at 11-12, 12 n.8, 13 n.10. With no other evidence specifically addressing the disputed random moment samples, the Board necessarily had to review the contents of the spreadsheet, focusing on the activity descriptions (*i.e.*, the narrative descriptions) in the spreadsheet and CMS's reasons for finding them ineligible, to ascertain whether the descriptions identified a qualifying, Medicaid-reimbursable service. *See id*. at 12 n.8, 16, 18-22. Finding that they did not, we upheld the disallowance. *Id*. at 14 ("Texas has not shown that the disallowed costs were for 'personal care services' eligible for Medicaid reimbursement under the applicable legal authorities and Texas State Plan.") (bolding and italics removed here).

Based on the foregoing, we determine that Texas's argument in reliance on CMS Guidance language does not raise an allegation of clear error of fact or law in the Board's decision.

III. Texas's remaining arguments do not raise any allegation of Board error.

Texas states:

> RMTS asks the participant to describe the activities that were occurring in the minute sampled. Describing the nature of a child's disability and

[11] Texas's failure to refute CMS's assertion that the claims based on the 238 random moment samples were ineligible aside, earlier, the OIG determined that Texas had not required RMTS participants to maintain any supporting documentation with which Texas could validate the RMTS results, that various school districts were unaware that supporting documentation was required, and that approximately 94 percent of the sampled moments lacked supporting documentation. *See* DAB No. 3066, at 13-14. We read the contents of page 37 of the CMS Guidance as conveying that the state must be able to substantiate its claims that were based on information and documentation from the participating school districts.

> whether the activities that were occurring are included in a child's IEP are not a description of the activities that were occurring in the moment. Rather than requiring [Texas] to collect during the RMTS a full interim claim that could be subjected to a utilization review, CMS instead approved the RMTS cost allocation methodology.
>
> Additionally, because of the design of the RMTS, the particular moment being sampled could be a service delivered to a Medicaid enrolled student or to a student not enrolled in Medicaid. For students not enrolled in Medicaid, [Texas] does not have the ability to require additional supporting documentation of the specific student being served in that moment or the nature of their disability because that student's IEP and medical information is protected from being shared with [Texas] by both FERPA and HIPAA, and no parental consent would be available to [Texas] to review such records.

Tex. Motion at 3.[12]

As an initial matter, since CMS cited as a reason for its disallowance Texas's failure to substantiate its claims, Texas could have, and should have, raised arguments about RMTS or its design earlier if Texas believed that RMTS, the use of which CMS never disputed it had approved, did not require Texas to collect or document certain kinds of information. But Texas did not do so. Moreover, Texas does not clearly and specifically explain how the above statements advance its position that the Board's decision is erroneous. The statements themselves identify no specific error of fact or law in the Board's decision.

Nevertheless, to the extent Texas appears to be asserting that the Board erred in determining that Texas had failed to produce certain information or documentation the RMTS by design does not generate, or does not require, the argument misses the point. In A-22-29, the parties did not make any representations or arguments specifically concerning the design or mechanics of the RMTS and, accordingly, such matters were not the subject of the Board's discussion. Nowhere in its decision did the Board state that it was upholding the disallowance because Texas had failed to comply with any RMTS-specific provision or failed to provide a specific form of documentation. Rather, as explained above and in the Board's decision, the Board found that Texas offered no proof, regardless of form, type, source, or manner of collection, concerning the 238

[12] Texas's reference to "IEP" is to "individualized education program," which is developed for disabled children in accordance with the Individuals with Disabilities Education Act. Medicaid provides health-related services included in a child's IEP if all Medicaid requirements are met. *See* DAB No. 3066, at 2. Texas's references to "FERPA" and "HIPAA" are to the Family Educational Rights and Privacy Act of 1974 and the Health Insurance Portability and Accountability Act of 1996.

random moment samples to refute CMS's position that the claims based on those samples were not allowable.

With respect to Texas's statements in the second paragraph quoted above, we accept for the purposes of this discussion that a degree of randomness may be inherent in the RMTS statistical sampling method and could result in a sampling pool that includes one-minute moments involving activities associated with Medicaid-enrolled students and students who are not enrolled in Medicaid or are ineligible for Medicaid benefits, and possibly also moments involving activity not associated with any student(s), regardless of eligibility status. But, in our view, the argument that Texas could not have obtained documentation about "students not enrolled in Medicaid" (presumably meaning students ineligible for Medicaid benefits) that is protected from disclosure by law and/or is inaccessible due to the lack of parental consent for its release is irrelevant. If a student who is the subject of a sampled moment is *not* enrolled in Medicaid or is *ineligible* for Medicaid benefits, then a claim based on an activity undertaken for or a service delivered to that unenrolled or ineligible student and that student alone during the moment in question presumably would not qualify for Medicaid coverage and reimbursement.[13] Accordingly, Texas's alleged inability to obtain "additional supporting documentation" about such students, whether because the law precludes its disclosure or due to the lack of parental consent to release it, is of no moment. We also note that Texas does not say anything about whether any law or the unavailability of parental consent precluded or impeded its ability to access or produce such documentation concerning Medicaid-enrolled or Medicaid-eligible students.[14] Texas's diversionary argument raises no allegation of error in the Board's decision.

Finally, we reject Texas's apparent implication that by "approving" the use of RMTS CMS relaxed or relieved Texas from any applicable requirement to substantiate entitlement to FFP. Tex. Motion at 3 ("Rather than requiring [Texas] to collect during the RMTS a full interim claim that could be subjected to a utilization review, CMS instead approved the RMTS cost allocation methodology."). Any such implication is inconsistent with the CMS Guidance language on which Texas itself relies and which indicates that the state is ultimately responsible for adequately documenting its claims.

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[13] The Board discussed a random moment sample, the denial reason for which was "Aged out," which we took as meaning that the student in question was not under 21 years old and thus no longer eligible under the EPSDT benefit category. *See* DAB No. 3066, at 12 n.8.

[14] The provisions of FERPA and HIPAA, and alleged unavailability of or inability to obtain parental consent to release student records or information are far beyond the scope of the discussion appropriate and necessary to respond to Texas's motion for reconsideration of DAB No. 3066. Nothing in this ruling should be construed as a comment or determination about FERPA, HIPAA, or any other authority concerning the disclosure or release of information about students or patients. We are simply considering Texas's argument at face value and responding to it to the extent necessary to rule on Texas's motion, and we need not address CMS's argument that Texas has not shown that FERPA and HIPAA apply to the disputed claims. *See* CMS Response Br. at 2-3.

See discussion above. More importantly, the implication appears to disregard the fundamental requirement that a non-federal party claiming entitlement to federal funding, as here, must show that it has met all applicable requirements and is in fact entitled to the funding. *See* DAB No. 3066, at 2-3 and 9-11 (and cited authorities). Texas nowhere cited, in A-22-29 or in its motion for reconsideration, any authority that such a requirement would carry any less force where, as here, claims for federal funding arose within the context of use of a statistical sampling method such as RMTS.

Conclusion

We decline to reconsider DAB No. 3066 (2022).

Michael Cunningham

Constance B. Tobias

Susan S. Yim
Presiding Board Member