STATE OF NEW YORK
DEPARTMENT OF HEALTH

In the Matter of the Appeal of

NEW YORK SERVICE NETWORK, INC.,
Provider (MMIS) # [redacted]

From a determination by the NYS Office of the Medicaid Inspector General to recover Medicaid Program overpayments

DECISION ON MOTION

Audit # 09- 2553

Before: David A. Lenihan,
Administrative Law Judge

Held at: New York State Department of Health
433 River Street, Troy, New York 12180
Hearings on this motion were held on September 27, 28 and December 23, 2011. The Record was closed on this Motion on receipt of briefs on March 30, 2012

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STATEMENT OF CASE[1]

This matter came on as a motion to dismiss the extrapolation that forms the basis of the OMIG claim against the Appellant. Should the Appellant prevail, the OMIG would be left with the 100 claims in its audit rather than the requested universe of some 63,355 claims. Accordingly, for all practical purposes, this motion is tantamount to a request for accelerated judgment and, as such, the entire record, to this point, will be searched.

JURISDICTION

The New York State Department of Health (the Department) acts as the single state agency to supervise the administration of the Medicaid Program in New York State pursuant to Social Services Law § 363-a. The New York State Office of the Medicaid Inspector General (OMIG) is an independent office within the Department of Health, responsible for the Department's duties with respect to the recovery of improperly expended Medicaid funds pursuant to Public Health Law § 31.

The OMIG in this case issued a final audit report for New York Service Network, Inc. (the Appellant) in which the OMIG concluded that the Appellant had received Medicaid program overpayments for chemical dependent outpatient services paid for by Medicaid during the period from May 1, 2003 through December 31, 2007. The OMIG auditors took a sample of 100 claims totaling some $8,088.15. The auditors identified errors in 98 of the 100 claims and these 98 amounted to some $7,548.98.

[1] A debt of gratitude is owed to my colleagues at the Bureau of Adjudication, especially Judge Terepka, who offered insightful and cogent suggestions on this case.

Next, the OMIG extrapolated this claim amount from the sample of 100 out to the universe of all the claims made by the Appellant during the period in question and came up with an extrapolated claim estimate of some $2,598.991.00. [2]

The Appellant requested this hearing pursuant to Social Services Law § 22 and Department of Social Services regulations at 18 NYCRR 519.4 to review the Department's determinations. Two days of hearing were held on May 2 and May 3, 2011. Evidence was received. Testimony was taken under oath. A transcript of these proceedings was made.

After two days of hearing, at which only a few of the claims were addressed, the Appellant's attorneys moved to dismiss the OMIG's extrapolation of the Medicaid overpayments because of the alleged failure of the OMIG to produce the random number generator program and the source code used by the program. [3] The Appellant's motion objected to the sampling methodology employed by the OMIG. This motion requested that the extrapolated audit disallowances be dismissed, leaving only the disallowances in the sample itself. Additional requests were made in later supplements to this motion dated, June 15, 2011 and July 21, 2011.[4]

The OMIG responded to the Appellant's motion on May 26, 2011. [5]
In a letter to the Administrative Law Judge dated September 19, 2011, the Appellant added an additional ground to its motion, indicating that without the seed used to start the program, it could not confirm that the random number generator was properly utilized.[6]

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[2] This is the total from the Final Audit Report (OMIG Ex. 3). The Draft Audit Report (OMIG Ex. 1) had a slightly larger point estimate of $2,638,717.00.
[3] This motion, by letter dated April 28, 2011, is in the record of this case as OMIG Ex. 65.
[4] These additions to the motion are in the record as OMIG Exhibits 67,74 and 83.
[5] In the case record as OMIG Ex. 66.

Hearings on this motion were held in Troy on September 27, 28, and reopened for additional testimony on December 23, 2011. Initially, Dr. Patricia Maykuth testified for Appellant. Kevin Ryan, the OMIG's Director of Business Intelligence, and Dr. Karl Heiner, the OMIG's statistical consultant, testified for the OMIG. This motion was initially heard on September27 and 28, 2011.

At the reopened hearing on December 23, Mr. John Santini, Jr. testified for the Appellant. Mr. Ryan and Dr. Heiner again testified for the OMIG. The entire record was considered in reaching this decision.

BACKGROUND AND FINDINGS

An opportunity to be heard having been afforded the parties and evidence having been considered, it is hereby found:

1. New York Service Network, Inc. (hereinafter "Service Network," "Facility," or "Appellant") is a provider of outpatient chemical dependence services located in New York City. The Facility participates in the New York State Medical Assistance Program under Provider # [redacted]

2. By notice of a draft report of findings, dated August 3, 2010, the Department determined that the Appellant was given overpayments totaling some $2,638,717.00. (Department Exhibit 1)

3. By notice of a final audit report of findings, dated November 23, 2010, the Department adjusted the initial findings and determined that the Appellant was given overpayments totaling some $2,589,991.00. (Department Exhibit 3)

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[6] In the case record as OMIG Ex. 83.

4. During the period May 1, 2003 through December 31, 2007, the Appellant submitted 63,355 claims for services to the Medicaid program and was paid $4,996,162.80. These claims are subject to audit pursuant to 18 NYCRR 504.8 (a). The OMIG did not review the records of each claim individually. Instead, in its audit, it selected a representative sample for review, and projected, or extrapolated, the amount of findings in the sample claims reviewed, over the whole universe of claims in the audit period.

5. In order to perform the above extrapolation, the OMIG employed the statistical sampling methodology which is being challenged in this motion.

6. During the audit period, the Appellant submitted 63,355 claims for out-patient chemical dependency services (the "universe" of claims, or the "sample frame") to the Medicaid program. The Medicaid program's billing and payments records show that the Appellant was paid $4,996,162.80 during the audit period. Using its statistical sampling methodology, the OMIG selected a random sample of 100 of the 63,355 claims in the universe for audit. The Appellant was paid $8,088.15 for the 100 selected claims. In Audit #09-2553, the OMIG's auditors found at least one error in 98 out of the 100 sampled claims, which resulted in a finding of $7,548.94 in Medicaid overpayments in the sample. Using its statistical sampling methodology, the OMIG extrapolated the sample overpayments to the universe and found a mean point estimate of overpayments of $2,589,991.00. (Department Exhibit. 3)

7. On December 2, 2010, the Appellant, by Douglas M. Nadjari, Esq., of Jacobson Goldberg & KuIb, LLP, requested an administrative hearing to review the final

Audit Report. (Department Exhibit 4) The hearing request referred to all of the issues raised in the Appellant's October 21, 2010 response to the Draft Audit Report in Audit #09-2553, including a generalized challenge to the OMIG's statistical sampling methodology.

8. On January 28, 2011, after the Final Audit Report was issued on November 23, 2010, David R. Ross, Esq., of O'Connell and Aronowitz, notified the OMIG that they were the new attorneys for the Appellant and submitted an additional "response" to the Draft Audit Report and the Final Audit Report. The administrative hearing was scheduled to commence on March 1, 2011 and did commence on May 2 and 3, 2011 in Troy, New York.

APPLICABLE LAW

REGULATIONS

NYCRR § 519.18 provides at d):

The appellant has the burden of: (1) showing that the determination of the Department was incorrect and that all claims submitted and denied were due and payable under the program, or that all costs claimed were allowable;

NYCRR § 519.18 provides at g): An extrapolation based upon an audit utilizing a statistical sampling method certified as valid will be presumed, in the absence of expert testimony and evidence to the contrary, to be an accurate determination of the total overpayments made or penalty to be imposed. The appellant may submit expert

testimony challenging the extrapolation by the department or an actual accounting of all claims paid in rebuttal to the department's proof.

New York State Case Law:

Matter of Mercy Hospital of Watertown v. New York State Department of Social Services, 79 N.Y.2d 197.

In this 1992 case, the Court of Appeals considered a case of Medicaid overpayments that were calculated by means of a statistical sampling rather than by an individual review of all the cases in the audit period. Petitioner had adequate records for all of the cases subject to the audit, but respondent reviewed only 800 randomly selected cases. On appeal, the court noted that respondent's powers included not only those expressly conferred, but also those required by necessary implication. The court concluded that respondent's decision to employ statistical sampling in conducting audits was implicit in its general grant of authority to supervise the Medicaid program.

The Court of Appeals determined in this case that the New York State Department of Social Services (DSS) did not exceed its authority in connection with its administration of the Medicaid program in New York State by conducting a random sample audit of petitioner hospital's Medicaid billings. Although the Social Services Law does not expressly refer to such audits, authority to audit the medical records maintained by Medicaid providers to determine the legitimacy of claims made by them is implicit in the designation of DSS as the agency "to supervise the administration of the [Medicaid] plan in this state" (Social Services Law § 363-a [1]). The holding in this case was that an agency's powers include those required by necessary implication, especially where, as

here, the Legislature has delegated administrative duties in broad terms, leaving the agency to determine what specific standards and procedures are most suitable to accomplish the legislative goals. It was held that DSS's decision to employ statistical sampling in conducting audits fell well within that broad authority.

Furthermore, and pertinent to the present case, the Court of Appeals went on to find that it was not arbitrary and capricious to employ a statistical sampling method in conducting an audit of overpayments. The court held that, in view of the vast number of claims subject to audit, it is not unreasonable for a supervising agency, such as DSS, to use statistical samples to establish that overpayments have been made and to estimate their total amount. As the regulation governing the use of statistical sampling dictates, the provider, who at all times bears the burden of proving entitlement to the Medicaid funds, must be given a fair opportunity to challenge the accuracy of the estimate by attacking the reliability of the methods or standards employed, as petitioner did in this case, or by conducting and submitting a complete audit, which petitioner chose not to do.

As for Constitutional concerns, the Court of Appeals went on to hold that the State Department of Social Services (DSS) did not violate constitutional separation of powers principles in determining to use a statistical sampling method to calculate the amount of overpayments made to providers of Medicaid services.

In conclusion, the Court of Appeals made it New York law that the authority for DSS to conduct Medicaid audits based upon statistical sampling is implicit in the general grant of authority to supervise the administration of the Medicaid program in this State and that such authority is not limited to cases in which the inadequacy of a provider's records preclude a complete audit.

Federal Case Law:

Yorktown Medical Laboratory, Inc., Plaintiff-Appellant, v. Cesar A. Perales,
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,
948 F.2d 84, (1991)

This Second Circuit case dealt with the legality of statistical audit samples and whether or not such practices were Constitutional. Yorktown, in its second and third claims, objected to certain procedural aspects related to the findings of the DSS audit. Yorktown's second claim focused on the statistical extrapolation by which DSS calculated the amount of overpayment. Yorktown did not challenge any specific statistical methods -- which it had an earlier opportunity to challenge -- but rather objected to any extrapolation from the sample to the entire universe of claims. Such an extrapolation, Yorktown argued, sanctioned it for unidentified unacceptable practices, practices which Yorktown has had no opportunity to contest. In essence, Yorktown claimed that any determination of overcharges by extrapolation violates its due process rights.

The Second Circuit disagreed and observed that Yorktown's claim overlooks the fact that due process depends on balancing various circumstances and factors. http://www.lexis.com/research/retrieve?_m=e78e0326e8849ac8b37727caefb1c0c0&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAW&_md5=86e54b3e10b4337daaceae359a8a2db0 - fnote7 It was held in this case that, given the low risk of error and the government interest in minimizing administrative burdens, the balance of interests favors DSS. *See Chaves County Home Health Serv. v. Sullivan*, 289 U.S. App. D.C. 276, 931 F.2d 914, 922-23 (D.C. Cir. 1991); *Illinois*

Physicians Union v. Miller, 675 F.2d 151, 156-57 (7th Cir. 1982). The Second Circuit held that to rule otherwise would hamstring DSS's attempts to eliminate fraud, without materially advancing Yorktown's interest and so, statistical auditing was found to be Constitutional.

New York State Administrative Decisions

The OMIG's statistical sampling methodology has been consistently upheld in administrative hearing decisions rendered by the Bureau of Adjudication. See, for example the following Administrative Decisions:

In the **Matter of Niagara Pharmacy**[7], ALJ John Harris Terepka's decision, dated July 20, 2011, held that the findings in the claim audit sample were selected from the "universe" of claims that the Department's billing and payment records show were paid by Medicaid. As in the present case, the OMIG submitted the required certification in the form of affidavits from Dr. Karl W. Heiner, the statistical consultant who designed the sampling and estimation procedure and the computer program that implemented it, and Kevin Ryan, the OMIG employee who used the procedure to select the audit sample.

Unlike the present case, the Appellant did not challenge the validity of the random sample, nor did the Appellant challenge the validity of the estimation methodology as described and implemented in the OMIG's certifications. The Appellant's witness on statistical issues, Dr. Zaporowski, conceded with regard to the estimation procedure described by Dr. Heiner and used in this audit that "the general methodology I think is ok."

[7] The full text of this and other recent Department of Health, Bureau of Adjudication, OMIG decisions can be found at the Department of Health web site: www://health ny.gov/

The *Niagara Pharmacy* case affirms the OMIG sampling methodology as do all the other reported OMIG cases dealing with the statistical sampling procedure, as can be seen in the following:

The **Matter of CVS Caremark Corporation, Dunkirk Store 309**, ALJ Jeffrey Armon, decision July 20, 2009;

Matter of Pharmhealth Infusion, ALJ John Harris Terepka decision dated May 28, 2009; at p. 26.

Matter of Transitional Services for New York, Inc. ALJ Sean O'Brien decision dated April 29, 2005.

It is noted that none of these decisions have been reversed by the courts. All of this legal precedent is set forth at length in the record herein in the OMIG's response to Appellant's motion (OMIG Ex. 66), and these decisions are followed in the decision herein. All of these decisions take cognizance of the fact that the OMIG's certificates are prima facie evidence of the validity of the Department's statistical sampling methodology [Enrico v. Bane, 213 A.D. 2d 784 (3 Dept. 1995)].

A review of the law shows that the decisions of the Bureau of Adjudication have consistently held that the Regulations provide that the Appellant does have the right to submit expert testimony to challenge the extrapolation as provided in 18 NYCRR 519.18 (g).

Of all the Bureau's decisions, the most significant for the facts in this case is the July 7, 2010 Decision After Hearing of Administrative Law Judge John Harris Terepka in the **Matter of the Appeal of "Rite Aid of New York, Inc."**, the full text of which is attached to OMIG Ex. 65, Appellant's motion herein, and as "Exhibit E"

to OMIG's Ex. 66 ("Rite Aid Decision"). In this decision, Judge Terepka ruled (at p.32) that the OMIG had to provide Appellant the information needed to review and evaluate the random sampling program that was used in this case.

In the *Rite Aid* case, the OMIG had refused to allow the provider to review the computer program used to select the audit sample. *Rite Aid* Decision at pp. 4, 27. Consequently, the OMIG's determination to extrapolate the findings in the sample to the universe of claims was not affirmed. In the *Rite Aid* decision Judge Terepka cited Mercy Hospital of Watertown v. New York State Department of Social Services, 79 N.Y 2d 197, 581 N.Y.S.2d 628: "We emphasize that, as the regulation governing the use of statistical sampling dictates, the provider, who at all times bears the burden of proving entitlement to the Medicaid funds, must be given a fair opportunity to challenge the accuracy of the estimate by attacking the reliability of the methods used or standards employed." (at p. 27)

ISSUES

1) Was it arbitrary and capricious for the OMIG to employ a statistical sampling method in conducting an audit of petitioner Medicaid provider's medical records to calculate the amount of overpayments made to petitioner for Medicaid services?

2) Did the OMIG's failure to provide the Appellant with the source code deprive the Appellant the opportunity to test the extrapolation program such that the Appellant has been unable to challenge the Random Number Generator program?

3) Did the failure of the OMIG to provide the Appellant with the seed (the number used by the program to begin the process of random number selection) deprive the Appellant of due process of law, such that the extrapolation should be excluded from the OMIG claim?

ANALYSIS AND DISCUSSION

The OMIG in this case issued a final audit report for New York Service Network, Inc. (the Appellant) in which the OMIG concluded that the Appellant had received Medicaid program overpayments. The Appellant requested this hearing pursuant to Social Services Law § 22 and Department of Social Services regulations at 18 NYCRR 519.4 to review the Department's determinations. The present matter is a motion to dismiss the extrapolation procedure, which multiplies the sample findings significantly and thus greatly enhances the claim. In past cases, such a matter was addressed in the final decision. In the interest of judicial economy, this matter is now addressed so as to obviate unnecessary and protracted delay should the Appellant prevail.

For the sake of clarity, the three issues in this case will be separately addressed and discussed.

Issue I:

The use of a statistical sampling methodology method in conducting the audit.

It is now well settled law that the OMIG's use of a statistical sampling audit is not, in and of itself, arbitrary or capricious. The Court of Appeals has ruled that, because of the vast number of Medicaid claims, statistical samples are necessary in order to regulate the Medicaid program in a reasonable and economical fashion.

This issue has been raised in several prior administrative hearing, cited above, and has been rejected. The Court of Appeals has made the law on this issue crystal clear and I see no reason to diverge from the holding that the use of a statistical sampling audit is not, in and of itself, arbitrary or capricious. Accordingly, I find that statistical sampling is not improper or illegal, in and of itself.

ISSUE II

Did the failure of the OMIG to provide the Appellant with the source code deprive the Appellant the opportunity to be able to test and challenge the Random Number Generator program?

It is noted that in the above cited case, the July 7, 2010 Decision of Judge Terepka in the Matter of the Appeal of "Rite Aid of New York, Inc.," it was held that the extrapolation should not be allowed because the OMIG failed to produce the program for the random selection of case audits and thus the Appellant was not afforded the opportunity to challenge the program.

In the case at bar, there was considerable delay in responding to a similar request for production of the random number generating program. However, the present case is

not on all fours with the *Rite Aid* case. In the present case, the OMIG has not refused to hand over its random sampling program and has, in fact, produced the program in question, albeit after some significant delay. The Appellant has now expanded its request to include the source code for the program and the seed utilized to start the program in the process of random number selection.

It should be noted that the Appellant has acknowledged receipt of a computer disk containing the OMIG's random number generator program (Appellant's Exhibit K). The Appellant is now claiming that the failure of the OMIG to also turn over the source code to its random number generator program made it unable to use the program to assess the soundness of the mathematical formula by which the alleged random numbers are generated.

It is noted that, for over a year, the parties were in discussion about the release of the source code. Property rights in this program were debated, back and forth, and confidentiality agreements involving outside parties, such as the Oracle corporation, delayed the negotiations. Suffice it to say for the present discussion, that the source code has, at long last, been delivered to the Appellant. The Appellant did raise several issues with the provided source code. However, I find these issues are not destructive of due process as the Appellant has been afforded an ample opportunity to review and analyze the process and its workings.

The Appellant has also contended that the OMIG has been slow to respond to its requests. On this matter, I find no fault on the part of the OMIG for these delays and note that there have been thorny intellectual property issues raised in this matter that were not easy to resolve. For instance, the record in this case is showing that (at T. 473)

Dr. Heiner's random number generator and extrapolation program contained within it a Java sourced random number generator, which Dr. Heiner's program used to generate the actual sample numbers. This is another program that was developed by Sun Microsystems and made available to persons who desired to use it. It appears that the rights to this random number generator had been purchased by the Oracle Corporation, which owns the copyright on the program.

A review of the testimony and documentary record in this case shows that the unfortunate delay in this case has been occasioned by the fact that the OMIG had to negotiate with the Oracle Corporation to get permission to provide the source code to this random number generator program to the Appellant. I note, again, that the source code[8] was given over to the Appellant. What was not given, was the seed[9] used to start the program.

Suffice it to say for Issue II that the source code has been provided and thus I find no due process violation with regard to it. What remains for resolution is Issue III, the production of the seed.

ISSUE III

WAS THE APPELLANT DEPRIVED OF DUE PROCESS BY THE FAILURE OF THE OMIG TO PROVIDE THE SEED?

[8] "Source Code" is a computer science term. In computer science, **source code** is text written in a computer programming language. The Appellant's expert defined "Source Code" at the hearing as the instructions in the programming language as written by a programmer that are used to determine a sequence of machine instructions to be executed by a computer. (T. 494)

[9] The "seed" is the number that was inserted into the Random Number Generator (RNG) program so as to generate the random numbers that became the subject of the audit in this case. See T. 250 *et seq.* for a discussion of the seed selection process.

There were three days of hearing on the issue of the extrapolation program. The Appellant was given ample opportunity to challenge the methods employed by the Department in selecting a random sample to be audited. It is noted that in the *Rite Aid* case, the OMIG did not hand over the program for review by the Appellant and Judge Terepka ruled that the extrapolation should therefore be disallowed. This was the correct decision under the law because *Rite Aid* was not afforded the opportunity to challenge the extrapolation methodology, a right set forth clearly and unambiguously in the regulations and case law.

However, the present case is not quite the same as the *Rite Aid* case. In the present case, the Random Number Generator program has been handed over for review, analysis and scrutiny. Now, the issue has become the seed, and the Appellant has argued that the failure of the OMIG to hand over the seed should warrant a *Rite Aid* type conclusion. After giving full and careful attention to the well-crafted arguments of the Appellant, I cannot agree with their demand.

It is noted that the source code has now been given to the Appellant and a diskette containing it is in the record as Appellant's Exhibit K. The seed, however, has been lost or not retained by the OMIG and so that issue remains. The issue thus becomes for this case whether the loss of the seed creates a situation in which the Appellant is unable to challenge the extrapolation. The testimony at the hearing from the OMIG expert was that the seed is not necessary to challenge the extrapolation. Doctor Heiner testified (T. 381) that the seed is not necessary and that what is needed for the extrapolation challenge is the actual numbers that were produced by the program.

The Appellant's expert, Dr. Patricia Maykuth, Ph.D., testified to the contrary of Dr. Heiner, that the seed is essential to be able to mount a challenge to the randomness of a sample. Dr. Maykuth testified that retaining the sample is "just a standard operating procedure." (T. 269) The logic of Dr. Maykuth is that a statistical sampling process has to be reproducible in order to be scientifically valid. Doctor Heiner, a PhD. and professor in this field for many years disagreed with Doctor Maykuth, and made a persuasive argument, at T. 381, that the seed is not required in order to determine whether a sample consists of valid random numbers. Doctor Heiner indicated that, for that purpose, all you need is the numbers themselves and those can be checked for randomness by the various tests discussed at the hearing.

However, I note that the ultimate question in this case is not whether the list of numbers are truly random but whether the process was correct that created the numbers in question. The issue is whether the process was honestly and fairly constructed and not arbitrary, unfair or unreliable. On review of the record and the transcripts of testimony in this case and on reading the legal briefs submitted by both sides, I conclude that the seed itself is not essential to a full and fair review of the process employed.

I find that the seed is not required in order to determine whether a sample is representative of or reflects the universe. As Doctor Heiner has stated, all you need for that is the numbers themselves, upon which you can perform certain tests to see if it "looks" random - that is, appears to be representative. The ultimate question in this case, however, is not whether the list of numbers looks random or passes certain after the fact tests for randomness or representativeness. The ultimate question is whether the process was correct that created the numbers and was honestly and fairly constructed and

not arbitrary, unfair or unreliable. That process is disclosed by the program, not by the numbers that it generated.

It is noted that the seed, itself, is in fact useless for evaluating the program. Whether the program is a genuine random generator or not, you will still get the same sample every time you plug that seed in and run the program. It tells you nothing about the randomness of the method by which the sample was selected.

In short, the seed is not required in order to determine whether a sample actually consists of random numbers. The seed, in fact, is of no use in such a question. It is the process by which the numbers are selected, not the starting point or the numbers themselves that must withstand scrutiny. Knowing the seed tells you nothing about the process by which it is used to select a sample. As the Appellant itself points out, it is the process that must be scrutinized and not just the list of numbers alleged to be random. That process is embodied in the computer program that selects the numbers, and that has been disclosed.

In the case at bar, the OMIG has produced the program and it contains the process that must and now can be scrutinized. If the Appellant is going to prevail in this case, it must show that this program is in some way defective or unfair. It is the process itself that will reveal the fairness of the program and the Appellant has been afforded an ample opportunity to review and scrutinize the process. The Appellant is claiming that it needs the seed to review the process. I disagree.

The Appellant has contended (at page 27 in their brief) that the failure to produce the seed is a denial of due process. However, the law requires the OMIG to surrender what is necessary for a challenge, not necessarily all that is demanded by the Appellant

and I see no necessity for the seed and no due process violation in the failure to produce the seed. A review of the testimony of Mr. Santini, the Appellant's expert, shows that he never did actually test the numbers of the sample in this audit. (See T. 537) The record also shows that Mr. Santini was not aware that these numbers did pass the three tests for randomness that were discussed at the hearing. (See T. 538) Mr. Santini went on to acknowledge that he was not an expert in statistics and mathematics (T. 539). Mr. Santini acknowledged (at T. 543) that he could run the sample tests without the seed and explained that the seed in this case is a number from the atomic clock that the Java program identifies and then uses. Mr. Santini went on to testify, on cross-examination, that it is a common practice to let the seed be chosen in this fashion from the atomic clock. (T. 544)

I find it pivotal to this case that Mr. Santini was never given the actual numbers of the sample so as to test them for randomness. (T. 536 and 537) The actual numbers are in the record as OMIG exhibit 8-A. In order to prevail in this motion to exclude the extrapolation it was incumbent on the Appellant to show that this process did not produce random numbers as per the certifications of the OMIG experts. This they did not do.

The Appellant also raised the argument that Medicare does require the production of the seed. This argument is not persuasive as this is a Medicaid case and not a Medicare case. I have found no similar legal demand imposed by the law on Medicaid. The Appellant has also argued (in their brief at page 33) that the certifications of Ryan and Heiner should not be accepted because they have no personal knowledge of the actual process of producing the putative random numbers. I disagree. I have reviewed the testimony of Mr. Ryan and Doctor Heiner and have read the certifications which are

in the present record as OMIG exhibits 6 and 7, respectively. The evidence shows that these gentlemen were involved in the process of collecting the random numbers, either personally or through their agents. On review, I find that this process was fair and honest and did not deprive the Appellants of their constitutional rights.

There was also some discussion at the hearing that the source code that was handed over was not the original code, but rather one that had been decompiled. The Appellant's expert, Mr. Santini, acknowledged, at T. 497, that the original code would have made his analysis easier, but it was not essential to a review of the process. Accordingly, the record shows that the failure to provide the original program did not deprive the Appellant of the ability to review and analyze the program, and therefore I find no denial of due process.

As for the seed issue, it is noted that Doctor Heiner admits that no seed is retained. (T. 379 – 380). The Appellant's attorneys have contended (in their brief at pages 35 and 36) that Dr. Heiner was arrogant in his assertion that the failure to retain the seed was immaterial. I disagree with this characterization. Doctor Heiner explained his reasoning at the hearing, and I find his reasoning sound and well considered, and by no means arrogant.

According to the Appellant's argument (brief at p. 37), if a random sample cannot be reproduced, it is not a random sample. (brief at p. 40 and T. 249) Dr. Maykuth testified that retention of the seed is a standard practice. (brief at p. 44 and T. 268) It appears from testimony that the OMIG seed is selected by the Java program from the atomic clock (T. 543) and according to Dr. Heiner, the OMIG's program does not retain the seed. (T. 380)

This argument of the Appellant that if the random sample cannot be reproduced it is not a random sample appears to be the linchpin of the Appellant's entire case. I do not accept the logic of this argument. Mere reproduction will tell the Appellant nothing. If the program is flawed, running it again will just give the same flawed sample. If the program is not flawed, running it again will give them the same valid sample. Either way, reproduction will not reveal anything new or necessary.

The numbers themselves are set forth in the record at OMIG exhibit 8-A and they have been certified by the OMIG experts as random. (OMIG Exhibits 6 and 7) The numbers themselves have not been tested by the Appellant's experts.

Accordingly, I see no denial of due process in the failure of the OMIG to retain the seed.

CONCLUSION

The evidence adduced at the hearing in this case demonstrates that the Appellant has been afforded a full and ample opportunity to challenge the extrapolation as required by 18 NYCRR Section 519.18 (g). After three days of hearing on this motion and extensive submissions from both sides, it appears that the Appellant has not been thwarted in its efforts to mount a challenge to the fairness of the random sample process employed in this case by the OMIG.

This case devolves about statistical proof. The New York courts, both state and federal, have, for some time now, held that such proof is allowable in cases such as this due to the singular nature of programs such as Medicaid. It has been shown, again and

again, that the only way for government to regulate a program of such size and scope is to resort to measures such as extrapolation from a small body of evidence to a universe 100 or more times larger. It is now well settled law that such a tactic is allowable and indeed necessary if the war on poverty is to be waged.

It is the task of tribunals such as this to see that the law is carried out in a fair and equitable manner and that justice is done. In a prior and similar case, cited above, Judge Terepka ruled that the OMIG was obliged to hand over the computer program that generated the random sample. What we have before us now is not the same case, as the program has been handed over, albeit after a long and tortuous struggle. In this case, however, there were additional requests beyond the statistical program, for the source code and then for the seed that starts the program to generate the supposedly random numbers.

Eventually, the source code was produced by the OMIG. The seed, however, was not retained. The experts for the Appellant have argued that the seed is necessary and the OMIG expert has testified that the seed is not necessary, because we have the list of numbers, OMIG Exhibit 8-A, that was actually produced and that exhibit is what should have been tested for randomness.

The case law and State regulations dictate that the Appellant has a right to challenge the extrapolation and that is what they have been given the opportunity to do. It is noted that, in this case, there has been no suggestion of manipulation or connivance by the OMIG and I have found the OMIG witnesses to be frank, honest and forthright.

Nevertheless, it is the task of tribunals such as this to protect the process and see to it that fairness is guaranteed, especially in a case where traditional rights to due process are in any way infringed. The Appellant's expert did not actually review the random numbers that were produced for this audit. These numbers are set forth in the record as Exhibit 8-A. I find these numbers to be one of the determinative factors in this case. The Department's experts have certified that they are indeed random and the Appellant's case has not shed doubt on that assertion.

In order to prevail on this motion to exclude the extrapolation it was incumbent on the Appellant to show one of two things. First: That the numbers were not random. The Appellant did not even attempt to do this. In fact, Mr. Santini was never even given the actual numbers in the sample so as to test them for randomness or for representativeness. Second: That the process used to select the numbers (that is, the random sample generator) was not a valid process for generating a random sample. Disclosure of the program has given the Appellant adequate information to challenge the process. The seed is not necessary for that. The law requires the OMIG to surrender what is necessary for a challenge, not necessarily all that is demanded by the Appellant. The Appellant has not established that the process employed in this case was in any way unfair.

Accordingly, I find that the Appellant has been afforded the opportunity to challenge the extrapolation process and has not established that this process was arbitrary, capricious or in any way unfair. Therefore the motion to dismiss the extrapolation is denied.

DECISION: The Appellant's motion to dismiss the extrapolation to the universe of claims in this case is denied. This decision is made by David A Lenihan, Bureau of Adjudication, who has been designated to make such decisions.

DATED: Troy, New York
April _____, 2012

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David A. Lenihan,
Administrative Law Judge
Bureau of Adjudication