

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: New York Department of Social Services      DATE: December 10, 1981  
Docket Nos. 80-92-NY-SS      81-147-NY-CS      80-142-NY-HC  
                  80-113-NY-SS      81-148-NY-CS      80-180-NY-HC  
                  80-147-NY-SS      81-149-NY-CS      81-57-NY-HC  
                  80-185-NY-SS      81-150-NY-CS  
                  81-139-NY-CS      81-153-NY-CS

Decision No. 238

DECISION

The State of New York appealed disallowances totaling \$5,227,216 in Federal financial participation (FFP) claimed under Titles IV-A, IV-D and XIX of the Social Security Act (Act). The Regional Commissioner, Social Security Administration (SSA), disallowed \$792,117 claimed under Title IV-A for the period January 1, 1979 through June 30, 1980. The Regional Representative, Office of Child Support Enforcement (OCSE), SSA, disallowed \$646,321 claimed under Title IV-D for the period of January 1, 1979 through March 31, 1981. The Director, Bureau of Program Operations, Health Care Financing Administration (HCFA), disallowed \$3,788,778 claimed under Title XIX for the period of January 1, 1979 through June 30, 1980. In all, the agencies issued thirteen disallowances, which were considered jointly since they involve common questions of law and fact. The costs disallowed are attributable to the computerized Wage Reporting System (WRS) used by the State to match recipient data to wage data in the administration of various programs, including Titles IV-A, IV-D, and XIX of the Act. The disallowances were based on the lack of specific prior approval for the development and operation of the WRS.

This decision is based on the State's applications for review, the Agency's responses, documents detailing the negotiations between the State and the Agency concerning approval of the WRS, an Order to Show Cause, and the State's response to the Order. Although the Agency was not required to respond to the proposed finding in the Order, it was asked to respond to specific questions concerning the status of New York's request for approval of the WRS.

In its response to the Order, the State requested that the Board not proceed to decision because of the possibility of a negotiated settlement. However, the Agency asked that we not delay the decision. Neither party indicated that the negotiations were almost completed. We have determined to decide this case now because a decision finding against the State,

would not preclude either continued negotiations for approval of the WRS or ultimate payment of part or all of the disallowed FFP. Under the applicable regulations, the Department must approve the WRS before New York can receive FFP in its expenditures. The State submitted an Advance Planning Document (APD) for the WRS and negotiated with the Department for approval, but began to claim FFP without the requisite approval. We have considered New York's arguments and find them unpersuasive. Accordingly, as explained below, the Board upholds the disallowances of FFP in the costs of development and operation of New York's WRS since the WRS has not yet been approved by the Department and there is no legal basis for payment of the claimed FFP.

### Regulations

45 CFR 95.611 (1978) 1/ provides as follows:

#### SPECIFIC CONDITIONS FOR FFP

- (a) General - \$25,000 acquisition requirement. A State must obtain prior written approval by the Department for acquisition of ADP [Automatic Data Processing] equipment or ADP services when the acquisition cost of ADP equipment or ADP services exceeds \$25,000 in Federal and State funds. The State shall submit requests for prior systems approval . . . to the Assistant Secretary for Management and Budget (ASMB) . . . . Requests from States shall indicate clearly the Social Security Act titles under which funding is requested, and the estimated amount or percent that is requested for each title. . . .

1/ Part 95 was effective December 28, 1978, or earlier at State option. 43 FR 44853, September 29, 1978. The preamble to the final regulation states at 43 FR 44851 that:

The regulation consolidates and codifies procedures for implementing the principles of OMB Circular A-90 and the provisions of 45 CFR Part 74, Appendix C, Part II, C.1, pertaining to the claiming of Federal financial participation for the acquisition and use of automatic data processing equipment and services. . . .

45 CFR Part 74, Appendix C, Part II, C.1, requires prior approval by grantor agencies for the costs of data processing equipment. OMB Circular A-90 requires that Federal agencies insure that systems development activities for which States are requesting Federal funding are well planned and do not involve duplication of effort or expense.

- (b) Specific prior approval requirements. The State agency shall obtain written approval of the Department:
- (1) For the advance planning document or any change of the advance planning document prior to entering into contractual agreements or making any other commitment for acquisition of ADP equipment or ADP services;
  - (2) For the service agreement (when data processing services are to be provided by a State central data processing facility or by another State or local agency);

. . . .

- (c) Prompt action on requests for prior approval. The ASMB will promptly send to the approving components the items specified in paragraph (b) of this section. If the Department has not communicated approval or disapproval within 30 days the ASMB or an approving component will notify the State regarding the status of the request.

45 CFR Part 74 (1977), applicable to the states through 45 CFR 74.171, provides at Appendix C, Part II, C. 1. as follows:

Automatic data processing. The cost of data processing services to grant programs is allowable. . . . The acquisition of equipment . . . is allowable only upon specific prior approval of the grantor Federal agency . . . .

New York's Request for Approval of the WRS

The State, by letter dated September 26, 1978, submitted an Advanced Planning Document (APD) to the ASMB for the development of the WRS. That letter stated that the APD was submitted "in conformance with . . . program regulations regarding approval for federal funds for EDP services or equipment" and cited 45 CFR Part 74. By letter to the State dated October 10, 1978, the Department of Health, Education and Welfare (now Department of Health and Human Services) (Department, HHS) acknowledged receipt of the APD. This letter informed the State that HHS needed additional information before taking any official action on the request for prior approval, but was distributing the State's request to the constituent agencies in order to expedite their review.

On November 27, 1978, former HHS Secretary Califano responded to a letter dated August 3, 1978 from Governor Carey of New York. Secretary Califano indicated that federal matching would be available for development

and operation of the WRS for exchanging wage information and specifically mentioned the AFDC (Title IV-A) program. Secretary Califano pointed out that the State can request AFDC matching only for AFDC-related aspects of the system. Secretary Califano, however, stated explicitly that "HEW must thoroughly review all aspects of New York's system, before approving matching funds" and that "HEW will . . . study whether the system meets all legal requirements, and if so, will approve matching funds." <sup>2/</sup>

By letter dated November 29, 1978, the State responded to HHS's October 10, 1978 letter acknowledging receipt of the APD. The State provided information about the Social Security Act programs affected by the WRS and the portion of the costs of the WRS to be allocated to each program.

HHS, by letter dated March 30, 1979, informed the State that the constituent agencies, to whom the APD had been forwarded, had reviewed the request and, based on their preliminary reviews, the Department needed certain information in order to reach a final decision on the State's request. Information requested by the Department included (1) current status of the WRS, since portions were then operational, (2) detailed cost breakdowns by federal program of the resources used during the development and implementation phase and the actual operation and maintenance costs, (3) copies of the service agreements for the WRS, and (4) clarification of the participation requested from the various federal programs. The State submitted a response to each question raised by the Agency in a letter dated September 4, 1979.

By letter dated December 15, 1979, the ASMB informed the State that the constituent agencies had reviewed the material provided in the September 4, 1979 response and that HHS "will consider approving Federal financial participation for only a part of the WRS, and, only then, if you [State] provide us with additional information." The Department then informed the State that "[t]he HEW components believe that system development and operational costs for the functions of matching wage data with . . . recipient records are clearly fundable . . . . However, they believe that the basic functions of collecting and recording employee wage data are functions which are typically funded by the Department of Labor . . . ." The Department requested information about development and operational costs associated with matching wage data and proposed negotiation of cost allocation questions. The State responded on January 28, 1980 that "[t]he wage data . . . is collected exclusively for WRS" and requested approval of "all aspects of WRS."

<sup>2/</sup> Secretary Califano's letter dealt only with the implementation of Pub.L. 95-216, which made "wage information in Social Security Administration records and State unemployment compensation agencies available for determining eligibility and payment amount in the . . . (AFDC) [Title IV-A] program."

In a letter to the State dated March 11, 1980, the Under Secretary, HHS pointed out that the State had proceeded to develop and install the system without HHS approval. The Under Secretary reiterated the Department's conclusion from its December 15, 1979 letter and stated that "HEW is prepared to provide Federal financial participation for development costs and operational costs associated with that part of the WRS used for matching wage data with . . . recipient records." The Under Secretary further informed New York that "[o]nce these issues [development and operation costs for matching wage data and method of cost allocation to HHS programs] are resolved, we would act quickly to reimburse the State for costs already incurred."

HHS again restated its position and again requested information in a letter dated March 25, 1980 responding to the State's letter of January 28, 1980. The Department stated, "to enable HEW to approve the WRS for Federal financial participation . . . we request that you inform us of the percentages by program area of development costs and operational costs . . . ."

By letter of June 18, 1980, Commissioner Blum of the New York State Department of Social Services responded to the Under Secretary's March 11, 1980 letter. She stated, contrary to statements made in the March 11 letter, that the information concerning "the details of the system components used specifically for matching employee wage data with . . . recipient files, resources devoted to the matching programs and the costs associated with those resources" was provided by the APD as supplemented. The Commissioner requested a meeting of "high level staff" and asked for reevaluation of the HHS decision that FFP is unavailable for costs associated with the collection of wage data. The record does not contain either a response to Commissioner Blum's letter or information about any meeting held in response to her request to convene "high level staff." 3/

3/ According to 45 CFR 95.611, the request for prior approval for the acquisition of ADP equipment or services is submitted to the ASMB and then forwarded to the approving components. The disallowances, which are the subject of this dispute, however, are made by the constituent agencies of the Department because the State claimed certain costs for reimbursement from each of these agencies under the programs they administer, i.e., Title IV-A, Title IV-D, and Title XIX. Under the terms of 45 CFR 95.611, the constituent agencies disallowed these claims. The documentation referred to above is comprised of correspondence primarily between the State and the ASMB concerning the State's request for prior approval. These documents were submitted by the State in response to a request by the Board in Docket No. 80-92-NY-SS. Since these documents concern the State's request for approval of its APD, they are applicable to all the joined cases. Therefore, these documents have been incorporated into the record for these appeals.

### The Parties' Contentions

According to the constituent agencies, SSA, OCSE, and HCFA (hereinafter referred to collectively as Agency), the State simply has not received prior approval for the WRS as required by 45 CFR 95.611. The Agency, therefore, disallowed claims under Title IV-A, Title IV-D, and Title XIX relating to the State's development and/or operation of the computerized WRS.

The State argued that the disallowances were inappropriate because, although the State did not receive "technical" approval, correspondence from HHS indicated that the system was approvable "in concept." The State contended that it complied with every request for additional information to aid the Department in giving its approval and that it was untimely for HHS to take disallowances prior to making its decision on the WRS. The State argued that the disallowance was inappropriate because HHS was kept informed of the development of the WRS from its inception, which preceded the effective date of 45 CFR 95.611.

The State further asserted that the reason it did not receive "technical" approval was that HHS was refusing to fund costs attributable to the collection of information used to match wage data for the Title IV-A and Title IV-D programs because HHS believed that the collection of the data was not a "public assistance" function and should have been funded by some other Agency. The State cited Secretary Califano's letter of November 27, 1978 as support for FFP payments since the Secretary stated that housing the WRS in the New York State Tax Department would not jeopardize FFP. In addition, the State contended that "[t]he major stumbling block to official approval appears to be approval of the cost allocation system." The State then alleged that both parties recognize that some costs are clearly reimbursable, and that, in any event, it did not claim more than a program's ratable share.

On October 16, 1981, the Board issued an Order to the State to show cause why the Board should not uphold the disallowances, essentially on the basis that the State had received no prior approval.

In its response to the Board's Order, the State characterized the issue in these cases as "whether the failure of the Agency to approve the APD and thereby deny FFP was appropriate or reasonable action given the rationale of the Agency." The State then quoted the portion of the ASMB's December 15, 1979 letter which stated that the HHS components believed that costs associated with matching wage data were fundable but the costs of collecting and recording employee wage data were not. The State asked that the Board rule on the "approvability" of the APD. 4/

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4/ New York equated the availability of FFP payments in its expenditures for the development and operation of the WRS with approval of the APD. However, 45 CFR 95.611(b) also provides for approval of:

(continued on p. 7)

In its two "Memorandum In Support of Respondent's Position," the Agency (1) briefly detailed the background of HHS's review of the State's request for approval of the APD, (2) noted the deferral of various claims and the State's failure to submit requested information, (3) cited 45 CFR 95.611 as requiring HHS's prior written approval, and (4) responded to three of the State's arguments:

- (1) In response to the State's argument of approval "in concept", the Agency asserted that it always emphasized the necessity for its approval before FFP would be available, that approval was always conditioned on review of the information received from the State, and that the State was fully informed that FFP would be available only for matching costs.
- (2) In response to the State's argument that its claims did not exceed a program's ratable share, the Agency argued that due to the State's repeated failure to submit information, it was not clear what the ratable share should be.
- (3) In response to the State's argument concerning untimely delay, the Agency alleged that the State's delay and failure to submit information resulted in the lapse of time.

In its response to the Order the Agency informed us that "New York has not received approval" for the WRS.

#### Discussion

There is no dispute that the cost principles at Appendix C of 45 CFR Part 74 apply so that prior approval of the WRS was required under Part II, C.1. of that Appendix. Part 95 of 45 CFR was effective several months after the State submitted its request for approval in accordance with Part 74 to the ASMB (State's September 26, 1978 letter). However, Part 95 implements the prior approval requirement of Part 74, and has been in effect for most of the time that the State's

4/ cont.

1) the service agreement, when services are provided by a central facility; 2) the request for proposal, when equipment is being solicited from outside sources; 3) the contract, when required for complex documents; and 4) the feasibility study, the system study, the system design, the system specifications, and the acceptance document, when required by the Department. Whether the parties regarded all necessary approvals for the WRS as encompassed by their negotiations following the State's request for approval of the APD is unclear. However, 45 CFR 95.611(b) provides that approval can be required for more than the APD itself. Thus, it does not appear that in all instances FFP would be available for all expenditures associated with an ADP system when only the APD has been approved.

request for approval has been pending. The State, by submitting its request for approval to ASMB and engaging in a dialogue for many months concerning the request and its review by the constituent agencies, actually followed the process specified by 45 CFR Part 95.

We consider here whether the disallowances are improper on the basis of some or all of the reasons urged by the State, despite the requirement that HHS approve this system prior to awarding matching funds.

The State's argument that correspondence from HHS indicated that the WRS was approvable "in concept" is unpersuasive. The State seemed to have concluded that HHS has withdrawn from the position taken by former Secretary Califano in his letter of November 27, 1978. However, that letter explicitly states that federal matching is available for developing and operating a wage reporting system only after HHS reviews and approves the system. The State cited 45 CFR Part 74 and requested approval of the WRS in its September 26, 1978 letter; accordingly, the State knew prior approval was necessary before matching funds could be made available. The record indicates, however, and there is no dispute, that the State has not yet received the requisite formal approval for the WRS system. There is no basis in the record for the State's argument that HHS approved the WRS "in concept," since the letter from the former Secretary, as well as successive subsequent correspondence from HHS, clearly stated that HHS must review the APD and give its written approval before federal matching funds are available. Even if HHS's statements concerning possible availability of FFP indicated approval of the WRS "in concept," this is not adequate since 45 CFR Part 74 and 45 CFR Part 95 do not provide for the payment of FFP on the basis of any type of preliminary or conditional approval. 6/

The State's arguments concerning its compliance with requests for information, the timeliness of a disallowance prior to HHS's decision on the WRS, and the Agency's knowledge of the development of the WRS, which the State asserted began prior to the effective date of 45 CFR 95, also do not provide a basis for overturning this disallowance. The issue here concerns the legal basis for FFP payments in the costs of development and operation of the WRS. While the State's alleged responsiveness to requests for information and its efforts to keep HHS informed about the WRS may be laudable, this occurred in the context of HHS's consideration of the State's request for approval and cannot

6/ It should be pointed out, however, that the thrust of the parties' negotiations indicates that the prior approval requirement will not be used here as a bar to payment of FFP in costs already incurred by New York once there is agreement concerning approval of the system and the scope of this approval.



substitute for that approval. The correspondence between the parties shows that the Agency regarded FFP in at least a portion of the claimed costs as appropriate upon approval of the system. The letter from the HHS Under Secretary requested additional information prior to "funding for any part of the WRS, on a retrospective or prospective basis." However, Commissioner Blum's June 18, 1980 letter to the Under Secretary indicated that all requested information was in materials already provided by the State.

With regard to whether HHS has unduly delayed its decision in response to the State's request for approval of the WRS, the record indicates that there were protracted negotiations between the State and HHS with both parties sometimes taking several months to respond. For example, no response was submitted by the State to HHS's March 30, 1979 request for additional information until September 4, 1979 -- after HCFA sent a deferral notice on July 19, 1979 and SSA sent a deferral notice on August 22, 1979 mentioning the State's failure to submit information requested on March 30, 1979. In turn, HHS did not respond to the September 4, 1979 submission of information until December 15, 1979.

The State contended that it has not received "technical" approval because HHS was refusing to fund costs attributable to the collection of information used to match wage data for the programs involved and that a major stumbling block to official approval of the WRS was the allocation of costs. The State's contentions in effect restate the Agency's position in the negotiations and do not overcome a legal requirement for approval prior to the payment of FFP.

The mere fact the State may not have claimed FFP for more than a program's ratable share is not a basis for overturning the disallowance. Even if the claims would have been in the appropriate amount if the Department had approved FFP in the WRS system, this can not substitute for the required approval or justify the payment of FFP. There is no reason to consider a claim in the proper amount equivalent to a claim in the proper amount made with the required approval.

In its response to the Order the State urged the Board to examine whether the Agency's actions have been "appropriate or reasonable" and to decide whether the APD is approvable. 6/ However, the State

6/ Although the record contains information supplementing the APD, the APD is not actually in the record.

has provided no more than conclusory arguments, with no analysis of the documents in the record, to support its position. In fact, the record would not even support a Board finding that New York has yet submitted sufficient information to the Agency for it to determine whether the APD is approvable. The record shows that the WRS system was operational and that New York began to submit claims for FFP only a few months after submission of the APD for the Department's approval. The regulations do not contain a presumption that once submitted an APD must be approved. Here, New York may have encountered unanticipated difficulty obtaining approval. Nevertheless, the record shows simply that the State and the Agency have failed to agree concerning the extent of FFP that would be available. The facts here require that our decision turn on whether the Department has approved the WRS.

Under the regulations the Agency's approval for the acquisition of ADP equipment or services is mandatory in order to receive federal matching funds. The September 26, 1978 letter from the State and the October 10, 1978 letter from HHS indicate that the State knew that approval was necessary in order to receive Federal funding. The regulations require "technical" compliance and without it the Agency has no legal basis on which it can make payment. Since there is nothing in the record which is persuasive evidence that prior written approval of the WRS either (1) was not necessary for the receipt of FFP or (2) has been given by HHS to the State, the Agency disallowances must be sustained.

Conclusion

For the reasons stated above, we uphold the disallowances.

/s/ Donald F. Garrett

/s/ Norval D. (John) Settle

/s/ Cecilia Sparks Ford, Panel Chair