Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Colorado Department of Health Care Policy and Financing
Docket No. A-06-33
Decision No. 2085

DATE: May 23, 2007

DECISION

The Colorado Department of Health Care Policy and Financing (Colorado) appealed a determination by the Centers for Medicare & Medicaid Services (CMS) disallowing $487,390 in federal financial participation (FFP). The disallowance concerns Colorado's claim for supplemental payments made to Mental Health Assessment and Services Agencies (MHASAs) as part of a Prepaid Inpatient Health Plan (PIHP) implementing the Colorado Medicaid Mental Health Capitation and Managed Care program. The supplemental payments were for the period October through November 2004. CMS disallowed Colorado's claim for the supplemental payments because the payments were not made pursuant to PIHP contracts that had been reviewed and approved by the CMS Regional Office as required by 42 C.F.R. § 438.6(a). For the reasons explained below, we uphold the disallowance in full.

Background

The following factual background is taken primarily from Colorado's Response to Order at 1-4. In 1992 the State Legislature authorized a two-year pilot program to provide comprehensive mental health services to Medicaid recipients through a capitated managed care system. In 1993, CMS's predecessor, the Health Care Financing Administration, approved Colorado's implementation of a managed care mental health program under the waiver authority in section 1915(b) of the Social Security Act (Act). CMS later extended the section 1915(b) waiver, allowing continuation of Colorado's managed care mental health program through May 4, 2005. Following the pilot program, the State Legislature first authorized a prepaid capitation system for providing statewide mental health services to Medicaid beneficiaries in 1995 and expanded the program in 1998. Colorado contracted with MHASAs under its PIHPs to implement the Colorado Medicaid Mental Health Capitation and Managed Care Program.

Each MHASA operated the program in a specific geographic area under a contract with Colorado. Only one MHASA operated in any one given geographic area.

In 1998, Colorado incorporated payments for services provided by Child Placement Agencies (CPAs) into the mental health capitation rate for the capitated mental health managed care system. A subset of foster care children within Colorado received some mental health services from their providers at CPAs, organizations retained by child welfare agencies to provide foster care placement and maintenance functions. CPAs do not provide comprehensive mental health services, nor are they intended to be the sole source of mental health services for this subset of foster care children.

By incorporating payments for services to children served by CPAs within the capitated rate, Colorado sought to spread a fixed amount of funding for all mental health services provided by CPAs to all children across its capitated per-member per-month (PMPM) rates, which varied among the MHASAs. In doing so, Colorado necessarily had to project in advance how many children would be enrolled in the program for a particular period. By 2001 Colorado became concerned that enrollment in the Mental Health Capitation and Mental Health Program had expanded beyond projections, and that as enrollment increased, the higher number of enrollees resulted in a greater number of PMPM capitated payments. According to Colorado, because each PMPM capitation payment included a set amount attributable to the fixed CPA funding, the increased enrollment rolls contributed to a greater drain on the fixed funding source than Colorado had anticipated. Colorado Response to Order at 2-3. Colorado states:

> As overall enrollment increases contributed to a greater-than-projected number of capitated PMPM payments, each additional PMPM payment increased the total amount of payment made for CPA services by an amount equal to the CPA additive. Those additional CPA additives were in excess of the fixed amount that had been [distributed] among the projected number of enrollees. In order to avoid overspending the fixed amount of resources allocated to CPA services, the Department removed the [amount intended to cover] those services from the capitated rate and paid it separately. The Department's separate payment allowed it to pay the [MHASAs] exactly the fixed amount allocated for CPA services.

Id. at 9. In response to a question from the Board, Colorado conceded that the MHASAs and the Department had "orally" agreed to the removal of the costs for the CPA services from the capitated rate during the fourth quarter of FY2000-2001 and that Colorado did not prepare any written supplemental contract or amendment to its existing contracts with each of the MHASAs to cover the two-month period at issue in its appeal. Id. at 4.

On April 4, 2005, CMS notified Colorado of its decision to defer $487,390 in FFP that Colorado had claimed as supplemental payments to PIHPs for CPA services covering the period October through November 2004. Colorado Ex. 11. In its deferral notice, CMS informed Colorado that 42 C.F.R. § 438.6(c) does not allow supplemental payments that are not actuarially certified and part of the capitated rate in approved contracts between a state Medicaid agency and PIHPs. In its response to the deferral, Colorado stated that the services provided to foster care children in the CPAs were medically necessary under its Medicaid State Plan and that these particular services had not been included in the capitation rates applicable for these two months. On November 17, 2005, CMS issued a notice of disallowance of $487,390 in FFP claimed by Colorado for supplemental payments through the CPA Fund to each of the PIHPs. Colorado Ex. 14. In the disallowance notice, CMS stated, "After review of your August 2, 2005 response to our notice of deferral, CMS did not find the necessary supportive information that would allow for FFP in the deferred expenditures" and that "the CPA Fund expenditures are also not allowable for FFP because such costs represent a supplemental payment to the Mental Health PIHPs." Id. at 1, citing 42 C.F.R. § 438.6(c).

Legal Authorities

Under the Medicaid program, established under title XIX of the Act, states and the federal government jointly finance the provision of medical care to low-income, elderly, and disabled persons whose income and resources are inadequate to pay for necessary medical services. Act §§ 1901, 1903. Each state operates its own Medicaid program subject to broad federal requirements. Id. § 1902.

In order to qualify for federal financial assistance, a state Medicaid program must have a federally-approved "plan for medical assistance" that describes the types of medical care covered by the program and how the program will pay health care providers for that care. Act § 1902(a)(10); 42 C.F.R. § 430.10. The Act mandates that states cover certain types of medical care and makes coverage of other items and services optional. Id.

§ 1902(a)(10). A state is entitled to FFP for its "medical assistance" expenditures (payments for covered medical care under the Medicaid plan). Id. § 1903(a)(1). The statute provides the states with methods of administration that can include managed care options. See, for example, sections 1903(m), 1905(t), and 1932 of the Act. Medicaid regulations at 42 C.F.R. Part 438 set out the requirements, prohibitions and procedures for the provision of Medicaid services through the various managed care options including PIHPs.

The regulations at 42 C.F.R. § 438.6(a) provide:

> The CMS Regional Office must review and approve all MCO [Managed Care Organization], PIHP, and PAHP [Prepaid ambulatory health plan] contracts, including those risk and nonrisk contracts that, on the basis of their value, are not subject to the prior approval requirement in § 438.806.

This section of the regulations became effective August 13, 2002. 67 Fed. Reg. 40,989 (June 14, 2002). States and health plans were required to come into full compliance within one year of the effective date, which was over a year before the October through November 2004 period in question. Id.

Analysis

The regulations at 42 C.F.R § 438.6(a) require that the CMS Regional Office review and approve the managed care contracts including PIHP contracts that a state enters into for the administration of its Medicaid program. The review and approval process enables CMS to find that the method of administration for managed care adopted by the State "is necessary for proper and efficient operation of the State plan." 42 C.F.R. § 438.1 (implementing section 1902(a)(4) of the Act). Thus, the approval process considers whether the contracts: 1) utilize actuarially sound capitation rates that have been developed in accordance with generally accepted actuarial principles; 2) are appropriate for the populations to be covered and the services to be furnished; and 3) have been certified as meeting the requirements of section 438.6(c) by qualified actuaries. 42 C.F.R § 438.6(c). The regulations contain several specific requirements for how the states must set an "actuarially sound rate" and how they must document the soundness of their rates. There are numerous additional or specialized requirements for these contracts as well in 42 C.F.R. Part 438.

Here, Colorado concedes that the CPA managed care costs at issue for the period October through November 2004 were covered neither as part of the contract containing the capitated rate for its MHASAs approved by CMS nor by a supplemental contract approved by CMS. We conclude, therefore, that these supplemental costs must be disallowed. CMS has never reviewed and approved a contract that covers these costs pursuant to the regulations and consequently has never found that these costs are necessary for the proper and efficient administration of the State plan as the statute and regulations require.

The regulatory provision requiring CMS approval was effective on August 13, 2002 and the states were given a year from that date to come into compliance. Colorado had already removed the CPA managed care costs from its contract containing the capitated rate for its MHASAs before the effective date of the regulation; however, Colorado was obliged after the deadline for compliance (August 13, 2003) to request approval for supplemental contracts covering CPA costs for any subsequent period after the deadline. In the absence of approved contracts, the payments for the period at issue here, October through November 2004, were unallowable.

Colorado nevertheless suggests that CMS was not justified in disallowing the payments since Colorado would be willing to submit at a future date a supplemental contract for CMS's consideration, arguing that CMS is not precluded from providing retroactive approval for the subject period under section 438.6(a). CMS seems to agree that retroactive consideration of approval is possible when it states that it does not believe that section 438.6 requires "prior" approval for PIHP contracts. CMS takes the position, however, that the issue of retroactive approval is irrelevant because Colorado has never yet submitted a supplemental or amended contract in any form for the period at issue and CMS was never even contemporaneously informed of the oral agreement Colorado had with the MHASAs. CMS also asserts that when CMS eventually discovered and asked about the oral supplemental arrangement for CPA services, Colorado failed to provide CMS with the requisite documentation to approve it. Specifically, CMS states:

> [Colorado's] "proposal," dated December 15, 2005, does not purport to apply to October and November 2004, and the documents attached as an apparent attempt to meet the requirement for actuarial certification do not contain any rates by which the proposal could be evaluated. (Exhibit 27, pp. 1-2, 6). Moreover, the unapproved Contract Amendment Number 4 presented by the State, which sought to revise foster care rates to reflect services provided by

> CPAs, is irrelevant to the disallowance at hand because it expressly pertained to a contract entered on January 1, 2005, and proposed to cover a period identified as *April 1, 2006 through June 30, 2006*. (Exhibit 28, p. 28).

CMS Response to Order at 3, italics in original. We can find nothing in the record to contradict the above assessment by CMS.

CMS in any event argues that even if Colorado requests retroactive approval for a contract at this late hour and makes the required actuarial certification, factors existing here may well preclude it from granting retroactive approval. CMS cites Colorado's failure to request approval within the contractual time period (here, October through November 2004) or within the two-year period for filing a claim for FFP under 45 C.F.R. § 95.7. CMS Response to Order at 2-3, n.1. Since no request has been made, we need not make any judgment on the merit of these factors or decide if it would be within the scope of our review to do so.

Moreover, as part of the approval process, Colorado would not only have to document retroactively the actuarial soundness of the payment for the CPA services for October through November 2004, it would also have to document the soundness of the approved contract with the capitated rate covering the same period since that contract, as Colorado concedes, still purports to cover these very services. As CMS states:

> What is relevant, but still unclear, is whether the separation of payments for CPA services from the capitated rate altered the scope of services or increased the amount of payment for those services for purposes of qualifying for federal matching funds.
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> Although [Colorado's] explanation is not entirely clear, it appears that [its] unilateral actions of withdrawing the funding for CPA services from the capitated rate resulted in CMS continuing to pay the same amount of matching funds toward the capitated rate, even though the capitated rate no longer covered CPA services. That potential problem is compounded by the additional reimbursement sought by the State on its CMS-64 for its supplemental payments for CPA services. (Exhibits 40-41). This leads CMS to question whether the State [would] actually [be] paid twice for the CPA services, once in the capitated rate and once in the supplemental payment. In short, the undocumented

> arrangement between the State and the [MHASAs] makes clear the need for actuarial certification and CMS approval.

CMS Response to Order at 4-6.

Colorado presented affidavits in support of its position that the reduction for CPA services from the capitated rate contract "is one factor affecting the change in rates from FY2000-01 and FY2001-02." Colorado Ex. 29. Colorado explains that it had decided not to request approval for the supplemental payment based on the rationale that there would be "no change to the amount of anticipated payment or to the scope of services" and that the change was limited to the "method of payment." Colorado Response to Order at 4; see also Colorado Exs. 29-30. In other words, according to Colorado, it merely "changed the method of payment by removing it from the capitated rate and reconstituting it as a fixed payment." Id.

However, the regulations require CMS Regional Office approval for any and all PIHP contracts covering any period after the regulatory deadline for compliance, including contracts that would cover supplemental payments of the type at issue here. The "method" and "amount" of payment for the period at issue (for any of the costs of the PIHP) would be among the most significant factors to be reviewed by CMS. Moreover, based on the facts alleged by Colorado, CMS would not have known that these CPA costs were no longer covered by the existing capitated rate contract when it approved that contract, nor would CMS have ever had the opportunity to approve the fixed amount that Colorado had set aside for the CPA services for the two-month period at issue here. Furthermore, it is difficult to understand what Colorado means when it states that there would be no change in the amount of the overall anticipated payment required under the pre-existing contracts when the whole purpose of removing the CPA costs from the capitated rates was apparently to exercise greater control over the costs. In any event, once Colorado decided to remove the CPA costs from the rates under the pre-existing contracts, it was obliged for any future period after the deadline for compliance with 42 C.F.R.§ 438.6(a) had passed to receive approval for and demonstrate the actuarial soundness of a contract for both the modified (presumably reduced) capitated rate costs and the supplementary amount for CPA costs that had been removed from the capitated rate.

Colorado asserts that there were multiple budgetary factors involved in its decision to remove the costs of the CPA services from the capitated rate and that it was easier administratively to pay separately for these services. Colorado Response to Order

at 9. Colorado also asserts that it considers the services provided by CPAs to be more cost-effective than comparable services provided by MHASA providers or other higher level providers. Id. at 3. Even assuming these factors to be true, they provide no basis to ignore the regulatory approval process.

Conclusion

Accordingly, in view of Colorado's failure to receive CMS Regional Office approval for the supplementary CPA payments covering October through November 2004 in violation of 42 C.F.R. § 438.6, we uphold the disallowance in full.

/s/
Judith A. Ballard

/s/
Sheila Ann Hegy

/s/
Donald F. Garrett
Presiding Board Member