

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Nebraska Department of Health and Human Services
Docket No. A-07-57
Decision No. 2177

DATE: May 30, 2008

DECISION

The Nebraska Department of Health and Human Services (NDHHS) appeals a January 4, 2007 decision by the Centers for Medicare & Medicaid Services (CMS) to disallow \$5,627,497 of federal Medicaid reimbursement for costs of administering Nebraska's Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program, which benefits Medicaid-eligible children under age 21. Under agreements with NDHHS, Nebraska public school districts help administer the EPSDT program, and NDHHS (the Nebraska Medicaid agency) reimburses the school districts for costs they incur to provide that help. In turn, NDHHS seeks federal Medicaid reimbursement, or federal financial participation (FFP), for the school districts' costs of EPSDT program administration. In November 2004, NDHHS filed a claim with CMS seeking FFP for EPSDT administrative costs that were, according to Nebraska, incurred by school districts between October 1999 and August 2002. In its January 4, 2007 decision, CMS disallowed \$5,627,497 in FFP for those administrative costs on the ground that Nebraska had failed to file the FFP claim within two years after the relevant Medicaid (EPSDT) program "expenditures" were made, in violation of section 1132(a) of the Social Security Act.

For the reasons discussed, we conclude that the disallowed FFP claim was, indeed, untimely and that Nebraska has failed to establish that it meets any of the exceptions to the two-year filing requirement. Accordingly, we affirm the disallowance of \$5,627,497 in FFP.

Legal Background

The federal Medicaid statute, title XIX of the Social Security

(Act),¹ authorizes a program that furnishes medical assistance to low-income individuals and families as well as to blind and disabled persons. Act § 1901. The program is jointly financed by the federal and state governments and administered by the states. Id. § 1903; 42 C.F.R. § 430.0. Each state administers its Medicaid program pursuant to broad federal requirements and the terms of its "plan for medical assistance," which must be approved by CMS on behalf of the Secretary of Health and Human Services (HHS). Act § 1902; 42 C.F.R. §§ 430.10-430.16. A state is entitled to federal reimbursement – i.e., FFP – for a percentage of the Medicaid program expenditures it makes in accordance with the state plan. Act § 1903(a); 42 C.F.R. §§ 433.10(a), 433.15(a).

EPSDT is a component of Medicaid addressing children's health. The Act requires states to provide EPSDT benefits – which include comprehensive diagnostic, prevention, and treatment services – to Medicaid-eligible children under age 21. Act §§ 1905(a)(4)(B), 1905(r).²

Section 1132(a) of the Act requires a state to seek federal reimbursement for a Medicaid program expenditure within two years after the quarter in which it makes the expenditure. The Secretary's regulations in 45 C.F.R. Part 95, subpart A implement the statutory two-year filing requirement.

Title 42 C.F.R. § 95.7 provides that CMS "will pay a State for a State agency expenditure made after September 30, 1979, only if the State files a [FFP] claim with us for that expenditure within 2 years after the calendar quarter in which the State agency made the expenditure" (emphasis added).

A "claim" is defined in 45 C.F.R. § 95.4 as a "request for Federal financial participation in the manner and format required by our program regulations, and instructions or directives issued

¹ The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

² The program's objective is to ensure that an eligible child's health needs are identified, assessed, and treated early, before they become more complex and costly to treat. Illinois Dept. of Public Aid, DAB No. 2022 (2006), aff'd, State of Illinois Dept. of Healthcare and Family Services v. Leavitt, No. 06-C-6412, 2008 WL 877976 (N.D. Ill. Mar. 28, 2008).

thereunder." The "manner and format" for filing FFP claims is the submission of a Quarterly Medicaid Statement of Expenditures (QSE). See Connecticut Dept. of Social Services, DAB No. 1982, at 11-12 (2005) (and authorities cited therein).

The regulations also explain how CMS intends to identify the calendar quarter in which an administrative expenditure will be considered to have been made as follows:

We consider a State agency's expenditure for administration or training under title [XIX] to have been made in the quarter payment was made by a State agency to a private agency or individual; or in the quarter to which the costs were allocated in accordance with the regulations for each program.

45 C.F.R. § 95.13(d).

Section 2500(A)(1) of CMS's State Medicaid Manual (SMM) (CMS Pub. 45) states in relevant part:

The amounts reported on [the QSE] and its attachments must be actual expenditures for which all supporting documentation, in readily reviewable form, has been compiled.

(Emphasis added).

Case Background

Since at least the late 1990s, Nebraska public schools have provided administrative support to Nebraska's EPSDT program called Health Check. This support includes "outreach" (informing parents of Medicaid-eligible children of the EPSDT program and its benefits) and "case management" (coordinating the provision of medical care and related services furnished to school-aged Medicaid recipients).

In 1999, Nebraska sought CMS's approval of policies and procedures specifying how it would obtain FFP for school-based EPSDT administrative activities which Nebraska refers to as its Administrative Outreach and Case Management Claiming Program (AOCM Claiming Program). Neb. Ex. 2. In a letter dated September 19, 2001, CMS gave qualified approval to these policies and procedures. Id.; Neb. Ex. 16. Nebraska published the policies and procedures governing its AOCM Claiming Program in a document called the *Nebraska Medicaid Administrative Claiming Guide for Administrative Outreach and Case Management Activities*

(Nebraska Administrative Claiming Guide, or NACG).³ Neb. Ex. 16.

In its September 19, 2001 letter, CMS stated that its approval of Nebraska's AOCM Claiming Program was effective "for the costs of Medicaid administrative activities performed beginning" September 1, 2001. Neb. Ex. 2, at 1. The letter also advised Nebraska "not to claim indirect costs [of furnishing EPSDT administration] until a final decision on the appropriate method for determining indirect costs is communicated to the State by CMS." *Id.* at 2. In addition, the September 19, 2001 letter advised Nebraska that it would need to obtain CMS approval of a methodology for developing and submitting "prior period" FFP claims – that is, claims for costs of EPSDT administrative activities performed prior to September 1, 2001. *Id.*

In order to participate in the Nebraska AOCM Claiming Program, a "school district" must enter into an interagency agreement with NDHHS, the Nebraska Medicaid agency.⁴ Neb. Ex. 16 (NACG at 8). Under this agreement, the school district agrees to (among other things): (1) provide outreach, case management, and other administrative support to Nebraska's EPSDT program; (2) maintain proper accounting of costs incurred in providing EPSDT administration in accordance with OMB Circular A-87 and 45 C.F.R. Parts 74 and 95; and (3) comply with NDHHS's methodology for identifying and claiming reimbursement for EPSDT administrative costs. *Id.* (NACG, App. B1 at 3-4). In turn, NDHHS agrees to "[r]eimburse the school districts the Title XIX federal share of actual and allowable costs for EPSDT administration provided by staff based upon a time accounting system which is in accordance with the provisions of OMB Circular A-87 and 45 C.F.R. parts 74 and 95[.]" *Id.* (NACG, App. B1 at 2, citing legal provisions applicable at the relevant time period).

The NACG contains a detailed description of the methods and procedures to which a school district must adhere in seeking reimbursement from NDHHS for its EPSDT administrative costs.

³ It is unclear when the Nebraska AOCM Claiming Guide was first published. Its cover page indicates that it was "revised" on October 2000, March 2001, July 2001, and August 2001. Neb. Ex. 16.

⁴ Local government entities known as "educational service units" (ESUs) may also participate in the AOCM Claiming Program. ESUs act primarily as "service agencies in providing core services and services identified and requested by member school districts." Neb. Rev. Stat. § 79-1204.

Reimbursement is sought on a quarterly basis. Neb. Ex. 16 (NACG at 36). The school district determines the reimbursement due for a given quarter as follows. First, the school district identifies the expenses associated with the group of school employees whose duties include EPSDT administration. This employee group is called the "cost pool." Id. (NACG at 5). Cost pool expenses include salaries, benefits, materials and supplies, and other direct and indirect costs. Id. (NACG at 14-15). The school district then multiplies cost pool expenses by the percentage of time spent by cost pool employees performing allowable EPSDT administrative tasks during the quarter; this time percentage is derived from a statistically valid time study. Id. (NACG at 5). The product of that calculation – cost pool expenses multiplied by time percentage – is then multiplied by the FFP rate for Medicaid administrative costs (50% in most cases) to arrive at "NET AOCM Payment Due" for the quarter.⁵ Id. The school district then submits to NDHHS an "AOCM invoice," along with supporting worksheets, for the payment due. Id. (NACG at 36-38 & App. D). The AOCM invoice for a given quarter must be submitted to NDHHS within one year after the end of that quarter. Id. (NACG at 36).

The invoice must contain the following certification from an appropriate school official:

I certify that sufficient state funds have been expended to comply with the Medicaid non-federal matching requirements:

1. The expenditures used to formulate this claim were taken from our accounting system.
2. All federal funds were excluded from the cost pools.
3. The claim is not a duplicate of any other claim for reimbursement.

Id. (NACG at 39 & App. D).⁶

⁵ Some administrative costs are further discounted using a factor called the Medicaid eligibility rate. Neb. Ex. 16 (NACG at 5). This discount is applied when it is appropriate to allocate costs between Medicaid-eligible and non-Medicaid-eligible students. Id.

⁶ According to the NACG, these statements certify that the school district "has expended local and general funds in an amount sufficient to provide the non-federal share of

(continued...)

Nebraska reports that, at the inception of its AOCM Claiming Program, NDHHS paid school districts for only 70% of allowable EPSDT administrative costs claimed on their AOCM invoices, electing to defer payment of 30% of allowable costs claimed because CMS had given only qualified approval to the AOCM Claiming Program. Neb. Br. at 1; Neb. Ex. 22. The record indicates that Nebraska applied this deferral policy to school-based administrative services furnished from October 1, 1999 through August 31, 2002. Neb. Ex. 22.

NDHHS engaged in some email exchanges with CMS staff in September 2001 about the possibility of "backcasting" the results of later time studies to calculate claims for costs incurred in earlier quarters. Neb. Exs. 3-4. No evidence was presented of any other discussions of, or of any approval for, any methodology for developing and submitting the prior period FFP claims.

In 2004, CMS notified NDHHS that it would conduct a Financial Management Review (FMR) of Nebraska's school-based administrative claims. State officials responded with suggestions about school districts to review for the prior quarters at issue and interpreted the FMR as playing "a major role in all past/present claims," and in particular in determining "what part of that 30% holdback will be released." Neb. Ex. 6, at 3; Neb. Ex. 5. The FMR was conducted from February 2004 to April 2004 but no results appear to have been released, at least as of the time of briefing in this case. Neb. Br. 3; Neb. Ex. 9.

On September 14-15, 2004, NDHHS paid school districts for AOCM costs that Nebraska identified as costs of the period from October 1, 1999 through August 31, 2002. See Neb. Ex. 12. According to Nebraska, the September 14-15, 2004 payments constituted reimbursement of the remaining 30% of AOCM costs of the period October 1, 1999 through August 31, 2002. Id.; see also Neb. Br. at 3, 8.

In November 2004, Nebraska submitted to CMS a Medicaid QSE for program expenditures made in the quarter ending September 30, 2004. Neb. Br. at 1; Neb. Ex. 1, at 1. That QSE reported certain "prior period adjustments." Prior period adjustments are previously unreported expenditures made in some quarter prior to the "current" quarter for which the QSE has been submitted. Oklahoma Dept. of Human Services, DAB No. 484 (1983). The record

⁶(...continued)
expenditures being claimed for federal financial participation." Neb. Ex. 16 (NACG at 39).

indicates that what Nebraska characterized as prior period adjustments on that QSE reflected claims for FFP for the AOCM payments that NDHHS made to school districts on September 14-15, 2004 – payments that reimbursed school districts for the remaining 30% of claimed AOCM costs in prior periods.

Invoking the two-year time limit in section 1132(a) of the Act, CMS determined that Nebraska's FFP claim was untimely with respect to the AOCM costs for the period from October 1, 1999 through August 31, 2002. Neb. Ex. 11. Accordingly, on January 4, 2007, CMS issued a formal notice of disallowance of \$5,627,497 in FFP.⁷ Neb. Ex. 13.

Discussion

1. *The expenditures were made when the school districts recorded their costs.*

The key issue in this case is determining when the relevant "State agency expenditures" on EPSDT administration were made for purposes of the two-year filing limit.

Nebraska argues that the FFP disallowed by CMS was for AOCM payments that NDHHS made to school districts on September 14-15, 2004, payments which constituted Nebraska's "expenditures" for EPSDT administration, so therefore FFP for these expenditures was claimed within the two-year limit because they were reported on the November 2004 QSE. Neb. Br. at 6. Nebraska emphasizes that CMS was aware that 30% of the school-based administrative claims for the period in question, that Nebraska actively tried to resolve the appropriate claiming mechanism with CMS, and that Nebraska could not submit claims earlier for the 30% because the State could not then document that its funds had been actually expended as required by CMS's State Medicaid Manual. *Id.* at 6-9; Neb. Ex. 19, at 9. Further, Nebraska suggests that the claims here fall within an exception to timely claims limits as adjustments increasing claims for prior quarters because the State was not making new claims but adjusting upward the prior 70% claims to include the remaining 30% allowable. Neb. Br. at 9-10. Finally, Nebraska requests that the Board grant it "the opportunity to obtain a good cause waiver from CMS based on 45 C.F.R. § 95.25." *Id.* at 10.

⁷ CMS did not disallow an unspecified amount of "indirect" AOCM costs because CMS had advised NDHHS not to claim those costs until it received further guidance. Neb. Ex. 11.

CMS responds that, for purposes of the two-year limit, the expenditures in this case "occurred when the school districts . . . paid their providers (employees) – not when the State Medicaid Agency passed the Federal Share to the School Districts." Response Br. at 4. Essentially, CMS's position is that the two-year period for claiming FFP for school-based EPSDT administrative activities began when the school districts incurred costs to perform those activities (outreach and case management), not when NDHHS reimbursed the school districts for their costs.

Both parties rely on 45 C.F.R. § 95.13(d) to support their respective positions. As set out above, that regulation provides that administrative expenditures are considered to have been made either when payment was made by a State agency to a private agency or individual or when the costs were allocated in accordance with the regulations for each program.

Nebraska asserts that NDHHS's September 14-15, 2004 payments to the school districts constitute payments by a "State agency" to a "private agency or individual." Neb. Br. at 6. Therefore, Nebraska argues, the first prong of section 95.13(d) applies.

We disagree with that assertion because we can discern no legal or factual basis for treating Nebraska's school districts as private agencies or individuals. In this context, the term "private" can refer only to that which is non-public or non-governmental. Cf. Inner City Broadcasting Corp. v. Sanders, 733 F.2d 154, 158 (D.C. Cir. 1984) ("It is beyond cavil that the common usage of 'private' refers to that which is not public or governmental."). Nebraska school districts are, in fact, units of local government, governed by elected boards. Neb. Rev. Stat. §§ 13-903, 79-401 et seq., 79-2202; Swanson v. State, 544 N.W.2d 333 (Neb. 1996) (noting that school districts are "independent political subdivisions").

Furthermore, school districts that participate in the Nebraska AOCM Claiming Program fall squarely within the definition of a "State agency" in 45 C.F.R. § 95.4. For Medicaid purposes, section 95.4 defines a "State agency" to be "any agency of the State, including the State Medicaid agency . . . , its fiscal agents, a State health agency, or any other State or local organization which incurs matchable expenses." According to the sample interagency agreement appended to the Nebraska Administrative Claiming Guide, school districts that participate in the AOCM Claiming Program perform Medicaid (EPSDT) administrative activities as "agents" or "instruments" of the

state Medicaid agency.⁸ School districts then seek reimbursement from NDHHS by submitting invoices detailing their costs of EPSDT administration. On this invoice, a school district must certify to NDHHS that the reported costs reflect "state funds . . . expended to comply with the Medicaid non-federal matching requirements." Neb. Ex. 16 (NACG, App. D). If the NDHHS determines that the costs reflected on the AOCM invoice reflect "actual and allowable costs of EPSDT administration," the NDHHS, pursuant to the interagency agreement, remits to the school district the "federal share" of those costs. *Id.* (NACG, App. B1 at 2). In short, to the extent that a school district's invoiced AOCM costs are determined to be allowable (reimbursable), they are treated by Nebraska as the state or "non-federal share of expenditures" for which it claims FFP (federal matching funds). Neb. Ex. 16 (NACG at 39, "Certification of Revenue"). Thus, a school district that participates in the AOCM Claiming Program is clearly a "State or local organization which incurs matchable expenses" and is thus a "State agency" for purposes of applying the two-year limit in section 1132(a).

Because the school districts involved are State agencies, we cannot regard NDHHS's September 14-15, 2004 payments to the school districts as payments by a State agency to a "private agency or individual" under section 95.13(d)'s first criterion for expenditure recognition. Nebraska's interagency agreements and official policies clearly establish that when NDHHS reimburses a school district for EPSDT administrative costs, it is not making matchable (FFP-claimable) expenditures but merely passing to the school district the federal share of those expenditures. For these reasons, we reject Nebraska's contention that the two-year period for claiming FFP for EPSDT

⁸ The interagency agreement states that the school district agrees to "[p]rovide EPSDT Administrative Outreach and Case Management as an instrument for the State Medicaid Agency to aid in assuring the availability, accessibility and coordination of required health care resources to Medicaid eligible children and their families residing within the district's boundaries." Neb. Ex. 16 (NACG, App. B1 at 3). The agreement's Statement of Purpose states that NDHHS "recognizes the School District as the most suitable agent to administer case planning and coordination through EPSDT Administrative Outreach and Case Management for its EPSDT eligible clients and their families," and that the AOCM Claiming Program "allows Nebraska's school districts to become an 'administrative arm' of the Medicaid agency through the assurance of health care coordination for students." *Id.* (NACG, App. B1 at 1).

administrative costs of the period October 1999 through August 2002 commenced on September 14-15, 2004.

We do not, however, accept CMS's concept that the school districts' payments to their employees were tantamount to state agency payments to individual or private agency providers. We view the expenditures at issue as most appropriately governed by section 95.13(d)'s second prong. Under that criterion, an expenditure is deemed to have occurred "in the quarter to which the costs were allocated in accordance with" Medicaid program regulations. As discussed, Nebraska regards a school district's AOCM costs as matchable state expenditures. To obtain the federal share of those expenditures, a school district submits an invoice (with supporting worksheets) identifying the EPSDT administrative costs it has incurred during a given calendar quarter. The school district quantifies the costs reported on the AOCM invoice using, among other tools, a statistically valid employee time study (a method of allocating costs of employee time among Medicaid and non-Medicaid activities), which is conducted during the quarter covered by the invoice.⁹ This quarterly AOCM invoice also allocates the school district's indirect costs for the same period. In addition, the school district certifies that its cost reporting for the quarter is based on "expenditures" reflected in its accounting system. Neb. Ex. 16 (NACG, App. D). Thus, when the school district submits the AOCM invoice to NDHHS for a given quarter, it represents that the EPSDT administrative costs shown on the invoice are allowable Medicaid program costs that are recognized in its system of accounting as costs incurred during that quarter. In other

⁹ The CMS Medicaid School-Based Administrative Claiming Guide, available on CMS's internet website, at <http://www.cms.hhs.gov/MedicaidBudgetExpendSystem/Downloads/Schoolhealthsvcs.pdf>, describes the function of a time study as follows: "In order to ascertain the portion of time and activities that are related to administering the Medicaid program, states must develop an allocation methodology that is approved by [HHS] The time study must incorporate a comprehensive list of the activities performed by staff whose costs are to be claimed under Medicaid. That is, the time study must reflect all of the time and activities (whether allowable or unallowable under Medicaid) performed by employees participating in the Medicaid administrative claiming program. The time study mechanism must entail careful documentation of all work performed by certain school staff over a set period of time and is used to identify, measure and allocate the school staff time that is devoted to Medicaid reimbursable activities."

words, the school district, a State agency, represents that the costs are allocable to Medicaid and to the calendar quarter for which it has prepared the invoice. The preparation of the invoices by the school districts for submission to NDHHS effectively constitutes the recording of the expenditures by a state agency.

It is undisputed that the contested disallowance relates to EPSDT administrative costs that Nebraska's school districts allocated – based on accounting records, time study results, and other data. For that reason, and because Nebraska recognizes a school district's invoiced AOCM costs as the state's share of expenditures on EPSDT administration, we conclude, in accordance with section 95.13(d), that the disallowance in this case was for expenditures "made" from October 1, 1999 through August 31, 2002.¹⁰ Because Nebraska's FFP claim for those expenditures was not filed within two years after the end of the quarter in which they were made, CMS properly disallowed the claims as untimely under section 1132(a) of the Act.

2. *The requirement that claims in an QSE must be actual expenditures is met by the school districts' incurring costs.*

Contrary to Nebraska's contentions, we see no inconsistency between this analysis and the requirement of section 2500(A)(1) of the SMM that the QSE must report "actual expenditures for which all supporting documentation . . . has been compiled." (emphasis added). Nebraska suggests that, in this case, there were no "actual expenditures" until CMS approved NDHHS's "backcasting" methodology for determining the amount of allowable

¹⁰ Nebraska failed to provide any specific documentation of when the school districts actually made the expenditures at issue, claiming only based on quarterly aggregates. We infer that the invoices recording the expenditures were prepared shortly after each relevant quarter since Nebraska apparently had the information in time to make its 70% payments. In its disallowance letter, CMS pointed out that some amount of the claims representing the period from June through August 2002 might be timely, but that any such amount could not be determined because Nebraska had failed to respond to repeated requests for documentation of the actual payment dates. Neb. Ex. 11, at 1. Nothing in this decision precludes CMS from considering any documentation proffered by Nebraska to establish whether any claims are in fact timely based on the actual dates when the expenditures were recorded.

AOCM costs incurred by school districts in quarters prior to September 2001 (when CMS approved the AOCM Claiming Program) and NDHHS had compiled all necessary documentation of the school districts' costs. Reply Br. at 2.

We find no merit in this contention because there is nothing in SMM § 2500(A)(1) – or, for that matter, in the statute or regulations – which indicates that an expenditure is recognized as having occurred only after CMS approves a state's cost allocation or cost estimation methodology or after the state "compiles" necessary documentation of its expenditures. Section 2500(A)(1) merely instructs states to compile documentation of their actual expenditures, whenever they may have occurred, before submitting an FFP claim. Furthermore, a review of the SMM provision in context makes clear that the focus is distinguishing actual from estimated costs, so as to permit claiming FFP only after costs have been incurred rather than merely planned. Other provisions of the State Medicaid Manual (SMM) make clear that an expenditure is deemed to have occurred when cash or other assets are used by a state agency to acquire an item or service, or when any state agency records its use of funds for any allowable purpose. See, e.g., SMM § 2560.4(G)(1).

In this case, Nebraska's own program policies and practices demonstrate that a school district's invoiced AOCM costs constitute "state funds . . . expended" during the quarter for which the school district seeks reimbursement. Neb. Ex. 16 (NACG, App. D, certification statement). We therefore reject the argument that the SMM compels us to overturn the disallowance.

3. *The exception in section 1132(a) for "adjustments to prior year costs" does not apply in this case.*

Section 1132(a) specifies exceptions to the two-year filing rule. One of those exceptions is for "adjustments to prior year costs." Nebraska contends that the two-year time limit should not be applied in this case because the disallowed "prior period adjustments" on the November 9, 2004 QSE constitute adjustments to prior year costs as contemplated by section 1132(a). Neb. Br. at 9-10. This contention has no merit.

An adjustment to prior year costs is defined in the regulations to mean "an adjustment in the amount of a particular cost item that was previously claimed under an interim rate concept and for which it is later determined that the cost is greater or less than that originally claimed." 45 C.F.R. § 95.4 (emphasis added). The exception for adjustments to prior year costs applies to FFP claims arising from state Medicaid programs that

pay health care providers for medical services using "interim" payment rates based on estimates of the providers' actual costs of providing the services, rates that later are subject to retrospective adjustment (during a "cost settlement" process) in order to account for data on the provider's actual costs of providing the services. See 46 Fed. Reg. 3527, 3528 (Jan. 15, 1981) (stating that an adjustment to prior year costs "is limited to claims for services or medical assistance based on interim rates that subsequently are determined to be higher or lower than originally claimed"); Kansas Dept. of Social and Rehabilitation Services, DAB No. 2014 (2006); New Jersey Dept. of Human Services, DAB No. 1562 (1996); Pennsylvania Dept. of Public Welfare, DAB No. 703 (1985).

In this case, there clearly has been no retrospective adjustment of interim payment rates for medical or other services, only a self-imposed delay by NDHHS in passing on to school districts the federal share of their invoiced AOCM costs of the period October 1999 to August 2002.¹¹ We thus conclude that the disallowed FFP was not for adjustments to prior year costs.

4. *The Board is bound by the statute and regulations and is not authorized to grant equitable relief.*

As noted, Nebraska points to communications between NDHHS and CMS staff as showing that CMS was aware of the withholding of 30% of the AOCM claims and yet did not give clear guidance to Nebraska. In fact, Nebraska asserts that it received "confusing" advice from CMS which makes it unfair that Nebraska should now be subject to the timely claims limitations, stating as follows:

Respondent had specifically informed the State not to submit expenses on the CMS-64 [the QSE] until the

¹¹ There is nothing significant in the fact that Nebraska identified the disallowed expenditures on the November 9, 2004 QSE as "prior period adjustments." In CMS's Medicaid program instructions, a prior period adjustment can denote any increase or decrease in the expenditure amount previously reported on the QSE for a "prior period" (that is, a period prior to the quarter for which the QSE was filed), without regard to the circumstances which led the state to make the adjustment. See Connecticut Dept. of Social Services, DAB No. 1982, at 5 n.3 (2005); New York State Dept. of Health, DAB No. 1827, at 3 n.2 (2002). An "adjustment to prior year costs" is merely one type of prior period adjustment that is recognized in section 1132(a) as an exception to the two-year filing limit.

expenditures were actually made, which resulted in a disallowance and then purports that Nebraska should have submitted the SBA 30% expenses in the two-year timely filing period even if the expenditures had not occurred. CMS was aware of Nebraska's situation and the fact that the 30% was being withheld pending the approval of Nebraska's plan for claiming related to past years.

Reply Br. at 3. Nebraska also asserts that NDHHS "had its data together" and was "waiting on" the results of a CMS financial management review (FMR) of its backcasting methodology before paying the 30% balance of invoiced AOCM costs from the period October 1999 through August 2002. (Nebraska implies that some of the expenditures disallowed by CMS were identified using backcasting methodology.¹² Since the administrative expenditures in which FFP is being claimed, however, were incurred by the school districts, no payment by NDHHS of the federal share to the school districts was necessary as a prerequisite for claiming FFP.)

These assertions do not implicate any of the statutory exceptions to the two-year filing limit, i.e., court-ordered retroactive payments or audit exceptions, or adjustments to prior year costs. Moreover, Nebraska was not legally constrained to wait for CMS approval of its backcasting methodology before filing a FFP claim, and we see no evidence that CMS made it impossible for Nebraska to file a timely claim for backcasted costs. Further, we note that CMS specifically instructed Nebraska not to file claims for indirect costs, and that CMS has elected not to treat claims for those costs as time-barred. Nebraska points to no such specific instructions in regard to the costs at issue here.

While Nebraska may well have had concerns about whether some or all of the costs would ultimately be allowed depending on the resolution of discussions about methodology, Nebraska has not shown why it could not have acted to preserve its position that these were allowable costs by filing a timely claim. As the Board has pointed out, a "state can always file a claim even if

¹² The discussion of backcasting appears to relate to how to calculate AOCM claims for periods predating CMS's September 2001 approval of Nebraska's AOCM Claiming Program. The NACG advises school districts that they could submit so-called "retroactive" claims for these prior quarters based, in part, on time study statistics from a "comparable" post-September 2001 time study period. Neb. Ex. 16 (NACG at 39).

it believes that the Agency will dispute the allowability of the claim." Ohio Dept. of Human Services, DAB No. 1177 (1990). To the extent Nebraska is contending that the circumstances should estop CMS's enforcement of the statutory two-year time limit, we note that the Board is bound by all statutes and regulations and is not authorized to grant equitable relief on an estoppel or other theory. Utah Dept. of Health, DAB No. 2131 (2007), and cases cited therein.

5. *The Board lacks authority to consider the merits of Nebraska's request for a "good cause" waiver of the two-year filing requirement.*

Section 1132(b) authorizes the Secretary of Health and Human Services to waive application of the two-year filing requirement if he finds good cause for the State's failure to file a FFP claim within the two-year limit in section 1132(a). The Secretary has not delegated his statutory authority to grant such a waiver, and accordingly the Board has held that it lacks authority to grant a section 1132(b) waiver request in the first instance. Connecticut Dept. of Social Services, DAB No. 1982 (2005).

Nebraska informs us that it has filed with CMS a section 1132(b) waiver request regarding the disallowed expenditures at issue in this appeal. Reply Br. at 4. Nebraska contends that "CMS's documented inaction in ignoring the State's many attempts to resolve . . . prior period claims issues" justifies a waiver. Neb. Br. at 10. Thus, Nebraska is already taking advantage of its opportunity to seek a waiver and does not need the Board to grant its request for such an opportunity.

Nebraska does not, however, ask the Board to grant the waiver, and given that we lack the authority to do so in these circumstances, it would be inappropriate for us to express an opinion on the request's merits.

Conclusion

For the reasons discussed above, the Board affirms CMS's January 4, 2007 decision to disallow \$5,627,497 in FFP.

_____/s/
Judith A. Ballard

_____/s/
Constance B. Tobias

_____/s/
Leslie A. Sussan
Presiding Board Member