DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: New Mexico Department of Human Services DATE: December 11, 1979
Docket Nos. 78-32-NM-HC
79-33-NM-HC
79-37-NM-HC
Decision No. 70

DECISION

The New Mexico Department of Human Services has requested reconsideration pursuant to 45 CFR Part 16, Subpart C (1978) of three disallowances, made by the Health Care Financing Administration ("HCFA"), involving the issue of the proper rate of Federal financial participation ("FFP") in the costs of certain transportation services provided to medicaid recipients under Title XIX of the Social Security Act. The three cases have been considered jointly without objection by the parties. (Executive's Secretary's letter of April 11, 1979; HCFA's Response to State's Application, April 16, 1979.)

Several issues of fact raised by the State have now been resolved, and the parties have submitted briefing on the legal issues. We have, therefore, determined to proceed to decision based on the written record and briefs. We conclude that, for the reasons stated below, the disallowances should be upheld, except with respect to Docket No. 78-32-NM-HC, in which the disallowance is reversed in part for reasons discussed separately.

Background

The statutory authority for FFP for transportation services under Title XIX is Section 1905(a)(17) of the Social Security Act. This section defines the term "medical assistance" for purposes of Title XIX as including the cost of "any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary." Regulations implementing this section define this category of costs to include transportation, 42 CFR 449.10(b)(17)(i)(A)(1977; 39 FR 16970, May 10, 1974, but provide that transportation is recognized as an item of medical assistance "only when furnished by a provider to whom a direct vendor payment can appropriately be made by the agency." 449.10(b)(17)(i)(B).

The reason stated for the present disallowances was that the expenditures for which FFP is claimed were "transportation expenses disbursed directly to recipients from petty cash accounts in county offices," and, therefore,

not furnished by a provider to whom a direct vendor payment was made. These expenditures were, however, allowed as administrative costs, available for transportation "when other arrangements are made." 449.10(b)(17)(i)(B).

The amounts disallowed, computed as an adjustment for the difference between the State's Federal Medical Assistance Percentage ("FMAP") and the administrative costs rate (50% of costs), were $10,511 for the quarter ending December 31, 1977 (Docket No. 78-32-NM-HC); $11,589 for the quarter ending March 31, 1978 (Docket No. 79-33-NM-HC); and $8,980 for the quarter ending June 30, 1978 (Docket No. 79-37-NM-HC).

Legal Issues

The State has claimed as medical assistance costs all non-emergency transportation for medicaid recipients even when furnished "by direct payments to recipients from petty cash in the county offices." (Application for Review, Docket No. 78-32-NM-HC, p.1.) Furthermore, the State has specifically stated that it does not dispute HCFA's interpretation of the regulation. (State's Response to Order, p.3.) The State does dispute the rationale behind the regulation, asserting that the regulation is invalid because it is "unreasonable to make an arbitrary distinction between the two methods for obtaining transportation." This distinction, the State argues with plausibility, penalizes rural, sparsely populated States such as New Mexico which must rely on family or friends of the recipient to provide transportation services, required as an element of the State plan, 449.10(a)(5)(ii), because there is not adequate public transportation. The State points out that public transportation may not be available, or even if available, may not be convenient or cost effective for the program.

Congress intended to encourage activities generating a higher Federal match and discourage comparable activities eligible for a lower match, the State argues, pointing out that administrative expenses receive only 50% match to promote greater efficiency while direct benefits are mat at a higher rate to encourage the desirable end of greater services w less overhead. According to the State, "The cash outlays to New Mexi recipients in the many outlying, sparse areas of the State are (1) necessary for them to receive medicaid services, and (2) inherently cost effective because no commercial vendor of transportation is competitive in this low volume 'market.'" (State's Response to Order, p.5.)

In support of its position, the State contends that the money paid out through petty cash funds is a legitimate payment for services rendered, that the county welfare officials are quite stringent in allocating the petty cash, and that a recipient's trip to the doctor's, as well as the mileage between the recipient's home and the doctor's office, can be easily verified.

Discussion

Assuming the State's policy argument to be persuasive as to how the regulation should best have been drafted, the argument is insufficient legally. The regulation actually promulgated is not inconsistent with the statute and the Secretary's authority under the statute.

The statute defines "medical assistance" in this instance as "care ... specified by the Secretary." The care specified by the Secretary here is transportation "furnished by a provider to whom a direct vendor payment can appropriately be made." It does not appear to be unreasonable for the Secretary to have determined that such a restriction should be placed on those transportation services for which the higher rate of FFP is available. Such a restriction might prevent misuse of funds and is not clearly inconsistent with the Secretary's authority to provide for the efficient administration of the functions with which he is charged under the Social Security Act. Section 1102.

During the course of the Board's proceedings in these cases, HCFA pointed out (Memorandum of December 28, 1978) a further reason in support of the disallowance not cited in the disallowance letter. Section 1905(a) of Title XIX, 42 U.S.C. 1396d(a), provides that "medical assistance" means payment of the cost of "services ... for individuals" with an exception for certain direct payments to individuals for some physicians' or dentists' services. HCFA interprets the contrast between services for individuals and payments to individuals in this provision to mean that, under the statute, matching at the medical assistance percentage is available only for payments made to providers of services and not for payments made directly to medicaid recipients. (HCFA Memorandum of December 28, 1978. See, also, Medical Assistance Manual Chapter 6-20-00, Section D., p.10, HCFA AT-78-51, May 30, 1978.) So interpreted, the statute itself excludes reimbursement at the higher rate for payments disbursed directly to recipients from petty cash.

In its response to an Order to Develop the Record issued in these cases, the State cites the legislative history of Public Law 90-248, January 2, 1968, which added Section 1902(a)(27) to Title XIX (and also amended Section 1905(a)), as supporting the proposition that the law "was intended to 'add flexibility in administration' in the medicaid program by, among other things, allowing 'at the option of the States, direct payments to recipients to meet the cost of physicians' and dentists' services.'" (Response, p.5.)

This does not, however, contradict HCFA's position that the only payments to individual recipients actually authorized were payments for certain physicians' and dentists' services. In fact, it supports HCFA's position that in all other cases, including transportation services, Section 1905(a) requires that payments be directly to providers.

Factual Issues

In its application for review in Docket No. 78-32-NM-HC, the State challenged the $10,511 disallowance there on two grounds in addition to the question of validity of the regulation. The State claimed that the correct Federal Medical Assistance Percentage ("FMAP") for the quarter in question (quarter ending December 31, 1977) was 71.84% rather than the 73.29% used by HCFA in calculating the disallowance. The State also contended that the amount claimed included payments to bus companies and airlines which, to the extent of $3017, met the requirement of 42 CFR 449.10(b)(17)(i)(B) that payments eligible at the higher percentage be to a "provider to whom a direct vendor payment can appropriately be made."

With respect to the applicable FMAP, HCFA admitted that the correct percentage was 71.84%, as asserted by the State, and reduced the disallowance to $9,857. With respect to the State's claim that part of the disallowance represented payments to bus companies and airlines, HCFA responded that if there were provider agreements with such bus companies and airlines, specifying that the company would bill the State agency directly and receive direct payment from the agency, payments to the companies would qualify under section 449.10(b)(17)(i)(B) for reimbursement at the FMAP rate. The State then submitted a form (DHS 104) called an Authorization for Ticket Purchase via Common Carrier, which HCFA accepted as sufficient for purposes of obtaining the FMAP rate where properly used for direct reimbursement. In response to our Order to Develop the Record, HCFA has also now submitted a notarized statement by the person who was the Medicaid Financial Management Specialist originating the disallowance. (Attachment A to HCFA Response.) Calculations included as an attachment to this statement show that of the original total claimed by the State at the FMAP rate ($45,132 x .7184 = $32,423), part of the claim should have been allowed at the FMAP rate ($4,228 x .7184 = $3,037), and the rest at the 50% administrative costs rate ($40,904 x .50 = $20,452), so that the disallowance should be only $8,934 ($32,423 - $23,489). Entries in the State's general ledger for the period support the allowance of $3,037 in payments to bus companies and airlines. There is a suggestion in the record that in some instances the State may have been using the DHS 104 form as mere evidence of payments from petty cash. Since HCFA has now admitted that $3,037 is allowable figured at the FMAP rate and the State in its original appeal claimed only $3017 as payments to bus companies and airlines, we do not find it necessary to reach that issue.

With respect to Docket Numbers 79-33-NM-HC and 79-37-NM-HC, the State has not claimed that any of the disallowed amounts represent payments to qualifying providers, and it appears from the calculations submitted by HCFA that, for the quarters involved there, adjustment for such payments was made in calculating the disallowances.

Conclusion

For reasons stated above, we uphold the disallowances of $11,589 in Docket No. 79-33-NM-HC and of $8,980 in Docket No. 79-37-NM-HC, and uphold the disallowance in Docket No. 78-32-NM-HC in the reduced amount of $8,934.

/s/ Bernard E. Kelly

/s/ Thomas Malone

/s/ Malcolm S. Mason, Panel Chairman