

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Pennsylvania Department of Public Welfare
Docket Nos. A-07-115
A-08-11
Decision No. 2152

DATE: February 6, 2008

DECISION

The Pennsylvania Department of Public Welfare (Pennsylvania) appeals determinations by the Centers for Medicare & Medicaid Services (CMS) disallowing costs claimed as "residential habilitation" costs under the State's Home and Community-Based Services Waiver for Individuals with Mental Retardation (HCBS waiver). The State claimed Medicaid funding under title XIX of the Social Security Act (Act) totaling \$50,939,457 for seven calendar quarters from July 2005 to March 2007. CMS disallowed the costs on the ground that they represent room and board costs that are excluded from reimbursement under section 1915(c)(1) of the Act and the regulations at 42 C.F.R. § 441.310(a)(2). On September 27, 2007, for the same reason CMS disallowed an additional \$9,997,220 in funding claimed by Pennsylvania for the calendar quarter ending June 30, 2007.

Pennsylvania argues that although it has had HCBS waivers for many years, and had never before claimed Medicaid reimbursement for "occupancy" costs (such as rent, utilities, facility maintenance and repairs, and furnishings) incurred by community residential facilities, Pennsylvania is entitled to such reimbursement now. Pennsylvania asserts that because its Medicaid recipients receive "habilitation services" while they are living in community residential facilities, 54% of the "occupancy costs" associated with those facilities should be reimbursed with Medicaid funds. This percentage, the State argues, represents a reasonable allocation of costs, consistent with Office of Management and Budget (OMB) Circular A-87 and CMS's State Medicaid Manual.

Pennsylvania concedes, however, that the costs at issue here are, in general, joint costs that benefit the objective of providing

room and board to the residents, as well as the objective of providing habilitation services. Congress excluded room and board costs from Medicaid reimbursement for HCBS services. Act, § 1915(c)(1). Under OMB Circular A-87, costs that are excluded from federal reimbursement are not allowable, and may not be charged to federal funds, even if they might otherwise be allocable to the program. For this reason, Pennsylvania's attempt to allocate and seek reimbursement for these "occupancy" costs must fail. Pennsylvania submitted no evidence to demonstrate that any of the costs were incurred solely to provide habilitation services and were not also attributable to the cost objective of providing room and board. Accordingly, we uphold the disallowance in full.

Relevant legal authority

Title XIX of the Act established the Medicaid program to provide medical services for low-income persons. The Medicaid program is jointly funded by the federal and state governments, and administered by the states under federal guidelines. Act, §§ 1901-03.¹ Federal financial participation (FFP) is available for Medicaid assistance provided under an approved State plan. Act, § 1903(a).

In the 1981 Omnibus Budget Reconciliation Act (OBRA), Congress added a provision to the Medicaid program authorizing the Secretary of the Department of Health and Human Services (HHS) to permit each state to apply for a waiver to provide Medicaid coverage for individuals who would otherwise need institutional care to receive care and services in home or community-based settings instead. Act, § 1915(c); see also H.R. Rep. No. 208, 97th Cong., 1st Sess. 965-68 (1981) (Conf. Rep.), reprinted in 1981 U.S.C.C.A.N 1010, 1327-30. This has come to be known as a home and community-based services (HCBS) waiver. Congress gave states the option of using the waiver to serve individuals with developmental disabilities and mental retardation. Conf. Rep. at 966. As with the legislation governing other parts of the Medicaid program, Congress provided for FFP in a percentage of the state's Medicaid costs. Act, §§ 1915(c), 1901-03.

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. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

The OBRA statutory provision for the HCBS waiver reads, in pertinent part, as follows:

The Secretary may by waiver provide that a State plan approved under this title may include as "medical assistance" under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State [Medicaid] plan.

Act, § 1915(c)(1) (emphasis added). Congress's choice to exclude room and board costs from Medicaid reimbursement was a deliberate one. As the Conference Report explains, the House bill would have permitted the Secretary to approve coverage for room and board services. However, the Senate amendment did not authorize coverage for such services, and the conferees agreed not to include the coverage. Conf. Rep. at 967.

Members of Congress enacting section 1915(c)(1) "anticipate[d] that the provision of community-based care [would] have a long-range and significant impact on the size of states' Medicaid budgets;" they believed that substantial savings could be achieved. Conf. Rep. at 966. The legislation required the states to ensure that the costs of home or community-based care, on an annual basis, did not exceed those costs estimated for the individual Medicaid recipients had they been in institutional care, and to report to the Secretary annually on this and other aspects of the waiver program. Act, §§ 1915(c)(2)(D) and (E).

The legislation enabled more people with disabilities to live in the community, and expanded the types of reimbursable medical assistance available to persons in home or community-based settings to include, for example, case management services, homemaker/home health aide services and personal care services, adult day health services, habilitation services, and respite care; and to include day treatment, psychosocial rehabilitation services, and clinic services for individuals with chronic mental illness. Act, § 1915(c)(4)(B). "Habilitation services" are defined as services designed to assist individuals in "acquiring, retaining, and improving the self-help, socialization, and

adaptive skills necessary to reside successfully in home and community based settings." Act, § 1915(c)(5)(A).

HHS promulgated implementing regulations at 42 C.F.R. Part 441, subpart G. 46 Fed. Reg. 48,532 (Oct. 1, 1981). These regulations provide, in pertinent part:

(a) FFP for home and community-based services listed in § 440.180 of this chapter is not available in expenditures for the following:

* * * *

(2) The cost of room and board

42 C.F.R. § 441.310.²

There are two exceptions to the room and board costs exclusion for Medicaid reimbursement purposes. The first is a regulatory exception promulgated in 1981 for respite care room and board costs, because Congress had provided in the HCBS waiver statute for respite care. 42 C.F.R. § 441.310(a)(2)(i); 46 Fed. Reg. 48,532, 48,534 (Oct. 1, 1981). The second is an exception for unrelated personal caregivers' room and board costs, enacted by Congress in the Omnibus Budget and Reconciliation Act of 1990. Pub. L. No. 101-508, amending section 1915(c)(1) of the Act; 42 C.F.R. §§ 441.310(a)(2)(ii), 441.303(f)(8). Pennsylvania does not claim that either exception applies here.

Factual background

For many years, Pennsylvania has held an approved HCBS waiver, under which the State obtains Medicaid coverage for home and community based services provided to persons with developmental disabilities or mental retardation who otherwise would require care in an intermediate care facility for persons with mental retardation (ICF/MR). Brief of Appellant Pennsylvania Department of Public Welfare (App. Br.) at 7. Pennsylvania secured CMS approval of a revised waiver in January 2001, covering July 1, 2000 through June 30, 2005, and authorizing the State to serve up to 18,279 eligible recipients under the waiver. App. Ex. 1. In December 2006, Pennsylvania obtained a five-year renewal of the

² We cite to the 2006 Code of Federal Regulations throughout this decision; all the relevant regulations were unchanged during the times at issue here.

waiver, effective December 23, 2006. App. Ex. 7.³ Pennsylvania currently has about 2,200 community-based facilities operating under its waiver, with up to four residents in each one. App. Br. at 6, 9. A small number of these facilities are owned by counties; most are operated by private non-profit agencies. Id. at 6.

The waiver agreement effective July 1, 2000 provided, in relevant part, that "Federal financial participation will not be available in expenditures for the cost of room and board, . . ." App. Ex. 1, at 6. This waiver agreement did not set forth any specific method for allocating "occupancy" costs between "room and board" and habilitation services. This waiver agreement did, however, contain a detailed description of habilitation services and an enumeration of habilitation costs, in these terms:

Community Habilitation means services designed to assist individuals in acquiring, retaining, and improving the self-help, socialization, and adaptive skills necessary to reside successfully in home and community-based settings. Habilitation may be provided up to 24 hours a day based on the needs of the individual receiving services. Included are provider training costs, supervisory costs, purchased personnel costs, and costs of necessary supplies, equipment and adaptive appliances. Services may be provided by a qualified family member or relative, independent contractor, or services agency.

App. Ex. 1, at 13 (emphasis added).

The July 1, 2000 waiver agreement also contained a specific provision requiring the State to make formal requests for waiver amendments for any proposed changes to the approved waiver. App. Ex. 1, at 8.

From July 2001 until the spring of 2006, Pennsylvania did not seek Medicaid funding under the HCBS waiver for any of the occupancy costs for Medicaid recipients in community residential facilities under the HCBS waiver. Church Decl. ¶ 5; App. Br. at 11; CMS Br. at 4. Instead, Pennsylvania paid these costs using a

³ Presumably, the July 1, 2000 waiver was extended to the period between July 1, 2005 and December 22, 2006, since neither party submitted any waiver document for that period, and it is undisputed that a waiver was in effect during the entire disallowance period at issue.

combination of state funds and part of the residents' Supplemental Security Income (SSI) payments. Church Decl. ¶ 5; App. Br. at 11.⁴

In 2005, Pennsylvania engaged a consultant, called MAXIMUS, to assist it in developing and implementing a revenue maximization strategy for the State's Medicaid program. Berger Decl. ¶¶ 1-3, 7-15. MAXIMUS's Director, Bruce Berger, developed several methods for allocating part of the facility (or occupancy) costs for Medicaid recipients in community residential facilities to "provision of waiver services," i.e., habilitation services. Id.

In late 2005 and early 2006, Pennsylvania officials chose an allocation method MAXIMUS had recommended which was based on an estimate that residents of the community facilities were, on average in a typical 24-hour period, sleeping for 8 hours, engaged in "habilitative activities or other waiver activities" for 13 hours, and eating or otherwise engaged in activities of daily living that do not involve receiving services for 3 hours. Berger Decl. ¶¶ 13-16; Church Decl. ¶ 6; see also App. Br. at 14-16. This estimate involved some difficult line-drawing, since according to Pennsylvania, many of the habilitation services are provided while residents are engaged in activities of daily living, such as bathing, dressing, grooming, preparing food, eating, taking medications, and taking part in other activities. App. Br. at 9-11; McCool Decl. ¶¶ 16-18. Pennsylvania nevertheless chose to treat most of this time as habilitation services time rather than daily living activities time. App. Br. at 15-16; Berger Decl. ¶¶ 13-15.⁵

⁴ Pennsylvania state law allows for up to 72 percent of the SSI maximum rate to be used to cover the resident's share of room and board at the community residential facility. 44 Pa. Code § 6200.16 (2006); App. Br. at 11, nn.7, 8. The SSI program, administered by the Social Security Administration, provides a federal income supplement for disabled, blind, and aged persons with little or no income. See title XVI of the Act, and 20 C.F.R. Part 416.

⁵ Had Pennsylvania chosen to count these 13 hours a day when residents are engaged in both daily living activities (such as preparing breakfast) and habilitation (such as receiving advice or instruction from a staff member about how to prepare breakfast) as daily living time, then the MAXIMUS method would not have resulted in a larger claim for Medicaid FFP. The allocation of hours and costs would have been 24 hours or 100% to
(continued...)

Based on this estimate, Pennsylvania allocated 54.1667% (or 13/24) of most categories of its occupancy costs (including rent, utilities, interest, depreciation, insurance, housekeeping, building repairs and renovations, furnishings and equipment) to "waiver services" or "habilitation services." App. Br. at 15-16. The rationale for this 54% allocation is that the premises of each community residential facility are used for both "room and board" and for waiver or habilitation services; therefore, according to Pennsylvania, these costs should be allocable in some proportionate share to "room and board" on the one hand and waiver or habilitation services on the other. *Id.* at 9-12, 22-24.⁶

According to Pennsylvania, it contacted CMS in April 2006 to begin discussing the use of its new cost allocation methodology, and submitted its first claim using the methodology (for calendar quarters covering July 1, 2005 to December 31, 2005) in August 2006.⁷ App. Br. at 16-18.

⁵ (...continued)

daily living activities and 0 hours or 0% to habilitation services.

⁶ There were other possible allocation methods that MAXIMUS considered but did not recommend, and Pennsylvania did not adopt. For example, MAXIMUS's director did not recommend, and Pennsylvania's officials did not select, a square footage allocation approach, which would be based on seeking federal Medicaid reimbursement for those spaces in the community residential facilities that are used exclusively for habilitation or treatment purposes. App. Br. at 13. According to Pennsylvania, this method was not adopted because "most of the rooms in Pennsylvania's community residential facilities have multiple uses" and "[v]ery few facilities have rooms devoted solely to eating, sleeping, or living activities or solely to the provision of services." *Id.* Therefore, an allocation methodology based on square footage used solely for habilitation or other waivers services would do little to increase the state's Medicaid revenue.

⁷ Pennsylvania apparently used this new methodology only as a basis for claiming increased FFP in its HCBS waiver costs, and did not increase the amounts paid to the counties and private non-profit providers operating the community-based facilities. *See* CMS Br. at 13, n.7; App. Br. at 29-30. It also
(continued...)

Pennsylvania and CMS representatives communicated several times during 2006 about Pennsylvania's new methodology for claiming FFP under its HCBS waiver, but failed to reach agreement. App. Br. at 16-19; see also App. Ex. 2-6. On June 21, 2007, CMS disallowed that part of the waiver claims Pennsylvania submitted for July 1, 2005 to March 31, 2007 based on its new allocation method for facility costs. App. Br. at 18-19; App. Ex. 8. On September 27, 2007, CMS disallowed similar waiver costs Pennsylvania submitted for the quarter ending June 30, 2007, on the grounds that they were not in accordance with federal statutes, regulations and guidelines or the provisions of Pennsylvania's approved waiver. Letter from CMS Associate Regional Commissioner to Secretary of the Pennsylvania Department of Public Welfare, September 27, 2007 (Attachment to Pennsylvania's Notice of Appeal in DAB No. A-08-11).⁸

Pennsylvania and CMS had also been negotiating for a renewal of Pennsylvania's HCBS waiver. CMS approved Pennsylvania's application for renewal of the waiver effective December 23,

⁷(...continued)

appears that the facilities continued to receive funds from residents' SSI payments to cover some room and board costs. App. Br. at 29-30.

⁸ In its appeal assigned Docket No. A-07-115, Pennsylvania disputes the disallowance of FFP for:

Quarter ending June 30, 2006 (covers retroactive period of July 1 to Dec. 31, 2005)	\$12,282,424
Quarter ending Sept. 30, 2006	8,193,804
Quarter ending Dec. 31, 2006	9,357,238
Quarter ending Mar. 31, 2007 (includes claims for Jan. 1 to June 30, 2006, and Jan. 1 to Mar. 31, 2007)	21,105,991.

See Pennsylvania's Notice of Appeal (July 19, 2007), and Attachment.

In Docket No. A-08-11, Pennsylvania disputes the disallowance of FFP for:

Quarter ending June 30, 2007	\$ 9,997,220.
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See Pennsylvania's Notice of Appeal (Oct. 18, 2007), and Attachment.

2006. App. Ex. 7. The waiver application approved effective December 23, 2006 provides that, in accordance with 42 C.F.R. §§ 441.310(a)(2), FFP will not be claimed for the cost of room and board except when it is part of respite care or reasonably attributed to an unrelated caregiver. App. Ex. 7, at 8. The waiver's definition of "habilitation" and its costs is very similar to the definition in the earlier waiver, and lists those costs as provider training, supervisory, purchased personnel, and necessary supplies. App. Ex. 7, Appendix C-3, at 7-8. In addition, the waiver award letter states, in pertinent part:

This approval is based on the assurances and information you provided including the Department of Public Welfare's assurance that Federal financial participation will not be claimed for room and board in accordance with § 4442.3.3.1.2 of the State Medicaid Manual, which defines "room" as "hotel or shelter type expenses including all property related costs such as rental or purchase of real estate and furnishings, maintenance, utilities, and related administrative services." This approval is based on the Department of Public Welfare's agreement not to claim the costs of room and board except as explicitly allowed under Federal regulations at 42 C.F.R. § 44[1].310(a)(2).

App. Ex. 7, at 1.⁹

Analysis

I. The costs at issue in this appeal are "room" costs, as part of room and board costs.

Pennsylvania seeks approval for a method that allocates "occupancy" costs between "habilitation services" on the one hand and "room [and board]" costs on the other. App. Br. at 11-16. However, the costs that Pennsylvania is calling "occupancy" (or "facility") costs today are the same as the costs that Pennsylvania previously has treated as room costs. They have the same component parts: rent, utilities, interest, depreciation, building insurance, housekeeping, building repairs and maintenance, building renovations, furnishings and equipment, and repairs of furnishings and equipment. Berger Decl. ¶ 15; App. Br. at 16. For all intents and purposes, Pennsylvania's occupancy costs in community residential facilities are room

⁹ The quoted definition of "room" is found at § 4442.3.B.12 of the State Medicaid Manual.

costs; they are the costs of providing housing to the Medicaid recipients who live there. Pennsylvania is not claiming that the occupancy costs have increased in order to provide habilitation services, nor is it claiming that these costs are no longer necessary, in full, to provide housing for its HCBS residents. As part of the costs of providing room and board, these costs are excluded by federal statute from amounts that may be reimbursed with Medicaid funds.

"Habilitation services" costs, on the other hand, have been defined in both of Pennsylvania's most recent waivers as including provider training costs, supervisory costs, purchased personnel costs, and costs of necessary supplies. App. Ex. 1, at 13; App. Ex. 7, Appendix C-3, at 7-8. Habilitation services costs have not been defined in these two waivers as including any of the "occupancy" costs at issue here. *Id.* Now, Pennsylvania seeks to shift 54% of its "room" or "occupancy" costs to the habilitation services category, and to claim Medicaid reimbursement for these costs, based on its consultant's reading of OMB Circular A-87. As we explain below, the cost principles in the Circular do not support Pennsylvania's claim.

II. OMB Circular A-87 does not permit the allocation of costs between two cost objectives for reimbursement purposes when the costs themselves are not allowable under federal law.

According to Pennsylvania, it is not seeking FFP in room and board costs because instead the occupancy costs at issue are "attributable to" habilitation services, having been allocated to that cost objective using the percentage of time allocation method developed by MAXIMUS. App. Br. at 19-25. The key flaw in Pennsylvania's argument is the presumption that, if costs are allocable to habilitation services, then they are not room and board costs. As discussed below, however, Pennsylvania acknowledges that the purpose of the facility space at issue (such as bedrooms, bathrooms, and kitchens) was, and is, to function both as living space for the residents and as a site for providing the residents with habilitation services. App. Br. at 1, 3-4, 9-10, 24 ("almost every room . . . has multiple purposes and uses"); McCool Decl. ¶ 18. Thus, the rent or depreciation costs for that space (and related costs such as maintenance and furnishings) benefitted the cost objective of providing "room and board" for the residents. Stated differently, it appears from the record here that all of the costs were allocable to the cost objective of room and board and were therefore unallowable.

Pennsylvania argues that these occupancy costs may be allocated in part to habilitation services under principles set forth in OMB Circular A-87, Appendix (App.) A ¶ C.3 ("A cost is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received."). App. Br. at 3-4, 20.¹⁰ We disagree.

OMB Circular A-87 provides that costs otherwise allocable under the cost principles are not allowable charges to federal grants if they are not allowed under federal law. For example, the "Basic Guidelines" that precede paragraph C.3 state:

1. Factors affecting the allowability of costs. To be allowable under Federal awards, costs must meet the following general criteria:
 - a. Be necessary and reasonable for proper and efficient performance and administration of Federal awards.
 - b. Be allocable to federal awards under the provisions of 2 C.F.R. part 225.
 - c. Be authorized or not prohibited under State or local laws or regulations.
 - d. Conform to any limitations or exclusions set forth in these principles, Federal laws, terms, and conditions of the Federal award, or other governing regulations as to types or amounts of cost items.
 - e. Be consistent with policies, regulations, and procedures that apply uniformly to both Federal awards and other activities of the governmental unit.

OMB Circular A-87, App. A, ¶ C.1 (emphasis added). Allocability is only one of the factors affecting whether costs may be properly charged to federal funds. If a cost is a type of cost subject to a limit or exclusion under the federal statute governing the program, then it is not allowable even if the cost is allocable to a cost objective under that program.

While the OMB Circular provides for allocation of some joint costs according to relative benefits received using a method such as the one used here (if that method is determined to be equitable under the circumstances), the joint costs to be

¹⁰ State, local, and tribal governments receiving Medicaid grants are subject to the cost principles of OMB Circular A-87, now codified in 2 C.F.R. Part 225. 45 C.F.R. § 92.22(b).

allocated must be allowable types of costs.¹¹ Thus, for example, OMB Circular A-87 provides that unallowable costs must first be excluded from indirect cost pools used to determine an indirect cost rate (a type of rate used to allocate costs that are not identifiable to any specific cost objective without inordinate effort). See OMB Circular A-87, App. E, ¶¶ A.1., C.2.b ("Both the direct costs and the indirect costs shall exclude capital expenditures and unallowable costs.").

Hence, although the OMB Circular provides instructions for allocating allowable costs among two or more cost objectives, it cannot and does not override specific federal law that prohibits the reimbursement of certain types of costs. In fact, the introductory "Purpose and Scope" section of the Circular states "The principles [in the Circular] are designed to provide that Federal awards bear their fair share of the costs recognized under these principles except where restricted or prohibited by law." App. A, ¶ A.1 (emphasis added).

Under the HCBS waiver program, room and board costs are not allowable because the statute and regulation specifically preclude federal funding for such costs, with limited exceptions that do not apply here. Applying the allocation method Pennsylvania used here clearly resulted in allocating to Medicaid costs that simply are not allowable under that program. Thus, the fact that the method used might, in some circumstances, be a reasonable method of allocating joint costs among benefitting activities is irrelevant here.

III. Pennsylvania did not adduce evidence to show that any of the "occupancy" costs were incurred only in order to provide habilitation services and not in order to provide room and board.

Pennsylvania has not provided any evidence that any of the space at issue was used exclusively for habilitation or other eligible

¹¹ In some circumstances, the awarding agency may approve allocation of costs that benefit more than one cost objective to one program in their entirety, where the statute permits such allocation. See Implementation Guide for Office of Management and Budget Circular A-87 (ASMB C-10) ¶ 2-12 (1997). Otherwise, the costs will be allocated among the benefitting objectives. See, e.g., Nebraska Dept. of Social Services, DAB No. 1494 (1994) (10% of residential staff costs allocated to room and board, representing the time staff members spent in helping to provide room and board for residents with mental retardation).

waiver services and did not benefit the cost objective of providing room and board for the residents. For example, Pennsylvania has not provided any evidence that it reasonably thought that the occupancy costs at issue were not "hotel or shelter type expenses" and relied on that determination in claiming the costs. See State Medicaid Manual (SMM) § 4442.3.B.12 ("FFP is not available for room and board of the recipient as part of a home and community-based service. . . . Room means hotel or shelter type expenses including all property related costs such as rental or purchase of real estate and furnishings, maintenance, utilities, and related administrative services.").¹²

Pennsylvania emphasizes that its community residential facilities operating under the HCBS waiver must meet requirements beyond those needed in private residences. For example, Pennsylvania cites State law as requiring that the facilities be licensed and meet numerous "design and staffing standards." App. Reply Br. at 6-7, citing 55 Pa. Code § 6000.351 and Ch. 6400. Pennsylvania also relies on the declaration of State official Patricia McCool that the facilities are "specifically designed to provide developmentally disabled individuals with the highest levels of necessary services possible outside of an institution." Id. at 7, citing McCool Decl. ¶¶ 14-18. Pennsylvania itself goes on to state, however, that "the facilities have two key purposes, providing shelter for the residents and serving as a location in which the residents receive a wide range of services." Id. The problem is that the evidence is insufficient to show which, if any, of the costs served only the goal of providing services and not the goal of providing shelter. Moreover, since by definition "habilitation services" are designed to assist and instruct developmentally disabled individuals in activities of daily living, the settings in which the services are provided are

¹² In arguing that the fixed costs of a facility such as rent, utilities, and maintenance may be included in reimbursement rates for federal funding, Pennsylvania relies on one Civil Remedies Division and two Board decisions, Gregory v. Inspector General, CR336 (1994); Massachusetts Dept. of Social Welfare, DAB No. 730 (1986); and Inter-Tribal Council of California, DAB No. 1418 (1993). App. Br. at 20-21. However, none of these cases involved reimbursement pursuant to the law and regulation governing HCBS waivers, which prohibit reimbursement of room and board costs, or pursuant to a law or regulation with any similar prohibition. Gregory involved a nursing facility, Massachusetts, an intermediate care facility, and Inter-Tribal Council, a Head Start program.

likely to be living spaces, which the facility would have to have even if only room and board were being provided for these residents.

The allocation method MAXIMUS developed for Pennsylvania is unacceptable because it results in claims for Medicaid FFP in room and board costs, under any reasonable definition of those costs. For example, while habilitation services may have been provided in the facility bathrooms, as Pennsylvania asserts, Pennsylvania cannot reasonably argue that the facilities could provide room and board for the residents without paying for bathroom space. Yet, Pennsylvania's method clearly resulted in Medicaid claims for rent and maintenance attributable to bathrooms in the facilities.

IV. Pennsylvania did not obtain approval for its cost allocation method as part of the waiver program.

Finally, even if Pennsylvania had had a basis for claiming Medicaid FFP for part of the occupancy costs, the allocation method used by Pennsylvania has not been approved by CMS as part of Pennsylvania's waiver program. App. Br. at 16-19; CMS Br. passim. CMS's State Medicaid Manual, which provides guidance to the states with HCBS waivers, explains:

Where you propose to provide care in a residential setting (e.g., assisted living, residential therapeutic foster care), there must be a clear differentiation between waiver services and nonwaiver services (e.g., room and board). There must also be a detailed cost allocation strategy provided as part of the waiver request to explain how the cost of waiver services in the residential setting will be determined and segregated from ineligible waiver costs.

SMM, § 4442.3.B.8 (emphasis in original).

Pennsylvania does not deny that CMS's waiver requirements include the requirement that any method for allocating costs among eligible and ineligible activities must be approved as part of the waiver. App. Br. at 4. Nor does Pennsylvania deny that it did not make a formal request, as required by the July 1, 2000 waiver, for any proposed changes to the waiver. Cf. App. Ex. 1, at 8 (requiring such a request). Pennsylvania argues, instead, that since CMS previously did not require it (or other states) to specify an allocation formula before receiving approval for an HCBS waiver, CMS may not now treat Pennsylvania's new methodology

as a significant change in the waiver, requiring advance approval by CMS. App. Br. at 28-31.

CMS would have had no reason, however, to require Pennsylvania to specify any method for allocating occupancy costs between room and board and habilitation services in the absence of any indication that Pennsylvania intended to claim some occupancy costs as the costs of habilitation services provided in residential facilities. Pennsylvania's approved waiver agreements identified the costs of residential habilitation services and did not include any occupancy costs for which CMS might otherwise have required an allocation methodology to ensure that room and board costs were not included. App. Ex. 1, at 13 (2000-05 waiver); see also App. Ex. 7, Appendix C-3, at 7-8 (similar language in waiver effective Dec. 23, 2006).

Pennsylvania provides no evidence that the other States which it says had waivers approved without specifying allocation methods were in fact allocating occupancy costs for residential facilities between room and board and habilitation services.

Pennsylvania argues, however, that CMS should approve its allocation of occupancy costs because the State Medicaid Manual refers to "rent" costs in discussing reimbursement for days when waiver recipients are temporarily absent. App. Reply Br. at 4-5. This part of the Manual reads:

FFP is not available to facilities providing services in residential settings on days when waiver recipients are temporarily absent and are not receiving covered waived services (sometimes called reserve bed days). Medicaid payment may be made only for waiver services actually provided to an eligible recipient. Since providers incur fixed costs such as rent, staff salaries, insurance, etc., even when a waiver recipient is temporarily absent, you may account for such continuing costs when developing payment rates for these providers. For example, rent is generally paid for a period of 1 month. However, day habilitation services are generally furnished only 5 days per week. You may take the entire month's rental cost into consideration in setting the rate paid for services furnished on the days the recipient is present. Similarly, if data show that a recipient is served in residential habilitation an average of 325 days per year and the slot is held open when the recipient is on a leave of absence, you may consider the entire yearly cost to the provider when establishing its rate of payment. However, in the rate setting process, it must be assumed that a facility will

not have a 100 percent utilization rate every day of the year. Consequently, payment rates are established by dividing the provider's total allowable costs by the number of Medicaid patient days you estimate recipients will actually utilize.

SMM, § 4442.3.B.15. In response, CMS suggests that this provision, like the one immediately preceding it (§ 4442.3.B.14), is meant to refer to an outpatient facility such as a partial hospitalization or day treatment facility, which is distinct from the resident's home and not furnishing "room and board." CMS Br. at 8, n.3. Pennsylvania cites the words "facilities providing services in residential settings" from § 4442.3.B.15 to support its claim that this part of the Manual refers to residential facilities, not outpatient settings. App. Reply Br. at 4-5.

Even if section 4442.3.B.15 applies to a state setting rates for HCBS waiver services provided in a residential setting, however, it is at best ambiguous with respect to what rent may be claimed. Its final sentence refers back to the provider's total allowable costs. As we have explained above, the federal statute and regulation establish that room and board costs are not allowable. Thus, any policy that permits allocation of some occupancy costs such as rent as a cost of habilitation or other services provided in community residential facilities clearly would not apply if those costs are also costs of room and board.

As discussed above, the method that Pennsylvania's consultant developed and that led to the claims here is unacceptable because it resulted in Pennsylvania claiming Medicaid funds for "room and board" costs that Congress excluded from reimbursement. Thus, CMS properly disallowed those claims, regardless of whether the method was a significant change to Pennsylvania's waiver.

Conclusion

For the foregoing reasons, we uphold the determinations of CMS to disallow Pennsylvania's claims for federal Medicaid financial participation in 54.1667% of its HCBS facility costs as

"habilitation" or "waiver" service costs, for the eight calendar quarters from July 2005 to June 2007, totaling \$60,936,677.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Judith A. Ballard
Presiding Board Member