Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Pennsylvania Department of Public Welfare
Docket Nos. A-15-9
Decision No. 2669
December 11, 2015

DECISION

The Centers for Medicare & Medicaid Services (CMS) disallowed $14,481,073 in federal financial participation (FFP) in administrative costs of non-emergency medical transportation services (NEMT) provided through the Pennsylvania Medical Assistance Transportation Program (MATP) consisting of $8,991,016 FFP for the quarter ending June 30, 2012 and $5,490,057 FFP for the quarter ending September 30, 2012. CMS determined that the costs had to be, but were not, included in a public assistance cost allocation plan (PACAP), and pointed to other concerns about the allowability of the costs. The Pennsylvania Department of Public Welfare (referred to as Pennsylvania or DPW) appealed.

We conclude that Pennsylvania has not shown that the disputed costs were properly allocated to Medicaid because it has not disclosed any methodology for allocating them in accordance with applicable cost principles and has not demonstrated that they were claimed in accordance with an approved PACAP. For the reasons explained further below, we uphold the disallowance in full.

Legal Authorities

The Medicaid program, established under title XIX of the Social Security Act (Act), is jointly funded by the federal government and states to provide medical assistance to financially needy and disabled persons. Act §§ 1902(a)(10)(A), 1902(e), 1902(f); 42 C.F.R. Part 435.[1] Section 1903(a) (7) of the Act generally permits states to claim FFP at a 50 percent rate in costs expended by the state and found necessary "for the proper and efficient administration" of the Medicaid program. Other provisions of section 1903(a) allow for claiming various kinds of "medical assistance" expenditures (as defined in section 1905(a)) at a state-specific rate or at various enhanced reimbursement rates for

[1] The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssacttoc.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.

specific activities (not involved here). Each state is responsible for funding its share of both the "medical assistance" provided under its state plan and the costs of administering its Medicaid program. Act §§ 1902(a)(2), 1903(a), 1905(b).

Section 1902 requires each state that chooses to participate in Medicaid to develop a state plan for medical assistance (Medicaid state plan). The state may then claim FFP at the appropriate reimbursement rate for services that are defined as medical assistance under its Medicaid state plan.

To claim administrative costs incurred by its state agency in operating its Medicaid program, a state must also have, and must claim in accordance with, an approved public assistance cost allocation plan (PACAP). 45 C.F.R. §§ 95.501, 95.502. "State agency costs" are defined as "all costs incurred by or allocable to the State agency except expenditures for financial assistance, medical vendor payments, and payments for services and goods provided directly to program recipients such as day care services, family planning services or household items . . . ." *Id*. § 95.505. The regulations expressly require that a state claim "FFP for costs associated with a program **only** in accordance with its approved" PACAP. *Id*. § 95.517(a) (emphasis added). Otherwise, the costs "improperly claimed will be disallowed." *Id*. § 95.519.

The PACAP must "[d]escribe the procedures used to identify, measure, and allocate **all costs** to each of the programs operated by the State agency," conform to the applicable accounting principles, and be compatible with the relevant state plan for operation of its public assistance programs. 45 C.F.R. § 95.507(a)(1)-(3) (emphasis added). The PACAP must include an "organization chart showing the placement of each unit whose costs are charged to the programs operated by the State agency" and a listing of all federal and non-federal programs "performed, administered, or serviced by these organizational units," with descriptions of their activities and the benefits to the federal programs. *Id.* § 95.507(b)(1)-(3).

The PACAP must provide assurance that any costs to be claimed for services provided by "a governmental agency outside the State agency" will be supported by a written agreement which must set out the services purchased, the "basis upon which the billing will be made by the provider agency (e.g. time reports, number of homes inspected, etc.)," and a stipulation of billing "based on the actual cost incurred." *Id.* § 95.507(b)(6). The required statement of assurance would be waived if the costs for such services are "specifically addressed" in a state-wide, local, or umbrella/department CAP. *Id*. Where "public assistance programs are administered by local government agencies under a State supervised system," the State agency PACAP "shall also include a cost allocation plan for the local agencies." *Id.* § 95.507(b)(7).

The PACAP must also "[c]ontain sufficient information in such detail to permit" the Department of Health and Human Services (HHS) Cost Allocation Services (CAS, previously the Division of Cost Allocation or DCA), in consultation with CMS, to "make an informed judgment on the correctness and fairness of the State's procedures for identifying, measuring, and allocating all costs to each of the programs operated by the State agency." 45 C.F.R. § 95.507(a)(4).

Allocability has historically been a basic component of allowability for all costs charged to federal grants. *See Me. Dep't of Human Servs.*, DAB No. 712, at 13 (1985) (noting that allocability is a "long-standing principle well-articulated in regulations").[2] OMB Circular A-87 – which was codified during the period at issue in appendices to 2 C.F.R. Part 225 and was made applicable to Medicaid grants by 45 C.F.R. § 92.22 (*see* 68 Fed. Reg. 52,843 (Sept. 8, 2003)) – provided that, in order for a cost to be allowable, it must be allocable to a cost objective of a grant program, and costs are allocable to a cost objective only to the extent that the relative benefits of the costs accrue to that cost objective. 2 C.F.R. Part 225, App. A, ¶ C.1.b and C.3.a. Costs that are allocable to one cost objective may not be charged to other federal grants to overcome fund deficiencies or avoid legal restrictions on grant awards. *Id.*, Att. A, ¶ C.3.c. "A cost is allocable to a particular cost objective" – a cost objective is a function, organization, or activity for which costs are incurred – "if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received." *Id.*, Att. A, ¶ C.3.a., ¶ B.11. The net effect is that when a grantee such as a state incurs costs that support or benefit more than one public assistance program (federal or otherwise), the costs generally must be allocated to each program in proportion to the benefits that each derives from the activity that generated the costs. *W. Va. Dep't of Health & Human Resources*, DAB No. 2529, at 2 (2013); *Minn. Dep't of Human Servs.*, DAB No. 1869, at 4-5 (2003).

Medicaid regulations define allowable transportation to include "expenses for transportation and other related travel expenses determined to be necessary by the agency to secure medical examinations and treatment for a beneficiary." 42 C.F.R. § 440.170(a)(1) (Eff. July 16, 2012).[3] Such expenses may include use of "ambulance, taxicab, common carrier, or other appropriate means." *Id.* § 440.170(a)(3)(i). Generally, such transportation may only be furnished "by a provider to whom a direct vendor

[2] The relevant cost principles have been codified in different locations over the years but have remained unchanged in the relevant fundamental concepts. Currently, a joint interim final rule for the federal government awarding agencies consolidates and makes consistent (with specified exceptions) guidance that had been contained in various Office of Management and Budget (OMB) Circulars, specifically, in regard to state governments, OMB Circular A-87. 78 Fed. Reg. 78,590 (Dec. 26, 2013). Effective December 26, 2014, HHS implemented the uniform rule by the "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards" published in 45 C.F.R. Part 75. *See* 79 Fed. Reg. 75,871, 75,889 (Dec. 19, 2014).

[3] A prior version of this regulation effective July 1, 2009 was in effect during part of the period at issue but the cited provisions were substantially the same.

payment can appropriately be made by the agency." *Id.* § 440.170(a)(2). The regulations provide an exception, however, for an optional state non-emergency medical transportation brokerage program. *Id.* § 440.170(a)(4). A State plan may provide for the establishment of a such a program "in order to more cost-effectively provide non-emergency medical transportation services for individuals eligible for medical assistance under the State plan who need access to medical care or services, and have no other means of transportation." *Id.* Brokerage services may include "wheelchair vans, taxis, stretcher cars, bus passes and tickets, secured transportation [for special needs], and other forms of transportation otherwise covered under the state plan." *Id.*

Standard of review

In decisions reviewing disputed disallowances, the Board "has consistently held that a state has the burden to document the allowability and allocability of its claims for FFP." *N.J. Dep't of Human Servs.*, DAB No. 2328, at 4-5 (2010) (citations omitted). For states, this burden is based on the requirement in the cost principles that costs claimed must "[b]e adequately documented" (2 C.F.R. Part 225, App. A, ¶ C.1.j) and on administrative requirements, including the requirement that grantees maintain accounting records supported by source documentation. *N.J. Dep't. of Health*, DAB No. 2497, at 4 (2013).

Factual and Procedural Background

The facts underpinning this appeal are mostly undisputed. We set out here the undisputed facts, leaving any relevant disputes of fact for later discussion in the analysis section, and explain the background leading to the current appeal.

Pennsylvania administers the Medicaid program through its State agency, DPW. CMS Corrected Response Brief (CMS Br.) at 6. Pennsylvania claims the expenses of its MATP/NEMT program, in all but one of its counties, as an administrative cost of Medicaid. State's Opening Brief Corrected (PA Br.) at 4. (Pennsylvania claims the MATP costs in Philadelphia County as medical assistance service costs – these costs are not at issue here. *Id.* at 4, n.3; CMS Br. at 6.) In one county (Northumberland), Pennsylvania contracts directly with a direct transit agency. PA Br. at 4, citing PA Ex. 3. Pennsylvania has grant agreements with each of the 65 remaining counties which subcontract in turn with local transportation vendors. *Id.*, citing PA Ex. 4 (Delaware County grant agreement submitted as an example); CMS Br. at 6.

DPW provided a handbook to the counties detailing their responsibilities under the MATP program, including how to verify eligibility, authorize and provide services and recruit providers. PA Ex. 5 passim; CMS Br. at 6-7. The MATP handbook provides a list of additional funding sources, besides Medicaid, which may be available for some county transportation programs. PA Ex. 5, at 66; CMS Br. at 7.

Pennsylvania's PACAP mentions the MATP only once, on a page listing the activities of DPW components generally. PA Br. at 5, citing PA Ex. 6. That page shows the Bureau of Managed Care Operations within DPW (the state agency) as responsible for the MATP, as well as for managed care programs. PA Ex. 6. It also shows that DPW's Division of Enrollment Assistance & Transportation Programs provides oversight of NEMT and coordinates with other offices and State agencies to ensure that the counties meet requirements for the program. *Id*.

Pennsylvania acknowledges that the PACAP "contains no detail on county administrative costs." PA Br. at 5. Indeed, it is not disputed that the single PACAP reference to the MATP provides no information at all about how the MATP overall (or the NEMT specifically) will be operated. For example, the PACAP does not state that the programs will be operated by the counties, nor does the PACAP indicate whether the State intends to claim administrative costs incurred outside DPW for their operation. Nowhere does the PACAP mention how any such costs of operating and administering the transportation systems would be allocated between Medicaid and any other benefitting funding sources.

CMS reports that the disallowance at issue in this case arose initially from a CMS review of Pennsylvania's treatment of administrative claims following a 2010 Inspector General audit of how Pennsylvania allocated administrative costs of its Aging Waiver program. CMS Br. at 7. Those costs were at issue in a recently decided case (Board docket number A-14-105) involving Pennsylvania's claims for waiver administrative costs incurred at the county level. *Penn. Dep't of Public Welfare*, DAB No. 2653 (2015). In 2012, according to CMS, its review involved requesting and examining supporting documentation relating to four of the 66 counties for which MATP administrative claims are now at issue. CMS Br. at 7-8. CMS questioned the allowability of items shown on the spreadsheets provided for those counties (including costs for "no-show" rides, use of estimates for some line items, and indirect costs of the county agencies operating the program). *Id*. at 8, *citing* PA Ex. 11 (Corrected Pennypacker Decl.). CMS further determined that Pennsylvania "did not have an allocation methodology" in its approved PACAP "to support claiming the MATP costs," and therefore proceeded to defer the costs for the quarters ending June 30 and September 30, 2012. CMS Br. at 8, *citing* CMS Exs. 9-10. Pennsylvania submitted proposed amendments to its PACAP to address the MATP costs in 2012 and again in 2013, but CMS did not consider them acceptable. CMS Br. at 8-9, citing CMS Ex. 17.

CMS proceeded to disallow $14,481,073 in FFP for the MATP/NEMT costs for the two quarters at issue. This appeal ensued.

Issue

The central issue is whether Pennsylvania has demonstrated that it properly allocated the disputed administrative costs incurred by the counties operating the MATP through an approved cost allocation methodology.

Analysis

The dispositive questions in this case are largely the same as those the Board addressed in the recent Pennsylvania Aging Waiver case. DAB No. 2653. As in that case, the parties here spend much of their briefing arguing about whether Pennsylvania was required to include with its PACAP separate CAPs for the counties operating the program at issue and administering the services and whether a statement that Pennsylvania had agreements with local agencies sufficiently met applicable requirements. And, as in the earlier case, we conclude that Pennsylvania failed to meet cost allocation requirements more fundamental than specific PACAP format or content requirements. As we explain below, we conclude that Pennsylvania failed to demonstrate that it had any approved methodology to ensure that the disputed costs were properly allocated to Medicaid. Having concluded that the costs at issue were properly disallowed because they were not properly allocated to Medicaid under an approved PACAP, we need not address CMS's other concerns about the allowability of some of the costs. After explaining the reasons for that conclusion, we address and reject Pennsylvania's other challenges to the disallowance.

1. Pennsylvania failed to meet its fundamental responsibility to demonstrate that all administrative costs claimed are properly allocable to Medicaid.

A. Pennsylvania had the burden of showing proper allocation of administrative costs.

The basic requirements for cost allocation arise from cost principles. As the Board explained in the prior Pennsylvania case already mentioned, the "core concept is that a federal program may not be charged for any costs of activities from which that program does not benefit – and that when multiple programs receive some benefit from an activity, the costs of that activity should be shared in a manner that fairly reflects the relative degree to which each benefits." DAB No. 2653, at 9. The state is responsible for developing and documenting an appropriate methodology to ensure that specific costs of administering a program are allocated in a manner compliant with the applicable requirements. *See* 45 C.F.R. § 95.507(a) (requiring submission of PACAP for "State agency" costs); *Mass. Dep't of Social Servs.*, DAB No. 1308, at 18 (1992) (stating that the regulations in 45 C.F.R. §§ 95.501-.519 "contemplate that a state is responsible for proposing an allocation method since the state has the best knowledge of its own administrative structure and organization").

The first step in demonstrating that administrative costs have been properly allocated, once a disallowance has called that into question, is for the state to explain the methodology used for allocating the costs. This obligation follows from the long-established rule that "[i]n general, the burden is on the entity challenging a disallowance to demonstrate that the disallowed costs are, in fact, allocable to the program in question and meet other applicable legal requirements for allowability." *W. Va. Dep't of Health & Human Resources*, DAB No. 2529 (2013), *citing New Jersey Dep't of Human Servs.*, DAB No. 2415, at 3 (2011); *Ark. Dept. of Information Syst.*, DAB No. 2010, at 7 (2006); *see also Mo. Dep't. of Social Servs.*, DAB No. 1783, at 25 (2001) (grantee bears burden of documenting allowability of claims, including "demonstrating that its allocation methodology was reasonable"). Logic dictates that before the agency can evaluate whether claims were properly allocated, the agency must know what method was used to allocate them and must determine that the methodology was reasonable. As explained above, a state is generally in the best position to know what methodology it used in making claims for FFP and is responsible for communicating that methodology to the granting agency.

This is true even if, as Pennsylvania argues, the specific methodology was developed by each county in its CAP. The State retained the responsibility for auditing the counties' costs and preparing the claims for FFP based on them. *See* PA Br. at 4-5 (State gives counties advance payments based on State allocation and then reconciles to actual costs based on audits); PA Ex. 4, at 1 (example of DPW agreement with one county showing county obligation to keep records required by State subject to review and audit); PA Ex. 5, at App. A (MATP Handbook, fiscal requirements for counties to report to DPW including record keeping, record retention, and audit requirements); PA Ex. 10 (example of cost spreadsheet from one county for two quarters). Pennsylvania itself, in explaining why it should not have been required to submit the counties' CAPs with its own PACAP, affirms that "[s]upervision" of CAPs by "these other agencies is the responsibility of the public assistance agency," here DPW. PA Reply Br. at 8. Plainly, to supervise and audit the counties' CAPs and cost submissions, Pennsylvania would have had to ascertain what methodology (or methodologies) the counties were using. Equally plainly, since Pennsylvania did not submit the county CAPs with its PACAP, the State, rather than the federal party, had the best access to the information about the methodology or methodologies on which it based its claims for the counties' MATP costs.

Furthermore, Pennsylvania has not disputed CMS's contention that not all clients served by the transportation systems are Medicaid recipients and that other programs and funding streams participate in the transportation programs. CMS Br. at 6, *citing* PA Ex. 5, at 88. Pennsylvania similarly does not contest CMS's statement that counties may draw on 17 funding streams in addition to MATP to finance their transportation programs. *Id*. at 7, citing PA Ex. 5, at 66. The State MATP Handbook calls for counties, "[w]henever possible," to integrate their MATP transportation "with transportation services provided by other [DPW] programs, programs funded by the

Department of Aging, and Public Transit Services provided by the Department of Transportation," using whatever administrative method is best suited to their locale. PA Ex. 5, at 2 (internal numbering).

Pennsylvania therefore cannot, and does not, contend that the administrative costs of the counties' transportation programs could properly be charged entirely to Medicaid. Indeed, Pennsylvania's MATP Handbook expressly requires that '[a]ll counties and prime contractors with more than one funding source for transportation must utilize a written cost allocation plan that demonstrates equitable cost distribution." PA Ex. 5, at 94. Clearly, therefore, basic cost principles require that these costs be allocated in a manner ensuring that Medicaid does not bear more than its fair share of the costs as reflected in the relative benefits received. Pennsylvania knew this was required, and required its counties to make a written record of doing so, subject to State audit. Pennsylvania stresses that the MATP costs were "strictly a cost-reimbursement arrangement with the counties," reconciling state advances to "actual allowable expenditures" incurred by the counties. PA Br. at 4-5. It is certainly true that only actual, allowable costs are eligible for reimbursement. However, the fact that a cost was actually incurred and was an allowable type of cost does not substitute for meeting the requirement that the cost be incurred for the benefit of the Medicaid program. The latter requirement means that actual, allowable costs incurred in administering transportation that is not limited to Medicaid recipients and that benefits programs in addition to Medicaid must still be allocated by an appropriate and approved methodology.

We therefore conclude that Pennsylvania was responsible for demonstrating that the costs at issue were properly allocable to Medicaid. Even apart from the issue of disclosure in the PACAP, and even more fundamentally, Pennsylvania had to demonstrate in this appeal that some reasonable methodology was used to allocate MATP administrative costs. Pennsylvania has remained unwilling or unable to do so. Pennsylvania has not offered at any point in these proceedings any explanation of how the costs incurred by the counties in operating the transportation systems are allocated to various programs that benefit from them.

Absent such an explanation, we do not see how Pennsylvania could claim to show that all the costs were properly allocated. We discuss below the record concerning the allocation of these costs and explain why the evidence and contentions offered by Pennsylvania in this appeal do not establish the required showing.

As we explain in the next section, moreover, if Pennsylvania had a methodology for allocating the counties' MATP costs, that methodology should have been disclosed in its approved PACAP.

B. Pennsylvania did not show that the costs at issue were allocated pursuant to an approved methodology.

Pennsylvania claims that CMS did not, prior to this disallowance, "question the omission of MATP costs" from its PACAP, and that Pennsylvania therefore "had no reason to think that inclusion of MATP costs into the PACAP was required." PA Br. at 5. Pennsylvania apparently contends that it did not think it needed to disclose the MATP administrative costs, because pursuant to its state-administered Medicaid program, its PACAP need not include all the individual county CAPs so long as the State stipulated in the PACAP that any costs for services provided by a governmental agency outside of DPW are supported by written agreements including specified information. PA Br. at 10-15, citing 45 C.F.R. § 95.507(b)(6); *but see* PA Reply Br. at 8 (State "acknowledges that county costs of administration of its MATP . . . must be addressed in the State PACAP," but reads regulation as allowing it "to satisfy this requirement by including a simple statement in its PACAP").

This argument, however, treats the inclusion of complete CAPs from 66 counties as the only alternative to complete silence about Pennsylvania's intention to claim any administrative costs for the MATP program and about what methodology (or methodologies) would be used to allocate such costs among benefitting programs. Regardless of whether Pennsylvania had to include the county CAPs and regardless of its stipulation about having required agreements in place with any non-DPW agencies, other regulatory provisions obliged Pennsylvania to disclose in the PACAP the nature of any administrative costs to be allocated to Medicaid and the methodology to be used for that allocation.

The overarching requirements for developing and submitting statewide PACAPs for approval require that a state submit a PACAP that shall:

> (1) **Describe the procedures used to identify, measure, and allocate all costs to each of the programs operated by the State agency**;
>
> (2) Conform to the accounting principles and standards prescribed in Office of Management and Budget Circular A–87, and other pertinent Department regulations and instructions;
>
> (3) Be compatible with the State plan for public assistance programs . . . ; and

> (4) **Contain sufficient information in such detail** to permit the Director, Division of Cost Allocation [now CAS], after consulting with the Operating Divisions, **to make an informed judgment** on the correctness and fairness of the State's procedures for identifying, measuring, and allocating all costs to each of the programs operated by the State agency.

45 C.F.R. § 95.507(a)(emphasis added). In this case, as in the prior Pennsylvania case involving Aging Waiver administrative costs, Pennsylvania emphasizes that its Medicaid program is state-operated but never comes to grips with the significance of this claim for its responsibilities under section 95.507(a). DAB No. 2653, at 12. As the Board explained in its decision in the prior case, the plain text of the regulation demands that the PACAP describe how all costs to be claimed for programs operated by the State agency are going to be identified, measured and allocated. *Id*. Since Pennsylvania says that the MATP is part of its state-operated Medicaid program which is administered by its State agency, its administrative costs and how they are to be allocated must be described in the PACAP even where the State agency has delegated some of the administrative activities for its Medicaid program to other components or local governments.

Yet, Pennsylvania identifies no description in the PACAP of the type of administrative costs to be allocated or the "procedures used to identify, measure and allocate" those costs. Without that information, neither CAS nor CMS could reasonably be enabled to "make an informed judgment on the correctness and fairness" of those procedures. This failure to comply with section 95.507(a)(1) and (4), here as in the prior case, is in itself sufficient to support the disallowance of Pennsylvania's claims.

Pennsylvania has also failed to comply with the requirements of section 95.507(b) which delineates specific contents of an approvable PACAP as follows:

> (1) An organizational chart showing the placement of each unit whose costs are charged to the programs operated by the State agency.
>
> (2) A listing of all Federal and all non-Federal programs performed, administered, or serviced by these organizational units.
>
> (3) A description of the activities performed by each organizational unit and, where not self-explanatory an explanation of the benefits provided to Federal programs.
>
> (4) The procedures used to identify, measure, and allocate all costs to each benefiting program and activity (including activities subject to different rates of FFP).

> (5) The estimated cost impact resulting from the proposed changes to a previously approved plan. . . .
>
> (6) A statement stipulating that wherever costs are claimed for services provided by a governmental agency outside the State agency, that they will be supported by a written agreement that includes, at a minimum (i) the specific service(s) being purchased, (ii) the basis upon which the billing will be made by the provider agency (e.g. time reports, number of homes inspected, etc.) and (iii) a stipulation that the billing will be based on the actual cost incurred. This statement would not be required if the costs involved are specifically addressed in a State-wide cost allocation plan, local-wide cost allocation plan, or an umbrella/department cost allocation plan.
>
> (7) If the public assistance programs are administered by local government agencies under a State supervised system, the overall State agency cost allocation plan shall also include a cost allocation plan for the local agencies. . . .

45 C.F.R. § 95.507(b).

Much of the briefing in this case, as we have mentioned, discusses whether the requirements of subsections 95.507(b)(6) and (7) applied and were met. In this case, as in the prior case, however, we do not find it necessary to resolve the questions of whether Pennsylvania should have included all the county CAPs with its PACAP submission and/or whether its statement that costs incurred by other governmental agencies outside DPW were supported by compliant agreements was accurate or sufficient to replace the submission of the CAPs. In addition to the failings already discussed, we agree with CMS that Pennsylvania did not provide the information required by section 95.507(b)(1)-(4). CMS Br. at 9.

Section 95.507(b)(4) reiterates that the "procedures used to identify, measure, and allocate **all** costs to **each** benefiting program and activity" (emphasis added) must be included in the PACAP itself. As noted, Pennsylvania admittedly neither identified the county's administrative costs for MATP nor described any procedures to allocate them. Furthermore, even were Pennsylvania not required to submit county CAPs, that would not explain its omission of all information about the non-State units whose MATP costs were being charged to the Medicaid program operated by the State as required by section 95.507(b)(1)-(3). (As mentioned earlier, the PACAP mentions MATP only in reference to the State components overseeing the transportation program. PA Ex. 6.)

For these reasons, we conclude that Pennsylvania did not claim the costs of its counties' administration of the MATP in accordance with an approved methodology.

We turn next to Pennsylvania's argument that it was not adequately informed of the need to demonstrate that it had and used an appropriate allocation methodology and that, if it was required to make such a demonstration in this proceeding, it should have been permitted additional opportunities to do so.

C. Pennsylvania had adequate notice of the need to explain its methodology and a full opportunity to do so.

Pennsylvania argues that CMS only belatedly introduced (in the CMS response brief)[4] the argument that Pennsylvania failed to show that the claimed costs were fairly allocated to Medicaid. PA Reply Br. at 2, *citing* CMS Br. at 1-2, 15-16. Pennsylvania does not deny that it had the opportunity to answer the argument in the reply brief provided for under normal Board procedures, and indeed Pennsylvania has, as we will discuss later, undertaken to supplement the record even after briefing closed.

Pennsylvania should have understood from the disallowance letter, and from its discussions with CMS after the Inspector General's audit identified problems with allocation of other county administrative costs, that CMS was concerned about how Pennsylvania was allocating administrative costs incurred at the county level. CMS clearly highlighted that no cost allocation methodologies were provided for the 66 counties involved as part of the approved PACAP. Pennsylvania certainly was able to argue, and present evidence, that it had disclosed the methodology being used in some manner other than submitting the county CAPs. Even if we considered the disallowance insufficient in itself to make clear that Pennsylvania needed to raise any such defense, we would find that Pennsylvania had adequate notice in the proceedings in this appeal. The Board has long held that a federal agency may amend or clarify its legal justification for a disallowance so long as the recipient is given adequate notice and opportunity to respond. *The Children's Ctr., Inc*., DAB No. 2506, at 9 (2013) (and cases cited therein). Pennsylvania itself recognizes the Board's longstanding practice. PA Reply Br. at 3, *citing Mass. Exec. Office of HHS*, DAB No. 2218 (2008); *see also W. Central Wisc. Comm. Action Agency*, DAB No. 861, at 7 (1987). CMS's response brief clearly identified the issue, and Pennsylvania had the opportunity to respond in its reply brief.

According to Pennsylvania, however, the effect of allowing CMS to argue that the cost allocation methodology was not disclosed in the PACAP or even during this appeal would be that Pennsylvania "loses its appeal because it has not produced spreadsheets, affidavits, and other evidence from 66 Pennsylvania counties showing that each and every county properly allocated its costs" to the MATP/NETP during the relevant period.

[4] This appeal arose under the Board's general procedures set out in 45 C.F.R. Part 16 which provide for the appellant to submit a brief and appeal file containing all documents supporting its claim that are important to the Board's decision-making. 45 C.F.R. § 16.8(a). The respondent, here CMS, must then submit its brief and must supplement the appeal file with any documents supporting its position. *Id*. at § 16.8(b). The appellant then has the opportunity to submit a reply brief. *Id*. at § 16.8(c).

PA Reply Br. at 2. Pennsylvania asked for a "preliminary ruling" on "whether the numerous documentation issues raised by [CMS in its response brief] are properly before the Board" rather than merely the "four legal issues" which Pennsylvania asserts are involved.[5] State's Request for a Preliminary Ruling and Request to Develop the Record (Ruling Request) at 1 (April 15, 2015). Pennsylvania contends that resolving any of the factual issues which Pennsylvania contends were newly raised in CMS's response brief would require "huge volumes of documentation not previously reviewed." *Id*.[6] Therefore, according to Pennsylvania, we should not reach any "documentation" issues raised by CMS unless the legal issues are resolved in Pennsylvania's favor, in which case any remaining questions about documentation could be explored on remand. Alternatively, Pennsylvania argues, the briefing framework is inadequate to allow it to respond to the factual arguments and the Board should provide it with an "opportunity to further develop the record to address these issues" and "a conference to discuss further proceedings." *Id*.

CMS disputes that the issue of whether Pennsylvania fairly allocated the administrative costs of its MATP program was first raised in its response brief. CMS Sur-Reply at 1. Instead, CMS contends that "whether DPW fairly allocated its administrative costs to Medicaid has always been an issue in this disallowance which is based on DPW's failure to identify in its [PACAP] how the costs were allocated." *Id*. Consequently, CMS denies that any preliminary ruling on the scope of the issues is needed since no new issue was introduced by its response brief. CMS Objection to DPW's Request at 1 (April 24, 2015). CMS argues that the point it was making in that brief was that Pennsylvania had not even made an attempt to show that the costs were allocated fairly to Medicaid, even though not included in its PACAP. CMS Sur-Reply at 2. CMS further argues that

[5] It is not entirely clear what four legal issues Pennsylvania means to reference. Pennsylvania's initial brief lists nine "issues," all of them in the nature of affirmative defenses. PA Br. at 8. Later, Pennsylvania asserts that the "main issues" are whether it had to "include MATP county and vendor costs in its PACAP" and whether such costs had to be claimed using a negotiated indirect cost rate. *Id*. at 9. The originating disallowance letter explained that the claims were disallowed because Pennsylvania did not have an approved PACAP authorizing their allocation to Medicaid and that a pending amendment which would be effective October 1, 2012 (if eventually approved) could not serve to support claims for periods prior to that date. PA Notice of Appeal, attachment at 1-2. The letter then noted three "[o]ther considerations" for the disallowance based on CMS's limited review of claims from one county to assess allowability of the costs included in NEMT claims. *Id*. at 2.

[6] In the same document which was submitted after its reply brief, Pennsylvania seeks "an opportunity to develop the record regarding [CMS] inaction" as to Pennsylvania's PACAP treatment of the administrative costs at issue from 1983 through 2012. Ruling Request at 2. Pennsylvania acknowledges that the Board recently rejected a similar request in a ruling attached to the decision in DAB Docket No. A-14-105, but seeks to offer more precise reasons here. *Id*. We find nothing persuasive or new in Pennsylvania's arguments that CMS silently changed its interpretation of 45 C.F.R. § 95.506 or, alternatively, that Pennsylvania lacked "fair notice" of CMS's position if the "inaction" was due to unawareness of how Pennsylvania was handling administrative costs incurred by the counties. *Id*. As Pennsylvania admits, the Board will not order fishing expeditions (whether sought early or late in a case) to explore speculation about questions which do not materially affect the resolution of the matter before us. *Id.*, n.1. We therefore deny Pennsylvania's request for record development on this issue.

Pennsylvania should have known that it bore the burden of documenting the allowability (including the allocability) of its claims in a disallowance action. *Id*., citing *Ill. Dep't of Public Aid*, DAB No. 2021 (2006).

As discussed above, we agree that Pennsylvania bore the burden of documenting allocability. We also agree that it should have been apparent to Pennsylvania throughout this process that the methodology by which MATP administrative costs were being allocated was at issue. Furthermore, even if we agreed (which we do not) that Pennsylvania only learned of the issue from the CMS response brief, Pennsylvania could have provided the relevant information with its reply brief.

Instead of doing so, Pennsylvania seeks to derail the proceedings after many months of record development by claiming surprise, asking to conduct massive discovery and proposing time-consuming procedures. We find the position Pennsylvania takes in its motion to be disingenuous and dilatory. In essence, Pennsylvania mischaracterizes the nature of the failure alleged in this case and hence exaggerates the evidence required to demonstrate compliance. The failure for which Pennsylvania is faulted is not failing to document that every cost in every county at every period at issue was allocated properly. Rather, Pennsylvania has failed to establish that <u>any</u> methodology at all was developed and implemented (much less that the methodology was reasonable or approved) to allocate which costs incurred by the counties should be charged to Medicaid. To rebut the evidence showing this failure, Pennsylvania needed to identify the methodology and demonstrate that it was appropriate and applicable. If some or all of the counties used the same methodology, Pennsylvania could have, for example, provided affidavits explaining that methodology and/or applicable excerpts from a representative county CAP. If counties had multiple methodologies, similar evidence might be necessary to explain each one. If Pennsylvania had thus documented <u>some</u> allocation methodology, the question <u>might</u> then arise whether it was in fact implemented consistently. But absent a methodology against which to test implementation, documentation of individual county costs would not be useful. We need not either review source documentation ourselves or remand for such a further review for each county in the present case because Pennsylvania has nowhere shown the existence of any allocation methodology.

Moreover, Pennsylvania has asserted that, as part of its state-supervised Medicaid program, it is responsible for supervising the cost allocation plans of any governmental entities outside of DPW that incur administrative costs. PA Reply Br. at 8. While Pennsylvania makes this assertion in an effort to explain why it was not required to submit the county CAPs with the state PACAP for "advance Federal review" (*id*.), the obvious implication is that Pennsylvania should have been monitoring and approving the counties' allocation methodologies long before this disallowance. Further, Pennsylvania asserts, as we have noted, that the counties' expenditures were audited before payment and that all the counties were required to have written cost allocation plans that covered transportation costs. PA Br. at 4-5; PA Ex. 5, at 95. Therefore, we find less than credible

Pennsylvania's claims that it could not respond to the question of what methodology was used to allocate these costs without the "assembly of huge volumes of documentation not previously reviewed." Ruling Request at 1. Pennsylvania provided no explanation of why it did not already have, or at a minimum could not readily obtain, the information needed to at least explain the methodology or methodologies on which it based its claims.

Further, Pennsylvania argues that its obligation to provide relevant documentation is conditioned on CMS specifying what documentation is required. Thus, Pennsylvania states:

> Reviewing documentation in the first instance is the job of Agency staff, who incidentally, could have obtained and reviewed the single audits, accompanying working papers, county cost allocation plans, and other documentation of costs at any time prior to going to a disallowance. The Agency must ask for the specific documentation it wants to review before the State can be expected to produce it.

PA Reply Br. at 3-4 (emphasis in original).

This proposition stands the review process on its head. As pointed out in its sur-reply, CMS repeatedly requested all documentation in support of the counties' MATP claims in its deferral notices beginning in 2012. CMS Sur-Reply at 3; *e.g.*, CMS Ex. 9, at 3; CMS Ex. 10, at 2. The same letters make clear that CMS did review what documentation was provided – mainly the invoices from one county – which generated the additional concerns mentioned in the deferral letters and the disallowance letter. Pennsylvania's letter in response to the deferrals complained that CMS is inferring issues as to all 66 counties based on invoices that cover only 18 percent of the $95 million spent in a fiscal year and asked CMS to "recognize that we employ various methods and models to assure transportation for our recipients." CMS Ex. 11, at 1. Pennsylvania went on to offer legal arguments in response to CMS's concerns but did not indicate that any supporting documentation would be forthcoming. To require CMS to go beyond requesting the documentation on which a state relies in submitting its claims and instead to specify in advance the nature or form which that documentation should take would be unreasonable, indeed likely impossible. Each state designs and operates its own Medicaid program and collects and maintains documentation in whatever form suits that particular program. CMS does not dictate the form of documentation required and hence cannot predict what documentation the State relied on for these claims or which "methods and models" it might have been employing. Once CMS questioned particular claims and requested the supporting documentation, Pennsylvania should have been able to produce the relevant documentation.

Pennsylvania also asks that, should the Board rule that any issues of fact are properly to be addressed in this appeal, it conduct a conference to discuss further proceedings and permit Pennsylvania a further opportunity to develop the record. In its reply brief, Pennsylvania described the contemplated proceedings as involving "a trial-type hearing at which the State would produce its documentation, and the witnesses needed to explain it, and the Board would decide whether the documentation suffices." PA Reply Br. at 4.

Given the belated, expansive and unfocused nature of Pennsylvania's request and its failure to reasonably clarify why it could not have produced its documentation earlier or what witnesses would be required to explain that documentation, we are not willing to indefinitely prolong the process for additional proceedings. We find that Pennsylvania has had ample opportunity to present its case. For all these reasons, we deny the request for a preliminary ruling.

D. The costs at issue were claimed as administrative agency costs and therefore required allocation.

Arranging for transportation to access medical assistance is a category of case management. Case management generally, like arranging transportation, may sometimes be claimed as an administrative cost (i.e., an activity for which the state agency incurs costs to facilitate recipients' access to services) and sometimes as itself a direct service cost (i.e., the provision of transportation or case management services to an individual recipient as medical assistance). In some situations, states may elect which way to treat certain case management costs, including arranging for transportation to obtain medical treatment and services. CMS Br. at 10-11; CMS Ex. 1, at 6-7. Pennsylvania is well aware of this option, since it chose to claim Philadelphia County's transportation program costs as Medicaid service expenditures and those of the other 66 counties as administrative expenditures. PA Br. at 4, and n.3. Nevertheless, Pennsylvania now seeks to reframe administrative costs incurred by those 66 counties in arranging transportation as direct services costs rather than as costs of administering the Medicaid program.

Even though Pennsylvania admits it claimed all the costs at issue as administrative costs, Pennsylvania denies that any allocation was required on the ground that "vendor level transportation costs" are for "services . . . provided directly to program recipients" rather than "state agency costs." PA Br. at 9, quoting 45 C.F.R. §§ 95.503 and 95.505. Pennsylvania also asserts that "a portion of the disallowance" includes direct payments to Medicaid recipients for mileage or transit fares, citing two lines on the spreadsheet for one period of time from one county. *Id*., citing PA Ex. 10. Pennsylvania offers no

evidence, however, to establish what share of the disallowance might be attributable to such payments to vendors or recipients, as opposed to the counties' expenditures to set up and manage transportation programs.[7]

As explained earlier, "state agency costs" include "all costs incurred by or allocable to the State agency" with certain exceptions. 45 C.F.R. § 95.505. The exceptions include "payments for services and goods provided directly to program recipients such as day care services, family planning services or household goods . . . ." State agency costs for administering the Medicaid program must be properly allocable to Medicaid and are reimbursed at the 50 percent rate. Costs for direct services under Medicaid are claimed as medical assistance and are reimbursed at the state-specific rate. Pennsylvania seeks to create a third category of Medicaid costs which may be claimed as administrative for reimbursement at the rate set for administration of the program but which are nevertheless not state agency administration costs for purposes of the requirement that such costs must be fairly allocable to Medicaid. Pennsylvania does not identify any authority for such a category.

Essentially, Pennsylvania argues that permitting states to claim some activities as administrative that could also be characterized as a medical assistance service and then requiring the costs of those activities to be allocated in a PACAP violates cross-cutting cost allocation requirements. According to Pennsylvania, this result follows from the fact that the Department-wide application of section 95.505 does not itself classify expenditures as administrative or service in nature. PA Reply Br. at 4 (noting that the regulation does not use the term "administrative cost"). Rather, Pennsylvania argues, the regulatory language covers all state agency costs but then simply excludes direct service costs from the allocation requirements. *Id*. Further, Pennsylvania contends that "payments for services and goods provided directly to program recipients" must "indisputably" include vendor payments to transportation providers, "even if a State chooses to claim the expenditures as an administrative cost." *Id*.

Pennsylvania made an analogous argument in the prior case (DAB No. 2653) in relation to all case management costs which the Board rejected. DAB No. 2653, at 17. We similarly conclude here that Pennsylvania cannot have it both ways in relation to the counties' transportation costs.

[7] Other line items in the spreadsheet include, for example, county salaries and benefits, space costs, office materials and furniture, data processing, etc. PA Ex. 10. The State MATP Handbook describes counties' responsibilities as including educating consumers about the program, offering a MATP telephone line, coordinating with local programs and stakeholders, verifying eligibility, authorizing services, schedules and trips, recruiting a provider network, tracking complaints and maintaining consumer confidentiality. PA Ex. 5, at 3. Clearly, the claimed costs are not limited to payments to vendors and recipients.

The State Medicaid Manual (SMM) provides longstanding guidance about how to claim case management activities of various kinds. Case management "is an activity which assists individuals eligible for Medicaid in gaining and coordinating access to necessary care and services . . . ." CMS Ex. 1, at 1 (SMM § 4302.A). As the SMM explains, statutory changes in 1986 added case management services to those which may be provided as medical assistance, but "aspects of case management have been an integral part of the Medicaid program since its inception," in order to assist patients in "locating and receiving" services. *Id.*; Act § 1915(g). In order to offer case management as an optional medical assistance service, a state must expressly describe such services in its state plan. CMS Ex. 1, at 3-6 (SMM § 4302.1-2). It must ensure that payment for such services will not "duplicate payments made to public agencies or private entities under other program authorities for this same purpose." CMS Ex. 1, at 6 (SMM § 4302.2.F). The state must "differentiate between case management activities which may be properly claimed at the service match . . . and case management services which are appropriate for FFP at the administrative match under the State plan . . . ." *Id.* (SMM § 4302.2.G).

The categories are not "mutually exclusive," and some activities may be appropriately eligible to be claimed under either rate. *Id.* "Examples of case management activities that may be claimed at either the administrative or service match rate entail providing assistance to individuals to gain access to services listed in the State plan, including medical care and transportation." *Id.* In situations where "an activity may qualify as either a Medicaid service or an administrative service," the state may "classify the function in either category" but must make the decision "prior to claiming FFP because of the different rules which apply to each type of function under the Medicaid program." *Id.* For example, "[a]ll case management services provided as medical assistance . . . must be described in the State plan . . . [and] be provided by a qualified provider as defined in the State plan." CMS Ex. 1, at 7 (SMM § 4302.2.G.1). On the other hand, case management activities claimed as administrative must be documented in a manner that allows CMS "to determine whether the activities are necessary for the proper and efficient administration of the State plan," which may include "arranging transportation for a recipient" to an appointment for Medicaid-covered

services. *Id*. at 7-8 (SMM § 4302.2.G.2).[8] Administrative case management activities "may be performed by an entity" other than the state Medicaid agency, but if so, an interagency agreement must be in place, and "the costs for these activities must be included in a cost allocation plan submitted to and approved by" CMS.[9] *Id*.

The preamble to the 2007 interim final rule regarding case management similarly explained that, while some case management activities may indeed be direct services, those case management activities which constitute "the proper and efficient administration of the Medicaid State plan," i.e., those which are "commonly referred to, by States and others, as 'administrative case management,'" may be claimed as administrative costs but must be "specified" in the state's PACAP. 72 Fed. Reg. 68,077, 68,087-88 (Dec. 4, 2007). The preamble also prohibits a state from claiming as administrative case management any costs that "are an integral part or extension of a direct medical service." *Id*. at 68,088. Thus, as the Board explained in DAB No. 2653, the fact that some claimed administrative costs may be associated with case management services provided directly to Medicaid recipients does not alter their identity as administrative costs for allocability purposes. DAB No. 2653, at 17.

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[8] Pennsylvania denies that transportation is necessarily a case management activity saying that THE SMM "does not say that payments to the transportation vendors themselves are within the scope of case management." PA Reply Br. at 6 (emphasis in original). We disagree. The SMM provisions above read as a whole clearly treat arranging transportation as a case management activity that may be claimed either as medical assistance or as administrative as appropriate. Direct payments to vendors may well be more appropriately classified as case management services claimable as medical assistance, rather than as administrative case management, but they are still case management. CMS also notes that a 1994 letter to State Medicaid Directors informed DPW that any "allowable administrative cost . . . must be included in a cost allocation plan . . . ." CMS Br. at 12, *quoting* PA Ex. 15, at 4, 6. The thrust of the letter is to assist states in distinguishing the then relatively new category of targeted case management as medical assistance from the long-standing category of administrative case management. PA Ex. 15 passim. Pennsylvania argues that the letter would conflict with the cost allocation regulation if read to apply to direct services and further challenges the "validity" of the letter as not being a proper interpretive statement. PA Reply Br. at 6-7, and n.5. Nothing in the cost allocation regulation requires CMS to treat costs as administrative but exempt them from allocation. As set out in the text, if some of the claims relate to direct services or payments to recipients, they may be disallowed on that basis. If they are properly claimed as administrative, they are not direct services. We need not resolve the challenge to 1994 letter's "validity," because we do not rely on it as distinct authority but merely note that the explanations in the letter demonstrate that the interpretation and application of the principles in it go back decades and that Pennsylvania has had ample notice of them.

[9] We see no inconsistency between the SMM discussion and the CMS guide for transportation providers which, as Pennsylvania points out, refers at times to transportation "services." PA Reply Br. at 4-5, citing PA Ex. 17 (CMS "toolkit" for MATP providers). The toolkit distinguishes between how states may administer transportation programs (for example, through brokers, as a managed care benefit, or through direct state management) and how provider entities (vendors, taxi companies, public transit, or private arrangements) may provide transportation services. PA Ex. 17, at 4-8. Certainly, nothing in the guide hints that states may claim administrative costs of arranging for transportation but not allocate those costs between Medicaid and any other benefiting programs.

Pennsylvania chose to characterize all the costs at issue as administrative in nature in its claims, and did not treat them as direct services to individual recipients. If the State's characterization was accurate, the expenditures are State agency costs which must be allocated in order to determine what share was necessary for the proper and efficient administration of Medicaid in Pennsylvania, a determination made through the PACAP approval process. If the State's characterization was inaccurate, the costs could only be claimed as medical assistance. To claim them as medical assistance, Pennsylvania would have had to include them as such in its Medicaid State plan and to submit timely claims as explained below. In any event, even if Pennsylvania were correct that some costs claimed as administrative costs were not State agency costs for administering its Medicaid program but rather medical assistance direct services to Medicaid recipients, we would uphold the disallowance of the claims because they should not have been claimed as administrative costs in the first place.

E. Conclusion on failure to demonstrate proper cost allocation

We conclude that Pennsylvania was required to demonstrate that all administrative costs incurred by or allocable to its State agency were allocated pursuant to a methodology that ensured that Medicaid was charged only to the extent it received the relative benefits. Although Pennsylvania claimed that it oversaw the counties' operation of the transportation program and required counties to use appropriate methodology, Pennsylvania failed to explain what methodology was used.

We further conclude that the costs of operating the MATP had to be allocated by a methodology approved through the PACAP process to ensure that they were necessary for the proper and efficient administration of the Medicaid program. Pennsylvania admits that the PACAP contained no disclosure of these costs or explanation of how they were allocated (beyond a brief mention of state components overseeing MATP).

We therefore uphold the disallowance in full.

We need not address whether the claims were also unallowable for other reasons. We therefore do not discuss CMS's additional concerns set out in the disallowance, such as whether some portion of the claims was based on estimates, whether the cost of "no shows" was permissible, or whether county agencies' indirect costs were claimable.

We explain in the next section why Pennsylvania's other arguments that the disallowance is improper do not alter our conclusion.

2. Pennsylvania has not shown that CMS could not properly take this disallowance under the circumstances shown in the record.

Pennsylvania raises a number of challenges here which were also raised and rejected in DAB No. 2653. We discuss each of them briefly below and reject them for the same reasons as in the prior case. We also discuss Pennsylvania's belated additions to the record and CMS' objections thereto.

A. CMS was not obliged to proceed through a state plan dispute process.

Regulations at 42 C.F.R. Part 430, subpart D, provide for a hearing on whether state Medicaid plans and practice conform to federal requirements. These provisions apply to appeals of CMS decisions to disapprove a state plan or amendment under section 430.18 or to withhold funds under section 430.35. 42 C.F.R. § 430.60. Pennsylvania briefly suggests that CMS might have to pursue "its contention that Pennsylvania is a state-supervised Medicaid program" through the state plan conformity procedures. PA Br. at 8.

The Board explained its rejection of this claim as follows:

> We have already concluded that this case is about whether the administrative costs are properly allocated under the PACAP, not about whether the Medicaid State plan substantially complies with federal law . . . . Accordingly, we need not address this argument further. We also note that even if the current action could be accurately viewed as raising a State plan conformity issue, the Third Circuit treated review by the Board as "sufficient to meet the hearing requirements" for plan conformity disputes. *N.J. Dept. of Human Servs.*, DAB No. 259, at 20 (1982). The Board has long recognized that the Secretary has discretion to "determine that a particular set of circumstances requires only a 'disallowance' when, arguably, a finding of noncompliance would also have been possible." *Id.* at 18.

DAB No. 2653, at 18.

Pennsylvania makes little effort to develop this argument in the present case. *See* PA Reply Br. at 12, n.9 (maintaining position that CMS is "squarely attacking" the State Medicaid plan by calling MATP "a state-supervised program"). In any case, our decision does not rest on whether the MATP program may be considered state-supervised even though the State Medicaid plan designates Pennsylvania's Medicaid program as state-operated. Moreover, the short answer to this contention is that CMS did not take any action against Pennsylvania under either section 430.18 or section 430.35, and the plan conformity provisions are inapplicable.

B. Administrative policies on PACAP amendments do not preclude a disallowance.

Again, as in DAB No. 2653, Pennsylvania contends a 2007 manual for review of PACAPs by the cognizant agency (the DCA, now CAS) precludes CMS from taking a disallowance in the present case. PA Br. at 15-16. The manual states that DCA will notify a state if it is found to have failed to amend its PACAP as required, and "disallowances will be made if [an amended plan] is not submitted within a reasonable period of time." PA Ex. 12, at 94.

As the Board explained before, the manual language nowhere bars disallowances but rather affirms that disallowances will be taken if required amendments are not submitted timely. DAB No. 2653, at 19. Furthermore, the manual applies when a state is found to have failed to promptly amend after specific events have occurred, none of which are alleged by either party to have occurred here. *Id*.; 45 C.F.R. § 95.509(a). [10]

Pennsylvania contends the policy should nevertheless be applied here to preclude a disallowance because it has claimed MATP costs "for nearly thirty years without submitting" county CAPs and CMS knew this "since all states are required to have transportation programs." PA Br. at 16. First, this contention has no relevance to the application of the plan conformity process. Second, as discussed further in the next section, it does not follow from the fact that CMS knew Pennsylvania had a transportation program that CMS should have been aware that Pennsylvania was claiming counties' administrative costs of that program without disclosing any allocation methodology.

C. CMS has not adopted a new interpretation of the cost allocation regulations.

Pennsylvania argues that, since it long claimed county costs "without being required to describe them in its PACAP," CMS must have changed its position on what the cost allocation regulations require. PA Br. at 17. From this, Pennsylvania reasons that CMS must have changed its interpretation after a "very lengthy period of conspicuous inaction" without providing an adequate explanation for the change and should therefore be required to defer to Pennsylvania's reasonable alternative interpretation "to allow it to use agreements in lieu of local agency CAPs." *Id*. at 17-18 (court case citations omitted).

[10] Pennsylvania points to a Board decision in which a disallowance was remanded to allow a state to resubmit to DCA an approvable PACAP amendment and suggests following that procedure here since CMS "is asserting that Pennsylvania's PACAP is materially incomplete." PA Reply Br. at 13, *citing Kansas Dep't of Social and Rehab. Servs.*, DAB No. 2056 (2006). In *Kansas*, the federal agency argued and the Board concluded that the PACAP appeared materially incomplete and, if so, approval of the PACAP did not preclude a disallowance of costs allocated under its terms. In the present case, CMS has not argued, and the Board has not found, that Pennsylvania's PACAP is materially incomplete, but rather that the PACAP does not inform CAS or CMS of an intention or methodology to allocate county costs of running the MATP to Medicaid.

Similarly, Pennsylvania asks why CMS did not "ask for" county CAPs when the Medicaid State plan was amended in 1983 to state that the MATP would be operated "at the local level by county governments." PA Reply Br. at 13, *citing* PA Ex. 1 (State plan amendment).

This question again reflects confusion between the functions of the Medicaid state plan and the PACAP. Essentially, the Medicaid state plan defines how a state chooses to operate its Medicaid program and what forms of medical assistance it will offer. States will naturally incur widely varying costs to administer their Medicaid program and the state agencies operating the Medicaid program may also engage in activities related to many other federal, state and local programs. The PACAP is the means by which states and the federal government communicate about how a state will equitably divide those costs across all program activities. The fact that the Medicaid state plan explains that a particular activity in the Medicaid program will involve a role for local entities in no way notifies the federal agencies that administrative costs of those local entities will be passed on to the State agency and thence to Medicaid claims for FFP. That information needed to be in the PACAP. Had that been disclosed in the PACAP, Pennsylvania might arguably have some basis to ask why CAS or CMS did not request an explanation of the allocation method or the submission of the county CAPs. As it is, Pennsylvania has no such basis.

This division of function also helps explain why Pennsylvania was able to include MATP administrative costs in its quarterly expenditure reports without CMS becoming aware earlier that these claims included county costs not disclosed in the PACAP. Despite Pennsylvania's expressed skepticism that CMS could have been unaware that the PACAP did not include county CAPs or "detail on county level cost allocation" *PA Reply Br. at 15), the point is not that CMS was unaware of what the PACAP contained but that Pennsylvania did not disclose in the PACAP that it was claiming county administrative costs for MATP. Therefore, CMS did not have prior reason to know that the PACAP should have contained either information on the allocation or county level costs or the county CAPs containing that information.

We therefore do not find any change in CMS practice based on Pennsylvania's prior claiming of these costs without challenge before an audit led to discovery of the inclusion of county administrative costs in the MATP claims. We find no basis to conclude that any CMS interpretation has changed in relation to the requirement that all administrative costs must be allocated according to the cost principles and the applicable methodology included in the PACAP. Pennsylvania's arguments focus on whether inclusion of the full county CAPs was always required. We need not reach the issue of whether that inclusion was newly required by CMS here, however. We uphold the disallowance based on Pennsylvania's failures to demonstrate, as required by longstanding and unambiguous cost allocation principles, what, if any, allocation methodology was applied and to

disclose any methodology in the PACAP. Thus, regardless of whether county CAPs had to be submitted with the PACAP, the claims here were properly disallowed. We further incorporate by reference the fuller discussion of this issue by the Board in response to the same arguments made by Pennsylvania in the prior case. DAB No. 2653, at 20-22.

For similar reasons, we need not rule on whether to admit, over CMS's objection, Pennsylvania's "Transmission of Additional Documents" on September 8, 2015. Pennsylvania attached a document which it "located" in relation to a different disallowance, but which it asserts shows that CMS "silently shifted its interpretation regarding cost allocation plan requirements." The attachment is a February 7, 2007 internal memorandum from an Acting Manager of the CMS Financial Review Branch in Region III to a Regional Director of the Office of the Inspector General (IG) concerning a draft audit report. The CMS manager disagrees with the draft IG audit report requiring submission of a PACAP amendment for county case management costs and says that requiring submission of all the county CAPs with the PACAP would be "administratively burdensome." CMS, by letter dated October 2, 2015, objected that document did not set out CMS policy but was merely a comment by a CMS employee concerning an audit of claims not at issue here. Our decision does not depend on whether Pennsylvania was required to include the county CAPs with the PACAP. We also do not see how an internal memorandum by an employee not shown to have the authority to make policy which the State has located now, more than eight years after it was issued and more than three years after the costs at issue were claimed could serve to bind CMS or to demonstrate any reliance by the State.

On October 14, 2015, Pennsylvania filed a "Transmission of Related Additional Document" in an attempt to further supplement record to which CMS again objected by letter dated November 4, 2015. The related document was the April 26, 2007 IG final audit report to which the CMS manager's letter referred to above was included as Appendix B. The audit report (at internal page 5) reflects the IG's conclusions that Pennsylvania "did not comply with Federal regulations and guidance when it claimed administrative case management costs" and "did not submit an amendment to DCA to identify administrative case management costs, or the procedures for claiming them in its cost allocation plan as required by Federal regulations." The IG recommended (at page 6-7) that CMS "direct Pennsylvania to amend" its PACAP "in order to claim administrative case management costs" and "reconsider its acceptance of Pennsylvania's claim for [FFP] for administrative case management services until a [PACAP] amendment is submitted." CMS objected to the further submission because it was based on the 2007 memorandum to which CMS already objected as not representing CMS policy and not relevant to the present case. Pennsylvania responded, by letter dated November 6, 2015, that it does not "suggest that the Board should go to decision based upon the 2007 memorandum," but rather proffers these documents to support its insistence "that further record development is required" in order to show that CMS changed its policy in applying the cost allocation regulations. State's Response to

Agency's Additional Objection at 2. We see no reason to develop the record on any such purported change in policy for the reasons already explained. And, finding the belatedly submitted documents irrelevant to the determinative issues in this case, we do not rule on CMS's objections.

D. Conclusion on Pennsylvania's affirmative defenses

We conclude that none of the arguments put forward by Pennsylvania preclude CMS's disallowing administrative costs incurred by counties in operating the MATP/NEMT program because Pennsylvania has not shown that those costs were claimed by an appropriate and approved cost allocation methodology.

Conclusion

For the reasons explained above, we uphold the disallowance in full.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member