DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Idaho Department of Health and Welfare DATE: March 19, 1981
Docket No. 80-26-ID-HC
Decision No. 156

DECISION

This case involves an appeal by the Idaho Department of Health and Welfare (State) from a determination by the Administrator of the Health Care Financing Administration (Agency), dated January 24, 1980, upholding a disallowance by the Regional Commissioner of the Social and Rehabilitation Service (SRS), Region X, of Federal financial participation (FFP) in the amount of $448,100 claimed by the State under Title XIX of the Social Security Act (Act). The costs in question were incurred for intermediate care facility services for the mentally retarded (ICF/MR services) provided at the Idaho State School and Hospital from October 1, 1972 through March 31, 1974. The costs were disallowed on the ground that the State failed to comply with the requirement in Section 1905(d) of the Act that it maintain its expenditures for ICF/MR services at the same level during the period in question as before Federal funding became available for such services. I find that the State failed to satisfy this "maintenance of effort" requirement, and, accordingly, sustain the disallowance.

Procedural History

The case was heard, at the State's request, pursuant to the provisions of 45 CFR 201.14, as amended March 6, 1978 (43 FR 9265) with the Board Chair substituted for the Administrator of SRS. The record on which this decision is based consists of the reconsideration record developed pursuant to 45 CFR 201.14(d), a letter from the State dated July 25, 1980 responding to an inquiry by the Board's Executive Secretary, and the transcript of a conference requested by the State pursuant to the Transfer of Functions dated March 6, 1978 (43 FR 9266-7), and held on December 4, 1980. At the conclusion of that conference, with the agreement of both parties, I directed that the State report to the Board and to the Agency by January 5, 1981, on efforts to reach a compromise settlement in the case. (Transcript, page 1-78, as corrected by letter dated December 31, 1980.) Although no report was made by the State, counsel for the Agency advised the Board orally on January 6, 1981, that the Agency had rejected the State's settlement offer. Accordingly, I proceed to decision.

Applicable Law

As noted above, the disputed costs were claimed for the period October 1, 1972 through March 31, 1974. The statutory provision on which the disallowance was based was added to the Social Security Act as Section 1905(d)(3) effective January 1, 1972 and read as follows:

> (d) The term 'intermediate care facility services' may include services in a public institution (or distinct part thereof) for the mentally retarded or persons with related conditions if —
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> (3) the State or political subdivison responsible for the operation of such institution has agreed that the non-Federal expenditures with respect to patients in such institution (or distinct part thereof) will not be reduced because of payments made under this title. Section 4(a)(2), Pub. L. 92-223.

Section 1905(d)(3) was amended on October 30, 1972 to read as follows:

> (d) The term 'intermediate care facility services' may include services in a public institution (or distinct part thereof) for the mentally retarded or persons with related conditions if --
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> (3) the State or political subdivision responsible for the operation of such institution has agreed that the non-Federal expenditures in any calendar quarter prior to January 1, 1975, with respect to services furnished to patients in such institution (or distinct part thereof) in the State will not, because of payments made under this title, be reduced below the average amount expended for such services in such institution in the four quarters immediately preceding the quarter in which the State in which such institution is located elected to make such services available under its plan approved under this title. Section 299, Pub. L. 92-603.

A regulation implementing Section 1905(d)(3) was published January 17, 1974 (39 FR 2220, 2222) with a stated effective date of March 18, 1974. (39 FR 2235). The Agency takes the position that the regulation was applicable to the costs in question even though the costs were incurred before the regulation's effective date, contending that the method

provided in the regulation for determining allowable costs is required by the Act. (Transcript, page 1-45.) The regulation in question, 45 CFR 249.10(c)(3), provides in pertinent part, that --

> Federal financial participation will be at 100 percent of the cost increase [between the base year and the quarter in question] except that such Federal financial participation may not exceed the Federal medical assistance percentage times the cost of intermediate care facility services for eligible individuals in the institution.

The Federal medical assistance percentage (FMAP) as defined in Section 1905(b) of the Act is a percentage based on a state's relative per capita income, with a floor of 50 percent and a ceiling of 83 percent. The term is used in the Act at Section 1903(a)(1), which provides for payment to a state of an amount equal to its FMAP times the total amount expended by the state during a quarter as medical assistance.

Quarterly Computation Method

The State concedes that its ICF/MR costs decreased in each quarter for which FFP was disallowed when compared with the average quarterly expenditure during the base year. (Transcript, page 1-40.) It contends, however, that this does not mean that it failed to maintain its effort as required by the Act, on several grounds. First, the State argues that it was not required to compare costs by quarter with base year costs, but instead could compare total ICF/MR costs during the period audited with base year costs. Alternatively, the State argues that it could compare total ICF/MR costs in each calendar year during the audit period with base year costs. (Transcript, pages 1-14, 1-15.) It bases this argument in part on the fact that Section 1905(d)(3) of the Act in its initial formulation (Pub. L. 92-223) did not require comparison by quarters, asserting that since the State's Title XIX plan in effect during the audit period referenced only Pub. L. 92-223, the State was not bound by any changes in the statute during that period. (Transcript, pages 1-10, 1-26, 1-27.)

In response, the Agency contends that the State's right to receive FFP was statutory, not contractual, and that the State was bound by any changes in the statute as long as those changes were prospective. It argues that the change in this case was prospective since Pub. L. 92-603 was enacted during the first quarter for which FFP was disallowed and the State therefore "had at least two month's notice before the end of that quarter of the method that was now required by the statute."

(Transcript, p. 1-31 - 1-33.) The Agency also argues that even if Pub. L. 92-603 was not applicable during the period in question, the State has not shown any reasonable method other than quarterly computation of assuring maintenance of effort. (Transcript, pages 1-45, 1-46.)

To show that it maintained its effort using other than a quarterly computation method, the State relies on a chart prepared by the Agency to compute the amount of the disallowance. (Reconsideration record, Exhibit 32, page 2.) The chart shows, for each quarter during the period audited, amounts for the following items: "FFP Limit," "FFP Claimed," and "FFP Exceeds Limit." The State argues that it maintained its effort because "FFP Claimed" is a net of $15,252 less than "FFP Limit" when the amounts for the entire period are totalled. As noted by the Agency (Transcript, page 1-53), however, this procedure, or a similar comparison for each calendar year, is meaningless for purposes of determining whether the State maintained its effort since it does not involve any comparison of current expenditures with base year costs. Instead, the amounts shown for "FFP Limit" for each quarter during the period audited were themselves derived by comparing current expenditures with base year costs. (HEW Audit Agency working papers, reconsideration record, Exhibit 31, Attachment B, column 10.) "FFP Claimed" simply represents the amounts of FFP which the State claimed for each quarter and is meaningfully compared to the "FFP Limit" only for purposes of determining the unallowable portion of the State's claim. That the State miscomprehends the nature of the figures with which it purports to show that it maintained its effort is apparent from its assertions that "FFP Limit" represents "the maintenance of effort level" and that "FFP Claimed" represents "the expenditures of the institution." (Transcript, page 1-14.) Since the State has not shown that it maintained its effort using any reasonable method, the issue whether a method other than the quarterly computation method is permissible as a matter of law need not be reached.

State Medical Assistance Percentage

Another argument advanced by the State is that the dollar value of the State medical assistance percentage should have been included in determining whether the State met the maintenance of effort requirement. (Transcript, pages 1-3, 1-18 - 1-21.) Asked at the conference to clarify what it intended by this argument, the State indicated that it may have mischaracterized its own position, and that it intended to argue that it "would want included the unmatched Federal dollars." (Transcript, page 1-35.) By way of example, the State contended that, assuming the State's FMAP to be 75 percent and the average quarterly base year ICF/MR costs for a particular institution to have been $100, the State would meet the maintenance of effort requirement if it spent $175 ($100 in State funds plus $75 FFP) in the institution in the current quarter. (Transcript, page 1-36.)

If the State could show that current quarter ICF/MR expenditures in the institution were in fact $175, there would be no question but that it complied with the maintenance of effort requirement. In a prior decision, the Board sustained the Agency's position, also taken in this case (Transcript, pages 1-61, 1-62), that maintenance of effort is assured by computing FFP in the manner specified in 45 CFR 249.10(c)(3). Louisiana Department of Health and Human Resources, Decision No. 126, October 31, 1980. Section 249.10(c)(3) allows FFP in an amount equal to 100 percent of the cost increase between the base year and the quarter in question, but not to exceed the Federal medical assistance percentage times the total cost of ICF/MR services in the institution. If current quarter costs were $175 and average quarterly base year costs $100, a state with an FMAP of 75 percent would indeed be entitled to $75 FFP. As indicated in the Louisiana decision, the Federal funds received act to free up an equivalent amount in state funds which would otherwise have to be devoted to ICF/MR costs incurred by the institution. Under 45 CFR 249.10(c)(3), however, a state's effort is maintained because, using the figures noted above, current quarter ICF/MR expenditures of $175 minus $75 FFP equals $100 in state expenditures, which is the same level as the base year costs. In the instant case, however, the State adds the $75 FFP to $100 in State expenditures to arrive at an amount which it then uses as a basis for determining the amount of FFP to which the State is entitled. This procedure is clearly defective, and any argument made on this basis must be rejected.

Adult and Child Development Center Costs

The State also argues that expenditures for services to the mentally retarded provided outside of the Idaho State School and Hospital, principally in adult and child development centers, should have been considered in determining whether the maintenance of effort requirement was met. In support of this position, the State argues that such expenditures enabled the State to reduce the number of persons in need of institutionalization, and that this was consistent with what it asserted was the intent of Congress to encourage deinstitutionalization and to establish community support services. (Transcript, pages 1-8, 1-22; Reconsideration record, Exhibit 29.)

In a Notice issued prior to the conference, I asked the State to be prepared to discuss what was the basis in law for its contention that these additional costs should have been considered. The State did not respond except with the general assertions regarding congressional intent noted above. Those assertions are not supported by the language of the Act, which deals specifically with ICF/MR costs. Section

1905(d)(3), as amended by Pub. L. 92-603, calls for maintaining "the non-Federal expenditures...with respect to services furnished to patients in such institution." The antecedent of "services" in Section 1905(d) is "intermdiate care facility services." The antecedent of "such institution" is "a public institution for the mentally retarded." Thus, the non-Federal expenditures in question are necessarily expenditures for ICF/MR services. The fact that the section permits a state to claim FFP for ICF/MR services provided in a public institution which provides other services as well, if the ICF/MR services are provided in a "distinct part" of the institution, seems also to indicate that Congress was interested specifically in ICF/MR costs.

The State also argues that it complied with the maintenance of effort requirement even though its ICF/MR expenditures decreased from the base year level, contending that the decrease was due to increased spending for other services for the mentally retarded, rather than attributable to the availability of Federal funding. (Transcript, page 1-21.) Section 1905(d)(3) of the Act prohibits the reduction of non-Federal expenditures "because of payments made under this title." In the Louisiana decision, cited above, the State made a similar contention that the reduction in its ICF/MR expenditures was attributable to factors other than Title XIX payments. The Board there rejected the State's contention, in part because the State had not specifically documented any instances in which other factors were responsible for the reduction. In the instant case, the State has not specifically shown that the adult and child development center costs or other costs caused the reduction in its ICF/MR expenditures. Moreover, the Agency noted at the conference that it measured maintenance of effort on the basis of per capita costs, in accordance with 45 CFR 249.10(c)(3), and that per capita costs would not have been affected by any decrease in the ICF/MR population of the Idaho State School and Hospital that might have resulted from increased spending for the mentally retarded outside of the institution. (Transcript, page 1-57.)

Other Arguments

Prior to the conference held in this case, the State raised two additional arguments: (1) That the costs of deinstitutionalized patients should have been included in determining whether the State maintained its effort; and (2) That the maintenance of effort requirement was not uniformly applied to all states claiming FFP for ICF/MR costs. In response to inquiries by the Board's Executive Secretary, the State indicated that it could not segregate the costs of deinstitutionalized patients and was therefore not pursuing the matter. (Letter dated July 25, 1980.) The Notice of Conference in this case asked the State

to be prepared to discuss the second issue mentioned above. The State did not raise the issue at the conference, and has presented no evidence or argument concerning the issue.

Conclusion

For the reasons discussed above, I find that the State failed to comply with the "maintenance of effort" requirement in Section 1905(d)(3) of the Act. The disallowance taken by the Agency is therefore upheld.

/s/ Norval D. (John) Settle, Chair
Departmental Grants Appeals Board